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Remembering GDLA President George Hall

GEORGIA DEFENSE LAWYER

A Magazine for the Civil Defense Trial Bar

Volume XVIII, Issue II
Winter 2022

Douglas Burrell Sworn-in as DRI President and DRI Honors GDLA as Best State Defense Organization

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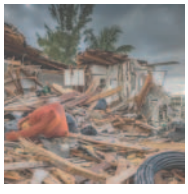

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DRI honored GDLA with its Janata Award, which recognizes the most outstanding defense organization in the country. On behalf of GDLA, Past President Matt Moffett (center) accepted the award from DRI President and GDLA member Douglas Burrell and DRI Immediate Past President Emily Coughlin. See page 5.

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Douglas Burrell Sworn-in as DRI President and DRI Selects GDLA as Outstanding Defense Organization

The DRI Annual Meeting held in mid-October in Boston was a very momentous occasion for both GDLA and one of its most dedicated members, Douglas Burrell, who assumed the helm of the national defense bar. He is the third African-American to lead the organization since its founding in 1960.

Mr. Burrell was installed as DRI President on October 15 at the Presidential Gala. Remarking on his leadership role, Mr. Burrell said, "I am honored to lead an organization that, for 62 years, has provided world-class legal education, resources and networking opportunities to facilitate career and law firm growth. Diversity is a core value of DRI and is fundamental to its success, and, as the organization's third Black leader, I hope to inspire other minority attorneys to advance in their careers and pursue leadership roles—despite the challenges they may encounter along the way."

Not only has Mr. Burrell been a dedicated leader within the national defense bar, but also he has been a tremendous asset to GDLA in countless ways, including serving many years on the faculty (and as Vice Chair and Chair) of GDLA's Trial & Mediation Academy.

Mr. Burrell is a partner at Drew Eckl & Farnham in Atlanta. He has been a practicing trial lawyer for over 26 years. He developed comprehensive experience while serving as first chair on more than 40 jury trials and more than 100 bench trials. He has also taken and defended hundreds of depositions. His practice consists of civil defense litigation with an emphasis on wrongful death and catastrophic injury, construction law, premises liability, transportation and trucking law and product liability.

Also during the Presidential Gala, DRI honored GDLA with the 2021 Rudolph Janata Award, which annually recognizes one state or local defense organization (SLDO) for undertaking an innovative program. GDLA also received the Janata Award in 2012. GDLA Past President and DRI State Rep Matthew G. Moffett accepted the award on behalf of GDLA at the DRI Annual Meeting

This year's Janata Award recognized GDLA's partnership with the Georgia Trial Lawyers Association (GTLA) in creating Mask Up! For Justice (MUFJ), a fundraising campaign to purchase and distribute masks and personal protective equipment (PPE) to help courthouses statewide operate safely during the lingering COVID-19 pandemic. We are especially proud that our project's impact stretches far beyond the civil defense bar. The award and nomination letters can be read by visiting the Janata link on our homepage.

Mask Up! For Justice marked its one-year anniversary in September and was featured in a *Daily Report* article on September 16, 2021. While we certainly did not foresee this project would be ongoing more

Continued on page 9

Member News & Case Wins

MEMBER NEWS

GDLA Treasurer **Pamela N. Lee** of **Swift Currie McGhee & Hiers** in Atlanta was appointed to the State Bar of Georgia's Statewide Judicial Evaluation Committee. This standing committee advises the Bar President with regard to the qualifications of all candidates for appointment to the Supreme Court of Georgia, Georgia Court of Appeals and other Georgia courts. The purpose is to assist the Governor's Judicial Nominating Commission.

Waldon Adelman Castilla Hiestand & Prout in Atlanta announced that **Alexandra Svoboda** has been named a partner. She has spent her entire legal career practicing insurance law, including auto and premises liability, coverage analysis and subrogation. The firm also announced **Hilliard Castilla** was sworn-in as Judge Pro Tem for the State Court of Fayette County. He will continue practicing with the firm.

Swift Currie McGhee & Hiers in Atlanta announced the addition of **Lucy Aquino** as an associate in its Atlanta office. Her practice focuses on premises liability, construction litigation, automobile and trucking litigation, and insurance coverage. Ms. Aquino has also been appointed Sponsorship Vice Chair of DRI's Young Lawyers Committee.

Meg Hatfield Yanacek of **Hall Booth Smith** in Atlanta served as Chairperson for the 2022 DRI Medical Liability and Health Care Law Seminar in Las Vegas, Nev., held February 2-4.

Patrick T. O'Connor of **Oliver Maner** in Savannah was honored by the Boy Scouts of America Alumni Association with its Council Alumnus of the Year Award. The honor is bestowed annually to one individual in recognition of "outstanding council contributions." Mr. O'Connor is affiliated with the Coastal Georgia Council of the Boy Scouts of America.

Noah Green and **Paul Henefield** announced the retirement of Eve Appelbaum and the changing of the firm name from Appelbaum & Henefield to **Henefield & Green**. The firm has moved to 3197 Bolling Way, NE, Suite 129, Atlanta, Georgia 30305. All email addresses are now first initial last name @henefieldgreen.com.

Levy Sibley Foreman & Speir welcomed **Tina M. Trunzo Lute** and **Erik E. Smith** to the firm. Ms. Lute joined as a senior associate in the firm's Atlanta office, where she will continue practicing in the area of workers' compensation defense. Mr. Smith joined as an associate in the firm's Atlanta office from the Public Defenders office in Columbus. He will also be practicing in the area of workers' compensation defense.

James Bates Brannan Groover, with offices in Macon, Atlanta and Athens, announced the addition of **Donia Wanna** and **Kelly L. Mason** to the firm's General Litigation Practice Group. Ms. Wanna focuses her practice on defending businesses, insurance companies and local governments in a variety of civil matters including business, employment, insurance claims and coverage disputes, and contractual disputes. Ms. Mason focuses her practice on insurance defense and general litigation matters. Prior to joining the firm, she gained experience in various areas of law including family law, probate, real estate and insurance defense.

Anne Kaufold-Wiggins of **Balch & Bingham** in Atlanta was elected Chairperson of the State Bar of Georgia's Commission on Continuing Lawyer Competency (CCLC), after previously serving as Vice Chairperson. She also was reappointed by Governor Brian Kemp for a third consecutive term on the Judicial Nominating Commission.

Michael L. Eber, formerly with Rogers & Hardin, has joined **Smith Gambrell & Russell** as a partner in the firm's Atlanta office. His practice focuses on complex civil litigation and appeals. He has significant experience representing defendants in high-stakes contract disputes, class actions and business tort cases.

CASE WINS

Craig Terrett of **Cruser Mitchell Novitz Sanchez Gaston & Zimet** in Norcross obtained a favorable verdict from a Banks County jury in an alleged traumatic brain injury case in which the plaintiffs asked the jury for $4,067,000 in compensatory damages and $618,000 in attorneys' fees and expenses pursuant to O.C.G.A. § 13-6-11. The jury ultimately returned a verdict of $150,000 in compensatory damages and awarded no attorneys' fees.

The plaintiffs alleged that their 88-year-old mother, Mildred Collins, was knocked down by an employee of a Ryan's Steakhouse when they visited for Thanksgiving in November of 2017. Plaintiffs argued that Mrs. Collins struck her head when she fell, in addition to injuring her ankle and hip and fracturing her wrist. The plaintiffs' primary claim was that the alleged head injury worsened Mrs. Collins' pre-existing dementia and Alzheimer's to the point where she was no longer able to perform ac-

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tivities of daily living and that ultimately required her to be admitted into hospice care. Ryan's admitted at trial that its employee was at fault for knocking Mrs. Collins down, but disputed the nature and extent of her alleged injuries.

Mr. Terrett took over the case from other counsel less than four months prior to trial. Prior to his involvement, the court had granted the Plaintiffs' Motion for Spoliation of a handwritten incident report that the on-duty Ryan's manager said she prepared. As a sanction, the court entered an Order that the jury was to be instructed to make certain presumptions, including that Mrs. Collins hit her head on the floor when she was knocked down, was not moving immediately after being knocked down, was initially unresponsive, had a bump on her forehead and had a bruise on her forehead. These presumptions were rebuttable and the defense was successful at rebutting these presumptions by showing the lack of any evidence in Mrs. Collins' medical records to indicate that she had suffered a head injury. Plaintiffs' expert, Dr. Said Elshihabi, a neurosurgeon, opined that Mrs. Collins suffered a head injury in the Ryan's incident based upon his review of medical records and deposition testimony. His opinions, however, were rebutted by Dr. Steve Shindell, a neuropsychologist, and by Plaintiffs' own treating physician.

A month and a half before trial, the defense made an Offer of Judgment pursuant to O.C.G.A. § 9-11-68 in the amount of $300,000, which was rejected. Plaintiffs also rejected a $500,000 settlement offer just before closing arguments.

The trial lasted six days and it took the jury approximately two hours to reach a verdict. Following the trial, the defense team spoke with some of the jurors and they indicated that they did not believe Mrs. Collins suffered a traumatic brain injury in the fall and the compensatory damages award was for the orthopedic injuries that the defense admitted she suffered as a result of the incident.

Mr. Terrett has filed a Motion for Attorney's Fees pursuant to O.C.G.A. § 9-11-68 in the amount of $76,883.67. Plaintiffs filed a Motion for Additur or, in the Alternative, for a New Trial on Damages. Both of these motions were pending at press time.

Alycen Moss and **Elliot Kerzner** of **Cozen O'Connor** in Atlanta had a Motion to Dismiss granted in a case in New Jersey involving a COVID-19 business interruption claim. The court held that Plaintiffs had not alleged a structural alteration or severe physical contamination of the properties at issue. The court reasoned that "neither the 'loss of use' of Plaintiffs' premises, nor the government orders allegedly prohibiting operations of such premises, constitute 'physical loss or damage' to the insured properties," so "no coverage exists for Plaintiffs' claim."

The Atlanta office of **Rutherford & Christie** has notched quite a few victories of late. Partners **Carrie L. Christie** and **Courtney M. Norton** along with associate **Ann S. Potente** obtained summary judgment on behalf of their client in *Stern v. David Pettis d/b/a Chick-fil-A of Tifton FSU*. The premises liability case involved a child who sustained burns to the soles of his feet while playing in the restaurant's outdoor play area. The defense successfully excluded testimony of Plaintiffs' chemical expert who attempted to relate the cause of the child's burns to a cleaning solution purportedly used on the playground. The expert admitted it was speculative as to whether the child actually came into contact with any cleaning solution while in the play area. Having won their motion against the plaintiffs' expert, the defense argued, in a subsequent Motion for Summary Judgment, that the plaintiffs lacked expert testimony to meet their burden of establishing the causation element of their negligence claim. The plaintiffs appealed the trial court's orders granting the defendant's Motion to Exclude Plaintiff's Expert and Motion for Summary Judgment. The Court of Appeals unanimously affirmed the trial court's orders. The plaintiffs then petitioned for *certiorari* which the Supreme Court of Georgia denied.

Next, **Ms. Christie** and **Ms. Norton** obtained an affirmance from the Georgia Court of Appeals of a grant of summary judgment in *Womac v. McDonald's Restaurants of Georgia, Inc.*, a case where the plaintiff alleged that she slipped and fell in a painted crosswalk in a McDonald's parking lot. Plaintiff claimed the crosswalk stripes were unreasonably slippery and created a hazard that McDonald's knew or should have known existed. The district court found that because the plaintiff had successfully traversed the area 50-100 times before the incident, and because there had been no other falls on the crosswalk paint, the defendant did not have superior knowledge of a hazard and was therefore entitled to summary judgment. After the plaintiff appealed the order, the Eleventh Circuit Court of Appeals affirmed the ruling on all grounds.

In another case, **Ms. Christie** and **Ms. Norton** obtained an order from the Eleventh Circuit Court of Appeals affirming the district court's grant of summary judgment for their client in *Smart v. Palmaccio Management Corporation d/b/a McDonald's, et. al.* The case involved a McDonald's customer who claimed a monitor hanging from the ceiling fell and struck his head and shoulders while he was picking up his food inside the restaurant. Defendant produced evidence that it inspected the monitor on a daily basis, was in compliance with all building and safety codes, and had no prior incidents with the monitor. The district court

granted—and the Eleventh Circuit upheld—summary judgment on the grounds that the plaintiff failed to prove that the defendant had constructive or actual knowledge of a hazard.

