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A Magazine for the Civil Defense Trial Bar

Volume XIX, Issue I
Summer 2022

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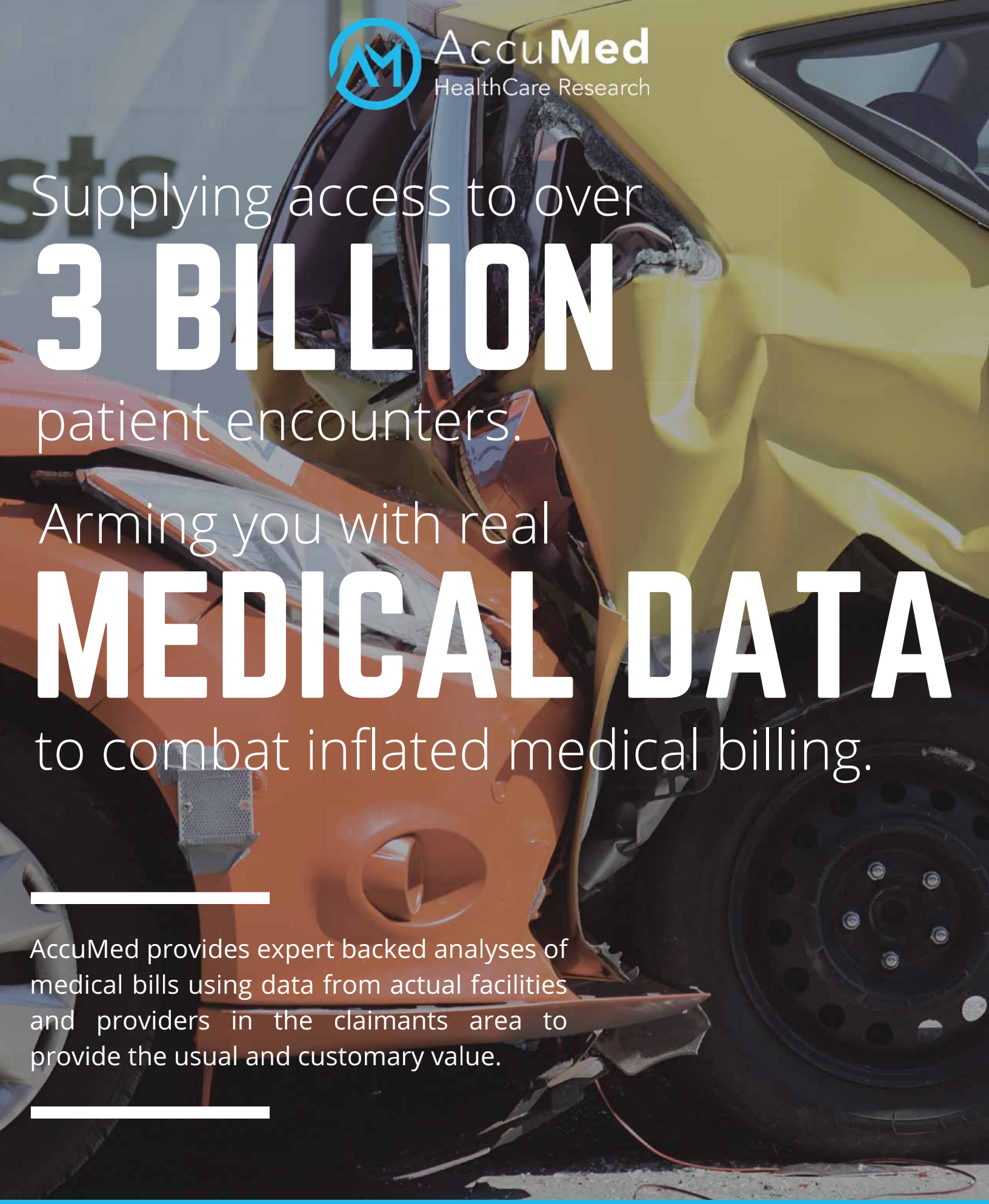

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GEORGIA DEFENSE LAWYER
Volume XIX, Issue I

EDITOR-IN-CHIEF:
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Editor's Note: Our cover photo is courtesy of Court of Appeals Presiding Judge Stephen Louis A. Dillard. His photo features a view of the State Capitol from inside the Nathan Deal Judicial Center.

President's Message

As we look back on the last two GDLA Annual Meetings and the sudden loss of two of our past presidents, I am reminded of the brevity of life and the importance of supporting each other both personally and professionally.

In June of 2021, at our 54th Annual Meeting, George Hall of Hull Barrett in Augusta was sworn-in as President. A few short months later, he passed away As we look back on the last two GDLA Annual Meetings and the sudden loss of our two past presidents, I am reminded of the brevity of life and the importance of supporting each other both personally and professionally.

In June of 2021, at our 54th Annual Meeting, George Hall of Hull Barrett in Augusta was sworn-in as President. A few short months later, he passed away unexpectedly during the swimming leg of an Ironman Triathlon—a competition in which he regularly competed. At that moment, I took the helm as President with a heavy heart.

Then came the 55th GDLA Annual Meeting. As we were preparing to gather in early June at Hammock Beach Resort, our Executive Director, Jennifer Davis Ward, lost her husband, Jeff Ward, following an accident on Memorial Day. Jeff was GDLA President the year before George and a very good friend to many in the legal community,

We pressed on with Jennifer's counterpart, Aimee Hiers, Executive Director of the South Carolina Defense Trial Attorneys' Association and Cindy Bitting, wife of Past President Staten Bitting, who handled Jennifer's conference responsibilities so she had time to grieve. (As a side note, that's why we do not have the typical GDLA Annual Meeting article/photo coverage in this issue; see page 47 for the 2022-2023 Board of Directors.)

Both George and Jeff were dedicated GDLA leaders, accomplished trial lawyers and mediators, exemplary community leaders, and devoted friends, colleagues, and family men.

They both would have wanted us to carry on with the important work of the association to which they devoted so many years of service. George would be especially proud that we established a Legislative Action Committee and hired a lobbyist.

It is through that legislative program that we were able to overcome the Supreme Court of Georgia's decision in *Hatcher v. Alston & Bird* on apportionment with the help our lobbyist, Kade Cullefer, of Troutman Pepper Strategies. With Governor Kemp's signing HB 961, the original intent and interpretation of the apportionment statute prior to Hatcher is restored.

Thanks goes not only to Kade Cullefer, but also to our Legislative Action Committee, which we established in 2020 under the leadership of Chair Jake Daly of Freeman Mathis & Gary in Atlanta, GDLA Vice President Marty Levinson of Hawkins Parnell & Young in Atlanta, and Jonathan Adelman of Walden Adelman Castilla Hiestand & Prout in Atlanta. We've added Barbara Marschalk of Drew Eckl & Farnham in Atlanta to the committee for the coming year. Our lobbying efforts were initially funded by a number of GDLA member law firms. This funding allows us to pay Kade for his valuable services.

We also added a voluntary check-off on our annual dues renewal (like the State Bar does) with a suggested individual contribution of $25. If you did not contribute when you paid your dues, you can still send a check payable to GDLA and earmarked as a "legislative contribution" so we can continue our presence under the Gold Dome. We have more work to do, so please support us in that effort.

For the Defense,

James D. "Dart" Meadows
Balch & Bingham, Atlanta

Member News, Case Wins & Significant Orders

MEMBER NEWS

Evelyn Fletcher Davis, a senior partner in the Atlanta office of **Hawkins Parnell & Young**, was inducted as President of the Association of Defense Trial Attorney's (ADTA) during the 81st ADTA Annual Meeting in Napa, Calif. At the same event, she received ADTA's Strubinger Award—also known as the "We Prefer to Refer Award." She is the first female to receive the prestigious award and is also the organization's third female President.

Stites & Harbison's Atlanta office announced the addition all attorneys from **Owen Gleaton Egan Jones & Sweeney**, including **Derrick L. Bingham, Thomas J. "TJ" Mihill, Theodore E.G. "Ted" Pound** and **Kathleen W. Simcoe** as members (partners), as well as **Julie R. Comer**. **Jennifer Guerra**, formerly with **Copeland Stair Valz & Lovell**, also made the move as a member (partner). Bingham defends governmental entities and officials, individuals, and businesses against a variety of claims including violation of civil rights, automobile accidents, premises liability, insurance disputes, and employment matters in state and federal courts. Mihill's practice focuses on intellectual property, business law and litigation, construction, fiduciary law, and estate and probate matters. Pound focuses on professional liability litigation, having managed hundreds of medical malpractice lawsuits to a successful resolution and tried more than 50 cases to a jury verdict on behalf of emergency physicians, hospitalists, radiologists, psychiatrists, OBGYNs, primary care physicians, surgeons, physician assistants, nurse practitioners, managed care organizations, behavioral health facilities, national practice groups, and their insurers. Simcoe has extensive experience representing healthcare providers, including defending them before Georgia licensing boards, and advising healthcare organizations concerning general risk management issues. Comer's practice focuses on business law and litigation, intellectual property, product liability, professional liability, construction, insurance defense, and estate and probate matters. She also advises corporate leaders on corporate governance, compliance and strategic planning. Guerra's practice encompasses commercial and business litigation with a particular emphasis on counseling and representing lawyers, accountants and other professionals. She also handles real estate, trusts and estates, corporate governance, tax, audit, product liability, insurance coverage, and data privacy and security.

Jay Patton and **Stephanie Capezzuto**, formerly with **Taylor English Duma**, have joined **Blue Sky Law** in Atlanta. Patton has 25 plus years of trial experience, having successfully represented businesses and individuals in cases filed across the country involving claims arising from contracts, warranties, commercial transactions, construction, and automobile accidents. Capezzuto's business practice involves litigating matters related to breach of contract, breach of warranty, violation of the Uniform Fraudulent Transfer Act (UFTA), negligent misrepresentation, fraudulent inducement to contract, and coverage disputes. She also litigates general liability claims, including premises liability and automobile liability matters.

Cozen O'Connor announced that **Alycen Moss**, co-chair of the firm's Property Insurance Group and co-vice chair of the firm's Global Insurance Department, was honored as the Claims and Litigation Management (CLM) Alliance's Litigation Management Professional of the Year.

Brett Tarver, an associate in **Troutman Pepper's** Health Sciences Litigation Practice Group in Atlanta, was named among Georgia State University's 2022 class of outstanding alumni under the age of 40.

Goodman McGuffey announced **Stephanie Glickauf** was named co-managing partner of the firm; she joins **Adam Joffe** who has been serving several years in that position.

Freeman Mathis & Gary announced the addition of **Elissa B. Haynes**, formerly with **Drew Eckl & Farnham**, as a partner in its Atlanta office. Haynes will vice-chair the firm's national Appellate Advocacy Section, which remains the focus of her practice. She chairs GDLA's Amicus Committee. The firm also announced that **Sangeetha Krishnakumar**, formerly with **Downey & Cleveland**, has joined its ranks as an associate in Atlanta. She has experience representing and defending individuals, businesses, and corporations in civil actions involving personal injury claims, premises liability claims, insurance coverage questions and contract disputes. She will maintain a general civil defense practice focusing on the areas of general liability, insurance coverage, premises liability, and property loss.

Continued on page 8

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Member News

Continued from page 6

The Chief Justice's Commission on Professionalism presented both **Michael St. Amand** of **Gray Rust St. Amand Moffett & Brieske** in Atlanta and **Paul Weathington** of **Weathington** in Atlanta with a Justice Robert Benham Award for Community Service. For 22 years, the Benham Awards have honored lawyers from across Georgia for contributing significant time to a variety of volunteer activities within their communities.

Copeland Stair Valz & Lovell announced the changing of its firm name following the elevation of **Frederick M. Valz III** as a named partner. With offices in Georgia, South Carolina and Tennessee, the firm has been defending clients across the Southeast for more than 50 years. All firm emails now end with @csvl.law.

McGrew Miller Bomar & Bagley in Atlanta announced the election of **Sam Britt** to partnership. In addition to defending medical malpractice cases, he has extensive experience litigating general liability claims, ranging from automobile/trucking to premises, and negligent security claims.

Chambless Higdon Richardson Katz & Griggs in Macon announced the promotion of **Christina M. "Christy" Curreli** to partner. She focuses her practice on civil litigation defense, business litigation, workers' compensation, professional disability, estate matters, and healthcare compliance.

Swift Currie McGhee & Hiers in Atlanta announced the promotion of **Beth L. Bentley** and **Kevan G. Dorsey** to partnership. Bentley focuses her practice on defending and assisting trucking and transportation companies, as well as a variety of both small and large businesses, in civil liability matters and coverage disputes. She has tried cases at the state and federal level, and she has experience with appellate proceedings before the Supreme Court of Georgia and the Eleventh Circuit Court of Appeals. Dorsey represents clients in an array of matters including transportation and automobile liability, premises liability, and product liability. He also has experience representing medical and dental professionals, hospitals, and nursing homes.

James Bates Brannan Groover announced the addition of **Amanda M. Morris**, formerly with **Hall Bloch Garland & Meyer**, and **Shepard M. Smith** as counsel in its Macon and Athens offices, respectively. **Andrada Steele** also joined the firm as an associate in the Macon office. Prior to joining James Bates, Morris was primarily focused on railroad law, representing Class I and short-line railroads in Georgia, and insurance defense matters. She also has experience in employment discrimination and retaliation cases, whistleblower claims, personal injury and wrongful death, tractor-trailer litigation, and Medicare compliance. Smith, who was previously practicing in North Carolina, focuses on insurance defense and general civil litigation, including business litigation, tort litigation and probate law. He also gained significant experience in workers' compensation before joining James Bates. Steele focuses on general litigation matters, including insurance defense.

Hawkins Parnell & Young announced that **Allison M. Escott**, formerly with **Drew Eckl & Farnham**, has joined its Atlanta office as a partner. She brings over 15 years of experience practicing general civil litigation defense across many fields, including commercial trucking, general transportation, premises liability, product liability, and uninsured motorist liability at both the state and federal level.

Cam Bowman, formerly with **The Bowman Law Office** in Savannah, has joined the local office of **Boyd & Jenerette**. Bowman has extensive litigation experience in a wide range of insurance defense coverage areas. He worked as in-house litigation counsel for several insurance companies for many years, during which time he gained significant trial experience. He also has prior experience in private practice in the areas of civil litigation and insurance defense.

Chartwell Law announced the addition of **Robert Luskin, Karen K. Karabinos, J.C. Roper, Chuck Hoey, Douglas K. Burrell, Whitney Lay Greene, Lara Ortega Clark, Anelise Codrington,** and **Robert "Bert" E. Noble III** in the firm's Atlanta office. Luskin, formerly with **Goodman McGuffey**, will maintain his complex litigation practice focusing on employment law, product liability, premises liability, professional negligence, questionable insurance claims, and other insurance coverage matters. Karabinos, formerly with **Drew Eckl & Farnham**, will continue to handle first-party property claims defense and insurance coverage disputes including bad faith, arson and fraud, as well as cyber breaches and loss of electronic data. Roper and Hoey, also formerly with **Drew Eckl & Farnham**, will continue their extensive workers' compensation practices. Greene and Clark, also formerly with **Drew Eckl & Farnham,** will maintain their transportation practices, including trucking and rideshare litigation, negligent security, personal injury, premises liability, and product liability. Burrell and Codrington, also formerly with **Drew Eckl & Farnham**, will continue to handle cases involving motor vehicle liability,

trucking and transportation liability with a focus on rideshare negligence, as well as wrongful death, negligent security and premises liability. Noble, formerly with **Gordon Rees**, will maintain his practice focusing on premises liability, negligent security, commercial litigation, motor vehicle and trucking negligence, and construction cases.

Alphonsie Nelson, a partner with **Quintairos Prieto Wood & Boyer** has been named managing partner of the firm's Atlanta office. He oversees the day-to-day management of the Atlanta office and will help to establish and guide the firm's strategic vision. The firm's Atlanta office handles matters for the entire state of Georgia, as well as Florida, Tennessee, Mississippi, and Alabama. He succeeds **Debbie Riley**, a partner and the firm's General Counsel who is resident in Atlanta.

Brittanie Browning of **Ackerman** in Atlanta was sworn-in as President of the State Bar of Georgia's Young Lawyers Division (YLD) at its Annual Meeting in June. **Jena Emory** of **Copeland Stair Valz & Lovell** in Atlanta is also a YLD officer for the 2022-2023 membership, serving as Newsletter Co-editor.

Gower Wooten & Darneille in Atlanta announced that **Jeffrey N. Schwartz** has joined the firm as of counsel and will continue to focus his practice on general insurance defense, automobile negligence, and assisting insurance carriers in the resolution of time-limited demands served pursuant to O.C.G.A § 9-11-67.1.

McAngus Goudelock & Courie announced that **Melody Kiella**, formerly with **Drew Eckl & Farnham**, has joined as a member in the firm's Atlanta office. Her practice focuses on complex civil litigation, including trucking/transportation law, catastrophic personal injury defense, premises liability, and negligent security.

CASE WINS

GDLA Treasurer **William T. "Bill" Casey, Jr.**, and **Beth Bentley**, partners at Swift Currie McGhee & Hiers in Atlanta, obtained a favorable result in a trial in the U.S. District Court for the Northern District before Judge Steve Jones for their client M&M Transportation and its driver, Joseph Abernathy.

Abernathy was hauling scrap metal in an open trailer for M&M Transportation when he passed Kriston Carter on I-20. Carter claimed a piece of metal flew out of the trailer and struck his windshield. Damage to Carter's vehicle was limited to the windshield. Carter and his passenger caught up to Abernathy and flagged him down. They pulled to the side of I-20 and talked before driving to the next exit to call police. Georgia State Patrol and Villa Rica, Ga. Sheriff's Department responded. Their reports noted no injuries. Abernathy was issued a warning.

Carter's wife came to the scene. She dropped Carter's passenger at a nearby relative's house then took Carter straight to the ER. The ER records confirm a five-hour delay between the accident and arrival in the ER. Plaintiff said his head pain was the worst imaginable and that he was bleeding from his face, hands, and legs. The ER records stated Carter's head was free of trauma. The ER did not order X-rays or other objective testing. Plaintiff was treated and released.

Plaintiff's first attorney referred him to Dr. Shevin Pollydore (pain management) and Dr. Ashok Reddy (knee surgery) at Peachtree Orthopedic. Carter also treated with Dr. Joseph Saba (traumatic brain injury). Plaintiff claimed a disc herniation, carpal tunnel syndrome, pars fracture, post-concussion syndrome with memory loss, torn ACL, reproductive problems, and migraines. His medical specials were just under $170,000. Carter claimed he was forced to close his mobile car washing and pressure washing business, but had no records to support the value of the mostly cash operation. Plaintiff told Pollydore and Saba a 250 gallon water tank in the back of his work van pushed him forward and causing his head to violently strike the steering wheel. At trial, Carter admitted there was a metal partition between his seat and the tank, the tank was bolted to the floor and did not strike his seat.

Carter asked the jury to award just over $2.7 million. After three days of evidence and eight hours of deliberation, the jury returned a verdict for the ER bill of $2,170.50. Plaintiff rejected a $150,000 offer at mediation. Defendants sent Plaintiff a statutory offer of settlement in 2019.

Callie Bryan, a partner at **Jones Cork** in Macon (note that the mailed version of the magazine erroneously listed her firm as James Bates), obtained a ruling in favor of her client in a premises liability lawsuit where the plaintiff, who rented a house from her client, claimed injury from a fall while walking down the rear steps outside the home. The court held that Bryan's client, an out-of-possession landlord, could not be liable to the plaintiff for defective construction or failure to repair because the plaintiff presented no evidence the steps had been defectively constructed or that her client had knowledge of a defect that needed to be repaired.

Although the plaintiff claimed he fell when a step broke under him, there was no evidence that anyone had any knowledge that the step needed repair before it broke. The defendant had lived in the house immediately prior to the plaintiff's moving into the house. When the defendant was moving out, a step on the front porch stairs

out, a step on the front porch stairs broke when a mover dropped a piece of furniture on it. The defendant inspected the broken step and noticed that it appeared to be rotten. The defendant had the step repaired before the plaintiff moved in.

The plaintiff argued that because the defendant had notice that one of the steps on the front exterior stairs was rotten before it was repaired, the defendant was on constructive notice that the rear exterior steps were rotten and, therefore, they should have also been replaced at the same time the front step was repaired. The trial court disagreed. Also, the plaintiff had lived in the house six or seven months before the alleged injury, going up and down the subject stairs at least once a day and was unaware of any issues with the steps. The plaintiff never made any complaints or requests to the defendant that there was a problem with the subject step. The trial court granted the Motion for Summary Judgment, dismissing the case entirely against the landlord. The plaintiff did not file an appeal.

Adam C. Joffe, a partner at **Goodman McGuffey**, in Atlanta, along with associate **Paul J. Spann**, obtained summary judgment from Judge Wayne M. Purdom in the State Court of DeKalb County for their restaurant client in a trip and fall case. The court found that although the defendants had knowledge of the alleged hazard (a water spill), the record reflected the plaintiff had equal knowledge of the hazard "through which she had walked unharmed immediately before her fall ..." In addition, the court noted that the defendant had placed a "caution wet floor" sign in the immediate vicinity of the spill that plaintiff claimed she did not see, even after hitting it as she fell. Thus, the court found, even if the defendant did have superior knowledge of the hazard, the plaintiff "did not plead or prove the restaurant was negligent in addressing it."

Chris Foreman of **Watson Spence** in Albany was granted summary judgment on behalf of a premises owner in a trip and fall suit. In the case, the plaintiff was walking for exercise on the sidewalks behind a healthcare office complex. In depositions, the complex was described as a health and wellness "destination."

The complex housed multiple medical offices in two large commercial buildings on approximately 19 acres. Notably, the premises owner had expended considerable funds to create walking paths and sidewalks throughout the 19 acres. The premises owner encouraged the public to use the paths and sidewalks free of charge for exercise and general recreation.

The plaintiff, who described the complex as one of her favorite exercise locations, began her morning walk shortly before 6:00 a.m. in late July. Less than 15 minutes into her walk, she tripped over a change in elevation at an expansion joint between two concrete sidewalk slabs. The plaintiff attempted to regain her balance but stumbled forward into a slate planter and fractured her dominant right arm. She immediately underwent surgery to repair the fracture and had at least two pins put in her arm.

The premises owner was never notified of the fall until the plaintiff sued the premises owner, alleging the owner knew or should have known of the dangerous/defective condition of the sidewalk (i.e., the change in elevation between the two slabs constituted a defect). The plaintiff contended the premises owner was liable for her considerable injuries and medical expenses.

The plaintiff testified that she had utilized the sidewalks and trails for walking and exercise on hundreds of occasions. However, she said she had only traveled on the area of sidewalk where she tripped between four and six occasions. She did, however, testify that she always walked on the same side of the sidewalk, walked in the same direction each time, and walked at the same time of day under the same lighting and weather conditions. She was not distracted at the time of the fall.

Although Foreman greatly emphasized the prior traversal rule in the premises owner's Motion for Summary Judgment, the court ultimately granted summary judgment on another of Foreman's arguments, specifically that the premises owner was shielded from liability under the Recreational Property Act. The Act, codified at O.C.G.A. § 51-3-20, et seq. shields from liability, "an owner of land who either directly or indirectly invites or permits without charge any person to use the property for recreational purposes."

Although the property had both commercial and recreational aspects, based on *Mercer Univ. v. Stofer,* 306 GA. 191 (2019) the trial court held that consideration of whether the premises owner was motivated by the possibility of obtaining financial benefits from allowing the public to use its sidewalks was irrelevant. The trial court held the Recreational Property Act was applicable to the plaintiff's claims, and her recovery was barred as a matter of law. There was no appeal.

