

Sanctions Appeals
Viability of Contractually-Shortened Tort Limitation Periods in Landlord-Tenant Lease Agreements

Situation Awareness in Crash Investigations

Hey Google! Where Did the Fire Start?

Mediation Can Result in Win-Win Resolutions

GEORGIA DEFENSE LAWYER

A Magazine for the Civil Defense Trial Bar

Volume XVI, Issue III
Winter 2021



COVID-19 Impact: Juries, Business Interruption and More



Martin Timm, MS, PE, CSP

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President’s Message

Our world has changed in immeasurable ways since March 2020 and with the approval and dissemination of a COVID-19 vaccine, we can only hope that we will prevail against this virus. Like everyone, a “normal” day in my law practice has evolved as I find myself conducting depositions, mediations and more via Zoom. Even GDLA has felt the impact having held Board of Directors meetings online. This is certainly not how I envisioned my tenure as GDLA President, but I’m grateful still for the opportunity to serve during such a challenging time.

I’m especially proud that my year will be marked by our teaming up with our colleagues on the other side of the “v.” to establish Mask Up For Justice! (MUFJ). This charitable fundraiser is allowing us to buy personal protective equipment to send courthouses whose budgets cannot support the need to supply masks to those who enter the halls of justice—many of whom are from poor, rural counties. The need is great and requests are pouring in for assistance. If you have not done so yet, please visit maskupforjustice.com to donate.

Some members said they’re waiting to donate because trial dates keeping getting pushed out, but there are many counties holding court now. In addition, the MUFJ Committee needs time to purchase and then ship supplies to arrive in time and without having to pay expedited shipping charges.

Another significant development this year was the establishment of a Political Action Committee (PAC) for GDLA. We have had a Legislative Committee for several years under the leadership of Jake Daly, who has been our eyes, ears and sometimes mouth by testifying before House and Senate Committees. Jake has done yeoman’s work—and was presented the President’s Award last June for his many years of service—but the idea to have a dedicated lobbyist advocating for a GDLA leg-

islative agenda was presented to the Executive Committee by Jake in August. He presented a formal proposal for the Board of Directors to consider in October. The proposal was approved with the caveat that no GDLA monies be used to fund the program or the establishment of a Political Action Committee (PAC). A number of GDLA member firms then stepped up to donate funds to cover the first year of our PAC’s operation.

Since that time, you have no doubt seen from GDLA e-blast updates that we employed Kade Culler of Troutman Pepper Strategies as our lobbyist. Jake has led our PAC as CEO/CFO with assistance from President-Elect George Hall, VP Marty Levinson and me, as we worked together during the General Assembly to identify issues that directly impact the civil defense lawyer.

While we hope, by the time you read this, that we have been effective at the legislature, we continue to influence the law at the appellate courts through our robust amicus program. In this issue, as in every one, you will see the amicus briefs we have filed and you’ll read about two positive outcomes related to apportionment and judicial estoppel.

As we begin the second quarter of 2021, it is with renewed hope that we are working together toward improvements in the justice system. Our tagline is “advancing the civil defense bar” and I believe we are doing just that.

For the Defense,

Jeffrey S. Ward

Drew Eckl & Farnham, Brunswick



Jeff Ward

Member News & Case Wins

MEMBER NEWS

Hawkins Parnell & Young announced the election of **Christine L. Mast** as Managing Partner. Ms. Mast is the first woman to serve as Managing Partner in the firm's nearly 60-year history. In 1991, she was recruited to the firm for a summer clerkship and began practice as an associate the next year. Ms. Mast was elected to the partnership in 1999 and has been a leader of Hawkins Parnell's professional liability and legal malpractice teams. She also serves as a member of the firm's Executive Committee and as its General Counsel.

Drew Eckl & Farnham named Atlanta partner **Elissa Haynes** as Chair of its Appellate Team. Her appellate and trial practice focuses primarily on defending claims involving negligent security, premises liability, personal/catastrophic injuries, and religious institution liability. She chairs GDLA's Amicus Committee and is currently serving as President-Elect of the State Bar of Georgia's Young Lawyers Division (YLD).

McAngus Goudelock & Courie announced **Lynn Olmert**, a partner in its Atlanta office, has joined the Fellows of the American Bar Foundation. The Fellows comprise a global honorary society of attorneys, judges, law faculty and legal scholars whose public and private careers have demonstrated outstanding dedication to the highest principles of the legal profession and to the welfare of their communities. Membership is limited to one percent of lawyers licensed to practice in each jurisdiction. Fellows are recommended by their peers and elected by the Foundation's Board.

Lewis Brisbois Bisgaard & Smith announced the elevation of **Bert Hummel** to partner in its Atlanta office as a member of the firm's General Liability and Workers' Compensation Practices. He is currently serving as President of the State Bar of Georgia's Young Lawyers Division (YLD). Mr. Hummel was also appointed to the State Bar's Formal Advisory Opinion Board and the Chief Justice's Commission on Professionalism.

Lewis Brisbois also announced a new partner in Atlanta. **Vonnetta L. Benjamin** joined the firm's General Liability Practice from **Womble Bond Dickinson (US)**. Ms. Benjamin focuses her practice on products liability, toxic tort matters, complex business litigation, and medical malpractice defense.

Candis Jones Smith, a partner at **Lewis Brisbois** in Atlanta was installed as President of the Gate City Bar Association. Established in 1948, it is the oldest African-American bar association in Georgia. She is also a member of the GDLA Board of Directors.

Donavan Eason, an associate in **Lewis Brisbois'** Savannah office, was elected to the Board of Trustees for the Zell Miller Foundation. The non-profit organization is focused on advocating for Georgia's HOPE Scholarship established by the former Governor. Mr. Eason was also selected to participate in the 2021 YLD Leadership Academy of the State Bar of Georgia. The Academy chooses its participants through a competitive process, receiving applications from all geographic areas of Georgia and various practice areas.

Jasmine L. Peele, formerly of **Waldon Adelman Castilla Hiestand & Prout**, has joined the General Lia-

bility Tort Litigation Practice Group at **Mozley Finlayson & Loggins** in Atlanta. She focuses her practice on insurance defense, trucking litigation and premises liability.

Hall Booth Smith announced the elevation of **Abe Varner** and **J.D. Dean** to partnership in the firm's Atlanta and Tifton offices, respectively. Mr. Varner's practice focuses on the defense of large hospital systems and healthcare providers and on insurance coverage matters. He also maintains a broad litigation practice, which includes the defense of premises liability accidents, negligent security cases, motor vehicle accidents, major property loss and subrogation cases, product liability cases and construction disputes. Mr. Dean focuses his practice on general liability, medical malpractice, products liability, premises liability and transportation matters.

Taylor English Duma announced the addition of **Kevin Spainhour** as a partner in the firm's healthcare practice. He brings more than 20 years of healthcare experience, focusing his practice on the defense of serious and catastrophic medical malpractice and general liability claims. Prior to attending law school, Mr. Spainhour served as a cardiac intensive care nurse and Extracorporeal Life Support Specialist at Children's Healthcare of Atlanta. He also has experience serving as a firefighter and paramedic with one of the state of Georgia's busiest fire services.

Akerman announced that **Brenden Dougherty** has joined its Atlanta office as an associate in the Litigation Practice Group. He focuses his practice on transportation, insurance coverage and general liability matters. Mr.



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Dougherty regularly defends clients against a wide array of negligence and insurance claims.

Brett Tarver, an associate in **Troutman Pepper's** Health Sciences Litigation Practice Group, has been appointed to serve as Second Vice Chair of the DRI Young Lawyers Committee (YLC) for the 2020-2021 year.

Alisha Wyatt-Bullman, formerly with the **City of Atlanta's Department of Law**, has joined the **Office of the General Counsel for the Social Security Administration**, as an Assistant Regional Counsel. Her practice focuses on labor and employment litigation within Region IV.

CASE WINS

Hawkins Parnell & Young partner **Bryan Grantham** obtained summary judgment for a law firm in a malicious prosecution case brought by the spouse of a former client. The claimant alleged that the firm encouraged his wife to bring criminal charges against him for an alleged assault on the couple's minor child. In the motion for summary judgment, the law firm argued that there was no evidence that it acted maliciously, that the arrest of the spouse was the result of an independent investigation, that there was probable cause for the arrest, and that even if the firm had encouraged the prosecution that it was protected by the attorney-client privilege. The trial court agreed and granted summary judgment for the law firm on all the claims made.

Cara Weiner of **Spears Moore Rebman & Williams** in Chattanooga, Tenn., and a firm colleague received a defense verdict in a 10-day medical malpractice trial in Chattanooga on behalf of a local hospital. Plaintiff alleged he devel-

oped a preventable decubitus ulcer due to the nursing staff's negligence in failing to turn and reposition him every two hours after an in-patient admission following knee surgery. Defendants argued the injury was a deep tissue injury which occurred when the patient was hypotensive during knee surgery and further argued that the wound was a known complication of surgeries. The patient's wife asserted a loss of consortium claim. The jury rendered a defense verdict on all counts. It was the first known trial regarding pressure ulcers in Hamilton County, Tenn.

Elissa Haynes of **Drew Eckl & Farnham** in Atlanta and **Robert Luskin** of **Goodman McGuffey** in Atlanta received a Court of Appeals win and reversal of the trial court's summary judgment denial in a negligent security case. On September 17, 2020, the Georgia Court of Appeals issued a unanimous Opinion in a case involving a plaintiff who was attacked in the parking lot of an Atlanta gas station and convenience store.

Ms. Haynes served as lead appellate counsel while both served as trial counsel. The trial court had previously denied Defendants' motion for summary judgment and subsequent motion for reconsideration based solely upon Plaintiff's evidence of 911 call logs showing the police had been called to the gas station on multiple occasions throughout the years. In reversing the trial court's summary judgment denial, the Court of Appeals first reiterated that there is no authority in Georgia which imposes a duty upon a property owner to investigate police files to determine whether criminal activity has occurred on its premises.

The Court further addressed the plaintiff's own knowledge of the criminal activity on the premises and found that the plaintiff failed to show there was an issue of material fact concerning whether the

store's knowledge of crime was superior to his own. In so holding, the Court relied heavily on *Bolton v. Golden Business*, another favorable Court of Appeals negligent security case which was handled by the duo. The case is *ABH Corporation v. Montgomery*, 2020 WL 5554162 (Ga. Ct. App. 2020). The case is covered in the Premises Liability Substantive Law Section's Case Law Update on page 44.

In addition to the case above, **Goodman McGuffey's** Atlanta office has notched several other wins recently. **James Hankins** obtained summary judgment in favor of Holder Construction Company. In *Fireman's Fund v. Holder Construction Group, LLC*, (State Court of Cobb County; 17-A-3479-1), the property insurer for a downtown Atlanta hotel filed a property damage subrogation lawsuit against Holder and two of its subcontractors asserting a variety of contract and tort-based claims and seeking recovery exceeding \$1.0 million in damages for business interruption and property damage/remediation. Fireman's Fund alleged that the coiling coil on a roof-top air handler froze and burst, and Holder and/or its subcontractors were responsible for the loss.

Holder and its subcontractors initially obtained summary judgment on all contract-based claims and the claim for simple negligence, relying on the waiver of subrogation clause in the construction contract. After the trial court's initial ruling, only one count for gross negligent remained.

The parties completed discovery, and then Holder and its subcontractors filed a second motion for summary judgment and sought to exclude the testimony of the opposing expert.

In connection with excluding the opposing expert, Holder and its subcontractors argued the opposing expert's testimony was unreliable because he failed to meet the

standard required for a causation opinion. Specifically, he could not testify about the primary cause of the water loss, and he kept saying there were multiple variables to the cause of the loss. He later offered an affidavit, contradicting his earlier testimony and saying he could opine that the proximate cause of the subject water loss was the mechanical contractor's actions relating to the maximum air damper on the air handler unit.

Ultimately, the trial court agreed with the defense and excluded the opposing expert's testimony. The trial court then also granted summary judgment to Holder and its subcontractor, finding there was no issue of fact on whether Holder and its subcontractor's actions proximately caused the subject water loss.

Next, **James Hankins** teamed up with **Samantha Mullis** to win summary judgment in a case involving an off-the-clock employee driving drunk and causing an auto collision. In *Bartholomew Ikemna v. Dean Electric Company, Inc. and Shannon Fox*, Mr. Ikemna filed suit against Dean Electric Company and one of its former employees asserting that Dean Electric was vicariously liable for Mr. Fox's actions and guilty of negligent hiring, training, supervision and entrustment.

After completing discovery, the defense duo filed for summary judgment, arguing that Mr. Fox was not on the job at the time of the collision and was outside the scope of his employment while driving intoxicated. The defense further argued that there was nothing in Mr. Fox's driving or employment history that would show a pattern of reckless driving and that Dean Electric lacked actual knowledge of Mr. Fox's incompetence to drive. In response, Mr. Ikemna argued that Mr. Fox was acting within the scope of his employment because he was allowed to re-

tain the vehicle for the duration of the job assignment and that Dean Electric's hiring procedures were unreasonable. Dean Electric pointed out the collision occurred more than seven hours after Mr. Fox had clocked out for the day and he was not furthering its business by driving while intoxicated.

Ultimately the court found that Mr. Fox was outside the scope of his employment at the time of the collision and that Mr. Ikemna failed to show that Dean Electric knew or should have known of Mr. Fox's tendencies to drive under the influence.

In the most recent win, **Robert E. "Bert" Noble III**, and **Robert A. Luskin** won summary judgment for Noodle Life, a closely-held family corporation, in a restaurant liability matter involving soup spilled into the plaintiff's lap. This case turned more complex when allegations of alter ego, agency, joint venture and attempts to pierce the corporate veil were injected into the litigation.

GDLA Treasurer **Dart Meadows** and **Patrick Silloway of Balch & Bingham** in Atlanta obtained summary judgment on July 7, 2020 in a product liability case pending in the State Court of Gwinnett County before Judge Rhonda Colvin Leary. The case arose when an employee of a cabinetry shop was using an industrial edgebander machine to place laminate banding on wooden boards. When one of the pads of the edgebander's feed track came off, the employee left his operating position and attempted to replace the pad without turning off the power.

The plaintiff's hand went into the machine's pre-mill cutterheads, which rotate at thousands of RPMs to shave off a portion of the board to provide a smooth surface to which the banding can be applied. The plaintiff lost his middle and ring fingers down to the knuckle.

The plaintiff sued the edgebander's foreign manufacturer and its North American distributor, alleging the distributor failed to inform him of a notation in the edgebander's manual that there should be two operators, and that failure caused his injury. Judge Leary ruled the plaintiff assumed the risk of his injury and any alleged failure to warn was not the proximate cause of the employee's injury.

The plaintiff's decision to perform maintenance without turning off the machine was an intervening cause. Moreover, the plaintiff could not prove causation without expert testimony concerning the instruction manual. In exchange for the defendants' agreement not to seek fees pursuant to an offer of settlement that was not accepted, the plaintiff through their attorneys Morgan & Morgan did not appeal the court's order and voluntarily dismissed his case against the manufacturer with prejudice.

In another case, the Georgia Court of Appeals affirmed a jury verdict on October 27, 2020 in favor of Dr. Brown in *Hunter v. Brown*, case number A20A1244. This was the fourth appearance of this medical malpractice case that was originally filed in DeKalb County in 2008 and tried in Cobb County State Court in May 2019. **Dart Meadows** and **Jonathan DeLuca** represented Dr. Brown and Emory-Adventist Hospital which was earlier dismissed. Mr. Hunter was taken by ambulance to the Emory-Adventist Hospital emergency room on December 31, 2005 with a chief complaint of shortness of breath and inability to urinate. After a cystoscopy was performed to relieve the urinary obstruction, Mr. Hunter was admitted to the hospital and treated the next two days by Dr. Brown, a hospitalist employed by Cobb Medical Associates.

On the second afternoon after admission, Plaintiff suffered a heart

attack and died while being transferred to the ICU. Mr. Hunter's widow sued Dr. Brown (and several other defendants who were earlier dismissed), arguing that his shortness of breath on admission was a sign of acute coronary syndrome that was missed and that Dr. Brown deviated from the standard of care by failing to order serial EKGs, serial troponins and a cardiology consult.

At trial, Dr. Wickliffe, a cardiologist at Piedmont Hospital with 48 years of experience, who has worked on thousands of heart attack cases, was permitted to offer standard of care opinions about the hospitalist care of Dr. Brown. Plaintiff argued that the trial court abused its discretion in permitting a cardiologist to testify as to the standard of care of a hospitalist. The Georgia Court of Appeals held that under O.C.G.A. § 24-4-702 (c), the cardiologist's testimony was properly admitted.