Ms. Christie and **Ms. Norton** next teamed up with associates **Emily Y. Wang** and **Quinton R. Beasley** to obtain an order dismissing the complaint of a premises liability plaintiff who produced intentionally-altered photographs of a restroom stall in which she claimed to have slipped and fallen. The case was before Gwinnett State Court Judge Pamela South. The Rutherford & Christie team successfully showed Plaintiff cropped the photographs in order to excise a yellow wet floor sign that stood inside the restroom stall and then swore under oath and in verified written discovery responses that the altered versions of the photographs were the only ones that had ever existed. In support of their motion for sanctions for discovery abuse against Plaintiff, the defense team presented Plaintiff's sworn testimony that she had used her mobile phone to take three photographs of the restroom floor immediately after she slipped and fell. She testified that these photographs, which did not show the presence of a wet floor sign, were accurate depictions of the condition of the restroom at the time of her fall. However, Ms. Christie and her team obtained the original versions of the photographs, which Plaintiff had sent to the restaurant's insurer shortly after the incident.

These versions of the photographs showed the yellow, rubber footing of a wet floor sign in the corner of the photograph, proving that a wet floor sign was in fact in place in the very spot where Plaintiff claimed to have fallen. E-mail chains and metadata connected to the photographs proved that the plaintiff sent the original, unaltered photographs to the insurer and then later in discovery produced cropped and altered versions of the photographs omitting any trace of the wet floor sign.

Throughout the original action and Plaintiff's subsequent renewal action, which spanned from February 2018 to May 2021, Ms. Christie and her defense team gave Plaintiff and her counsel several opportunities to produce the unaltered photographs before ultimately moving for sanctions for discovery abuse. The defense successfully moved the Court to impose the most stringent punishment available in order to deter any such future conduct.

In its Order Dismissing the Plaintiff's Complaint, the Court profoundly noted: "Plaintiff abused discovery. Plaintiff provided altered photographs to Defendant in discovery but swore the photographs had not been altered. Plaintiff's intentionally false discovery response constitutes a total failure to respond to discovery. And because the false response concerns a pivotal issue in the litigation—the presence or absence of a 'wet floor' sign—the appropriate sanction is striking Plaintiff's complaint."

In one of their latest wins, also in Gwinnett County, **Ms. Christie, Ms. Norton** along with associate **Savannah L. Bowling** obtained summary judgment in a premises liability case where Plaintiff alleged she slipped and fell on a greasy substance at a Pappadeaux Seafood Kitchen. Surveillance video reflected that Plaintiff traversed without issue the exact area six minutes prior to where she would later slip and fall. The footage also showed a manager inspecting the area just two minutes prior to the fall, and dozens of employees and other guests traversing the area safely in the minutes leading up to the fall. The Court agreed Plaintiff failed to carry her burden in establishing Defendant had actual or constructive knowledge of the alleged greasy substance on the floor. The Court also found that Defendant's manager had inspected the area just two minutes before the fall and Defendant's inspection procedures were adequate as a matter of law.

Most recently, **Ms. Christie, Ms. Norton** and associate **John R. Hooven** obtained summary judgment in Gwinnett State Court in a slip and fall, which occurred directly in front of a drink station in a Hooter's restaurant. The defense used surveillance footage to show

Burrell Sworn-in

Continued from page 5

than a year later, GDLA is grateful for the unique opportunity to have teamed up with our colleagues on the other side of the "v." to make a difference during such a critical period in our nation's history. To date, we have purchased and shipped more than 44,000 masks and PPE.

GDLA thanks its MUFJ Committee members, Vice President Ashley Rice of Waldon Adelman in Atlanta and Board member Anne Gower of Gower Wooten & Darneille in Atlanta, for their continued work on this important project. Immediate Past President Jeff Ward also contributed significant time to the effort, including helping us secure a sizeable grant from the State Bar of Georgia Commission on Continuing Lawyer Competency (CCLC) to be used as a gap-filler when funds we raise are depleted.

We are, of course, hopeful the pandemic will subside such that courthouses no longer require PPE; but, until then, we are still fielding requests from judges and clerks statewide. With that in mind, please consider making a tax-deductible contribution (or another if you already have) by visiting our homepage and clicking the MUFJ logo. ◆

that seven minutes before the fall a manager walked through and inspected the area and two minutes before the fall an employee swept the area. The defense argued that the written cleaning policies had been followed, and that the presence of an employee sweeping at the time of the fall was insufficient to prove actual or constructive notice of a hazard when the manager testified that there was no liquid on the floor at the time of his last inspection. Additionally, the defense argued that Plaintiff was unable to identify what substance he slipped on, and that Plaintiff's contention that he "likely fell" on water or ice, because of the proximity of the drink station, were speculative at best. The Court agreed, holding that "Defendant pointed to an absence of evidence on file to establish that it had actual or constructive knowledge of the hazard alleged by Plaintiff. Plaintiff did not point to evidence on file sufficient to create an issue for the jury concerning whether Defendant had superior knowledge of the alleged hazard."

The Atlanta office of **Hawkins Parnell & Young** has enjoyed a series of successes over the past several months. On June 28, 2021, the Georgia Court of Appeals ruled in favor of the firm's client, finding that the statute of repose applies to strict liability cases filed under the Georgia Asbestos Claims Act. **David Marshall** argued the case with assistance on briefing and argument from **Eric Hawkins**. The ruling reversed a trial court holding that the statute of repose does not apply to asbestos cases and represents a significant victory limiting future strict liability claims. Plaintiff alleged cosmetic talcum powder usage from 1963 through 2016. She later developed ovarian cancer, which she contends is due to asbestos contamination in the cosmetic talcum powder. Mr. Marshall and Mr. Hawkins moved to dismiss the strict liability claims based on the 10-year statute of repose, but the trial court denied the motion, finding that a limitation provision in the Act barred applying the statute of repose. The Court of Appeals held that rules of statutory construction require that the limitation provision only applies to statutes of limitations, not to statutes of repose.

In July, the Georgia Court of Appeals affirmed summary judgment in favor of a fire suppression equipment company. Hawkins Parnell & Young's client was defended by **Frank Bedinger**, who obtained summary judgment in the trial court and then teamed up with **Bryan Grantham** to preserve the victory after the plaintiff appealed. This case arose from a kitchen fire in a South Georgia church with a fire prevention system maintained by the client. The plaintiff, a volunteer cook at the church, suffered burn injuries from a gas fire while igniting the stove pilot light. The fire was due to an improperly capped gas line from when the church upgraded the deep fryer to a large stove. The plaintiff claimed the defendant should have noted the issue during an inspection of its systems. Mr. Bedinger and Mr. Grantham successfully argued that the defendant had no duty to inspect other kitchen equipment. They also showed that even if the client examined other equipment, it would have been outside their expertise and they could not be liable for the injuries. Both the trial court and appeals court agreed.

In August, **Kate Whitlock** secured a victory when Cobb County State Court granted summary judgment in favor her lawyer-client in a professional malpractice claim from a former client. The defendant-lawyer had done substantial legal work for the plaintiff-client who refused to pay. The underlying client also refused to honor its contractual obligation to have a receiver appointed to ensure the payment of legal fees. The plaintiff-client answered the complaint for recovery of the initial expenses and only later moved to assert counterclaims alleging legal malpractice, breach of fiduciary duty, and unjust enrichment. The plaintiff-client submitted a detailed and lengthy expert affidavit that made serious allegations against the defendant-lawyer. Ms. Whitlock helped the judge navigate through the numerous accusations. The judge agreed with the defense and granted its lawyer-client all relief requested. In a related case, the Hawkins Parnell team convinced a different judge to enforce the attorney's lien, which allowed the lawyer-client to apply the debt due with money held in trust.

In another case, this time in September, **Mr. Grantham** secured summary judgment for his client in a premises liability case related to an apartment fire. The case involved a fire set by an arsonist at an apartment building in Atlanta, resulting in the death of a tenant. The estate of the deceased filed a lawsuit against the limited liability company that owned the apartment and the single member of the LLC. In the Motion for Summary Judgment, the defense argued that the single-member of the LLC could not be liable individually and was insulated from liability by the Georgia LLC statute. Plaintiff countered that personal decisions as to which fire safety equipment to install in the apartment building could make the single-member liable in his individual capacity. The court sided with the defense and granted summary judgment to the individual member of the LLC.

Several **Waldon Adelman Castilla Hiestand & Prout** lawyers have been busy collecting wins. On August 30, 2021, **Kayla Bell** defended the estate of a defendant who passed away prior to trial. Plaintiff alleged injuries to her neck and shoulders, as well as low back pain that she testified she still expe-

Continued on next page

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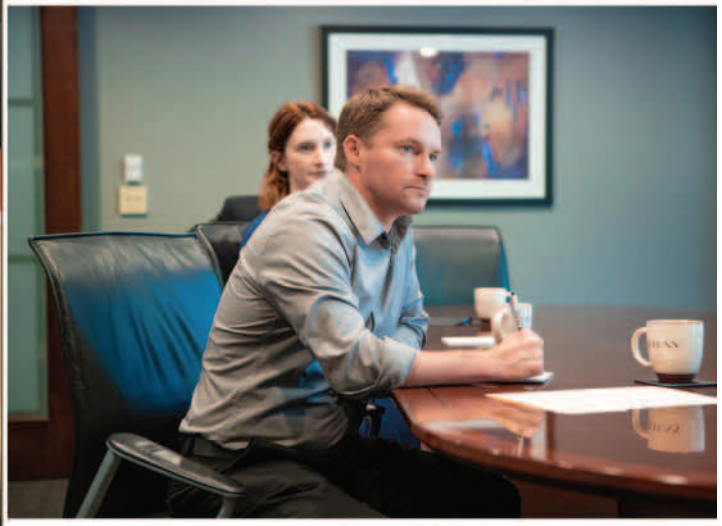

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Case Wins

Continued from previous page

rienced as a result of a minor accident in 2016. A Fulton County jury awarded Plaintiff $3,274.51, less than Defendant's last offer and well below the more than $20,000 Plaintiff asked the jury to award. Ms. Bell was able to impeach Plaintiff regarding a prior accident and subsequent injuries and successfully argued for more than $7,000 in medical bills to be excluded from evidence.

After a four-day trial in October, **Brian McCarthy** secured a very favorable jury verdict in the Superior Court of Newton County. This case involved an admitted fault rear-end accident. Plaintiff claimed serious spine injuries, received multiple spine injections, underwent a three-level cervical fusion, and had a spinal cord stimulator implanted. Plaintiff claimed his injuries left him totally disabled and unable to return to his job as a baggage handler. Plaintiff's trial evidence included two surgeons, one pain doctor, one vocational expert and one economist. Plaintiff blackboarded special damages in the amount of $1,650,000 (approximately $460,000 in medical bills; $760,000 in future lost wages; $250,000 in future medical bills; and $180,000 in lost wages) and requested the jury to return a verdict of $4,000,000. During closing arguments, the defense requested the jury either return a defense verdict or a verdict of $50,000. After approximately two hours of deliberation, the jury returned a verdict for plaintiff in the amount of $50,000, well under the pre-trial offer.

After a one-day trial in November, a DeKalb County jury returned a defense verdict in eight minutes. **Brian F. William** was able to convince a jury that Plaintiff's alleged concussion claims from a minor admitted fault automobile accident were not credible. Plaintiff alleged $11,752 in medical bills and asked the jury for $130,000 during closing arguments. Plaintiff had rejected a $13,500 pre-trial offer.

Following a two-day trial in December, **Ben Harbin** obtained a defense verdict in Henry County. The case involved an admitted fault rear-end accident. The plaintiff presented medical bills totaling $15,000 and argued the accident caused a meniscus tear. Plaintiff admitted having a prior history of knee pain but related the meniscus tear directly to the accident. A post-accident MRI showed a meniscus tear. Defense argued that the meniscus tear was a degenerative tear rather than an acute tear. After 20 minutes of deliberation, the jury asked if they could award the defendant attorneys' fees and defense costs.