Robert Luskin and **Bert Noble** of **Chartwell** in Atlanta obtained summary judgment on a case in DeKalb County State Court in 2021 while they were working together at **Goodman McGuffey**. The Court of Appeals affirmed the decision on appeal in March 2022. The Plaintiff was severely burned when a takeout container of soup burst as she exited her vehicle. Plaintiff sued several sister corporations owned by three siblings, attempting to pierce the corporate

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veil on theories of alter ego, joint venture, and agency. The Court of Appeals affirmed summary judgment finding the companies were separate despite some overlap, including jointly placing orders for food and supplies together and using the same employees for food preparation.

M. Scott Bailey and **David D. Mackenzie**, partners at **Huff Powell Bailey** in its Atlanta office, secured a defense verdict in Forsyth County, in a medical malpractice trial. Plaintiffs sought damages in excess of $1.3 million in an alleged failure to diagnose septic arthritis. The patient was a 43-year-old female, who underwent multiple and subsequent procedures and alleged pain, suffering and permanent injuries. The jury deliberated for less than an hour before returning a verdict in favor of the defendant.

Hawkins Parnell & Young partner **Kathryn S. Whitlock** and associate **Kelli K. Steele** secured summary judgment on all claims for their client, thyssenkrupp Materials NA, Inc., in a wrongful death lung cancer case filed by Metzger Law Group. Decedent was a 54-year-old machinist with a decades-long employment history at various machine shops. Plaintiffs claimed that Decedent's work at these machine shops exposed him to a variety of substances and materials, including metals supplied by thyssenkrupp, that caused him to develop lung cancer. The Hawkins Parnell duo was able to establish that Plaintiffs had not and could not prove that Decedent was ever exposed to a thyssenkrupp product through creative investigation and discovery. Absent that evidence, the question of whether such work could even cause lung cancer did not need to be addressed. The court agreed with the evidence and argument presented in thyssenkrupp's Motion for Summary Judgment, finding that it shifted the burden to Plaintiffs, and that Plaintiffs thereafter failed to meet their burden.

Hawkins Parnell & Young partners **David C. Marshall** and **Eric T. Hawkins** (along with a law partner from the firm's Dallas, Texas office) successfully upheld in the Georgia Court of Appeals a grant of summary judgment in favor of a major Atlanta hospital in an asbestos premises liability case. The plaintiff, Sinyard, was a union pipefitter who developed mesothelioma. The case initially arose when Plaintiff claimed his disease was caused by asbestos exposure while working in facilities owned by three defendants. The trial court initially granted summary judgment to the hospital and both co-defendants—a public utility company and an automobile manufacturer. However, the court reversed the dismissal to the co-defendants, finding the plaintiff could proceed to trial against them exclusively. In a 46-page opinion, the court held that the plaintiff's employer with whom the hospital had contracted had equal knowledge of any potential hazard and affirmed the trial court ruling dismissing the hospital.

Brannon Arnold, **Rick Sager**, **Gary Toman,** and **Michael Weathington** of **Weinberg Wheeler Hudgins Gunn & Dial** in Atlanta obtained a jury verdict in a wrongful death product liability trial in Gwinnett County in March 2022. The case arose out of an incident that occurred on September 7, 2017, when the plaintiff was attempting to troubleshoot an issue on a street sweeper designed and manufactured by the firm's client. The plaintiff left the engine running, climbed the side of the street sweeper, then wedged himself into a narrow compartment not meant for access behind a lockable door. He was ultimately crushed to death by inadvertent activation of the conveyor when his leg contacted an exterior control, which plaintiff's counsel claimed should have been guarded. Plaintiff sought claims in the amount of $25 million, alleging design defect and failure to warn, as well as punitive damages. After a five-day trial and a day and a half of deliberation, the jury awarded $4,250,000 and no punitive damages. The jury further found that the decedent-plaintiff was 49 percent at fault for the accident, which reduced the net recovery to $2,167,500. This final judgment was only eight percent of the $25 million ask—a very favorable result.

Brett Tarver, an associate at **Troutman Pepper** in Atlanta, was part of the trial team in *Lowery v. Sanofi-Aventis LLC* (Mar. 9, 2021, 535 F. Supp. 3d 1157 (N.D. Ala. 2021)), which was recognized in the Drug & Device Law Blog's Best Decisions of 2021. The product liability case against the global pharmaceutical company arose out of knee injections that were recalled after allegations they were contaminated and causing bacterial infections. This case presented issues about the admissibility of expert testimony, the causation requirements in a toxic tort case with complicated medical and technical issues, and the limiting effect of federal regulations on state-law claims. In the end, Plaintiff's two experts were deemed unqualified under the *Daubert* standard resulting in summary judgment since, according to the court's opinion, "… without that expert testimony, Plaintiff cannot connect the dots necessary to present his case to a jury. That is, Plaintiff cannot show exactly what his condition was, much less that his condition was caused by the bacteria in his injection."

Carrie L. Christie, Courtney M. Norton, and **Breandan D. Cotter** of **Rutherford & Christie** in Atlanta recently obtained summary judgment in Cherokee County State Court in a motor vehicle accident in which the plaintiff argued the insured driver moved into her lane of traffic without verifying her lane was clear, thereby causing the collision. The defense used an accident reconstructionist to develop evidence that Plaintiffs were in a right turn only lane and were the ones who entered the insured's lane of travel. Plaintiffs subsequently failed to respond to Defendant's request for admission (RFA) on this theory. The defense subsequently filed a Motion for Summary Judgment, arguing the RFAs were deemed admitted and thus Plaintiffs failed to establish the requisite elements of their negligence claim. The Court agreed, holding "Plaintiffs did not point to evidence on file to establish a genuine dispute of material fact concerning any negligence by Defendant."

In another case, the defense trio obtained summary judgment in DeKalb State Court in a hot water burn case at a Chick-fil-A branded restaurant. Plaintiff alleged Defendant was negligent in serving excessively hot water to customers and that Defendant's employees negligently failed to secure the lid to the cup. The plaintiff sustained third-degree burns over her chest, face and arms, resulting in permanent scarring and skin discoloration, and required extensive medical treatment. The defense argued in its motion that Plaintiff failed to establish a legal duty owed to the Plaintiff because she was unable to cite to any industry standard or Code that restaurants are not permitted to serve beverages at the temperatures maintained by the defendant. The court agreed, holding that "[t]he appropriate temperature for serving hot beverages in a fast-food restaurant is not a fact within the common experience of a layperson … . It is not sufficient to argue in court, 'This is too hot.'"

SIGNIFICANT ORDERS

Editor's Note: At its Spring Meeting, the Board of Directors discussed the importance of sharing significant orders, in addition to case wins. We hope you will find this helpful and, of course, please submit your own orders to jward@gdla.org. For this first installment, each order was submitted by GDLA Board member **Zach Matthews** on behalf of lawyers at his firm, **McMickle Kurey & Branch** in Alpharetta. We look forward to receiving your orders, too, as we add this useful resource to each issue of the magazine.

David Wright and **Zach Matthews** secured an order compelling production of withheld communications, electronic medical suite records, and other data from Ortho Sport & Spine Physicians in the pending State Court of Hall County case of *Smith v. Hernandez and TFT Nega, LLC.* The State Court of Hall County granted Ortho Sport's motion to reconsider, did so, then re-issued its original order in a more comprehensive manner.

Matt Sessions and **Zach Matthews** secured an order compelling production of withheld communications, electronic medical suite records, and other data from Ortho Sport & Spine Physicians in the pending State Court of Hall County case of *Vargas-Alvarez v. Cooper and Cornerstone Foundations and Concrete, Inc.* The State Court of Hall County granted Ortho Sport's motion to reconsider, did so, then re-issued its original order in a more comprehensive manner.

Matt Sessions and **Zach Matthews** secured an order compelling production of withheld records from Ortho Sport & Spine Physicians in the pending State Court of Hall County case of *Michael v. New Leaf Landscaping Services, Inc.* Ortho Sport was ordered to produce not just materials in its possession, but also those accessible to it.

Jon Hughes and **Zach Matthews** secured an order compelling production of withheld materials, including a HIPAA audit log, from Ortho Sport & Spine Physicians in the pending Clayton County State Court case of *Burgos v. Hailes*. Ortho Sport was also ordered to certify its statement that it had already produced all attorney communications in its possession.

Zach Matthews secured an order from the State Court of Gwinnett County compelling Benchmark Rehabilitation Partners, LLC to produce withheld materials, including its "rate sheet" showing the amounts it bills patients who have lawsuits versus those who do not. Baker Donelson represented Benchmark in the dispute.

Kevin Branch secured an order from the State Court of Gwinnett County compelling production of withheld materials by Georgia Spine & Orthopedics, after lengthy oral argument before Judge John Doran, in the ongoing case of *Miller v. Old Dominion Freight Line, Inc.* In-house counsel Alex Smith and Tom Grant of Freed Grant represented Georgia Spine in the dispute.

Pachal Glavinos secured an order requiring Orthopedic Surgery Center of Sandy Springs, LLC to sit for a 30(B)(6) deposition, after repeated efforts to subpoena that surgery center, from the State Court of Effingham County, which also ordered compliance with the document production notice. ◆

Welcome, New GDLA Members!

The following were admitted to membership in GDLA since the last edition of the magazine:

Tyler Adams
Downey & Cleveland, Marietta

D. Garrett Anderson
Bovis Kyle Burch & Medlin, Atlanta

Allison C. Averbuch
Hall Booth Smith, Atlanta

Andrea Avery
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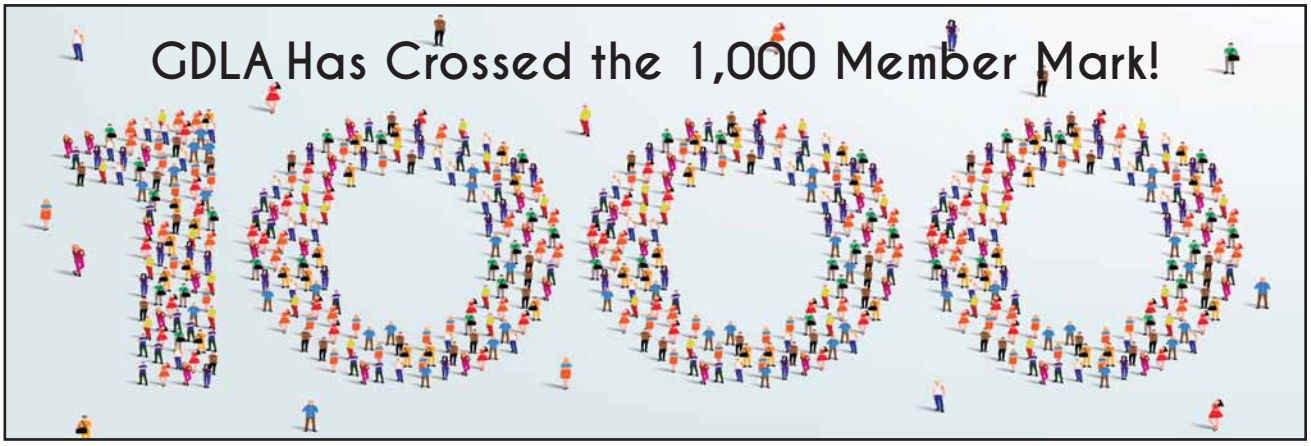

GDLA Files Amicus Brief in Seat Belt Statute Case: Supreme Court Issues Opinion

On March 10, 2022, GDLA filed a Motion for Leave to file an Amicus Curiae Brief in support of Defendant Ford Motor Company about the proper scope and application of O.C.G.A. § 40-8-76.1(d) ("the Seat Belt Statute") in a product liability action challenging the design and manufacture of a vehicle's restraint system. *Kristen Domingue et al. v. Ford Motor Company*, No. S22Q0279 (Ga. Sup. Ct. docketed October 28, 2021).

Domingue is a vehicle crashworthiness case arising from a March 27, 2020, accident involving a 2015 Ford SRW Super Duty Pickup. There, the plaintiffs contend that the design and manufacture of the vehicle's restraint system was defective and unreasonably dangerous because the passenger side airbag did not deploy in the accident, causing injuries to a vehicle occupant. The airbag, however, was a secondary part of the restraint system and not designed to deploy in the accident. The primary component—the one designed to provide protection in such accidents—was the seatbelt.

The Seat Belt Statute provides: "[t]he failure of an occupant of a motor vehicle to wear a seat safety belt in any seat of a motor vehicle which has a seat safety belt or belts shall not be considered evidence of negligence or causation, shall not otherwise be considered by the finder of fact on any question of liability of any person, corporation or insurer . . .."

The U.S. District Court for the Middle District of Georgia certified a three-part question to the Supreme Court of Georgia about the scope and application of the Seat Belt Statute. The certified question was:

> Does O.C.G.A. § 40-8-76.1(d) preclude a defendant in an action alleging defective restraint system design and/or negligent restraint system manufacture from producing evidence related to:
>
> (1) The existence of seatbelts in a vehicle as part of the vehicle's passenger restraint system; or
> (2) Evidence related to the seatbelt's design and compliance with applicable federal safety standards; or
> (3) An occupant's nonuse of a seatbelt as part of their defense?

In its Amicus Curiae Brief, GDLA urged the Supreme Court to answer all three parts of the certified question "no" and argued the Court should recognize a judicial exception to the statute to permit the admission of nonuse evidence when the plaintiff in a product liability action places the design and/or manufacture of the restraint system at issue.

Unfortunately, the Supreme Court did not side with GDLA when issuing its decision on June 22, 2022. However, the opinion, authored by Justice Sarah Warren, explained its rationale in the concluding paragraph, saying:

> To be sure, some of us have serious concerns about the constitutionality of a statute that strips from a defendant the ability to present evidence that could be critical to its ability to present a defense of a product it designs and manufactures—including but not limited to being prevented from making arguments related to proximate cause and risk-utility factors—which may occur if a defendant-manufacturer is precluded from raising in a product-liability case about a motor vehicle all (or almost all) evidence related to a vehicle occupant's failure to wear a seatbelt. But for the reasons explained above [in the opinion], we believe the constitutional questions are not properly presented to this Court for resolution at this time.

Since the high court alluded that the General Assembly would need to amend the Selt Belt Statute to interpret it as GDLA had urged in its brief, GDLA may pursue this as part of its legislative agenda for 2023.

GDLA thanks Jonathan Friedman and Gary Toman of Weinberg Wheeler Hudgins Gunn & Dial in Atlanta who authored the brief. GDLA's Amicus Committee is led by Chair Elissa Haynes of Freeman Mathis & Gary in Atlanta and Vice Chairs Anne Kaufold-Wiggins of Balch & Bingham in Atlanta and Philip Thompson of Ellis Painter in Savannah. Requests for amicus briefs should be directed to the committee. All GDLA amicus briefs are posted in the members only area in the Amicus Policy & Briefs section. ◆

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Litigating an Allegation of Spoliation of Evidence

By Jason Stewart
Wilson Elser Moskowitz Edelman & Dicker, Atlanta

Georgia's courts take spoliation of evidence seriously, to say the least. Sanctions for spoliation can result in the removal of evidence and issues from a jury's consideration.[1] Civil litigators understand how these sanctions can drastically transform a case. From a defensive perspective, spoliation sanctions against a defendant can change a defendable case into a case with adverse liability and increased financial exposure.

If you have tried a case involving an allegation of spoliation, you likely participated in a pre-trial hearing during which the trial court acted as the fact-finder to determine whether to impose sanctions for spoliation.[2] In that setting, the trial court makes factual findings for evaluating the enumerated issues below and determining what spoliation sanctions might be warranted:[3]

1. Did the alleged spoliator have a duty to preserve relevant evidence and was the duty to preserve triggered before the evidence was destroyed or lost?
2. If the spoliator breached a duty to preserve and destroyed evidence, are spoliation sanctions warranted based on the facts of the case and precedent?
3. If spoliation sanctions are warranted, which sanctions are appropriate based on the facts of the case and applicable law?

Each decision addressing spoliation sanctions is guided by case law but grounded in the unique facts of a singular case. Georgia's law on spoliation of evidence instructs litigants on how to forecast a decision regarding the enumerated issues above and develop discovery efforts in preparation of litigating an allegation of spoliation.

Confirming a Duty to Preserve Evidence Existed When Spoliation Occurred

As a prerequisite to sanctions, a party claiming spoliation must show that the alleged spoliator had a duty to preserve evidence when it was lost or destroyed.[4] The occurrence of an incident involving injury or damages, without more to consider, does not trigger a duty to preserve.[5] So, when and how is this duty to preserve triggered?

Based on the current state of Georgia law, a party's duty to preserve evidence is triggered not only when litigation is pending but when litigation is "reasonably foreseeable" from that party's perspective.

The Supreme Court of Georgia's decisions in *Phillips v. Harmon*[6] and *Cooper Tire & Rubber Co. v. Koch*[7] define and explain the standard for triggering a party's duty to preserve. The Court's opinion in *Koch* also explains some nuances in applying the same standard to plaintiffs and defendants.

In *Phillips*, a plaintiff brought a medical malpractice action against a hospital and other defendants, whom the plaintiff claimed had caused her infant to suffer oxygen deprivation after birth, Tragically, the baby was left with severe, permanent neurological injuries. A fetal heart rate monitor used for the infant printed out data on paper slips. Nurses made written notations on these paper slips during labor and delivery, and later referred to them for completing the official hospital record. The hospital destroyed the paper slips at issue after 30 days pursuant to hospital protocol.

The plaintiff in *Phillips* claimed defendants were negligent in monitoring and responding to her infant's lowered heart rate, which is sign of fetal distress. The mother contended the paper slips were critical evidence because they were

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Coverage For Losses Caused by Protests, Riots, and Curfews

By Alycen Moss and Elliot Kerzner
Cozen O'Connor, Atlanta

Whether to characterize a gathering of people as a "protest" or a "riot" is more than a political question; it is a legal question that can determine whether insurance coverage exists for property damaged by the gathering's members. This legal question has become particularly relevant as the scope and frequency of protests and riots increase throughout the United States. Most recently, protests erupted across the United States in response to the U.S. Supreme Court's decision overturning *Roe v. Wade* and holding that the U.S. Constitution does not confer a right to abortion.[1] Even before that decision, a prominent insurer recently urged businesses to prepare for a rise in civil unrest as the cost-of-living crisis trails the Covid-19 pandemic.[2]

Only two years ago, the level of property damage inflicted by the civil unrest that followed the death of George Floyd made it the costliest civil disorder in U.S. history, according to data compiled by the Property Claim Services unit ("PCS") of Verisk Analytics, a data analytics company.[3] The previous record for civil unrest damages was set in 1992 from rioting that occurred after a jury acquitted police officers who had been videotaped beating Rodney King.

The PCS reported that insured losses from that event reached $775 million. In contrast, business losses resulting from the 2020 riots have exceeded $2 billion, far exceeding the previous record.[4] For the first time, the PCS designated the civil unrest a multi-state catastrophe, ultimately including 20 states in the "catastrophe event."

In the wake of the 2020 riots, many cities issued orders restricting access to areas affected by vandalism and looting and/or imposed curfews in anticipation of further unrest. As a result, many businesses lost income and sought coverage under their insurance policies.

Many commercial property policies provide coverage for "riot" and "civil commotion." Other policies have "riot" or "civil commotion" exclusions. Similarly, many commercial property policies provide coverage for losses incurred while access to a covered location, or a location within a specified distance of a covered location, is denied by an order of civil authority.

To determine the existence and scope of coverage for damage and lost income resulting from the riots, we must consider the following questions: (a) Did a "riot" or "civil commotion" occur? (b) If property damage occurred while businesses were closed, is coverage precluded by vacancy exclusions or occupancy requirements? (c) Did the lost business income resulting from curfew orders qualify for "civil authority" coverage? and (d) How many "occurrences" were triggered by the riots?

A. Did a "Riot" or "Civil Commotion" Occur?

1. "Riot"

While the policy definition of "riot" governs, many policies do not define the term "riot." Therefore, we generally rely on statutory and common law definitions of the term when evaluating coverage for claims associated with a potential "riot." Individual states differ in their definitions of "riot," and the facts of each claim must be measured against the definition of the governing jurisdiction to determine whether a riot occurred.

Although the Georgia Code has not defined "riot" in the civil context, it has done so in the criminal context. Georgia law provides: "Any two or more persons who shall do an unlawful act of violence or any other act in a violent and tumultuous manner commit the offense of riot."[5]

The Merriam-Webster Dictionary defines "tumultuous" as: "1: marked by tumult: loud, excited, and emotional; 2: tending to or disposed to cause or incite a tumult; [or] 3: marked by violent or overwhelming turbulence or upheaval."[6] It defines "tumult" as: "1: a. disorderly agitation or milling about of a crowd usually with uproar and confusion of voices: commotion; b. a turbulent uprising; 2: hubbub, din; [or] 3: a. violent agitation of mind or feelings; [or] b. a violent outburst."[7]

The Supreme Court of Georgia expounded on the definition of "riot" as early as 1886, in *Fisher v. State*, 78 Ga. 258 (1886). There, a police officer arrested a man named Beadles, at which time a large crowd gathered around the officer and declared that Beadles should not be imprisoned.[8] Fisher was prominent in the crowd, using violent, threatening, and profane language.[9] The effort to release Beadles was unsuccessful, and the police took him to jail.[10] However, Fisher was convicted for the crime of riot.[11]

The Supreme Court held: "Where one with a number of others comes in a violent and tumultuous manner, and, through menaces and threats, endeavors to rescue from the hands of an officer a person he had arrested and held in custody to answer for an offense against the laws of the state, he is guilty of riot."[12]

When the factual circumstances have failed to meet all the necessary elements of a "riot," Georgia courts have held that no riot occurred.[13] In *Smith v. State*, two defendants were convicted of an attempt to commit a riot, but there was no evidence that they were acting in concert or that either of them acted violently or intended to provoke violence.[14] In determining that this failed to satisfy the statutory definition, the court held that the mere making of a noise or behaving tumultuously will not alone constitute a riot, in the absence of any violence.[15]

The Court of Appeals of Georgia has applied this definition to an insurance policy that excluded coverage for "loss caused directly or indirectly by . . . riot . . ."[16] The evidence showed that the plaintiff's house had been considerably damaged by explosions of dynamite, thrown or placed by an unknown person or persons.[17]

However, the Court of Appeals held that the exclusion did not apply because it was not shown by any evidence that these outrages were committed by more than one person, and, under the law, it required the participation of more than one person to constitute a riot.[18]

2. "Civil Commotion"

Many states have not defined the term "civil commotion." Courts addressing the definition of "civil commotion" generally distinguish it from "riot," since each term in an insurance policy is presumed to have its own meaning.[19] Comparing the two terms, a federal district court in Ohio found that "civil commotion" refers to "a temporary, primarily civilian disturbance, of a greater degree than a riot but less than armed insurrection, wherein the civil peace is disrupted by violence or acts of civil disorder."[20] Applying this definition to the facts of the case, the court stated: "The natural, ordinary and commonly accepted meaning of the term 'civil commotion' would encompass widespread acts of looting by civilians occurring over a period of days."[21]

B. Vacancy Exclusions and Occupancy Requirements

Commercial property policies that provide coverage for vandalism or other damage caused by riots often exclude coverage when the insured premises are vacant or unoccupied for some specified period, commonly 60 consecutive days. Courts generally uphold these common exclusions and preclude coverage for physical damage to insured property that has been vacant for the amount of time specified in the policy.[22]

Many vacancy exclusions apply only when the property is not being used for "customary business operations." The Court of Appeals of Georgia determined that this policy language requires that the insured's customary operations occur on the insured premises to avoid a finding of vacancy.[23] Similarly, some policies include in their definitions of covered premises or named insureds terms that require occupancy of the insured.[24]

In the summer of 2020, some businesses were closed due to Covid-19 when they sustained property damage as a result of riots, vandalism, and looting. If these businesses were not being used for their customary business operations, or were unoccupied, during the period preceding the damage, their property policies may preclude coverage.