The **Weathington** firm in Atlanta has enjoyed several successes over the last few months. On August 24, 2020, the Supreme Court of Georgia affirmed summary judgment obtained by Weathington in a medical malpractice case. In 2017, Weathington's physician-client was sued following a uterine fibroid embolization procedure with allegations that he violated the standard of care by failing to provide the patient post-procedure care. Following expert discovery, **David Hanson** obtained a summary judgment ruling from the trial court that the physician was not liable based on the testimony of Plaintiff's expert witness. Plaintiff appealed and the Court of Appeals affirmed in a decision reported at 354 Ga. App. 279. The Supreme Court denied Plaintiff's petition for certiorari, upholding the rulings of the trial court and Court of Appeals.

Next, on September 3, 2020, Weathington's appellate team led

by **David Hanson** obtained another victory in the Georgia Court of Appeals in a novel case involving a husband and wife's both potentially sitting on the same jury. Plaintiff argued at trial that he should have been allowed to strike a husband and wife for cause because of a potential for conflict. The trial court disagreed, forcing Plaintiff to use a peremptory strike. On appeal, Weathington argued that there was no prejudice simply based on two jurors' status as husband and wife, and that more evidence of bias was necessary to justify a strike for cause. The Georgia Court of Appeals agreed, in what may be the first appellate decision nationwide to address the issue. In the underlying case, **Paul Weathington** obtained a defense verdict on behalf of an Ob/Gyn Doctor in a wrongful death action arising out of Defendants' delivery of Plaintiff's baby. Plaintiff alleged that Defendants breached the standard of care by failing to respond appropriately to signs of fetal distress, including the readout from a fetal heart rate monitor. The jury found that the Defendants acted within the standard of care and entered a verdict in their favor. appeal followed. **Zach Fuller** assisted in the appellate briefing, and **David Hanson** presented oral arguments to the Court of Appeals.

In the final case, the firm's appellate practice team led by **David Hanson** won a landmark decision before the Georgia Court of Appeals on October 23, 2020, concerning the application of Georgia's emergency medical care statute, O.C.G.A. 51-1-29.5, to medical emergencies occurring in the obstetrical unit. For the first time in Georgia, the Court held that Plaintiffs must prove gross negligence by clear and convincing evidence in cases involving medical emergencies arising in the obstetrical unit.

The underlying medical malpractice action was filed against a Certified Registered Nurse Mid-

wife and an OBGYN group, alleging that the Midwife was negligent in her delivery of a baby after a shoulder dystocia was encountered. Defendants, represented by **Paul Weathington** and **Heather McGrotty**, moved for summary judgment, arguing that under O.C.G.A. 51-1-29.5, Plaintiffs must prove gross negligence by clear and convincing evidence because the shoulder dystocia was a medical emergency occurring in the obstetrical unit. The trial judge disagreed, finding that the emergency medical care statute only applied to emergency medical care provided in obstetrical units following treatment in the emergency department, and also finding that because shoulder dystocias are commonly encountered by obstetricians and the dystocia in this case was resolved in 40 seconds, it was a jury question as to whether this dystocia was a medical emergency.

The firm's appellate team took the case and argued that Plaintiffs' interpretation of the emergency medical care statute was wrong as the plain language clearly stated that the gross negligence standard was to be applied to emergent treatment in the obstetrical unit, the emergency room, and in surgical suits following evaluation in the emergency department. Weathington also argued that the statute does not require a catastrophic or rare injury, but instead covers any emergency treatment when the failure to treat could lead to serious injury or death.

The Court of Appeals agreed on both points, finding that the statute unequivocally applied to emergency care rendered in the obstetrical unit without the need to present first to the emergency room, and that shoulder dystocia was an emergent medical condition as a matter of law; thus, Defendants were entitled to the heightened standard of gross negligence and summary judgment.

Continued on next page

Case Wins

Continued from previous page

Former GDLA Board member and **Freeman Mathis & Gary** Partner **Wayne Melnick** and his associate **Wesley Jackson** had quite an October. They obtained not one, but two reversals of denials of summary judgment in dog bite cases before the Georgia Court of Appeals. In both cases, plaintiffs sought to recover from an out-of-possession landlord for bites received from their tenant's dogs. In both cases, although the trial court denied summary judgment, the Court of Appeals reversed finding that the dog bite statute was inapplicable to out-of-possession landlords whose only liability is controlled by a different Code section. The different panels of the Court held that even if there was potential liability on the part of the landlord, the plaintiffs failed to present any evidence that the landlord knew of the specific dog's alleged vicious propensities—even with evidence in one case of there being other dogs roaming at large on the property. Finally, the Court determined that a City municipal ordinance could not be used to supplant the actual knowledge requirement when it was not clear the statute was intended to apply to the landlord.

Mr. Melnick and Mr. Jackson also obtained summary judgment for their client, a public school teacher, who was sued by the father of one of her students for defamation. Although the plaintiff alleged that the teacher conspired with another teacher (the mother of the student and plaintiff's ex-wife) to make

false report of domestic violence to police thereby damaging him, the trial court found that the statements in question were 1) privileged; and 2) truthful; and there was no evidence of record to support the alleged conspiracy or that the statements were not made in good faith.

William Pate of **Dennis Corry Smith & Dixon** in Atlanta won summary judgment in a significant personal injury case for trucking client Keen Transport, Inc. before Judge William T. Moore, Jr. in the U.S. District Court, Southern District of Georgia. Plaintiff sued Keen Transport, Inc. for injuries claiming Keen's employee failed to properly secure a forklift on his flatbed truck at Keen's Savannah facility. Plaintiff was a truck driver for JRC Transportation and he went to Keen's facility to pick-up two JCB forklifts for delivery to Richmond, Va. A Keen employee loaded the forklifts on Plaintiff's flatbed trailer, but Plaintiff complained the forks on one of the forklifts extended past the front of the flatbed. Plaintiff asked the Keen employee to raise the forks, and the Keen employee refused. Plaintiff raised the forks by hand, but when he tried to secure the forks with his trailer straps, the forks hit him in the head, causing him to fall to the ground. Plaintiff suffered a gash to his head, broken teeth, and a torn rotator cuff. Judge Moore granted Keen's summary judgment because Plaintiff failed to present specific evidence showing Keen had a duty to secure the forklifts or advise Plaintiff about the proper method

to raise the forks and Plaintiff's failure to exercise reasonable care for his safety was the proximate cause of his injuries. Specifically, Plaintiff tried to raise and secure the forks by hand without assistance.

Jay Doyle and **Bert Hummel**, partners at **Lewis Brisbois Bisgaard & Smith** in Atlanta obtained summary judgment for their clients in a negligent security case involving a shooting in Clayton County. The plaintiff was a resident in his 20s who was shot at an apartment complex while allegedly moving belongings out of his apartment. The undisputed facts showed that the plaintiff set off a car alarm while loading boxes into his car. The owner of the car heard the car alarm and when he came out to investigate an argument quickly ensued. The argument escalated and the plaintiff was shot by the car owner. The plaintiff suffered extensive injuries and spent several days in critical care running up medical bills around half a million dollars. The plaintiff ultimately survived and after rehabilitation was able to return to a seemingly normal life. The plaintiff then sued both of the firm's clients—the apartment complex owner and the management company—for negligent security. The defense team filed for summary judgment on behalf of each defendant after the close of discovery. State Court of Clayton County Judge Tammi Hayward ruled in the defendants' favor on all dispositive issues. The plaintiff appealed the Order and the parties are in the process of submitting briefs to the Georgia Court of Appeals. ♦

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Perhaps you've made partner, won an award or been elected officer in another association. We also welcome your defense wins.

Remember our circulation includes all Georgia judges.

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

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Weathington, Atlanta

Ramsey Chambliss
Myers & Wingate, Gainesville

Jonathan Deluca
Balch & Bingham, Atlanta

Da-Shon Akelan Dixon
Downey & Cleveland, Marietta

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GDLA Helps Reshape and Revitalize Judicial Estoppel Doctrine in the Bankruptcy Context in New Supreme Court Decision

On October 5, in a case GDLA briefed, the Georgia Supreme Court changed the way judicial estoppel will be applied in cases involving plaintiffs in bankruptcy proceedings. The Supreme Court has ruled that Georgia courts are to look to recent Eleventh Circuit case law in applying the judicial estoppel doctrine. It has also disapproved of precedent suggesting that amendment of bankruptcy schedules in response to a dispositive motion constitutes a per se defense to application of the doctrine.

The case concerns a plaintiff who brought whistleblower claims against Fulton County asserting retaliation on the basis of her rejection of a Fulton County commissioner's alleged attempted use of the Wolf Creek Amphitheater for private gain. The plaintiff was hired as the entertainment manager for the amphitheater in 2012. She filed a voluntary petition for Chapter 13 bankruptcy in May 2013, which was confirmed in March 2014. The plan required her to make payments until March 2019.

Meanwhile, the plaintiff filed her whistleblower suit in October 2016, alleging retaliation for actions she took from September 2015 to August 2016. In her amended complaint, she sought \$3 million in damages, as well as attorney's fees and pre-judgment interest.

On September 5, 2017, Fulton County filed a motion for summary judgment on judicial estoppel grounds, arguing that the plaintiff had failed to disclose her lawsuit as an asset in her bankruptcy proceedings. Less than a month later, the plaintiff amended her bankruptcy petition to disclose her lawsuit as an asset, but swore in her amended bankruptcy petition that her claim was worth \$1. The plaintiff then responded to the motion for summary judgment, insisting that she had no intention to deceive the bankruptcy court but was previously unaware of her obligation to disclose the lawsuit.

At the end of the summary judgment hearing, the trial court announced from the bench that the plaintiff's actions made a mockery

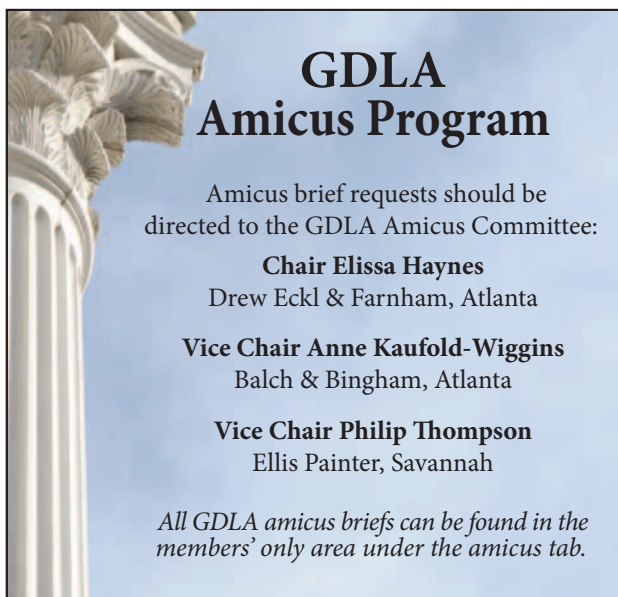
of the judicial system. The court's order noted that the plaintiff was a law school graduate who was represented by counsel in her bankruptcy proceeding and determined that the timing of her bankruptcy amendment and valuation of her claim demonstrated an intent to deceive. In reaching its decision the trial court applied *Slater v. United States Steel Corp.*, 871 F.3d 1174 (11th Cir. 2017) (en banc), which requires courts to use a two-part test in applying judicial estoppel in the bankruptcy context: whether (1) the party took an inconsistent position under oath in a separate proceeding, and (2) these inconsistent positions were calculated to make a mockery of the judicial system.

The Court of Appeals reversed, determining that regardless of whether *Slater* applied, Georgia precedent established that the judicial estoppel doctrine is no longer applicable once a debtor amends her bankruptcy filings to include the previously omitted claim. The court also determined that the plaintiff's valuation of her claims at \$1.00 did not affect its analysis.

The defendant filed a petition for certiorari, and GDLA was asked to file a brief in support of the Fulton County's petition to argue that the trial court acted properly in granting summary judgment. After the Supreme Court granted the petition, GDLA was asked to again weigh in with another amicus brief in support of Fulton County. Amicus Committee Vice-Chair Philip Thompson of Ellis Painter in Savannah wrote both amicus briefs.

GDLA argued that Georgia case law recognizes judicial estoppel's nature as a flexible, equitable federal doctrine and that the Court of Appeals' decision strayed from clearly established principles con-

of the trial court and the bankruptcy court and that the plaintiff had acted with an intent to deceive creditors. The plaintiff filed a motion for reconsideration, which included affidavits presenting evidence on the issue of her intent to deceive. After another hearing, the trial court entered a written order granting the motion for summary



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Drew Eckl & Farnham, Atlanta

Vice Chair Anne Kaufold-Wiggins
Balch & Bingham, Atlanta

Vice Chair Philip Thompson
Ellis Painter, Savannah

All GDLA amicus briefs can be found in the members' only area under the amicus tab.

cerning the doctrine's application. GDLA further argued that trial courts are vested with considerable discretion to consider facts pertinent to the debtor's intent in failing to make the appropriate disclosure, regardless of whether the debtor amends her bankruptcy filings in response to a dispositive motion, and that the trial court properly exercised its discretion. Accordingly, the GDLA encouraged the Supreme Court to adopt a rule that would encourage candor from litigants involved in contemporaneous bankruptcy proceedings at all times, not simply when potential deception is revealed in a dispositive motion.

In its opinion, the Supreme Court agreed that *Slater* should be applied by Georgia courts "where a party to a civil action was not a party to the bankruptcy proceedings in which an allegedly inconsistent position was taken." The court also reemphasized that judicial estoppel is an equitable doc-

trine not subject to bright-line rules and thus disapproved "cases that can be read to support the proposition that any amendment, no matter how inaccurate, will automatically make a debtor's positions consistent for purposes of judicial estoppel."

Although it disagreed with the Court of Appeals' reasoning, the Supreme Court affirmed the Court of Appeals' reversal on the grounds that the trial court improperly applied the summary judgment standard by construing facts and drawing inferences against the plaintiff. The Supreme Court, looking primarily to the plaintiff's affidavit evidence, determined that there was inconsistent evidence on the issue of the plaintiff's intent to deceive.

The Supreme Court looked again to federal case law and determined that the trial court would need to hold an evidentiary hearing to assess credibility and to resolve any conflicts in evidence. The

court also discussed additional factors the trial court would need to consider in performing this analysis, including whether application of the doctrine would result in a windfall to the defendant. Three justices suggested that the trial court might also consider the public's interest in whistleblower claims being allowed to proceed. The dissent likewise applied *Slater* but would have held that the trial court properly granted summary judgment.

Likely consequences of the Supreme Court's decision are that judicial estoppel will have more force and application in cases moving forward, but that an evidentiary hearing before the trial court to assess credibility and resolve inconsistencies in the evidence will be required in most cases the doctrine is successfully invoked.

The case is *Fulton County, Georgia v. Sandra Ward-Poag*, Georgia Supreme Court, Case No. S19G1619 (Oct. 5, 2020). ♦



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Supreme Court Rules Apportionment Applies to Strict Products Liability, Siding with GDLA Amicus Brief

On October 19, 2020, the Supreme Court of Georgia held the apportionment of damages applies to strict products liability claims in a case where GDLA filed an amicus brief (*Johns v. Suzuki Motor of America, Inc.*). This is a huge victory for product manufactures, the business community, and the defense bar.

The suit arose from a motorcycle accident in which the plaintiff was seriously injured after a front brake failure. The plaintiff and his wife both brought suit against the motorcycle's manufacturer and the company's American distributor. A jury awarded the couple a combined \$12.5 million in damages, but found the plaintiff was 49% responsible for the accident. The trial court, applying O.C.G.A. § 51-12-33(a), reduced the award accord-

ingly. The plaintiffs appealed, arguing apportionment was not appropriate in, and fundamentally incompatible with, strict products liability cases. The Georgia Court of Appeals rejected the plaintiffs' arguments and affirmed. The Supreme Court granted certiorari to decide whether an award in a strict liability case may be reduced in accordance with fault under the apportionment statute.

GDLA filed an amicus brief in support of the defendant-appellees, arguing the plain text of the statute requires its application to strict products liability cases and there is no incompatibility between the apportionment statute enacted in 2005 and Georgia's strict liability statutes. The Supreme Court unanimously affirmed, holding the plain language of the apportionment

statute compelled its application to strict products liability cases. Furthermore, the Court agreed with GDLA that pre-2005 case law, relied on by the plaintiffs, was not a bar to reducing the plaintiffs' award. The Court held those decisions had been "supplanted" by the 2005 apportionment statute. Ultimately, the Court concluded there was no reason "to ignore the plain language of O.C.G.A. § 51-12-33 (a) and write into the statute an exception for strict products liability claims."