GDLA Secretary **Bill Casey** and **Kevan Dorsey** of **Swift Currie McGhee & Hiers** in Atlanta obtained a defense verdict in Athens-Clarke County Superior Court before Judge Lawton Stephens in October. Opposing counsel was Von Dubose who brought in Mike Rafi for trial. Plaintiff sued defendant Eleanor Mitchell in her capacity as administratrix of her deceased mother's estate and in her individual capacity. Plaintiff accepted Ms. Mitchell's statutory offer of settlement during trial. The trial continued against Ms. Mitchell in her capacity as administratrix.

Plaintiff claimed burn injuries to his hand, foot and face stemming from a house fire. Defendant took control of the home after her mother's death. She allowed her son to live in an unheated basement and her niece and young children to live in the upstairs portion of the house which had a central gas heat system. The tenants paid very little rent. The upstairs tenant was supposed to pay the utilities. The gas bill went unpaid so both tenants were using space heaters.

Plaintiff ended up in the basement one cold February night. There was some dispute over whether he was expected to be there, invited by the son/tenant, etc. He let himself in with a key hidden by the tenant. He found some snacks and started watching TV. He noticed a space heater lying face-down on a stack of clothes piled on a sofa next to the bed. He sat the heater on a crate between the sofa and bed. He fell asleep with his right arm extended off the right side of the bed with his hand touching the sofa. He woke up on fire. His right arm, including his coats (he was wearing three coats) were ablaze and his hand was burning. He found a plastic bucket under the bathroom sink, filled it with water and tossed it in the direction of the fire. At that point flames, like a giant blow torch, shot out of the outlet into which the heater was plugged. Plaintiff ran out of the house and woke up the upstairs tenant.

Plaintiff was treated at Still Burn Center in Augusta where he underwent skin graft (pig not his own) treatment. He claimed just over $83,000 in medicals and 4-6 months of wage loss from his cooking job at a local restaurant.

The Clarke County Fire-Arson investigator concluded the fire started when the space heater ignited the bedding. Plaintiff challenged his opinions and suggested the source was electrical in nature and started when the receptacle or heater cord over-heated. Plaintiff also argued the fire started when the electrical receptacle for the dryer overheated.

Plaintiff requested a verdict of $550,000-$750,000 but not as much as $1 million. Defendant asked for a full defense verdict. The jury returned a verdict for the defendant. ◆

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

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Swift Currie McGhee & Hiers, Atlanta

Michael M. Becker
Vernis & Bowling, Atlanta

Yaa Acheampomaa Boachie
Worsham Corsi Scott & Dobur, Marietta

Peter Coffin Brown
Mabry & McClelland, Atlanta

Daimon LaCour Carter
Levy Pruett Cullen, Decatur

Nathan Chong
Groth Makarenko Kaiser & Eidex, Suwanee

Amy L. Cooper
Copeland Stair Valz & Lovell, Atlanta

Breandan D. Cotter
Rutherford & Christie, Atlanta

Chelsea McKenzea Dease
Squire Patton Boggs (US), Atlanta

Hunter Delashmit
Lueder Larkin & Hunter, Alpharetta

Drew DeMott
Moore Clarke DuVall & Rodgers, Savannah

Garret Drogosch
Hawkins Parnell & Young, Atlanta

Michael Eber
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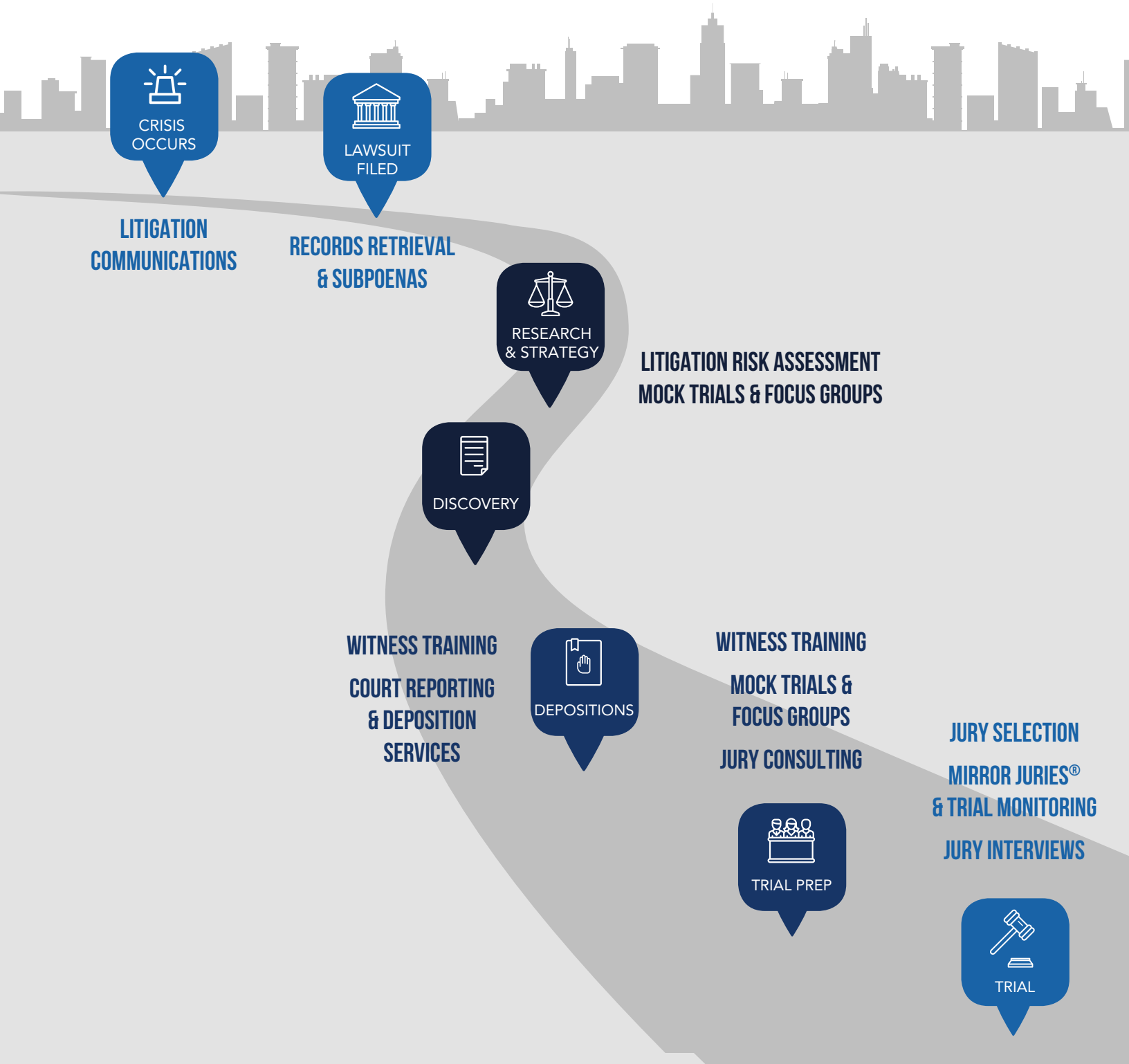

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GDLA Files Amicus in Support of Petition for Cert Regarding Enforcement of Settlement Agreement

On August 25, 2021, GDLA filed an amicus brief in support of a petition for writ of *certiorari* to the Georgia Supreme Court in relation to the Georgia Court of Appeals' decision in *White v. Cheek*, 859 S.E.2d 104 (2021).

The Georgia Court of Appeals held that an insurance company's act of leaving a voicemail for claimant's counsel was a rejection of the claimant's settlement demand, although the substance of voicemail did not relate to the demand itself. The Court of Appeals relied upon a very broad interpretation of the Supreme Court of Georgia's previous decision in *Grange v. Woodard*, 300 Ga. 848 (2018).

GDLA joined in the position being pursued by former Chief Justice Leah Sears on behalf of the petitioning party. GDLA argued the Georgia Supreme Court should refine its previous holding by clarifying that although O.C.G.A. § 9-11-67.1 may allow additional terms not specifically stated in the statute, such terms must be material and/or essential.

The GDLA Amicus Committee is led by Chair Elissa Haynes of Drew Eckl & Farnham in Atlanta and Vice Chairs Anne Kaufold-Wiggins of Balch & Bingham in Atlanta and Philip Thompson of Ellis Painter in Savannah for their efforts. This and other briefs can be found in the members' only area. ◆

GDLA Helps Defendants in Criminal Activity Premises Liability Cases Establish Important Precedent

In companion third-party criminal conduct cases involving GDLA amicus support, the Court of Appeals of Georgia has created favorable precedent on the duties owed to invitees in premises liability cases. The opinion is available at *Pappas Rest., Inc. v. Welch*, No. A21A1341, 2021 WL 5898809 (Ga. Ct. App. Dec. 14, 2021). GDLA filed an amicus brief in support of Defendants/Appellants Pappas Restaurants, Inc. (the premises owner) and Tactical Security Group, LLC (a security services provider).

The opinion involves an October 7, 2016, armed robbery turned murder in the parking lot of the Pappasito's Cantina restaurant in Marietta. The plaintiff and her husband were leaving the restaurant at night when two criminals robbed and shot the plaintiff and her husband, causing the plaintiff to sustain serious injuries and her husband tragically to pass away. Of particular importance were the defendants' alleged prior notice of criminal activity at and around the property and the actions of the onsite security guards on the evening of the shooting. The plaintiff alleged that numerous incidents of non-violent property crimes both on the premises and at neighboring businesses in Marietta more generally imposed duties on the defendants to prevent plaintiff's injuries and her husband's death. The plaintiff also alleged that adequate security on the evening of the attack would have prevented the shooting, given that the assailants had been casing the parking lot looking for a target. Both defendants filed Motions for Summary Judgment, which were denied.

GDLA submitted an amicus brief authored by Amicus Vice Chair Philip Thompson of Ellis Painter in Savannah in support of both defendants. In the brief, GDLA focused on the important limits placed on the scope of duties generally owed by defendants in third-party criminal conduct cases in three respects: the foreseeability of the criminal act itself, the plaintiff's obligation to establish proximate cause in such cases, and the contractual obligations of an agreement for the provision of security services on the property at issue.

The Court of Appeals agreed with the arguments made by the defendants and GDLA and reversed the trial court. First focusing on foreseeability, the Court noted that plaintiffs can typically establish foreseeability in one of two ways: (1) through substantially similar crimes or (2) by showing that the proprietor knew of the particular danger. Considering both of these possibilities, the Court found that there was no evidence of knowledge regarding similar crimes in the parking lot or that the attack was possible in the police reports, the witness testimony or in reports of criminal activity from surrounding areas.

Relying on precedent from the Supreme Court of Georgia, the lower appellate court found that break-ins of unattended vehicles were "the complete opposite" of the shooting that occurred in this case, which occurred in a busy lot, under a streetlight and with security patrolling the area. The Court of Appeals also found that a shooting was not the type of injury one would expect to follow from the break-in of unoccupied cars in a busy, well-lit parking lot.

With respect to the claims against Tactical, the Court of Appeals held that the plaintiff was not a third-party beneficiary of the security contract. The Court also declined to address how Restatement § 324A applied in the case noting that it had never applied that section in the manner requested by the plaintiff and that in any event, Tactical would be entitled to summary judgment because the crime was not foreseeable. ◆

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GDLA Files Amicus in Support of Petition for Cert Regarding Enforcement of Settlement When Insurer Undertook All Acts Within its Control to Satisfy All Conditions

On October 28, 2021, GDLA filed an amicus brief in the Georgia Supreme Court on behalf of the petitioner/appellee in *De Paz v. De Pineda*, urging the high court to grant *certiorari* and consider whether a binding settlement is reached when an insurance company unequivocally accepted a settlement demand on behalf of its insured and undertook all acts within its control to satisfy all conditions. GDLA had previously filed an amicus brief in the Georgia Court of Appeals on August 19, 2021.

On September 30, 2021, the Court of Appeals, reversing the trial court, held that no settlement agreement had been reached because the settlement funds were not delivered with the deadline imposed by the demand. However, the evidence showed that appellee's insurer, State Farm, timely and unequivocally accepted the settlement offer presented to its insured and placed the settlement check in the mail using UPS overnight delivery. Due to an error within the UPS system, the settlement check was lost and never delivered. Although State Farm immediately reissued a settlement check upon learning of the problem, appellant's counsel took the position that the offer had been rejected and filed suit.