C. Did Lost Business Income Resulting From Curfew Orders Qualify for Civil Authority Coverage?

1. Requirement of Direct Physical Loss or Damage to Property

Commercial property policies typically include civil authority coverage, which provides coverage for loss of income that occurs when access to the insured premises has been prohibited by a civil authority, such as a government entity. A city-wide curfew likely qualifies as an order of civil authority as contemplated by civil authority provisions. However, to trigger civil authority coverage, most policies require physical loss or damage to covered premises or property within a certain distance from covered premises. Therefore, for businesses seeking to recover for loss of income and extra expenses resulting from a curfew imposed because of rioting, no coverage exists absent evidence of physical loss of or damage to covered premises. Similarly, contingent business interruption coverage typically requires physical damage to contingent properties that supply materials for the insured, purchase the insured's goods, or attract customers to the insured's business. Thus, losses based solely on an insured's inability to deliver or accept goods during a city-wide curfew do not trigger coverage under most commercial property policies.

Most courts interpret "direct physical loss or damage" using the

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Legislative Session Wrap-Up

By Kade Cullefer
Troutman Pepper Strategies, Atlanta

In 2021, through the generosity of several GDLA member law firms, we established a Political Action Committee (Georgia Defense Lawyers Action Fund, Inc.) and hired a lobbyist to counter GTLA's efforts there and give our members and clients a presence at the Capitol. Many of the same firms contributed again this year, and some members contributed as part of the voluntary dues check-off, enabling us to keep Kade Cullefer of Troutman Pepper Strategies working on our behalf.

Jake Daly of Freeman Mathis & Gary, Atlanta, is GDLA's Legislative Chair and COO/CFO of our Legislative Action Committee. Other members are President Dart Meadows of Balch & Bingham, Atlanta; Marty Levinson of Hawkins Parnell & Young, Atlanta; and Jonathan Adelman of Waldon Adelman, Atlanta.

Please consider helping fund GDLA's lobbying efforts when you receive your annual dues renewal (via the voluntary legislative donation check-off) or you can also send a check payable to GDLA and put "lobbying contribution" in the memo line.

Following is Cullefer's final report for this session:

The Georgia General Assembly concluded the 2021-22 Legislative Session by going just beyond midnight, spilling into the morning of Tuesday, April 5. A multitude of bills impacting the practice of civil litigation were introduced; however, only four made it across the finish line, including our top priority—House Bill 961 (five if we include the criminal evidentiary standards legislation, which we were only monitoring to fend off

any harmful maneuvering which may have impacted Daubert). A comprehensive list of the legislation we worked on or that would have impacted the industry may be found below:

PASSED

House Bill 961

GDLA's top priority, House Bill 961, sponsored by Representative Chuck Efstration (R), passed and was signed into law by Governor Kemp on May 13, 2022. HB 961 fixes the impact of the Supreme Court of Georgia's decision in *Hatcher v. Alston & Bird*. The new law restores the right to apportion fault to non-parties in cases brought against only one defendant, and it applies to all cases filed on and after May 14. Now we have to focus on convincing the Supreme Court to overrule the part of the *CVS* decision holding that a case is "brought against" only one defendant when all but one of multiple defendants are dismissed just before trial.

House Bill 1150

House Bill 1150, sponsored by Representative Robert Dickey (R), limits the circumstances under which agricultural facilities and operations may be sued for nuisance. HB 1150 passed and was signed by Governor Kemp.

House Bill 1390

House Bill 1390, introduced by Representative Teri Anulewicz (D), creates new standards for determining sexual discrimination in a public workplace and creates a new private right of action for retaliation. HB 1390 passed and was signed by Governor Kemp.

Senate Bill 363

Senate Bill 363, sponsored by Senator Blake Tillery (R), provides the right to file a class action for violating the requirements of solicitations for corporate filings or labor notices. SB 363 passed and passed and was signed by Governor Kemp.

House Bill 478

House Bill 478, sponsored by Bonnie Rich (R), aligns criminal evidentiary standards for expert testimony with the federal rules. HB 478 passed and was signed by Governor Kemp.

FAILED

COVID Liability Protection Extension

COVID liability extension legislation was not introduced this year due to bigger priorities—i.e. *Hatcher* fix.

House Bill 1091

House Bill 1091, sponsored by Martin Momtahan (R), creates liability when an invitee is injured on the premises of a landowner or occupier

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Florida Changes Rule to Allow for Appeals on Punitive Damage Amendments

By Kansas R. Gooden
Florida Defense Lawyers Association

The Florida Defense Lawyers Association (FDLA) recently secured a win for defense lawyers practicing in Florida. However, it was not in a lawsuit; rather, it involved a rule change to the Rules of Appellate Procedure.

The Florida Bar's Appellate Rule Committee submitted a proposed rule which would allow an immediate, interlocutory appeal of an order granting or denying an amendment to add a claim for punitive damages. The Florida Supreme Court allowed members of the bar to comment. Numerous individuals and the plaintiff's bar opposed the rule, maintaining that it would interfere with plaintiffs' rights to a speedy resolution of their cases.

The FDLA submitted the only comment in support of the rule change by urging its state Supreme Court adopt the proposed rule because it would protect the constitutional rights of defendants. Under the Florida Constitution, there is a strong right of privacy. Financial information and documentation fall within this fundamental right of privacy, as there is a legitimate expectation of privacy. The prior law prevented defendants from testing the sufficiency and truthfulness of the proffer submitted to obtain the amendment for punitive damages. In other words, the claim could have been based on entirely false or hearsay information and defendants were required to wait until the end of the case to test the sufficiency of the evidence. At that point, the defendant's constitutional right had already been invaded and ultimately destroyed.

The Florida Supreme Court heard oral argument from the commenters. Elaine Walter, a FDLA board member, appeared on behalf of The Florida Bar's Rules Committee to explain how the rule came about. As FDLA President and Amicus Committee Chair, I presented on behalf of the FDLA. FDLA argued that the want for speedy proceedings should not trump a defendant's fundamental, constitutional rights. A constitutionally-protected right should take precedence, the FDLA contended, and the Court should adopt the amendment to protect that right.

The Florida Supreme Court ultimately agreed with the FDLA and adopted the proposed rule. The rule now allows for an immediate appeal on orders that "grant or deny a motion for leave to amend to assert a claim for punitive damages." *In re Amendment to Fla. Rule of App. Proc. 9.130*, 47 Fla. L. Weekly S1 (Fla. Jan. 6, 2022). The amended rule took effect on April 1, 2022.

One justice dissented raising concerns that the new rule would create unnecessary delays in civil actions. He noted that plaintiffs will forego meritorious punitive damages claims in order to avoid a timely appeal and bring their cases to final resolution. Ultimately, the other justices did not agree.

This new rule on punitive damages will be a game-changer in Florida. It will allow punitive damage claims to be tested early on appeal. Defendants will be allowed to test the sufficiency and accuracy of the proffer. And, most importantly, the fundamental, constitutional rights of defendants will be protected.

Editor's Note: *Since many of our members practice across state lines, GDLA is teaming up with our neighboring states' defense organizations to bring our respective members important updates on changes in state laws and practice rules. Kansas R. Gooden is FDLA President and chairs its Amicus Committee. She practices with Boyd & Jenerette in Miami.* ◆

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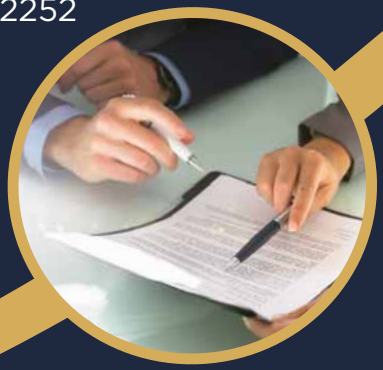

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Medical Expert Witnesses: When is it Time to Clear the Stable?

By Burton Bentley II, M.D., FAAEM
Elite Medical Experts

Human nature compels us to use resources efficiently, but the recycling of medical expert witnesses often brings more problems than it solves. The consideration is borne of familiarity and accelerated by racing down the path of least resistance. In other words, when an attorney encounters a new case that seems relatively similar to a prior one, the natural tendency is to rekindle an expert in anticipation of achieving a similar outcome.

When enough experts are amassed in the fold, the temptation is to reach right back into the stable. While this approach can lead to success, there are several factors that should enter the calculus before making such a mission-critical, and perhaps costly, decision.

1. Am I choosing the correct medical specialty for this specific case? Given the fact that the skill set and credentials of the medical expert are paramount to the success of the case, this question forces one to consider whether the expert was considered for excellence or expediency.

For example, an attorney may instinctively reach back to a general orthopedic surgeon who was a valuable resource in a prior case rather than seeking an orthopedic trauma specialist who would be better suited for the current set of facts. This situation is increasingly common given that there are over 250 recognized medical specialties and subspecialties. Even within the field of ophthalmology, for example, there are at least seven areas of focused specialization, and the subspecialties rarely cross. Beyond the essential metric of specialty fit, one must also consider how often the expert diagnoses and treats the specific condition in question, and the extent to which the candidate is an unimpeachable subject-matter authority.

Exact alignment is not only a commonsense requirement, but also intuitively expected by the trier of fact and statutorily mandated in an increasing number of states. For all these reasons, identifying the correct areas of expert specialization should be the first step in identifying potential candidates. When a go-to expert does not align with the details of the case and statutory requirements, it is time to pass.

2. Is this the ideal medical expert for the unique variables of the case? Cases have varying degrees of complexity, record volume, urgency, value, exposure, combativeness, and risk. When considering tactical resources, it is unlikely that the optimal expert resides in a limited stable of choices.

Due diligence mandates an impartial exploration of each candidate's singular fit for the assignment. While a perfect match is not an absolute requisite, shortcutting a key requirement risks the integrity of the case.

Whether choosing from a stable or a fresh resource, be sure to fully discuss the scope of the task and ask essential questions regarding the candidate's fitness for the case. This includes objective factors such as the expert's immediate and long-term ability to commit to the case, their willingness to absorb the anticipated volume of records and pleadings in the case, and their freedom from any identified conflicts of interest. Subjective assessments of confidence, resiliency, persuasiveness, likeability, and raw intellect can be gleaned from the same conversation.

By following these steps, the ideal expert is revealed and aligned rather than perfunctorily appointed.

3. What other subjective expert facets would benefit the case? Beyond core requirements, there are innumerable expert traits and attorney preferences to consider for every assignment. For some cases, an expert close to the trial venue facilitates travel and cost-savings, but

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A Peek Behind the Curtain: Settlements and Verdicts

By Alan Pershing
CaseMetrix, LLC

Personal injury claims are a very unusual world characterized by extreme information asymmetry. Unlike real estate—where buyers, sellers and their agents have access to the Multiple Listing Service (MLS) and can quickly come to an agreement on price—in personal injury cases each insurance carrier has a wealth of information on a plethora of metrics (settlement amounts, citations, defendant types, injuries, treatments, medical expenses, venue, etc.), but no one else sees it.

Carriers routinely employ analysts who can put relatively precise estimates on a host of characteristics in a case (e.g., incremental value of an ambulance ride, a DUI, a corporate defendant, a particular venue, injections, surgery, prior related injuries, etc.). They can build statistical models to estimate the value of a case.

On the other hand, there are practitioners (attorneys and adjusters) who seem to have very little to go on except their personal experience (which can be extensive), conversations with peers, list serves, rumors and the occasional splashy headline about seven, eight or nine-figure verdicts/settlements or a defense verdict. Also, attorneys tend to see the "trees" of individual cases while analysts look at the "forest" and a lot of subtlety is necessarily discarded. The idea that "every case is different" in the personal injury is similar to "every house is different" in real estate; the difference is that carrier analysts, like real estate agents, buyers and sellers, are initially looking at the neighborhoods to find similarities. Then they use the individual facts of the case to adjust value up and down.

Some readers may be surprised that I included adjusters in the list of practitioners, thinking that *of course* they would have access to information compiled by their carrier. But, in our experience, adjustors usually do not have that information and are relying on their and their manager's experience, as well as the guardrails put up by the carrier regarding claims authority. We have told defense attorneys while they were at mediation about recent high-dollar verdicts of which they were unaware against their carrier. And we've had experiences with plaintiff's attorneys not knowing about verdicts with a fact pattern similar to the case they're handling.

So, I thought it would be interesting and helpful to give GDLA members a glimpse of what's happening behind the curtain with these analysts, as it has a number of significant implications:

1. The relative importance of certain common aspects of cases
2. The cases you receive (and don't) from carriers
3. How adjuster, attorney and law firm performance can be measured and utilized by carrier management

Because there is *tremendous* variability in personal injury cases—think anywhere from $0 defense verdicts to nine and 10-figure settlements and verdicts—I thought it would be more instructive to create a dataset where much of the variability is reduced. Then you can still see the kinds of analysis and decisions that can be made even with something sharply constrained. So, I pulled all the MVA cases in the CaseMetrix database meeting this criteria:

1. Only one carrier and no additional layers of coverage
2. Policy-limits cases are removed
3. Only cases with soft tissue injuries are analyzed
4. Defendants are only individuals (no corporations, trucking companies or government entities)

Of that group of case results:

- 75.9% settled pre-suit
- 21.5% settled after a suit was filed and before a trial
- 2.6% were adjudicated to verdict

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	Ratio Avg.	Amount* Median	Average Amount	Median Amount	Average Medicals	Median Medicals
Pre-Suit	1.66	1.65	$11,283	$7,900	$6,813	$4,788
Litigated	1.72	1.66	$21,739	$13,000	$12,660	$7,809
Verdict	3.26	1.26	$40,841	$8,423	$12,529	$6,697

*Ratios are simply settlement/verdict values divided by medical expenses. When we first started CaseMetrix in 2009, the rule of thumb was "settlements average 3 times medical expenses"; for this group that number is approximately half.

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Can I Subpoena Facebook? Compelling Private Social Media Content

By Stephen Roper
DigiStream Investigations

You may have heard this story before. You, a legal professional, find yourself embroiled in a case necessitating the admission of electronically stored information (ESI) into evidence, specifically social media content. However, you are unsure as to the exact nature and extent of the content due to the user's privacy settings. Moreover, opposing counsel has stood firm that the content in question is not relevant to the case, or perhaps insists it does not exist at all, and the judge is not inclined to compel your opponent on a hunch. One of the most common questions investigators are asked by our clients is: "Can I subpoena private social media content?" The answer is maybe—but probably not.

Stored Communications Act

The protections afforded to social media platforms by the Stored Communications Act (SCA), 18 U.S.C. § 2701, remains a point of heated discussion in legal circles. In part, the SCA protects ESI, such as emails and all communications understood to be "private," from subpoena of a third-party. However, the implications of the SCA on social media platforms which function both as a public and private platform remain uncertain.

In the seminal case, *Crispin v. Christian Audigier, Inc.*, defense counsel attempted to subpoena content from multiple social media platforms, including Facebook, to obtain "all communications" between the defendant and the plaintiff.[1] This matter arose as part of discovery requests in private litigation, when defendant Christian Audigier, Inc. served subpoenas on Facebook and MySpace for access to communications between the plaintiff and a third party. The Central District of California district judge held that the requested ESI fell under SCA and therefore could not be compelled. Prior to this case, the SCA protected domestic emails and private messages from discovery, but not necessarily communications posted to social media sites in the form of "comments" and "wall posts." The court's broad interpretation of the Act curtailed access to data on social media sites, reasoning that, because the content is "temporarily" stored for "backup protection purposes" it was protected under subsection 17 (A) and (B) respectively of the SCA. The Act defines "electronic storage" as follows:

> A) *any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and*
>
> B) *any storage of such communication by an electronic communication service for purposes of backup protection of such communication;*[2]

In most jurisdictions this has been interpreted to mean that while a judge can compel a user to deliver specific content to opposing counsel, social media platforms are generally immune from such orders.[3]

Facebook Policy

Most notably, Facebook, anchored in the precedent set by *Crispin*, considers itself to be prohibited from sharing user content with any non-governmental entity without a subpoena. Moreover, once a subpoena is acknowledged, Facebook will turn over only "basic subscriber information" (i.e. information used to create an account), not content such as status updates, comments, photos, and the like.[4] Facebook instead created an archiving tool which enables users to download the entirety of their Facebook timeline. This process can be conducted on both public and private (and the various levels of privacy settings in between) accounts at any time by going to "General Account Settings" and selecting the hyperlink "Download a copy of your Facebook data" (assuming the account has not been deleted in the past 90 days). Below is language pulled directly from Facebook's "General Account Set-

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What Lies Beneath: Underwater Structural Inspections

By Brian Moody, PE, SE
FORCON International

Some may recognize that this article shares a name with the year 2000 supernatural horror thriller film starring Harrison Ford and Michelle Pfeiffer. The title of the film (and the title of this article) is a play on words. Waterfront property owners, the traveling public, and even engineers often take for granted the unseen (underwater) foundation structures that support docks, piers, bulkheads, and other similar waterfront structures. These structures should be assessed by engineering professionals on a periodic basis but often fall victim to the phrase "out of sight out of mind." Neglecting to have inspections performed can cause deferred maintenance or inadequate design practices to remain hidden. A triggering event such as heavy loading, a vessel allision, and/or a severe weather event can cause structural failures and the need for unique forensic engineering expertise.

The field of Engineer Diving was largely born out of two tragic water-related bridge collapses which resulted in significant loss of life. Due to scour and undermining (river bottom "washout" below footings) of bridge piers at the route I-90 Bridge over Schoharie Creek, N.Y., and the US-51 Bridge over Hatchie River, Tenn., catastrophic collapses occurred in 1987 and 1989, respectively. To help prevent similar failures in the future the Federal Highway Administration (FHWA) through the National Bridge Inspection Standards (NBIS) has since defined standards for inspecting and evaluating submerged bridge elements for all owners. Title 23, Code of Federal Regulations, Part 650, Subpart C defines evaluation requirements, which include an underwater (diving) inspection requirement at least every 60 months.

In addition to underwater bridge evaluation, inspection standards for other waterfront structures such as piers, bulkheads, wharfs, docks, etc. were developed in parallel by the offshore diving industry and the U.S. Navy. While many municipalities and port agencies have their own manuals describing underwater inspection requirements, in the absence of an agency specific manual, the American Society of Civil Engineers (ASCE) publishes a Waterfront Facilities Inspection and Assessment Manual—the only nationally recognized manual for conducting underwater structural inspections. Since the field of underwater engineering consultants is relatively small and all guidance on practice typically evolved from U.S. Navy standards, many of these underwater inspection manuals have very similar procedures and nomenclature.

In the late 1980s the field of Engineer Diving was in its infancy and engineers with commercial diving certification were hard to find. During this time the Occupational Safety and Health Administration (OSHA) did not provide specifics on the qualifications, diving means, and crew size for dive inspection operations. Licensed Professional Engineers (PEs) who had practiced scuba diving as a hobby and had some sense of adventure were drawn to the field and began to team with "hard hat" construction divers. Thus, the PE Diver was born. Today, this individual is the "end all, be all" of the inspection diving industry. PE Divers lead dive crews in the inspection, report writing, and repair design (when applicable) of waterfront structures and subsurface bridge elements.

Modern OSHA requirements require at least a three-person dive crew and all crew members, including engineers, must be commercially certified (also known as "Hard Hat Divers"). "The hat," as it is typically referred to in the industry, weighs approximately 30 pounds, but it is designed to be "neutral" underwater due to buoyancy. The hat somewhat resembles the helmet worn by spacewalking astronaut. It is equipped with an "on demand regulator," which releases air when the diver inhales, and a "free-flow valve," which can provide a continuous flow of air, create positive pressure within the hat, and help clear fog on the diver's face mask. Inside the hat are two ear speakers and a microphone which allow for constant communication with the surface team.

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Dr. Fuentes is a founding partner of R&D Strategic Solutions, LLC. He has specialized in jury behavior and decision-making and the evaluation of complex evidence for more than 25 years.

Mitigating Risk in Today's Construction Industry

By Chris Frederick, Chris Roane, and Jeanette Meadows
Bennett Thrasher

Forensic accountants use their skills to investigate fraud, embezzlement and other financial irregularities. They can also be hired for compliance purposes to ensure a company's finances are safe and in good order and to assist in contract disputes and serve as expert witnesses in court. Like so many other states, Georgia's construction industry has experienced difficulties resulting from the COVID-19 pandemic, including supply chain issues, rising costs, labor shortages, shifting governmental priorities and legal disputes, and these struggles have led to financial woes for many of those that serve the industry. And when business owners, employees, contractors, and others are feeling financial pressure, they might be motivated or otherwise find an opportunity to engage in fraudulent behavior. With these and other added stresses impacting the construction industry, it's important for companies to take proactive measures to ensure they do not become the next victim of theft or embezzlement, the subject of a government investigation, or a party to a costly legal dispute. In this article, we explore some of the common risks currently impacting the construction industry and what you and your clients can do to mitigate those risks.

Construction expenditures and hiring are at all-time highs, exceeding pre-pandemic levels. These increased costs, coupled with a shortage of labor and building materials are making it exceedingly difficult for companies to budget for and coordinate construction projects. The White House's trillion-dollar Infrastructure Investment and Jobs Act was signed into law by President Biden on November 15, 2021 to fund critical infrastructure projects across the country, focusing on new roads and bridges, public transportation, airports, internet access, electric vehicle charging stations, and water infrastructure. It is estimated that over $11 billion is earmarked for projects in Georgia. The increased demand for companies needed to complete these projects will be welcomed by those in the construction space, but it may further stress an industry already dealing with serious resource constraints. A highly competitive, resource-strapped environment could lead to an increased risk of occupational fraud, regulatory enforcement, project mismanagement, business disputes, bid-rigging, corruption and financial reporting irregularities.

Infrastructure Bill - Georgia

Description	In Millions
Roads and Bridges	$9,100
Public Transportation	$1,400
Airports	$619
Water Infrastructure	$193
Expand EV Charging	$135
Internet Access	$100
Protect Against Cyberattacks	$24
Protect Against Wildfires	$22
Total	$11,593

The Association of Certified Fraud Examiners' (ACFE) 2020 study on occupational fraud and abuse identified the most common fraud schemes impacting the construction industry as corruption, financial statement fraud and false billings. In the context of this study, corruption includes conflicts of interest, bribery, kickbacks, economic extortion, collusion, and bid-rigging. Billing schemes may include inflated invoices for inferior or substituted materials, incorrect labor rates or uncompleted work.

Unlike other recent acts, the Infrastructure Bill does not provide for coordinated, independent oversight of this funding. It did authorize some funding for individual inspectors-general, but it did not create a central oversight mechanism. A newly released comprehensive report issued by the Coalition for Public Integrity, "Oversight of Infrastructure Spending," noted that without such oversight, projects risked falling victim to fraud in several ways such as inflated costs, inferior products and materials, collusion and bid rigging. The lack of a central oversight mechanism for the trillions of dollars in projects that will be ongoing over the next decade further increases the construction industry's risk environment.

There are dozens, if not hundreds, of unique fraud schemes that could impact a business in the construction space. While it is not possible to summarize them all, we did want to highlight a few common situations that we've seen recently so that businesses and their counsel can take appropriate and preventative measures to avoid being the next victim of a fraud.

Recognizing Revenue

Within the construction industry, the calculation of a project's estimated total cost is fundamental and critical to the recognition of rev-

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- Business Interruption & Extra Expense
- Property Damage
- Lost Profits
- Stock & Contents
- Fidelity, Employee Dishonesty & Surety
- Product Liability & Recall
- Buillders' Risk
- Reported Values
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Future Motion: Capturing Human Performance for Litigation

By Chuck Fox, Ph.D. and Julius Roberts, M.S., P.E.
ESi (Engineering Systems, Inc.)

Data Converges to Tell a Story

Quality engineering visualizations are built piece-by-piece. Each step of creating the visualization contributes to the reliability of the visual tool. In order to create a 3D animation of a car/pedestrian accident, technologists must collect and incorporate scene data, vehicle geometry, and human geometry. The size and shape of a vehicle, position of the items at the scene, and movement of vehicles, objects, and people over time are all necessary to create an animation that accurately depicts what happened before, during and after the accident.

