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GEORGIA DEFENSE LAWYER

A Magazine for the Civil Defense Trial Bar

Volume X, Issue II
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President's Message

For my first message as 55th President of GDLA, I am filled with thanks to all those that came before me and especially those who were instrumental in getting me where I am today. I am honored to join the ranks of the Presidents who preceeded me, with a huge debt of gratitude specifically to Lynn Roberson, Past President of GDLA and the Atlanta Bar Association (simultaneously, I might add) and my former law partner. It was Lynn who really lit the fire of interest in my for GDLA, and DRI at the national level, and made the introductions and sowed the seeds of the success I have been fortunate enough to reap over the years. I would not be the lawyer or the leader I am today without her and my debt to her can never be repaid.

I am thankful for the wonderful friends and colleagues that GDLA has given me over the years. The Annual Meeting, which we just held at the Breakers in June, has become more of a family reunion than a conference. We look forward to going every year, seeing old friends, making new ones and, unfortunately over the past few years, saying our final goodbyes to the ones we have lost along the way. If you have never attended a GDLA Annual Meeting, this is my personal invitation to you. Come join us, join the family, and get some good and relevant CLE credit along the way. We'll be at Ponte Vedra Inn & Club next year from June 13-16.

When I was a younger lawyer looking to get involved, and Lynn Roberson steered me to GDLA, I began volunteering on what was then the Education Committee. From there, anytime I was asked to help, I said yes. If you, or some of the younger lawyers in your firm, are looking to get involved, please reach out to me or Jennifer Ward. We can plug them in and get them helping on a committee. Who knows, it may start the wheels turning for one of our future Presidents. If there is a willingness to serve, we can find a place for you.

I am looking forward to a wonderful year ahead. We already know our year will be full with work on our Legislative Action Committee, helping shape our legislative agenda for the next session, and work on our Amicus Committee, which is already busy churning out amicus briefs to weigh in on important decisions that affect our own practices, our clients, and the state as a whole. I am so thankful to all of our volunteers on those committees. It's going to be an "all hands on deck" kind of year, so if you have any interest in serving on either committee, give me a call.

For the Defense,

Pamela N. Lee
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Member News & Case Wins

MEMBER NEWS

Brittanie Browning of **Akerman** in Atlanta was sworn-in as President of the Young Lawyers Division (YLD) of the State Bar of Georgia. **Jena Emory of Copeland Stair Valz & Lovell** is also a YLD officers, serving as Co-Editor of the *YLD Newsletter*. In addition, **Carlos Fernández** of **Freeman Mathis & Gary** in Atlanta and **David Bobo Mullens** of **Oliver Maner** in Savannah are serving on the YLD Board of Directors for 2023-2024.

Warner Fox, a senior partner with **Hawkins Parnell & Young** in its Atlanta office was invited to membership to the **Association of Defense Trial Attorneys (ADTA)** membership. ADTA maintains a ratio of one defense trial attorney per one million, in population, in jurisdictions across the United States. During his nearly 40-years career, he has taken more than 100 trials to jury verdict on behalf of many prominent companies. He has become known for handling complex medical and technical issues, particularly traumatic brain injuries and other catastrophic injuries. Fox is a GDLA Past President.

Hall Booth Smith announced the promotion of **Stephen D. Delk** to partner; he resides in the firm's Tifton office. Delk's practice areas include general liability, premises liability, governmental liability, transportation, medical malpractice/professional negligence, and retail, and hospitality liability. The firm also announced the addition of **Mark L. Pickett** as of counsel in its Atlanta office. His practice focuses on construction, general liability, premises liability, products liability, and transportation matters. He is an experienced litigator, having handled hundreds of claims for clients in every corner of the state, from pre-litigation investigations through the appellate courts, including having tried over 50 civil jury trials to verdict. Prior to joining HBS, Pickett worked for a metro-Atlanta firm that handled self-insured and insurance defense claims all over Georgia, representing a variety of companies, including a multi-national retailer, commercial carriers, property managers, hospitals, and insurance companies. Prior to relocating to Atlanta, he was a partner in a South Georgia firm representing motor carriers, construction contractors, insurers, financial institutions, hospitals, and municipalities.

GDLA Executive Director **Jennifer Davis Ward** has been reappointed to a three-year term on the State Disciplinary Board by State Bar President Tony DelCampo. She is one of four nonlawyer members serving on the board, which investigates grievances against lawyers and serves like a grand jury determining whether there is probable cause to believe that a lawyer's conduct violated Bar Rules.

CASE WINS

Rutherford & Christie, with offices in Atlanta and New York, has notched several victories recently. Partners **Carrie L. Christie** and **Courtney M. Norton**, along with associate **Tereza Kucerova**, secured summary judgment in a premises liability case in Rockdale County where Plaintiff alleged she slipped and fell on a puddle of water by the exit door as she was leaving a McDonald's branded restaurant. The court agreed that her evidence did not show Defendant had actual or constructive knowledge of the hazard, and that Plaintiff lacked knowledge of the hazard despite the exercise of ordinary care. The case is *Jessi Hebert v. BPV Partners, LLC*, Civil Action No. 21SV1774, State Court of Rockdale County.

Christie and **Norton** next teamed up with associate **Breandan D. Cotter** to have *Daubert* motions on causation granted on all seven of Plaintiff's experts put forward by Beasley Allen in a Gwinnett County case where a restaurant guest alleged she was attacked and beaten by a restaurant employee. The following experts were successfully *Dauberted* on causation opinions: Dr. Erik Shaw, a pain management physician; Dr. Russell Gore, a neurologist and the medical director of vestibular neurology at the Shepherd Center; Dr. Stacey Olliff, a general family MD; Dr. Gerald Newman, a podiatrist; Dr. Bryce Gillespie, a thumb/wrist orthopedist; Dr. Ryan Kauffman, an ENT; and Dr. Mason Florence, a foot and ankle surgeon. The case will now proceed to trial without the plaintiff being able to offer any medical causation testimony.

In another case, **Christie** and **Norton** teamed up with associate **Savannah L. Bowling** to obtain summary judgment in a premises liability case in Fulton County State Court where Plaintiff alleged he slipped and fell on water that had leaked from a restroom sink while he was washing his hands. Surveillance video and deposition testimony established the restroom had been inspected by an employe approximately one hour and 15 minutes before Plaintiff entered it and, at that time, the employee observed the floor was dry and there were no issues regarding the sink. There was also no evidence an employee was present in the immediate area and could have easily seen a hazard and removed it. The court

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Amber Bishop is an ACTAR accredited Traffic Accident Reconstructionist (ACTAR #3780) and a licensed attorney. Amber has a degree in physics, a masters from Emory, and extensive accident reconstruction training. Prior to joining WREC, Amber was a litigator at a highly respected law firm in Atlanta. She worked at the Centers for Disease Control and Prevention as a research scientist and epidemiologist before attending law school. Amber has worked hundreds of crashes in her years at WREC. Amber's scientific knowledge, legal experience, and attention to detail touch every case WREC handles.

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agreed Plaintiff failed to carry his burden in establishing the defendant had actual or constructive knowledge of the alleged wet substance. The case is *Andre L. Mingo v. GPS Hospitality, LLC*, Civil Action No. 21EV000893, State Court of Fulton County.

In the last case, **Christie** and **Norton** successfully obtained dismissal of a premises liability case in Cobb County State Court, arguing that the statute of limitations had run on Plaintiff's claim and was not saved by the Georgia Supreme Court's March 14, 2020 Judicial Emergency Order, which extended the statute of limitations by 122 days. Counsel presented evidence, based on pre-suit correspondence, that Plaintiff's alleged fall occurred months before the date in the Complaint, which led to dismissal. The case is *Vincent Kerr v. GPS Hospitality Holding Co., LLC d/b/a Burger King, Cobb Village LLC, and Burger King Corporation*, Civil Action No. 22-A-2192-2, State Court of Cobb County

Groth Makarenko Kaiser & Eidex in Atlanta has recorded a series of wins in recent months. Partner **Jay Eidex** scored a big victory for his client in a four-day jury trial in the State Court of Fulton County involving a plaintiff, a former NBA player, who alleged injuries from a car accident prevented him from making a comeback to the NBA. The plaintiff was represented by a firm that proclaims themselves as the largest personal injury firm in the country. The accident involved the plaintiff and defendant both travelling westbound on Holcomb Bridge Road in Roswell in September of 2019. The plaintiff was driving a Camaro and was belted with a four-point racing harness. The defendant was driving a Smart car and struck the plaintiff's vehicle as she merged lanes. She was cited for improper lane change. Negligence in this case was admitted. The plaintiff did not seek any medical treatment on the date of loss.

The plaintiff initially sought treatment for low back pain approximately two weeks after the accident. He ultimately underwent surgery to his lumbar spine (L5-S1) in April 2020. His medical bills, including the surgery, were approximately $168,000. He had been drafted by the New York Knicks in 2009, and had played for multiple teams in the NBA through the 2016-2017 season during which he played with the Minnesota Timberwolves. He was released after that season. He further claimed past and future lost wages alleging that while he had not played in the NBA for two years, he was in the midst of making a "comeback" and attempting to play basketball professionally again. He alleged these injuries and surgery prevented that from happening and also alleged his total lost wages to be in excess of $20 million.

On cross-examination he admitted to playing in a charity basketball exhibition in Montana roughly two weeks after the accident. Photographs of him dunking a basketball during that exhibition were admitted into evidence.

At trial, the plaintiff presented testimony from Dr. Harvinder Bhatti who presented himself as the plaintiff's treating neurosurgeon. Dr. Bhatti recommended the plaintiff obtain decompression surgery (lumbar microdiscectomy) for his back injuries on February 28, 2020. Dr. Bhatti acknowledged the plaintiff's prior medical history and disc-related back injuries before the motor vehicle accident. He further acknowledged that the plaintiff ended his basketball career due to prior injuries but he believed the current issues all stemmed from the motor vehicle collision.

Plaintiff also presented Dr. Sean Mahan, M.D, a radiologist. Dr. Mahan acknowledged the plaintiff suffered from "herniated discs" prior to the auto accident. However, Dr. Mahan stated the plaintiff's lumbar and spine injuries became more prevalent and severe because of the accident. Dr. Mahan explained there was a "new bright signal at L5-S1" in the post-accident MRI on February 7, 2020. Plaintiff then presented Dr. Raymond Walkup, the surgeon who operated on the plaintiff. Dr. Walkup described the surgery he performed on Plaintiff.

Next to address lost income, Plaintiff called Sara Ford, a Vocational Economic Analyst for Vocational Economic, Inc. She testified her conclusion was the plaintiff would suffer losses in the amount of $21,853,196.00 due to the collision. Plaintiff also called his agent, Kevin Bradbury, who testified his negotiations were "mostly focused" towards China. Mr. Bradbury stated the yearly contract range for negotiations was probably between $1.2 to $1.5 million dollars. However, he admitted he had not secured Plaintiff a contract to play professional basketball in 2018, the year before the accident. He acknowledged the plaintiff had continuing and on-going back pain during the negotiation process following the plaintiff's final NBA season.

In the defense case, Eidex presented Dr. Barry Jeffries, a neuroradiologist. Dr. Jeffries testified there was a significant "degenerative process" in the plaintiff's back. Dr. Jeffries further provided his expert opinion on the plaintiff's MRIs before and after the accident. Additionally, Dr. Jeffries stated the MRIs showed evidence of retrolisthesis which supports the conclusion that the plaintiff's back injuries are chronic. The MRIs show the plaintiff suffered from a

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herniated disc at L5-S1 before the accident and its severity did not significantly change when comparing the pre and post-accident MRIs. In fact, Dr. Jeffries found the MRI images actually reflected an improvement in the condition of the plaintiff's back. He further rebutted Dr. Mahan's findings of "increased signal" were false and misleading due to Dr. Mahan's simply manipulating the contrast on the images.

The defense also called a medical billing expert to testify about the reasonable value of cost of medical services provided. After analyzing and reviewing the plaintiff's medical billing, the expert determined the reasonable market value for medical services provided was $68,205.76, much less than claimed by the plaintiff.

Finally, the defense presented Dr. Torrence Welch, a biomechanical engineer and David Buzdygon an accident reconstructionist—both with GDLA Platinum Sponsor ESi. They performed a reconstruction and analysis and determined the change in velocity and forces involved in this accident were minimal. Dr. Welch testified the plaintiff would likely have moved slightly forward and to the right immediately following impact; however, that movement would have been minimal and would have the effect of effects of vibrations and shaking motions. The plaintiff presented Dr. Michael Freeman in rebuttal of this biomechanical testimony.

In closing, Plaintiff's counsel asked the jury to return a verdict in the amount of $22,017,949.94 plus an amount for pain and suffering at the jury's discretion. Eidex asked the jury to award a defense verdict. The jury deliberated for approximately three hours before returning a verdict in favor of the plaintiff in the amount of $100,000.

The verdict was well below the defendant's pre-trial offer of $225,000. Further the defense had filed an offer of settlement under O.C.G.A. 9-11-68 in that amount as well. Eidex announced his intention to file a motion for all of the fees and costs of the defense under the Offer of Settlement.

The case is *Jordan Hill v. Connie Frew,* State Court of Fulton County CAFN 20EV002660.

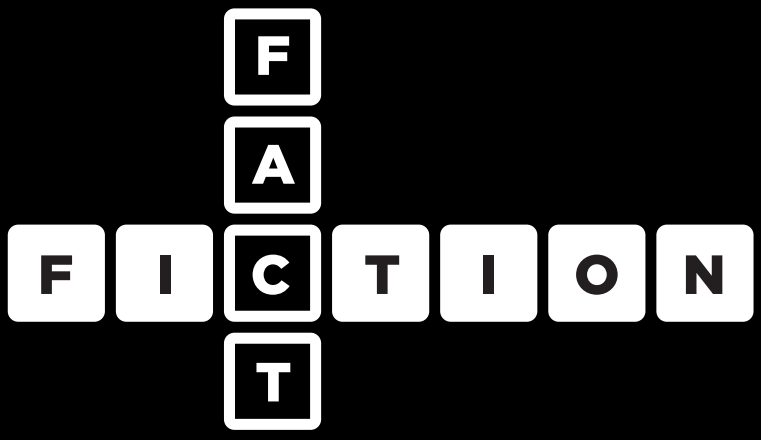
On May 30, 20203, **Groth Makarenko** associate **Deborah Nogueira-Yates** won summary judgment on behalf of her client, a restaurant operator in Houston County. This case arose out of a incident that occurred in a restaurant. The plaintiff alleged he was injured when two employees of the restaurant were involved in a fight or altercation with each other and collided with the plaintiff causing injuries to his back and knee. Plaintiff alleged the defendant-restaurant was negligent in keeping its premises safe, vicariously liable for the actions of its employees and separately for negligent hiring and retention of the employees involved in the altercation. He did not sue the employees involved in the altercation.

In her Motion for Summary Judgment, Yates argued the restaurant was entitled to summary judgment as to all claims. First, as to ordinary premises negligence, there was no static or unsafe condition that existed leading to the plaintiff's injuries. Second, as to vicarious liability, Yates argued that once the physical altercation was initiated, both employees abandoned the performance of their respective jobs and engaged in the altercation, which was not within the course and scope of their employment. As to the final claim of negligent hiring and retention, neither employee had any prior disciplinary history, nor did management have any reason to believe such actions were a possible or likely occurrence.

The court entered an Order granting summary judgment finding that the plaintiff's claims as pled mixed theories of premises liability and ordinary negligence. The court found there was no evidence that the premises itself was unsafe. The court further found that the intervening intentional criminal conduct of the employees was outside the scope of their job duties and was the proximate cause of any injuries. Because it was outside the scope of the employee's job duties, the employer was not vicariously liable for the actions of the employees. Finally, as to the issue of negligent hiring and retention, the court found the record clearly demonstrated that neither employee had any criminal record, history of disciplinary action or history of violence finding "zero evidence" of negligent hiring or retention.

On June 27, 2023, senior associate **Kevin James** obtained a defense verdict in the State Court of Gwinnett County before Judge Erica Dove. The suit arose from a motor vehicle collision that occurred on March 6, 2020. The defendant was exiting a private drive onto Atlanta Highway and approached the plaintiff's vehicle which was stopped at a red light. The defendant admitted to being distracted counting money from his pizza delivery job and rolled into the rear end of Plaintiff's vehicle causing minor property damage. The plaintiff did not report any injuries at the scene.

Plaintiff reported to a chiropractor five days after the accident for a regular adjustment, she reported no new complaints or injuries on that visit. two days later she reported to an orthopedist with complaints of lumbar pain radiating into her legs. She was diagnosed with herniated discs in her lumbar spine at multiple levels and underwent epidural steroid injections and ultimately a microdiscec-



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tomy surgery. Post-surgery she had follow-up visits and attended some physical therapy. The medical damages were approximately $42,000.

At trial, Plaintiff presented medical testimony by way of video deposition from Dr. Julian Price. Dr. Price provided an opinion that the plaintiff's injuries were caused by the motor vehicle collision. However, on cross-examination he admitted he was unaware of any of the plaintiff's prior treatment and had not reviewed any records or films from prior to the motor vehicle collision.

Defendant provided expert testimony from Dr. Barry Jeffries, a neuroradiologist who opined that the conditions identified on the MRI scans were all chronic and degenerative in nature and that there was no evidence of an acute injury which could be related to the motor vehicle accident. Specifically, Dr. Jeffries focused his testimony on the findings from a pre-accident 2016 lumbar MRI which was identical to the post-accident MRI and revealed the exact same findings.

In closing, the plaintiff asked the jury to award a verdict in the range of $342,000-$642,000 for past special damages and past and future general damages, including pain and suffering. James asked the jury to award a defense verdict. The jury deliberated for approximately 20 minutes before returning a defense verdict.

The case is *Kristina M. Eiklor vs. Jeffrey H. Long*, State Court of Gwinnett County CAFN 20-C-08384-S5.

Nicole Leet and **Michael Rust**, partners at **Gray Rust St. Amand Moffett Brieske** in Atlanta, obtained a defense verdict in Gwinnett County in a premises liability case where Plaintiff claimed three back surgeries and medical specials in excess of $800,000. Plaintiff brought the action under O.C.G.A. § 51-3-1 for a slip and fall in a bathroom, which was admittedly wet after cleaning. After the accident, Plaintiff had cervical, thoracic, and lumbar surgeries. The thoracic surgery was a mere two weeks after the accident. Plaintiff's counsel never made a demand under seven figures, and repeatedly renewed claims of spoliation as video of the plaintiff walking into the premises was not retained. Undisputedly, there was no video of the accident in the restroom itself. No spoliation sanctions were imposed. The jury trial lasted five days in front of Judge Jaletta Smith, with the jury hearing from both the surgeon who performed all three surgeries on the plaintiff, as well as the defense expert neurosurgeon. The jury deliberated for less than thirty minutes before returning the defense verdict.

McMickle Kurey & Branch in Alpharetta has enjoyed a couple recent victories. In the first case, GDLA Northern District Director **Zach Matthews** and **Matt Sessions** secured a defense verdict in a contested-liability truck wreck case on July 12, 2023, after a three-day jury trial in Bleckley County before Judge Howard Kaufold. Six plaintiffs sued for personal injuries as well as the wrongful death of their deceased father. Plaintiffs' decedent suffered catastrophic trauma in the head-on collision, and endured quadriplegia for the six months before his death. The principal liability dispute was over which vehicle had crossed the center line. Plaintiffs alleged over $900,000 in medical expenses, plus the full value of their father's life. Matthews handled the liability portion of the trial while Sessions handled the full value of life elements, including cross-examining the plaintiffs.

The most unusual thing about the case was the accident occurred on January 24, 2012—more than 11 years before the matter reached trial. Plaintiffs' decedent passed away six months after the accident, but the defendant truck driver (Andy Forrest) also died before trial, during the Covid-19 pandemic in 2021. Forrest was deposed in 2016, but his deposition was not video-taped, meaning it had to be read into the record by the plaintiffs' lawyers at trial.