Due to an error within the UPS system, the settlement check was lost and never delivered. Although State Farm immediately reissued a settlement check upon learning of the problem, appellant's counsel took the position that the offer had been rejected and filed suit.

In its brief in support of the petition for *certiorari*, GDLA highlighted the ongoing issue in Georgia regarding time-limited settlement demands designed to do one thing—allow plaintiffs to argue no settlement has been reached in order to set up a later claim for "bad faith" or "negligent failure to settle." There was no doubt State Farm intended to accept the settlement offer and that it did everything in its power to satisfy all conditions.

As set forth in GDLA's brief, this case is yet another example of the unintended consequences stemming from the Supreme Court's decision in Southern General Ins. Co. v. Holt, almost 30 years ago. Although the *Holt* court cautioned that it was not creating a rule of law that would allow plaintiff attorneys to "set up" insurance companies, and despite efforts to enact a legislative reform through O.C.G.A. § 9-11-67.1 (which was amended again this year), the "bad faith set up" persists in Georgia, now more than ever. GDLA argued that it should not be this difficult for an insurance company to pay its policy limits to settle a claim against its insured. And yet, it is in Georgia. GDLA urged the Supreme Court to grant *certiorari* and address the unintended consequences created by *Holt* and subsequent decisions. Specifically, GDLA urged the Court to adopt a ruling that an insurer has reached a settlement of the claim on behalf of its insured when it takes all reasonable steps to satisfy the conditions imposed by the demand.

GDLA thanks David Atkinson and Myrece Johnson of Swift Currie McGhee & Hiers in Atlanta who authored both amicus briefs. In fact, Mr. Atkinson and Ms. Johnson are two of our most prolific amicus contributors, regularly volunteering to author briefs on behalf of GDLA. ◆

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Remembering President George Hall

GDLA and the greater legal community lost an extraordinary leader and an accomplished, respected litigator on September 26, 2021 when President George Hall, a 30-year partner at Hull Barrett in Augusta, passed away unexpectedly on the eve of his sixtieth birthday.

There are no words to explain the sudden loss of George Hall. He was beloved by his family, admired by lawyers and judges, and dedicated to GDLA. George was an extraordinary husband (married to his college sweetheart), dad, grandad, friend, lawyer and partner.

Below we have compiled remembrances from many who worked alongside George in various capacities. His passing leaves a void that will never be filled. We can only hope to honor his memory as we move forward without him.

TRIBUTES

I got to know George through our work together on GDLA's Board of Directors. Several lawyers in my firm also worked with George. He was the consummate leader—humble, thoughtful, diplomatic, measured and good-humored. His reputation as a stellar litigator and a select member of the American College of Trial Lawyers was well known. The news of George's untimely death at age 59 during the Ironman in Augusta, shared with me that day by my partner and George's good friend, Ben Brewton, was and still is shocking and a reminder of how quickly life can pass by. He had only been GDLA President since June where I last saw him at the Annual Meeting in Amelia. The Board was gearing up for George's Fall Meeting at the Ritz Oconee just five days later. I was looking forward to working with George during his year at the helm. George's death has impacted me, GDLA and everyone who knew him. Following you will read tributes from others about this fine lawyer, friend and family man.

—James D. "Dart" Meadows
GDLA President
Balch & Bingham, Atlanta

My recently deceased law partner, George Hall, was a special and very unique individual and lawyer.

The Bar will miss his intellect, excellent character and basic honesty in communicating with the court, members of the jury and opposing counsel.

When George first visited our law firm, I had a very pleasant and informative office interview with him. I found that he had an outstanding academic record and a very positive attitude about a future career in the law. I specifically recall his final words to me as he walked to the elevator with a broad smile on his face. He looked me directly in my eyes and stated with great conviction the following words, "Mr. Rice, if you will hire me, I will be the best lawyer you ever hired."

On the surface, those confident words may appear to be a little over the top. In fact, however, they evidenced a self-confidence that our expanding trial department could utilize at that very point in time. And, in George's case, it was exactly that extra little quality that soon projected him to the upper ranks of Georgia's most exceptional trial attorneys.

His commitment to service was evident within the greater Augusta community, as well as the local bar and State Bar.

In addition, his personal life was as exemplary as his professional life. He treated everyone with respect and kindness. With an innate sense of sincerity, he had a unique ability to convey compassion and caring concern for others.

George's loss was tragic to our firm, and the Bar as a whole. We will all miss him and the exceptional qualities he brought to the Bar and to all of us fortunate to be able to call him our friend, and our partner.

Indeed, his exemplary life as a lawyer, law partner, churchman, friend, husband and father blessed our lives.

—Patrick J. Rice
GDLA Past President
Retired, Hull Barrett, Augusta

During his senior year at South Carolina law school, George came to Augusta to interview for an associate's position in 1986. This South Carolinian was motivated by the fact that his wife grew up in Augusta and her parents lived here.

George had an impressive law school academic record and told one of our senior partners [see Pat Rice's tribute] that if given a chance, he would become one of the best trial lawyers we knew. And darn if he didn't.

His accomplishments as a trial lawyer led to his induction as a Fellow in the American College of Trial Lawyers and his position as President of the Georgia Defense Lawyers Association. He had a record of trying more than 120 cases to verdict or trial court decision. He approached his cases with diligence, imagination and hard work. But, in doing so he was always courteous to the opposing lawyers, adverse parties and, of course, to the court. Those characteristics led him to be chosen as a mediator or arbitrator in over 300 cases.

Yet George's hard work as a trial lawyer did not force him into being a workaholic. He and his dear wife Margaret raised two fine young men to adulthood and had just embarked on their first experience as grandparents. It was shocking to us all when George suffered a heart attack while engaged in the swimming leg of the Augusta Ironman competition. For George was a regular swimmer and runner—the last one you would have imagined to have an unexpected heart attack. George also loved to hunt and fish. He would often be seen in the office on a cold winter afternoon wearing hunting gear after having returned from a morning duck hunt.

And those of us here in the law firm office thoroughly enjoyed our daily confabs with George about the Atlanta Braves and SEC football. He had to develop a measure of humility as a Gamecock fan surrounded by so many in the Bulldog nation. This was especially true after one of his sons graduated from UGA and abandoned any allegiance to his father's alma mater.

George's former law partner, dear friend and Ironman relay teammate, Judge Neal Dickert, was on-hand at the GDLA Annual Meeting in June to swear George in as GDLA's 54th President. He is pictured celebrating that momentous occasion alongside George's wife, Margaret (right), and his wife, Floride.

George followed in his own father's footsteps in his devotion to the Presbyterian church in Augusta where he and Margaret were members. George's father was a Presbyterian seminary professor and former World War II chaplain. He was especially proud of George for assuming all of the leadership roles available to a lay member of his church.

Whether one came to know George as a law partner, a fellow church member or a neighbor, there could not have been a better friend. That is what we miss most about George—not being able to share the days ahead with a friend we loved.

—David E. Hudson
Hull Barrett, Augusta

Much has been said about George, his many accomplishments and the lives he touched while he was with us. You could fill countless pages discussing his good deeds, his legal acumen and how he truly made this world a better place. But I want to take a moment to discuss what he meant to me: as a partner, a mentor and most importantly, a friend.

In life, there are few people we are fortunate enough to cross paths with who make an indelible impression on us and help to shape who we are and who we will become. George was one of those special few for me. As a young attorney coming into private practice years ago, George was one of the partners I had the privilege of working with from the outset of my time with Hull Barrett. He demanded the best, and was the first to point out your flaws—**y**et also the first to provide accolades when they were deserved.

George taught me the importance of showing up and always doing your best. More often than not, I am not the smartest person in the room but, because of George, I am usually one of the best prepared. He was my mentor.

George cuts up with this dear friend, Augusta "neighbor" and swim training partner, GDLA Past President Staten Bitting, during the 2016 GDLA Annual Meeting.

And in doing so, he not only helped me to hone my abilities as a lawyer and a litigator, but also as a person. For George lived his life the way we all should—with passion, always putting others first, never compromising his values, and always having an open mind.

Through the years, as I continued to work with George, I became honored to call him my partner and, most importantly, my friend. I would look forward to our daily talks—whether it was about sports, work, or just life in general. George's door was always open if you needed assistance or just a moment to talk. Not a day goes by that I do not miss conversing with him or seeing his smile. George's energy and sense of humor were infectious. He never met a stranger, and whether he knew you well or not, he always made you feel like the most important person in the room when you had his attention.

I do not believe I will ever get accustomed to living a life without George in it. He was that much a part of my life and I know that sentiment rings true with many who had the privilege of knowing and working with him. So, thank you, George, for inspiring me to be better. Thank you for making every day I came to work a little brighter. And, most of all, thank you for your friendship and support. You will always be missed and will never be forgotten. I truly hope as the days go on, I can continue to make you proud up there.

—Brooks Hudson
Hull Barrett, Augusta

I had the good fortune of working with and learning from George for 20 years. It is rare you can say this, but everyone who knew George liked him. He was one of the finest people I have ever known. He was a humble supporter of his church, our local community, and the Bar, both statewide and local, serving in many offices and capacities, making each a better place. His loyalty, knowledge, compassion and character made George the type of lawyer and person who others trusted, relied upon and strived to emulate. While his contributions are immeasurable, his proudest achievement without a doubt was his family. A loving husband to his wife Margaret, a proud father to Thomas and David, and a newly-minted grandfather to Aubrey (the best grandchild ever in his unbiased opinion), George always amazed me in not only being one of the hardest workers at our Firm, but also balancing it with family and never missing a school function, ball game or dinner with Margaret. I am thankful that I could call George a friend, and he is and will continue to be greatly missed by all who knew him.

—Davis A. Dunaway
Hull Barrett, Augusta

George was the mentor who helped me start my legal career. He showed compassion to everyone no matter their circumstances. And, he showed such deep devotion to his family and friends—a trait that will be greatly missed by all. George always welcomed his colleagues when we sought advice from him. He was a man who always took time out of his busy schedule to listen, even when he really didn't have any time to spare. George also made sure to always present himself in a way that made all of his fellow lawyers proud. He will be missed by all who knew him and, especially, by his family whom he loved and cherished.

—Jordan Bell
Hull Barrett, Augusta

The death of a close professional associate is always sad. An unexpected, sudden death of a close friend and colleague like George Hall, taken in the prime of his career, is unfathomably difficult. Those of us who knew and had the pleasure to work with George are experiencing this difficulty. For those of you who did not have a chance to work with George, you missed the opportunity to know one of Georgia's great lawyers and a wonderful man.

I first met George when interviewing him for a job with the Hull Barrett firm of Augusta in the fall of 1985. At the time, he was a sen-

ior law student at the University of South Carolina. Our firm hired George with my strongest recommendation. I am, and have always been, proud to say that I had a role in bringing George and Margaret to Augusta. George tried his first jury trial with me, and I tried my last case as a lawyer with him. There were many other jury trials and other cases we handled together between those two. Each experience was a pleasure.

George was the consummate professional, always competent and thoroughly prepared to zealously protect the best interests of his clients. While he was a tenacious and powerful advocate, he was never haughty, arrogant or mean-spirited. He always treated everyone, including opposing counsel, with dignity and respect, thus embodying the highest principles of professionalism. Just as his career as a lawyer exemplified the finest our profession has to offer, his personal life reflected a faith that led him toward a lifetime of service to his church, family, community and neighbors. While I have had many friends who lived long, productive and distinguished lives, no one I know lived life any more fully and contributed more to making this world a better place than George. While those of us who knew him will continue to miss him and grieve with Margaret, we will be sustained and will move forward with wonderful memories of his life well lived. In the words of the Gospel, "Well done, good and faithful servant."

—Hon. Neal W. Dickert
Former Partner
Hull Barrett, Augusta
Senior Superior Court Judge, Augusta Judicial Circuit

George (kneeling) climbed Whiteside Mountain in Highlands, N.C., during the 2018 Fall Board Meeting along with (l-r) DeeDee and Jason Willcox, Past President Matt and Diane Moffett, Past President Warner Fox, Patty Kilgore, Past President Hall McKinley and Past President Dave Nelson.