Over the years, new tools and technologies have emerged, allowing us to capture precise data that increases our confidence about the accuracy of the elements used in our visualizations. Laser scanners and drone photos give 3D modelers the ability to use quantitative data and photographs to position roadways, signs, buildings, witness marks, and other static components with millimeter accuracy in 3D space. Camera matching tools allow animators to replicate existing photographs taken by first responders and reverse-engineer the objects, people, and vehicles in those scenes and position them in the 3D space. Additionally, data from Event Data Recorders (EDRs) and security camera or dashcam videos can be used to accurately reconstruct vehicle motion.

On the other hand, human motion can be complex and nuanced, making it challenging to capture and convey. Viewers are very attuned to how humans move, so hand animated motions are often oversimplified, which makes them less convincing. However, in recent years, the rapid development and commercialization of motion capture technology (MOCAP) has helped to bridge this gap, extending how we use human performance data in an investigation, and providing an economical solution for incorporating human motion into 3D animations.

Human Performance Data–Metrics

Accident investigation and reconstruction require a deep understanding of the interactions between people and the objects or other elements in their environments (such as consumer products, industrial equipment, vehicles, or machinery). Human performance data, including biomechanical and human factors analyses, can be used to assess injury mechanisms, the role of the product/machine being used, and contributing environmental factors. Additionally, human performance data can provide insight into the credibility of event narratives and whether a described scenario is consistent with sound scientific principles or physical evidence of human-machine-environment interactions. Many techniques and tools—from video to sophisticated instrumentation—can be used to rapidly record, analyze, and quantify complex human-machine-environment interactions.

- **Videos** can be used to quantify the movement of an object or action within a known space, and can help tell a story from distinct vantage points.
- **Optical motion tracking systems** can track reflective markers placed on people and/or objects and are particularly advantageous when full 3D motion data is desired. Optical motion tracking can capture whole-body kinematics (movement) to accurately analyze complex interactions within the human-machine-environment.
- **Instrumentation** such as accelerometers, inertial measurement units (IMUs) and force plates also can be used to measure and quantify human movement. IMUs allow for capturing whole-body 3D kinematics to better understand biological motion in various environments. They are not restricted to line-of-sight configurations.

Regardless of the tool or technique used to capture the various interactions, human performance data can provide valuable insight into how and why an event occurred. It also provides a streamlined path to being able to visualize how the physical evidence supports or aligns with the scientific analysis.

Human Performance Data—Visualization

Human models are available from a variety of sources and can be customized to have specific physical characteristics that may be important to a particular event. Visually, the more difficult task is animating the human 3D models in a way that appears realistic and biofidelic. When using 3D tools to reconstruct an event, reliable human motion data is critical to understanding and illustrating how someone moved during an accident.

For example, an investigator may capture motion data from surrogate actors walking at different speeds to better understand the movements of a pedestrian when struck by a car. Showing the pedes-

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Through the Looking Glass: Perspectives From the Plaintiff's Room at Mediation

By Thomas J. Lyman
BAY Mediation & Arbitration Services

As a mediator with a background exclusively representing plaintiffs for the last 10 years, my perspective at mediation has been largely confined to the four walls of the plaintiff's room. That is not to say I am blind as to what's happening on the defense side. Since joining the panel at BAY, I have mediated dozens of cases both in-person and via Zoom, and my mediation practice has picked up to a point where I am mediating at least once a week. But my experience goes back all the way to law school when I worked as a mediator in landlord-tenant disputes. Over the course of two years then, I mediated hundreds of cases and primarily learned how people handle negotiations when the power structure is massively skewed towards the plaintiff. For injury cases, the power structure arguably goes the other way, with the defense holding all the money and potential for resolution. With that in mind, looking at how the plaintiff's room thinks and acts during mediation can benefit everyone in a path towards resolution.

Motivating Factors for the Plaintiff

Now that we have the curtain pulled back on the plaintiff's room, at mediation the plaintiff is primarily looking for one thing: closure. They want this all to be over. They just want to be done. For most plaintiffs, mediation is the culmination of years of litigation—years that have probably flown by for the lawyers, but years where the plaintiff has gone through some sort of traumatic event, extensive medical treatment, and is now living with significant changes to their day-to-day life, all while having to endure the completely foreign process of litigation.[1] Mediation is a chance for the plaintiff to finally put this all behind them and potentially move on with their life.

Recognizing (and taking advantage of) this, defense counsel can do much to move the case toward settlement in the joint session at mediation.[2] Let the plaintiff know in the opening that everyone at the mediation has the shared interest of resolving the case. That can go a long way in developing good will, on both sides. Having that shared interest of working toward resolution gives the plaintiff the sense that the defense is trying to help them. It also tells the plaintiff that the case may soon be over, giving the plaintiff the closure they desire. By telling the plaintiff that closure is possible, the plaintiff may see the defense as working with the plaintiff, rather than against them.

Being Heard

Another way to put the plaintiff in a position to resolve the case is to make them feel heard, or to give their case some validity. An easy way to do this is to point out some of the plaintiff's strengths in the openings/joint session. While this might seem contrary to principles of negotiation at mediation, it unquestionably gives the plaintiff a feeling that they are important to this process, and it gives them a sense of importance in the mediation. If the case has made it to mediation, some aspects of the plaintiff's case are potential strengths. Letting the plaintiff hear those strengths from the defense gives credence to why everyone is there in the first place. This helps the plaintiff feel there is an actual benefit to them being present at the mediation and working toward resolution. In most mediations this is done just before the defense asserts their primary arguments against the plaintiff, but it can certainly lessen the blow of those arguments.

This tactic can also be beneficial by encouraging the plaintiff to listen actively to both the pros and the cons of their case. In my experience, plaintiff's lawyers often instruct their clients to effectively "tune out" once the defense begins their opening statement. I employed this same tactic with my clients for years, largely based on the fear of my client hearing something they might not like and becoming indignant towards the entire process from that point on. But when the plaintiff has heard the strengths of their case first, from not only their own lawyer but the defense as well, there is at least a chance

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Unique Characteristics of Biomechanical Investigations

By Joseph Geissler
ARCCA

A biomechanical investigation of a motor vehicle collision will often involve quantifying the collision severity, and the occupant response in terms of movement and the forces experienced. Commonly, investigators seek to determine whether the forces experienced by an occupant created the injury mechanism responsible for a diagnosed injury. An injury mechanism is created when forces are applied in the right direction and hard enough to cause tissue failure.[1,2] The results of a biomechanical investigation are analyzed in the context of human tolerance and any relevant biomechanical attributes of the occupant. These types of investigations sometimes feature unique characteristics such as body posture, degree of awareness, and pre-existing conditions. A robust biomechanical investigation will help determine whether under a worst-case scenario, those unique characteristics have any substantial effect on the occupant's response during the event. This approach is commonly referred to as a parametric, or sensitivity analysis.

When conducting a biomechanical analysis of a motor vehicle collision, often an investigator will rely on the forensic evidence left behind at the scene, whether on the roadway or the vehicles themselves, to reconstruct the collision and evaluate severity. Relevant pieces of information include damage to the vehicle components, such as the bumper assembly, in the form of permanent residual crush.[3,4,5,6] The final rest position of a vehicle, as well as roadway skid marks, can also be relevant to the overall reconstruction.[7,8,9,10] Objective scientific quantification of a motor vehicle collision generally involves the vehicle's Delta-V and acceleration. Delta-V represents the vehicle's change in speed, or the difference between the pre-impact speed and post-impact speed of the vehicle. As an example, if a vehicle is traveling 35 mph and strikes a brick wall, it may rebound off the wall at approximately three mph, producing an overall Delta-V, or change in velocity, of approximately 38 mph. The reason most investigators look at Delta-V rather than impact speed is because Delta-V accounts for mass, as well as closing velocity of the collision. Acceleration represents how quickly the vehicle changes speeds. Acceleration is often quantified in units of gravity (or Gs). One unit of gravity is the amount of acceleration required to hold objects on Earth's surface. The acceleration experienced by the vehicle that strikes a brick wall at 35 mph is on the order of 20 to 30 Gs, or 20 to 30 times the acceleration of gravity. Delta-V and acceleration are long-established, objective scientific parameters that describe the vehicle's speed change and how quickly it changed speeds as a result of a collision.

Figure 1. ATD pre-impact posture and test setup. ATD positioned in a normal, in-position pre-impact posture (top left). ATD positioned in a rightward shifted pre-impact posture (top right). ATD positioned in a rightward reaching pre-impact posture (bottom left). ATD in a forward leaning pre-impact posture (bottom right).

Passenger vehicles sold in the United States are subjected to full-scale crash tests that are designed to evaluate their performance under various real-world collision scenarios. Known as Federal Motor Vehicle Safety Standards (FMVSS), these testing standards are gener-

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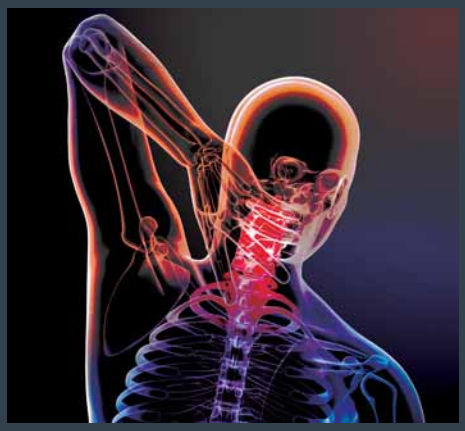

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Southeast Women Litigators Hold Inaugural Conference

Women litigators in Alabama, Georgia, Florida, North Carolina, South Carolina and Tennessee teamed up to support, educate and advance women civil defense litigators at the inaugural Southeastern Women Litigators (SEWL) Conference held March 24, 2022, at Zoo Atlanta. The long-anticipated conference had been derailed for two years because of the pandemic. Events kicked-off on Wednesday evening, March 23, with a reception at the State Bar of Georgia followed by dine-arounds at local Atlanta restaurants.

The one-day seminar combined speakers and panelists who discussed developing leadership and career-building skills. The presentations also explored challenges, risks and rewards on the path to having a fulfilling and productive career for women lawyers.

SEWL was the brainchild of GDLA member Karen Karabinos of Chartwell Law in Atlanta, who hatched the idea after also creating, and chairing for the first two years, a Women Litigators Section within GDLA. Her impetus behind SEWL was to give female civil defense lawyers in the southeast the opportunity to experience what DRI offers annually at its women's conference in Arizona. The goal being those who could not otherwise afford to attend that amazing event—whether for financial reasons or the extra time required out of the office to travel out West—could enjoy the same networking and learning experience just a short drive or flight away from their hometowns.

The following, fellow state organizations assisted GDLA in planning with all the executive directors pitching in to help alongside planning committee of members: Alabama Defense Lawyers Association, Florida Defense Lawyers Association, North Carolina Association of Defense Attorneys, South Carolina Defense Trial Attorneys' Association, and Tennessee Defense Lawyers Association.

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Pictured enjoying the SEWL Conference Zoo at Atlanta are: *1. Conference creator and chair Karen Karabinos and GDLA Women Litigators Section Chair Alycen Moss (with a photobombing elephant!); 2. Shannon Barrow, Shubhra Mashelkar, Lindsay Ferguson, and Carol Michel; 3. Nicole Grida, Cate Dugan, Lynn Lawyer, and speaker Cindy McGovern; 4. Amy Cooper, Jalisa Stevens and Jasmyn Jackson; 5. Libby Watkins and Sarah Darden; 6. Amanda Yenerall and Brook Davidson; 7. Erica Morton and Brianna Tucker; 8. Taylor Poncz and Marcia Ganz; 9. Hannah Patton and Krysta Grymes.*

Southeast Women Litigators Hold Inaugural Conference

Pictured are: *1. Bridgette Eckerson and Tracy O'Connell; 2. Jacque Clarke and Anelise Codrington; 3. Lauren Dick and Christine Mast; 4. Ashley Howard and Andrea Avery; 5. Annie Wiggins, Marsha Thompson, Sloane Phillips, and Meghan Pieler; 6. Dawn Pettigrew and Atlanta Braves EVP/Chief Culture Officer DeRetta Cole Rhodes; 7. Jennifer Foster, Stephanie Chavies and Jasmine Saenz; 8. Marcia Stewart and Sangeetha Krishnakumar; 9. Samia Taufiq, Brittanie Browning, Nicole Leet, and Andrea Baker; 10. Lanier Flanders and Jamie Noveas; 11. Speaker Marianne Trost and Meade Hartfield; 12. Kelly Chartash, Nichole Novosel, Kristen Vigilant, and Ann Joiner; 13. Danielle Le Jeune and Dakota Knehans; 14. Lindsay Ferguson and Evelyn Davis (and that photobombing elephant again!).*

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GDLA Board Holds Spring Meeting

The GDLA Board of Directors convened on St. Simons Island for its Spring Meeting at the King & Prince from April 22-24, 2022.

The Nominating Committee held its annual meeting to formulate a slate of candidates for 2022-2023 (see next page). Following that, the weekend officially commenced with a reception in the hospitality cottage, after which everyone enjoyed dinner outdoors on the resort's oceanfront lawn. The Board meeting was held on Saturday morning, leaving the afternoon free for everyone to enjoy the pool, golf, biking, shopping and more. Board members and their spouses and guests gathered again in the hospitality cottage on Saturday evening for a reception before dispersing to dinner on their own.

Those present were **Executive Committee:** President James D. "Dart" Meadows of Balch & Bingham, Atlanta; Secretary William T. "Bill" Casey, Jr.; of Swift Currrie, Atlanta; and Past President Hall F. McKinley III of Drew Eckl & Farnham, Atlanta. **Vice Presidents:** Martin A. "Marty" Levinson, Hawkins Parnell & Young, Atlanta; and Tracy O'Connell of Ellis Painter, Savannah. **Board Members:** Anne Gower of Gower Wooten & Darneille, Atlanta; Daniel C. Hoffman of Young Thagard Hoffman, Valdosta; Jason C. Logan of Constangy , Macon; Candis Jones Smith of Lewis Brisbois, Atlanta; Joseph D. Stephens of Cowsert Heath, Athens; Mary Elizabeth "Libby" Watkins of Levy Sibley Foreman & Speir, Augusta; James S.V. "Jamie' Weston of The Weston Firm, Augusta; and Jason Willcox of Moore Clarke DuVall & Rodgers, Albany. **Past Presidents:** N. Staten Bitting, Jr. of Levy Sibley Foreman & Speir, Augusta; Morton G. "Salty" Forbes of Forbes Foster & Poole, Savannah; W. Melvin Haas III of Constangy, Macon; Walter B. McClelland of Mabry & McClelland, Atlanta; Peter D. Muller of Goodman McGuffey, Savannah; and Grant B. Smith of Dennis Corry Smith & Dixon, Atlanta. **Also present:** Young Lawyers Chair Leah Parker of Swift Currie, Atlanta; and Executive Director Jennifer Davis Ward. ◆

Pictured at the Spring Meeting are: *1. Bill Casey and Salty Forbes; 2. Jason and Wendy Logan; 3. Grant Smith, Tracy O'Connell, Peter Muller, and Hall McKinley; 4. Zach Matthews and Candis Smith; 5. Dan Hoffman and his wife, Sue, with Marcia Freeman; 6. Anne Gower and Jason Willcox; 7. President Dart Meadows and Joe Stephens.*

55th GDLA Annual Meeting: June 9-12, 2022

The 55th GDLA Annual Meeting was held June 9-12, 2022 at Hammock Beach Resort in Palm Coast, Fla.

As President Dart Meadows reported in his President's Message (see page 5), this edition of the magazine does not have the typical multi-page spread of photos and an article about Annual Meeting happenings.

That is because our Executive Director Jennifer Ward lost her husband and GDLA Past President, Jeff Ward, following a tragic accident on Memorial Day—just 11 days before the conference was to begin. Because of that, Jennifer's counterpart, Aimee Hiers, Executive Director of the South Carolina Defense Trial Attorneys' Association, and Cindy Bitting, wife of Past President Staten Bitting, graciously stepped up to handle Jennifer's conference responsibilities.

We were honored to have Supreme Court Justice Andrew Pinson (then with the Court of Appeals) on-hand not only as a co-presenter on Typography in the Law, but also to swear in the new officers: President Dart Meadows, President-Elect Pamela Lee, and Treasurer Bill Casey (see photo above left; Secretary Ashley Rice was not present due to a conflict).

President Dart Meadows (photo above right) presented the association's highest accolade, the GDLA Distinguished Service Award, post-humously to Past President George Hall. George's wife, Margaret, accepted the award. ◆

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Congratulations to the following leaders elected to serve—asterisk indicates new Board members:

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*Philip Thompson
Ellis Painter, Savannah

**denotes new Board member*

Spoilation of Evidence

Continued from page 18

relevant as to the hospital's timeliness in responding to her baby's signs of fetal distress.

The mother moved for a jury charge providing the rebuttable presumption that the paper slips would have been prejudicial to the hospital.[8] The trial court denied the mother's request, finding the hospital did not have notice of potential litigation when it destroyed the paper slips. Ultimately, the jury returned a verdict in the defendants' favor.

The plaintiff appealed to the Georgia Court of Appeals, contending the hospital's actions after the delivery showed it was contemplating litigation. She cited the hospital's internal investigation of the incident, performed pursuant to hospital policy and procedure, which consisted of questioning hospital personnel, giving notice to the hospital's insurance carrier, and communicating with legal counsel.

The plaintiff contended the hospital triggered a duty to preserve potentially relevant evidence when it began its internal investigation. She also pointed to evidence the hospital had sometimes preserved such monitoring strips in other incidents. The Court of Appeals affirmed, holding the hospital did not have notice of pending or contemplated litigation when it destroyed the paper strips. The plaintiff petitioned for and was granted *certiorari* by the Supreme Court of Georgia.

The Supreme Court reversed, holding the Court of Appeals had applied the wrong standard to determine whether the hospital had duty to preserve the strips. The Court held that the courts below has premised a potential duty to preserve evidence on whether the hospital had received *actual* notice of a claim or litigation from the plaintiff.

The Court explained that a duty to preserve must be viewed from the perspective of the party with control of the evidence, and the duty to preserve "… is triggered not only when litigation is pending but when it is *reasonably foreseeable* to that party."[9] The Supreme Court further explained that a defendant can become aware of "contemplated or pending" litigation either by actual notice from a plaintiff or by "constructive" notice.[10]

The Supreme Court instructed that a trial court should examine whether a defendant's actions demonstrate constructive notice. A trial court also may look at the type and extent of the injury, the extent to which fault is clear, the potential financial exposure from a finding of liability, the relationship or history between the parties, the frequency with which litigation occurs from similar circumstances, and any other factors which would make litigation reasonably foreseeable from the alleged spoliator's perspective.

Phillips expanded the concept of a defendant's notice of contemplated or pending litigation significantly and provided a list of factors to analyze whether a defendant received constructive notice. In *Cooper Tire & Rubber Co.*, the Georgia Supreme Court reconfirmed the standard for triggering a party's duty to preserve, which it announced in *Phillips*; however, the Supreme Court *Cooper Tire & Rubber Co.* applied it in a case involving a plaintiff as the alleged spoliator.

In doing so, the Supreme Court noted the understandable nuances between a notice of contemplated or pending litigation to a plaintiff—who actually initiates litigation—and a defendant. Also, the Supreme Court made clear that the list of factors for analyzing a defendant's constructive notice in *Phillips* was non-exhaustive and amendable based on a case's singular facts.

In *Cooper Tire & Rubber Co. v. Koch*, the plaintiff was a widow who brought a product liability action against a tire manufacturer and others. The plaintiff's late husband drove a Ford Explorer which experienced a tire blowout resulting in an accident that resulted in his death two months later.

After the accident but prior to her husband's death, the widow agreed to transfer the Explorer's title to the tow company's owner to avoid storage fees. The plaintiff's husband had told her to instruct the towing company to save the rear tire that failed, which she did. The tow company stored the remains of the failed tire and sold the Explorer to a salvage yard.

Weeks after her husband's death, the widow sought legal counsel and later filed suit. After some discovery, the tire manufacturer filed a motion seeking spoliation sanctions, citing the wife's duty to preserve the Explorer. The trial court denied the motion, finding the widow had no duty to preserve the vehicle because litigation was not reasonably foreseeable from her perspective when the vehicle was destroyed. On appeal, the tire manufacturer argued the trial court erred by focusing on whether the widow subjectively knew litigation was likely when the vehicle was destroyed rather than following the "objective" standard for constructive notice announced in *Phillips*.

The Court of Appeals disagreed and affirmed the trial court. In doing so, the court held that the list of factors enumerated by the Supreme Court in *Phillips* should not be applied to a plaintiff. The Court of Appeals held the standard for determining a plaintiff's duty to

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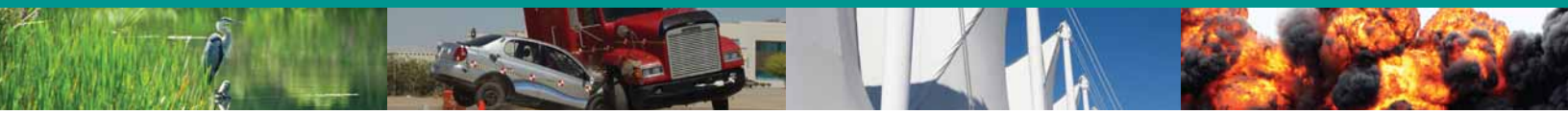

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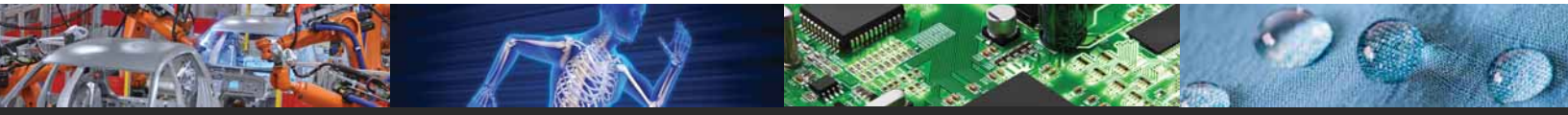

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preserve evidence is the objective "reasonable foreseeability test" and that this test would involve different factors for a plaintiff than for a defendant.

In affirming the Court of Appeals, the Supreme Court held that a plaintiff's duty to preserve evidence arises when litigation is reasonably foreseeable from the plaintiff's perspective; however, because a plaintiff's generally controls whether or not litigation will be pursued, a plaintiff's duty to preserve evidence is more likely to be resolved based on an actual knowledge of litigation. The Supreme Court explained that not every factor listed in *Phillips* for analyzing constructive notice applies in every case, and a decision on constructive notice would heavily depend on the facts and circumstances of each case.

Examining the factors for an alleged spoliator's constructive notice analyzed in *Phillips* and *Koch* can help evaluating whether an alleged spoliator actually or reasonably should have anticipated litigation. A letter of representation notifying of litigation may or may not be determinative. In addition, a party alleging spoliation must show the evidence was within the possession or control of the alleged spoliator when lost or destroyed.[11]

Determining Whether Spoliation Sanctions are Appropriate

A trial court weighs five factors before exercising its discretion to award sanctions ("five-factor test"): (1) whether the party seeking sanctions was prejudiced by the destruction of the evidence; (2) whether the prejudice can be cured; (3) the practical importance of the evidence; (4) whether the alleged spoliator acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence is not excluded.[12]

In some instances, a trial court may determine spoliation sanctions are not appropriate based its findings. Litigators can look to facts surrounding whether the party claiming spoliation is prejudiced, whether the party claiming spoliation can show a causal link between the spoliation and an effect on the underlying cause of action, whether the evidence at issue was destroyed in good or bad faith, and who destroyed the evidence at issue and that person's relationship to the alleged spoliator.