Meanwhile, the decedent's only statements about the wreck were comments he had allegedly made to his family members prior to his death.

Thus, the trial involved an unusual level of legal fencing over obscure elements of the hearsay rule—such as whether Plaintiff's decedent's claim, "that man hit me," which was made months after the accident, could constitute *res gestae* or a continuing comment, given the medically-induced coma he had been placed in the interim. The court excluded that statement. Another hearsay battle involved a 911 audio call wherein an unidentified caller made a vague statement about Andy Forrest ("He was a talkin' to us on the Link and he got to hollerin' that he'd been in an accident"), which Plaintiffs argued indicated improper use of a phone while driving a commercial vehicle. Because that caller was never identified or deposed, the court also excluded that statement on (double) hearsay grounds.

There were also unusual accident facts, including an unofficial 45 mph speed limit sign that had been erected by a local church, which did not indicate any legally-binding state law. (The court allowed photos and argument about the speed limit sign to reach the jury on a general negligence theory but charged them that such a sign could not be used to determine negligence per se). Matthews subpoenaed and called Laurens County Commissioner Bryan Rogers to clarify that issue.

The accident was a head-on collision on a dangerous curve, which happened early on a dark and rainy winter morning. State Trooper Darrell Thigpen reconstructed the scene and was the only reconstructionist heard by the jury—both sides having had their experts excluded for *Daubert* reasons years before trial. Plaintiffs made the unusual choice to display the scene investigation via an hour-long squad car video, but did not call the trooper to testify. Matthews called Trooper Thigpen in Defendant's case-in-chief, and walked him through his accident diagram, as well as multiple enlarged scene photos, including several depicting Plaintiff's decedent's bald tires—which explained why Plaintiff's decedent slid off the road and lost control before crossing the center line and ultimately hitting Andy Forrest head on.

The jury deliberated for only 20 minutes before returning a defense verdict. During the 11 years the case was pending, it was first called to trial in 2015, dismissed without prejudice, then refiled. Defendant's Motion for Summary Judgment was denied as to Defendant Forrest but granted as to the risk retention group insurer (which had become immune to Georgia's direct action statute under the Georgia Supreme court's holding in *Reis v. OOIDA*, also handled by the firm, while the case was pending). The court simultaneously granted *Daubert* motions to exclude *both* sides' experts, and the parties mediated unsuccessfully. The Court conducted multiple hearings on evidentiary issues prior to trial. Defendants' insurer (also OOIDA Risk Retention Group) had been unwilling to overpay the claim and would not offer six figures due to the favorable liability factors. Meanwhile, the six plaintiffs evidently were unwilling to come below a mid-six figures demand.

The takeaway is likely that juries in defense-friendly counties are still willing to deny a recovery outright, even to a grieving family, where the liability questions overwhelm the sympathy factors. As of publication, Plaintiffs had not indicated whether they plan to appeal.

In another case, **Scott McMickle** and **Sessions** secured an extremely favorable result in an admitted liability truck wreck case, *Lowe et al. v. Difei Transport et. al.*, 1:20-cv-05224-CAP, in the Northern District of Georgia following a four-day trial in February 2023. The plaintiffs were represented by the Witherite Law Group. Mr. Lowe claimed neck, shoulder, and low back injuries from the accident, and his wife brought a loss of consortium claim. Plaintiffs asked the jury for $8,000,000 in closing and were awarded $5,000 in an admitted liability case. Ultimately, Plaintiffs forfeited that verdict, their right to appeal, and agreed to pay a sum to Defendants in exchange for withdrawal of Defendants' Motion for Attorney's Fees under O.C.G.A. § 9-11-68.

With liability admitted, the focus of the defense was on medical causation issues, reasonableness and necessity of medical bills, and evidence of bias, motive, and intent on behalf of the plaintiff's medical providers, Spine Center Atlanta. Plaintiff Steven Lowe underwent extensive treatment culminating in the installation of a spinal stimulator in his low back, resulting in an unpaid medical lien with over $200,000 in bills. Defense counsel initiated a dogged inquiry into Witherite's referral relationship with the prominent Atlanta lien doctor who rendered treatment to the plaintiff after the plaintiff was referred there by Witherite only hours after the accident. After multiple 30(b)(6) depositions of Spine Center and a withdrawn motion for sanctions, evidence was admitted at trial of an eight-figure referral relationship, comprising almost 500 patients, between the lien doctor and the plaintiffs' attorneys. That same document also showed the total amount of bills issued to all lien patients referred by attorneys in a three-year span, which was a nine-figure amount. A corporate representative from the

Spine Center confirmed these figures through testimony live at trial and authenticated the document in open court.

The corporate representative also admitted that 60-80 percent of all Spine Center's patients are attorney referred personal injury claimants. The plaintiff in this case initially claimed over $200,000 in bills from Spine Center but ultimately chose to try the case without presenting those bills to the jury in an unsuccessful attempt to render the referral data inadmissible at trial. Plaintiffs only sought general damages (pain and suffering) at trial. However, Judge Charles Pannell ruled that while the reasonableness of the bills was no longer relevant, the ongoing referral relationship and amounts billed were still relevant to prove bias, intent, and motive of the Spine Center physician who testified that the accident caused Plaintiff's need for treatment. The jury also heard that the plaintiff had health insurance but chose not to use it, opting to incur a litigation loan from the attorney-referred doctor for the full amount of the inflated bills.

Because the medical bills ultimately were not presented to the jury, it was not pertinent to this case, but that same admitted evidence also showed the amount accepted from referral partners to settle liens after the plaintiffs settle their claims. This type of data could be critical to proving the reasonableness of medical bills in future cases.

Also critical to the defense were credibility issues generated by trial testimony of both plaintiffs. The plaintiff failed to disclose prior similar complaints of pain, and subsequent medical records from providers unrelated to the post-accident treatment did not match Plaintiff's claimed injuries and complaints of pain reported to Spine Center.

This is believed to be the first case tried in Georgia where a jury was allowed to hear the full extent of a lien doctor's referral relationship with a plaintiff's attorney and the staggering amount of bills generated from that relationship. Defense counsel believe this was critical to the ultimate result and that this case serves as a bellwether for addressing cases involving similar medical providers moving forward. Additionally, Plaintiffs' decision to abandon all special damages in an effort to exclude or minimize this evidence offers valuable insight into trial strategies employed by Plaintiffs who may find themselves in a similar position.

Laura D. Eschleman and **Shawn H. Choi of Nall & Miller** in Atlanta secured a jury verdict for Dr. William Hsu in Bibb County State Court following a nearly three-week jury trial in Macon, Georgia. The wrongful death action arose from the death of 25-year-old Nykevia Sanford, who died from complications relating to her sickle cell disease. Despite their $40 million award to the Sanford family, the jury found no-fault as to Dr. William Hsu. Instead, the jury apportioned 50 percent of fault to Phoebe Physicians Group, LLC and the remaining 50 percent to the Medical Center of Central Georgia. Dr. William Hsu was the only named defendant found not liable in the case.

Brett Tarver of **Troutman Pepper's** Atlanta office was part of a national trial team that secured a defense verdict for client Johnson & Johnson's subsidiary Ethicon Inc. after a nine-day jury trial in a pelvic mesh case in New Jersey federal court in May. This trial win is the third win in seven months for Tarver and the Troutman Pepper team as part of national trial teams following recent defense wins in a 12-day federal jury trial in Florida this past March and a 10-day federal jury trial in California in September 2022.

Hawkins Parnell & Young has seen a couple wins this year. In June, partner **Debra LeVorse** in the Atlanta office obtained an award for attorney's fees for frivolous litigation on behalf of a long-term care facility that provides skilled nursing services. This victory is a rare decision in Georgia.

In the lawsuit, the plaintiff accused the facility of holding her grandmother against her will. Contrary to these allegations, the facility had been actively assisting in arranging for the resident's transfer to another location and sending the necessary paperwork to numerous other facilities. LeVorse sought to avoid escalation by communicating with opposing counsel numerous times, urging them to dismiss the meritless claims against the firm's client. Despite being apprised of the facility's efforts to arrange the resident's transfer, the plaintiff refused to dismiss the lawsuit.

Given the plaintiff's continued pursuit of baseless claims, LeVorse filed a motion for attorney's fees as the most effective strategy for resolution. Following a hearing with live testimonies from both parties, the presiding judge ruled in favor of the firm's client and adopted LeVorse's draft order almost verbatim. The judge noted that the plaintiff's claims lacked justification as substantially groundless and vexatious. Notably, the award of attorney's fees and expenses was levied against both the plaintiff and her attorney.

In August, partner **Todd Alley**, of the Atlanta and South Carolina offices, successfully defended a fuel hauling tanker truck company against claims it was responsible for a hazardous materials spill in Augusta. In November 2021, hundreds of gallons of an oily, fuel-like substance was found to have spilled

Welcome, New GDLA Members!

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

Allison White Bailey
Downey & Cleveland, Marietta

Peri Bailey
Lokey Mobley and Doyle, Atlanta

Karl P. Broder
Beck Owen & Murray, Griffin

Shawn H. Choi
Nall & Miller, Atlanta

Samantha Allison DiPolito
Drew Eckl & Farnham, St. Simons Island

Ainsley Fagan
Gower Wooten & Darneille, Atlanta

Ernest "EJ' Harrell
Gray Rust St. Amand Moffett & Brieske, Atlanta

Ryan Hathcock
Chartwell Law, Atlanta

Tameika Jackson
Mozlay Finlayson Loggins, Atlanta

Meredith Knight
Quintairos Prieto Wood & Boyer, Atlanta

Grace Simms Martin
Noland Law Firm, Macon

Morgan McGee
Waldon Adelman Castilla Hiestand & Prout, Atlanta

Abigail Williams Miller
Brown & Adams, Columbus

Essie Ndem
Gray Rust St. Amand Moffett & Brieske, Atlanta

Nada Paisant
Gray Rust St. Amand Moffett & Brieske, Atlanta

Alex Pisciarino
Nelson Mullins, Atlanta

Latevia Priddy
Groth Makarenko Kaiser & Eidex, Duluth

Hallie Richards
Swift Currie McGhee & Hiers, Atlanta

Marc H. Salm
Publix Super Markets, Inc., Lakeland, FL

Jessica Sanford
Fain Major & Brennan, Atlanta

Michael Scaljon
Hawkins Parnell & Young, Atlanta

Jeffrey Ronald Scheese
Rutherford & Christie, Atlanta

Taylor Simone Ward
Waldon Adelman Castilla Hiestand & Prout, Atlanta

C. Brent Wardrop
Quintairos Prieto Wood & Boyer, Atlanta

Jacob Wilson
Noland Law Firm, Macon

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onto the ground and contaminated a creek in Augusta, resulting in an environmental clean-up costing the City of Augusta hundreds of thousands of dollars. In the ensuing investigation by the Georgia Environmental Protection Division (EPD), it was determined that a tanker truck belonging to the fuel hauling company had been parked in a large parking lot used by tractor-trailer drivers to park their vehicles overnight. The Georgia EPD concluded that the oily substance which had contaminated the creek had come from the fuel hauling company's truck while it was parked overnight and sought to have the fuel hauling company pay for the clean-up efforts.

The fuel hauling company, from the start, denied that its truck was the source of any spill or contamination as the truck, while parked overnight at the lot, was empty at the time and could not have discharged any substance. By pursuing multiple investigative angles, including conducting GPS mapping of the movements of the truck; detailing records of amounts and types of fuel carried and delivered by the truck; conducting site inspections at the location of the alleged spill and the location where fuel is acquired for deliveries; and by spending a day riding shotgun on a tanker truck to learn the specific methods of and regulations related to the hauling and delivery of fuel, Todd was able to present a conclusive defense to the Georgia EPD and head off any enforcement action.

The environmental clean-up company that remediated the contamination, however, was still owed hundreds of thousands of dollars and petitioned the federal government, through the National Pollution Funds Center (NPFC) administered by the US Coast Guard, for reimbursement as the matter involved contamination of navigable waters of the United States. In turn, the NPFC sought to determine if the fuel hauling company was responsible for the contamination of the water which, if it were, meant the fuel hauling company would be liable for the costs of the clean-up. After Alley presented the case to the NPFC, the NPFC determined that the fuel hauling company was not responsible for the contamination. ◆

GDLA Files Amicus Brief Supporting Petition for Cert to Address the Mirror Image Acceptance Rule

On July 28, 2023, GDLA filed an amicus brief supporting the petition for writ of certiorari to the Supreme Court of Georgia in *Pierce v. Banks* after the Court of Appeals issued its opinion a month earlier. No. A23A394, 2023 WL 4227923 (Ga. App. June 28, 2023). The case involves a reversal by the Court of Appeals of the trial court's grant of a Petitioners' motion to enforce a settlement agreement. Specifically, it addresses the limits of the mirror image acceptance rule for time-limited settlement demands. GDLA had previously filed an amicus brief in the Court of Appeals. Past President N. Staten Bitting and Mary Elizabeth "Libby" Watkins of Levy Sibley Foreman & Speir in Augusta authored both appellate court amicus briefs on behalf of GDLA.

Pierce stems from a motor vehicle accident. Before filing suit, plaintiff's counsel presented a time-limited offer to settle for the liability insurer's policy limits of $25,000. The pre-suit statutory offer to settle stated that payment had to "be received 15 days after" written acceptance and that the payment must not include any expirations. The settlement check was delivered before the 15th day after acceptance. The settlement check stated on its face that it was "void after 180 days." The plaintiff attorney asserted that the purported acceptance was not a mirror image of the offer, and so no settlement agreement was reached.

Judge Charles E. Auslander III of the State Court of Athens-Clarke County found that an unconditional acceptance had occurred. An order was entered enforcing the settlement. The plaintiff appealed. The Court of Appeals reversed the trial court, finding that the offer required delivery of the settlement check on (and not before) the 15th day after written acceptance. It also found that the check had an impermissible expiration date. It concluded the acceptance was not a mirror image of the offer, therefore no enforceable settlement contract was formed.

The defendants filed a petition for certiorari in the Supreme Court of Georgia. They argue that a check delivered before 15th day after acceptance was "received 15 days after" acceptance. It is also asserted that the ambiguity should be resolved against the offeror/plaintiff. Petitioners point out that the pre-suit settlement offer statute permits payment by insurance company check on a commercial account. The statement on the check void after 180 days simply states Georgia statutory law regarding timely presentation of checks for payment. The Supreme Court is asked to find that the settlement offer, as governed by O.C.G.A. § 9-11-67.1, was properly accepted and that a settlement contract was formed.

The requirements of a time limited demand letter "at times can be a trap for the unwary, leading us to caution parties to avoid crossing the line from vigorous advocacy to gamesmanship." *Pierce v. Banks*, No. A23A394, 2023 WL 4227923, at *6 (Ga. App. June 28, 2023) (Dillard, J., concurring). (Exhibit A to the Petition). The efforts to avoid acknowledging a good faith acceptance of a time limited settlement should not be "cageyness for its own sake" but should be restricted to "detail-oriented advocacy." *Id.* These settlement offers, which are really attempts to avoid an unequivocal acceptance of the offer, fail to comply with the requirement of candor and cooperation in the settlement of cases with lower insurance policy limits and large special damages. The case subject to this Petition for Certiorari is a case where the line marking vigorous advocacy was crossed by the Respondent.

The Georgia General Assembly acknowledged the gamesmanship problem in its passage of O.C.G.A. § 9-11-67.1. The version of this statute applicable to this date of accident provides for five material terms required in a pre-suit offer to settle a personal injury tort claim arising from use of a motor vehicle. The statute also provides acceptable methods of payment. An offeror may include terms of acceptance in addition to those in

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Florida Tort Legislation Passage: Its History, Consequences, and Effects

By Frank Ramos
Clarke Silvergate, Miami, Florida

The Florida legislature drafted and Governor Ron DeSantis signed on March 24, 2023, sweeping tort legislation changing the panacea of tort and insurance law for decades. Before addressing the law and its implications, the question is: How did we get here?

It started with a drumbeat to reform windstorm claims, often driven by attorneys' fees. Insurers were fleeing the Florida property market, and many expected the next significant hurricane would drive more out. And then Hurricane Ian hit, devastating Southwest Florida and causing over $50 billion in damage. In December 2022, the Florida Governor and the Republican lawmakers, who held a supermajority in the House and Senate, were worried about an insurance industry collapse so they managed to reform property damage claims and litigation, including one-way attorneys' fees that favored plaintiffs. The insurance and commercial industry were pleasantly surprised and thought—if we can reform property damage litigation in Florida, can we reform personal injury litigation? And they got to work.

How Did It Pass?

The obvious first question, especially for other states wishing for similar reforms, is how did it pass? This is especially curious, since past efforts for sweeping Florida tort reform had fallen short. This time, though, it did pass for three reasons.

First of all, the politics had changed. Although some view Florida as a purple state, it is solidly red as far as the legislature and executive branches are concerned. Despite that, the plaintiff's bar lobbyists historically had an outsized effect on the conservative majority. With the legislature moving further to the right and looking to flex its muscle, it took up one conservative cause after another. And tort reform has always been front and center of the conservative agenda. Adding to that, the upcoming presidential campaign and Governor DeSantis' wanting to show his conservative bona fides, it was not a question of whether tort reform would happen but how widespread it would be.

Next, the industry copied the plaintiff's bar. The insurance and corporate industry took a page from the plaintiff's bar and pushed tort reform through lobbying, print and social media, advertising, etc. The industry had a story to tell, they told it and shared it repeatedly.

Lastly, the Florida civil defense bar staged an offensive. Historically, the state's civil defense bar had primarily remained on the sidelines over tort reform battles. This time, many leading defense firms and the Florida Defense Lawyers Association (FDLA) staged a full frontal assault and outflanked the plaintiff's bar. Their efforts caught the plaintiff's bar by surprise and made some bitter. More on that in a bit.

The combined result of these three reasons—a conservative political climate, an organized and astute industry, and a defense bar that articulated why reform was necessary through testimony before one legislative committee after another—left an indelible mark on Florida tort law. It was masterfully played and orchestrated, and many in the industry remain stunned by what together we managed to achieve.

Unintended Consequences

Before tackling the law's effects, let's address its unintended consequences: 1) a flood of lawsuits; 2) attacks on the defense bar; 3) a tale of two cities; and 4) the next battle. Now to address each of those.

A Flood of Lawsuits. Plaintiff's firms, looking to avoid the effects of the new laws, filed complaints for all their pre-suit claims. Morgan & Morgan alone filed over 25,000 complaints. Some estimates are that plaintiff firms filed over 100,000 suits before the Governor signed the bill. This will strain Florida's county clerks and judiciary and require insurers and defense firms to add to their teams and enhance their training and litigation management to prepare for the onslaught of lawsuits. The Florida Defense Lawyers Association (FDLA) wrote the Florida Supreme Court seeking relief and asking for an administrative order allowing additional time to respond to these Complaints. Plaintiff's bar responded, stating that insurers and defense firms asked for tort reform and should live with the consequences. We will see what administrative orders, if any, are entered to address this deluge of lawsuits.

Attacks on the Defense Bar. Returning to the comment of the plaintiff's bar's bitterness directed to the defense bar, there are reports of plaintiff lawyers attacking defense lawyers for their role in the legislation. Beyond that, there has been chatter of plaintiff firms planning on refusing to agree to extensions to respond to complaints, discovery, etc. Some in the plaintiff's bar have taken the legislation personally and are prepared to vent their frustration and bitterness on defendants and their counsel. Expect less collegiality, cooperation, and professionalism.

A Tale of Two Cities. Civil defense lawyers in Florida will be handling two cases—those for which the new law applies and those that don't. The changes are so drastic that we must treat pre-legislation cases differently than post-legislation cases and develop protocols for our teams to handle each effectively and efficiently.

The Next Battle. Having rewritten both windstorm and personal injury claims, the industry is preparing for the next battle for additional tort reform. Their past victories portend future ones, and lines will be drawn over additional changes to tort legislation. Past reform will lead to future reform.