GDLA thanks the Balch & Bingham team who wrote the amicus brief, which included Amicus Committee Vice-Chair Anne Kaufold-Wiggins. Her co-authors were GDLA Treasurer Dart Meadows, Jim Hollis and Patrick Silloway. ♦



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GDLA Files Amicus Brief on Whether Insured's Breach of Policy Conditions Bars Bad Faith Claim

On November 9, 2020, GDLA filed an amicus brief in the Supreme Court of Georgia on behalf of the appellant in *GEICO Indemnity Company v. White-side* on the question of whether the failure of an insured and the injured party to notify her insurer that the insured had been served with a lawsuit, together with a “no action” clause in

the insurance policy, preclude a claim for “bad faith” failure to settle where the settlement demand was rejected before suit was filed and the injured party secured an excess judgment by default before the insurer learned of the suit.

GEICO's insured was involved in an accident with a bicyclist. The attorney for the injured party sent a policy limits demand to GEICO, which included less than \$10,000 in medical bills. GEICO made a counteroffer, which the injured party's attorney never acknowledged or responded to. Instead, the injured party filed suit against the insured but did not tell GEICO.

The insured was served but ripped up the papers that were served on her, did not tell GEICO about the suit, and filed no answer in the case. The injured party obtained a default judgment for over \$2.9 million dollars. The injured party then forced the insured into involuntary bankruptcy and the bankruptcy trustee, represented by the injured party's attorney, sued GEICO for bad faith or negligent failure to settle. The case was removed to federal court in the Middle District of Georgia, and the



District Judge denied GEICO's motion for summary judgment. A jury trial resulted in a judgment against GEICO and it appealed to the Eleventh Circuit. The Eleventh Circuit certified three questions to the Georgia Supreme Court. The first question asked “[w]hen an insurer has no notice of a lawsuit against its insured, do O.C.G.A. § 33-7-15 and a virtually identical insuring provision relieve the insurer of liability from a follow-on suit for bad faith?”

O.C.G.A. § 33-7-15 requires all motor vehicle policies in Georgia to specifically require the insured to notify the insurer “as soon as practicable” that the insured was served with a summons or other process and cooperate with the insurer in defending a claim or suit covered by the policy. The statute further provides that an insured's noncompliance with these requirements is a breach of the policy and, if the noncompliance is prejudicial to the insurer, relieves the insurer of the duties to defend the insured or to pay any judgment on behalf of its insured. GEICO's policy contained the mandatory notice and cooperation conditions and also

had a “no action” clause which prohibited any action against the company unless there was full compliance with the policy's terms and conditions.

While breaches of policy conditions and “no action” clauses have been held to preclude bad faith suits in other circumstances, the Georgia courts have never decided

whether such breaches of the insured's duties would bar a claim for a bad faith failure to settle when the settlement demand was rejected at a time when coverage existed, before suit was filed and the policy conditions were breached. In its amicus brief, GDLA argues that the prejudicial breach of the notice of suit condition precludes a bad faith action after a default excess judgment is entered against the insured. This result is required by the statutory language relieving an insurer of its obligation “to pay any judgment” “on behalf of the insureds” and prior case law saying that an insurer with no notice of the suit has no obligation to pay “any judgment resulting from the suit.” Although not part of the certified question, GDLA further argued that the “no action” clause was enforceable and prohibited the bad faith action even if the statute and notice provision of the policy alone did not.

GDLA thanks the authors, Brad Wolff, David Atkinson and Lee Clayton of Swift Currie McGhee & Hiers in Atlanta, for their work on the brief. ♦

GDLA Files Amicus Brief on Duties of Employer for Criminal Conduct of Employees

On November 12, GDLA has filed an amicus brief in the Supreme Court of Georgia on behalf of the appellees in the companion cases of *Johnson v. Avis Rent A Car System, LLC* and *Smith v. Avis Rent A Car System, LLC* on the question of legal duties owed by an employer for criminal conduct of an employee that is outside the scope of employment and away from the business premises. In these cases, an employee who stole a vehicle from the rental car lot where he worked ended up running from the police and ultimately crashing into a brick wall thereby injuring the two plaintiffs.

Two separate juries found Avis to be either partially or entirely at fault for damages of \$7 million in one case and \$47 million in the other case. The Court of Appeals reversed on several grounds including a finding that the trial court should have directed a verdict on the absence of proximate cause as a matter of law. The Supreme Court granted plaintiffs' petitions for writs of certiorari on two questions: (1) whether the employee's criminal conduct

was an intervening proximate cause as a matter of law; and (2) whether the employee acted under "color of employment." In its amicus brief, GDLA argues that the question of proximate cause is not reached because Avis did not owe a tort duty to plaintiffs in the first place which is a question of law for the court to resolve and not a jury.

To hold Avis liable in these circumstances would essentially hold employers to be insurers of their employers' conduct no matter how remote the injury might be. Similarly, on the second issue, GDLA argues that Avis had no control over the manner in which the employee used the stolen vehicle. As such, stretching the "color of employment" standard to apply would likewise create a duty "to all the world" which the Supreme Court has expressly rejected in previous rulings. Oral argument was held on December 8, 2020.

GDLA thanks the authors, Phil Savrin and Alexia Roney of Freeman Mathis & Gary in Atlanta, for their work on the brief. ♦



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GDLA Files Amicus Brief in Important Case Involving Scope of Claims Under the Georgia Street Gang Terrorism and Prevention Act

On November 30, 2020, GDLA filed an amicus brief in support of the defendants (the owner and manager of an apartment complex) in a negligent security case in which the plaintiff brought a claim for nuisance under the GSGTPA. *Star Residential, LLC and Terraces at Brookhaven, LLC v. Manuel Hernandez*, No. S20G1214 (Ga. Sup. Ct. docketed Nov. 2, 2020).



The case is a standard negligent security case. The plaintiff alleges that on May 29, 2017, he was shot from behind by two unknown males as he was attempting to enter his apartment at Terraces at Brookhaven. Alleging a failure to provide adequate security at the apartment complex, the plaintiff asserted claims for negligent security under O.C.G.A. § 51-3-1, nuisance under the GSGTPA, negligence per se based on a violation of the City of Brookhaven's nuisance ordinance, and negligence per se based on a violation of DeKalb County's nuisance ordinance. The defendants filed a motion to dismiss with respect to the nuisance and negligence per se claims, which Judge Dax Lopez of the State Court of DeKalb County denied. Judge Lopez issued a certificate of immediate review, and the Court of Appeals granted the defendants' application for interlocutory review.

GDLA also filed an amicus brief in the Court of Appeals, but only with respect to the nuisance claim

under the GSGTPA. The GSGTPA is an act whose primary purpose was to eradicate gang-related crimes by criminalizing "criminal gang activity" committed by "criminal street gangs" and their members. Originally enacted in 1992, it was overhauled in 1998. Included in the 1998 revision was a provision that creates a civil cause of action for "[a]ny person who is injured by reason of criminal gang activity." It also includes a provision that prohibits a judgment from being entered unless the jury determines that the action is consistent with the legislature's codified statement of purpose. This statute went unused for almost 20 years before the plaintiff bar decided to start using it in negligent security cases. Their motivation for suing under this statute instead of relying only on O.C.G.A. § 51-3-1? This statute provides for the recovery of treble damages, attorney fees (in both the trial and appellate courts), and costs of investigation and litigation.

GDLA argued in the Court of Appeals that the provision in the GSGTPA that creates a civil cause

of action should be interpreted to apply only to criminal street gangs and their members. In other words, it should not apply to owners and occupiers of property who did not participate in the criminal gang activity that caused the plaintiff's injuries. Thus, in this case, GDLA argued that the defendants could not be liable under the GSGTPA

because the plaintiff did not allege that they were involved in his shooting. The Court of Appeals disagreed and affirmed the denial of the defendants' motion. Interestingly, however, the Court of Appeals did not even attempt to interpret the statute, either by reference to its plain language and meaning or by applying the rules of statutory interpretation. Instead, it held that the issue of who can be sued under the GSGTPA must be decided by a jury since the statute requires it to determine whether the action is consistent with the legislature's codified statement of purpose. Apparently, the Court of Appeals believed that this requirement includes a determination of whether owners and occupiers of property who did not participate in the criminal gang activity at issue should be subject to liability. As Judge Todd Markle noted in a special concurrence, such statutory interpretation has always been considered to be a function for the courts, not juries. Further, Judge Markle noted that interpreting this requirement in such an absolute

GDLA Files Amicus Brief on Applicability of O.C.G.A. § 9-3-33.1 in Sexual Abuse Claims

On January 12, 2021, GDLA filed an amicus brief in the Supreme Court of Georgia on the applicability of O.C.G.A. 9-3-33.1 in sexual abuse claims.

The plaintiff attempted to bring suit in Georgia arising out of alleged sexual abuse that occurred more than 20 years earlier, while the plaintiff and defendants lived in Canada. The plaintiff argued that a Georgia statute, O.C.G.A. § 9-3-33.1, allowed her to circumvent the statute of limitations and bring the stale claims in Georgia, while the defendants argued the statute was

inapplicable. In an amicus brief on behalf of the plaintiffs, GTLA argued that the suit was proper in Georgia because the plaintiff continued to suffer injuries such as humiliation and emotional distress related to the alleged abuse when she and the defendants (her parents) later moved to Georgia.

In its amicus brief, GDLA argued O.C.G.A. § 9-3-33.1 did not apply to claims because the alleged torts and the injuries occurred in Canada—separate, independent intentional torts—which were all barred by the statute of limitations.

The argument highlighted the fact that the plaintiff’s interpretation would permit any person injured by a tort in any state or country to move to Georgia to seek recovery—without limitation—simply by arguing that they suffered continued emotional consequences from the extraterritorial tort.

Oral argument for the case, *Harvey v. Merchan*, was held on February 4, 2021.

GDLA thanks Paul Weathington, Zach Fuller and Hilliard Burton of Weathington in Atlanta for authoring the brief. ♦

Gang Amicus Brief

Continued from previous page

manner “essentially eviscerate[s] the summary judgment statute.”

The Supreme Court granted the defendants’ petition for a writ of certiorari on November 2, 2020. GDLA is again arguing that the GSGTPA should be interpreted to provide a civil cause of action only against criminal street gangs and their members and not against owners and occupiers of property who did not participate in the criminal gang activity at issue. This interpretation is supported by the plain language and meaning of the specific statute, as well as the overall context of the entire act, and the legislature’s codified statement of purpose. Additionally, the Georgia RICO Act contains an almost identical provision creating a civil cause of action, and that provision has been interpreted as applying only to the persons who committed the alleged crimes. Finally, GDLA’s interpretation is supported by the canon of constitutional doubt or avoidance, which requires courts to avoid interpreting statutes in a way that would create serious constitu-

tional concerns. Specifically, allowing claims against owners and occupiers of property who did not participate in the criminal gang activity at issue would create serious concerns about their constitutional right to due process and their constitutional right to be free from excessive fines. This would also create a serious concern about the imposition of unconstitutional vicarious criminal liability.

Beyond these arguments of statutory interpretation, GDLA is arguing that the Court of Appeals erred by abdicating its role as interpreter of statutes. Again, as Judge Markle noted in his special concurrence, allowing juries to engage in statutory interpretation may cause various unintended consequences. Because statutory interpretation is a matter for the courts, the Court of Appeals should have ruled on the issue of who can be sued under the GSGTPA.

The requirement of the jury determining whether the action is consistent with the legislature’s codified statement of purpose does not require it to determine who can be sued. These are separate issues, and GDLA contends that the Court

of Appeals erred by conflating them. Moreover, if this requirement is as absolute as the Court of Appeals suggested, the elimination of summary judgment would not be the only consequence.

If a jury has to determine everything, there could be no dismissal (under O.C.G.A. § 9-11-12 or O.C.G.A. § 9-11-37), no default judgment, and no appellate review. All this seems to be contrary to common sense and historical practice, but it also seems to be what the Court of Appeals held.

For all of these reasons, GDLA is urging the Supreme Court to reverse the judgment of the Court of Appeals and hold that owners and occupiers of property who did not participate in the underlying criminal gang activity cannot be sued under the GSGTPA.

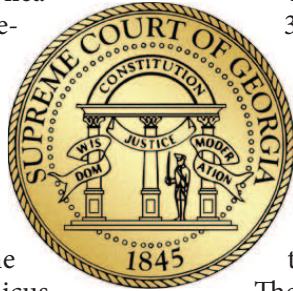
Oral argument in the Supreme Court was scheduled for March 2021, and a decision must be issued by July 17, 2021.

GDLA thanks Jake Daly of Freeman Mathis & Gary in Atlanta who authored the brief for his work on behalf of the civil defense bar. ♦

Cert Granted, GDLA Files Third Amicus Brief in Support of Appellant in Pivotal Apportionment Case

On February 1, 2021, the Georgia Supreme Court granted cert in *Alston & Bird LLP v. Hatcher Management Holdings, LLC*, No. S20C1419 (Ga. Sup. Ct. July 2, 2020), an important case involving application of the apportionment statute in single-defendant cases. On March 4, 2021, GDLA filed an amicus brief in support of the defendant's appeal. GDLA had previously filed two other amicus briefs in the case – the first in support of reconsideration before the Court of Appeals authored by Laurie Webb Daniel and the second in support of cert authored by Amicus Vice-Chair Philip Thompson. He also authored the most recent brief.

The case involves a malpractice claim against Alston & Bird LLP arising out of the creation and operation of a holding company. Ultimately, a jury found Alston & Bird liable but apportioned 60 percent of fault to a nonparty, and the trial judge (after reducing the verdict for the plaintiff's own percentage of fault) reduced the judgment accordingly. A Court of Appeals panel reversed



and determined that the trial court should not have reduced the judgment per the nonparty's fault because Alston & Bird was the only defendant.

The panel's decision holds that O.C.G.A. § 51-12-33(b) provides for reduction of damages consistent with nonparty fault only in multiple-defendant cases. Relying in part on pre-tort-reform case law, the panel reasoned that the distinction between the terms "fault" and "damages" supported this interpretation. Defendants in single-defendant cases now arguably are entitled to a reduction in damages only for plaintiff fault.

The Court of Appeals denied a motion for reconsideration (in support of which GDLA filed an amicus brief), and Alston & Bird successfully petitioned the Georgia Supreme Court for certiorari. The Georgia Supreme Court has asked the parties to address two issues: (1) When an action involves a single defendant, does O.C.G.A. § 51-12-33 allow a reduction of damages against that defendant in accordance with the jury's allocation of fault to a nonparty?; and (2) Is an award for

Continued on page 52



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Insureds Appeal District Court’s Ruling on Business Income Loss Related to COVID-19

By Karen K. Karabinos
Drew Eckl & Farnham, Atlanta

Shortly before Christmas 2020, a Georgia restaurant and event space appealed to the Eleventh Circuit Court of Appeals a ruling by an Atlanta U.S. District Court dismissing their lawsuit in which they sought coverage for their business losses. See *Henry’s Louisiana Grill, Inc. v. Allied Insurance Company of America*, No. 20-14156-BB (11th Circuit). The insureds were forced to cease operations following the Executive Order declaring a “Public Health State of Emergency” issued by Georgia Governor Brian Kemp. The insureds sought coverage under the business loss and civil authority provisions of their policies.

At the heart of the insureds’ appeal is their contention that the term “physical loss of” property must be interpreted differently than “damage to” property. They contend the policy is ambiguous and the “correct interpretation of ‘physical loss of’ property should include scenarios where, as here, an insured has lost the functional use of its space due to external circumstances beyond its control.”

Because the term “physical loss of” property is not defined in the policy, the insureds argue the district court should have looked to dictionary definitions for guidance, but the district court rejected the definitions of physical loss that included “diminution” or “disappearance” in value and focused on the definition of “period of restoration” contained in the provision for Busi-



ness Loss coverage. The “period of restoration” was defined as the “time between the date of the loss and the earlier of:

- (i) The date when the property at the described premises should be repaired, rebuilt or replaced with reasonable speed and similar quality; or
- (ii) The date when the business is resumed at a new permanent location.”

The insureds seek to persuade the Eleventh Circuit that the definition for the “period of restoration” referencing repairs should be interpreted to mean “to restore to a sound and healthy state.” As a result, the insureds contend the policy should provide coverage until “the executive order is lifted and the space is repaired and restored to its original sound and healthy state.”

Judge Thomas Thrash held that definition of “period of restoration” and its “range of contemplated harms aligns with an understanding that ‘loss of’ means total de-

struction while ‘damage to’ means some amount of harm or injury.”^{2020 WL 5938755 at *6}. Because the insureds acknowledged that COVID-19 was not present at their businesses, Judge Thrash held they cannot argue that COVID-19 caused a physical change resulting in their losses. Judge Thrash noted that

the insureds’ argument was that a minute before the governor issued the Executive Order, the dining rooms were in one state, but a minute later, after the Order had been issued, the dining rooms “underwent a direct physical change that left the dining rooms in a different state.” *Id.* at *4. According to Judge Thrash, “[t]his interpretation of the contractual language exceeds any reasonable bounds of possible construction, pushing the words individually and collectively beyond what any plain meaning can support.” *Id.*

The insureds’ “physical loss of” argument is essentially a loss of use argument—because of the Governor’s Executive Order they lost the physical use of the dining rooms. They argue that the holding in Georgia Court of Appeals in *AFLAC, Inc. v. Chubb & Son, Inc.*, 581 S.E.2d 317 (2003) is inapplicable because the Court only addressed the definition of direct physical “damage to” property. Judge William C. O’Kelley previously rejected that argument by an insured in *Northeast Georgia Heart Center, P.C. v. The Phoenix Insurance Co.*, 2014 WL 12480022

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COVID-Related Attitude Changes Toward Companies and Industries: Implications for Defense Counsel



By Lorie Sicafuse, Ph.D. & Melissa Loberg, Ph.D.
Courtroom Sciences, Inc.