> *Even if a defendant wrongfully destroyed evidence, a party claiming spoliation must show that the spoliation prejudiced him.*

Even if a defendant wrongfully destroyed evidence, a party seeking spoliation sanctions must show prejudice. In *Craig v. Bailey Bros. Realty, Inc.*,[13] a child's foot was impaled on a landscape timber spike on a railroad crosstie at an apartment complex. Emergency responders had to cut the crosstie to dislodge the spike from the child's foot. Shortly after the incident, the apartment complex's owner hammered down and removed the remaining protruding spikes and cleared vegetation from the area around the railroad crossties.

In the ensuing premises liability action, the owner moved for summary judgment, arguing that the child was an unanticipated trespasser and that the railroad crossties were not an attractive nuisance. In response, the child's father asserted that the owner improperly destroyed evidence when it hammered down and discarded the remaining spikes and removed overgrown vegetation from the area. The father claimed that the owner's spoliation of evidence created a rebuttable presumption in his favor that precluded summary judgment. The trial court disagreed and granted the owner's motion.

In an opinion affirming the trial court, the Court of Appeals held the father could not show he was prejudiced by the owner's actions, given that emergency responders altered the spike and crosstie to dislodge the child's foot. The Court held the father was unable to establish a causal link between the failure of his premises liability and attractive nuisance claims and the owner's alleged misconduct.[14]

A trial court may also deny a motion for spoliation sanctions where it determines lost evidence was destroyed negligently, rather than in bad faith. In *Bagnell v. Ford Motor Co.,*[15] for example, the Court of Appeals affirmed the denial of an auto manufacturer's motion for sanctions against a plaintiff who destroyed a van shortly after a rollover wreck. The trial court concluded that the car manufacturer was prejudiced and the prejudice could not be cured, but also found the destruction was not malicious.

The Court of Appeals held that the trial court had not abused its discretion since neither side had an opportunity to inspect the van, all parties were on "equal footing" and there was "limit[ed] . . . potential for abuse through expert testimony."[16] *Bagnell* highlights the role that a trial court's discretion plays in spoliation disputes; the Court of Appeals noted that another trial court may have resolved the spoliation issue in the case differently.[17]

An alleged spoliator may be subject to sanctions for a third-party's destruction of evidence *only*

if the third-party acted as the alleged spoliator's agent in destroying the evidence.[18] Thus, in *Sheats v. Kroger Co.,*[19] the Court of Appeals affirmed the denial of a plaintiff's motion for sanctions against a distribution company when there was no evidence that a grocery store was the distribution company's agent in destroying a package which fell in the store, causing the plaintiff's injuries.

When there is potential for a spoliation issue, developing facts to facts to support or refute a claim of spoliation can be just as critical as developing facts regarding the underlying cause of action . Written discovery, depositions, or affidavits can be used to evaluate whether the spoliation resulted in any prejudice or detrimental effect to the underlying causes of action or defenses, as well as whether the evidence was destroyed in good or bad faith.

The Trial Court's Discretion in Awarding Spoliation Sanctions

After considering the five-factor test concerning appropriateness of sanctions, a trial court is empowered to tailor sanctions which correspond to its factual findings.[20] Trial courts have wide discretion in deciding spoliation issues, and a trial court's ruling will not be disturbed on appeal absent an abuse of discretion.[21] A trial court's ruling on spoliation sanctions will be upheld if there is any evidence to support it and unless it is based on erroneous legal theory[22] or clearly erroneous findings of fact.[23]

To remedy the prejudice resulting from spoliation, trial courts are authorized to (1) charge the jury that the spoliation of evidence creates a rebuttable presumption that the evidence would have been harmful to the spoliator; (2) dismiss the case; or (3) exclude testimony concerning the evidence.[24] This list of remedies is not exhaustive, and courts have held that a trial court has wide latitude to tailor sanctions on a case-by-case basis, "considering what is appropriate and fair."[25] However, spoliation of evidence, in and of itself, cannot serve as the basis for awarding punitive damages.[26]

In *Cowan Systems, LLC v. Collier*, 361 Ga. App. 823 (2021), the Court of Appeals discussed safeguards which may apply to tender the severity of spoliation sanctions under some circumstances. That case arose from an auto accident involving a car and a truck. After the accident, the plaintiff's attorney sent a preservation letter to the motor carrier who employed the truck driver. The letter requested that the motor carrier preserve data from any computer system on the truck. At the time, the motor carrier had recently started installing a fleet management system computer into its trucks which would collect GPS location tracking data and speed data.

A trial court's ruling on spoliation sanctions will be upheld if there is any evidence to support it and unless it is based on erroneous legal theory or clearly erroneous findings of fact.

The motor carrier's employees who received the preservation letter did not know of the computer system's capability to collect speed data and they did not know how to access the data. The motor carrier preserved the GPS location tracking data within electronic logs it printed out but did not preserve the speed data.

The motorist moved for sanctions against the motor carrier, arguing the motor carrier should have preserved the electronic speed data. The trial court found the motor carrier did not destroy the data in bad faith but nevertheless found it would be appropriate to give a jury instruction stating that it was presumed that the truck driver was speeding and had violated hours of service rules at the time of the accident, that the truck driver had a pattern and practice of speeding and violating hours of service regulations, and that the motor carrier knew about this information on the accident date.

On appeal, the Court of Appeals reversed, holding the trial court had improperly weighed the factors within the five-factor test and imposed a sanction that was too severe. The Court of Appeals explained that an adverse jury instruction is a severe sanction generally appropriate only in exceptional cases involving intentional or bad faith spoliation of evidence. The court noted that the motor carrier did not destroy the data in bad faith and explained that negligent loss of relevant evidence should result in a lesser sanction, if any. The court also noted that the absence of speed data actually prejudiced the motor carrier, rather than the plaintiff, since the lost data left no evidence to refute the plaintiff's testimony that the truck driver was speeding and following too closely.

As seen in *Cowan*, different sanctions are appropriate in cases involving intentional, bad faith spoliation versus less culpable, severe conduct by a spoliator. Courts should consider that and the other

elements of the five-factor test in determining whether to award sanctions and which to award. Defendants faced with a potential spoliation sanction might consider admitting liability to cure any prejudice created by the spoliation, depending on a case's circumstances. ◆

Jason S. Stewart is Of Counsel with Wilson Elser Moskowitz Edelman & Dicker in its Atlanta office. He maintains a trial litigation practice with the focus areas of transportation and logistics, commercial litigation, wrongful death and catastrophic injury, and complex tort and general casualty. He was counsel of record for the appellant in Cowan Systems, LLC v. Collier, *which is analyzed in this article, and obtained an appellate order reversing a trial court's decision levying sanctions for spoliation of evidence. He is licensed to practice in Georgia and Florida.*

Endnotes

[1] *See Bouve & Mohr, LLC v. Banks*, 274 Ga. App. 758, 762.

[2] *MARTA v. Tyler,* 360 Ga. App. 710 (2021) (holding that a trial court's allowance of a jury instruction on spoliation of evidence was reversible error when, prior to trial, no party filed a motion for sanctions and the trial court had not held a hearing to determine whether spoliation occurred); *See Hillman v. Aldi, Inc.*, 349 Ga. App. 432, 443-444 (2019).

[3] *AMLI Residential Properties v. Georgia Power Co.,* 293 Ga. App. 358, 361 (2008).

[4] *Phillips v. Harmon*, 297 Ga. 386, 394 (2015)

[5] *See Sentry Select Ins. Co. v. Treadwell*, 318 Ga. App. 844, 845 (2012) (citing holding in *Kitchens v. Brusman*, 303 Ga. App. 703, 707 (2010)).

[6] *Phillips*, 297 Ga. at 386.

[7] *Cooper Tire & Rubber Co. v. Koch*, 303 Ga. 336 (2018).

[8] *See O.C.G.A.* § 24-14-22 (providing that "[i]f a party has evidence in such party's power and within such party's reach by which he or she may repel a claim or charge against him or her but omits to produce it or if such party has more certain and satisfactory evidence in his or her power but relies on that which is of a weaker and inferior nature, a presumption arises that the charge or claim against such party is well founded; but this presumption may be rebutted").

[9] *Phillips*, 297 Ga. at 396.

[10] *Id.* at 397.

[11] *E.g., Cooper Tire & Rubber Co.,* 303 Ga. at 343-345; *Sentry Select Ins.,* 318 Ga. App. at 847-848 (reversing a trial's court order awarding spoliation sanctions based on an improper finding that defendants' had destroyed a tractor's ECM data when the evidence showed no such data existed).

[12] *See R.A. Siegel Co. v. Bowen*, 246 Ga. App. 177. 180 (2000).

[13] *See Craig v. Bailey Bros. Realty, Inc.,* 304 Ga. App. 794 (2010); *Hardeman v. Spires*, 228 Ga. App. 723 (1997).

[14] *Id.; See also Sharpnack v. Hoffinger*, 231 Ga. App. 829 (affirming summary judgment in favor of a trampoline manufacturer and holding that an injured quadriplegic's claims of spoliation did not affect the outcome of his claims for negligence and products liability, which were precluded by a successful assertion of the defense of assumption of risk).

[15] *See Bagnell v. Ford Motor Co.*, 297 Ga. App. 835 (2009).

[16] *Id.* at 840-841.

[17] *Wal-Mart Stores, Inc. v. Lee*, 290 Ga. App. 541, 546 (2008) (trial court did not abuse its discretion in imposing exclusionary sanction for spoliation of evidence, notwithstanding that the trial court did not find that spoliator acted in bad faith).

[18] *Boswell v. Overhead Door Corp.,* 292 Ga. App. 234, 235-236 (2008).

[19] *Sheats*, 336 Ga. App. at 310.

[20] *See R.A. Siegel Co.,* 246 Ga. App. at 182 (2000).

[21] *See Sheats v. Kroger Co.,* 336 Ga. App. 307, 310 (2016).

[22] *Phillips*, 297 Ga. at 397; *See also Amin v. Guruom*, 280 Ga. 873, 875 (2006).

[23] *Cowan Systems, LLC v. Collier,* 361 Ga. App. 823 (2021); *See also* Anthem Cos. v. Willis, 305 Ga. 313, 316-317 (2019) (holding that a trial court abuses discretion when it imposes a sanction inconsistent with the factual findings).

[24] *R.A. Siegel Co.,* 246 Ga. App. at 180.

[25] *Bouve,* 274 Ga. App. at 764 (affirming trial court's spoliation sanction ordering a jury charge instructing the jury that the plaintiff was raped on the property of defendant owners).

[26] *Brito v. Gomez Law Group, LLC*, 289 Ga. App. 625 (2008).

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Legislative Session

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who prohibits firearms on the property. We were able to keep this bottled up in House Judiciary Committee.

House Bill 1377

House Bill 1377, introduced by Representative James Burchett (R), would authorize a private right of action against a private employer when such employer fails to properly deduct and withhold income tax from an employee's wages. HB 1377 failed in the Senate.

House Bill 109/Sente Bill 276

House Bill 109, sponsored by Representative Heath Clark (R), would permit entities to be sued for claims of child sex abuse even after the statute of limitations has run in cases where the entity knew the abuse was occurring or knew that a volunteer or employee had committed sex abuse in the past and intentionally concealed it or withheld information about it. HB 109 did not receive a hearing in the Senate; however, the House stripped a Senate Bill—SB 276—in committee and replaced the original language with HB 109 language. The House passed SB 276 with the new language, but it failed in the Senate.

Senate Bill 364

Senate Bill 364, sponsored by Senator Blake Tillery (R), provides the right to file class actions for telephone solicitation violations. SB 364 failed to make it out of the House.

Senate Bill 380

Senate Bill 380, sponsored by Senator Randy Robertson (R), would remove the dangerous requirement for a pet owner to be held liable for a bite. We were able to keep this in committee and it died.

House Bill 829

House Bill 829, sponsored by Representative James Burchett (R), would increase the minimum amount in controversy threshold for 12 person juries from $25,000 to $1 million in Georgia state courts. We were able to keep this in committee and it died.

Senate Bill 160

Senate Bill 160, sponsored by Senator Bill Cowsert (R), is legislation that came from Beneke. In Beneke v. Parker, the Georgia Supreme Court revised the method for calculating the expiration of the statute of limitations in some personal injury cases by tolling the statute until prosecution of a criminal case is completed. The decision included cases where a driver has received a traffic citation, extending the statute well beyond the number of years expressly allocated in statute. SB 160 would initiate the running of the statute of limitations on the day of the incident as it was prior to Beneke. SB 160 did not move out of committee and died.

Senate Bill 166

Senate Bill 166, introduced by Senator Bill Cowsert (R), would prevent the disclosure of a juror's relationship to an insurance company during the jury selection process in "open court," signaling an insurance company is involved in litigation. Instead, relationships to insurance companies would be revealed via questionnaire. Last year, SB 166 failed narrowly on the Senate floor by a vote of 27-24 (with 29 votes required to pass). After going back to committee, it did not move and died.

Senate Bill 191

Senate Bill 191, introduced by Senator Bill Cowsert (R), would amend Georgia law permitting a plaintiff to sue the insurance carrier directly in a trucking case, rather than the individual or company. This legislation aligns trucking lawsuits with other cases involving motor vehicles. SB 191 did not move out of committee and died.

House Bill 581

House Bill 581, introduced by Representative Martin Momtahan (R), places new burdens and limitations on insurance companies when settlement offers are made. Additionally, a provision governing attorney fee arrangements was included as it relates to unfair claims settlement practices. HB 581 did not move out of committee and died.

House Bill 1001

House Bill 1001, sponsored by Representative Tyler Paul Smith (R), would alter the definition of prepaid legal services plans regulated under insurance. HB 1001 did not move and died.

House Bill 1298

House Bill 1298, sponsored by Representative Matthew Gambill (R), would permit a chiropractic practice to place a lien on a personal injury claim for the costs of care and treatment of injuries stemming from the claim. This legislation did not move and died.

House Bill 1389

House Bill 1389, introduced by Representative Teri Anulewicz (D), would create new standards for determining sexual discrimination in the workplace and create a new private right of action should a violation occur. We encouraged the committee to hold it and it died.

Senate Bill 329

Legislation similar to HB 961 was filed in the Senate by Senator Bo Hatchett (R). It did not receive a hearing and died.

Senate Resolution 583

Senate Resolution 583, introduced by Senator Jen Jordan (D), sought to change the way judicial vacancies are filled and to provide for the terms of those persons filling such vacancies, by amending the constitution. SR 583 died. ◆

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Protests, Riots & Curfews

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common meaning of the words and hold that the terms contemplate "an actual change in insured property then in a satisfactory state, occasioned by accident or other fortuitous event directly upon the property causing it to become unsatisfactory for future use or requiring that repairs be made to make it so."[25] Therefore, to trigger civil authority coverage, there must be physical damage to covered property or to property within a specified distance of covered property.

2. No Coverage for Orders Due to Future Threats

Generally, the purpose of a curfew order is to prevent future injury or damage, not to repair prior injury or damage. Most jurisdictions, including Georgia, have held that there is no coverage for business income losses caused by orders designed to prevent future threats.

The Northern District of Georgia analyzed a typical civil authority coverage provision in *Paradies Shops, Inc. v. Hartford Fire Insurance Co.*, No. 1:03-CV-3154-JEC, 2004 WL 5704715 (N.D. Ga. Dec. 15, 2004). There, the insured operated gift shops, newsstands, and retail stores located in airport terminals around the country.[26]

Immediately after the September 11 attacks on the World Trade Center, the Federal Aviation Administration issued a ground stop order for all flights, which caused the insured to lose business at its airport stores.[27] The court noted that, under Georgia law, if a civil authority issues an order "due to the threat of future injury to persons and property and not because of any already existing physical loss or damage," any damages suffered by the insured are not covered by a civil authority provision.[28] The court held that there was no civil authority coverage because the destruction of the World Trade Center and damage to the Pentagon building were not the cause of the decision to ground all flights.[29] Rather, the court explained, the ground stop order was issued as a result of the threat of *future* terrorist acts involving the nation's airlines.[30]

Based on the above precedent, business losses caused by curfew orders designed to prevent future damage would not trigger coverage under most civil authority provisions.

> *In addition to requiring physical loss or damage to property, civil authority provisions usually apply only while access to the insured property is completely prohibited.*

3. Civil Authority Orders Must Completely Prohibit Access to Insured Property

In addition to requiring physical loss or damage to property, civil authority provisions usually apply only while access to the insured property is completely prohibited. When a business remains open and access is merely inconvenient or diminished, or when the civil authority does not expressly and completely prohibit access to the business, civil authority provisions are generally inapplicable.[31]

The curfew orders issued after the 2020 riots generally did not completely prohibit access to specific premises. Therefore, they likely would not trigger coverage under a commercial property policy's civil authority provision that requires access to the insured premises to be specifically prohibited.

4. Civil Authority Exclusions

Many commercial property policies contain an exclusion precluding coverage for "loss caused by order of any civil authority, including seizure, confiscation, destruction, or quarantine of property." Although courts have not addressed this provision in the context of an order prohibiting use of property, a New York appellate court has implied that this exclusion would preclude coverage for loss or damage due to a civil quarantine order.[32] In *Massi's Greenhouses*, the insured sought to recover the costs of removal, clean-up, and lost business opportunities associated with the bacterial contamination of geraniums in its greenhouses following a quarantine order of the New York State Department of Agriculture and Markets.[33] The court held that there was a question of fact with regard to whether the losses were caused by the quarantine order, but indicated that if it was determined that the losses were caused by the quarantine order, they would be precluded by the civil authority exclusion.[34] The implication of this ruling is that the civil authority exclusion would preclude coverage for loss or damage due to a civil quarantine order.

It is unclear whether this exclusion would apply to business losses resulting from curfew orders. On one hand, it is a "loss caused by order of [a] civil authority." On the other hand, it does not fit into any of the provision's specific examples: it is not a seizure, confiscation, destruction, or quarantine of property. Courts have yet to address this issue.

D. How Many Occurrences?

The amount of the applicable deductible and limits of liability are generally determined by the number of "occurrences." In determining the number of "occurrences," the policy definition always controls. The issue is: do multiple instances of property damage

resulting from a riot constitute multiple occurrences, or do they constitute only a single occurrence because they originate from a single cause?

The majority of states, including Georgia, determine the number of occurrences by the number of "causes." Under this test, all instances of property damage resulting from a single, uninterrupted cause would likely be deemed a single occurrence.[35] The Supreme Court of Georgia, in adopting the cause test, expressed it as follows: "the number of accidents is determined by the number of causes of the injuries, with the court asking if '[t]here was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage.'"[36] In these states, property damage resulting from a single, uninterrupted riot would likely be deemed a single occurrence, unless otherwise defined in the policy.

One example of a court's application of the cause test is *Travelers Property Casualty Co. of Am v. Continental Cas. Co*.[37] In *Travelers*, the court held that multiple claims in underlying products liability cases involving plastic bottles manufactured by the insured were caused by a single "occurrence," even though the bottles were filled by a fuel gel supplier, shipped and sold to various retailers across the country, and used by multiple individual claimants over a five-year period, because the basis for the insured's alleged liability in each underlying case was its decision to use the bottle to package gel fuel for use in firepots.[38] The fact that there were multiple injuries of different magnitudes extended over a period of time did not mean there were multiple "occurrences."[39] Accordingly, a single liability limit applied to all 19 underlying products liability cases against the insured.[40] Based on this reasoning, even multiple acts of vandalism or theft against an insured business could constitute a single "occurrence" if they are caused by a single riot.

Nevertheless, injuries or property damage resulting from separate riots would be deemed separate occurrences. In fact, even a slight gap between two acts could render them separate "occurrences" under certain circumstances.[41] In *Matty*, a motor vehicle accident occurred in which the insured struck a bicyclist and then struck a second bicyclist.[42] An accident reconstruction expert testified that it would have taken the driver "just over a second" to travel the 95 to 115 feet between the two bicyclists.[43] The Georgia Supreme Court remanded the case to the district court to answer whether "there was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage."[44] The jury found that there were two "occurrences."[45] The insurer filed a motion for new trial, contending that there was no evidence from which a reasonable jury could find that there were two occurrences.[46] The district court denied the motion, finding that a course correction by the driver lasting less than a second could be deemed an intervening cause.[47] On appeal, the Eleventh Circuit affirmed the denial, holding that the course correction could have rendered the second collision a separate "occurrence."[48]

E. Conclusion

For a protest to constitute a "riot," Georgia requires multiple people engaged in tumultuous behavior involving either violence or the threat of violence. To constitute a "civil commotion," most states require a prolonged disturbance of civil order such as widespread acts of looting. Some of the protests that occurred during the summer of 2020 likely satisfied the definition of either "riot" or "civil commotion" under the law of the states in which they occurred. However, if the insured properties damaged in such riots were not being used for customary business operations, coverage may be precluded by a vacancy exclusion or an occupancy requirement.

Business losses sustained as a result of curfew orders enacted for the purpose of preventing future riots do not trigger coverage under the civil authority provisions contained in most commercial property policies because, under Georgia law, such orders are not considered to result from actual physical loss or damage to property. Furthermore, the curfew orders generally did not completely prohibit access to insured properties. Whether coverage for such losses would also be precluded by a civil authority exclusion is currently undetermined.

When multiple instances of property damage to an insured property result from a single riot, Georgia law would likely consider such damage to constitute a single "occurrence" for purposes of the deductible amount and the liability limits of the applicable policy. However, if the instances of property damage result from separate riots, or from acts that do not qualify as riots, they may implicate separate "occurrences."

While these rules are typical of most commercial property insurance policies, the existence and scope of coverage for any given loss will depend on the language of the particular policy provisions governing the claim at issue and the particular jurisdiction in which the loss occurred. ◆

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Endnotes

[1] *See Dobbs v. Jackson Women's Health Organization*, Slip Op., No. 19-1392 (U.S. Jun. 24, 2022).
[2] *See https://businessday.ng/news/article/businesses-urged-to-prepare-for-rise-in-social-unrest/* (accessed June 26, 2022).
[3] *See https://www.iii.org/fact-statistic/facts-statistics-civil-disorders.*
[4] Verisk Analytics. PCS will not reveal an exact dollar figure from the violence, but it reveals approximate figures.
[5] O.C.G.A. § 16-11-30(a).
[6] Merriam-Webster Online Dictionary, as of April 25, 2021.
[7] *Id.*
[8] *Fisher v. State*, 78 Ga. 258, 258 (1886).
[9] *Id.*
[10] *Id.*
[11] *Id.* at 259.
[12] *Id.*
[13] *See, e.g., Phenix Ins. Co. of Brooklyn v. Jones*, 16 Ga. App. 261, 85 S.E. 206 (1915); *Smith v. State*, 72 Ga. App. 108, 33 S.E.2d 120 (1945).
[14] *Smith v. State*, 72 Ga. App. 108, 109, 33 S.E.2d 120, 120 (1945).
[15] *Id.*
[16] *Phenix Ins. Co. of Brooklyn v. Jones*, 16 Ga. App. 261, 85 S.E. 206 (1915).
[17] *Id.*
[18] *Id.*
[19] *See, e.g., Portland School District No. 1J v. Great Am. Ins.*, 241 Or. App. 161, 171 (2011).
[20] *See Sherwin-Williams v. Ins. Co. of State of Penn.*, 863 F. Supp. 542, 554 (N.D. Oh. 1994).
[21] *Id.*
[22] *See, e.g., Charter Oak Fire Ins. Co. v. Patterson*, 46 F. Supp. 3d 1361 (N.D. Ga. 2014) (holding that, under Georgia law, if an insurance policy requires an insured, as a condition of coverage, to reside at the property and the insured does not reside there, the insured cannot recover under the policy); *Fitzpatrick v. Fire Ins. Exchange*, 2000 WL 567101 (Tex. App. 2000) (holding that, under Texas law, vacancy clause excluded coverage for vandalism to insured premises that occurred more than 60 days after vacancy of premises).
[23] *Sorema North Am. Reinsur. Co. v. Johnson*, 258 Ga. App. 304, 574 S.E.2d 377 (2003); *see also Crum & Forster Ins. Cos. v. Mecca & Sons Trucking Corp.*, 2009 WL 2917898 (N.J. Super. App. Div. Sept. 9, 2009) (holding that vacancy provision excluded coverage for damage caused by vandalism when insured was not conducting customary operations at loss location); *but see Gallo v. Travelers Prop. Cas.*, 21 A.D.3d 1379, 1380, 801 N.Y.S.2d 849, 851 (2005) (finding that the presence of furnishings in three apartments

was sufficient to establish the "customary operations" of renting the apartments).