What the Law Says and Its Effects

So what does the new law say? Following is a summary of its salient provisions.

Effective Date. This law generally applies to causes of action filed after the act's effective date of March 24, 2023 (The shortening of the statute of limitations for negligence causes of action from four to two years applies to cause of action accruing after March 24, 2023. The law's changes apply to insurance contracts issued or renewed after March 24, 2023). As previously noted, in an effort to avoid the effect of this law, plaintiff attorneys filed tens of thousands of lawsuits to get them under the wire.

Paid Medical Bills. New law limits the introduction of evidence for medical damages at trial. Further, it limits evidence of past paid medical bills to the amount paid for services regardless of the source of the payment. Thus, if a health insurer paid for a medical bill, the amount the insurer paid is admissible at trial. Plaintiff cannot introduce into evidence the amount the provider billed.

Unpaid Medical Bills. If a plaintiff has health care coverage, what the health insurer must pay under an insurance contract or regulation (plus the plaintiff's contribution, such as a co-pay or deductible) is admissible at trial. If a Plaintiff has health care coverage but chooses to fund medical care through a letter of protection, only evidence of the amount his healthcare insurer would have paid if he had submitted his bills to the insurer (plus the plaintiff's contribution) is admissible. If a plaintiff does not have health care coverage, then evidence of 120 percent of the Medicare reimbursement rate being in effect on the date of the claimant's incurred medical services may be introduced at trial. If there is no applicable Medicare rate for a service, 170 percent of the applicable state Medicaid rate is admissible. Suppose a plaintiff receives services pursuant to a letter of protection, and the medical bill is assigned to a third party. In that case, the only evidence of the amount the third party agreed to pay the provider for the right to receive payment is admissible.

Future Medical Care. The law limits evidence as to future medical care. If a plaintiff has health care coverage or is eligible for health care coverage, the only evidence of the amount for which future charges could be satisfied if submitted to such health care coverage (plus the plaintiff's portion such as co-pays and deductibles) is admissible. If a plaintiff does not have health care coverage or has health care coverage through Medicare or Medicaid, or is eligible for such health care coverage, evidence of 120 percent of the Medicare reimbursement rate in effect at the time of trial for the medical treatment or services the claimant will receive, or if there is no applicable Medicare rate for a service, 170 percent of the applicable state Medicaid rate, is admissible.

Discovery of Health Contracts. Contracts between providers, insurers, and HMOs are neither subject to discovery nor admissible.

Damages for Medical Expenses. The law prohibits recovery for amounts above the amounts paid for medical services, and it also prohibits an award for damages from exceeding the amount: 1) Actually paid by or on behalf of the claimant to his provider; 2) necessary to satisfy charges for unpaid medical services at the time of trial; and 3) required to provide for any reasonable and necessary future medical treatment.

Effects of Changes to the Admissibility of Medical Expenses.

- Defense experts who opine on the appropriateness of the amount of medical bills are no longer necessary. As medical bills skyrocketed, these experts played a more significant role on the defense side, and now they are potentially obsolete.
- Plaintiff-oriented doctors, especially surgeons, will rethink their medical treatment and billing approach. The law closes the spigot on exorbitant medical bills and discourages unnecessary treatment and surgeries.
- Lower medical expenses, past and future, boarded for the jury should reduce non-economic damages awards and nuclear verdicts. Likewise, it should increase the likelihood of settlements at mediation.
- More reasonable life care plans.
- Reduced abuse of letters of protection.

Letters of Protection. If a Plaintiff receives medical services subject to a letter of protection, the plaintiff must disclose a copy of the letter of protection, as well as the following:

- All billing for Plaintiff's medical expenses, itemized and coded (in effect on the date the services were rendered). For providers billing at the provider level, the relevant codes are found in the American Medical Association's Current Procedural Terminology (CPT) or the Healthcare Common Procedure Coding System

(HCPCS). For providers billing at the facility level for expenses incurred in a clinical or outpatient setting, the relevant codes are found in the International Classification of Diseases (ICD) and, if applicable, the American Medical Association's Current Procedural Terminology (CPT). For providers billing at the facility level for expenses incurred in an inpatient setting, the relevant codes are found in the International Classification of Diseases (ICD).

- Whether the provider sold the accounts receivable to a third party, the name of the party, and the dollar amount paid by the third party.
- Whether the plaintiff had health insurance at the time of treatment and the identity of the health care coverage provider.
- Whether the plaintiff-claimant was referred for treatment under a letter of protection and, if so, the identity of the person who made the referral.

Effects of Changes as to Letters of Protection. First, it brings letters of protection to the foreground. Juries will hear more about letters of protection, what they mean, the financial relationship they create, and the doctor's financial interest in the case's outcome. Second, it reduces opaqueness. The law creates transparency about letters of protection, what they are, and who benefits. There are no more secrets about who stands to gain from them.

Modification to the Attorney-Client Privilege. There is no attorney-client privilege in communications related to an attorney's referral of a client for treatment. This overturns the Florida Supreme Court's 4-3 decision in Worley v. Central Florida YMCA, which found that "the defense could not seek discovery information about the relationship between Plaintiff's attorneys and medical providers to whom they referred clients, finding the attorney-client privilege protected that." The financial relationship between a law firm and a medical provider, including the number of referrals, frequency, and financial benefit obtained, is relevant to the issue of the bias of a testifying medical provider.

Effects of Changes as to the Modification to the Attorney-Client Privilege. First, it will even the playing field. Until now, plaintiff's counsel could address the alleged bias of the defense medical expert, but defense counsel was hamstrung in showing the financial relationship between plaintiff's counsel and plaintiff's treaters. Defense counsel may address a treater's relationship with a plaintiff's lawyer. Next, it will suggest collusion. A relationship where a plaintiff lawyer sends his clients to the same doctors and has a referral relationship with them suggests to a jury something is afoot. Where juries are constantly judging whether to trust or discount a witness's testimony, this relationship may go a long way to undermine these treaters' testimony.

> *"Juries will hear more about letters of protection, what they mean, the financial relationship they create, and the doctor's financial interest in the case's outcome."*

Comparative Negligence. The law changes Florida's comparative negligence system from a pure comparative negligence system to a modified one (except for medical negligence cases) so that a plaintiff who is more at fault for their injuries than the defendant may not generally recover damages from the defendant.

Effect of changes to comparative negligence. It avoids outsized awards against nominally negligent defendants. In matters where the plaintiff was significantly at fault, plaintiff attorneys argue for more considerable damages so that defendants with low negligence pay an outsized portion of damages, which drives up settlement and increases the likelihood of trials. Under the law, defendants can prevail outright at trial (i.e., a plaintiff who walks into the street and is struck by a vehicle).

Negligent Security. The law will provide a presumption against liability if the property owner follows and completes their checklist of measures.

- Requirements for Presumption Against Negligence. The law provides three requirements that a property owner must show they followed before the incident giving rise to the negligence claim: 1) A list of physical property safety measures to be taken on the property; 2) a crime prevention analysis; and 3) crime prevention training for all employees.
- Physical Property Safety Measures. The first requirement includes the implementation of the following safety measures:
  - A security camera system at points of entry and exit that records and maintains footage for at least 30 days. The goal of this precaution is to assist in offender identification and apprehension.
  - A lighted parking lot that provides light from dusk until dawn.
  - Lighting in the hallways, laundry rooms, common areas, and porches from dusk until dawn.
  - A deadbolt measuring at least one inch in each dwelling unit door.

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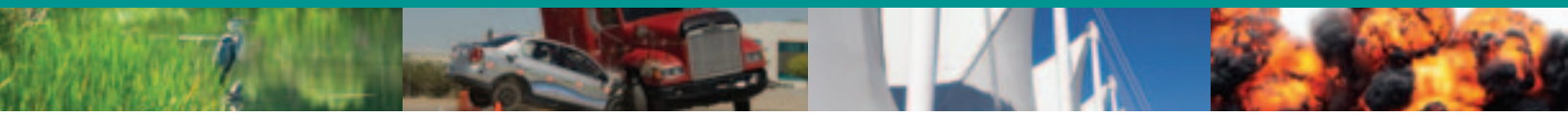

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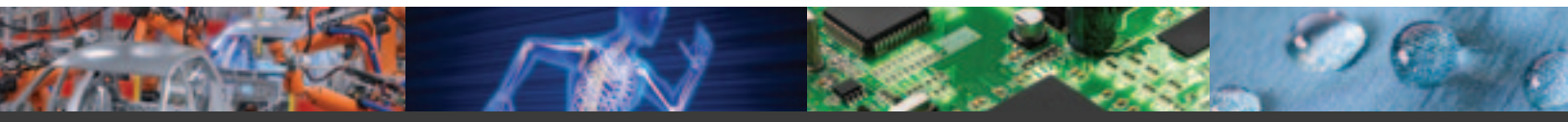

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Remembering Jeff Ward

GDLA and the greater legal community lost one of its best and brightest last year on May 30, 2022, when Jeffrey S. "Jeff" Ward passed away following an accident in Albany. He was born in Yakima, Washington, on May 10, 1969, and spent his happiest days growing up at his aunt and uncle's ranch, living the cowboy life, in Mancos, Colorado. Jeff's first career was serving as an environmental field engineer, after earning a Master's in environmental resource management from Arizona State. He later went on to graduate from the University of Georgia School of Law. He began his career at Gilbert Harrell in Brunswick in 2002, and then joined Drew Eckl & Farnham as a partner 10 years later. Following a successful defense practice, including serving as Regional Counsel to Walmart on pharmaceutical malpractice matters, Jeff moved to mediating full-time where he thrived knowing he was helping everyday people with each case he handled. He represented the civil defense bar with distinction and unmatched professionalism. Jeff was involved in numerous organizations but none more than GDLA, where he volunteered countless hours promoting the civil defense bar before eventually serving as its President in 2021-2022. Jeff was also a family man. He loved his children—Bennett, Beth Anne, and Mobley—and his wife, Jennifer, who was always by his side. Below we have compiled remembrances from many who knew and worked alongside Jeff. His passing was far too soon and leaves a void for many of us, who remain heartbroken even though Jeff has moved on to a better place. We strive to honor his memory as we move forward.

TRIBUTES

I will miss, and already do, seeing Jeff's huge smile at every GDLA event. It was hard not to have a good time when Jeff was around. He was always laughing, smiling, and enjoying the company of good friends and colleagues. It's simply not the same without him.

—Pamela Lee
GDLA President
Swift Currie McGhee & Hiers, Atlanta

I have many great memories of Jeff, but a few stand out. His smile made me, and everyone else, feel good. It was big and it was genuine. I always felt like he was genuinely glad to see me. I miss Jeff's signature greeting, "Hi, Pal!" Jeff loved a good time. Every party was better when he was in the room. I will never forget the cheer in Jeff's voice when he called from Savannah to fill me in on his love for Jennifer. A splendid gentleman in all respects.

—Bill Casey
GDLA President-Elect
Swift Currie McGhee & Hiers, Atlanta

Jeff was such a positive force and mentor for young lawyers. He brought joviality to the practice of civil defense. I will always remember Jeff's robust sense of humor and how welcoming he was to new GDLA members. He was an excellent litigator, but seemed to most enjoy sharing the war stories that poked fun at himself. Jeff showed us that it was ok and normal to make mistakes and that we would be remembered for how we handled those challenges. His eyes sparkled when he spoke about fatherhood, his children, and his love for Jennifer. Jeff will forever be missed.

—Ashley Rice
GDLA Treasurer
Waldon Adelman Castilla McNamara & Prout, Atlanta

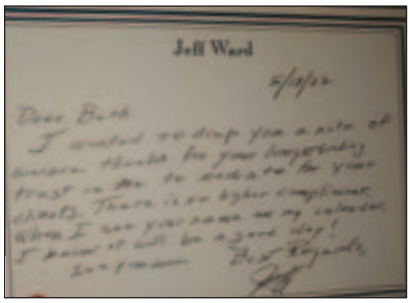
Jeff was a true professional and a gentleman. He was quick with a smile or a great idea and slow to criticize. I first met Jeff when we represented co-defendants in the same case and got to know him better as we both committed more time to GDLA. Later, I mediated several cases with him. Regardless of the context, I always enjoyed spending time with Jeff. He was one of those people who was always a pleasure to be around, and he was someone who could connect equally well with younger lawyers and more experienced ones. I always looked forward to our time together. The legal profession needs more people like Jeff, and we will miss him.

—Marty Levinson
GDLA Secretary
Hawkins Parnell & Young, Atlanta

I met Jeff through practicing in Glynn County—he was personable, charming, smart, and just FUN. My husband taught his daughter and he lived down the street. Jeff became a close friend and got me involved in GDLA. I was glad he found such happiness with Jennifer, it was apparent to anyone in their company. We were set to mediate a case the day after his untimely death, and he had just sent me a heartfelt note of

appreciation (see below). It is cherished. Jeff's smile and laughter, his wit and humor, and his loving personality will be long remembered. He was a lawyer's lawyer, truly one of the good guys. I miss him.

—Beth Boone
GDLA Vice President
Hall Booth Smith, Brunswick


Jeff Ward

It's still so hard to believe that Jeff is no longer with us. His smiling face has been a staple at GDLA functions for as long as I can remember. It seems like just yesterday we were at the King & Prince telling hunting stories and comparing pictures of our trophy bucks. Jeff was always friendly and the kind of person who made you feel welcome. I will truly miss him.

—Jason Logan
GDLA Vice President
Constangy Brooks Smith & Prophete, Macon

Both being in South Georgia, we would often end up in the same case with co-defendants. He was such a good trial lawyer and strategist that I always learned something from working with him. Not only was he a very skilled and professional lawyer, he made the work interesting and fun. I distinctly remember a trip to Chicago with him for depositions that while the case was very boring (literally concerned drying concrete!) it was so much fun. He always had a positive attitude and generous spirit lifting up all around him. Jeff was a truly exceptional person and even as I write this my heart aches that he left us too soon.

—Tracy O'Connell
GDLA Vice President
Ellis Painter, Savannah

Jennifer and Jeff with his children, Mobley, Beth Anne, and Bennett, on their wedding day, August 19, 2019, at The Mansion on Forsyth Park. So much joy!

Jeff Ward was one of my closest friends. I think of him every day. A colleague in the Georgia Defense Lawyers Association, and then a colleague at Miles Mediation when we both were mediating full-time. Jeff was the guy who always checked in on his friends, hosted a dinner party and made everyone feel welcomed. I first met Jeff when he was a law student. The next interaction with him was when he'd just graduated from law school and was at a calendar call (the older folks will remember those) and he called to tell me that one of my cases was called and I wasn't there. He covered for me (I didn't get the notice). That is class and sums up Jeff. Always taking care of his friends.

—Sally Akins
GDLA Past President
Miles Mediation, Savannah

It is always sobering to receive news of the death of a long-time friend who is vigorous and not yet old. The news of Jeff Ward's passing was a hammer blow. Then reflection begins.

My first thought was that Jeff was an able and effective advocate for his clients. I know of no higher praise for a lawyer who engages in a trial practice. He also had the ability to conduct himself in a way that earned and kept the respect of opposing counsel. Mastery of this skill can be difficult for some, but Jeff could practice no other way. This made Jeff much in demand by plaintiff and defense lawyers when he began his mediation practice.

Jeff was always a good companion. If you needed a golf game, Jeff was good to go. If you were plan-

ning a fishing trip, Jeff always said "I'm in." Get a group together for dinner, Jeff could match anyone at the table with entertaining stories.

I was also fortunate to be with Jeff in quiet moments. I know of the deep abiding love he had for his children. I was there when Jeff and Jennifer had their first date. As I have said before, the spark was palpable. Anyone present could see it. And the spark never died. This is what I remember most.

—Staten Bitting
GDLA Past President
Levy Sibley Foreman & Speir, Augusta

I last saw Jeff when I was at Miles (mediating with another neutral) a few weeks before he passed. We had a nice long chat. In fact, just a few days earlier, he had responded to a GDLA blast email question I had sent out. He had provided some very valuable insight. And know what? It wasn't even what I had asked about. He alerted me to an important issue I had not even thought of—that's Jeff!

—Johnny Foster
GDLA Past President
Forbes Foster & Pool, Savannah

Three of GDLA's best and brightest leaders, lawyers, and friends are no doubt having fun together in the heavenly realm: George Hall, Jeff, and Rusty Gunn. At left, George presents Jeff with the outgoing President's gavel plaque at the 2021 GDLA Annual Meeting, as George took the reins as President. At right, Jeff and Rusty are pictured at the 2017 Fall Meeting of the Board at Brasstown Valley Resort.

In so many ways, Jeff Ward was larger than life. He was a true cowboy, outdoorsman, hunter, golfer, and yes, a fine lawyer. In a bygone era, he might have been called a "man's man." But that would have only told half the story. What I will remember most about Jeff was his infectious smile and his consistent kindness and generosity.

Five years ago, a neighbor of mine gave me his tickets to an Atlanta United game in the Supporters Section of Mercedes Benz Stadium, which is reserved for only the most die-hard fans. Mary and I invited Jennifer, and she asked if she could bring along a friend. Turns out, the "friend" was Jeff, who had never been to a pro soccer match and truth be told, probably had no interest in seeing one. But the beer would be cold and plentiful, and he would be with Jennifer, and so of course, he said yes. Atlanta won the match, Jeff had a great time, and we got an early picture with the young couple and one of our new-found friends (see below). Jeff was a great guy, and we miss him dearly.

—Ted Freeman
GDLA Past President
Freeman Mathis & Gary, Atlanta

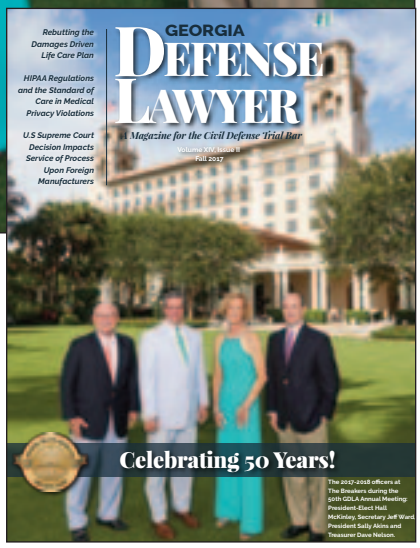
Below left, Jeff is with Brian Moore and Mel Haas on the links at the 2014 Annual Meeting, as Mel mentions. See Ted Freeman's tribute to learn about the photo at right.

Really enjoyed our rounds of golf together at Annual and Board Meetings!

—Mel Haas
GDLA Past President
Constangy Brooks Smith & Prophete, Macon

Jeff Ward and I became friends many years ago when we had a case and an opportunity to work together. Oddly enough, it was a plaintiff's case for Jeff. Jeff was ethical, straightforward, and a pleasure to work with and our relationship continued long after the case was resolved. He was in many respects a renaissance man in that he had experienced many things with his history in Colorado and the West in general. He was an avid, accomplished hunter of wild game and an excellent fisherman. One of my fondest memories was of a fishing trip with Jeff, Dale, and Staten when each of us landed a redfish requiring extensive effort, as they were all beyond the slot for keeping. A photo of Jeff with his catch is below. We had many great times together and I miss him and his unwavering optimism about everything all the time. Despite whatever might have been going on, he always was enthusiastic, happy, and smiling with his enviable attitude. His tragic death is a loss to all who knew him and especially to his widow, Jennifer, whom he adored and who adored him.

Jeff loved fishing (and hunting) as much as he loved golf. As Bubba Hughes recalls above, here Jeff shows off a huge redfish caught during an outing with Bubba, Staten Bitting, and Dale Akins.



The magazine cover photo shoot of the officers at The Breakers commemmorating GDLA's 50th Anniversary in 2017 was quite memorable. It featured then officers President-Elect Hall McKinley, Secretary Jeff, President Sally Akins, and Treasurer Dave Nelson, While we went to press with the serious photo, the other one was much more fun!