Introduction

All of us have been significantly impacted by the COVID-19 crisis. Most of us have experienced significant changes in how we socialize, work, and educate our children. Not only are our behaviors affected by the crisis, our way of viewing the world is also affected during this time of extreme change. The goal of this article is to advise defense attorneys and corporate clients about the impacts of COVID-19 on jurors' perceptions of corporations in general as well as on jurors' perceptions of specific industries and entities.

This article reports survey results obtained from a national sample of jury-eligible respondents regarding shifts in feelings toward a variety of corporations and industries. It concludes with key points for defense counsel and corporate clients to consider in interpreting these findings and in their efforts to promote favorable case outcomes.

Results

Courtroom Sciences' research team surveyed 527 jury-eligible individuals from venues across the nation during the COVID-19 pandemic. The survey assessed the extent to which respondents' feelings regarding a variety of businesses and entities have changed as a result of the COVID-19 crisis. Respondents were sampled from 11 different states and were generally representative of typical jurors in their venue. Approximately 53 percent of the respondents were female. The majority of respondents (70 percent) identified as White/Caucasian, followed by 16 percent Black/African-American, 10 percent Hispanic/Latino, two percent American Indian/Alaska Native; one percent Asian/Asian-

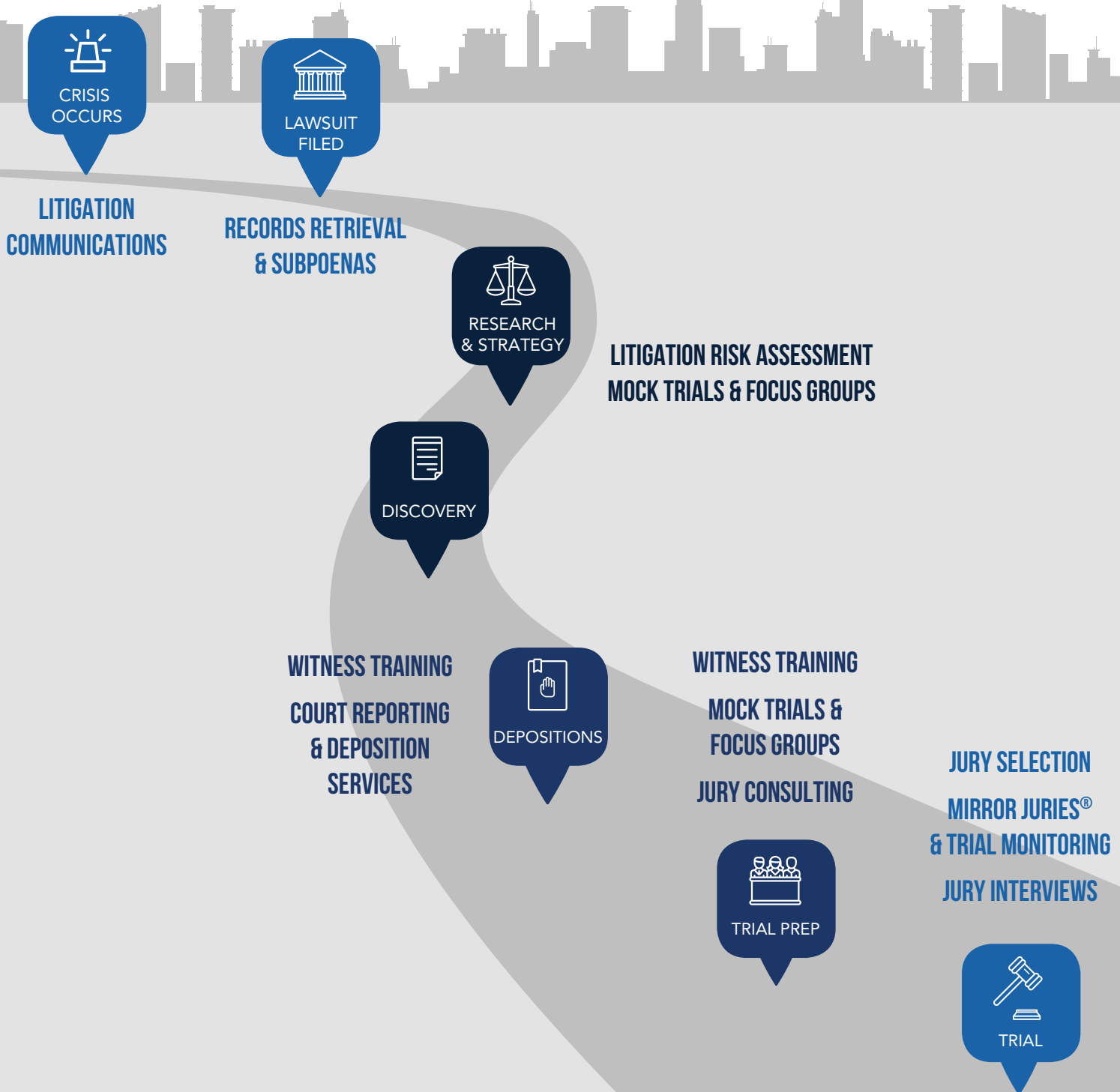
America; and one percent "Other." When asked to indicate their political ideology, one-third (33 percent) of jurors identified as liberal; another 33 percent identified as conservative; and the remaining 34 percent said that they were "middle of the road" or political moderates.

Survey results are summarized in the table below. Although many participants reported no attitude changes, some substantial attitude shifts were observed across industries. Most notably, the majority of respondents indicated that their feelings about physicians, nurses, and hospitals have become more positive as a result of the COVID-19 pandemic. Additionally, the data revealed a significant shift in feelings about transportation industries that are focused on prod-

Continued on page 48

As a result of COVID-19, how have your feelings changed, if at all, regarding the following businesses or industries? Results below:

	More Favorable	Less Favorable	No Change
Large corporations	9%	24%	67%
Small businesses	64%	3%	33%
Trucking companies	39%	4%	57%
Railroads	23%	3%	74%
Auto manufacturers	14%	9%	78%
Oil & gas companies	15%	9%	75%
Pharma companies	16%	29%	55%
Physicians	57%	8%	35%
Nurses	65%	4%	31%
Hospitals	55%	11%	34%
Nursing homes	34%	22%	44%
Cruise lines	4%	30%	66%
Grocery stores	35%	14%	49%
Walmart	21%	24%	54%
Amazon	30%	24%	46%
People who file lawsuits	6%	74%	20%



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Impact of the Pandemic on the Jury Pool and Jurors' Attitudes and Behavior

By Maithilee Pathak, Ph.D., J.D. & Rick Fuentes, Ph.D.
R&D Strategic Services



These are the best of times.
 These are the worst of times.
 These are unprecedented times.

Seemingly interminable quarantines and episodic shutdowns have made people fearful and anxious about getting sick, losing jobs, losing loved ones, losing homes, and losing their minds. People are suffering from emotional exhaustion. As in-person and/or virtual jury trials resume, the question becomes, “What impact has the pandemic had on the jury pool, on juror attitudes, and on juror decision-making?” While it is understandable that many fear the pandemic will have a deleterious impact on the ability of defendants to prevail in court, empirical data suggest otherwise. Indeed, based on preliminary analyses, signs are encouraging for defendants. It appears that jurors have grown more skeptical of certain types of cases and claims.

Impact on Jury Pool

The pandemic has created tremendous turmoil in the lives of virtually all Americans, but it has wrought havoc on some communities more than others. This carries certain implications for litigants.

Some jurors are more likely to be “essential workers” and/or to qualify for exemption from jury service due to financial hardship and/or fear of contracting the virus, irrespective of safety precautions taken by the court (e.g., social distancing, mandatory masks, clear acrylic dividers in the courtroom, sanitation stations, etc.). Jurors who experience high anxiety about the virus are more likely to exhibit what psychologists describe as an “external locus of control,” which



research shows is more likely to be associated with pro-plaintiff orientation.

“Locus of control” describes the extent to which a person believes they have control over what happens in their lives.¹ A person who attributes their successes and/or failures to internal factors, such as personal disposition, individual effort or lack thereof, competence, their own mistakes, etc., is said to have an “internal” locus of control. On the other hand, a person who attributes their successes and/or failures to external factors, such as situational factors, the mistakes of other people, the malicious or negligent conduct of others, sheer luck, etc., is said to have an “external” locus of control. People with an internal locus of control are more likely to perceive themselves as the “captain of their own ship,” whereas people with an external locus of control are more likely to perceive themselves as “flotsam in a torrential sea,” or as subject to victimization by people and/or circumstances.

In the context of juror decision-making, people with an “external locus of control” are typically more victim-orientated and are more

likely to attribute the plaintiff’s misfortune to factors beyond their control. These jurors reason the plaintiff was harmed by the conduct, negligence, reckless disregard, and/or malice of others. This is apt to make them more motivated to protect and/or compensate the plaintiff for the resultant harm.

Preliminary research reveals a similar trend in more than two dozen mock trials and surveys in various venues across the nation. Jurors who describe themselves as having been affected “more seriously than others” by the COVID-19 pandemic have consistently been found to be plaintiff-oriented in all types of cases.² Importantly, this is based on jurors’ *subjective perception* that they have been “more seriously affected than others,” irrespective of what any objective analysis might show; that is, what is paramount is what jurors *believe* about the impediments they face.

Impact on Juror Attitudes

Perhaps the most encouraging finding for defendants is that jurors embroiled in a pandemic appear to

Continued on page 50



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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.

Donate Now, Masks en Route to Courthouses

As reported in the last issue and via multiple e-blasts, GDLA teamed up with the Georgia Trial Lawyers Association (GTLA) to establish Mask Up for Justice! This charitable project is raising funds to purchase and ship masks and personal protective equipment (PPE) to Georgia's courthouses to help them resume jury trials and operate safely during the pandemic. Requests are coming in from all over the state. Over 19,000 masks have been shipped by MUFJ to Georgia courts since December 2020.

At press time, we have collected almost \$50,000. We ask members not only to contribute individually, but also have your law firm make a tax deductible donation. All donors are listed by level under "Thank You to Our Donors" on the MUFJ and both Associations' websites:

Heroes - \$10,000	Protectors - \$1,000
Warriors - \$7,500	Supporters - \$500
Fighters - \$5,000	Leaders - \$250
Defenders - \$2,500	Helpers - under \$250

Supreme Court Chief Justice Harold Melton applauded the effort saying, "Your support for safe court proceedings sends a very important message at a very critical time." Following are more notes of thanks:

"We appreciate your efforts in keeping everyone safe."
—Judge Ken Hodges, Court of Appeals of Georgia

"I received the donated masks and PPE donated by Mask Up For Justice! I wanted to thank GDLA and GTLA for your contribution to ensuring the safety of jurors, attorneys, parties, and court personnel as we strive to dispose of cases fairly and as expeditiously as possible during the current pandemic. In a time when our nation is more divided than ever, it is gratifying to see courtroom opponents work together to achieve a common goal. I assure you we will put these items to good use when we are able to resume jury trials."
—Judge W. Kendall Wynne, Jr., Augusta Superior Court

"Thank you and your respective organizations for the masks and PPE from Mask Up For Justice! This has certainly been a trying time for all trying to figure out how to navigate the courts during this pandemic, and we certainly appreciate any assistance. With jury trials resuming soon in our area, we are appreciative of the efforts you all have made in trying to ensure that court is conducted as safely as possible. Your joint collaboration only further confirms the good we all know lawyers can accomplish when we apply ourselves to a problem, especially when we do so cooperatively."
—Judge Currie M. Mingledorff, II,
Piedmont Superior Court



"Thank you, everyone. We really need these masks and greatly appreciate the combined effort of GTLA and GDLA. Please pass along our Circuit's gratitude to your members."

—Judge Benjamin A. Land, Superior Court,
Chattahoochee Judicial Circuit

"This is amazing. Y'all rock. Thanks so much. This will certainly help us get up and running again safely."

—Judge Dax E. Lopez, State Court of DeKalb County

"Thanks so much for all of your help."

—Judge Robert W. Chasteen, Jr., Cordele Superior Court

"Mask Up For Justice is a wonderful program and a great opportunity for lawyers to help keep the wheels of justice turning during this difficult time. Thank you for the masks and PPE. I can assure you that it will be put to good use."

—Judge Rachel Krause, Fulton Superior Court

"Thank you so much for your help and for the collective efforts of the groups involved."

—Judge Victoria Darrisaw, Dougherty Superior Court

"I just want to thank you for what you are doing!"

—Judge Ronnie Lewis,
Magistrate Court of Appling County

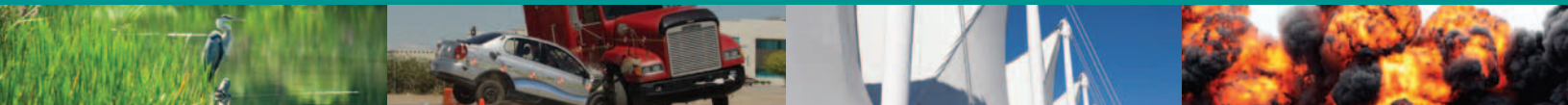
"Thank you so much. We are grateful for this resource and the work that you all are doing. Many thanks to you all for doing this!"

—David Summerlin, Court Administrator,
Atlanta Judicial Circuit

"This assistance is very much appreciated! We are grateful for whatever you can provide."

—T.J. BeMent, District Court Administrator,
Tenth Judicial District

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Sanctions Appeals: Fighting Against Weaponized Discovery

By John E. Hall, Jr., Beth Kanik and Tyler Fisher
Hall Booth Smith, Atlanta



Georgia tort plaintiff attorneys continue the tactic of weaponizing discovery. They seek to set up nuanced and extreme requests through discovery to paint the defense as uncooperative. The plan is to attack the case by attacking the defense counsel, in a way that causes a psychological effect of the defense over producing discovery or just trying to "get along." It encourages less than aggressive advocacy from the defense bar. All defense lawyers who defend companies and professionals find themselves at risk to the bare-knuckle tactics.

Complimenting the plaintiff attorney tactics, is the ever-widening division of political views and the plaintiff's bar clothing themselves in "for the people" campaigns and demonizing businesses and their attorneys. The plaintiff's bar is leading political contributions to judges. They also "honor" and "recognize" them in "professional" organizations. While there are several GDLA members in leadership at the State Bar of Georgia, there have been just as many, if not more, plaintiff's lawyers actively engaged over the past decade.

As an example of their influence, the State Bar of Georgia Formal Advisory Opinion (FAO) Board recently passed proposed FAO No. 20-1, which would allow a lawyer to communicate with former employees of a represented organization without notice to or the consent of the organization's lawyer. It now goes to the Supreme Court of Georgia for review before possibly becoming binding as a "persuasive authority only" (see the

Georgia Rules of Professional Conduct, Part IV, Rule 4-403).

Given this world, defense lawyers who stand up find themselves at a risk for sanctions and motions. Knowing the procedure to combat sanctions by plaintiff-friendly judges is a must.



Some Georgia tort plaintiff attorneys continue the tactic of weaponizing discovery.

They seek to set up nuanced and extreme requests through discovery to paint the defense as uncooperative.



An adverse order awarding attorney's fees or expenses of litigation pursuant to O.C.G.A. § 9-15-14, standing alone, cannot be directly appealed to a higher court. *Capricorn Systems, Inc. v. Godavarthy*, 253 Ga.App. 840, 841 Som(2002). Even if the plaintiff does not challenge your ability to directly appeal, the Court will sua sponte "inquire into its own jurisdiction" and dismiss your appeal.

Ledford v. Mobley, 321 Ga.App. 761 (2013). The only context in which you can directly appeal such an order is if it is made as an ancillary part of another judgment which is directly appealable under O.C.G.A. § 5-6-34(a), such as a "final judgment" ending the case. See *Murray v. DeKalb Farmers Market, Inc.*, 305 Ga.App. 523, 524 (2010).

However, you do not have to wait for a final judgment to challenge an adverse award of attorney's fees. An O.C.G.A. § 9-15-14 award of attorney's fees is enumerated as one of the "certain specified cases" of O.C.G.A. § 5-6-35(a), the discretionary appeal statute. Under this Code section, you have the ability to make an "application," via a Petition for Interlocutory Review, to the Court of Appeals. And, notably, there is no requirement in O.C.G.A. § 5-6-35 that the trial court certify its order as important enough for immediate review. (This makes sense, as a trial judge who has just deemed your pleadings frivolous and awarded fees against you is unlikely to certify that decision at your request.)