[24] *Grange Mut. Cas. Co. v. DeMoonie,* 277 Ga. App. 812, 490 S.E.2d 451 (1997).

[25] *AFLAC Inc. v. Chubb & Sons, Inc.*, 260 Ga. App. 306, 308, 581 S.E.2d 317, 319 (2003) (Georgia law); *Graspa Consulting, Inc. v. United Nat'l Ins. Co.*, No. 1:20-cv-23245 (S.D. Fla. Jan. 20, 2021) (Florida law); *see also Hasan v. AIG Prop. Cas. Co.*, 2018 WL 10335670, *3 (D. Colo. Aug. 2, 2018) (Colorado law) ("The requirement that the loss be 'physical,' given the ordinary definition of that term, is widely held to exclude alleged losses that are intangible or incorporeal and, thereby, to preclude any claim against the property insurer when the insured merely suffers a detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property."); *Steiner Steakhouse LLC v. AMCO Ins.*, No. 1:20-cv-00858 (W.D. Tex. Dec. 30, 2021) (Texas law) (holding that the phrase "direct physical loss of or damage to property" is unambiguous and means "a distinct, demonstrable, physical alteration of the property"); *L.A. Cty. Museum of Nat. Hist. Found. v. Travelers Indem. Co.*, No. 2:21-cv-01497-SVW-JPR, 2021 U.S. Dist. LEXIS 83317 (C.D. Cal. Apr. 15, 2021) (California law) (stating that the meaning of "direct physical loss or damage" was well established under California law: property must undergo a "distinct, demonstrable, physical alteration," and "some external force must have acted upon the insured property to cause a physical change in the condition of the property."); *Georgetown Dental, LLC v. Cincinnati Ins. Co.*, et al., No. 1:21-cv-00383 (S.D. Ind. May 17, 2021) (Indiana law) (determining that the terms "physical loss" and "physical damage" require actual and demonstrable physical harm to the property); *Columbiaknit, Inc. v. Affiliated FM Ins. Co.*, No. 99-434-HU, 1999 WL 619100, at *7 (D. Or. Aug. 4, 1999) (Oregon law) (holding that property suffers "direct physical loss" triggering coverage under a first party property policy when the property undergoes a "demonstrable physical change . . . necessitating some remedial action"); *Nguyen v. Travelers Cas. Ins. Co. of Am.*, No. 2:20-cv-00597-RSM (W.D. Wa. May 28, 2021) (Washington law) (holding that "physical loss" requires "tangible, material, discernable, or corporeal dispossession of the covered property"); *Torgerson Props., Inc. v. Continental Cas. Co.*, No. 0:20-cv-02184 (D. Minn. Feb. 17, 2021) (Minnesota law) (asserting that the term "direct physical loss of or damage to property" required "actual, demonstrable loss of or harm to some portion of the premises itself," and did not encompass "simple deprivation of use"); *System Optics, Inc. d/b/a Novus Clinics v. Twin City Fire Ins. Co.*, 2021 WL 2075501 (N.D. Oh. May 24, 2021) (Ohio law) (holding that "direct physical loss" requires "some actual harm to the structure rendering it uninhabitable or unusable"); *Chief of Staff, LLC v. Hiscox Ins. Co. Inc.*, No. 20-C-3169, 2021 WL 1208969, at *1-*2 (N.D. Ill. Mar. 31, 2021) (Illinois law) (holding that "'physical loss' refers to a deprivation caused by a tangible or concrete change in or to the thing that is lost'"); *PF Sunset View, LLC v. Atlantic Spec. Ins. Co.*, No. 20-81224-CIV, 2021 WL 1341602, at *2 (S.D. Fla. Apr. 9, 2021) (Florida law) (holding that "the plain meaning of the terms 'direct physical loss of or damage to property' unambiguously requires actual, tangible damage to the physical premises itself, not merely economic losses unaccompanied by a demonstrable physical alteration to the premises itself'"); *The Brown Jug, Inc. v. Cincinnati Ins. Co.,* No. 5:20-cv-13003, 2021 WL 2163604 (E.D. Mich. May 27, 2021) (Michigan law) (holding that, to constitute "direct physical loss or damage," the insured property must be physically lost, damaged, replaced, or uninhabitable).

[26] *Paradies Shops, Inc. v. Hartford Fire Ins. Co.*, No. 1:03-CV-3154-JEC, 2004 WL 5704715, at *1 (N.D. Ga. Dec. 15, 2004).

[27] *Id.* at *2-3.

[28] *Id.* at *6.

[29] *Id.* at *7.

[30] Id.

[31] *See Bros., Inc. v. Liberty Mut. Fire Ins. Co.*, 268 A.2d 611 (D.C. Ct. App. 1970) (holding that although the loss resulted from a curfew and municipal regulations imposed during civil disorder in April of 1968, there was no coverage because these did not prohibit access to the premises because of damage to adjacent property); *Commstop, Inc. v. Travelers Indem. Co. of Conn.*, No. 11-1257, 2012 U.S. Dist. LEXIS 69962 (W.D. La. May 17, 2012) ("prohibit" access means "totally and completely prevented – i.e., made impossible"); *Southern Hospitality, Inc. v. Zurich Am. Ins. Co.*, 393 F.3d 1137, 1141 (10th Cir. 2004) ("prohibits access" means to "formally forbid or prevent"); Syufy Enterprises, 1995 U.S. Dist. LEXIS 3771 (N.D. Cal. March 20, 1995) (no coverage because theater access was not specifically foreclosed by dawn-to-dusk curfew); *Ski Shawnee, Inc. v. Commonwealth Ins. Co.*, 2010 WL 2696782, *5 (M.D. Pa. 2010) (holding there was no civil authority coverage because closure of main road to ski resort did not completely cut off access to resort); *TMC Stores, Inc. v. Fed. Mut. Ins. Co.*, No. A04-1963, 2005 WL 1331700, at *4 (Minn. Ct. App. Jun. 7, 2005) (holding that civil authority coverage only applies while access is completely prohibited; where a business remains open and access is merely inconvenient or diminished, or where there is some confusion about whether access is prohibited but no civil authority actually exists preventing access, civil authority provisions are inapplicable); *Royal Indem. Co. v. Retail Brand Alliance, Inc.*, 33 A.D.3d 392, 822 N.Y.S.2d 268 (1st Dep't 2006) (the destruction of the World Trade Center had not "prevented" the use of or access to a store after it reopened even though one entrance was closed and there was scaffolding on the building); *Davidson Hotel Co. v. St. Paul Fire & Mar. Ins. Co.*, 136 F. Supp. 2d 901, 912 n.6 (W.D. Tenn. 2001) (holding civil authority coverage provision was not applicable where a civil authority denied an insured use of a hotel for business reasons, but did not deny the insured physical access to the premises).

[32] *See Massi's Greenhouses, Inc. v. Farm Family Mut. Ins. Co.*, 233 A.D.2d 844, 844, 649 N.Y.S.2d 307, 308 (4th Dep't 1996).

[33] *Id.* at 844.

[34] *Id.*

[35] *See, e.g., Int'l. Flavors & Fragrances, Inc. v. Royal Ins. Co. of Am.*, 46 A.D.3d 224, 228 (1st Dep't 2007) ("Whether a series of losses or injuries are a result of a single or multiple occurrences is determined by: 'whether there is a close temporal and spatial relationship between the incidents giving rise to injury or loss, and whether the incidents can be viewed as part of the same causal continuum, without intervening agents or factors.'"); PECO Energy Co. v. Boden, 64 F.3d 852, 855-856 (3d Cir. 1995) ("If there is only one cause for all of the losses, they are part of a single occurrence.").

[36] *State Auto Prop. & Cas. Co. v. Matty,* 286 Ga. 611, 611, 615, 690 S.E.2d 614 (2010).

[37] T*ravelers Prop. Cas. Co. of Am. v. Continental Cas. Co.*, 226 F. Supp. 3d 1359 (N.D. Ga. 2017).

[38] *Id.* at 1370.

[39] *Id.*

[40] *Id.*

[41] *See State Auto Prop. & Cas. Co. v. Matty*, 286 Ga. 611, 611, 615, 690 S.E.2d 614 (2010).

[42] *Id.*, 286 Ga. at 615.

[43] *Id.* at 611-12.

[44] *Id.* at 617.

[45] *State Auto Property and Cas. Co. v. Matty*, 438 Fed. Appx. 820, 821 (11th Cir. 2011).

[46] *Id.*

[47] *State Auto Prop. and Cas. Co. v. Matty*, 719 F. Supp. 2d 1377, 1381 (M.D. Ga. 2010).

[48] *State Auto Property and Cas. Co. v. Matty*, 438 Fed. Appx. 820, 822 (11th Cir. 2011).

Medical Experts

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for high-stakes litigation one typically opts for excellence over convenience. Depending on the case's venue, fact set, and parties, a skilled trial attorney has a palette of expert preferences including demographics, depth of testimony experience, accessibility, academic title, and publications.

While no single variable may be pivotal, one or more facets may tip the scale toward choosing a given candidate and ultimately strengthen the odds of winning the case. Rarely will a stabled expert meet all subjective preferences and requirements.

4. Is there an appearance of impropriety when using a "go-to" medical expert? Even the most impeccable medical expert may be tempted to favoritism or undue advocacy for an established client. That is exactly why your expert will be asked on cross-examination how often he or she has worked for your firm.

Whenever the answer is more than once, there is risk. When the answer is "I review a lot of their cases," Pandora's Box has opened and your expert's credibility is in the crosshairs of predictable questioning. How long have you known Attorney X? How many cases have you reviewed for their firm? How many times have you written a report or testified for them? How many dollars have you billed their firm for case reviews and testimony? Have you ever given them an opinion that didn't support their case?

Even if those questions don't make you nervous, they will rile nearly any expert and cast an appearance of impropriety upon your relationship. If the insinuations resonate with the trier of fact, the expert's integrity is threatened and the entire case is imperiled. Such costly risks are better avoided from the outset rather than remediated at the eleventh hour. Cautiously reuse, but never overuse, an expert.

5. Is the medical expert still properly credentialled with an active clinical practice in the exact area in question? While longitudinal experience is what creates a go-to medical expert, it is ironic that the same longevity often derails the relationship when the expert's credentials show signs of age. Reduced clinical hours, loss of Board Certification, and other practice modifications are often signs that an expert is at a different point in their career than when you first met.

> *"Rarely will a stabled medical expert meet all subjective preferences and requirements."*

While some factors are less relevant than others, it is imperative to assure that each candidate has maintained ABMS (American Board of Medical Specialties) certification along with full-time practice in medicine or surgery, particularly at the time of the issues pertinent to the case. Equally as important, the expert must be practicing in the exact same areas relevant to the claims and should have a depth of experience on point for the issues. This differs from simply matching the correct specialty.

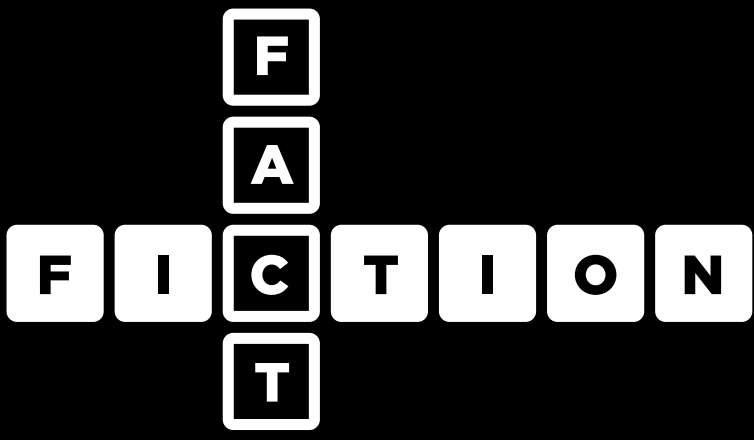
A common mistake is to use a poorly suited go-to medical expert for a first look or preliminary affidavit with the intention of pulling in a "real expert" later. This strategy wastes time and capital by securing an opinion from an expert who either can't be disclosed or who ultimately may be disqualified. The best strategy is to properly screen candidates and secure a reasoned, reliable, and evidence-based opinion from the outset.

Conclusion

By valuing medical experts as strategic assets rather than mandated necessities, one quickly realizes the optimal expert for any given case should be chosen from a tactical arsenal rather than an overused stable. On rare occasions when the perfect expert comes from a prior list, the benefits may outweigh the risks. The true test is to consider each physician and surgeon as a "candidate" rather than an "expert."

Even though you are already acquainted, take time to discuss the case, obtain an updated curriculum vitae, and ask tough vetting questions. If the familiar expert doesn't pass the screening interview, or if either of you is intimidated by the process, it is time to explore better qualified candidates. Using this approach gives your case the best chance of success while avoiding costly mistakes. ◆

Burton Bentley II, M.D., FAAEM, is the CEO of Elite Medical Experts, a GDLA Platinum Sponsor. Dr. Bentley is a board-certified Emergency Medicine physician, who practiced full-time for 21 years before stepping out in 2015 to pursue a novel medical device that he developed and patented. His device was acquired by Centurion Medical in 2016, and Dr. Bentley now devotes all his energy to Elite Medical Experts, a consulting firm he founded in 2010. Elite aligns Professors of Medicine and Surgery as experts in complex litigation and serves over 3,500 clients across the U.S. and abroad. Dr. Burton is a nationally recognized authority on medical liability, informed consent, and complex issues at the intersections of medicine, business and law.



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Peek Behind the Curtain

Continued from page 28

Pre-Suit Claims

As expected, the vast majority (99.6%) of pre-suit soft tissue matters settled below $100K. Of all pre-suit matters, 9.5% settled at or below the medical specials.

I looked at matters whose settlements were above two median absolute deviations (MAD), which is approximately the highest 20% of cases. Comparing the differences with pre-suit matters involving that group and the 80% *below* 2 MAD values shows:

1. Medical specials were a very significant factor with the upper group of cases, averaging $15,858 in specials while the lower group averaged only $4,729.
2. Another big differentiator apparently is significant citations (e.g., DUI, hit-and-run, which we call Tier 1 citations), implying punitive damage exposure. More than 5 times the high settlement cases (19.9%) had a Tier 1 citation compared to only 3.7% of the lower group cases. Based on the verdict percentages with Tier 1 citations (only 13% in the higher verdict group - shown later), it appears that adjusters are giving cases with Tier 1 citations higher value than actually exists in adjudicated trials with soft tissue injuries.
3. 10% of all pre-suit matters had prior related injuries, with 16.7% of them in the 2+ outlier group, compared to only 6% in the <2 MADs comparison group.
4. There were 3 times as many cases with injections in the upper outlier group compared to the lower group.
5. Property damage had the expected relationship of none or slight damage having very few cases in the upper outlier group, while cases involving totaled vehicles were represented twice as often in the upper outlier group.
6. There were 3 times the percentage of cases in the upper outlier group where an ambulance was taken from the scene, compared to overall. That was followed by self transport; not going to the ER was penalized and only 14% of those cases were in the upper outlier group.
7. There was a slight tendency for older plaintiffs (avg. age 40) in the upper outlier group compared to lower group (avg. age 35).
8. Gender made no difference.
9. There was a handful of insurers where the majority of their pre-suit cases were in the upper end of ratios; those carriers tend to be associated with more affluent individuals.

So soft tissue cases settled pre-suit with relatively high medical specials, Tier 1 citations, injections, totaled vehicles and plaintiffs who took an ambulance from the scene, have higher settlement values. It seems prior related injuries are counterintuitively related to higher settlements but that's because plaintiffs with prior related injuries have higher medical specials (average $10,097) than those without prior related injuries (average $6,444). The settlement ratios of people *with* prior related injuries are *lower* (average 2.1) than people without prior related injuries (average 2.7), so that's where the negative adjustment happens in spite of their high medical specials.

Litigated Settlements

The first question looking at litigated settlements vs. pre-suit settlements was whether there is a difference between insurance carriers in allowing (or suppressing) cases from migrating from pre-suit to litigation. Do they allow their adjusters to handle case resolution or are they more resistant to settling pre-suit and thus have more cases go into litigation?

The short answer is yes, there is a difference between *insurance carriers*. A total of 76 insurers were represented in this group of pre-suit and litigated cases (remembering the other criteria I used to pre-select it: MVA only, individual defendants, no stacked insurance coverage, soft tissue only, etc.) .

The percentage of cases that were litigated vs. settled pre-suit was 21.5% vs. 75.9%. We are showing 18 insurers whose litigated percentage is 50% *higher* than the average; so on average they are allowing many more of their cases to go into litigation. We are also showing 18 insurers who only allow 11% or less of their cases to go into litigation, so most of their soft tissue settlements are happening pre-suit with adjusters. On both ends of the spectrum, those tend to be smaller carriers but each end has a couple of very large carriers; the upper end has four that I would characterize as large carriers. Two of them have litigated percentages over 50% compared to pre-suit settlements, so a majority of their soft tissue cases are going into litigation.

The next question was whether the medical specials were different and the answer here is also yes, but probably not as extreme as you' would think.

	Ratio		Settlements		Medical Specialists	
	Avg.	Median	Avg.	Median	Avg.	Median
Pre-Suit	1.65	1.65	$11,283	$7,900	$6,813	$4,788
Litigated	1.75	1.66	$21,739	$13,000	$12,454	$7,809

While both median and average settlements and medical specials are higher in litigated cases, the median settlement ratios are virtually identical at around 1.65; the litigated average ratios are slightly higher at 1.75.

One significant difference between pre-suit and litigated settlements concerns *prior related injuries*. While 10% of pre-suit settlements had prior related injuries, 23.65% of litigated cases did. So adjusters were having a harder time getting those cases resolved and a higher percentage were flowing over into litigation. Plaintiff's attorneys probably ascribe less importance to prior related injuries and refuse to back down on their demands.

Litigated settlement outliers have 13.55% of cases with a Tier 1 citation, compared to pre-suit case outliers where 19% have a Tier 1 citation. Defense attorneys apparently do not ascribe near the same value to DUI and hit-and-run type citations in settlement value as adjusters.

Lastly, *17.29% of all litigated cases settled at or below* the medical specials. Defense attorneys seem to have a stronger track record than adjusters getting soft tissue cases settled at or below specials (adjusters were at 9.5%).

Litigated Settlement Outliers

Taking a look at the litigated settlement outliers (those 2+ outside the MAD statistic) compared to those below 2 deviations shows:

1. Medical specials again appear to be the big driver as seen in the chart below:

	Ratio		Settlements		Medical Specials	
	Avg.	Median	Avg.	Median	Avg.	Median
<2 MAD	1.41	1.50	$11,209	$10,000	$7,960	$6,680
2+ MAD	2.08	3.23	$59,633	$42,000	$28,631	$13,000

. Twice as many of the higher outlier cases are associated with a Tier 1 citation; 6% without Tier 1 vs. 13.55% with Tier 1.
3. Prior related injuries are positively related to higher settlements. The same dynamic exists as with pre-suit cases where prior related injuries are associated with higher medical specials ($19,138 avg. vs. $10,390). Again, while prior related injuries are associated with higher settlements, the settlement ratios are *lower* for those *with* prior related injuries (average ratio 2.57) vs. those without (3.39). So, they are also being penalized for having prior related injuries in litigated settlements.
4. Property damage has a significant relationship with settlement amounts in the expected direction: no or slight property damage is associated with lower settlements while both substantial and totaled property damage is associated with higher settlements.
5. There is a significant relationship between taking an ambulance to the ER and higher settlements; there is no relationship between either self-transporting or not transporting to the ER and settlement value.
6. There is a significant relationship between higher settlements and ever having received an injection. Prior related injuries, taking an ambulance to the ER, and injections are all associated with higher medical specials so medical specials contain a lot of correlated information.

It appears that high medical specials, presence of a prior related injury and a Tier 1 citation are highly related to a case moving into litigation, as those numbers and percentages are much higher in litigated cases.

I created a statistical model to explore these characteristics together in relation to the litigated settlement outliers and all had a significant and positive relationship with higher litigated settlement values.

1. Medical specials
2. Tier 1 citation present
3. Taking an ambulance
4. Having injections
5. Having prior related injuries

All the variables except Tier 1 citations were positively correlated with medical specials. Tier 1 citations don't have a positive relationship to higher medical specials; so just because a defendant had a DUI doesn't mean the plaintiff's injuries are more severe or require more treatment. In fact, the relationship is reversed; litigated outlier cases *with* a Tier 1 citation have *lower* average medical specials of $20,239 while those outlier cases *without* a Tier 1 citation have a *higher* medical specials average of $29,899.

Verdicts

Looking at verdicts, 23% were in the 2+ deviation group, which was defined by verdicts only above $25,169, so 77% of soft tissue verdicts were below that. Importantly, 17.4% of the soft tissue verdicts were defense verdicts where the plaintiff got nothing *and* another 21.6% were soft tissue verdicts where the plaintiff got less than the medical specials. So, in 39% of the verdicts involving soft tissue cases, the plaintiff got less than the specials or zero.

Continued on next page

Only 9.5% of soft tissue verdicts were over $100K. Taking a look at the 9.5% that had verdicts over $100K, are there any similarities?

1. 28% of the $100K+ verdicts had a defendant with a Tier 1 citation (e.g. DUI, Hit and Run), compared to only 3.77% in the lower verdict group. But only 6% of verdicts had Tier 1 citations at all so most were dealt with earlier in the settlement process.
2. As we've seen at other stages, cases with prior related injuries had higher medical expenses but were penalized by juries as well. No prior related injuries had a median ratio of 1.49 but those *with* prior related injuries had a *lower* 1.4 ratio; cases with prior related injuries had twice the medical specials. Interestingly, the percentage of cases that were litigated and tried to verdict are virtually identical (approximately 24%), so the negative value of a prior related injury must have continued to be a point of contention between plaintiff and defense. If the verdict percentages were lower, it would mean a higher percentage had been settled during the litigation/pre-trial phase.
3. Medical specials averaged more than twice ($25,662 vs. $11,150) for the $100K+ group.
4. More than twice as many of the verdict outliers took an ambulance from the scene to the ER.
5. More than twice as many verdict outliers had injections.
6. Plaintiffs tended to be older (average 49 years vs. 40 years) in the $100K+ group.
7. There was a slight tendency for slight property damage to be associated with lower verdicts but totaled and substantial damage made no difference.
8. Venue didn't seem to be as obvious a predictor; looking just at GA data, we had higher soft tissue verdicts in places you'd expect (Dekalb, Chatham, Bibb) but also where you wouldn't (Bullock, Newton, Jackson). *This follows a theme we've seen for years where the facts of the case will often trump the supposed conservative characteristics of a particular venue.*
9. There were three insurance carriers (all smaller carriers) in GA who had 50% or more of their soft tissue verdicts over $100K; they may have not understood the risks involved in taking those cases to trial. One very large carrier had 27% of their soft tissue verdicts over $100K; another very large carrier was only 7%. The remainder of larger carriers were below 10%.

Performance Statistics

It's a very simple matter to compute performance statistics on anyone associated with the settlement process; adjusters, defense attorneys, defense firms, plaintiffs' attorneys and plaintiffs' firms.