Although I cannot remember the exact year, Jeff and I became good friends when he joined the Board of GDLA. I would see him at Board and Annual Meetings and would visit late into the night, play golf, and go to dinner frequently. In fact, the last time I saw Jeff before his untimely passing, Kathy and I had dinner with Jeff and Jennifer at the 2022 Spring Board Meeting in St. Simon's.

When I had a case in southeast Georgia, I would call Jeff to get intel on the venue, opposing counsel, or the judge, and Jeff allowed me to use his conference room for depositions on several occasions. Jeff was the consummate professional, a great lawyer, and a valued friend. Kathy and I were honored to be invited to his and Jennifer's wedding in Savannah in 2019 and I can't recall a time when he was happier.

Jeff's term as President of GDLA ended at the June 2021 Annual Meeting in Amelia Island. I was honored by GDLA to receive the Distinguished Service Award at that meeting, but the honor was made even more special because Jeff presented it to me. Every day I look at

Jeff and Jennifer joined GDLA colleagues and friends at the DRI Southeast Regional Meeting at the Ocean Reef Club in Key Largo, Florida, in April of 2019. They're pictured with Douglas Burrell, Hall McKinley, Dave Nelson, Matt Moffett, and Ted Freeman.

this award, I'm reminded of Jeff and what a friend he was to me and to all of us in the GDLA family.

'Til we meet again, good friend.

—Walter McClelland
GDLA Past President
Mabry & McClelland, Atlanta

Jeff and Walter McClelland at the 2012 GDLA Annual Meeting golf tourney.

Remembering our friend Jeff—I had the great pleasure of working with Jeff for over 10 years at Drew Eckl. We worked closely together on mutual clients and I saw him develop into one of the leading defense trial lawyers in Georgia. We also worked and served together at GDLA as our paths through VP and officer positions overlapped for many years! He was a lawyer who was truly committed to his clients and to GDLA. We were all lucky to have had him serve in leadership at GDLA, and are all better off for having known him. We lost a great friend way too early.

—Hall McKinley
GDLA Past President
Drew Eckl & Farnham, Atlanta

Jeff Ward was a lawyer I looked forward to seeing as we attended GDLA meetings three or four times a year for more than 10 years. Jeff's warm personality and sense of humor made him fun to be around. His sudden loss was a particular shock to me because it came just a few months after GDLA President George Hall died unexpectedly and I had started my term as GDLA President earlier than planned. Jeff was the GDLA President before George, so we lost both of our Immediate Past Presidents at a very young age.

At the 56th GDLA Annual Meeting in June 2023, it was my responsibility to choose the recipient of the 2023 GDLA Distinguished Service Award, which honors a GDLA member for meritorious and extended service to the mission of the Association. The candidate should be a leader within the broader legal community, a recognized public servant, and instrumental in developing, implementing, and carrying through the objectives of the GDLA. His or her conspicuous commitment and dedication to GDLA and its purposes should be demonstrated over an extended period of years, the result of which strengthens the defense bar and, as a byproduct, the justice system in Georgia. The candidate should serve the profession and the public through other legal association and community volunteer efforts. Jeff

checked all of these boxes. In addition to GDLA, Jeff was a State Bar Board of Governors member, a State Disciplinary Board Review Panel member and chair, and served on the Bar's Advisory Committee on Legislation. Jeff was invited to serve on the Southern District Advisory Committee by his former Gilbert Harrell mentor, Judge Lisa Wood, and was active in Leadership Brunswick and many other organizations. I was proud to announce Jeff as the recipient of the 2023 GDLA Distinguished Service Award (posthumously).

Jeff enjoyed practicing law for many years and then became a mediator. He also had a passion for golf and had recently played in the Savannah Golf Club member-guest tournament with Craig Avery in which they both had a blast. Jeff was also doing what he enjoyed—golfing in Albany on a holiday weekend with his wife and friends—just before he passed. We celebrate Jeff's remarkable life as a lawyer, friend, father and loving husband to Jennifer. We remember and honor his legacy.

—Dart Meadows
GDLA Immediate Past President
Balch & Bingham, Atlanta

Jeff Ward, we didn't get to see each other regularly, but when we did we picked up where we left off, like good friends always do. We also shared a fondness for IPAs (and many a war story embellished by them, too)! Jeff had that friendly smile, robust laughter, and engaging personality. He loved the law and all his friends in GDLA, a close second to how he loved his family. He was a man of faith, and I can imagine George Hall's greeting Jeff upon his arrival at the Father's house.

—Matt Moffett
GDLA Past President
Gray Rust St. Amand Moffett & Brieske, Atlanta

I'll always remember Jeff as a smiling, very personable individual in addition to being a fine lawyer. He was very engaging in his interactions and a most likable person. It was tragic that he passed away so prematurely, but his memory is still vivid in my recollection—Rest in Peace.

—Bob Travis
GDLA Past President
Bryan Cave Leighton Paisner (retired), Atlanta

Jeff, we miss your welcoming hug and gregarious laugh. We miss our insightful, serious, yet hilarious conversations. Most of all, we miss you and the smile that changed a room. We both loved and worshipped our kids—especially our baby girls who could command a room and became dear friends. We love you and know you are looking down upon us.

—Anne Gower
GDLA Board of Directors
and **Jason Darneille**
Gower Wooten & Darneille, Atlanta

Above, Jeff and Jennifer celebrate the holidays at a Christmas party with Diane and Matt Moffett in December 2018. Below, Jeff and Jennifer are pictured with honorary GDLA member Craig Avery and his wife, Resa, in Carmel, California, while the Wards were in the area for a DRI Annual Meeting in San Francisco in October of 2018.

Continued on next page

1. Jeff and Jennifer (then Davis) at the 2017 State Bar of Georgia Annual Meeting accepting the Best Newsletter Award from then-Bar President and GDLA member Pat O'Connor. Jeff served as Editor-in-Chief for 3.5 years. 2. Jeff with Judge Tripp Self and Jason Lewis at the 2019 GDLA Annual Meeting in Ponte Vedra. 3. Jeff and Judge Rick Story at the 2019 meeting of the Advisory Committee for the U.S. District Court for the Southern District of Georgia, of which Jeff was a member, at the Ritz Amelia. 4. Jeff and Jennifer with Anne Gower and Jason Darneille watching the Crimson Tide kick off college football season at Mercedez-Benz Stadium on Labor Day weekend 2021. Jeff had to swallow his Dawg pride for that one. 5. Jeff and Brad Marsh at GDLA Trial & Mediation Academy in 2017. 6. Jeff and his youngest child, Mobley, at her first GDLA Annual Meeting in 2014 in Ponte Vedra.

I first met Jeff when he joined Drew Eckl & Farnham in 2012. We became instant friends even though we worked in different offices. He would often call me while he was on the road, even after he left the practice of law to start mediating full-time.

As friends do, we often discussed both our personal lives and professional lives. As a result, I had the benefit of hearing Jeff talk about his four loves—his wife, Jennifer, his children, the law, and mediation. But no matter what was going on in his life, Jeff frequently reached out just to see how I was doing. He truly was a man who put his family and his friends first.

I also had the benefit of trying a case with Jeff. I saw first-hand how the judge and opposing counsel respected him and how the jury was captivated by his gift of storytelling. That trial will be one that I will always remember as I learned so much from him that week.

Miss you, Jeff.

—Karen Karabinos
GDLA Board of Directors
Chartwell Law, Atlanta

Jeff Ward, the jolly guy on the coast who was always willing to give me the skinny on opposing counsel, insights on a case, or his thoughts on an argument. Jeff was a fine mentor. He was so generous with his time; I wasn't even in his firm.

Fifteen years of friendship, dinners, laughs, and advice, and what comes to mind is the night he started calling me Tenderfoot. On this particular occasion, we were drinking bourbon in a bar in South Carolina. About halfway to the bottom of our glasses, he glanced down and spotted my new cowboy boots—customs from Texas.

With a twinkle in his eyes, he emptied his glass, looked down at the boots again, and through a chuckle, said: "Jason, those are some nice new boots you're wearing, but you made one mistake; they're two-tone. No cowboy wears two-tone boots." I thought about bumming a pinch of Skoal from him to reclaim my manhood. He just smiled, patted me on the back, and ordered another round. We went on talking about horses and his time on the ranch.

One of the best parts about GDLA is the friends who become like family, as each of these tributes to Jeff attests. Here, Jeff and Jennifer (at right) were part of a surprise 70th birthday celebration for Ted and Bubba in Ponte Vedra in August 2021. Pictured are Ted Freeman and his wife, Mary Peironnet, Debbie and Bubba Hughes, Cindy and Staten Bitting, and Sally and Dale Akins. That's when the guys went on the legendary fishing trip Bubba recounts in his tribute. It was a truly special weekend. (Bubba and Ted say "70" is a typo.)

Through the years, up or down, you could always count on a warm welcome, a big smile, and a funny story from Jeff Ward. He was a man of great generosity and kindness. He's greatly missed.

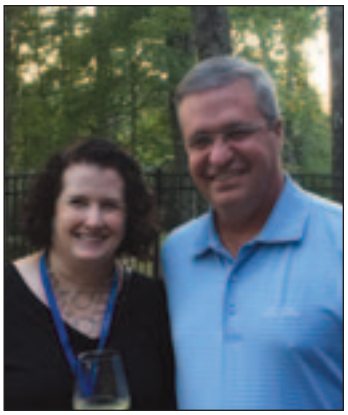
—Jason Lewis
GDLA Board of Directors
Chambless Higdon Richardson Katz & Griggs, Macon

How do you summarize a life well lived, but one cut short? How do you capture the essence of a person who you like and respect, who was your law partner and friend? This is one of the most difficult things that I have done and I must admit that I have dragged my feet writing this because I have been scared that I won't talk about Jeff Ward the way he deserves. I have been waiting for inspiration to provide me with the confidence to write about Jeff so all who know him or didn't get the chance to know him will understand how great an impact he made and how great a void he has left behind. During my search for the right words, it finally hit me that I was thinking about Jeff in the past tense, which I believe is wrong.

Although Jeff is no longer physically present with us, he will always be with me and many others because he touched our hearts and our minds and his spirit will always remain with us. Thus, I choose to think of Jeff in the present tense. I cherish the many talks that Jeff and I had over the years, whether we talked about the law—especially trials and trial strategy—our families, or simple legal gossip, they were always long conversations and often times we laugh. I consider myself lucky to know Jeff. I consider myself lucky to have been invited to his wedding to Jennifer. My wife, Lori, and I drove to Savannah and got to spend time with friends as we all celebrated the marriage of two wonderful people who I have known for 20 years.

I am proud of the fact that my friend became President of GDLA, an organization we both love so much. I appreciate Jeff's leadership style and how he has the ability to bring so many different people to-





1. Past President Mel Haas (right) has Jeff cracking up during the Board of Directors Meeting at the King & Prince in April 2011. Probably had something to do with a robust idea. 2. Jeff in his element doing his favorite thing: mentoring young lawyers by teaching at GDLA Trial & Mediation Academy at Callaway Gardens in 2017. 3. Tracy O'Connell with Jeff at the 2018 Board of Directors Fall Meeting in Highlands, North Carolina.

gether and he is once again bringing us together through the writings of so many people who are remembering how he touched their lives. Jeff collects friends, which is a rare gift and I consider myself very fortunate that I am one of the many people Jeff invited into his life. The bedrock of a true friendship is the ability to accept people as they are, to tolerate their shortcomings, and to make the person better because you know them. I can certainly attest that Jeff has done all of that for me and it is an emotional experience to reflect about all that my friendship with Jeff means to me.

The thing about emotions, however, is that one minute you can be depressed and the next minute you are smiling and that is what I'm doing now as I think about how Jeff gives a slight pause and then says, "well …" before he begins telling a memorable story.

I'm fortunate that Jeff entered my life and I'm glad that he will always be with me, as he will forever remain with those of us who are fortunate enough to know him. So, while my words may not be enough to explain Jeff's importance to me, to us, the best way I can convey Jeff's essence boils down to how I/we feel about him.

I cannot recall who said it, but the essence of the comment is that we may not remember what people say to us but we will never forget how people make us feel. And I think that is the best thing I can say about Jeff is that he makes so many of us feel such good things about him and ourselves that he will always be present with us.

—Douglas Burrell
Chartwell Law, Atlanta

About 18 years ago, while waiting in the hall to have my case called at the Glynn County Courthouse, the nicest lawyer approached me and welcomed me to "his neck of the woods." That man was Jeff Ward and little did I know that I would later become his sister-in-law. Over the next hour, we discovered we knew the same lawyers and laughed over war stories. Jeff was someone who made me feel welcome on his "home turf."

Following that experience, I associated Jeff on many cases through the years to guide us on local issues and personalities. He was a smart and savvy lawyer, but also became a true friend. It was a delight to watch Jeff connect with younger lawyers over the last decade during the GDLA Trial & Mediation Academy and warmly welcome these young, and sometimes intimated, attorneys to the profession, much as he welcomed me to Brunswick so many years ago.

I came to appreciate over the years that Jeff reflected the traits we all aspire to display as lawyers: he offered concern for our welfare, strove to make our association a professional friendship, and assisted colleagues in becoming better people in the practice of law. He will be missed.

—Carrie Christie
Rutherford & Christie, Atlanta

Jeff Ward was one of the first lawyers I met and worked with when I moved south from Connecticut and became a Georgia lawyer in 2012. He knew I had several years of litigation and defense experience already but was learning the Georgia ropes. When we were co-defendants on cases, he took the time to walk me through the cases, taught me some nuances of Georgia law, and made it clear he was always there if I needed his help.

Over the years we would bounce cases off each other, and I came to truly respect him as a lawyer and as a person. I was delighted when he connected with Jennifer because when he found her, he found the smile he had lost for a bit. Seeing him so happy made everyone around him happy—it was infectious.

When he joined the team at Miles Mediation, and I got to see him more often, he always took the time to re-

1. In May 2016, GDLA teamed up with GTLA for a panel presentation, "Bridging the Divide: Plaintiff and Defense Counsel, Ethics, Civility & Mediation Summit," at the ABA TIPS Annual Conference in Atlanta. Pictured are (back row) Pope Langdale, Jeff, Carrie Christie, Darren Penn, Hall McKinley, (front row) Susan Forsling, Scott Young, and Matt Moffett. 2. Jeff and Jennifer with Judge Susan Edlein at GDLA's Skits & Suds CLE in March 2019.

connect and get caught up on life before diving into the case. He cared about me and what was happening in my world, and he was more than happy to share how happy he was in his world. I mediated with him the week before his passing and I think we spent more time catching up than mediating but no one was complaining!

I distinctly remember that day—the smile on his face when I arrived, the hug we exchanged, the updates about his lake house (he had taken a phone call from me months prior when he and Jennifer were doing the final purchase walk-through with their realtor to discuss a case) and his summer plans. We talked about interesting cases he'd mediated and cases I had going on, and some challenges I was facing at my then job.

As always, he offered sage and practical advice on the job front, gave me some thoughts of his to consider on the cases we discussed, and reminded me of all the reasons why he was such a great lawyer and mediator.

I was devastated to hear of his passing … I am not sure how more than a year has passed since but here we are. Time stands still for no one and Jeff wouldn't have wanted that anyway. I keep a photo of Jeff on my computer screen to remind me to take the high road, think things through, and always be professional in my correspondence—all things he stressed to me were important to making it as a Georgia lawyer.

He was one of the best I have had the privilege to work with, learn from, and share a friendship. I will forever be grateful we met and had so many years of friendship.

—Mareesa Dittle
Worsham Corsi Dobur & Berss, Savannah

I think my husband, Joey, and I have the distinct privilege of being the only married couple to have both worked with Jeff. Joey and Jeff were colleagues at Gilbert Harrell Sumerford & Martin in Brunswick. Jeff was his friend and a "big brother" type who helped show him the ropes as a brand-new associate.

When I wanted to make the move from Atlanta to Brunswick to join my now husband, we took Jeff to lunch. I asked him if he had any openings for an associate (with one year of experience in a practice area his office did not handle). He responded, without hesitation, that he would make one.

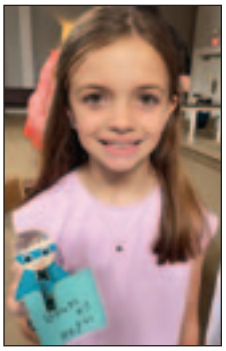
A few years later, when we decided to make the move back to Atlanta to be closer to family, I dreaded telling Jeff the news. But again, without hesitation, he said he was excited for us and wished me the best. Jeff served many roles for the two of us, including mentor and boss, but his favorite role was friend. And he was always a good one.

— Whitney Lay Greene
Chartwell Law, Atlanta

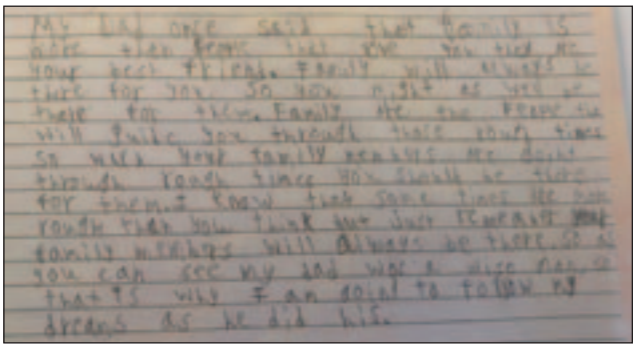
I am so grateful that I had the opportunity to meet and work with Jeff while at a previous law firm. At the time, I was working hard to build my appellate practice and I had not yet taken the lead on a federal appeal. Jeff, being the brilliant trial lawyer he was, had just won a complex one-week breach of contract trial in the Southern District and put his trust in me to take the lead at the Eleventh Circuit. When we found out we won the appeal, Jeff was no longer at my firm, but I will never forget how genuinely proud and excited he was for me.

Jeff would later become a mediator and would successfully mediate the cases I told him could not be resolved. Jeff really was a jack-of-all-trades and succeeded at everything he did—whether it was trying cases, becoming GDLA President, becoming a mediator, or ultimately landing and marrying his soulmate, Jennifer.

He was truly one of the kindest individuals I have ever met and was



1. Jeff at age 17 working on his family's cattle ranch in Mancos, Colorado. 2. Jeff's Colorado family on June 22, 2022, at his memorial service on the ranch where he spent his happiest years as a youth. His ashes were interred in the family cemetery. 3. Jeff's youngest child, Mobley, wrote this about her dad and shared it with the pastor who conducted his memorial service on St. Simon's Island on June 17, 2022. 4. Mobley made this refrigerator magnet for Jeff, which reflected how she felt about her dad: "You're my hero."



always there to listen to me vent, even when he was busy. I don't think there is a single time where Jeff didn't take my call. I only wish I had the chance to remind him how appreciative I was of his mentorship and friendship.

—Elissa Haynes
Freeman Mathis & Gary, Atlanta

I was fortunate to meet Jeff many years ago at a State Bar of Georgia function and we became friends. I always enjoyed seeing him at State Bar and GDLA events. For many years, we served together on the Review Panel of the State Bar and I always found him be thoughtful and well prepared in each meeting. He took seriously his obligations to give back to the legal profession through his involvement with the Bar as a whole and particularly the defense bar. He willingly and capably volunteered his time for many years as an instructor at the GDLA Trial & Mediation Academy.

Jeff was always up for interesting discussions on a wide variety of subjects.He always had a big smile and a good word, and seemed to thoroughly enjoy the law and his life.We are all fortunate to have known Jeff and we all feel his loss. We should continue to tell stories which recall his past and remember his many contributions to the Bar, to his family and to his friends.

May You Rest in Peace, My Friend.

—Brad Marsh
Swift Currie, Atlanta

We all are fortunate enough to come across people in life who light up a room. Jeff Ward was a light in every room he entered. He was one of the people you could not wait to speak to, no matter the occasion. As we recall his life and his legacy, our earthly pain remains, but the light of his life brings us never ending joy. Jeff inspired us, made us strive to do good, made us laugh, and made us—as lawyers—proud to be part of the profession he so dearly loved. He set an example for us all. We will never forget.