George and I had worked for the firm for about 20 years before circumstances brought us together as a team for the last 10. He was all the things everyone hopes to be when they grow up. He was intelligent, witty, confident, kind, humble and quick to be of help to anyone in need. If I had to choose a couple, the major things I came to admire about George were his love of God and family. His wife, Margaret, was his very best friend and partner in crime, and their banter was legendary.

Around the office, George would make daily contact with folks on various topics to uplift and encourage them or just to make them laugh. He made sure you knew you were appreciated. His passion for his work and life itself was infectious.

George wore many hats, and he did it so well. He was a leader, a mentor, a counselor and a devoted friend. If there was a problem, he took it head on without hesitation and made it look so effortless. He was truly a lawyer's lawyer. He cherished his time with the Georgia Defense Lawyers Association and the many relationships forged through his membership and service to it, ACTL and ABOTA.

The huge vacuum left in G's wake is inexplicable. We all continue to deal with it daily in our own way. From my perspective, I believe he would be proud of his firm family and their efforts to continue his legacy by soldiering on, keeping what he helped build moving forward in the right direction.

Our Inter-galactic Super Lawyer, as I liked to call him, has left his mark in indelible ink on the hearts and lives of more people that I can count, and I am a better person for having known him.

I am sure he will be shaking his head at my comma placement. I hope it makes him chuckle.

—Mary Marschalk
Paralegal
Hull Barrett, Augusta

The Roman poet Juvenal wrote that we should "pray for a sound mind in a sound body." For one day short of 60 years, George Hall would come to mind when considering this standard. George was

George's first magazine cover shoot as an officer was on the hottest day of the year in Palm Coast, Fla., during the 2018 GDLA Annual Meeting. He is pictured with then-officers President-Elect Dave Nelson, President Hall McKinley and Treasurer Jeff Ward. He kept everyone laughing while they sweated (and whined!). The bottom of the next page features some of his cover appearances.

disciplined in his work, regular in his exercise, a leader in his church and good husband, father, father-in-law and grandfather. I give him this highest praise I know regarding a lawyer whose practice involves civil litigation. He was an effective advocate. His clients always benefited from his representation.

I can state all of these things without equivocation. They are a matter of personal knowledge to me. For three decades we represented co-defendants in the trial and appellate courts. We were occasionally adverse to each other. We referred cases to each other. We mediated cases for each other. He had the goods and was straight as a rail. He was honored with membership in the American College of Trial Lawyers.

For many years we exercised in adjacent lanes at the Y pool in downtown Augusta. Once, when the pool heater broke down in mid-winter, George shamed me into swimming laps with him in the icy water. He was, as they say, born ready.

My family shared meals and many happy times with the Halls at GDLA events. I can see George, Margaret, David and Thomas on the beach at Ponte Vedra. It was a favorite venue of the boys. As was to be expected of him, George performed many tasks on behalf of GDLA. No one was surprised when he rose through the offices to become President.

On September 26, 2021, while in the swimming leg of a relay event, something he had loved doing annually for over 10 years, an undetected problem in his otherwise sound body resulted in his untimely death. Suddenly we were all reminded of the words of St.James who wrote "… you do not even know what will happen tomorrow. What is your life? You are a mist that appears for a little while and then vanishes." This is not to diminish a life but to remind us to live each day to the fullest. George's life was a lived fully and well, as one would expect from someone who was always ready. We will miss him. Please keep Margaret and her family in your prayers.

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

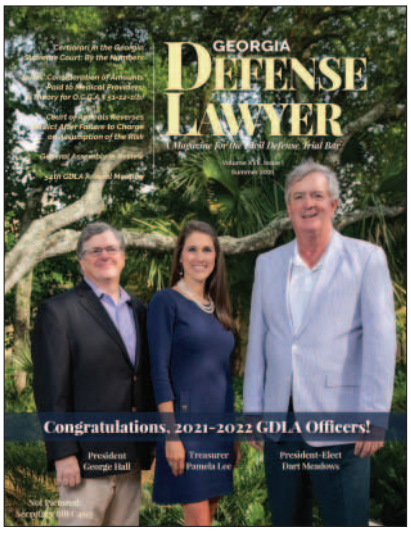
Note: The following was sent to the Georgia Chapter of the American College of Trial Lawyers on September 27, 2021.) My time as State Chair comes to an end later this week. Never did I imagine that my likely last communication with you would be to notify you of the tragic and untimely death of my dear friend, Fellow George R. Hall of Augusta. George died suddenly yesterday while participating in the swimming portion of an Ironman Triathlon in Augusta. Today would have been his 60th birthday.

George practiced with the Hull Barrett firm in Augusta and was partners with Fellows David Hudson and Pat Rice. I knew George from the very first day I set foot in Augusta in 1988. George was one of the finest people I have ever met

Above left: One of the happiest days for the Hall family was October 27, 2018 when their elder son, David, married Lauren, joyfully adding a sister-in-law and sister to the family. Their younger son, Thomas, is beaming next to his groom-brother. Above right: George and David competed in the Augusta Ironman on February 22, 2020 and proudly displayed their "finisher" ribbons.

or known. He had the perfect blend of intellect, compassion, humility and moral compass that makes the kind of man people admire and want to be associated with. George balanced these qualities with just the right amount of very well justified self confidence that you have to have in our profession. He was universally admired and routinely sought out by people and institutions that needed help, counsel and a lawyer that could try a case. His guidance was also widely sought out in the community and especially in his church where he was a lay minister and served in multiple capacities, some of which involved steering the church through troubled waters.

George was extremely proud of his involvement with the College and was active in it. He had, in fact, in the last several weeks agreed to serve on the State Committee going forward. I had occasion to be involved in his work up to be in the College and, while I know those investigations are meant to be secret, I will take a moment of personal privilege to tell you that in speaking with a local federal judge about George I was told, "He enjoys the most credibility with a jury of anyone I have ever seen appear in my courtroom." I tried cases with



"I married my best friend," George often said of his bride. The Presbyterian College sweethearts tied the knot on June 8, 1985. At right, the lovebirds are pictured attending a family wedding.

George and found that to be a spot-on assessment.

It is perhaps worth commenting on to this particular group that George died in the midst of an ongoing trial. Had he lived until today he would have been entering the fourth week of a wrongful death trial involving Johnson & Johnson talc powder currently being tried in Augusta [which eventually would be a defense verdict].

George leaves behind his beloved wife Margaret, two adult sons and a new grandchild. He was a devoted family man and, in looking back at my text messages from George, I saw that the last one I received prior to his telling me about his trial was a photo of him on a sofa holding his grandchild with the simple caption, "This is cool!"

Life seems to be fleeting and tenuous at times. George was loved and appreciated while he was here and will be sorely missed now that he is gone. Thank you for allowing me to share my feelings about his passing and be well.

—Ben Brewton
Balch & Bingham, Augusta

Always ready with a kind word, a witty retort or a creative solution to a situation. A wonderful father, a devoted husband and a loyal friend. An exceptional lawyer, a keen mind and a fine gentleman. A servant leader, a God-fearing man and an example to be emulated. This was George Hall. He is dearly missed by all who had the pleasure of knowing him. I certainly miss him.

—Sarah B. "Sally" Akins
GDLA Past President
Miles Mediation & Arbitration, Savannah

"O Lord that lends me life, Lend me a heart replete with thankfulness!" Shakespeare's *Henry VI Part Two*, Act 1, Scene 1

It is a sad privilege to write this brief homage to George Hall, our great friend and colleague.

Any tribute to George would by definition and in truth be inadequate. His was a life that cannot be reduced to a few words on a page. But, at a minimum, it would have to contain these concepts and words: wonderful, friend, father, husband, grandfather, lawyer, brilliant, kind, honest, unwavering, devoted, dedicated, unflinching, unyielding, funny, friendly, engaging, leader, stalwart, witty, fierce advocate, hero, considerate, creative, engaging, gifted, good, family man … . The list goes on.

We all mourn our loss at George's passing but remain thankful for the time we had with him. It was truly a privilege.

—Jerry A. Buchanan
GDLA Past President
The Buchanan Firm, Columbus

I had a case a few months ago with a fairly well-known plaintiff's lawyer who insisted that George be our mediator. When a plaintiff's lawyer insists that the President of the GDLA mediate his case, it tells you something about George's credibility and the respect he generated from friend and foe alike. (We ultimately were able to settle a difficult case with George's help). It is hard to describe what an asset he was to our profession and how much we will miss him.

—George E. Duncan, Jr.
GDLA Past President
Dennis Corry
Smith & Dixon, Atlanta

George was always my go-to lawyer in Augusta. If I couldn't convince a client just to hire him instead of me when a client sent me a case in Augusta, I did everything I could to make sure he was my local counsel. Not only because he was a great lawyer, but also because he was a good friend and someone I could trust to tell it to me straight. Of course, he was also well known by just about anyone who mattered in Augusta, which always helped. Most importantly, George was man of passion and integrity in the practice of law. I still can't believe he's gone. It will be so very strange

Above, George's beloved family celebrated Christmas 2021 together: David, Aubrey, Lauren, Thomas and Margaret. About his first grandchild, born May 23, 2021, George wrote on Facebook, "My heart is full!" He was able to see Aubrey on the day before he passed, as the family had gathered that weekend to celebrate his 60th birthday.

and sad to go to Augusta and not to be able see George.

—Warner S. Fox
GDLA Past President
Hawkins Parnell & Young, Atlanta

George loved to talk about swimming even with novices like me—very humble! I miss him so much.

—W. Melvin "Mel" Haas
GDLA Past President
Constangy Brooks Smith & Prophete, Macon

The last time I was with George, we were at the GDLA Winter Board Meeting in Asheville, N.C. We had a thorny issue to decide as a board and George navigated the waters with a calm and steady hand. We remarked later that afternoon that it was like that when he would swim his marathons. To think he was doing something he loved when he passed away was a reassuring thought. I will miss him terribly.

—Steven J. Kyle
GDLA Past President
Bovis Kyle Burch & Medlin, Atlanta

When I think of George, I'll always remember one of the last times I saw him. He was relaxing on the beach, the way people with grown children can do, when I walked by during the 2021 GDLA Annual Meeting schlepping enough gear for my kids that it looked like the Clampetts going to the beach. He heckled me as I walked by and that's the way I'll remember him. Full of joy, full of fun and full of life.

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

George was one of the most caring and *genuine* people I've had the pleasure to know. He wanted to talk about whatever *you* wanted to talk about, and he was just as comfortable listening as talking. George told stories that were funny without being mean-spirited. He was one of the best examples of attorney professionalism I have encountered. I will miss talking to George about our cases, the newest legal issues, and the Braves. George will be missed by many but forgotten by none.

—Martin A. Levinson
GDLA Vice President
Hawkins Parnell & Young, Atlanta

George was the "go-to" defense lawyer in Augusta; he was beloved and respected by all judges and counsel. George was funny, smart and savvy. He will forever be missed, and forever remembered.

—David C. Marshall
Hawkins Parnell & Young, Atlanta

I did not know George well, but all my interactions were positive. His upbeat, jovial personality coupled with a sharp wit and a welcoming smile made a perfect combination. He was recognized as a talented attorney, a loyal and loving family man, and a dedicated member of his church. For all who remain, he left too soon and will be missed greatly.

—Kirby Mason
GDLA Past President
HunterMaclean, Savannah

George was my friend and my lawyer! When there was a big case in Augusta requiring most capable local counsel—George was the man. He helped us try a significant false arrest case to a defense verdict in February 2020, as we awaited the spread from California of the

COVID virus. It is with great regret and frustration that COVID prevented all of us from seeing and spending time with George over the last two years, and it is with great sadness that all of us now lose his friendship and his great leadership of GDLA. We will miss our friend.

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

George was a damn good trial lawyer, a savvy mediator and effective leader for GDLA. His intellect, common sense and humble confidence was respected by lawyers throughout Georgia and beyond. And, I bet nobody ever turned down a friendship with George Hall. I truly admired this Godly man of integrity and service, a man who loved his family and friends unconditionally.

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

I got to know George over 30 years ago, when we were on the State Bar Younger Lawyers Section [now YLD] board together. After we aged out, luckily both of us became more involved in GDLA. What an all-around great guy.