The table below is for five adjusters at a large insurance carrier where we have a lot of data (more than 50 cases for each); as you can see, there is a lot of variability given that these are *all soft tissue MVA cases only with individual* defendants. All are doing a good job holding down settlement values although Adjuster 1 is leading the pack and, on average, settles cases below the medical specials, which is pretty impressive:

	RATIO		SETTLEMENT		MEDICAL EXPENSES	
	Avg.	Median	Avg.	Median	Avg.	Median
Adjuster 1	.92	1.27	$11,548	$8,500	$12,518	$6,654
Adjuster 2	1.15	1.43	$17,429	$14,500	$15,153	$10,119
Adjuster 3	1.47	1.57	$15,321	$13,000	$10,410	$8,260
Adjuster 4	1.66	1.83	$8,418	$6,625	$5,059	$3,630
Adjuster 5	1.85	1.61	$8,183	$6,500	$4,419	$4,031

Management should have similar statistics for all their adjusters and will compare these to the adjuster group and make decisions involving raises, promotions, additional training, etc.

The same process can happen for defense firms that are working for the same insurance carrier and attorneys within those firms. When we first started CaseMetrix in 2009, State Farm was going through a highly publicized process of reducing the number of defense firms working for them in Georgia; if I remember correctly, they took it down from around a dozen to five firms. They didn't throw darts to make these decisions; they would have used this general process to look at each firm's performance, probably with different break-outs (e.g., non-soft tissue injuries, jury trials, corporate/trucking defendants, etc.).

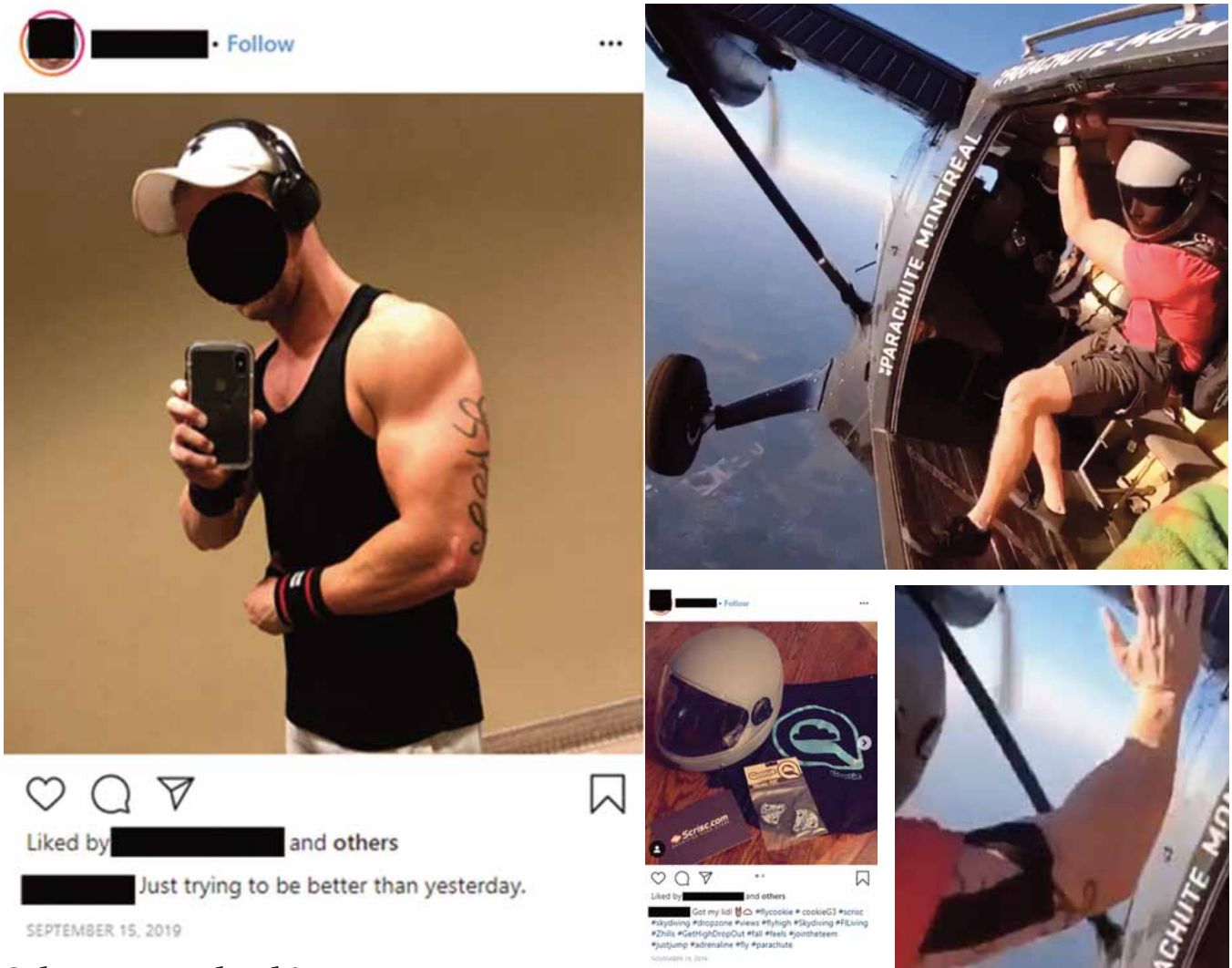
I ran an analysis of a defense firm some time ago and noticed that one of the firm's attorneys had numbers much, much stronger numbers than others in the firm (i.e., the ratios were much lower). About six months later, that attorney left along with a carrier's business, so that carrier's analyst(s) were probably paying attention to the same numbers we were seeing.

Similarly, carriers could analyze individual plaintiff's attorneys and adjust their offers based on past performance with them. Attorneys with a track record of accepting low offers or having low verdicts will continue to get low offers and those with high settlements or verdicts will trend higher; again, it's all a function of the amount of information (i.e., cases) the carriers have on the attorney. Smaller carriers will have less data and fewer analytic resources involved in decision making.

Attorneys with a track record of accepting low offers or having low verdicts will continue to get low offers and those with high settlements or verdicts will trend higher; again, it's all a function of the amount of information (i.e., cases) the carriers have on them.

There is a lot of analysis that can happen behind the scenes at carriers to better understand the important drivers of settlement and verdict values. All this analysis was conducted with a single sub-group (MVA, soft tissue, single carrier, individual defendant, etc.). There are thousands more non-soft tissue cases, corporate, trucking, and government defendants, etc. where the settlement dynamics can be significantly different and the stakes much higher. ◆

Alan Pershing is CEO and one of the co-founders of CaseMetrix, which he developed in 2009 with Kim White. CaseMetrix is as GDLA Platinum Sponsor. Pershing and White started CaseMetrix when they realized that, while 95 percent of cases settle, there was no database that systematically collected recent settlements and verdicts and compiled it into an easily accessible, cloud-based database with world-class searching capabilities. On March 10, 2022, CaseMetrix was awarded First Place at ALM's Legalweek convention in New York City for "Research & Data Science–Vendors." CaseMetrix was awarded the "LegalTech Overall Data Solution of the Year" in both 2020 and 2021.



Subpoena Facebook?

Continued from page 30

tings" section defining the function of their tool:

> *Download Your Info: This includes a lot of the same information available to you in your account and activity log, including your Timeline info, posts you have shared, messages, photos and more. Additionally, it includes information that is not available simply by logging into your account, like the ads you have clicked on, data like the IP addresses that are logged when you log into or out of Facebook, and more. To download your information, go to your Settings and click Download a copy of your Facebook data.*[5]

It is important to note that downloading such content requires the cooperation of the user.

Best Practices

The malleable application of the SCA's protections means compelling a social media platform to turn over user data is difficult if not futile.[6] Social media continues to be the platform on which the general public feels comfortable sharing details of their lives, and the data shared on these platforms is becoming more relevant to legal professionals every day. While attempts to obtain private online content can be made more compliable with specificity in the request, such as the type of content posted (e.g., photo, status update, comment) and the actual date it appeared on a platform, that still does not guarantee it will be provided. It is worth noting, however, that your likelihood of success is increased significantly if you identify the exact dates and types of content you want as opposed to asking for "everything." For now, the optimal standard practice remains to gather, authenticate and preserve open source intelligence (OSINT)—i.e., information available to the public and therefore not protected by a user's privacy settings. Given the complexity of the task, engaging a trusted third-party service provider is almost always best practice.

And while at this point in 2022, the idea of online content being instrumental—if not essential—to successfully defending certain insurance claims may be obvious, a recent case reinforces why tapping this resource early and often is

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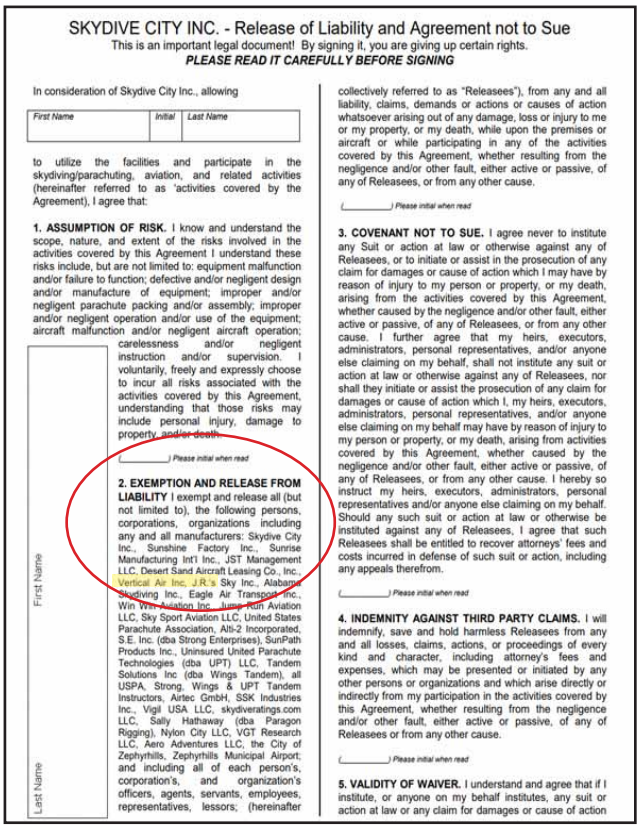
Registered Owner			
Name	WIN WIN AVIATION INC		
Street	7300 THOMPSON MILL RD		
City	WAKE FOREST	State	NORTH CAROLINA
County	WAKE	Zip Code	27587-9087
Country	UNITED STATES		
MFR Year	1969	Mode S Code (base 16 / hex)	A32346
Type Registration	Corporation	Fractional Owner	NO

paramount to leveraging publicly-available online content. A 28-year-old male trucker made a workers' compensation claim due to an alleged cumulative back injury and the subject was found to have an active lifestyle on social media. More specifically, an Instagram account was located via a user handle search (personal email address with @gmail or @yahoo removed) that featured dozens of helmet-cam videos posted by the claimant engaging in skydiving after the date of loss. Of course, the date said videos were posted does not guarantee the date they were taken.

Nonetheless, photos posted by the subject of his helmet as well as a distinctive tattoo on his left arm assisted in confirming the individual featured in the videos was him.

Additional clues in the video provided a name of a business, Parachute Montreal, and an aircraft number on the side of the plane that ultimately yielded a company name: Win Win Aviation, Inc. That prompted another search ending with a Release of Liability Form uncovered for Win Win Aviation which if/when recovered would provide not only the subject's signature but the actual date it was signed—confirming notable post-date of loss activity in an irrefutable way. ◆

Stephen Roper is the Managing Partner of DigiStream Carolinas. Prior to that he was the Senior Intelligence Specialist of DigiStream's Intelligence Division, overseeing background, social media, medical, and accident scene investigations nationally. He has completed over 1,000 digital investigations including pre-employment screenings for public agencies and international, multi-jurisdictional investigations and is a licensed Private Investigator. DigiStream is a GDLA Platinum Sponsor.



SKYDIVE CITY INC. - Release of Liability and Agreement not to Sue

This is an important legal document! By signing it, you are giving up certain rights.

PLEASE READ IT CAREFULLY BEFORE SIGNING

In consideration of Skydive City Inc., allowing

First Name | Initial | Last Name

to utilize the facilities and participate in the skydiving/parachuting, aviation, and related activities (hereinafter referred to as 'activities covered by the Agreement), I agree that:

1. ASSUMPTION OF RISK. I know and understand the scope, nature, and extent of the risks involved in the activities covered by this Agreement I understand these risks include, but are not limited to: equipment malfunction and/or failure to function; defective and/or negligent design and/or manufacture of equipment; improper and/or negligent parachute packing and/or assembly; improper and/or negligent operation and/or use of the equipment; aircraft malfunction and/or negligent aircraft operation; carelessness and/or negligent instruction and/or supervision. I voluntarily, freely and expressly choose to incur all risks associated with the activities covered by this Agreement, understanding that those risks may include personal injury, damage to property, and/or death.

(_____) *Please initial when read*

2. EXEMPTION AND RELEASE FROM LIABILITY I exempt and release all (but not limited to), the following persons, corporations, organizations including any and all manufacturers: Skydive City Inc., Sunshine Factory Inc., Sunrise Manufacturing Int'l Inc., JST Management LLC, Desert Sand Aircraft Leasing Co., Inc., Vertical Air Inc, J.R.'s Sky Inc., Alabama Skydiving Inc., Eagle Air Transport Inc., Win Win Aviation Inc., Jump Rich Aviation LLC, Sky Sport Aviation LLC, United States Parachute Association, Alti-2 Incorporated, S.E. Inc. (dba Strong Enterprises), SunPath Products Inc., Uninsured United Parachute Technologies (dba UPT) LLC, Tandem Solutions Inc (dba Wings Tandem), all USPA, Strong, Wings & UPT Tandem Instructors, Airtec GmbH, SSK Industries Inc., Vigil USA LLC, skydiveratings.com LLC, Sally Hathaway (dba Paragon Rigging), Nylon City LLC, VGT Research LLC, Aero Adventures LLC, the City of Zephyrhills, Zephyrhills Municipal Airport; and including all of each person's, corporation's, and organization's officers, agents, servants, employees, representatives, lessors; (hereinafter collectively referred to as "Releasees"), from any and all liability, claims, demands or actions or causes of action whatsoever arising out of any damage, loss or injury to me or my property, or my death, while upon the premises or aircraft or while participating in any of the activities covered by this Agreement, whether resulting from the negligence and/or other fault, either active or passive, of any of Releasees, or from any other cause.

(_____) *Please initial when read*

3. COVENANT NOT TO SUE. I agree never to institute any Suit or action at law or otherwise against any of Releasees, or to initiate or assist in the prosecution of any claim for damages or cause of action which I may have by reason of injury to my person or property, or my death, arising from the activities covered by this Agreement, whether caused by the negligence and/or other fault, either active or passive, of any of Releasees, or from any other cause. I further agree that my heirs, executors, administrators, personal representatives, and/or anyone else claiming on my behalf, shall not institute any suit or action at law or otherwise against any of Releasees, nor shall they initiate or assist the prosecution of any claim for damages or cause of action which I, my heirs, executors, administrators, personal representatives, and/or anyone else claiming on my behalf may have by reason of injury to my person or property, or my death, arising from activities covered by this Agreement, whether caused by the negligence and/or other fault, either active or passive, of any of Releasees, or from any other cause. I hereby so instruct my heirs, executors, administrators, personal representatives and/or anyone else claiming on my behalf. Should any such suit or action at law or otherwise be instituted against any of Releasees, I agree that such Releasees shall be entitled to recover attorneys' fees and costs incurred in defense of such suit or action, including any appeals therefrom.

(_____) *Please initial when read*

4. INDEMNITY AGAINST THIRD PARTY CLAIMS. I will indemnify, save and hold harmless Releasees from any and all losses, claims, actions, or proceedings of every kind and character, including attorney's fees and expenses, which may be presented or initiated by any other persons or organizations and which arise directly or indirectly from my participation in the activities covered by this Agreement, whether resulting from the negligence and/or other fault, either active or passive, of any of Releasees or from any other cause.

(_____) *Please initial when read*

5. VALIDITY OF WAIVER. I understand and agree that if I institute, or anyone on my behalf institutes, any suit or action at law or any claim for damages or cause of action

First Name

Last Name

Endnotes

[1] *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965 (C.D. Cal. 2010). See also "eDiscovery Case Law: *Crispin v. Christian Audigier Inc.*" Doug Austin. December 30, 2010. Accessed via: *https://www.ediscovery.co/ediscoverydaily/case-law/ediscovery-case-law-crispin-v-christian-audigier-inc/*.

[2] "18 U.S. Code 2510." Cornell Law School. Legal Information Institute. 1992. Accessed via: *https://www.law.cornell.edu/uscode/text/18/2510*

[3] "Don't Ask For Too Much: Court Strikes Balance in Addressing Dispute Over Discoverability of Social Media." Scott J. Etish. July 11, 2017. Accessed via: *https://www.ediscoverylawalert.com/2017/07/11/ dont-ask-much-court-strikes-balance-addressing-dispute-discoverability-social-media/*

[4] "Facebook Doesn't Care Much About Your Lawyerly Subpoena." Ernie Svenson. August 24, 2011. Accessed via: *http://ernietheattorney.net/facebook-doesnt-care-much-about-your-lawyerly-subpoena/*

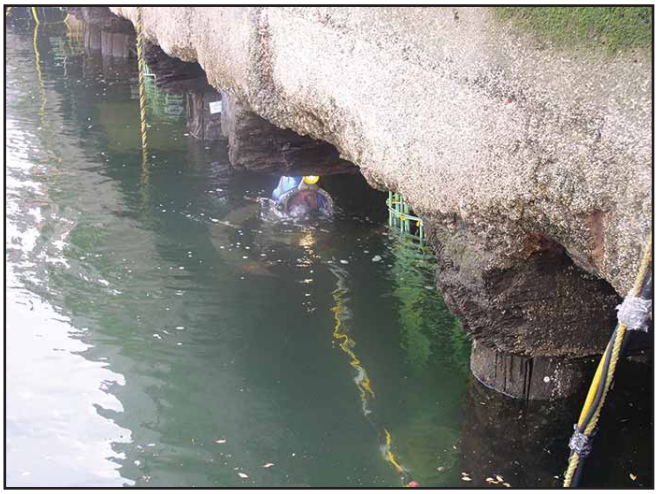
[5] "Download a copy of your Facebook data." Facebook. Accessed via: *https://www.facebook.com/settings*

[6] "Crispin v. Christian Audigier, Inc.: Stored Communications Act Protects Facebook and MySpace Users' Private Communications." Kathryn Freund. June 11, 2010. Jolt Digest. Accessed via: *http://jolt. law.harvard.edu/digest/ crispin-v-christian-audigier-inc.*

What Lies Beneath

Continued from page 32

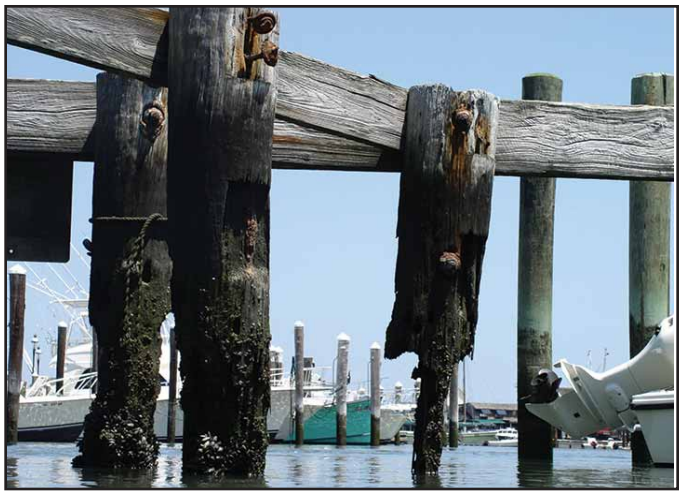
Connected to the hat is the diver's lifeline, often called "the umbilical." The umbilical is comprised of several elements: the main air line, communication wires, a strength line (usually rope) ,and an extra hose that can be used for emergency air delivery or can be used to measure pressure, which can indicate the diver's water depth



to the crew on the surface. The "topside" end of the umbilical is connected to a communication radio and two air sources (typically one gas fired compressor and one high pressure air bottle). The diver also has a third source of air on his back known as a "bailout bottle." This small high pressure bottle can only be turned on by the diver and is only used in an emergency. The bailout bottle is designed to allow the diver to safely return to the surface in the case of lost air. Use of the bailout bottle is rare, but can be required due to a severed umbilical, frozen airlines, or human error by the surface crew. This simplified description of the dive station set up is typically consistent for dive crews in the industry, but the setup can vary and be much more sophisticated for deep water dives. Most inland structural inspection diving, though, is done in shallow water (less than 30 feet). Dive inspection crews typically must be very mobile, usually setting up at different locations for each dive day, so the dive station is usually staged on small boat (around 25 feet) or from a commercial van.

An Engineering Dive Crew (inspection crew) is typically comprised of the PE Diver Team Leader, an Engineer Diver (Engineer-in-Training) and a Commercial Dive Supervisor. All crew members have some level of structural engineering inspection training, and all are of course capable commercial divers. The three crew members typically can all take the role of in-water inspector, dive tender and/or note taker, and will rotate responsibilities for each conducted dive. The note taker directs the sequence of the dive and records observations made by the diver. The diver is in constant communication with the note taker. The dive tender assists the diver in getting in and out of the water and manages the umbilical from the surface. The accepted industry guidance, such as the ASCE Manual, define the required qualifications for the dive crew. Most important is that the crew understand the structural load path and the significance of observed damage. This comes through education and experience with analysis and design of all types of structures and foundation systems, in addition to the diving and inspection skills required to gather the data.

Perhaps the most valuable attribute for a PE Diver when called upon in a forensic engineering capacity is a thorough understanding of structural behavior. This begins with education; however, the failure of marine structures is far from any academic discussion. As a young engineer while working with a team on the design of the largest permanent floating ferry terminal in the world, I was warned by one of my mentors that "in the marine environment, the loads are real." The loads imposed by waves, currents, ice, etc. can be extraordinary. The movement among elements of floating structures during everyday wave loads causes cyclic loading and often leads to metal fatigue is-



sues. Fatigue can cause failure of material even at low load levels, without any "significant event" (such as a storm or vessel allision). Furthermore, the marine environment is probably the worst on earth (for structures). Steel corrodes, concrete deteriorates, and timber rots. There are also "underwater termites" called marine borers that have seen a resurgence in recent decades as our rivers and oceans have become less polluted.

Compounding all of these problems is the fact that these issues are often underwater, unseen, and unknown. Thus, in the absence of a monitoring program, the door can be open to potential claims of negligence when things go awry. Some examples of the types of situations that can lead to litigation include:

- *"Your vessel crashed into my pier!"* Imagine you lean against your landlord's giant oak tree, and it comes crashing down on his car! Who is to blame? In one legal case analogous to the aforementioned dilemma, a dinner cruise vessel was accused of causing the failure of a pier structure while berthing. Inspection of the timber piles supporting the pier revealed extreme damage due to marine borers, which, obviously, occurred prior to the berthing.

- *"Your wharf needs $X million in repairs."* An occupying tenant at a wharf (a type of waterfront platform) who was responsible for maintenance of the wharf, completed a significant number of underwater repairs to damaged pilings. A few years later the owner's inspection consultant claimed additional costly repairs were required due to observed deterioration. The issue with this example was related to the need to understand structural behavior. The wharf had more than adequate capacity and completed repair schemes considered the observed deterioration. Another consideration in this case related to the change in use for the structure; the original structure was designed for much higher loads than the tenant was currently imposing. Their agreement for maintenance was based on the lower loading.

- *"This pier now belongs to the HOA."* Those who have experience with lawsuits associated with condominium construction would probably agree it is not uncommon for a developer to transfer properties to the homeowners' association (HOA) having completed construction with shoddy methods and subpar materials. Now, imagine what an unscrupulous developer might attempt when repairs are under a pier and underwater. Unfortunately, when condos are founded on aging waterfront structures, ongoing maintenance costs can be extreme and unexpected.