—Pat O'Connor
Oliver Maner, Savannah

I first met Jeff Ward as a fellow faculty member at the GDLA Trial & Mediation Academy. The whole reason I love to teach there is because it puts play to the canard that you can't teach old dogs new tricks. I learned a lot about both trying and mediating cases from watching and talking with Jeff, usually over a cocktail, or three. He had that trial lawyer's gift (that many defense lawyers lack) which is a genuine interest in other people. He had an ability to communicate with juries in a trial, and with parties in a mediation, on a personal level—no bluster, no showmanship. He was genuine and authentic. He was honest. He was smart and effective, but also humble, down to earth, unpretentious. As a defense lawyer, he still had faith in juries, which seems increasingly difficult as the world gets crazier. He had that ability, in the words of the poet, to "meet with triumph and disaster, and treat those two imposters just the same." He was very funny, but never at someone else's expense. Nothing he ever did or said had an edge of cynicism to it. He cared about his clients and his colleagues more than his win/loss record or his list of accolades. While it was stunningly tragic at the time, it now seems fitting that his last days were spent playing golf with friends. I not only miss Jeff, I miss lawyers like Jeff. He was part of a vanishing breed, and I'm glad I knew him.

—Dick Willis
Williams Mullen, Columbia, SC

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Auto Liability Case Law Update

By Morgan McGee (left) and Brooke Ray
Waldon Adelman Castilla Hiestand & Prout, Atlanta

UM COVERAGE DISPUTE: "REDUCED-BY" VS. "ADD-ON" BENEFITS
***Frey v. Jesperson*, 336 Ga.App. 488 (2023)**
Dillard, P.J.; Mercier and Markle, JJ., concur

On January 23, 2023, the Court of Appeals of Georgia affirmed a trial court's ruling that decedent William Frey knowingly and voluntarily purchased an insurance policy with "reduced-by" uninsured motorist ("UM") benefits despite arguments that he was not given a meaningful opportunity to select "add-on" UM coverage and that his untimely return of the UM selection form resulted in his policy providing the "broadest UM coverage available."

This case arises from a wrongful death and personal injury action brought by decedent William Frey's wife, Irish Frey, against Michael Jesperson after a motor vehicle accident involving William and Jesperson resulted in William's death. At the time of the accident, William was covered by two UM policies issued by Progressive Insurance Company that each provided $25,000 in "add-on" UM coverage. William was covered by a third UM policy issued by Liberty Mutual which provided $100,000 in "reduced-by" UM benefits.

It is undisputed that the Liberty Mutual policy was secondary in priority to the Progressive policies. Prior to trial, Jesperson tendered his liability policy limits of $50,000; Progressive tendered a total of $50,000 of "add-on" UM benefits; and Liberty Mutual tendered $50,000 under its "reduced-by" policy.

Thereafter, a dispute arose regarding the amount of UM benefits available under the Liberty Mutual policy.

Liberty Mutual filed a motion for summary judgment arguing that William affirmatively selected "reduced-by" UM coverage when executing his policy, and thus, Liberty Mutual was entitled to a setoff of the $50,000 liability limits. Irish Frey opposed the motion arguing that the language in Liberty Mutual's UM selection form and its accompanying cover letter was "coercive" and "discouraged" William from selecting add-on coverage. Further, Irish argued that William did not knowingly and voluntarily select reduced-by coverage and that by returning the UM selection form after Liberty Mutual's stated due date, William's policy provided the broadest UM coverage available (which she alleged was $250,000). The trial court granted Liberty Mutual's motion for summary judgment and Irish Frey appealed.

William first secured an automobile insurance policy with Liberty Mutual in August of 2004 and renewed the policy each year until his death in 2017. In July of 2009, he modified the policy by executing a UM selection form that gave him the option to select reduced-by, add-on, or no UM coverage. William chose reduced-by UM coverage in the amount of $100,000 per person for bodily injuries then signed, dated, and returned the form to Liberty Mutual.

In 2013, Liberty Mutual sent William an updated UM selection form ("2013 Form") and accompanying cover letter. The 2013 Form also explained the differences between reduced-by and add-on UM coverage including the effect on policy premiums with each type of coverage. The accompanying cover letter explained that Liberty Mutual had pre-selected the limit that was already being afforded on the policy at that time (reduced-by UM coverage with a $100,000 per person policy limit) and that if William wanted to maintain that current coverage, he was to sign, date, and return the form by Feb-

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Employment Case Law Update

Robert Luskin (left), Substantive Law Section Chair, and
Graham Newsome, Substantive Law Section Vice-Chair
Chartwell Law, Atlanta

We are already over halfway through with 2023, and it has been a rough year for employers and the attorneys who represent them. While employment law at the state level has remained relatively unchanged, there have been drastic changes happening in areas of federal employment law that still affect many businesses and industries across the state. From the National Labor Relations Board (NLRB) to the Equal Employment Opportunity Commission (EEOC), all the way up to the U.S. Supreme Court, if the latter half of 2023 is anything like the first half, then next year and beyond likely will be very strange animals indeed for the employment defense bar.

The FTC's Proposed Rule on Noncompete Clauses

On January 5, 2023, the Federal Trade Commission (FTC) announced a rule that would add a new subchapter J, consisting of part 910, to chapter I in title 16 of the Code of Federal Regulations, titled Rules Concerning Unfair Methods of Competition, Part 910—Non-Compete Clauses. The proposed rule can be found on the FTC's website: https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking.

The proposed rule states, that "it is an unfair method of competition" for an employer to enter into a non-compete with a worker, "maintain" a non-compete clause with a worker or lead a worker to believe that they are subject to such a clause without a good faith basis for doing so.

For existing non-compete clauses, employers who have entered into non-compete clauses prior to the rule must rescind such a clause no later than "the compliance date," which is 180 days after publication of the final rule by the FTC.

For employers providing notice to employees regarding an existing non-compete clause, employers "must provide notice to the worker within 45 days of rescinding the non-compete clause." The notice does not only apply to current employees; the notice requirement also applies to former employees, "provided that the employer has the worker's contact information readily available."

The FTC has also provided model language that employers can use to provide notice to employees regarding recission of non-compete clauses.

The NLRB Limits Employer Protections in Severance Agreements

On February 21, 2023, in *McLaren Macomb*, Case No. 07-CA-263041, the NLRB held that employers may not offer severance agreements requiring employees to broadly waive rights provided to them by the National Labor Relations Act (NLRA). Specifically, the decision focused on a severance agreement that included the two following broad non-disparagement and confidentiality provisions:

1) Confidentiality Agreement. The Employee acknowledges that the terms of this Agreement are confidential and agrees not to disclose them to any third person, other than spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.

2) Non-Disclosure. At all times hereafter, the Employee promises and agrees not to disclose information, knowledge or materials of a confidential, privileged, or proprietary nature of which the Employee has or had knowledge of, or involvement with, by reason of the Employee's employment. At all times hereafter, the Employee agrees not to make statements to Employer's employees or to the general public which could disparage or harm the image of Employer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.

NLRB Broadens What Constitutes An "Employee"

A ruling from the NLRB broadens the definition of "employee" and acts as increasing the number of workers who have a right to unionize under the National

Continued on page 66

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Workers' Compensation Case Law Update

By Ann McElroy
Swift Currie McGhee & Hiers, Atlanta

POSTED PANELS MUST BE PROMINENTLY PLACED, NOT JUST ACCESSIBLE
Lilienthal v. JLK, Inc., et al.
Court of Appeals of Georgia
A23A0290
2023 WL 3611404 (May 24, 2023)

The Georgia Court of Appeals issued an opinion in May regarding a claimant's challenge to the validity of an employer's posted panel on the basis that the panel was not posted in a "prominent" location in accordance with O.C.G.A. § 34-9-201(c). Although the employer had a valid panel that was posted on a wall on the employer's premises, there was a dispute as to whether the location of the panel complied with the requirement that it be posted in a "prominent" place. It should be noted throughout the pendency of the claim, the panel was found to be valid and in compliance with O.C.G.A. § 34-9-201 by the ALJ, the Appellate Division and the Superior Court.

In this case, the employer is a daycare facility responsible for caring for young children. The employer's premises contained no teacher/employee breakroom. However, there was a resource room on the premises which held teacher supplies and items for use by the teachers, including paint, scissors, a paper cutter, as well as other items that could pose a harm to the children onsite. As such, the door to the resource room was locked. Facts found by the State Board of Workers' Compensation show the door to the resource room, as documented in photographic evidence submitted into the record, had a full panel of glass almost the entire size of the door (not just the upper half of the door) allowing a person outside of the room to see inside the room. The Board also found that the key to the resource room was kept in an unlocked box in a drawer at the front desk of the facility. Teachers and employees were allowed to grab the key at any time they wanted to enter the resource room. The employee in this claim argued she and other employees rarely went into the resource room due to it not often being fully stocked, while other testimony from witnesses claimed the room was appropriately stocked. These were all facts considered by the Administrative Law Judge (ALJ) and Board's Appellate Division in rendering their decisions.

> *"Thus, the Court of Appeals concluded that substituting, if that is what the State Board of Workers' Compensation had done, the word "prominent" for the word "accessible," would be a mistake of law."*

The recent Court of Appeals decision did not decide whether the panel in this case was posted in a prominent location. Rather, the Court of Appeals appeared to interpret the ALJ's observation that the employee was not precluded from accessing the resource room to mean the ALJ had failed to determine whether the panel was posted in a "prominent" location, particularly because the ALJ never specifically stated the panel was posted in a prominent place. Thus, the Court of Appeals concluded that substituting, if that is what the State Board had done, the word "prominent" for the word "accessible," would be a mistake of law. Therefore, the Court of Appeals reversed and remanded the case to the Board to confirm that the Board also thought that the panel was posted in a prominent location.

Whether a panel is posted in a prominent location on the employer's premises is a factual question not to be overturned on appeal if supported by any evidence. The Court of Appeals has not redefined the word "prominent" to mean anything different than its usual meaning. While some observers have suggested the Court of Appeals has found the panel in this case to be invalid because it was not prominently located, this is a misstatement. Instead, the Court of Appeals simply wants to ensure the State Board of Workers' Compensation by concluding the employer complied with the provisions of O.C.G.A. § 34-9-201 which is the provision of law that requires a prominent placement of the panel, intended to also find the panel was prominently placed. ◆

Ann McElroy, a senior attorney with Swift Currie in Atlanta, defends employers and insurers in workers' compensation claims. Her clients include county governments, insurance companies and large-scale claims management companies, to name a few. She coauthored a GDLA amicus brief to the Georgia Court of Appeals for the prevailing party regarding the issue of whether workers' compensation statute O.C.G.A. § 34-9-221(h) defines "compensation" to include medical benefits. She has prevailed in multiple hearings in front of various administrative law judges.

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Leveraging a Medical Billing & Coding Expert to Successfully Challenge Inflated Medical Bills

By Jennifer Adair (left), *Freeman Mathis & Gary, Atlanta,* and Toni Elhoms, *AccuMed*

Artificially inflated medical bills are a hot button issue in Georgia personal injury cases. Lien-based medical treatment costs have skyrocketed at unprecedented rates, which has incentivized overtreating and overcharging for medical care. The surge of inflated medical bills has unfortunately become all too common, and these issues resonate now more than ever with juries.

Challenging the cost of medical bills may seem like the last line of defense but should be considered in the early stages of evaluating the key defenses of your case. Even before a lawsuit is filed, defendants may be presented with settlement demands that require a good faith consideration, and a critical analysis of the medical bills may aid defense counsel and claims adjusters in analyzing the value of claims to respond to demands. Further, if claimants present surgical estimates and indicate an intention to move forward with surgery, there may be an opportunity to intervene and educate the claimant about the reasonable charge for the procedure before he/she commits to treatment at an inflated cost. In suit, not only do billing analyses provide data for the jury to consider in determining the reasonable cost of treatment to award, but they add context and further explain the bias inherent in the relationship among lien-based providers, attorneys, and their clients. Having bill review performed early in the claim process enables counsel and adjusters to make informed decisions and develop strategies based on objective data.

There are two important questions to ponder when evaluating

the reasonableness of medical bills and damages in your case. The first question is—Are there potential billing and coding noncompliance issues that exist? The answer can be uncovered in a billing and coding audit of the treating physician's/provider's medical bills and records conducted by a seasoned billing and coding expert. The second question is—Are the treating physician's/provider's charges above the usual, customary, and reasonable (UCR) threshold percentile for the medical market? The answer can be determined through a medical bill value analysis of the sticker prices of what other physicians/providers charge in the medical market where the treatment was rendered. The answer will also provide you with a unique perspective of what competitors of the treating physician/provider charge for the exact same service.

Medical billing and coding experts provide invaluable insight into the reasonable cost of both past medical care and future medical care. These experts possess specialized knowledge that can expose potential medical billing and coding abuses and price gouging. Knowing how to identify these issues in your case takes some practice and awareness of billing and coding fundamentals. Below are three of the most common billing and coding errors to be on the lookout for:

- **Upcoding:** Upcoding occurs when the medical provider bills for a higher level of service than was provided to the plaintiff. For example, the Chiropractor charges the plaintiff for 60 minutes of manual therapy, but only spends 17 minutes providing manual therapy. This would be an example of upcoding the service to reflect a higher service than was rendered.
- **Unbundling:** Unbundling occurs when the medical provider bills for multiple services that

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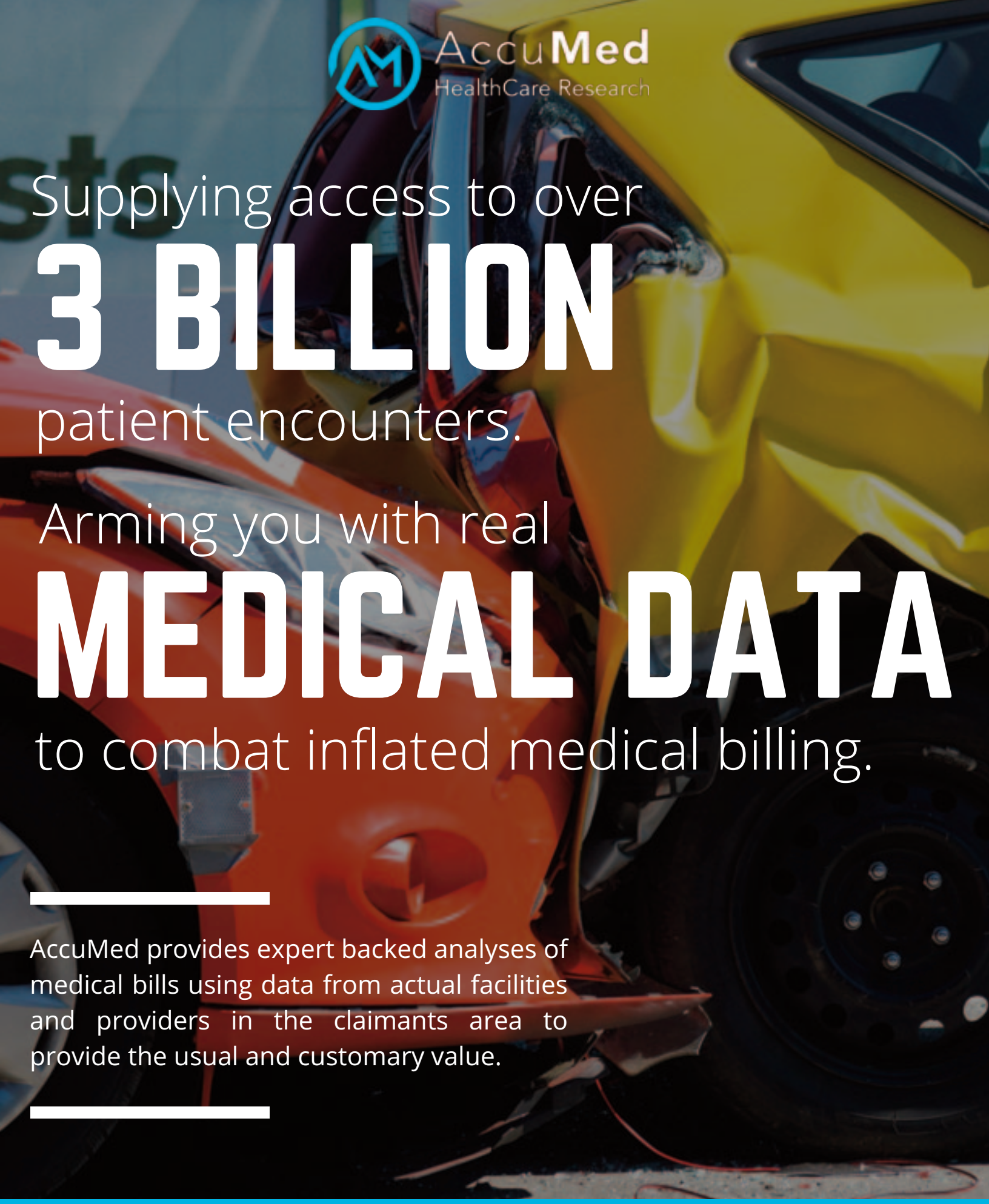

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All Forensic Cell Phone Images Are Not Created Equally

By Robert Draper
Relevant Data Technologies

We've all heard the phrase, "a picture is worth a thousand words," potentially leading many to believe that all forensic images of mobile devices are the same. However, when it comes to data-driven cases, all forensic images are not created equally.

Forensic cell phone imaging, also known as mobile device forensics, is the process of extracting and analyzing digital evidence from cell phones or other mobile devices. This type of forensic examination is often conducted in legal matters, such as criminal investigations, civil litigation, or internal corporate investigations. It involves preserving, acquiring, and analyzing data from mobile devices to uncover relevant information that can be used as evidence in court.

Forensic images preserve the data on the original device, making it usable in a legal proceeding. Capturing these specific types of images requires an in-depth understanding of the collection process and how images vary. If the proper software isn't used or an inferior process is deployed, key evidence will be left behind, either intentionally or unintentionally. Could this be a tactic intentionally used by your opposing party?

A perfect forensic copy, known as a Physical Image, is an exact copy of the physical storage on the device. But with the constant evolution of cell phones and operating systems, it can be challenging to acquire this type of image on many devices. Forensic images are created using forensic software, and there is no one software that can capture every device perfectly. Depending on the Make, Model and Operating System of a mobile device, some software will perform better than others.

There are different types of forensic images, with some only capturing the party's active data. This type of collection is less extensive and may work fine if the activity of the user is not key evidence. However, to get all the information within the system, including the deleted items and application databases, teams must acquire a Physical or a Full File System (FFS) image.

Why Collecting Full File System Data Is Essential

Forensic imaging maintains the original data, and by acquiring it legal teams ensure the electronic data can be submitted as evidence in court or their legal case. These images can determine which party has the most exposure in a case. They can be collected from cell phones, and other portable devices to uncover and understand the actions of the parties that are under investigation. Without an FFS image this type of key data can be left behind.

An FFS image shows the entirety of the data on the device, not only the active data but the deleted data and the application database information of the user. Without an FFS image, you could be leaving your team vulnerable to lost information or undiscovered data that could be what makes or breaks the case. Today, most legal matters rely, at least in part, on the data found and collected from a mobile device, so it is imperative you take the necessary steps to ensure it's a complete collection as possible using the industry's best software for the device being acquired.

Once a device has been properly imaged, using the best-known software and processes available, having an expert forensic analysis of the data can determine the location, time, and place of an event or actions of the user which are constantly being tracked and stored on a device. Investigating the activities of a party or individual user on their mobile devices requires a forensic expert with expertise to understand the difference in images, cell phone data, and how it is stored. These experts have experience and software to protect your best interests and the critical data needed.

Forensic data teams work to uncover the truth hidden in the data, collecting suitable types of forensic

Continued on page 70

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Why Defense Lawyers Should Love Early Mediation

By Jim Poe
BAY Mediation & Arbitration

The constant pressure that defense lawyers face from clients/carriers to hold down the costs of litigation requires a prompt, effective response. Failure to respond to this demand can result in bad outcomes: bills can be disputed and/or cut, cases can be redirected toward other firms and ultimately clients/carriers can make permanent changes in the lawyers they use to defend cases.