Of course, there is a checklist of rules that you must follow when filing your petition. You have 30 days from the entry of the trial court's order awarding attorney's fees to file with the Clerk of the Court of Appeals or the Supreme Court. O.C.G.A. § 5-6-35(d). Additionally, the statute requires you to serve a copy of your application/petition upon opposing counsel "at or before the filing of the application." O.C.G.A. § 5-6-35(d)(emphasis supplied).

Under O.C.G.A. § 5-6-35(c), your petition must contain the following:

- A specification of the order being appealed;
- A statement of the appellate court's jurisdiction (here, O.C.G.A. § 5-6-35(a)(10));
- An explanation of the need for interlocutory appellate review;
- Exhibit "A," a copy of the order being appealed.

Your petition should contain the following as well:

- Exhibit "B," a copy of the plaintiff's Motion which led directly to the order;
- Exhibit "C," a copy of any responses you filed to the plaintiff's Motion.

- Exhibit "D," copies of "such other parts of the record or transcript" as appropriate, i.e. the transcript of the hearing on plaintiff's Motion.

Once you have checked all these boxes and filed your petition, opposing counsel has 10 days from the date of filing to submit her response, and the appellate court will issue its order either granting or denying your appeal within 30 days of your filing. If you are granted the appeal, you then have 10 days to cement your review of the issue by filing a formal Notice of Appeal, at which point the case proceeds the same as all other appeals. O.C.G.A. § 5-6-35(e)-(g).

As defense lawyers, we will find ourselves facing more and more attacks. We must stand up and fight when our client is, and we are, right. ♦

John E. Hall, Jr. is one of the founding partners of Hall Booth Smith. He specializes in the defense of high exposure cases, including medical malpractice, batch claims, construction, commercial litigation, mass torts, transportation and products liability. During his legal career, he has tried more than 125 cases to resolution.

Beth W. Kanik is a partner in the firm's Atlanta office. A seasoned trial attorney, she has defended physicians, general contractors and hospitals in New York and in Georgia on issues of standard of care, proximate causation in a medical context and the acceptance doctrine in the construction and professional liability context.

Tyler Fisher is an associate with the firm, focusing on professional negligence and medical malpractice.



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The Viability of Contractually-Shortened Tort Limitation Periods in Landlord-Tenant Lease Agreements

By Donovan K. Eason
Lewis Brisbois Bisgaard & Smith, Savannah

Assume you represent a property management company. The company has been roped into a tort action after a tenant fell on a curb located on one of its premises two years prior. Looking over the documents in the case, you skim the lease agreement, noting information on the key parties to the suit. But as you turn the final page, you notice something rather unique compared to most leases:

Limitation on Actions. To the extent allowed by law, Resident also agrees and understands that any legal action against Management or Owner must be instituted within one year of the date of claim or cause of action arises and that any action filed after one year from such date shall be time barred as a matter of law.

You think to yourself: A one-year limitation period? Any cause of action? Is that all there is to it? It is never this straightforward.

Your intuition would be right as this exact scenario posed a question of law which finally came to a close after four years in *Langley v. MP Spring Lake, LLC*.

On March 3, 2014, Pamela Langley alleged she fell on a common area of her apartment complex when her foot got caught and slid on a crumbling portion of a curb. Two years later, Langley filed suit against Spring Lake in the Superior Court of Clayton County, alleging theories of negligence and negligence per se.



Spring Lake moved for summary judgment citing the same language above restricting any legal actions by Langley to be brought within one year—March 3, 2015.

Langley countered along a few lines, but two bear particular import for the case’s eventual trajectory. First, Langley argued the limitation should be interpreted so as to apply only to claims arising from the lease agreement itself—not any tort claims which might materialize during the term of the lease. And second, she stated the language should be held unenforceable as a matter of law. In granting summary judgment, Judge Robert Mack found in favor of Spring Lake and declared Langley’s suit to be time-barred.

Langley appealed to the Georgia Court of Appeals, arguing Mack’s ruling was “erroneous

because a contractual limitation period, such as the one at issue, should not apply to claims that do not arise out of the agreement in which it is contained.” Langley’s counsel openly questioned: What if she’s driving in downtown Atlanta and a maintenance man for the apartments hit her? She can’t sue? It doesn’t make any legal or logical sense to me.

But the Court of Appeals sided with the trial court, affirming its decision. In its analysis, the Court of Appeals underscored parties’ freedom to contract and cardinal rules of construction in interpreting contract to hold “although personal-injury claims are ordinarily subject to a two-year statute of limitation, Langley contractually agreed to bring any action against Spring Lake—including, but not limited to,

personal-injury actions—within *one* year.

Professor Anne Tucker, an associate professor at Georgia State University College of Law who teaches contracts, commented the Court of Appeals opinion should be understood to mean:

blanket restrictions on liability for all types of claims can be written into a contract, even in contracts that are not normally subject to negotiation, like a landlord-tenant contract . . . If your job is to reduce liability or contain exposure, you would absolutely want to include a statute of limitation on any type of claim.

But the opinion also drew an immediate rebuke from the plaintiff’s bar:

This could and likely will have far-reaching implications for a number of injured people as virtually all corporate defendants will not seek to include similar provisions in their contracts . . . daycare centers, gyms, hospitals, nursing homes and trampoline parks might try to limit their exposure by limiting the time a suit can be filed or even capping damages a party can seek. It’s a scary decision.

Following the denial of Langley’s Motion for Reconsideration by the Court of Appeals, the Supreme Court of Georgia granted certiorari, acknowledging the gravity of the decision. In doing so, the Supreme Court posed two questions: (1) Whether the one-year limitation period in Langley’s lease agreement also encompassed tort

actions against Spring Lake; and (2) if so, whether the provision is enforceable. But despite asking for briefing on both questions, the Court channeled its focus early:

[T]he question here is not whether contractual time-limitation provisions are generally enforceable in this State; that question is clearly answered in the affirmative as to claims for breach of contract. Rather, the question is whether the Limitation Provision agreed to by the parties in this case, who were at the time creating a landlord-tenant relationship, applies to Langley’s premises liability tort claim.

Competing responses were put forth by the Georgia Trial Lawyers Association and Georgia Defense Lawyers Association in amicus briefs. GTLA asserted the majority of cases enforcing contractually shortened limitations periods traditionally concerned suits to recover on a policy of insurance. In other words, the limitations were solely contractual and nature and have been evidenced by cases reaching as far back at 1858.

GDLA countered this view, noting the limitation constituted a structural provision of contract no different than parties’ mutual agreement to other terms pertaining to remedies or dispute resolution—*e.g.*, choice of law, arbitration, and forum selection. In fact, “[i]n the context of arbitration agreements, torts that are even slightly related to the contract are engulfed by the arbitration provision.”

Critical to the Court’s holding was the context of the otherwise unambiguous terms. “Words, like people, are judged by the company they keep.” The Court noted a

conflict existed between the broad literal meaning of “any legal action” and the limited function of the lease agreement itself, prompting the Court to read the phrase in favor of Langley, the non-drafter. Taken together with the lease agreement’s recitals to duties sounding in contract, as opposed to those sounding in tort, the Court held the limitation period should be cabined to contract claims arising under the lease.

While *Langley* prevented application of the limitation period here, counsel should not overlook what the Supreme Court left undisturbed. The Court expressly noted *Langley* offers no opinion on whether a limitation period within a lease agreement could be constructed so as to avail would-be defendants of the same strategy pursued here. And the Court’s continued reasoning suggests this specific issue, if presented on appeal, will likely pit the Court’s deference to parties’ freedom of contract and individual justices’ views upon statutory interpretation against prior decisions’ worries of eroding the General Assembly’s public policy goals in landlord-tenant settings. But the public policy concern underscored by the General Assembly in *Thompson*, the opinion cited by the Supreme Court, pertains to limitations on a landlord’s *substantive liability*—not limitations on the *procedural devices* agreed upon by the parties in resolving that substantive liability.

So, while *Langley* functionally denied the defense to Spring Lake in this instance, the ultimate issue the case presented remains very much unsettled. Perhaps equipped with lease verbiage specifically limiting the *period* for the pursuit of tort claims, while also noting the limitation does not affect the *duties*

Continued on page 57



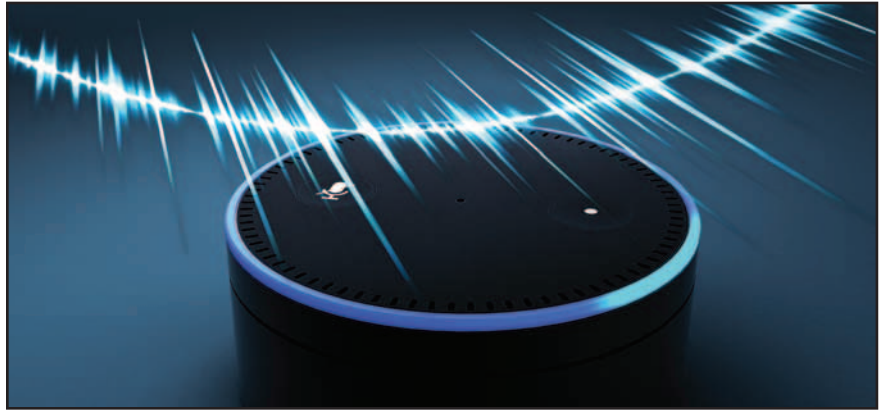
Hey Google! Where Did the Fire Start? Smart Home Devices and Fire Investigation

By Nick Mahoney, P.E., CFEI
S-E-A, Limited

Hey Google! Where did the fire start? If only it were that easy! Many are now accustomed to asking their smart assistants such as Siri, Alexa, or Google Home devices for mundane information like the weather or latest sports scores. What if these devices could also aid in the investigation of fires? It turns out, they can, but it takes more than just asking.

Smart home devices such as smart speakers, thermostats and security cameras have increased in prevalence in recent years. Some insurance and utility companies have even started offering incentives for smart home device installations [1], [2], [3]. Their increased prevalence has led police and fire departments to attempt to utilize their data with mixed success [4], [5], [6]. In two recent instances, smart smoke detectors were attributed with reducing fire service response time [4], [6]. A quick response from the fire service can potentially save more evidence of the fire's origin and cause. Additionally, some of the data collected from smart home devices can be used in fire investigation. To utilize the data from smart home devices, a fire investigator must understand their construction, how their data is stored, and how exactly that data can assist in fire origin and cause investigation.

Broadly speaking, a smart home device is any electronic device in your home, usually with wireless capability, that can act autonomously or interactively. Common examples are thermostats such as the Google Nest; doorbell / security cameras such as the Amazon Ring; or smart speakers like the Amazon Echo. Smart home devices have also grown to include larger products such as ranges, microwave ovens, and refrigerators. Smart home devices are typically accessi-



ble over the home's wi-fi network or a user's mobile phone via Bluetooth. They are almost always composed of one or more electronic sensors, a processor, a wireless radio, and on-board or cloud-based data storage.

Electronic sensors in smart home devices include cameras, microphones, temperature sensors, and motion sensors. Each of these types of sensors can provide useful information for fire investigators. A typical smart home security camera may pair a motion sensor with a camera to detect intruders and begin video recording. This same device may be also be able to detect the motion of flames or smoke and begin video recording. A smart home thermostat will monitor the temperature in a room or even multiple rooms via remote temperature sensors, but many other smart home devices also have integrated temperature sensors. Regardless of the source, a log of temperature measurements could help track a fire's growth. Smart home speakers can record fire-related data as well. A feature added to Amazon's smart speakers includes the ability to monitor and record smoke alarm activation sounds while the homeowner is away. When the feature is enabled, a notification will be sent to the owner's mobile device in the event a fire is detected.

None of these sensors make a smart home device useful unless the data is processed and stored. Processors are the brains of a smart home device, but the most intensive processing, especially for speech and video data, is often done at a remote data center. For example, only the word "Alexa" is deciphered by your speaker if you ask, "Alexa, what is the weather forecast for today?" The entire question is then processed and stored in the cloud (at a datacenter).

Data retention is one critical differentiating factor among smart home device manufacturers. Depending on the device and manufacturer, cloud-based data could be deleted automatically, after ten days, as in the case of the Nest thermostat, or retained indefinitely as in the case of Amazon's Alexa devices. With such a variation in data retention, preservation of evidence for smart device data presents emerging legal issues [7]. This discrepancy in retention policies also compounds the need for timely fire investigation by a qualified fire investigator.

Use of electronic data in fire investigation is not a new idea [8]. Witness information and/or electronic data is one of the four recognized sources of information for origin determination listed in the

Continued on page 56



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Mediation Can Result in Win-Win Resolutions: Tips for Success

By Greg Hecht

Henning Mediation & Arbitration Services

As opposed to the long-expressed mantra that everyone goes away unhappy from a mediation, the truth is that all parties can gain win-win resolutions. Mediation gives parties a unique opportunity to express positions and provide information for the other side to review and evaluate with the assistance of a third-party mediator. Usually, the parties get one chance to listen, evaluate and mutually win a mediation. The below factors may help you win your mediation.

I. Wait for the Magic Moment.

Recently, I mediated a case involving an injury that occurred at an industrial facility, where the parties were 29 million dollars apart at the beginning of the mediation. The first offers were dramatically different from the ultimate resolution. Early on both parties wanted to leave the mediation due to the other party “not being realistic”.

After many hours, however, the case did resolve. A reasonable resolution was reached based on the information presented and the willingness of the parties to listen to the objective questioning by a third-party mediator. Both parties needed to have their say. At the beginning, both parties needed to present unrealistic offers based on client pressures.

As a mediator, I kept expressing that there was no downside to staying put to see if we could get in a reasonably close ball park at some point. There is a natural tendency to want to leave when first offers are so far apart.

However, if most parties will stay the course through the mediation, there is often a magic moment. After a significant portion of truth



testing and real concerns being expressed and evaluated, a break from the preconceived notions of what each party should agree to often results. If you will stay the course, your clients will benefit.

II. All Parties and Counsel Should Take the Good Faith Pledge and Mean It

Recently, I mediated a real estate litigation matter, and like usual, I required the parties and the attorneys to take the good faith pledge. The good faith pledge states simply that the parties and their counsel will listen to each other, will negotiate in good faith, and came to the mediation for the purpose of settling the case. Each party took the pledge then went into their respective bunkers. In this particular case, the real questions came down to how certain contracts related to each other and whether the parties had mutually departed from the terms of the contracts by their actions. When it came right down to it, both parties basically stated that they rejected the interpretation of the opposing side.

The key question for me to convey to the parties and counsel was, “Do you believe there is a risk that the judge may interpret the contract or your actions differently than you

do?” Initially, both sides balked at the question. However, I reminded each side of the good faith pledge to listen to the other side, to objectively review the information presented, and to determine if there was a risk moving forward with their position. They had promised that they would listen, assess the risk and negotiate in good faith.

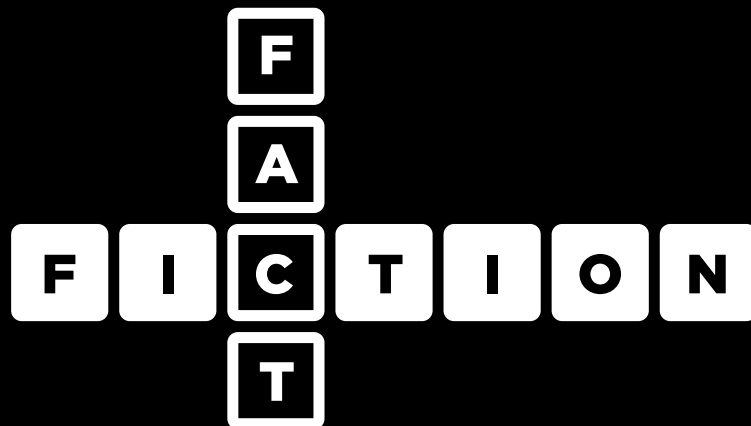
Once we resumed our good faith review, evaluation and negotiations, both sides admitted that a Judge could find for the opposing party’s viewpoint on some level of a scale from 1 to 10. That broke the ice and led them to a successful resolution. However, the key is breaking the barriers down and making sure that your clients and all counsel are agreeable to listening, learning and negotiating in good faith. All three of these steps must flow from the foundation of real good faith.

III. Creativity Matters (Don’t Assume There’s Only One Way to Resolve the Matter)

In one of my recent mediations, the parties were going through a business divorce. One party was the founder of a company. The other party was comprised of the continuing members of the business who believed the founder was an impediment to success. Both parties assumed that the only resolution was to pay a certain amount of upfront money to the founder to ensure his exit from the company immediately. The continuing members were short on cash and claimed the company was not worth anything.