—Peter D. Muller
GDLA Past President
Goodman McGuffey, Savannah

Learning of George's passing was heartbreaking. He was always so warm and inviting. What a tragic loss to us all.

—Ashley Rice
GDLA Vice President
Waldon Adelman Castilla Hiestand & Prout, Atlanta

George and Margaret with Past President Jerry Buchanan and his wife, Carolyn, at the 2019 GDLA Annual Meeting in Ponte Vedra.

George was a class person who invariably sought me out to greet me with a smile whenever we were together and I would always ask him about my friends and his partners, David Hudson and Pat Rice. He would give me an update on them and his fine firm. I'll miss seeing him.

—Robert M. "Bob" Travis
GDLA Past President
Bryan Cave, Atlanta (retired)

Always quick with a smile, quip or words of encouragement, George Hall had a knack for making people around him feel good. The list of accomplishments and recognitions contained in George's impressive resume clearly shows respect and admiration by his peers in the legal community (American College of Trial Lawyers and GDLA President, just to name two). While was he gifted with a sharp legal acumen, work was definitely not the most important thing to him. George loved and doted on his family; they were, without question, number one in his life—probably with the South Carolina Gamecocks being a distant second. Those privileged to know him witnessed his many admirable qualities, which can be rare finds in today's world: honesty, courtesy, professionalism, humility, loyalty and Godliness. My good friend George is dearly missed.

—Jeffrey S. Ward
GDLA Immediate Past President
Miles Mediation & Arbitration, Savannah

George was a great lawyer and an even better person. That sounds very trite, but it's true. He was my mentor. I greatly appreciated his legal advice and insights; I worked across the hall from him for 10 years, and he didn't mind answering my embarrassingly stupid questions (at least he never said he did). Not only has GDLA and the legal profession lost an exceedingly effective leader and advocate, the Augusta community has lost a tremendous husband, dad and granddad. I'll miss my friend.

—James S.V. "Jamie" Weston
GDLA Vice President
The Weston Law Firm, Augusta

Sunday morning, September 26, will be a moment in time I'll never forget. That's when I got a call with news I could not have imagined. Past President Staten Bitting's wife, Cindy, was on the line telling me George Hall had

At left, George with Past President Steve Kyle at the 2017 GDLA Spring Board Meeting at the King & Prince. Above he is with Past President Sally Akins three years earlier at the Spring Board Meeting in Hilton Head. The man was timeless, as was his wardrobe! (Hope he's smiling down at that comment!)

died that morning while swimming his relay portion of an Ironman triathlon. I was speechless and then overwhelmed with shock and grief, tears were pouring.

George had just been sworn-in as GDLA President in June. He was about to preside over his first Board of Directors meeting five days later at the Ritz Lake Oconee—a venue he chose.

In the months that have followed, I've come across email exchanges that make me miss even more his gift of leading with diplomacy, commitment, kindness, ingenuity and, most importantly, humor. He truly was a humble servant. I will miss his clever banter when we chatted all things GDLA. He was an absolute joy to be around, and I miss him every day.

—Jennifer Davis Ward
GDLA Executive Director,
Savannah

GDLA Trial & Mediation Academy Continues Tradition of Training Leading Litigators

After being derailed in 2020 due to the pandemic and then being pushed from August to November 2021, lawyers made the trek to Callaway Gardens for the Melburne D. "Mac" McLendon Trial & Mediation Academy from November 10-12, 2021.

The conference again kicked off with a welcome reception for faculty and students to gather informally on Wednesday evening, before the seminar commenced the next morning.

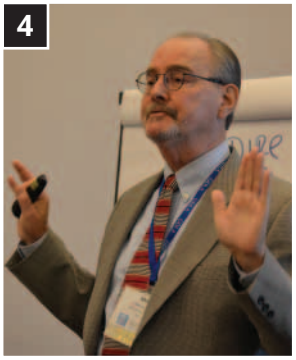
Students were guided through the two-and-a-half day experience by a distinguished faculty: Chair C. Bradford "Brad" Marsh of Swift Currie McGhee & Hiers; Brannon J. Arnold of Weinberg Wheeler Hudgins Gunn & Dial, Atlanta; GDLA Past President Jerry A. Buchanan of The Buchanan Firm, Columbus; William T. "Bill" Casey, Jr., Swift Currie McGhee & Hiers, Atlanta; Carrie L. Christie, Rutherford & Christie, Atlanta; GDLA President Matthew G. Moffett of Gray Rust St. Amand Moffett & Brieske, Atlanta; and Richard H. "Dick" Willis of Williams Mullen, Columbia, S.C.

Art Glaser with GDLA Platinum Sponsor Henning Mediation & Arbitration instructed students on best practices. Mark de Turck of R&D Strategic Solutions led a session on voir dire.

Trial & Mediation Academy employs a modified mock trial format to teach litigation skills. In advance of the program, students are given a case to study and begin preparing aspects of the trial. Following faculty instruction and demonstrations, students disperse into breakout groups to work on their skills from opening statements to cross and direct examinations to closing.

The first day concluded with a reception and dinner, featuring a keynote address on professionalism by Fulton State Court Judge Susan B. Edlein.

Save the date for the next Academy set for November 9-12, 2022, at Callaway. It is an exceptional learning opportunity not only for those early in their careers, but also for experienced attorneys who find themselves needing to brush up on their courtroom skills. Students could repeat the program each year and undoubtedly learn something new. Even the faculty professes to gain new trial tips and strategies every time—and some have been teaching for over 25 years. ◆



Scenes from Trial & Mediation Academy: *1. The Class of 2021 along with their faculty (in back); 2. Academy Chair Brad Marsh; 3. Art Glaser with Henning Mediation & Arbitration, a GDLA Platinum Sponsor and Academy Sponsor; 4. Mark de Turck with GDLA Platinum Sponsor R&D Strategic Services, also an Academy Sponsor; 5. Professionalism keynote speaker Fulton State Court Judge Susan Edlein with two Academy participants, Bryn McDermott and Sarah MacKimm.*

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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.

Apportionment: Now Bad for Georgia Business?

By Matthew G. Moffett (left) and Chris J. Perniciaro
Gray Rust St. Amand Moffett & Brieske, Atlanta

Introducing nonparty liability into a trial can be one of the most effective tools for a civil defense lawyer. Using Georgia's apportionment statute, O.C.G.A. § 51-12-33, a lawyer can take the teeth out of a dangerous case by carefully arguing that the real villain is not before the jury. Unfortunately, Georgia's appellate courts recently curtailed the apportionment statute's effectiveness in two situations often faced by defense lawyers. Defense lawyers and business owners should be asking: Is this statute being construed by appellate judges in a way that contravenes the pro-business legislative intent, and, if so, what can be done?

In 2005, the General Assembly enacted broad tort reform legislation.[1] As part of that legislation, the General Assembly created the current version of the apportionment statute, curtailing joint and several liability in most cases.[2] In doing so, the General Assembly supplanted common law apportionment and replaced it with a detailed statutory scheme applicable to tort claims.[3] Legislative history shows the General Assembly intended to model its tort reform after the success of similar legislation in other states.[4] Citizens and businesses in other states obtained reduced litigation costs and insurance rates as a result of tort reform in those states,[5] both of which serve as clear goals for Georgia.

Although the tort reform legislation that was passed in 2005 contained numerous other provisions (such as a punitive damages cap and enhanced medical malpractice affidavit requirements), the amendment of O.C.G.A. § 51-12-33 was one of the most transformative of civil practice.[6] We are still feeling the effects. The main tenet behind the statute is to hold each defendant responsible only for the damages caused by his or her own tortious conduct. At the final stage of trial, a jury applies the apportionment statute to plaintiffs, defendants, and any nonparties who breached a legal duty to the plaintiff that proximately caused the plaintiff damages.[7]

The statute is applied in steps. First, a jury determines whether a defendant is liable to the plaintiff based on the claims asserted. Second, the jury calculates damages. Third, the jury apportions fault among all parties and nonparties.[8] In this final step, each party and nonparty must be apportioned its share of the plaintiff's total damages proportional to its own percentage of fault.[9] The total amount of damages to be awarded to the plaintiff is then reduced by the percentage of the plaintiff's own fault, if any, under subsection (a) of the statute. Under Subsection (b), each at-fault defendant is liable for the damages apportioned to him, with no right of contribution.[10] Nonparty fault is then calculated pursuant to Subsection (c). The jury calculates nonparty fault solely as a means to determine each defendants' fault in light of all possible tortfeasors.[11] In other words, apportionment of damages to nonparties serves only to reduce the total damages recoverable from the named defendants; it does not allow the plaintiff to recover from the nonparties.[12] We now know that in cases "brought against" a single defendant, subsection (b) does not apply. [13] Therefore, in the third step, a jury will still calculate nonparty fault but cannot apportion damages to any at-fault nonparty.[14]

How this three-step process works when the plaintiff's comparative fault bars recovery is unusual and somewhat murky. Subsection (g) provides that a plaintiff cannot recover if he or she is 50 percent or more at fault for her own injuries or damages (Georgia's "comparative liability" doctrine). Therefore, a jury could determine the defendant was negligent; calculate the plaintiff's total damages; and then find the plaintiff 50 percent at fault, allowing no recovery. The order of these steps creates unnecessary work for a jury when its ultimate conclusion is one of no-recovery.[15] It also arguably skews the process in favor of plaintiffs by making the jury award damages then take them away; the latter becomes less likely if the jury has already calculated damages.

Alston & Bird, LLP v. Hatcher Management Holdings, LLC (August 10, 2021)

Since the apportionment statute was enacted, it was generally accepted that a defendant could reduce his exposure by proving a nonparty was at fault, in whole or in part, for the plaintiff's damages. In fact, the Georgia Supreme Court said as much in *Couch v. Red Roof Inn*[16] by indicating the plaintiff's damages should be apportioned to at-fault nonparties.[17] Other cases also refer to a defendant reducing the extent of his liability for a plaintiff's damages by having a jury apportion fault to nonparties.[18] This is consistent with the stated legislative intent that each person only be responsible for the amount of damages that person proximately caused—no more and

no less—thus, the abolishment of joint and several liability in most tort cases.[19]

Going against this commonly understood purpose, the Georgia Supreme Court recently concluded in *Alston & Bird LLP v. Hatcher Management Holdings, LLC* that a factfinder cannot apportion damages to at-fault nonparties where the plaintiff only sues a single defendant.[20] As a result, joint and several liability arguably exists between a single defendant and nonparty tortfeasor. This distinction in rules between single-defendant cases and multi-defendant cases is not based on any particular purpose or intent, but rather a strict textualist reading of the statute.