Early mediation can effectively reduce the cost of handling cases and can actually allow a defense firm to differentiate itself from other firms and expand its business. When early mediation resolves a case, it produces the following benefits which directly address the cost concerns of insurers and self-insureds:

1. Resolution through early mediation lowers the cost of defense counsel and can reduce the costs of discovery and expert witnesses by cutting those off early.
2. Resolution through early mediation eliminates the inherent risks of a trial and a surprise verdict.
3. Resolution through early mediation can produce a less expensive settlement because:
   A. Plaintiffs get a larger **net** recovery because they too avoid the out-of-pocket costs of discovery and expert witnesses.
   B. Plaintiffs may also get a larger net recovery because the contingent fee may be lower. (Even if the contract does not provide a lower contingent fee early in the case, plaintiff's counsel may be willing to reduce the fee as part of an early settlement).
   C. Early mediation takes advantage of an inherent interest in certainty (the value of "a bird in the hand over two in the bush"). Plaintiffs will often accept less to get a sure recovery instead of facing potentially lengthy and uncertain litigation. This is particularly true if plaintiffs face economic pressure from lost wages and mounting medical expenses.

For defense lawyers who resolve select cases through early mediation, there are separate benefits. Early resolution can reduce the tedium of handling bad cases within the economic expectations of the client/carrier. Resolving cases through early mediation can mean that most of the cases that then move to trial are those which need talented defense counsel. Selectively weeding out the cases where early mediation is appropriate can also reduce the need for a constant supply of young, inefficient, lawyers who need to be recruited and trained. Recruiting and training young lawyers, who often leave just as they finally become profitable, can reduce defense firms' efficiency and erode profit margins. It also magnifies the need to constantly increase the client base to accommodate those associates who grow to be partners. If the experienced trial lawyers within a firm are primarily spending their time only on serious cases, this will improve their and the firm's profitability, not to mention the lifestyle and burn out rate of these key members of the firm.

There are at least four kinds of cases where early mediation is likely to be beneficial. These case types need to be identified early in the discovery process:

1. Cases in which plaintiff is going to have a serious problem in establishing liability or causation.

This category is not intended to include cases where liability or causation is just weak. Instead, this is a narrower category—it is the subset of cases where there is a *decidedly* flat side on the wheel of the case.

Sometimes plaintiff's counsel takes a case based on representations by the prospective client which turn out not to be true. Auto accident cases can illustrate this point. Accident reports often have independent witnesses who actually tell a decidedly different story than the plaintiff has told his attorney. Alternatively, the physical evidence from the scene or the damage photos may establish a completely different story than the one the officer recorded. The same thing can happen with damages. Initial radiology reports taken at the time of the accident may identify serious pre-existing conditions which could not have

Continued on page 72

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Risk Analysis Considerations in Industrial Machinery Accident Investigations

By Martin Timm, P.E.
FORCON International

When a serious industrial machinery accident occurs, multiple parties want to know the causes and contributing factors of the accident. A thorough investigation is important. A "rush to judgment" may overlook significant underlying causes or contributing factors, while a thorough investigation may uncover these. A thorough investigation should consider whether: (1) a risk analysis was performed for the machinery; (2) the results of the analysis were used to reduce risk to the extent practicable; and (3) the residual risk was fully communicated to the purchaser, operators, and maintenance personnel.

Failure of a machinery supplier to identify hazards, reduce risk to the extent practicable, and communicate the residual risk to the machinery purchaser may place the machine supplier in a weak position. Being able to show that hazards were identified, risk was reduced, and residual risk was fully communicated can place the machine supplier and other third parties in a strong position.

Experienced legal and insurance professionals are familiar with the need to preserve evidence to aid in accident reconstruction and avoid spoliation claims: the need to secure witness statements, verify the condition and functionality of safety features, and obtain photos and videos of the equipment and scene as found, etc. There are additional items that may be important to a machinery accident investigation depending on circumstances. These items may not be as obvious, but early consideration should be given to having them secured and copies obtained to aid in later analysis. Broad categories of these items include:

- Procurement Documents
- Risk-related Documents
- Supplier IOM Documents (Installation, Operation, Maintenance)
- Owner IOM Documents
- As-found condition of signage / warnings / alert devices
- After-action reports from authorities or first responders

The following sections or this article will discuss each subject area.

Procurement Documents

Procurement documents are important in that they provide a roadmap to what was asked for, what was offered by the supplier(s), what promises, assurances, or guarantees were offered, and what was finally purchased and installed. Procurement documents include, but are not limited to:

- Requests for quotation (RFQs)
- Supplier sales literature and specifications
- Quotes / Purchase Orders / Contracts
- Drawings and schematics
- Text messages, e-mails, or correspondence between the parties that may address or touch on roles and responsibilities, especially as related to safety and training of personnel.

Comparison of these documents can identify potential issues such as: (1) purchasers of equipment applying them in ways not disclosed during purchase negotiations and not approved by the manufacturer; (2) suppliers failing to fully satisfy the customer requirements in the RFQ; (3) scope between parties being left undefined; (4) technical information provided by the supplier not matching what was actually shipped to the job site; and (5) resellers or integrators failing to pass on all safety related information from the supplier to the ultimate end-user, etc. Electronic and written correspondence are especially important as they can provide insight as to how each party met their obligations as described in the RFQ and supplier quote(s). For example, did a supplier specify that the purchaser was to provide and install certain safety barriers or interlocks, but the purchaser overlooked or ignored this and did not install such devices? If the supplier(s) stated they would comply with certain industry standards and government regulations, did they do so?

Risk-Related Documents

Most machinery industry segments have recognized standards, best practices and RAGAGEP (recognized as generally accepted good engineering practices). For example, the machine tool industry in the USA utilizes the "ANSI B11" standards. One of the foundation

Continued on page 76

- 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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GDLA Held its 56th Annual Meeting at the The Breakers in Palm Beach, June 15-18, 2023

A record number of GDLA members, sponsors, and other special guests gathered at The Breakers in Palm Beach, Fla. for the 56th GDLA Annual Meeting from June 15-18, 2023. Events began on Thursday evening with the Welcome, Y'all! Reception sponsored by BAY Mediation & Arbitration Services. Friday and Saturday mornings were marked by CLE presentations as planned by Program Chair and (then) President-Elect Pamela Lee. Friday evening was the President's Reception, sponsored by Veritext, honoring outgoing President Dart Meadows for his unprecedented 20-month term of office following the tragic passing of President George Hall in October 2021. FORCON sponsored the closing reception and dinner. Collision Specialists, Inc. and ESi sponsored the poolside hospitality bungalows.

During the Business Meeting on Saturday, GDLA members unanimously accepted the report of the Nominating Committee, co-chaired by Past Presidents Dave Nelson and Hall McKinley, electing the 2023-2024 officers and Board of Directors (see page 51). Pamela Lee of Swift Currie McGhee & Hiers in Atlanta took the reins as GDLA President. Other officers installed were President-Elect William T. "Bill" Casey, Jr., of Swift Currie, Atlanta; Treasurer Ashley Waldon Adelman Castilla McNamara & Prout, Atlanta; and Secretary Martin A. "Marty" Levinson of Hawkins Parnell & Young, Atlanta. Beth Boone of Hall Booth Smith, Brunswick, was elevated to Vice President and the following were elected to the Board of Directors: Scott Kelly of Fulcher Hagler, Augusta, and Barbara Marschalk of Drew Eckl & Farnham, Atlanta. The officers were sworn in by U.S. District Court Judge Rick Story.

Outgoing President Dart Meadows presented the Distinguished Service Award, the highest accolade given by GDLA, recognizing the recipient's extensive years of meritorious service, to Past President Jeffrey S. "Jeff" Ward. His widow, GDLA Executive Director Jennifer Davis Ward, accepted the posthumous award. Jeff passed away after a tragic accident on Memorial Day 2022.

Mark your calendar for the 57th GDLA Annual Meeting set for June 13-16, 2024, at Ponte Vedra Inn and Club in Florida.

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56th GDLA Annual Meeting: Welcome, Y'all! Reception

***Pictured enjoying the Welcome, Y'all! Reception are**: 1. Past President Warner Fox and his wife, Pat, with Scott and Michaela Young of BAY Mediation & Arbitration Services, a GDLA Platinum Sponsor and our host for the opening night reception. 2. Jay Doyle and his wife, Court of Appeals Judge Sara Doyle, with her college best friend and General Counsel of The Breakers Palm Beach, Kristy Pressly, and her husband, Grier. Unfortunately, they all kept saying, "Go, Gators!" 3. The First Family: President-to-be Pamela Lee with her husband, Chris, and two of their three children, Addison and Lillian. It was Lillian's birthday that evening so everyone serenaded her. Big brother Jackson was away at a baseball tournament. 4. Judge Rick Story and his wife, Nancy; Beth Boone; Amy Self and her husband, Judge Tripp Self; and Past President Steve Kyle. 5. Bill Merchant and Past President Staten Bitting. 6. Karen Karabinos with Elissa Haynes and her husband, Charlie. 7. Past President Walter McClelland and his wife, Kathy, with Jim Budd and his wife, Carol. 8. Visiting President of the South Carolina Defense Trial Attorneys' Association (SCDTAA) Giles Schanen and his wife, Christine, with President Dart Meadows and his wife, Carol.*

56th GDLA Annual Meeting: Welcome, Y'all! Reception


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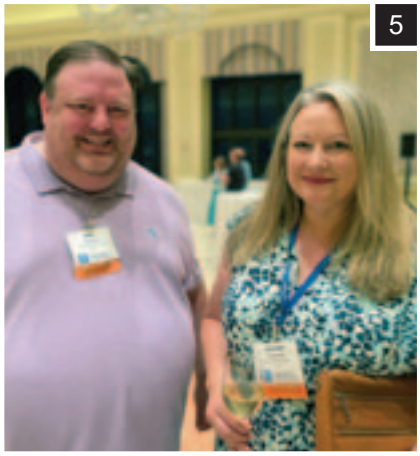
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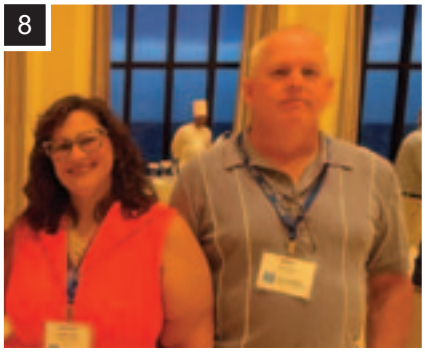
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More scenes from the Welcome, Y'all! Reception: *Although Mother Nature forced us indoors for the opening night, it didn't seem to dampen anyone's spirits. Pictured enjoying the evening are: 1. Joe and Christina Stephens, Jason and Wendy Logan, Ivy and Travis Hall. 2. David and Elizabeth Hayes (left) with then-Treasurer Bill Casey and his wife, Jet. 3. Marty Levinson, Matt Friedlander, and Elliott Ream. 4. Dana Braun, Executive Director Jennifer Davis Ward, and Philip Thompson. 5. Jake Daly and Jennifer Adair. 6. Tracy O'Connell, Katie Harden, Beth Boone, Beth Brooks, and Beverly O'Hearn. 7. GDLA's lobbyist Kade Cullefer, Jonathan Adelman, Brandon Rice and Secretary Ashley Rice, Senator Steve Gooch, and Ben and Alex Harbin. 8. Jennifer Guerra and her husband, Mike Smith.*

56th GDLA Annual Meeting: Educational Program

1. The late Jeff Ward had planned a U.S. District Court judges' professionalism panel for the 2020 GDLA Annual Meeting at The Breakers when he was program chair/President-Elect, but COVID cancelled that conference. We finally realized Jeff's dream team panel this year: Judge Tripp Self (Middle), Judge Rick Story (Northern), and Judge Lisa Wood (Southern and Jeff's mentor at Gilbert Harrell) with moderator Pat O'Connor. 2. Legislative panel with Jonathan Adelman, Marty Levinson, Jake Daly, Senator Steve Gooch, and GDLA lobbyist Kade Cullefer. 3. Jennifer Guerra discussed ethics in tripartite relationships. 4. Marty Levinson, Elissa Haynes, and Matt Friedlander explored bad faith traps. 5. Jay Doyle spoke with Judge Story about human trafficking and civil liability. 6. Toni Elhoms with GDLA Platinum Sponsor AccuMed and Jennifer Adair addressed how to challenge inflated medical bills (see article on page 40). 7. Ashley Kelly and Jud Wooddy with GDLA Platinum Sponsor InQuis offered practical considerations when reviewing medical projections and lifecare plans.

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The Executive Committee (EC) is composed of the officers and three most recent past presidents. This year is an exception in the wake of the passing George Hall and Jeff Ward.

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56th GDLA Annual Meeting: President's Reception

Friday night is the President's Reception*—this time honoring Dart Meadows for his extended tenure as President. 1. Dart (right) is pictured with his wife, Carol, and the evening's sponsor representatives, Jon Woody and Robyn Hipp, of GDLA Platinum Sponsor, Veritext. 2. Secretary Bill Casey (left) and his wife, Jet, with Kevan Dorsey and his wife, Caroline. 3. Sarah Lisle (left) with Past President Walter McClelland and his wife, Kathy. 4. Walter and Ruth Ballew. 5. Pat and Carol O'Connor with Robert Ingram. 6. The Logan family: Wendy, Jason Jr., Lilly, and Jason. 7. Judge Lisa Wood and Laurie Daniel. 7. Pam Harrison and Ryan Mock.*

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56th GDLA Annual Meeting: Business Meeting & Awards

Saturday morning marks the annual members business meeting: *1. President Dart Meadows receives the DRI Award for Distinguished Service for his leadership. He's pictured with outgoing DRI State Rep and GDLA Past President Matt Moffett, as well as DRI Southeast Regional Director Allen Estes. 2. Pamela Lee is sworn-in as the 57th GDLA President by Judge Rick Story as her husband, Chris, and daughters, Addison and Lillian, watch with pride. 3. An outtake from the magazine cover shoot featuring the officers in front of the iconic Breakers fountain. 4. GDLA member and Senator Bill Cowsert provides a legislative update. 5. Newly-sworn President Pamela Lee presents outgoing President Meadows with his gavel plaque, engraved mint julep cup, and the coveted "Past President" yellow ribbon for his name badge. 6. Past President Peter Muller alerts members to the potential for unauthorized practice of law (UPL) when clients use third-party companies to request medical records. 7. Judge Rick Story swears in the 2023-2024 officers: President-Elect Bill Casey, Treasurer Ashley Rice, and Secretary Marty Levinson. 8. Nominating Committee Co-Chairs/Past Presidents Hall McKinley and Dave Nelson present the slate of candidates for officer and Board of Directors positions for approval by the membership.*

56th GDLA Annual Meeting: Fun in the Sun

1

2


3

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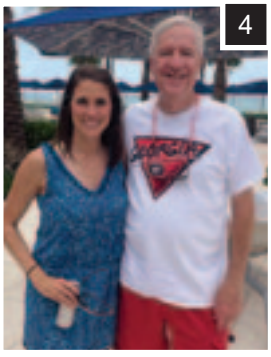
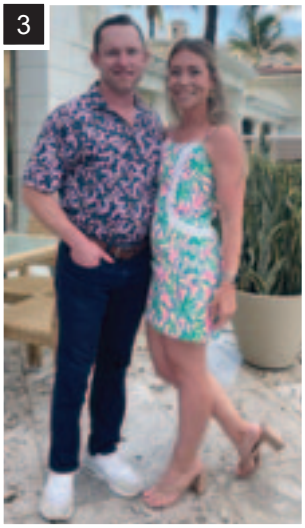

4

Fun in the sun! *We were grateful once again to have GDLA Platinum Sponsors Collision Specialists, Inc. and Engineering Systems, Inc. (ESi) team up to sponsor our hospitality bungalows. 1. Dylan and Connor Murphy of Collision Specialists, Inc. with Joe Stephens, Jason Lewis, and Treasurer Ashley Rice. 2. Robert Johnson and Bill Merchant with ESi's Heather Slatton and Torrence Welch. 3. Katie Harden, Beth Brooks, and Bea Hancock. 4. President Pamela Lee and Judge Rick Story.*

56th GDLA Annual Meeting: Closing Reception & Dinner



Platinum Sponsor FORCON, again sponsored our closing festivities. *1. Past President Grant Smith and his wife, Holly (left), with FORCON's Bryan Hubert and his wife, Shannon. 2. The Lewis family: Henry, Jason, Annie, and Carter. 3. Cody and Rebecca McCollum. 4. Treasurer Ashley Rice and her husband, Brandon. 5. The Bevill family: Colby, Christina, Chad, and Cy. 6. David Hayes and his wife, Elizabeth. 7. The Parker family: Leah with her husband, Walter, and children, Fox and Miller. 8. "Top Gun" doppelgangers, John Glenn and (his dad) Kevan Dorsey, with their equally cool mom/wife, Caroline. 9. The Levinson family: Secretary Marty with his wife, Cathi, and children, Lexi, Zach, and Lucas.*

10. Wes Childs and his wife, Lauren (left), with Elizabeth Ford (right) and her husband, Bradshaw. 11. Joe Stephens and his wife, Christina (left), with Senator Bill Cowsert and his wife, Amy. 12. Past President Matt Moffett and his wife, Diane, with Anne Gower.

CLOSING RECEPTION AND DINNER

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Florida Tort Legislation

Continued from page 20

  - A locking device on each window and each exterior sliding door, and another on other doors not used for community purposes.
  - Locked gates with key or fab access along pool fence areas.
  - A peephole or door viewer on each dwelling unit door that does not include a window or that does not have a window next to the door.
- Crime Prevention Analysis. By January 1, 2025, the property owner must complete a "crime prevention environmental design" that is no more than three years old for the property. The assessment must be performed by a law enforcement agency or a Florida Prevention Through Environmental Design Practitioner (FCP). The property owner must remain in substantial compliance with this assessment.
- Crime Prevention Training. By January 1, 2025, the property owner must provide proper crime deterrence and safety training to its current employees. This training is to familiarize employees with security principles, devices, measures, and standards outlined in the checklist of physical measures listed in requirement one.
- Proposed Curriculum. The Florida Crime Prevention Training Institute of the Department of Legal Affairs shall develop best practices for owners and operators to implement such training.
- The fault of the assailant. The individual who performed the criminal act may be included on the verdict form.
- Trespassers. Trespassers do not have a claim for negligent security.

Effect of changes as to negligent security claims. First, we expect a reduction of negligent security cases. These changes will reduce the number of negligent security cases. Between defining the standard of care and placing assailants on the verdict form, the likelihood of prevailing on these matters and the amounts one can recover for them is reduced. Plaintiff lawyers will be hesitant to accept these cases. Next, we anticipate a battle of the Experts. Before the law changed, negligent security cases were typically a battle of the experts, in which each side's expert testified about the foreseeability of the criminal action that occurred and the reasonableness of the steps the property owner took to maintain the property in a safe condition. Plaintiff's expert typically testified that the property didn't have sufficient patrols, lighting, guards, security cameras, and lighting. The new legislation incentivizes property owners to implement these security measures to be presumed not to be negligent and will reduce the cost of expert retention.