At the beginning of the mediation, I tried to gain a sense of what each party’s main interests were, but there was resistance to dis-

Continued on page 58



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Making Numbers Make Sense





Situation Awareness: Concepts, Controversy and Crash Investigation

By Phil Fatolitis, Ph.D
J.S. Held

Introduction and Definition

Like many topics studied in the branch of science known as human factors (HF), the concept of situation awareness (SA) has been perceived as being both intuitive and difficult to understand. SA is associated with attention, human decision-making and ultimately, with human performance (including human error) [1].

Questions as to the validity of SA as a scientific construct have been levelled in both the scientific and legal communities. Despite criticisms and counterarguments, scientific methods enable investigators to identify SA in crash investigations. The objectives of this article are to: provide an overview of the subject of SA; to provide examples of SA's relevance to driving; to discuss some criticisms levelled against SA; and to provide an example of a technique that can be used to properly investigate the role of SA in a crash investigation.

SA has been (and currently is) used to study human behavior, especially in complex, dynamic environments where time-critical decision-making is required. In such environments, operator goals and mental models interact to direct attention and to form a course of action [2]. SA provides the primary bases (e.g., cue recognition, hazard assessment, prediction) for decision making and task performance, although it is acknowledged

that SA alone cannot guarantee successful decision-making [3]. In an example of how it can apply to driving, an alert and attentive driver possessing knowledge of hazards associated with left-hand turns at intersections has better SA when approaching an intersection than one who simply perceives automobiles on the roadway, or worse, is distracted by texting and driving.

The central idea is that operators possessing a high level of SA are better equipped than low-SA

Perception (Level 1) is where people perceive the status, attributes and dynamics of relevant elements in the environment. Comprehension (Level 2) is the synthesis of Level 1 elements to form a holistic picture of the environment, including comprehension of the significance of objects and events. Projection (Level 3), the highest level, depends on input from Levels 1 and 2 and is characterized by the ability to project future status of environmental elements.

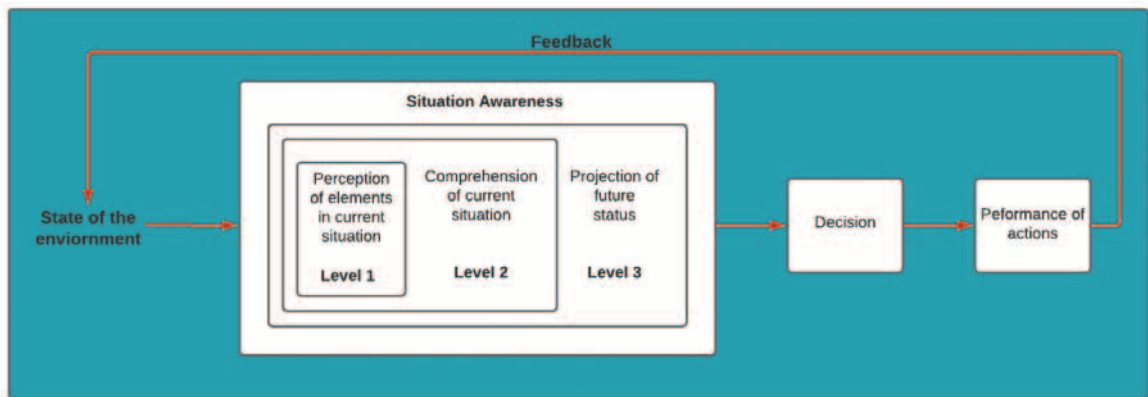


Figure 1. Adaptation of the situation awareness model shown in Endsley, M. (1995). *Toward a theory of situation awareness in dynamic systems. Human Factors, 37(1), 32-64.*

operators to make appropriate decisions and this is especially relevant in circumstances that require time-critical decision-making.

SA is defined as “the perception of environmental elements and events with respect to time or space, the comprehension of their meaning and the projection of their future status” [3]. According to a widely researched and accepted model of SA (see Figure 1), perception, comprehension and projection constitute three “levels” of SA that represent increasing states of awareness at a given place and time.

The model also recognizes factors that can influence the development and maintenance of SA, such as individual and system variables [3].

Driver SA

As a “stand-alone” construct, SA first appeared in the scientific literature in the mid-late 1980s. The concept has since been widely researched, involving topics such as: SA-related psychological variables (e.g., attention), factors that influence SA acquisition and maintenance, and designs that optimize SA (e.g. technologies, displays,

Continued on page 54

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COMMERCIAL LITIGATION/BUSINESS CASE LAW UPDATE

By James T. Hankins III
Goodman McGuffey, Atlanta

STATUTORY SETTLEMENT OFFERS

Eichenblatt v. Piedmont/Maple, LLC

Georgia Court of Appeals

Case No. A20A2052

January 29, 2021

In *Eichenblatt v. Piedmont/Maple, LLC*, the Georgia Court of Appeals held the trial court improperly awarded attorney’s fees to a party pursuant to O.C.G.A. 9-11-68, reversing a six figures award (\$837,444.95) of attorney’s fees.

In the case, David Eichenblatt and Kaufman Development Partners (KDP) formed Piedmont/Maple, a real estate investment company that owned and operated a piece of commercial property in Atlanta. The business marriage of the newly-created venture later soured and litigation followed between the business partners.

In connection with one of the cases, Piedmont/Maple, LLC, Kaufman Development Partners, and Craig Kaufman filed a declaratory judgment action against Mr. Eichenblatt, and he answered the

complaint and also asserted counterclaims against his business partners based on breach of contract (i.e., breaching the operating agreement for the business) and tort (i.e., breach of fiduciary duty).

During the lawsuit, the plaintiffs served a statutory settlement offer pursuant to O.C.G.A. 9-11-68, seeking to settle Mr. Eichenblatt’s counterclaims. Although Plaintiffs described the offer as an “offer to settle the counterclaim for breach of fiduciary duty asserted by [Mr. Eichenblatt]”, the statutory offer required Mr. Eichenblatt to dismiss and release all counterclaims.

The Georgia Court of Appeals reviewed the statutory offer and held the statutory offer unenforceable. First, O.C.G.A. 9-11-68 only applies to settlement of tort claims, and because the offer required the release and dismissal of all claims, including the contract claim, the statutory offer could not be enforced by the trial court. In connection with this part of the opinion, the Court of Appeals did address an exception to the general rule that these types of statutory offers can only be used to settle tort claims.

If the other claims sought in the case are entirely premised on the allegations contained in the tort claims, then a statutory offer may require settlement of these non-tort claims. Applying this exception to the Eichenblatt case, the Court of Appeals reasoned this exception did not apply because the breach of contract claim was not entirely premised on the breach of fiduciary duty claim.

The Court of Appeals also reversed the trial court’s grant of attorney’s fees because the statutory offer was ambiguous based on the inconsistent description of the scope of the offer. Although the introductory paragraph noted the offer was to settle the breach of fiduciary duty claim, other parts of the statutory offer required dismissal and release of all claims. Accordingly, based on this ambiguous language, the Court of Appeals reversed the trial court’s award of attorney’s fees due to the statutory offer being legally unenforceable.

Eichenblatt illustrates both the strategic value in sending a statutory offer and how important it is to draft an offer that fully complies with the statutory requirements. A defendant can send an early statutory offer, which may create leverage in the case and in later settlement discussions. But if a defendant is going to send a statutory offer, the defendant must make sure the offer terms are clear and the other statutory requirements are satisfied. ♦

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MASS TORTS CASE LAW UPDATE

By Todd E. Schwartz, Substantive Law Section Chair
Lewis Brisbois Bisgaard & Smith, Atlanta

**NON-PARTY FAULT AND
 ALTERNATIVE CAUSATION**
*Pneumo Abex, LLC, et al. v.
 Sheila Long, et al*
Court of Appeals of Georgia
Case No. A20A1442
October 6, 2020



On October 6, 2020, the Court of Appeals affirmed the trial court grant of summary judgment dismissing Defendants’ affirmative defenses, including non-party fault and alternative causation. Defendants attempted to allocate fault for Plaintiff’s deceased spouse’s injury to his treating physicians. Mr. Long worked as a truck and automobile mechanic from 1977 to 1999. In 2014, he was diagnosed with lung cancer. In 2016, he filed a lawsuit against numerous defendants alleging that his lung cancer was caused by exposure to asbestos containing products from his work as a mechanic.

During the pendency of the case and after Mr. Long’s death, his surviving spouse filed a Motion for Summary Judgment on Defendants’ affirmative defenses, including the alleged medical malpractice by Mr. Long’s lung cancer treatment providers as a source of apportionment of non-party fault. Plaintiff claimed Defendants failed to meet their burden of proof. The trial court granted Plaintiff’s motion finding insufficient expert testimony regarding alternative causation of Mr. Long’s lung cancer. Further, the trial court found that Defendants’ expert witness on the alleged malpractice of Mr. Long’s treating physicians, Dr. Allan Feingold, was not qualified as an expert to opine about the alleged malpractice.

Defendants appealed the trial court ruling. During the appeal, the Georgia Trial Lawyers Association

(GTLA) filed an amicus brief in the case after oral arguments by the parties. GTLA argued that O.C.G.A. § 24-7-702(c) applies to the proof for an asserted malpractice claim no matter which party raises the issue. Further, the party asserting a malpractice claim needs sufficient evidence of causation even for apportionment claims. In this case, it is Defendants’ burden and they failed to meet it.

The Court of Appeals affirmed the trial court’s ruling that Dr. Feingold’s testimony was insufficient to meet the burden of proof regarding any alleged failure to provide the adequate standard of care in treating Mr. Long and thus his treating physicians could not be placed on the verdict form as potentially at fault non-parties. In arriving at its holding, the Court of Appeals determined that O.C.G.A. § 51-12-33 considers the fault of all entities but the party asserting fault of that entity needs competent evidence that the non-party contributed to the alleged injury. For a medical malpractice claim, the asserting party must meet its burden of proof with expert testimony.

In this case, Defendants’ expert, Dr. Feingold, stated that it is common in an adenocarcinoma case to submit pathology samples for DNA mutation analysis for possible extra treatment, e.g. TKI treatment, in addition to chemotherapy. Mr. Long was not treated with TKI treatment for at least two years after his diagnosis, but showed improvement after receiving such treatment. This

was the basis of his opinion that Mr. Long’s treatment fell below the applicable standard of care. However, the Court of Appeals found Dr. Feingold’s “testimony was too vague to express the kind of reasonable degree of medical certainty or probability necessary to establish causation for a medical malpractice claim.” Thus, Defendants failed to present competent evidence that Mr. Long’s treating physicians were tortfeasors who committed malpractice. Therefore, the trial court did not err in refusing to include the physicians for apportionment of fault for Mr. Long’s injury.

Recent Bankruptcy Filings By Defendants in Asbestos Cases

Two newly formed entities, created from prior defendants involved in asbestos litigation across the country, filed for Chapter 11 Bankruptcy protection on June 18, 2020. Aldrich Pumps and Murray Boilers were spin off companies formed by Trane Technologies after its merge with Ingersoll-Rand. Both newly formed companies filed their petitions in the Western District of North Carolina.

Aldrich Pumps dates back to 1905 as a manufacturer of pumps and compressors. It was named as a defendant in asbestos cases starting in the mid-1980s. Murray Boilers traces its beginnings back to 1913. Its products included HVAC compressors, furnaces and related equipment.

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PREMISES LIABILITY CASE LAW UPDATE

By Carrie Coleman, Substantive Law Section Co-Chair
Drew Eckl & Farnham, Brunswick

DUTY OF PROPERTY OWNER WITH REGARD TO CRIMINAL ACTIVITY
ABH Corporation et al. v. Montgomery
Court of Appeals of Georgia
Case No. A20A0854
September 17, 2020

In *ABH Corporation et al. v. Montgomery*, the Court of Appeals reiterated the extent of the duty placed upon property owners with regard to criminal activity that has previously taken place on or near the subject property. In a unanimous opinion, the Court held that a property owner is under no duty to investigate police files to determine what, if any, criminal activity has occurred on or near their property.

In *ABH Corporation*, Plaintiff, Brandon Montgomery, was driven to the store by a friend to pick up some snacks. Before he entered the store, a male approached Plaintiff and asked for money. The plaintiff replied that he had none. After seeing the Plaintiff make a purchase, the male again approached Plaintiff inside the store. Plaintiff again stated that he had no money. The two exchanged words inside the store. As Plaintiff exited the store, he was attacked by the male and other assailants. Plaintiff suffered injuries from the attack.

The plaintiff filed suit against the *ABH Corporation* and the owner/operator of the gas station (“the store”). Plaintiff claimed the store had breached its duty to keep the premises safe. He also brought claims for nuisance and punitive damages. Counsel for *ABH Corporation* and the owner/operator of the store filed a motion for summary

judgment. This motion was denied by the trial court. Defendants appealed.

While examining Plaintiff’s breach of duty claim, the Court reiterated that a property owner is under a duty to exercise ordinary care to protect invitees from unreasonable risks of which he or she has superior knowledge. With regard to risks that may stem from criminal activity on the property, the key question in determining whether risk of injury to invitees is foreseeable is the owner’s superior knowledge. The burden falls upon the Plaintiff to establish that the property owner had superior knowledge of substantially similar crimes on or near the property, which would establish the foreseeability of injuries to invitees.

Plaintiff argued that the store should have foreseen the risk of such an attack based upon 911 call logs presented to the trial court. The logs included only a date, time, and a general, vague description of the subject of the call. Several of the calls on the log were only labeled “suspicious.” Plaintiff argued that the logs showed that police were routinely called to the shopping center, where the store was located, in regard to suspicious activity. Plaintiff also argued that the attack was foreseeable as one of the assailants had been arrested eight years earlier on drug and trespass charges, and was ordered to stay away from the area.

Defendants countered the plaintiff’s arguments by showing that the plaintiff had resided only a few minutes from the store for approximately 15 years. Plaintiff regularly shopped at the store. He also worked at a barber shop in the

same shopping center, and deposed that people regularly entered the barber shop restroom for criminal purposes. Plaintiff admitted he and some of his co-workers began carrying firearms for personal protection. Finally, he admitted he knew of people, including his roommate, who had called police from the shopping center. The evidence clearly demonstrated that Plaintiff’s knowledge of any criminal activity was, at least, equal to that of the defendants.

The Court of Appeals found that there was no issue of material fact concerning Defendant’s knowledge of criminal activity at the store or in the surrounding area that was superior to the plaintiff’s. The Court of Appeals also reversed the trial court’s ruling on Plaintiff’s claims for nuisance and punitive damages. The Court stated that Plaintiff’s claim for nuisance failed, as there was no evidence presented to establish Defendant’s superior knowledge of the alleged risk. As the punitive damages claim was derivative of the breach of duty and nuisance claims, the trial court’s denial of summary judgment was likewise reversed.

CONTRACTUALLY-SHORTENED TORT LIMITATION PERIODS IN LANDLORD-TENANT LEASE AGREEMENTS
Langley v. MP Spring Lake, LLC
Supreme Court of Georgia
Case No. S18G1326
October 21, 2019

See the feature article by Substantive Law Section Co-Chair Donovan Eason analyzing this case on page 34. ♦

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PRODUCTS LIABILITY CASE LAW UPDATE

By Patrick N. Silloway
Balch & Bingham, Atlanta

MANUFACTURERS DUTY TO MAKE PRODUCTS REASONABLY SAFE FOR INTENDED OR FORESEEABLE USES
Maynard et al. v. Snapchat, Inc.
Court of Appeals of Georgia
Case No. A20A1218
October 30, 2020

In *Maynard v. Snapchat*, the Georgia Court of Appeals held that a manufacturer’s duty to make products “reasonably safe for intended or foreseeable uses ... does not extend to intentional (not accidental) misuse of the product in a tortious way by a third party.”

The case revolves around the popular smartphone app “Snapchat” and its “Speed Filter” feature, which allows users to superimpose their current speed over a video or photo that can be shared through the app. The plaintiffs, a husband and wife, sued Snapchat, Inc. for negligently designing the Speed Filter feature after the plaintiff-husband was injured when a woman trying to reach 100 miles per hour while using the app crashed her car into the back of his car. The plaintiffs alleged Snapchat violated its duty to design a reasonably safe product because the Speed Filter “encourag[ed] users to endanger themselves and others on the roadway.” Essentially, the plaintiffs argued the app caused their injuries.

On Snapchat’s motion to dismiss, the trial court dismissed the claim against Snapchat, concluding “Snapchat ‘had no duty to alter the design of its mobile application to prevent McGee from driving recklessly or negligently.’” The Georgia Court of Appeals affirmed, holding



“it is up to the user to avoid dangerously misusing [the product].”