Hatcher involved a legal malpractice/breach of fiduciary duty claim against a law firm. Maury Hatcher hired the firm to create a holding company for his family's fortune. Mr. Hatcher then secretly liquidated and redeemed his interest in the company in excess of its objective value, constituting an alleged breach of his fiduciary duty by embezzling the holding company's assets.[21] The company brought separate suits against Mr. Hatcher and the law firm. The company sued Mr. Hatcher individually in 2009 and then sued the law firm three years later. In the case against the law firm, it identified Mr. Hatcher as an at-fault nonparty. At trial, the jury found the law firm liable and awarded damages to the company plaintiff. The jury then assigned percentages of fault to the plaintiff company, the defendant law firm, and nonparty Mr. Hatcher. The judge reduced the verdict according to the amount of the plaintiff's and nonparty's combined fault.[22]

On appeal, the Georgia Court of Appeals held the trial court erred in reducing the judgment by the percentage of fault the jury assigned to the nonparty.[23] The court concluded that since only one defendant was sued, the jury could only reduce the total damages awarded by the amount of the plaintiff's fault under subsection (a).[24] Even though the jury was still required to calculate the nonparty's fault under subsection (c), it was erroneous to reduce the plaintiff's award against the defendant by the amount of nonparty fault.[25] In reaching its conclusion, the Court of Appeals referenced subsection (b), which expressly says it applies

> *"The jury apportioned 50 percent fault to both employer and employee for the accident, and therefore the plaintiff could recover nothing under the comparative negligence doctrine."*

when "more than one person" is joined as a defendant.[26] The language of subsection (b), requiring the jury to "apportion its award of damages among the persons who are liable according to the percentage of fault of each person," did not apply.[27] The court discounted Subsection (c), concluding calculating nonparty "fault" is distinguishable from nonparty "damages."[28] The court agreed that subsection (c) requires the jury calculate nonparty fault, but disagreed the defendant could benefit from the calculation by reducing the plaintiff's damages pro rata by the amount of nonparty fault.[29]

After granting *certiorari*, the Supreme Court of Georgia affirmed the Court of Appeals' conclusion that damages cannot be apportioned to nonparties in single-defendant cases.[30] The Supreme Court simply held "[t]here is no grant of authority in the apportionment statute to reduce damages according to the percentage of fault allocated to a nonparty in a case with only one named defendant."[31] The Court held subsection (b) does not apply in single-defendant cases and no other provision of the statute expressly authorizes a factfinder to reduce an award by the amount of nonparty fault. This decision was rooted entirely in a strict textualist interpretation of O.C.G.A. § 51-12-33. The Court declined to consider legislative intent, despite conceding it could be construed as contrary to the Court's ultimate decision.[32] The Court also noted that *Couch* was brought against a single defendant.[33] As had the lower court, the Supreme Court discounted the requirement of subsection (c) of the statute that a jury apportion fault to nonparties.[34] The Court found no authority for apportioning damages in subsection (c) and held that only subsections (a) and (b) provided authority for actually apportioning damages.[35]

During oral argument, a few points were raised that did not appear to be addressed in the final opinion. For instance, Justice David Nahmias reiterated the Court had previously declared that fault is the limit of liability.[36] It followed that a defendant cannot be liable for more than his portion of fault regardless of whether he is sued jointly with others. Second, counsel for the law firm in *Hatcher* reiterated that even if the Court of Appeals' decision were affirmed, the statute would still require a jury to calculate nonparty fault, making this exercise meaningless where no comparative fault exists in a single-defendant case. Subsection (c) and (d) ensure that nonparty fault must be heard in all cases where notice is given 120 days prior to trial. No exception exists in the statute for cases involving comparative fault or multiple defendants. How can

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Insurer Wins First Jury Trial on Coverage for COVID-19 Business Interruption Losses

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

An insurer recently won the first jury trial on coverage for COVID-19-related business interruption losses after a federal jury in the Western District of Missouri issued a verdict in favor of The Cincinnati Insurance Company in *K.C. Hopps Ltd. v. Cincinnati Insurance Co.*, Case No. 4:20-cv-437 (W.D. Mo. 2021).

The insured, K.C. Hopps Ltd., owned and operated bars, restaurants, catering services and event spaces in the Kansas City metropolitan area. In response to the COVID-19 pandemic, civil authorities in Missouri and Kansas issued stay-at-home orders in March of 2020. In accordance with the orders, Hopps'ss operations were limited to delivery, drive-through and carry-out services. Hopps submitted a claim to its insurer, Cincinnati Insurance Company, for coverage under its commercial property policy for "Business Interruption due to COVID-19," and Cincinnati denied the claim. Hopps then filed suit against Cincinnati, seeking coverage under the policy's Business Income, Extra Expense, Civil Authority, and Ingress and Egress coverage provisions.

The policy at issue provided coverage for "the actual loss of 'Business Income' [the insured] sustain[ed] due to the necessary 'suspension' of [the insured's] 'operations' during the 'period of restoration.'" The policy specified that the "suspension" must be "caused by direct 'loss' to property at a 'premises' caused by or resulting from any Covered Cause of Loss." The policy further provided coverage for "Extra Expense" sustained during the "period of restoration." The policy defined "loss" as "accidental physical loss or accidental physical damage," but did not define the terms "physical loss" or "physical damage." The policy defined "period of restoration" as beginning at the time of direct "loss" and ending at the time of repair, resumption of business at a new permanent location, or a specified number of months after "direct physical 'loss.'"

The policy's Civil Authority provision provided coverage for business income loss and extra expense "caused by action of civil authority that prohibits access" to a premises other than covered property, provided that: (a) access to the area immediately surrounding the damaged property is prohibited by civil authority as a result of the damage; and (b) the action of civil authority is taken in response to dangerous physical conditions resulting from the damage or to enable the civil authority to have unimpeded access to the damaged property. The Ingress and Egress provision provided coverage for business income loss and extra expense caused by "the prevention of existing ingress or egress at a 'premises' shown in the Declarations due to direct 'loss' by a Covered Cause of Loss at a location contiguous to such 'premises.'"

Both parties moved for summary judgment. In its Motion for Summary Judgment, Cincinnati argued Hopps failed to demonstrate that SARS-CoV-2 caused physical loss or physical damage to Hopps's property because Hopps did not have any evidence that the virus was present on its premises; Hopps used its premises throughout the relevant time; and the virus did not render its property unsafe. Cincinnati further argued that Hopps never sustained an "actual loss" as required for Business Income coverage, that the insured was not entitled to Civil Authority coverage or Ingress and Egress coverage, and that certain policy exclusions precluded coverage.

The court granted summary judgment to Cincinnati with respect to Civil Authority coverage and Ingress and Egress coverage, but denied summary judgment to both parties on whether Business Income coverage was triggered. The court observed that, while the stay-at-home orders limited Hopps's operations, they did not prevent Hopps from accessing its premises. As such, Cincinnati was entitled to summary judgment on Hopps's Civil Authority coverage and Ingress and Egress claims.

However, the court held that genuine issues of material fact existed regarding the other issues in contention. The court rejected Hopps's argument that it sustained "physical loss" or "physical damage" simply because the COVID-19 pandemic resulted in stay-at-home orders, but also rejected Cincinnati's argument that physical contamination at Hopps's property could never satisfy the "physical loss" or "physical damage" requirement because such an interpretation would render the policy's contaminants exclusion meaningless. Rather, the court found that physical contamination which rendered the property unsafe could be considered "physical loss" or "physical damage" under the policy.

As to whether coverage was triggered under this standard, the court found that Hopps had sufficient evidence to support the inference that SARS-CoV-2 was present on its premises and that the virus

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Another Brick in the Wall:

How the Supreme Court's Decision in Johnson v. Avis *Strengthened the Defense of Proximate Cause for Premises Owners and Employers*

By Martin A. Levinson and Elliott C. Ream
Hawkins Parnell & Young, Atlanta

In May 2021, the Supreme Court of Georgia issued a decision in the consolidated cases of *Johnson v. Avis Rent a Car System, LLC* and *Smith v. Avis Rent A Car System, LLC*.[1]

The two cases arose when Byron Perry, a car washer and employee at a car rental company's lot, snuck onto the lot about five hours after closing time and stole a rental vehicle with the intention of selling it. Before he could sell the vehicle, however, Perry drew the attention of police. While attempting to elude police, Perry drove at high rates of speed and ultimately lost control of the vehicle, crashed into a wall and seriously injured two women, Brianna Johnson and Adrienne Smith, who were sitting on the wall. Perry later pled guilty to serious injury by vehicle, hit-and-run resulting in serious injury, reckless driving, felony theft by taking and other crimes.

In separate lawsuits, Johnson and Smith sued Avis Rent A Car System, LLC, Avis Budget Group, Inc., and Peter Duca (a regional security manager for Avis Budget Group), as well as CSYG, Inc. (the independent operator of the downtown Avis location), Yonas Gebremichael (CSYG's owner), and Byron Perry. The plaintiffs alleged Avis was liable for negligently failing to secure its car in the lot and for negligently hiring, training, supervising, and retaining Gebremichael and CSYG. The plaintiffs also alleged Avis was vicariously liable for Gebremichael's and CSYG's negligence. Perry was dismissed without prejudice from the Johnson suit before trial.

According to the evidence presented in the two lawsuits, about a year and a half before the incident, Gebremichael hired Perry on behalf of CSYG to wash cars at the lot. When hired, Perry told his employer he had been to prison, but no background check was done.[2] There was evidence presented of Avis's "two-key system," which allegedly made cars more likely to be stolen if one of the two keys was cut from the singular key ring and of Avis's "general concerns" about nationwide car rental thefts. Avis's Security Manager testified a car thief "could" attempt to evade police after stealing a rental car, and people "could be" seriously injured if one of Avis's vehicles was stolen. Plaintiffs also presented evidence of one other car theft from the subject lot approximately a year before the subject incident. And while there was no other direct evidence of other thefts, Avis destroyed or failed to preserve "operator and location files" requested by the plaintiffs in discovery, leading to a jury instruction on spoliation of evidence and an adverse inference that information in those files "would have been prejudicial to Avis."

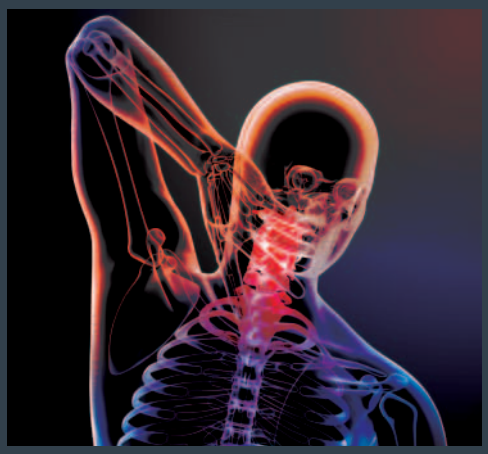
The two lawsuits were tried to juries who returned very different verdicts. In the *Johnson* case, the jury awarded $7 million and apportioned 100 percent fault to Avis. However, in the *Smith* case, the jury awarded $47 million and apportioned fault as follows:

- 50 percent to Avis
- 33 percent to Perry
- 15 percent to CSYG (independent operator of the Avis lot)
- 1 percent to Duca (Avis's regional security manager)
- 1 percent to Gebremichael (owner of CSYG)

Avis moved for judgment notwithstanding the verdict (JNOV) in both cases, arguing Perry's criminal conduct was a superseding, intervening act and, thus, the sole proximate cause of the plaintiffs' injuries. Avis also argued it owed no duty to the plaintiffs. In the *Johnson* case, the trial court overturned the verdict against Avis, finding the verdict entered in favor of the lot owner and independent operator eliminated any possible basis for liability against Avis, including claims of negligent hiring and retention. Ultimately, the trial court granted a new trial rather than judgment notwithstanding the verdict. In the *Smith* case, the trial court denied both Avis's motion for new trial and motion for judgment notwithstanding the verdict. Avis appealed the trial court's post-judgment rulings in both cases.

In 2019, the Georgia Court of Appeals reversed the verdicts in

Continued on page 56



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Constructing a Defense in Negligent Security Cases:

Attempts to Erode Actual Knowledge, Assessing the Plaintiff's Knowledge, and Tightening the Ropes on Proximate Cause

By Elissa Haynes
Drew Eckl & Farnham, Atlanta

It Has Always Been an "Actual Knowledge" Standard

If you defend negligent security cases, you have inevitably witnessed plaintiff's counsel argue that your client had knowledge of prior crime based on: (1) an impressive crime grid showing 9,000 crimes in a five-mile radius of your client's property; (2) prior police reports; (3) prior 911 call logs; or (4) the simple and undeniable reality that your client's property is located in a "bad area."

None of these is sufficient to establish a defendant's knowledge of prior crime.[1] Similarly, those who defend negligent security cases have also likely seen plaintiff's attorneys repeatedly argue that all they need to prove is the defendant's constructive knowledge (that the defendant **should** have known) of prior crime. Fortunately, *Bolton v. Golden* Business, Inc. provided long-awaited clarity that the true standard is **actual** knowledge, even if the Court of Appeals would not go so far as to say it in such plain terms.[2]

Before a landowner or occupier can be held liable for a third party's criminal act, a plaintiff has the burden of proving: (1) the criminal act was foreseeable to the owner or occupier; and (2) if the criminal act was foreseeable, that the owner or occupier failed to exercise ordinary care to protect its invitees from such act.[3] Plaintiffs can prove "reasonable foreseeability" one of two ways—evidence of the defendant's **actual knowledge** of prior substantially similar crime or other evidence that the defendant had **actual knowledge of a propensity for crime**.[4]

That actual knowledge is needed to establish reasonable foreseeability should come as no surprise. Georgia law has always supported an actual knowledge standard. If we take the time to dig into each of the cases plaintiffs routinely cite when arguing for a constructive knowledge standard, we see that each involves evidence of the defendant's actual knowledge of prior crime or actual knowledge of a propensity for crime. Following are those cases:

Sturbridge Partners v. Walker, 267 Ga. 785 (1997)—Reasonable foreseeability was established by evidence that the defendant had actual knowledge of three prior burglaries. The late Supreme Court Justice Harris Hines even emphasized the actual knowledge standard by stating the issue was not the foreseeability of the rape itself, "but whether the defendant had **actual** knowledge of the prior burglaries and, because of that knowledge, should have reasonably anticipated the risk of harm."[5]

Walker v. St. Paul Apartments, Inc., 227 Ga. App. 298 (1997)—The record contained evidence that one of the apartment complex's board members had knowledge of an assault of another tenant before the plaintiff's assault. There was also evidence that the complex's security guard had informed the owner and management company of concerns regarding crimes in the vicinity.