Bad Faith. The law modifies bad faith law to:

- Allow an insurer to avoid third-party bad faith liability if the insurer tenders the policy limits or the amount demanded by the claimant within 90 days after receiving actual notice of the claim.
- Failure of an insurer to tender within 90 days is not bad faith and is inadmissible in a bad faith action.
- If the insurer fails to tender within 90 days, any applicable statute of limitations is extended by 90 days.
- Clarify that negligence alone is not enough to demonstrate bad faith.
- Require a claimant to act in good faith concerning furnishing information, making demands, setting deadlines, and attempting to settle the insurance claim.
- The trier of fact may consider whether the insured, the third-party claimant, or their representative did not act in good faith and, if so, reasonably reduce the damages awarded against the insurer.
- Allow an insurer, when there are multiple claimants in a single action, to limit the insurer's bad faith liability by paying the total amount of the policy limits at the outset.
- If two or more third-party claimants have competing claims arising out of a single occurrence, which in total may exceed the insured's available policy limits, the law provides that the insurer does not commit bad faith by failing to pay all or any portion of the available limits to one or more of the third party claimants if, within 90 days after receiving notice of the competing claims, the insurer must either: 1) Files an interpleader action; or 2) pursuant to binding arbitration agreed to by the parties, makes the entire amount of the policy limits available for payment to the competing third-party claimants before a qualified arbitrator selected by the insurer and

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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.

the third-party claimants at the insurer's expense.

Effect of changes to bad faith law. Before this law, the system incentivized plaintiff lawyers to devise situations that led to a bad faith claim to obtain larger settlements. This law ends such "set up" claims. It is also anticipated to reduce bad faith claims. Allowing insurers enough time to apprise a claim will result in more comprehensive claims handling and fewer bad faith claims. Rushed claims handling due to stringent time restraints led to many bad faith claims.

Contingency Fee Multiplier. The law creates a presumption that the lodestar fee is sufficient and reasonable in a case in which attorney fees are determined by or awarded by the court. A claimant may overcome this presumption only in a rare and exceptional circumstances and only if they can demonstrate that they could not have otherwise reasonably retained competent counsel.

Effect of Changes to Contingency Fee Multiplier. Removing multipliers will reduce the threat of runaway of attorney fees.

One-Way Attorneys' Fees. One-way attorneys' fee provisions for plaintiffs are limited to where the insurer denied coverage and the insured prevailed in a declaratory action.

Effects of Elimination of One-Way Attorneys' Fees. Plaintiffs may be subject to attorney's fees and are less likely to file questionable claims, thereby reducing insurance claims. It may increase the likelihood of settlement. Plaintiffs facing a possible attorneys' fees claim may be more inclined to settle on reasonable terms.

Statute of Limitations. The statute of limitations for general negligence is reduced from four to two years.

Effects of Changes to the Statute of Limitations. With a shorter statute of limitations, some claims may not be filed timely, possibly resulting in fewer claims. There is also a reduced likelihood of loss of evidence. Cases filed close to the four-year deadline may make tracking relevant witnesses and evidence difficult. With a two-year deadline, one is more likely to track down relevant evidence.

What Happens Now

This law changes the tort litigation landscape in Florida. Expect challenges to its constitutionality. The Florida Supreme Court leans right and may be inclined to leave the law and its provisions alone. It may, however, having issued administrative orders in response to the COVID pandemic, issues administrative orders to ensure courts and counsel have the structure and protocols to deal with the onslaught of new suits. And what should you do to respond to all the new lawsuits?

> *Rushed claims handling due to stringent time restraints led to many bad faith claims.*

Here are some suggestions:

- ***Scale Up.*** Consider expanding your legal team. You will be deluged with cases. You will be flooded with time-sensitive policy limits demands if you're a carrier. Plaintiff's bar has made clear that the time frame for these demands will be short (Morgan & Morgan is making thousands of five-day policy limits demands), and they will argue that the lack of claims professionals to evaluate these claims is not a defense to bad faith. Expect plaintiff firms to discuss which carriers have the fewest boots on the ground. Those in leadership at defense firms know we have already been struggling to hire and keep associates for several years. And now, just as the hiring boom was waning, this happened. Look to your local state attorneys' and public defenders' offices, local law schools, and recruiters, and institute a training program to teach them how to handle a large volume of time-sensitive matters.
- ***Bad Faith.*** Expect most suits filed before the statute's passage to have a time-sensitive policy limit demand of only a few days. Do not expect courts to provide grace to law firms or legal or claims departments who do not have the resources to investigate these claims thoroughly. Create a protocol for each type of case you handle (non-commercial auto, commercial auto, slip and falls, trip and falls, negligent security, etc.), teach it to your team, and organically modify it in response to what works and what doesn't. This ensures everyone is appropriately and thoroughly investigating all claims and will serve as evidence of proper claims handling in any subsequent bad faith claim.
- ***Develop protocols.*** Large caseloads demand litigation management. Develop protocols, checklists, and procedures for your team to effectively and efficiently litigate when handling many deadlines. As with addressing time-sensitive demands, have a litigation plan for each type of case, and modify it with your team's feedback.
- ***Share orders.*** Trial courts will enter numerous orders on response times, discovery issues, and applications of the new law. Defense firms should develop means to share helpful orders.
- ***Collaborate.*** In addition to developing litigation management plans, meet regularly with your team to evaluate what is working and what isn't.
- ***Work with opposing counsel.*** Despite anecdotes of plaintiff attor-

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neys planning on behaving obstreperous, everyone will need extensions, accommodations, and patience. Do your part to lower the temperature and work cooperatively with opposing counsel.

- ***Keep your cases straight.*** Have two case lists—those that fall under the new law and those that don't, and work each set appropriately.
- ***Seek out opportunities to streamline.*** Large caseloads demand efficiencies. Through a feedback loop with your team, learn where forms, shortcuts, and other measures can help your team work faster and more efficiently.
- ***Judges will be overwhelmed.*** What will happen will be reminiscent of the foreclosure deluge after the banking crash. Judges had more cases they could handle and expected counsel to work out as much as possible, reducing the number of hearings. Despite any animosity this law will engender between the plaintiffs and the defense bar, courts expect attorneys to get along and not file countless motions to compel, for sanctions, etc.
- ***Possible repercussions.*** Carriers, businesses, and defense firms who led the fight for this legislation may find the least amount of cooperation from the plaintiff's bar. Everyone knows who stuck their necks out, and they may be targeted with shorter time frames for demands, fewer extensions, and fewer courtesies. Be prepared if this happens.
- ***Educate.*** There will be innumerable resources interpreting the new legislation and advice on handling the influx of matters. Select what works best for your team and share it with them.
- ***Support.*** Your team will be overextended and anxious from all the deadlines. Support them.

Conclusion

To say this legislation is a game-changer in the state of Florida is an understatement. In-house counsel, claims professionals and defense firms must prepare for the onslaught of cases and the changes this legislation brings. ◆

Frank Ramos is a partner with Clarke Silvergate in Miami, Fla., where he practices in the areas of commercial litigation, drug and medical device, products liability, and catastrophic personal injury. He is a Past President of the Florida Defense Lawyers Association (FDLA) and former Southeast Regional Director on the DRI Board of Directors (GDLA is part of the Southeast Region with FDLA and the Alabama Defense Lawyers Association).Ramos has also served on the board of the Federation of Defense & Corporate Counsel (FDCC). He has tried to verdict personal injury, medical malpractice, product liability, and inverse condemnation cases.

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Mr. Shryock has a wide breadth of experience in forensic accounting for insurance and construction-related matters. He has testified at arbitration, in Federal Court and in State Court. He has also been deposed on numerous occasions and has participated in multiple meditations and other claims settlement negotiations. He has been named as an expert in matters related to business interruption/lost profits, construction costs and related change order documentation, financial condition and motive in alleged arson claims, business valuation issues, and business inventory losses due to fire.

Auto Liability

Continued from page 34

ruary 27, 2013. The cover letter noted that the only markings allowed on the 2013 Form were William's signature and date and that if he wanted to select different coverage than was pre-selected, he needed to call Liberty Mutual using the provided telephone number. Finally, the cover letter provided another explanation of the differences between reduced-by and add-on coverage along with a hypothetical to illustrate the same. It was undisputed that William signed, dated, and returned the 2013 Form on March 6, 2013 (a week or so after the stated deadline).

On appeal, Irish Frey argued that by limiting what William could write on the 2013 Form, Liberty Mutual discouraged him from selecting add-on coverage and coerced him into maintaining the pre-selected reduced-by coverage. Irish also asserted that by placing the "burden" on William to call Liberty Mutual if he wanted to change the pre-selected coverage, the insurer was not acting pursuant to the intent of Georgia's UM statute, O.C.G.A. §33-7-11. However, Irish cited to no legal authority or specific language in the UM statute prohibiting an insurance company from so "burdening" an insured.

The Court disagreed and found that because the language of the 2013 Form and cover letter unambiguously explained the difference in reduced-by and add-on coverage and provided detailed instructions on how to make a selection between the two, Irish could not show that William was coerced into selecting reduced-by coverage. Moreover, by signing, dating, and returning the 2013 Form, William represented that he understood Liberty Mutual's explanation of coverage. The parties to a contract are presumed to have read their provisions and to have understood the contents. Thus, the Court held that William's selection of reduced-by UM coverage was knowing and voluntary under the unambiguous language of the 2013 Form and its cover letter.

Finally, Irish Frey argued that the policy should provide the "broadest UM coverage available" because Liberty Mutual received William's signed 2013 Form after its due date. The Court found this argument to be a "nonstarter" and reiterated prior holdings that an insured may modify the terms of his or her policy at any time by notifying the insurer of the requested change. Thus, even though William executed and returned the 2013 Form after the deadline, his selection of reduced-by coverage was a modification of the policy and was nevertheless effective once made.

Jones v. Georgia Farm Bureau Mutual Insurance Company
367 Ga. App. 35 (2023)
Dillard, P.J.; Mercier and Markle, JJ., concur

On March 1, 2023, the Court of Appeals of Georgia affirmed the trial court's grant of partial summary judgment to Georgia Farm Bureau Mutual Insurance Company as to the amount of uninsured motorist ("UM") coverage provided for in an insurance policy GFB issued to Ernie Jones in two appeals filed by beneficiaries William Jones and Madison Jones which were consolidated.[1] These cases provide guidance as to the applicable UM policy limits in cases where the insured affirmatively chose UM limits less than the liability limits without specifying the amount of the UM limits, and the amount of the UM limits was included separately on the declarations page.

On January 12, 2015, Jones met with GFB agency manager Russ Godwin. During the meeting, Jones made modifications to his policy and signed his name to a form stating, "I affirmatively choose Uninsured Motorist Limits in amount of less than the Limit of Liability for Bodily Injury and Property Damage Coverage." The signature page did not provide him with an option to select the *specific* amount of UM coverage desired, but it stated that it "contain[ed]" a declarations page which included the amount of coverage. The declarations page showed that Jones had liability limits of $1,000,000 per person and UM limits of $25,000 per person. Thereafter, periodic notices were sent by GFB to Jones confirming these limits.

On April 18, 2016, Jones was killed in a car accident while covered by his GFB policy. During litigation following the accident, the Court granted GFB's motion for partial summary judgment, finding that Jones affirmatively chose UM limits of $25,000 when he modified his policy in 2015. These consolidated appeals follow.

In Case No. A22A1685, William argued, in part, that the trial court erred in granting partial summary judgment to GFB because (1) Jones did not affirmatively choose UM limits lower than the liability limits and, thus, the UM limits are set at an amount equal to the liability limits pursuant to O.C.G.A. § 33-7-11; and (2) the signature page and the declarations page do not establish that Jones selected UM limits of $25,000.[2] O.C.G.A. § 33-7-11 requires insurers to provide UM coverage unless the insured rejects UM coverage in writing. Following a statutory amendment in 2001, insurers were required to provide either the mandatory minimum UM coverage of $25,000 per person or optional coverage in an amount equal to the liability limits if the liability limits exceed $25,000 per person. While an insured may affirmatively choose UM coverage in an amount less than the liability limits, the amount of UM coverage defaults to the liability limits in the absence of an affirmative choice of a lesser amount. Further, unlike an insured's rejection of UM coverage, an insured's choice of UM coverage

in amount less than the liability limits need not be in writing. Even still, the insurer has the burden of proving that the insured made an affirmative choice of lesser coverage.

First, while Jones was not statutorily required to make an affirmative choice of UM coverage in amount less than the liability limits in writing, the record conclusively establishes that he did so by signing his name under a statement that is not only unambiguous but also tracks the language of O.C.G.A. § 33-7-11. Further, the Court declined to impose a requirement that an insured *simultaneously* make an affirmative choice of UM coverage in amount less than the liability limits and a choice of the specific amount of UM coverage, reasoning that the General Assembly did not include language imposing such a requirement in the UM statute and it is not the role of the Court to rewrite the statute to include such a requirement. As such, even though the specific amount of UM coverage was not included on the signature page, Jones properly exercised his option to affirmatively choose UM coverage in amount less than the liability limits.

Second, while a declarations page showing a UM limit less than the liability limit, standing alone, is insufficient evidence of an affirmative choice of UM coverage in amount less than the liability limits,[3] GFB satisfied its burden of proving that Jones affirmatively chose UM limits of $25,000 per person with the *combined* evidence that Jones signed his name under a statement affirmatively choosing UM coverage in amount less than the liability limits, the signature page expressly stated that the policy contained a declarations page detailing the amount of coverage, and the declarations page indicated that he chose UM limits of $25,000 per person. In short, the Court charged Jones with "awareness of the insurance coverage [he] solicited, and with checking the policy to see that proper coverage had been obtained."

In Case No. A22A1696, in addition to the arguments outlined above, Madison argued that public policy concerns weigh against the trial court's grant of partial summary judgment to GFB. Because the appellants relied on *Jones v. Ga. Farm Bureau Mut. Ins. Co.*, 248 Ga. App. 394 (2001), which applied the pre-2001 version of the UM statue and did not involve the issues presented in their appeal, the Court held that this claim of error was not supported by relevant legal authority. ◆

Morgan McGee and Brooke Ray practice with Waldon Adelman Castilla Hiestand & Prout in Atlanta. Ms. McGhee focuses her practice in the areas of insurance defense, insurance coverage, and civil litigation. She authored the Frey case law update. Ray concentrates on automobile negligence, insurance defense, and civil litigation. She authored the Jones update.

Endnotes

1. In accordance with the Court's reference to the parties throughout its opinion, we will refer to William Jones and Madison Jones by their first names or as the "appellants" collectively, Georgia Farm Bureau Mutual Insurance Company as "GFB", and Ernie Jones as "Jones."
2. William also argued that the testimony of the insurance agent who met with Jones in 2015 was not credible and GFB's routine destruction of documentary evidence required denial of its motion for summary judgment. However, the Court did not consider the credibility argument because the trial court expressly noted that the insurance agent's credibility was irrelevant to its ruling and is, therefore, outside the scope of the Court's review. Further, the Court did not consider the spoliation argument because litigation was not pending or even contemplated in 2015 when the alleged destruction of evidence occurred.
3. *McGraw v. IDS Property & Casualty Insurance Company*, 323 Ga. App. 408 (2013); *Government Employees Insurance Company v. Morgan,* 341 Ga. App. 396 (2017).

Amicus

Continued from page 16

the statute. In its amicus brief, GDLA asks the Court to clarify when a mutual agreement between the parties has occurred, adding, "We respectfully request this Court provide that a standard of candor and reasonableness must be used to determine whether the offer complies with the statute and whether the acceptance conforms to the requirements of the offer."

GDLA joined the petitioners in requesting the grant of a writ of certiorari. The Supreme Court is asked to impose some reasonable standards and a duty of good faith on increasingly complex pre-suit policy limits offers. It is argued that pre-suit settlement offers on low limits policies are actually a calculated effort to engineer a response from the insurer that the plaintiff can assert is not a mirror image of the terms of the offer, so not settlement contract is formed. Two other amici briefs were filed. The respondent/plaintiff also requested that the Supreme Court accept the case to, inter alia, "address the insurance industry's constant requests to re-write the law of contract formation."

GDLA thanks the authors for their time in drafting both briefs. We also appreciate the continued efforts of our hard-working Amicus Committee co-chaired by Elissa Haynes of Freeman Mathis & Gary in Atlanta and Philip Thompson of Ellis Painter in Savanna, alongside Vice-chair Patrick Silloway of Balch & Bingham in Atlanta. These and prior briefs can be found in the members only area under Amicus Policy & Briefs. ◆

Employment Update

Continued from page 36

Labor Relations Act (the "Act"). The issue before the NLRB in *The Atlanta Opera, Inc.*, Case No. 10-RC-276292 was whether certain workers—artists, hairstylists, and wig artists—are independent contractors or employees of The Atlanta Opera, Inc. The Make-up Artists and Hair Stylists Union, Local 798, filed a petition to represent those workers and The Atlanta Opera, Inc. asserted that the petition should be denied because the workers are not covered by the Act; they are independent contractors, not employees. The NLRB disagreed and found the workers to be statutory employees, entitled to the right to unionize. This decision is particularly significant in its clarification of the independent contractor standard.

The Act provides that the "term 'employee' shall include any employee … but shall not include … any individual having the status of an 'independent contractor.'" Courts have applied a common-law agency test to determine whether workers are employees or independent contractors under the Act. The non-exhaustive list to be considered has historically included:

a. the extent of control which, by the agreement, the master may exercise over the details of the work;
b. whether or not the one employed is engaged in a distinct occupation or business;
c. the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
d. the skill required in the particular occupation;
e. whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
f. the length of time for which the person is employed;
g. the method of payment, whether by the time or by the job;
h. whether or not the work is a part of the regular business of the employer;
i. whether or not the parties believe they are creating the relation of master and servant; and
j. whether the principal is or is not in business.

The NLRB has also considered whether workers have significant entrepreneurial opportunities and, in making that determination, has assessed whether they have the ability to work for other companies and hire their own employees, as well as whether they have a proprietary interest in their own work. In Atlanta Opera, Inc., the Board prior precedent that seemed to focus on the "entrepreneurial opportunity facet of the test." According to the NLRB, there is no precedential basis on which to use entrepreneurial opportunity as a "super-factor" in the determination of a worker's status. Moreover, the NLRB emphasized that the "dimensions of the employer-employee relationship [ ] cannot be reduced to a single comparison between employer control and entrepreneurial opportunity. Instead, a nuanced, multi-factor inquiry—including entrepreneurial opportunity as one of its factors—is required."

Pregnant Workers Receive Additional Protections

The Pregnant Workers Fairness Act ("PWFA") went into effect on June 27, 2023, and the Equal Employment Opportunity Commission ("EEOC") began accepting charges under the PWFA that same day.

The PWFA applies to all private and public sector employers with at least fifteen employees as well as Congress, federal agencies, employment agencies, and labor organizations. It requires that employers provide "reasonable accommodations," to qualified employees and job applicants, relating to childbirth, pregnancy, or other related medical conditions, unless those accommodations cause the employer "undue hardships."

The terms "reasonable accommodations" and "undue hardships" under the PWFA are defined by the Americans with Disabilities Act of 1990 ("ADA"). Appropriate reasonable accommodations are to be determined by the interactive process provided for by the ADA, in which employers and employees work together, in good faith, to pursue reasonable accommodations. Employers who, in good faith, pursue reasonable and equally effective accommodations that do not cause an undue hardship are not liable for damages when such accommodations cannot be found. The PWFA removes pregnant workers and job applicants from the void created by Title VII and the ADA.

U.S. Supreme Court Increases Employer Burden for Title VII Religious Accommodations

In one of its last days in session, the U.S. Supreme Court issued its decision in *Groff v. Dejoy,* Case No. 11-174, which was on appeal from the Third Circuit's decision, which can be found at 35 F.4th 162 (3d Cir. 2022). In its decision issued on June 29, 2023, the Court changed an important standard for assessing a religious accommodation request under Title VII of the Civil Rights Act of 1964.