“Georgia law does not impose a general duty to prevent people from committing torts while misusing a manufacturer’s product.” This meant a manufacturer could not be held liable as a matter of law for intentional, even if foreseeable, misuses of its product. Instead, “it is up to the user to avoid dangerously misusing [the product].” The Court suggested to hold otherwise would be contrary to public policy, citing to how Georgia’s hands-free law targets drivers’ conduct with relation to cell phones and driving, rather than imposing any kind of restriction on manufacturers. The Court also referred to cases from other states holding a manufacturer does not have a duty to control the actions of third parties.

Chief Judge McFadden dissented. He maintained the plaintiffs had done enough to state a claim by alleging “Snapchat failed to

adopt a reasonable design, leading to foreseeable use or misuse of the Speed Filter, thus foreseeably causing their injuries.” He would have allowed this case to proceed, as he could see how the plaintiffs could ultimately satisfy the risk-utility test of *Banks v. ICI Americas*. McFadden took issue with the majority’s conclusion there is no duty on manufacturers to protect against intentional, rather than accidental, misuses, accusing the majority of “creat[ing] new law.”

Maynard is an important and welcome decision for manufacturers. Rather than hold a manufacturer liable for the intentional misuse of its otherwise safe product, the Georgia Court of Appeals placed the liability squarely on the shoulders of the intentional misuser, and did so as a matter of law at the motion to dismiss stage. ♦



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COVID-Related Attitude

Continued from page 26

uct delivery, with over one-third (39 percent) of respondents reporting more positive feelings towards trucking companies and nearly one-quarter (23 percent) reporting more positive feelings towards railroads.

The extent and valence of attitude change towards retailers depended on the type of retailer specified. Across retailers, respondents were most likely to perceive grocery stores more favorably, with 35 percent reporting more positive feelings because of the COVID-19 crisis and only 14 percent reporting more negative feelings toward grocery stores. In comparison, almost one-quarter (24 percent) said that their feelings toward Walmart have become more negative during the COVID-19 crisis and 21 percent said that their feelings toward Walmart have become more positive. Perceptions of Amazon were similarly split, with 24 percent reporting less favorable feelings and 29 percent reporting more favorable feelings.

Results suggest that most jury-eligible adults are likely to show support for small businesses during this time, as 64 percent said that their feelings about small businesses have become more favorable. On the other hand, only nine percent reported more favorable feelings about large corporations and 24 percent said that their feelings about large corporations have become more negative. Although most respondents (74 percent) said that their feelings about plaintiffs or “people who file lawsuits” has not changed as a result of the COVID-19 crisis, 20 percent said that their feelings towards plaintiffs have become more negative since the pandemic.

Discussion

Our results demonstrate significant shifts in jurors’ perceptions of certain companies and industries because of the pandemic. These shifts may be particularly advantageous for counsel representing defendants in the healthcare or transportation industries. Specific attitudes are much more powerful predictors of juror verdict preferences compared to juror demographics; therefore, defense counsel might reasonably assume that a juror reporting more favorable feelings about physicians and hospitals will be favorable in a medical malpractice case.

Importantly, though, predicting juror decisions remains a complex task, and defense counsel will face additional challenges in trying cases in the COVID and post-COVID era. We offer the following key points and observations for defense counsel to consider in interpreting the current results and promoting favorable case outcomes.

Juror Polarization

More extensive analyses of respondents’ attitude shifts across various companies and industries suggest that these shifts are largely attributable to polarization rather than to an extreme change from one end of the spectrum to another. For example, most of the participants who reported more positive feelings about the trucking industry already had somewhat positive or at least neutral feelings about the trucking industry prior to the COVID-19 crisis.

Similar trends were observed in participants’ attitude shifts regarding large corporations, small businesses, and people who file lawsuits. The lesson is that strong pro-plaintiff jurors pre-COVID will continue to be strong pro-plaintiff jurors post-COVID, and the same pattern will occur for strong pro-defense jurors. It is the

“middle of the road” jurors who are the primary targets for true attitude change that can affect litigation outcomes.

Feelings about Large Corporations and Plaintiffs

More than one-quarter of respondents reported feeling more negatively toward large corporations in general as a result of the pandemic. This is a puzzling finding, as most large corporations cannot be directly implicated in contributing to the introduction or spread of COVID-19 within the U.S. These findings are likely partially attributable to polarization such that participants who already had negative attitudes towards large corporations have become even more anti-corporate; large corporations are also convenient scapegoats. At the same time, a smaller but still significant percentage of survey respondents (20 percent) reported more negative feelings towards those filing lawsuits.

The same strategies for identifying favorable and unfavorable defense jurors still apply. Jury selection will largely remain a “deselection” process focused on identifying and eliminating the most unfavorable jurors; yet counsel should pay special attention to thoroughly rehabilitating anti-litigation jurors. In the current highly polarized and politicized environment, it will be critical for counsel to seat one or more confident pro-defense jurors with strong leadership potential. It also should be noted that negative sentiments towards large corporations in general tend to predict sentiments towards specific companies.

Aside from key industries that have been critical during the pandemic (e.g., healthcare, transportation, and other industries specifically catering to consumers’ needs during this time), most jurors have not formed strong opin-

ions about specific companies and thus tend to view any given corporate defendant either negatively or positively based on their view of Corporate America as a whole.

Corporate Behaviors and Responses to the COVID-19 Crisis

Benefits of coronavirus-related attitude shifts may be easily undermined by well-executed reptile tactics that show the jury how a corporate defendant broke its own safety rules. In response to the pandemic, many companies have released official communications and statements touting their commitment to employee, consumer, and public safety. Although well intended, these communications typically include language that establishes unattainable safety standards and rules, which dramatically increases a company's susceptibility to reptile attacks in litigation. Such communications must be carefully crafted to demonstrate that a company indeed cares about health, safety, and well-being without raising the legal standard for corporate conduct.

Corporate defendants also should be prepared to show that specific actions have been taken in response to the COVID-19 crisis. Additional survey data indicate that jury-eligible participants are particularly concerned with corporations' treatment of employees during this time. Specifically, participants wanted to see companies promise to rehire laid off/furloughed employees, offer additional health benefits to employees, and cut pay for corporate executives.

The Importance of Witness Testimony

Although it is helpful for counsel to demonstrate pride in representing corporate defendants during the opening statement, our research indicates that many jurors

are likely to question a "good company story" that is solely delivered by defense counsel. Rather, jurors have indicated that they would be much more convinced if fact witnesses testified about a company's character, culture, and measures taken to support employees and consumers during the pandemic. Thus, either past or current employees (in good standing) as well as Corporate Representatives are best suited to tell the "good company story" at trial.

Witness preparation for deposition and for trial is always important but is even more so now given defendants' increased susceptibility to reptile approaches as well as the additional stress that witnesses are experiencing due to the pandemic. The process of testifying during a deposition or at trial has also changed. It will be critical to assess key fact witnesses from a psychological perspective and evaluate each witness' capabilities in terms of their resiliency to plaintiff reptile approaches and ability to educate the jury if testifying at trial. A tailored approach to training for each witness can then be developed and executed to promote favorable case outcomes.

Conclusion

Current results indicate that the pandemic has catalyzed significant shifts in attitudes towards various companies and industries among many jury-eligible adults. Such shifts may be either beneficial or detrimental to defense counsel depending on the specific case and entities involved. However, counsel and clients should consider factors beyond demonstrated attitudinal shifts. In particular, counsel and clients should be aware of the implications of juror polarization, increased susceptibility to reptile attacks, and challenges that fact witnesses are experiencing during this time that may affect their performance at deposition or at trial.

A qualified Litigation Consultant can assist defense counsel and clients in navigating new and unique issues the defense bar will face in the midst and aftermath of the COVID-19 crisis, and in ultimately promoting favorable case outcomes. This can be accomplished through witness assessment and tailored training; pre-trial research; advisement on communications to stakeholders, consumers, and the general public; and strategic jury selection. ♦

Lorie Sicafuse, Ph.D., is a Litigation Consultant at Courtroom Sciences, Inc., a full-service national litigation consulting firm and GDLA Platinum Sponsor. Her grant-funded doctoral research examined jurors' perceptions of witnesses, susceptibility to bias, and attributions of blame. She applies her expertise in attitude change, information processing, and research methods to maximize the likelihood of favorable trial outcomes. Her knowledge of psychological research informs the wide range of services she provides, which include witness training, pre-trial research, jury selection, venue attitude research, and post-trial interviews.

Melissa Loberg, Ph.D., Litigation Consultant at Courtroom Sciences, Inc., has 15 years of experience using her expertise in psychology to provide attorneys and their clients with a tactical advantage throughout the litigation process. Dr. Loberg applies her expertise in research methodology to the planning and implementation of focus group and mock trial studies, as well as the development and analysis of jury supplemental questionnaires and post-verdict juror interviews. Additionally, she applies her training and education in clinical psychology to the preparation of witnesses in anticipation of both deposition and trial.

Impact of Pandemic

Continued from page 28

be more inclined to rely on science to solve cases. Roughly two-thirds of jurors surveyed in venues across the country characterized scientific information as “very important” in making important decisions. Research shows an even higher number of jurors indicating that scientific information is “very important” in deciding a legal case (60-93%) and three-fourths of jurors (75%) saying that if they were serving as a juror in a legal dispute, they would rely on scientific experts instead of their own instincts or experiences.

Not surprisingly, research shows that jurors’ attitudes toward certain occupations and companies that are perceived to be on the “front lines,” fighting the pandemic, are currently ascending. Doctors, nurses, hospitals, and other medical providers are generating the greatest boost in perceptions. Research shows 25-40 percent of jurors indicating their opinions have grown more positive across two dozen different venues since the start of the pandemic.

Interestingly, jurors’ opinions of trucking companies shipping materials like food and toilet paper all over the country have also improved since the pandemic. In fact, research shows 30-50 percent of jurors hold a much more favorable opinion of shipping companies, trucking companies, and truck drivers since the pandemic. In contrast, companies perceived to be profiting from the pandemic are triggering jurors’ wrath.

Notably, jurors’ perceptions of corporations generally have not soured as a function of the pandemic, though jurors continue to believe that corporate executives disproportionately benefit at the expense of ordinary folk. This perception is fueled in part by the burgeoning social justice movement, which has underscored inequities in society today.

Roughly one-third to one-half of jurors polled individually in ven-

ues across the country indicated that their opinion of the Federal Government has grown more negative since the onset of the pandemic, with the balance saying their opinion of the Federal Government has not changed. Virtually no jurors indicated that their opinion of the Federal Government has grown more positive. This may bode ill for defendants looking to buttress their No Liability position by arguing compliance with regulatory requirements. It’s too soon to tell.

Importantly, jurors have grown more skeptical of certain types of cases and claims. Jurors appear less inclined to entertain hyperbole from angry plaintiff lawyers issuing ad hominem attacks. The emotional exhaustion stemming from the pandemic has caused jurors to take a more “no nonsense” approach to cases. Jurors appear increasingly irritated with lawyers perceived to be emotionally manipulative. Furthermore, jurors who are worried about the nation’s economy, the stability of their jobs, and the health of loved ones appear to have trouble connecting to plaintiffs complaining about emotional distress and/or loss of enjoyment of life. Simply put, jurors today appear to be more critical of plaintiffs’ non-economic damages claims in individual tort cases.

The emotional tax exacted by the pandemic seems to leave little surplus energy for more arcane aspects of law; thus far, jurors seem to demonstrate a more tepid response to some business disputes and claims of lost profits.

Impact on Jurors’ Behavior: The Virtual Trial

R&D was involved with one virtual product liability trial in California that resulted in a defense verdict. In that case, the plaintiff, a janitor at a car dealership, alleged that exposure to brake dust at work caused his peritoneal mesothelioma. Post-trial jury interviews revealed that jurors paid close attention to the scientific ex-

perts refuting the plaintiff’s claim that there was a causal association between exposure to brake dust and peritoneal mesothelioma. Jurors appear to have closely examined and weighed heavily the epidemiological evidence showing that full-time mechanics are not at increased risk of peritoneal mesothelioma. Jurors ultimately reasoned that the plaintiff’s mesothelioma was not a result of his exposure at work. Jurors appear to have attended more carefully to the scientific testimony in this case, as compared to similar cases in the past, and they seem to have remembered and retained the scientific evidence somewhat better, as well. Jurors returned a defense verdict after careful consideration of the epidemiological evidence and causation analysis. The great majority of jurors described the virtual deliberations as very orderly and civil, perhaps facilitating the group’s careful sifting of the evidence.

R&D has done multiple virtual mock jury exercises since the onset of the pandemic and has found a similar trend with jurors online giving closer examination to evidence and showing greater respect to others during deliberations. This may be a positive outcome of the social justice movement that has gripped the nation. Jurors in virtual trial settings appear to take a more egalitarian approach to deliberations and exhibit more overt attempts to be inclusive, consider different opinions and perspectives, give others a chance to speak and be heard, etc. This trend toward inclusivity and voicing diverse opinions bodes well for jury verdicts.

Indeed, the social justice movement unfolding across the nation appears to have made jurors more solicitous of differing opinions and more open to re-examining their own perspectives and conclusions. This, in turn, is likely to engender a more thorough examination of evidence and more accurate decisions. Why?

Groups expressing diverse opinions are less susceptible to “group-

think,” a psychological phenomenon that can result in faulty, ineffective, or incorrect and dangerous decisions—all of which are made in effort to reach consensus. When “groupthink” takes hold, demographic, interpersonal, social, and/or cultural forces operate to squelch independent thinking among group members. In the face of group pressure toward conformity and cohesion, people are apt to ignore important facts, discount risks, and overlook warnings and are more likely to abandon critical analysis, reality testing, and moral judgment. The result is that a group of people begins to effectively think with one brain, and that one brain can make bad decisions as the group ignores unpopular opinions.

Virtual jury research exercises conducted recently illustrate the unexpected benefits of jurors’ increased sensitivity to the positions of others and greater decorum in discussions. For example, in three recent studies, each with three deliberation groups (i.e., nine jury panels in total), only

one juror demonstrated an inclination to run roughshod over others in the group. Deliberations during in-person jury exercises can be raucous, but in the virtual context, jurors are compelled to raise their hands to speak and take turns in expressing opinions, and they are unable to engage the person next to them in a side-conversation.

All in all, the pandemic has wrought havoc in every realm, but there may be some unexpected benefits for defendants. ♦

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Endnotes

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² Data collected between June 2020 and October 2020 (total 559 jurors in 16 venues).

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Insureds Appeal

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(N.D.GA May 23, 2014). Judge O’Kelley recognized the policy’s distinction between “damage” and “loss” as separate categories of coverage. He went on to note that “AFLAC does too; spatial displacement—the loss of possession or mysterious disappearance of coverage property—may constitute an “actual change” in insured property from a satisfactory to unsatisfactory state.” *Id.* at *5.

Judge O’Kelly specifically refused to “expand ‘direct physical loss’ in include loss-of-use damages when the property has been physically impacted in some way. To do so would be equivalent to erasing the words ‘direct’ and ‘physical’ from the policy.” *Id.* at *5

Since the pandemic forced businesses to close in March 2020, several courts across the nation have addressed and rejected insured’s claim for coverage based on loss of use of their business space. For example, in *4431, Inc. v. Cincinnati Insurance Company*, Case No. 5:20-cv-04396 (E.D. PA Dec. 3, 2020), Plaintiffs, owners of various restaurants, sought business interruption coverage claiming the policy requirement of a “physical loss” is synonymous with loss of use of their property, which was caused in their case by the pandemic and the shelter-in-place orders.

The Pennsylvania district court focused on the fact that the term “physical” preceded the word “loss” in the policy, and “surveying the legal authority” held that to constitute a direct “physical loss” an “economic loss resulting from an inability to utilize a premise as intended must:

- (1) bear some connection to the physical conditions of that premise, which conditions; and
- (2) operate to completely or near completely preclude operation of the premises as intended.”

The district court on *4431, Inc.* found there was no coverage because the plaintiffs had failed to allege there were any physical conditions of the premises that were altered that resulted in or affected the plaintiffs’ loss, and the plaintiffs still maintained the ability to operate at their businesses “albeit on a limited basis.”

In other opinions issued in 2020, courts have held that the “loss of” must be a permanent dispossession of the property (*Long Affair Carpet and Rug, Inc. v. Liberty Mut. Ins. Co.*, Case No: SACV 20-01713 (C.D. CA Nov. 12, 2020)) or property that is unrecoverable (*Robert W. Fountain, Inc. v. Citizens Ins. Co. of America*, Case No: 3:20-cv-05441 (N.D. CA Dec. 8, 2020)). Other courts have held that a tem-

porary loss of use of insured property or the inability to access property is not a physical loss of property. See *MudPie, Inc. v. Travelers Cas. Ins. Co. of America*, Case No: 4:20-cv-03213 (N.D. CA, Sept. 2020 and *Sandy Point Dental, P.C. v. The Cincinnati Ins. Co.*, Case No: 20 CV 2160 (N.D. IL, Sept. 21, 2020).