- *"We finished all the underwater repairs."* Most marine contractors do quality work; but, again, when repair work is performed underwater, some may expect that no one will ever see this or inspect it. Quality control of underwater construction is very important to ensure conformance with contract specifications. Underwater construction inspection is another duty for the PE Diver. Failure to employ an adequate QC program for underwater construction can often lead to problems for owners down the road. ◆

Brian Moody, PE, SE (ADCI certified diver) is a Forensic Marine Engineering consultant with GDLA Platinum Sponsor FORCON International in Atlanta. He has provided expert testimony for litigation and has over 25 years of experience in inspection, analysis, and design of buildings, bridges, foundations, and numerous waterfront structures.

Mitigating Risk

Continued from page 34

enue and impacts all aspects of a project, including timing and amount of billings, debt covenants, bond covenants, taxes and jurisdiction, as well as a multitude of other potential contractual provisions. For instance, if a project has an estimated total cost of $10 million and a contract value of $12 million, and the project has incurred what is believed to be 50 percent of its total project costs, the company will recognize $6 million in project revenue. However, if the project has actually only incurred 30 percent of its estimated total cost, then the company has inappropriately recognized $2.4 million in revenue. Revenue might be a significant metric for parties involved with financing or insuring the project, and overstated revenues might allow the company to comply with certain contractual covenants when they would otherwise be violating those covenants. Overstated revenues would also overstate tax liabilities and the timing of billing and collections. Overstating revenues can also impact coordination of resources, such as labor and equipment. Project coordinators might assign individuals and/or equipment to new projects a couple of weeks or months in the future, assuming that the current project will be completed when it's actually behind schedule.

Given the importance and impact of estimated total cost on a project's revenue recognition, the fact these costs are still only estimates significantly increases the risk of intentional or negligent mismanagement of a project's expenses—especially when considering the potential difficultly that may come with managing expenses in the current environment with labor shortages, supply chain uncertainty, rising materials pricing and intense demand. Therefore, it is imperative that companies employ experienced and capable staff to assist with the accurate estimation of project costs and correct recording of actual expenses incurred by the project. This becomes even more crucial when construction companies are managing several projects at the same time, as there is a higher likelihood of misallocation of expenses. Companies should have robust job costing and financial reporting capabilities, and financial reporting packages should be reviewed in detail by the project and company leadership team to ensure that cost estimates continue to remain accurate and revenues are appropriate.

Cost Shifting

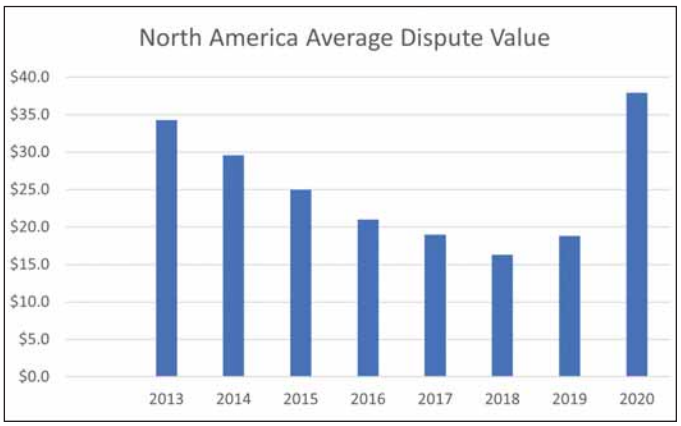
When construction projects experience significant overruns, the costs that drive those overruns often relate to labor (e.g., employees and subcontractors). Labor costs can be difficult to track and manage when companies are juggling multiple projects, and this can result in intentional or inadvertent misallocation. For that reason, the appropriate accounting of project labor costs is a significant risk factor with regards to accurate financial reporting. We've already covered how project costs can impact revenue recognition, but overstating or understating a project's costs will impact profitability and tax liability. Financial ratios, important for certain types of covenants that include costs, could also misrepresent the financial performance of a project if misstated. Accounting for labor costs also represents a key fraud risk indicator due to the opportunity for manipulation.

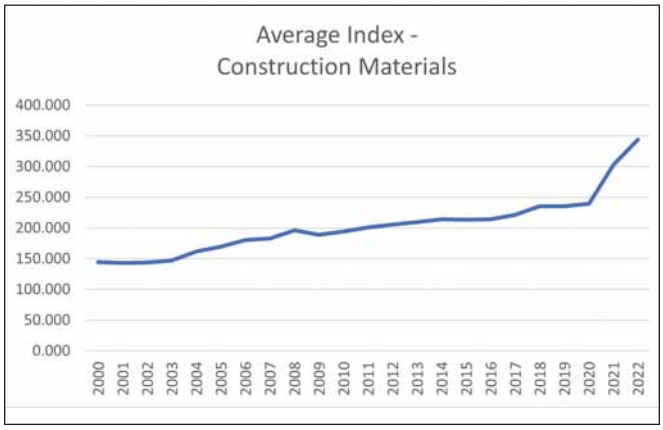
It's easy to imagine plenty of scenarios where costs may be shifted (i.e., moved or misallocated). For instance, if a company has two projects and one is highly profitable while the other is experiencing significant overruns, the company might consider shifting some of those cost overruns to the more profitable project to make both projects appear profitable. Whether for tax or financial reporting purposes, this shifting of expenses would be fraudulent and could put the company at risk of enforcement from the IRS or lawsuit by banks, insurance companies or investors.

Another common scheme involves shifting a project's excessive expenses to another project with a longer term to lessen the impact of those expenses on profitability by spreading them out over two or more years. Or a company may attempt to avoid paying as much in income taxes by shifting expenses from a project in a low- or no-income tax state to a project in a high-income tax state to lower the taxable income and, ultimately, the tax liability for that project.

The schemes and motivations are nearly endless, and it is easy to see how a project's costs could be inadvertently misallocated or intentionally manipulated. However, it's imperative that companies allocate all expenses accurately to avoid any problems with investors, insurance companies, banks, government agencies, auditors, etc. In addition to hiring capable and experienced accountants, companies should consider maintaining separate accounting files or records for each project, and individuals who are working on two or more projects concurrently should be required to complete daily timesheets to track the amount of time that should be allocated to each project.

Companies should consider hiring or contracting with auditors to periodically monitor projects in the field to determine if the financial information is being tracked and recorded accurately and completely. Financial statements for each project should also be produced and reviewed periodically to ensure costs are not being misallocated, and the duties of those charged with preparing accounting information should be segregated from those doing the projects. Last, but not least, the work of third-party contractors should be monitored by those at the company to ensure that those costs are accurately captured and allocated—especially if the same contractor is working on multiple projects on behalf of the company.





Contracts

Contractors may face risks with their contracts due to increased material costs and delays, particularly if the contracts originated prior to the pandemic. While the volume of construction disputes stayed relatively the same in 2020, the average value of the disputes rose sharply in North America and across the globe.

The leading cause of construction disputes is a failure to understand and/or comply with the contract obligations. Owner direct changes, errors and omissions in the contract document, as well as third-party or *force majeure* events are also high on the list. The most popular method for resolving disputes is the owner/contractor willingness to compromise, followed by accurate, timely schedules and reviews by project staff or third parties, such as forensic accountants.

Contractors can mitigate these risks by including language that compensates the contractor for price increases and/or material delays. Compensation can be tied to price indexes and include language to allow for additional time in the case of material delays.

Contracts should also clearly define and explain recognition of revenue, billing, draws, proceeds, cost allocations and seniority upon liquidation. They should also establish specifics of the construction parties and vendors involved, unrelated projects, monitoring and reporting requirements, financial disclosures and timing of such disclosures and right to audit. Contracts should include interim/preliminary calculation 'checkpoints' for deferred payment as well as clearly define what constitutes an objection. ◆

Chris Frederick is a Partner in Bennett Thrasher's (BT) Dispute Resolution & Forensics practice and leads the Insurance Claims Services practice. BT is a GDLA Platinum Sponsor. Frederick has extensive experience in the management of engagements related to business interruption and extra expense, property damage, reported values, litigation support and forensic accounting. His industry experience includes healthcare, hospitality, manufacturing and supply chain, and professional services. He is a Certified Public Accountant (CPA) licensed in Georgia and Washington, Chartered Global Management Account (CGMA) and Certified in Financial Forensics (CFF).

Chris Roane is a Director in BT's Dispute Resolution & Forensics practice. He has experience assisting clients with regulatory compliance, corporate integrity agreements, litigation support, corporate investigations, economic damage analyses, accounting malpractice and fraudulent financial reporting. His industry experience includes healthcare and professional services. Within the healthcare industry, He has worked with hospital systems, provider networks, managed care organizations, pharmaceutical companies, DME manufacturers and laboratory testing facilities.

Jeanette Meadows is in BT's Disputes, Valuation & Forensics practice. She specializes in measuring economic damages for insurance claims and litigation, including damage measurement resulting from business interruption, contract disputes, fraud and property loss. Her industry experience includes hospitality, healthcare, multi-family housing and retail.

Endnotes

1 *https://www.11alive.com/article/ news/politics/white-house-infrastructure-bill-georgia-impact/85-556acf9b-c78b-456a-9748-4550c557dd50*

2 *https://data.bls.gov/timeseries/SMS13000002000000001?amp%253bdata_tool=XGtable&output_view=data&include_graphs=true*

3 *https://fred.stlouisfed.org/series/ WPUSI012011*

4 *https://www.arcadis.com/en-us/ knowledgehub/perspectives/global/global-construction-disputes-report?utm_source=news_release&utm_medium=web&utm_campaign=USconstructiondisputes2021*

Future Motion

Continued from page 36

trian walking at different speeds in an animated environment can help investigators analyze different scenarios and determine what events led up to the pedestrian/car interaction. This information can be compared to deposition testimony, security camera footage, and other useful sources of information.

Conclusions

When combined with data from other reliable sources, human performance data allows visualization experts to reconstruct human movements during an event. It can provide insight into both the kinematics and dynamics (acceleration and forces) associated with an event and lead to a better understanding of any related injuries. This information can then be used to create powerful visuals that can serve as an effective tool for legal teams to convey what happened, leading to a shared understanding of the facts, and improved outcomes. ◆

Chuck Fox, Ph.D., is the Senior Director of ESi's Technical Services and leads its Visualization Team in producing groundbreaking visualizations and animations that can be used to demonstrate highly technical and difficult-to-understand concepts. During his 20 years in the litigation graphics industry, Dr. Fox has established a reputation as a "go-to" for demonstrative aids and exhibits used in high stakes litigation, where scientific accuracy is paramount and the ability to help jurors clearly understand what happened and why it can make or break a case. ESi is a GDLA Platinum Sponsor.

Julius Roberts, M.S., P.E., is a Senior Consultant at ESi specializing in automotive accident investigation and reconstruction of recreational, passenger, and commercial vehicles, including heavy truck and semi-trailer air brake systems, along with vehicle dynamics instrumentation, testing, and analysis. Mr. Roberts has also captured and analyzed biomechanical data pertaining to human subjects on trains, bicycles, walking, running, jumping, and sustaining impacts to the head with various types of objects. His analytical skills assist clients in evaluating competing theories of incident causation.

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Looking Glass

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that the plaintiff will hear both sides. Doing this will, likely, make you more credible with the plaintiff, which could go a long way in having them listen to your arguments and positions outside of your view.

It is also important to remember when the defense makes its opening statement, that may be the first time the plaintiff has heard from the other side about the incident. Up to this point, the most interaction the plaintiff has had with the defense is by way of a deposition or responses to discovery. The plaintiff has been sitting around waiting for something to happen, potentially causing the plaintiff to grow more and more frustrated with the entire process. Acknowledging the strengths of the plaintiff's case can make the defense seem more empathetic and reasonable, gaining you valuable good will as negotiations begin. It will also give the plaintiff more perspective on what happened and why, straight from the people they have been litigating and fighting against. In most cases, allegations involve some sort of negligence rather than intentional harm by the defendant. Reframing the events into this paradigm gives the defense more potential for gaining trust and understanding from the plaintiff as far as why things happened. This can potentially assuage some of the caustic feelings that inevitably arise during the course of the litigation.

When looking at the plaintiff's room from this perspective—that is, when the plaintiff is an active participant in the mediation—it is also important for the defense to pay particular attention to how the plaintiff presents. Does the plaintiff appear aloof? Unhappy? Frustrated? Are they giving any non-verbal clues into their thinking or rationale during the opening? If any of these signs are present, it is a perfect time to use some of the tactics listed above to defuse the feelings the plaintiff is exhibiting. If the plaintiff feels like they are an actual part of the mediation, any feelings of frustration or anger can be neutralized, potentially paving the way for a resolution in the case.

The Plaintiff's Lawyer

As much as possible, it is important to know what the plaintiff's lawyer is thinking when the mediation starts. What is their motivation to settle the case? Obviously, there is the chance of the lawyer getting the file off his or her desk, avoiding trial, and making some money; but what other motivations are present?

In preparing for mediation on the defense side it is important to try and deduce what these non-financial motivations are, usually by way of just researching who the plaintiff's lawyer is. Is this a lawyer that routinely tries cases? Is it a lawyer that typically settles cases for less than full value? Have they taken appropriate depositions or postured the case for trial? Is the lawyer prepared? While these seem like simple questions, they can help the mediator in exerting pressure on the other side once negotiations begin.

There are also plaintiff's lawyers that everyone knows are terribly difficult to deal with. Lawyers that are caustic, aggressive, and simply not pleasant litigators. It is vital in these mediations to not fall into the trap of mirroring that behavior. Having this knowledge ahead of the mediation can prepare you for thinking of the best way to tactically approach the plaintiff's lawyer while still trying to move the case towards resolution.

Selecting the Mediator

Mediator selection is another topic that warrants a look into the plaintiff's room. For most of my career as a plaintiff's lawyer my strategy was simply to defer to the defense on selecting a mediator. After all, the defense holds all the money and arguably the real power in the ability to settle the case. It always just felt prudent to give the defense (and more likely the claims adjuster) first choice as to who they wanted. But in the altered post-pandemic landscape of mediation, it is perhaps more important now for the parties to collaborate in selecting a mediator. If both sides work together to choose the mediator, the chances of resolution at mediation increase exponentially.

When selecting a mediator, consider these questions: Who will the plaintiff listen to? Who might the plaintiff's lawyer listen to? Does the case require a strong, authoritative voice at the head of the table? If it does, perhaps selecting a mediator who has done defense work for decades and tried hundreds of cases makes sense. Other cases might require someone who will instantly connect with the plaintiff—cases where everyone agrees on value, but the plaintiff needs to be "shown the light." Those cases might benefit from a mediator who has not only represented plaintiffs, but who has also tried cases and understands the nuances and contours of trial work. There is undoubtedly a time in most mediations to discuss what a trial might look like through the plaintiff's eyes, and to use that discussion as a tactic in case resolution. But if the plaintiff is disinterested in the mediator from the beginning, the mediator's effectiveness will likely be significantly diminished.

Hopefully this gives some insight into not only into what is happening in the plaintiff's room, but also the perspectives of a mediator who routinely represents plaintiffs. There is much to be learned from peering behind the curtain with the aim of making the best use of time for both parties at mediation. ◆

Thomas J. Lyman is a mediator with BAY Mediation & Arbitration Services, a GDLA Platinum Sponsor. He has primarily represented plaintiffs in civil litigation matters for the past 10 years. He has tried dozens of cases to verdict all over Georgia and has been a registered neutral with the Georgia Office of Dispute Resolution since 2010. He relies on his extensive litigation experience when working with parties towards resolution in all types of mediations, primarily those involving personal injury and wrongful death.

Endnotes

[1] Obviously, there are cases where the opposite is true: cases where the trauma is minimal or non-existent, the medical care is entirely lawyer-driven or excessive, and the changes in the day-to-day are exaggerated. At mediation, these cases are much more difficult to resolve, but mediation can nonetheless be very beneficial in getting the defense arguments front-and-center in the minds of both the plaintiff and the plaintiff's lawyer.

[2] There are certainly cases that do not require openings, especially extensive ones, with the advent of remote mediations. But in most cases even a short introduction from the defense outlining some of the topics mentioned above can go a very long way in developing rapport with the plaintiff.

Biomechanical Investigations

Continued from page 40

ally categorized into three main areas (crash avoidance, crashworthiness, and post-crash survivability) and share the overall goal of mitigating injury during a motor vehicle collision. These test programs typically involve the use of anthropomorphic test devices (ATDs), more commonly known as crash test dummies. ATDs are valuable tools to investigators as they objectively measure forces and accelerations applied to different areas of the body. These devices are often used in the biomechanics community as they provide repeatable and accurate measurements of force and acceleration, offer humanlike impact responses, and can be subjected to impact forces above those known to cause injury. Results measured from these ATDs can then be evaluated in the context of known injury mechanisms, human tolerance, and Injury Assessment Reference Values (IARVs) to investigate occupant injury causation.[11]

Peer-reviewed and generally-accepted scientific publications can also be used in the context of a biomechanical investigation.[12,13,14] These scientific studies can include the use of human volunteers,[15,16,17,18,19] ATDs,[20,21,22] and cadavers.[23,24] This collective research forms a foundational basis for determining the movement and force an occupant will experience during a motor vehicle collision. For example, these biomechanical investigations, in conjunction with the laws of physics, demonstrate that during a rear-end collision, an occupant will move rearward relative to the vehicle's interior. Unique characteristics are also frequently addressed within the published literature. Anderson et al.[25] investigated, using human volunteer subjects, the effects of an occupant's degree of awareness and pre-impact braking on their overall response. Results from this investigation demonstrated that an "aware" condition decreased the movement of the occupant's head during a rear-end collision at a Delta-V of approximately 2 to 6.5 mph. No effect was observed on occupant head movement during fully braked verses unbraked rear-end collisions. Additional scientific research has considered the effects of age, gender, and head positioning during motor vehicle collisions. For example, Kumar et al.[26] investigated, using human cadaver samples, the effect of an occupant's head position on their overall response. Results from this investigation demonstrated that with the head rotated, both head velocity and acceleration decreased as compared to the neutral position.

The amount of force experienced by occupants given these unique characteristics is often relevant to establishing the presence or absence of an injury mechanism. Thus, scientific test programs involving ATDs are regularly conducted to investigate the forces experienced during motor vehicle collisions at various levels of collision severity. For example, Welch et al.[27] investigated the occupant movement, as well as the forces and accelerations experienced by an occupant, during rear-end motor vehicle collisions at four different collision severity levels (Delta-V of 5, 8, 12, and 15 mph). The pre-impact seated posture involved the ATD seated upright on a passenger vehicle seat facing forward, and utilized a three-point safety restraint, the standard seat belt system available in all modern passenger vehicles. Results from this biomechanical investigation demonstrated the forces and accelerations experienced by the ATD's cervical spine, lumbar spine, and head were all maintained within human tolerance levels and IARVs for each region of the body.

Biomechanists regularly investigate motor vehicle collisions involving unique characteristics. For example, an occupant's pre-impact seated posture is often unique to the particular event or poorly described within the investigative material. As such, our team has regularly performed sled test programs involving ATDs to evaluate the effect of pre-impact seated posture on the forces an individual experienced during a motor vehicle collision. These biomechanical investigations utilized a parametric approach to determine, in a worst-case scenario, what effect pre-impact seated posture might have on the forces experienced by an occupant during a rear-end motor vehicle collision.

One test series involved rear-end collisions at Delta-Vs of 5 and 7.5 mph and peak acceleration levels 3 to 5 Gs.[28] A belted 50th percentile ATD with instrumentation necessary to measure the head accelerations and spinal forces was seated positioned on a passenger vehicle seat rigidly affixed to a test sled in three different postures: upright, leaning forward six inches, and leaning forward 20 inches. The measured response forces were maintained within known human tolerance values and body part-specific IARVs. Another test series considered the response forces in an upright seated posture versus leaning forward, leaning inboard, and turned (Figure 1). The 50th percentile male ATD was again restrained and seated in a vehicle passenger seat that was rigidly affixed to a sled. The ATD was equipped with instrumentation necessary to measure the head accelerations and spinal forces. The Delta-V's of these sled tests were 8 to 9 mph with acceleration levels of 6.5 to 7.5 Gs. The results again demonstrated that the response forces were maintained within known human tolerance values and body part-specific IARVs.

Results from these test programs showed that, in the worst-case scenario of forward leaning pre-impact seated postures, the maximum lumbar compressive force measured was 210 pounds. These measurements are relatively low compared to an IARV for the lumbar spine that dictates maximum compressive loads shall not exceed 1,500 pounds.[29] These types of tests provide objective scientific information defining the accelerations and forces an occupant would experience during a rear-end motor vehicle collision while in different postures and orientations. The results are readily applicable to an investigation that seeks to determine if a known injury mechanism was present or absent during a specific event.

Parametric analysis can be applied to any biomechanical investigation and is not limited to the assessment of motor vehicle collisions. Consider another real-world scenario involving an individual struck in the head by a wet ceiling tile while working in an office. In this scenario, the investigator may know the height from which the tile fell from and the seated height of the worker, but might not know the exact amount of water absorbed by the ceiling tile that fell. To account for this unique characteristic, a scientific test program was conducted to evaluate how the amount of absorbed water might affect the resulting forces and accelerations applied to the body. The tested conditions included dry, 50% saturated, and 100% saturated ceiling tiles dropped from approximately 5 feet onto the head of a 50th percentile ATD equipped with instrumentation to measure the head accelerations and spinal forces (Figure 2). Results from this biomechanical investigation demonstrated the forces and accelerations experienced by the ATD's cervical spine, lumbar spine, and head were all within human tolerance and IARVs for each region of the body.

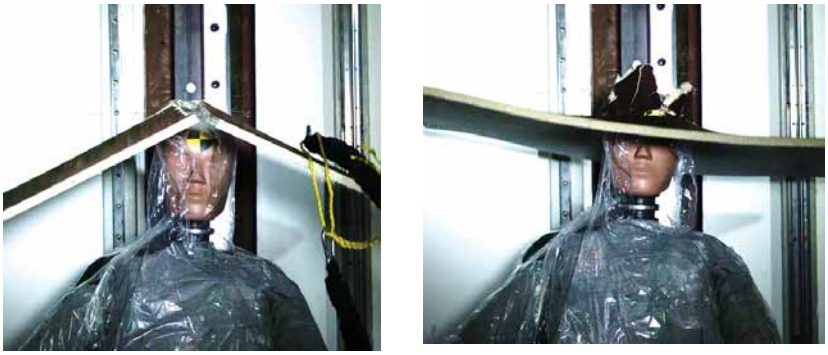

Figure 2. Test program involving dry (left) and 100% saturated (right) ceiling tiles dropped onto an ATD head.

Biomechanical investigations are often confronted with unique characteristics. Through either scientific research and/or robust test programs, such unique characteristics can be evaluated to determine whether they have any effect on the response forces and accelerations experienced by the individual. This approach is known within the scientific community as a parametric, or sensitivity analysis. This peer-reviewed and generally-accepted scientific methodology is a valuable tool to biomechanical investigations as it enables the objective scientific quantification of response forces and accelerations relevant to the individual event. ◆

Dr. Joseph Geissler is a Senior Biomechanist with GDLA Platinum Sponsor ARCCA, Inc. His areas of expertise include injury causation biomechanics, human injury tolerance, human factors, and accident reconstruction. His academic background in biomedical engineering, as well as his professional experience in crashworthiness, serve as the cornerstone for his expertise in accident reconstruction and injury mechanism analysis. Dr. Geissler utilizes these skills to quantify the severity and impact mechanics of vehicular collisions, slips, trips, falls, and other loading scenarios and to evaluate the human kinematic responses to these events while also investigating potential injury mechanisms and associated injury tolerances.

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