The U.S. Supreme Court's Factual Summary is as Follows:

> Petitioner Gerald Groff is an Evangelical Christian who believes for religious reasons that Sunday should be devoted to worship and rest. In 2012, Groff took a mail delivery job with the United States Postal Service. Groff's position generally did not involve Sunday work, but that changed after USPS agreed to

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begin facilitating Sunday deliveries for Amazon. To avoid the requirement to work Sundays on a rotating basis, Groff transferred to a rural USPS station that did not make Sunday deliveries. After Amazon deliveries began at that station as well, Groff remained unwilling to work Sundays, and USPS redistributed Groff's Sunday deliveries to other USPS staff. Groff received "progressive discipline" for failing to work on Sundays, and he eventually resigned. Groff sued under Title VII of the Civil Rights Act of 1964, asserting that USPS could have accommodated his Sunday Sabbath practice "without undue hardship on the conduct of [USPS's] business." 42 U. S. C. §2000e(j). The District Court granted summary judgment to USPS. The Third Circuit affirmed based on this Court's decision in Trans World Airlines, Inc. v. Hardison, 432 U. S. 63, which it construed to mean "that requiring an employer 'to bear more than a de minimis cost' to provide a religious accommodation is an undue hardship." 35 F. 4th 162, 174, n. 18 (quoting 432 U. S., at 84). The Third Circuit found the de minimis cost standard met here, concluding that exempting Groff from Sunday work had "imposed on his coworkers, disrupted the workplace and workflow, and diminished employee morale." 35 F. 4th, at 175.

Under the new standard articulated by the U.S. Supreme Court in its ruling, showing undue hardship under Title VII, which would excuse an employer from providing a religious accommodation, is shown when a burden is substantial in the overall context of an employer's business. This is a gross departure from the prior standard of requiring an employer to show that it would bear more than a "de minimis cost" in order to prove an undue hardship. However, the Court did not provide much guidance for application of this new test and remanded the case back to the lower courts. ◆

Robert Luskin is a partner with Chartwell Law in Atlanta, where he defends corporations and individuals in various complex litigation matters. He has extensive experience in the areas of product liability, premises liability, professional negligence, questionable insurance claims, and other insurance coverage matters. He also defends companies against employment related matters, including discrimination and harassment issues. Luskin serves as GDLA's State Rep to DRI.

Graham Newsome is an associate with Chartwell Law in Atlanta. He defends corporations in administrative charges and lawsuits arising under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (ADEA), the Family and Medical Leave Act (FMLA), and the Americans with Disabilities Act (ADA), as well as related state laws.

Medical Billing & Coding

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are already accounted for in a primary procedure. For example, the Pain Management Doctor charges the plaintiff for a lumbar epidural facet injection under fluoroscopic guidance ($6000) at L3-4 and then reports a separate charge for fluoroscopic guidance ($2500), which is effectively double-dipping since the fluoroscopic guidance is already included in the charge for the lumbar epidural facet injection. This would be an example of unbundling the service resulting in a double charge for the same service.

- **Duplicate Billing:** Duplicate billing occurs when the medical provider bills multiple units of the same exact service for the same fee. For example, the Orthopedic Surgeon performs an Anterior Cervical Discectomy Fusion (ACDF) and charges $100,000 for the surgery. The Physician Assistant (PA) employed by the Orthopedic Surgeon, who helped assist the surgeon in the ACDF also charges $100,000 for the surgery. This would be an example of duplicate charging since it would be improper to charge the PA's work at the exact same rate as the Orthopedic Surgeon performing the actual surgery.

If any of these medical billing and coding issues or inflated medical charges come to light in your case or you have an inkling, consider consulting with a seasoned medical billing and coding expert to offer valuable intel on possible defenses of your case. ◆

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Forensic Phone Images

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images for each client based on the specifics of their case. They should streamline the workflow and ensure data is collected, categorized by relevance, and formatted for clarity to maintain optimal data outcomes.

Here are some key steps involved in the forensic cell phone imaging process:

- **Evidence Preservation:** Properly preserving the mobile device is crucial to maintaining the integrity of the evidence. This involves documenting the condition of the device, including physical damage, and ensuring that it is securely stored to prevent any potential tampering or alteration of data.
- **Device Acquisition:** Forensic specialists use specialized tools and software to create a forensic image, also known as a bit-by-bit copy, of the entire device's storage. This image is a snapshot of the device's contents at the time of acquisition and ensures that the original data remains intact for analysis.
- **Data Extraction:** Once the forensic image is created, investigators can extract various types of data from the mobile device. This includes call logs, text messages, emails, internet browsing history, social media activity, photos, videos, GPS data, and any other relevant files or applications.
- **Data Analysis:** The extracted data is then analyzed to identify and interpret relevant information. This may involve searching for specific keywords, examining communication patterns, reconstructing timelines, and piecing together the digital evidence to support or refute a particular claim or allegation.
- **Report Preparation:** A comprehensive report is generated to document the findings of the forensic analysis. This report includes details about the device, the extraction process, the analyzed data, and any conclusions or expert opinions based on the findings. The report should be clear, concise, and prepared in a manner that is admissible as evidence in court.

It's important to note that forensic cell phone imaging should be performed by qualified forensic professionals who are experienced in handling digital evidence and following proper chain of custody procedures. The specific techniques and tools used may vary depending on the type of mobile device and the available technology at the time of the investigation. Additionally, legal requirements and protocols can vary between jurisdictions, so it's essential to adhere to applicable laws and regulations during the forensic process.

Knowledge is Power, and the data on mobile devices can lead to acquiring the data that supplies the key knowledge you need to defend your positions. However, improper techniques used by Forensic Examiners, or your Opposing Party can leave that key data behind. It is important to understand this occurs all the time in our industry by inferior Forensic Examiners, or possibly done intentionally by your opponent to hide the truth. Protect your best interests and those of your client and avoid this happening to you. ◆

Robert Draper is the President of GDLA Platinum Sponsor Relevant Data Technologies, an Atlanta litigation support company that provides cutting-edge technology, with white glove boutique-style service. Rob has been in the industry for over 17 years, supporting clients in their unique discovery needs. He works very closely with his clients leading the strategic and tactical identification of potentially relevant information; addressing the changing market with service offerings to ensure the proper use of technology, nimble project management, and the desired project outcomes.

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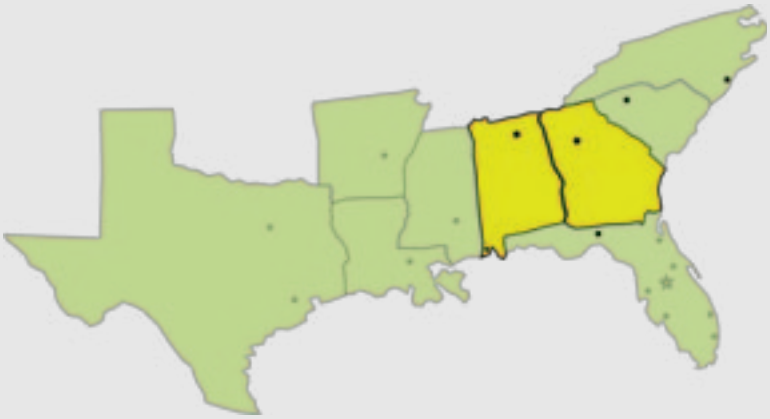

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Early Mediation

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been caused by the collision. Medical histories may document pre-existing conditions the plaintiff failed to report to his/her lawyer. The plaintiff's lawyer may be completely unaware of prior collisions or claims involving the same injuries of which the defense has knowledge.

The venue chosen or forced on the plaintiff may also mean some cases are significantly less likely to result in a high verdict. In some counties jurors are simply not going to be receptive to hotly disputed claims for liability when there is minimal physical damage or demonstrable injury. In some counties jurors may not be very receptive to soft tissue injury cases.

While defense counsel may be correct that such cases can be successfully defended through trial with relatively low exposure, such cases can actually be a trap that makes the client/carrier unhappy even if the defense wins. Defending these claims can be winning the battle but losing the war! These weak cases can gobble up billable hours and generate expenses on the way to trial that end up defeating the demands being made for cost control.

The key is to recognize that these cases are also a potential trap for plaintiff's counsel. They too have an incentive to resolve the case early and move on. Both sides can have an incentive to find a resolution of the case which makes sense economically. Early mediation provides both sides a chance to take an exit ramp before the expenses lock in a need for trial.

2. Cases in which plaintiff's counsel may have one or more reasons to want an early resolution, either from the outset or from developments during discovery.

Not every case filed is a substantially perfect case. Some are damaged from the outset. Others may become damaged as discovery moves along. Experienced defense counsel reading a file early on can often spot the flaws which are already present, or which can be readily exploited.

A. Plaintiffs may seriously damage their own cases. Plaintiffs are not professional witnesses. Most are under a lot of self-imposed pressure when they give their depositions. Sometimes plaintiffs are such poor witnesses that they seriously weaken their own cases. They may be inarticulate, they may come across too aggressively, or they may seem like profound exaggerators. They may be so concerned with establishing their right to recover that they contradict key facts or construct stories that are internally inconsistent. Sometimes they make up "facts" rather than admitting they do not know the answer to a question. In some cases, they come across so poorly that it is clear that jurors are unlikely to believe them, like them or want to help them.

B. Independent witnesses may fall apart. Independent witnesses can be subject to the same potential deposition performance issues as plaintiffs. They can be so concerned with establishing their version of the facts that they make up implausible facts or damage their own credibility by the way they testify. Experienced defense counsel can often accurately anticipate when and where such problems will occur and can direct discovery to explore and exploit that possibility.

C. Expert witnesses may turn out to be terrible witnesses. Despite their cost, some experts are simply unprepared. Many have either not been given pertinent records of past care and treatment or they have them but have not bothered to read them and are not ready to manage how these records contradict key claims. Others are simply so awed by their own brilliance that they over-testify and undercut their credibility. Some will take unbelievable positions based on who hired them and what they think they have been hired to establish.

When defense counsel believes one of these problems is present or likely to develop, they should move promptly to exploit that assessment. While effective discovery is always to be celebrated, saving such accomplishments for trial is not the best use of such testimony. Instead, locking in such testimony should be recognized as an opportunity to explore settlement. Significant damage to a case in discovery may well mean that plaintiff's counsel will be significantly more interested in going to mediation than in trying to patch the holes that are damaging the case. These are opportunities to "kick the tires" regarding settlement and early mediation is the mechanism to use.

Even if mediation fails, it may create a good chance for an offer of settlement/judgment or some other step to increase pressure on plaintiff's counsel. In any event, after a failed mediation, the client/carrier will clearly understand why the steps to prepare for trial are going to be necessary.

3. Cases in which normal discovery is only going to encourage plaintiff's counsel to aggressively pursue the claim.

Some cases get worse from the defense perspective, rather than better, as discovery goes on. Before depositions are taken, records are reviewed, independent witnesses are interviewed, and experts are consulted, each of these future events constitute an unknown with uncertain impact on the case. As each source of uncertainty is erased through discovery a plaintiff's case can get progressively stronger. It then becomes more difficult for the defense to win that case or settle it on favorable terms.

Sometimes, through carefully reading the file when it comes in and identifying the pressure points on which the case is going to turn, defense counsel can beat plaintiff's counsel to an accurate assessment of the case and its likely exposure.

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When a careful review and initial workup suggest that the light at the end of the tunnel is actually a train headed for policy limits, defense counsel needs to see if early mediation can resolve the case before the discovery process educates plaintiff's counsel to the full value of the claim.

4. Cases in which the defense's position is unlikely to improve as time passes.

There are some cases where liability is clear, and a quick review of the file establishes that the passage of time is not likely to improve the posture for the defense. Lost wages may be on-going and accumulating at a significant rate. Medical treatment and rehabilitation may be unlikely to provide cure or recovery. Predicted rehabilitation may just be hopeful optimism from the treating physicians. Pain and suffering may turn into an intractable issue instead of being only a temporary problem. In sum, there are cases in which the passage of time is simply going to confirm the severity of the damages. Resolving these cases before they become a headline in the *Daily Report* is normally a good step.

Identifying the cases which should be resolved through early mediation may require a change in the traditional course of defense case handling. An experienced litigator must perform the initial review when a file arrives to see if the new assignment falls into or can be pushed into one of the categories for early mediation. If a fit is not immediately apparent, experienced counsel can often see that focused discovery might well push the case into one of the above four categories and can direct action to do that.

It is crucial that defense counsel actually reads the file in detail soon after the file arrives. If counsel waits to examine the file until the answer is filed; the interrogatories are sent and the responses come in; the non-party requests for production of documents are sent and responses are received; the records are received and everything is read and summarized, then much of the potential savings to the carrier has been lost.

The four types of cases discussed above entail distinct reasons for needing to be settled early. Yet, the early mediation and settlement of each type leads to the same benefits for defense firms—meeting the client/carrier's demand for efficient case handling and better utilizing the time of experienced trial lawyers. ◆

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Risk Analysis

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documents in this series of standards is ANSI B11.0, *Safety of Machinery*[1]. It includes a formal method describing in detail how to conduct a risk assessment, and how to document it. The robotics industry utilizes ANSI R15.06-2012, *Industrial Robots and Robot Systems—Safety Requirements*[2]. The packaging machinery industry utilizes ANSI/PMMI B155.1-2016, *Safety Requirements for Packaging and Processing Machinery*[3]. Each has similar requirements for risk analysis.

B11.0-2020 has been harmonized with an international standard, ISO 12100-2010, "Safety of machinery — General principles for design — Risk assessment and risk reduction"[4]. Compliance with B11.0 automatically assures compliance with ISO 12100-2010, but the opposite is not true, because the scope of ISO 12100-2010 is not as comprehensive as B11.0-2020. Other standards developed by USA organizations have undergone similar international harmonization efforts. Compliance with international standards does not automatically guarantee compliance with USA requirements, so "digging" may be required to identify possible gaps that may be relevant to an incident under investigation.

A thorough accident investigation should include review of how hazards and risks were evaluated and documented, whether the supplier complied with B11.0-2020 or other appropriate industry safety standards. The review should evaluate whether the hazards were fully identified, and whether the risk reduction measures, and engineering controls identified in the risk analysis were fully implemented in the machinery as installed and as maintained up to the time of the accident. Risk reduction measures include cautions and warnings in the manuals and procedures, and signage and labeling installed on the equipment.

Standards have evolved over time. The versions referenced above may not have existed at the time the machinery was procured and installed. Engineering experts examining compliance with standards will typically start with the standards that were in effect at the time the equipment was originally procured and installed and will explore whether the machinery was upgraded (or should have been upgraded) to comply with later standards if it was moved, modified, or repurposed.

Supplier IOM Documents (Installation, Operation, Maintenance)

Suppliers provide a wealth of information to purchasers regarding the safety features, intended use, operation, and maintenance of the equipment being supplied. The information transfer typically takes the form of written documentation, often augmented by on-site training. IOM documentation can include, but is not limited to:

- Supplier Manuals and collateral materials, including:
  a. Detailed descriptions of what is included/provided
  b. Recommended operating procedures
  c. Recommended maintenance procedures and schedules
  d. Recommended trouble-shooting procedures
  e. Safety cautions and warnings
- Drawings (Process, mechanical, pneumatic, hydraulic, electrical, site layout, etc.)

Section 8.2 and Annex D in B11.0-2020[1] describe the requirements around content of manuals, including that the manual(s) conform with requirements of ANSI Z535.6, *Product Safety Information In Product Manuals, Instructions And Other Collateral Materials[*5]. Demonstrating that a supplier complied with these standards and requirements can help defend against any suggestion that the manuals and safety warnings were less than adequate.

B11.0-2020 requires that the supplier analyze the risk involved in operation and maintenance of the machinery being supplied, that they reduce the risks to a tolerable level, and that they communicate the risk, residual risk, and protective measures and engineering controls that are being provided in the supplier IOM materials. A thorough machinery accident investigation will consider how hazards were identified by the supplier, how the risks were reduced, whether the residual risk met the risk tolerance of the purchaser and the supplier, and whether the residual risks were fully communicated in the supplier manuals and collateral materials.

The title block of drawings and schematics usually contain dates and version numbers. Early versions of drawings and schematics may contain markings such as "not for construction." A thorough investigation should include review of these title blocks against equipment actually supplied to determine if the drawings and schematics were accurate and "up to date." Did the version of drawings and schematics provided by the supplier match the equipment actually supplied? Are drawings found in or near the machinery the "up to date" versions? If the drawings and schematics were out-of-date or for a similar but not identical model, is the discrepancy relevant to the sequence of events of the accident? If modifications were made to the machinery during commissioning activities, were the changes captured on "as-built" versions of the drawings and schematics?

Owner IOM Documents

Industrial sites with stationary machinery will typically have multiple written administrative procedures that provide guidance and

job execution requirements to their employees. Many of these relate to OSHA regulatory requirements. Site specific administrative procedures typically include:

- Lock-out tag-out [6]
- Confined space entry [7]
- Electrical safety [8], [9]
- Hazardous or "hot work" permits [10]
- Lone workers [11]

A thorough accident investigation will identify if any of these administrative procedures is relevant to the accident. If so, further review should be done to determine if the procedure was followed. For example, if a hazardous work permit was taken out for work during one shift, but the work was incomplete and needed to continue into the next shift, were procedures strictly adhered to for communicating status and transferring responsibility to the workers coming in on the new shift? If an arc-flash accident occurs during maintenance on electrical equipment, was the worker wearing the level of personal protective equipment required in the electrical safety administrative procedure? If deviations from the site administrative procedures occurred at the time of the accident, did the deviations contribute to the cause or sequence of events of the accident? If an accident occurred during cleaning or maintenance of machinery, had the lock-out tag-out procedures been strictly adhered to?

In addition to the "site wide" administrative procedures, owners will often extract the operating and maintenance procedures from the supplier manual(s) and write their own custom procedures for the equipment at their site. Whether or not this was done for machinery involved in an accident should be clearly identified. When such site specific (or multi-site) procedures have been created by the owner, careful review should be done by the reviewing expert(s) to determine if all the risk-related information in the supplier manuals and procedures was carried over into the owner-written procedures. If risk information, cautions, or warnings are missing in the owner-written procedures, is this finding relevant to the accident?

Owner IOM documents include records such as work orders and "down time" reports showing what maintenance or modifications were actually done on the machinery since it's installation. If recommended maintenance was skipped or deferred, was it relevant to the accident? If the machinery was modified by the supplier or someone other than the supplier, was the modification relevant to the accident? If "near misses" occurred before the accident being investigated, was management aware of them, and were appropriate corrective actions taken?

As-Found Condition of Signage, Warnings, and Alert Devices

CFR 1910.145, Specifications for Accident Prevention Signs and Tags, has specific requirements for danger signs, caution signs, and safety instruction signs [12]. All three types of signs are commonly found on or near industrial machinery.

Machinery always has some extent of:

- labeling on controls indicating their function
- safety signage at key locations where there is residual risk (possibility of injury)
- safety signage indicating need for personal protective equipment such as safety glasses or hearing protection
- Visual and/or audible indicators and annunciators (horns and lights)
- Etc.

A thorough investigation will include evaluation of these items to determine if they are: (1) present; (2) legible/audible; (3) formatted consistent with industry and regulatory standards; (4) in a language that could be understood by the person(s) involved in the accident. If horns or other audible indicators are used to warn workers of an immediate or impending hazard, are they audible above the background noise present in the workplace? Is signage or labeling peeling away or covered in dirt to an extent rendering them illegible? Are control switches and indicator lights clearly labeled as to their function and meaning?

After-Action Reports From Authorities or First Responders

Authorities such as OSHA or first responders such as fire departments may issue reports or findings after an incident. Obtaining copies of these documents can be useful to ascertain whether these authorities uncovered facts or took photos which may be useful in fully understanding conditions at the site, particularly in the time frame between the occurrence of the accident and the start of formal investigation activities.

Conclusions

The relevancy of the various issues discussed here will depend on the specifics of a particular machinery accident. It is in the interest of each party with a stake in the outcome of the investigation to have as complete of an understanding as possible of the actual causes and contributing factors that led to the sequence of events resulting in an injury or worse. The understanding should include: (1) how hazards were identified; (2) risks were reduced; and (3) the residual risk and safeguards were communicated. If no discrepancies or shortcomings are found in these areas, focus can shift to other facts of the accident. If discrepancies or shortcomings are found, they can be further scrutinized. Just because there is a discrepancy, it doesn't mean it is relevant to the causal factors of the accident. Opinions of

engineering experts can help interested parties identify issues that are relevant to causation of the accident. ◆

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