According to the Central District Court in California, there must be a “distinct, demonstrable, physical alteration.” *Mark’s Engine Co. No. 28, Restaurant, LLC v. The Travelers Indem. Co. of Connecticut*, Case No.: 2:20-cv-04423 (C.D. CA, Oct. 2, 2020).

Based on the critical coverage issues presented in *Henry’s*, insurers in Georgia, as well as their defense counsel, will be waiting to see whether the Eleventh Circuit follows the Northern District Court rulings by Judge Thrash and Judge O’Kelly and the trend of courts in other jurisdictions or certifies the coverage questions to the Georgia Supreme Court. ♦

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Apportionment Amicus

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attorney fees and expenses of litigation under O.C.G.A. § 13-6-11 subject to apportionment under O.C.G.A. § 51-12-33?

GDLA’s brief again argues that the panel’s decision conflicts with the language and legislative history of the apportionment statute and with Georgia courts’ understand-

ing of the statutory scheme. The legislation that would become O.C.G.A. § 51-12-33 was substituted specifically to permit consideration of nonparty fault in the apportionment of damages, and this intent is reflected in the text of the apportionment statute. The Georgia Supreme Court has accordingly recognized that the apportionment statute provides a comprehensive scheme for the ap-

portionment of damages consistent with the assigned fault of parties and nonparties in all cases to which it applies. GDLA’s brief explained how the panel’s decision deviates from these principles and leads to untenable and absurd results.

GDLA thanks Mr. Thompson, who is with Ellis Painter in Savannah, and Ms. Daniel, who is with Holland & Knight in Atlanta, for their efforts on this pivotal case. ♦



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Situation Awareness

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warnings, training programs, procedures) [2]. The construct has been shown to be relevant to human performance where critical decision-making is required for individuals, teams and across different kinds of systems [2].

Driver SA has increasingly become a research topic across the decades. For example, results from a study of car drivers and motorcyclists suggest that SA is likely to be different across different kinds of road users, and that SA incompatibilities in different kinds of drivers can partially explain ‘right of way’ collisions [4]. The study showed that car drivers often do not allocate attention to locations on the roadway where cyclists are likely to be located. Other studies showed that SA influences drivers’ decision to engage in distracting tasks [5] and that drivers are able to interact with secondary tasks in a situationally aware manner [6]. In a review of the scientific literature, key findings from the research to date involving driver SA included:¹⁰

- Stress, sleep disruption and fatigue adversely influence SA
- Pre-existing mental models have a strong influence on SA, shaping expectations and directing attention and SA
- SA is likely to be substantially different across human operators even when they are exposed to the same environment
- When SA is incompatible among different operators, conflicts arise that can lead to safety-compromising incidents

Critiques of SA

The validity of SA as a psychological phenomenon has been questioned in both the scientific and legal communities, including transportation litigation. For example, a 2015 Amtrack derailment in Philadelphia sparked controversy when SA was indicated as the pri-

mary causal factor by the National Transportation Safety Board. Critics argue that, as a construct, SA is essentially impossible to measure or validate, that any conclusions derived from its application in investigations are the result of circular reasoning or hindsight bias and that no relationship between SA and operator performance has been demonstrated [8]. Such critics sometimes refer to SA as pseudoscience, a “folk model” or “junk science.”

The perspective that SA is “junk science” has found some reception in the legal community. An argument against SA is that it is a convenient means by which proponents can help clients to evade liability or blocking claims for punitive damages [9]. Not surprisingly, recommendations for debunking or blocking admissibility of SA-related testimony in litigation have accompanied this criticism.

Notwithstanding the recognized limitations of SA applications, its role in the incidence of motor vehicle crashes can be identified, within a reasonable degree of scientific certainty, when appropriate HF methods are applied in reconstruction.

SA and Crash Investigation/ Reconstruction

When constructs, such as human “intelligence,” cannot be measured directly, psychologists resort to indirect measurement (e.g., “I.Q.” as measured by validated intelligence scales). Constructs such as SA can also be measured indirectly. Psychologists and HF professionals have scientific methods at their disposal to examine such constructs. A specific method that can be used in such investigations is what’s known as the “ecological approach.”

Using this approach, investigators examine the effect that the environment has on operators’ goal-directed behavior and performance. The following technique is an example of a reliable, systematic means to collect both ecologi-

cal (or qualitative) and quantitative data to assist investigators in identifying the role that SA played (or not) in the incidence of traffic crashes [10]:

- Identification of sequence of events in context
- Examination of environmental conditions and behaviors for changes during events
- Identification of people’s goals and attention for a given time and location
- Production of a conceptual description

Evidence from which data may be obtained to employ this technique includes sources such as video recordings, vehicle downloads, witness statements, etc. A detailed decomposition of events is necessary to make any links between crash data and any model that purports to explain cognitive events. This method has been recommended to investigators who may be expected to testify at trial [10].

Conclusion

Interest in SA grew quickly from its initial start in aviation to many fields including air traffic control, military operations, transportation, power systems, law enforcement, emergency management, healthcare, space, transportation, education, mining, and oil and gas operations.¹⁴ Advances have been made over the years in SA measurement and it is credited with positively influencing research in training, error analysis, teamwork, automation and workload [11]. Its increased use in both theory and applications and its viability as a construct have been recognized by HF researchers [11].

SA has been credited with being an innovation in the psychology of attention [12]. Where attention is a discussion of a single person attending to a single stimulus, SA takes a more holistic approach:

it is awareness of one's broad, dynamic surroundings; is involved in making sense of someone else's actions and intentions; and can describe acts in context, including mental projections of actions expected of one's self as well as those of other persons [12].

If transportation litigation outcomes are intended, at least in part, to improve public safety, then road users will suffer a loss if SA is dismissed as pseudoscience. The limitations of SA application to any incident should be acknowledged. It should also be acknowledged that scientific methods are available to properly examine any role that it may have played.

Study of the construct has resulted in improved safety systems and understanding of human performance/human error in a number of applications. It provides a useful way for us to think about how humans operate in dynamic environments where seconds count and where time-critical decisions can have profound ramifications with respect to preservation of life, limb and property. ♦

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Mass Torts Update

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By the time of the bankruptcy filings, the two companies were spending nearly \$100 million a year on asbestos cases, spending \$70 million plus for settlements, and \$25 million in defense costs. At the time of the filings, the two companies had 8,200 mesothelioma claims and over 90,000 non-mesothelioma claims pending.

From the mid-1980s to 2000, Aldrich spent \$2.5 million total to resolve mesothelioma cases while Murray only spent \$1 million. However, both saw a remarkable rise in the number of filings. By the late 2000s, 2,500 new mesothelioma cases were being filed each year. In 2019, Aldrich was named in 80 per-

cent of all new filed mesothelioma cases, while Murray was named in 60 percent of cases. New filings caused the amount of money needed to resolve and defend cases to increase dramatically.

By 2004, Aldrich was spending \$30 million annually to resolve cases and Murray spent \$15 million. In the last four years, Aldrich spent \$40 million and Murray \$20 million annually to resolve mesothelioma claims. Overall, the two companies estimated they spent \$2 billion on asbestos cases—\$1.3 billion in indemnity and \$600 million in defense costs.

Recent Bankruptcy Filings By Defendant in Silica Cases

A company that has been a defendant in silica cases across the

country has filed for Chapter 11 Bankruptcy protection.

Covia Holdings Bankruptcy

On June 29, 2020, Covia Holdings filed for Chapter 11 Bankruptcy protection in the Southern District of Texas. Among the companies including in Covia Holdings' bankruptcy is Best Sand, which is involved in numerous silica-related injury cases across the country.

According to the various pleadings filed with the petition, the recent economic downturn and railroad leases were the reason Covia Holdings sought bankruptcy protection. defenses, including non-party fault and alternative causation. ♦

Hey Google!

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2017 edition of NFPA 921, Guide for Fire and Explosion Investigations [9]. As part of investigating a fire using the scientific method as defined in NFPA 921, a fire investigator must collect data, analyze the data, develop hypotheses, and test those hypotheses. The most fundamental part of the fire investigator's job comes in the development and testing of hypotheses of the origin and cause of a fire. Smart home technology simply provides another source of data that a fire investigator can use to develop origin and cause hypotheses.

It is readily apparent how smart home security camera footage may be useful in fire investigation, but other, less-obvious data, may be useful as well. Consider a home with a smart device in every room of the house. Now, consider that a fire occurred in that home and burned to flashover, erasing many of the burn patterns that might be useful to a fire investigator. Rather than processing the entire scene, an investigator can reduce the area of interest by examining data from smart home devices. Without ever looking at video footage, the investigator can examine when each smart device lost power or wireless connectivity. This information can be used to create a timeline for analysis of fire growth and spread.

Smart home technology may also complicate a fire investigation. Smart home devices are connected to an owner's home network and often connected to the internet such that they are accessible via the owner's mobile phone or tablet. This connectivity means that fire investigators must consider the possibility of a remotely initiated fire. With appliances such as microwaves ovens and ranges being given smart capabilities, the possibility exists for ill-intentioned users or hackers to remotely start a fire [10]. Aside from the ill-intentioned, some have even reported the accidental preheating

of their smart ovens [11]. For a fire investigator, these scenarios represent more potential hypotheses for fire origin and cause, but the evidence to support these hypotheses may not always be easy to obtain.

A question often raised in relation to digital data is one of ownership. If a consumer buys a smart device, who owns the data recorded



A question often raised in relation to digital data is one of ownership. If a consumer buys a smart device, who owns the data recorded on the device?



on the device? In the European Union, regulators have attempted to address the issue head on with the General Data Protection Regulation (GDPR) which, among other things, attempts to require that individuals own their data and can access or delete the data upon request. Recent legislation in the United States has been more focused on security [12]. So, as of the writing of this article, the privacy policy for a smart home product may include provisions that the manufacturer owns and may retain the data stored in its data centers [13].

Experience has shown that accessing smart home data is best done early in the investigation. As a defense attorney, the fire investigator you hire will only be involved in the investigation after an initial scene examination is completed by another party. At this point, the clock

is ticking as far as data access to smart home devices. Often the easiest way to access smart home data is at the initial scene exam during witness interviews. Although direct access to the data can be difficult, a homeowner can often pull-up logs on their mobile device, take a screen capture, and e-mail or text that information to the fire investigator.

Fire investigators have successfully utilized data from smart home devices on several recent occasions. One recent example of this utilized Ring camera footage in an apartment building that experienced flashover in the room of origin. The fire investigator was able to identify and recover Ring cloud video surveillance even though the smart device was never found at the scene. The tenant's witness statements directly contradicted the physical evidence, the video surveillance enabled the investigator to build a timeline of events that provided irrefutable evidence of a smoking materials fire.

In another example, a fire investigator was able to recover an ADT smart home security system's historical logs, which included the history related to motion, smoke detectors, and glass break sensors. The investigator was able to use the glass break sensor data to identify not only where the fire broke through a glass-paned French door, but also the origin and only potential cause of the fire.

Many common products in the home can now be considered smart home devices. Fire investigators must know what to look for, what questions to ask, and when to enlist the services of a technical expert such as an electrical engineer. From there, time is of the essence when it comes to gathering smart home data. Aside from their use as a source of data, smart home devices must also be considered as potential ignition sources. Smart home data is unlikely to be the sole evidence used in determining a fire's origin and cause, but in some cases, it may be the critical piece of data required. ♦

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Landlord-Tenant

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owed by the landlord to the tenant—a drafting tip counsel should relay—the defense could persevere after all. ♦

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Endnotes

¹ *Langley v. MP Spring Lake, LLC*, 345 Ga. App. 738, 739 (2018); see also *Tenant’s Premises Liability Action Against Landlord Was Barred By Contractual Limitation*

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³ Land, *supra* note 2.

⁴ Land, *supra* note 2.

⁵ *Id.*

⁶ *Langley*, 345 Ga. App. at 742-43.

⁷ Land, *supra* note 2.

⁸ *Id.*

⁹ *Langley v. MP Spring Lake, LLC*, 307 Ga. 321, 321 (2019).

¹⁰ See Brief of Amicus Curiae by Georgia Trial Lawyers Association, *Langley v. MP Spring Lake, LLC*, 307 Ga. 321 (2019) (Case No. S18G1326) 2018 GA. S. Ct. Briefs LEXIS 607, at *4-5 (citing *Brown v. Savannah Mut. Ins. Co.*, 24 Ga. 97 (1858); *Melson v. Phoenix Ins. Co.*, 97 Ga. 722

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¹³ *Langley*, 307 Ga. at 325 (citing *Anderson v. Anderson*, 274 Ga. 224, 227(3) (2001)).

¹⁴ *Id.*

¹⁵ *Id.* at 329.

¹⁶ *Id.* at 329 n.4 (citing *Thompson v. Crownover*, 259 Ga. 126, 128 (1989)).

¹⁷ See Brief of Georgia Defense Lawyers Association, *supra* note 11 (citing *Amu v. Barnes*, 283 Ga. 549, 552 (2008) (“A statute of limitations is a procedural rule limiting the time in which a party may bring an action for a right which has already occurred.”)).

Win-Win Resolutions

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cussing their goals and concerns. Each party just wanted to argue about the amount of money for an upfront buyout and what the company was presently worth. They were far apart and going nowhere.

After asking several questions about the path of resolution requested, we were able to show that this method would never resolve the matter. However, while subtly asking about their basic interests along this path, we were able to find the desire for the founder to gain some upside for a matter of time while accepting that his interest could be diluted down over a period of time. In addition, he was not concerned with voting rights. Certain safeguards were put in place to capture the upside for the founder and to ensure that revenue was not artificially deferred or expended during this period. The entire outlook from the inability to settle was turned on its ear with an entirely new method of resolution. Creativity matters, and parties should not be stuck on one resolution method.

IV. The Law Matters

Obviously, facts are critical and usually highlighted in mediations. When opening presentations are requested, which happens with decreasing frequency, PowerPoint presentations, videos, texts and social media pages provide persuasive evidence. However, the law should not be bypassed. In some cases, the law is clear or so well stated in a new case that it will be critical to one side or the other. Bringing a couple of significant cases for legal review by the other side and the mediator may create an inflection point where one party must admit they are subject to significant risk on the law. On the other hand, overwhelming another party with

legal cases or statutes is generally not advisable. On a key point or two, case law or a statute may assist the mediator in breaking an impasse. The law still matters.

V. Allow for Cathartic Moments

Let your clients emote with the mediator in shuttle diplomacy sessions. Often, defense clients and plaintiff clients need to express their feelings behind closed doors. All of us as counsel have been through the mediation process so often that we forget about a party's feelings. Often, an insurance carrier is involved, and even their own counsel may believe that since this is standard operating procedure, that the insurance representative does not need to express his or her concerns. However, the insurance representative or the risk manager of a company may have significant feelings about the case also. Don't assume that they are so used to the process that they do not need to let their feelings or frustrations be told to the mediator.

The beginning of the mediation is a good time to allow these cathartic moments to be expressed in confidential sessions to the mediator. Then, the mediator can assist the process by understanding and empathizing with those frustrations, and thereafter, express how important it is to get to a sensible business solution. Use your mediator to get these frustrations on the table and then off the table. Often, the mediator's role is to listen and understand and thereafter to provide the practicalities of a smart business deal to end these frustrations. These cathartic moments can eliminate barriers that result in resolution later in the session.

VI. Try to Avoid Pre-arranged Floors and Ceilings

Obviously, both sides must consider a budget, past expenditures and their evaluation of the case.

However, in mediation, the goal of the parties is to listen, learn, evaluate, and resolve. When both sides come with a predesigned floor or ceiling, it often leads to the inability to really listen and evaluate risk. Also, it diminishes the opportunity for the third-party mediator to provide an objective evaluation of the evidence and law presented. If there is no movement from pre-established floors and ceilings, then the mediator is impaired in his or her ability to affect the resolution of a case through the use of an independent lens. A potential range is fine, but maintaining a hard and fast floor or ceiling may doom resolution.

VII. Kill Them with Kindness

All attorneys and parties want to be treated with kindness and respect. Nothing will doom a resolution faster than one side or the other feeling like they have been disrespected, this includes attorneys, especially attorneys. Whatever you do, always make the other side feel respected and appreciated. And remember, with the opposing counsel, you still have to complete a final settlement agreement.

Showing respect and cordiality, despite some hard feelings in discovery or during some other time in the litigation, is still important for you and your client to complete the case. While these tips are not the only way to gain an effective resolution, they will help you on your journey. Best of luck in your good faith negotiations. ♦

Greg Hecht is a mediator and arbitrator through Henning Mediation and Arbitration Services, a GDLA Platinum Sponsor. He mediates and arbitrates business, real estate, tort, personal injury, civil rights, employment and local government matters. He has a law firm, Hecht Walker, and previously served as a State Senator and State Representative.



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