TGM Ashley Lakes, Inc. v. Jennings, 264 Ga. App. 456 (2003)—Although the Court of Appeals' opinion frustratingly states "**constructive knowledge of danger is sufficient**,"[6] the appellate court's ultimate holding—that the defendant had reasonable grounds to foresee additional criminal activity—was based on the defendant's **actual** knowledge of prior crime on the premises. Specifically, there was evidence of prior crime reported to complex management, staff meetings where management and its employees discussed a pattern of prior crime, and management's actual knowledge that the maintenance employee who committed the attack had a criminal history.

Wal-Mart v. Lee, 290 Ga. App. 541 (2008)—Although the actual knowledge component is not addressed in opinion by the Court of Appeals, the trial court record and appellate briefing discuss police reports which revealed the defendant's actual knowledge of the prior crimes contained in the police reports, as well as unrebutted expert testimony of the defendant's actual knowledge of 38 prior crimes on the premises.

Drayton v. Kroger, 297 Ga. App. 484 (2009)—While not addressed by the Court of Appeals in its opinion, the trial court record and briefing shows there was evidence

that store management had contacted the landowner about a prior armed robbery at the store.

Walker v. Aderhold Props., 303 Ga. App. 710 (2010)—As in *TGM Ashley Lakes*, the appellate court's opinion in this case says the "landlord need not have actual knowledge of criminal conduct before it may be held liable for failing to keep premises safe."[7] But that is mere dictum, since the Court of Appeals' holding was based on evidence of defendant's **actual** knowledge of prior crime. The Court held because security personnel received prior reports that burglaries were taking place on the premises (the actual knowledge component), the defendant had reasonable grounds to anticipate another criminal attack would occur on the premises.

Double View Ventures v. Polite, 326 Ga. App. 555 (2014) (overruled on other grounds)—There was undisputed evidence of at least two prior violent crimes reported to the defendant management company and that the security guard reported security violations to the management company before plaintiff's attack.

Martin v. Six Flags Over Georgia, 301 Ga. 323 (2017)—There was evidence Six Flags had actual knowledge that it employed gang members, which was the topic of daily security briefings, gang graffiti in the Six Flags locker room, and evidence that the assailants were known by park security.

Plaintiff's Knowledge of Crime Can Bar Recovery

A landowner or occupier is charged with a duty to exercise "ordinary care in keeping the premises and approaches safe."[8] This duty, however, is limited to exercising ordinary care to protect invitees from unreasonable risks of which the property owner or occupier has superior knowledge. The key inquiry is the landowner or occupier's superior knowledge of the criminal activity.[9] Equally as important, though not addressed by our appellate courts in the context of a negligent security case until recently, is the relative knowledge possessed by the plaintiff of the existence of or potential for crime.

In *ABH Corp. v. Montgomery*, the trial court denied the defendant's Motion for Summary Judgment in a parking lot attack case based solely on 911 call logs showing prior crime reported at the convenience store.[10] The evidence revealed the plaintiff had at least equal knowledge of a risk of a physical attack. Plaintiff's deposition testimony established that he was very familiar with the gas station where he was attacked because it was just a two-minute walk from his home. He had also worked at a barber shop in the same shopping center and testified that his coworkers carried weapons to protect themselves while at work. When asked whether Plaintiff considered the area where the gas station was located to be a "dangerous area," he testified, "dangerous still as in to the point of is there a possibility that I'm being affected or I can be affected? Yeah." In reversing the trial court's denial of summary judgment, the Court of Appeals found "ample evidence" that Plaintiff knew about the risk of crime and had failed to prove the gas station operator's knowledge was superior to his own.

Don't Forget About Proximate Cause

While many negligent security cases focus on reasonable foreseeability, recent appellate decisions have found that a plaintiff's claims failed **as a matter of law** where the plaintiff failed to establish proximate cause. In *Johnson v. Avis Rent A Car System, LLC*, the Supreme Court of Georgia addressed claims of a rental car company's negligence after an employee stole a rental car after hours, got into a high-speed chase with the police, lost control of the vehicle, and seriously injured two women who were sitting on a nearby wall.[11] In two subsequent lawsuits brought by the injured women, evidence revealed that when the employee was hired, he told the independent owner of the lot that he had been to prison, yet his employer failed to perform a background check which would have revealed prior convictions for DUI, reckless driving, car theft, and eluding a police officer. There was also evidence of Avis's "two-key system," which allegedly made it easier to steal cars, as well as Avis's general concerns surrounding nationwide car rental thefts. The Supreme Court ultimately held that even if Avis was negligent, it could not be held liable because its actions did not proximately cause the plaintiffs' injuries. The Court held that for a defendant to be liable, the ultimate outcome must be a **probable** result of the defendant's alleged negligence (i.e., "not unlikely") according to usual experience; no jury question existed where "it may be 'possible' to connect a defendant's negligence to an otherwise unforeseen outcome."[12] The Court held the employee's criminal conduct was the superseding, intervening, and sole proximate cause of Plaintiffs' injuries, and Avis could not reasonably foresee that such criminal conduct would cause a high-speed police chase and an accident with injuries. (See article on page 32.)

More recently, in *Stadterman v. Southwood Realty Co.*, a man was shot in the parking lot of his apartment complex after a brief verbal altercation with another person.[13] He sued both the apartment complex and its management company, arguing their inadequate security measures were the proximate cause of his injuries. Specifically, the plaintiff claimed the shooting would have likely been prevented if the defendants had employed a competent courtesy officer and provided functional gates at the entrance of the apartment complex.

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Observations on Rising Jury Verdicts in Georgia

By M. Anne Kaufold-Wiggins
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Jury verdicts are on the rise in Georgia.[1] We have seen rising verdicts in all types of cases, especially in trucking and premises liability cases. For example, in 2018, a Clayton County jury rendered a $1 billion verdict against a security company for the alleged sexual assault of a young woman by one of its armed security guards at an apartment complex. The plaintiff argued the security company was negligent in training, performance, and failing to keep the plaintiff safe. The verdict followed the plaintiff's impact statement.

In 2019, a Muscogee County jury issued another nuclear verdict of $280 million in a wrongful death action against a trucking company after an accident involving the death of a 58-year-old school cafeteria worker. The truck crossed the center line, hitting the SUV head on. The verdict in the admitted-liability case included $150 million for value of the decedent's life, $30 million for pain and suffering, and $100 million in punitive damages. The jury expressed frustration over what it perceived as an unapologetic and irresponsible trucking company.

Another outlier verdict occurred in 2019 when a Fulton County jury entered a verdict of $43 million in a negligent security case after a man was shot in a CVS parking lot where he arranged to buy an iPad from another person he met online. Neither the plaintiff nor the assailant was a customers of the CVS—they simply used the parking lot to conduct their transaction. No fault was apportioned to the shooter following arguments the CVS was known to be in a "high-crime area" and evidence of at least two prior armed robberies and a mugging on the premises after security guards were removed. The plaintiff in that case contended the CVS should have foreseen that security should be provided to protect those on its premises.

Over the years, I have been watching this rising verdict trend because it directly impacts the work I do for my clients, who routinely ask me to predict verdict ranges. Here are three things I have observed. First, the rise in verdicts increased sharply following the implementation of the Jury Composition Reform Act of 2011[2] (the "Act"). Second, Georgia's apportionment statute, O.C.G.A. § 51-12-33, has not substantially reduced verdicts. Finally, when a jury becomes angry with a corporate defendant, the results can become nuclear.

1. The Jury Composition Reform Act of 2011

By way of background, the Jury Reform Composition Act of 2011 ("Act")brought about two principal changes to jury pool compositions in Georgia. First, it greatly expanded the jury pool list from which county courts draw individuals for the venire. Prior to the Act, county jury lists were updated every two years primarily using county voter registration list and a small sample from the state driver's license database. After the Act took effect, the jury pool master list—now maintained by the Council of Superior Court Clerks of Georgia, not individual counties—includes the entire state driver's license database and is updated on a yearly basis. A county's court clerk compiles the jury venire by randomly selecting individuals from the master list for a given county.[3] This change also assists counties in obtaining and using more accurate contact and demographic information regarding the individuals in the jury pool.

Second, the Act ended the practice of "forced balancing." Prior to the Act, if a jury list was not considered a "fairly representative cross section" of the county's residents,[4] a county would remove from the jury list individuals of an overrepresented class to achieve a distribution approximating that found in the most recent Census. Though Georgia courts have found forced balancing constitutional,[5] some federal courts have found the opposite, concluding the practice is not the most narrowly-tailored means to achieving a representative jury list.[6] Moreover, basing forced balancing decisions on dated Census data, which rarely reflected the actual demographics of a particular county, failed to obtain the representative samples the practice purportedly sought. The result of the

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Establishing Medical Foundation for the Life Care Plan

By Michael Fryar and Betsy Keesler
InQuis Global

A life care plan is an evidence-based document that comprehensively identifies an individual's current and future healthcare and other needs as related to a catastrophic injury or chronic health condition. The plan is designed to identify a person's requirements for healthcare, educational/vocational services, home modifications, living arrangements, attendant care, equipment, medications, supplies and community services. When a life care plan lacks appropriate medical foundation and isdetermined to be incongruent with accepted published standards and consensus statements it will likely be challenged and ultimately may not be accepted into the evidentiary record for an evaluee.

The development of an individualized plan of care has historically been considered an essential part of the medical and rehabilitation process. The transdisciplinary specialty practice of life care planning originated from a variety of professional healthcare backgrounds to include, but not limited to, counseling, nursing, medicine and allied health. The International Association of Rehabilitation Professionals (IARP), through its section titled the International Academy of Life Care Planners (IALCP), represents the largest national professional organization devoted entirely to the practice of life care planning.

Professionals who are members of the IARP have pledged to adhere to all published standards of practice as maintained by the organization. The third edition of the "Standards of Practice for Life Care Planners" was published jointly by IARP and IALCP in 2015. These standards indicate that a life care planner must remain within their scope of professional practice when completing a life care plan (IV. 1 A & B & IV. 6 D). When an item or service needs to be considered for life care planning purposes but is beyond the life care planner's specific professional scope of practice *(e.g., nursing, medicine, rehabilitation counseling, occupational therapy, etc.)*, it is imperative to gather direct input from other qualified professionals and/or other relevant and reliable sources before making a final decision to include or exclude (IV. 6 C & D). Otherwise, the resulting life care plan will be incongruent with published IARP/IALCP practice standards.

In addition to published standards of practice, the life care planning field has many published consensus and majority statements relative to the development of a life care plan within its peer-reviewed journal. In 2018, IARP published a special issue through the *Journal of Life Care Planning* which identified current consensus and majority statements for life care planning. The 2018 consensus and majority statements were published secondary to the completion of a Delphi study and multiple professional summits across an 18-year period. Relative to establishing medical foundation for the life care plan, the consensus statements, like the 2015 IARP/IALCP standards, noted the following:

- **Life Care Planning Consensus Statement 80:** "Life Care Planners may independently make recommendations for care items/services that are within their scope of practice."
- **Life Care Planning Consensus Statement 81:** "Life Care Planners seek recommendations from other qualified professionals and/or relevant sources for inclusion of care items/services outside the individual life care plan planner's professional scope(s) of practice."

Appropriate resources for establishing life care planning medical foundation outside of the direct consultation and collaboration with evaluating and/or treating medical, psychological or allied health professionals would include directly referencing and utilizing published clinical practice guidelines, empirical research and/or other reliable resources to identify the standards of care that fit the life care plan and/or drawing clear links between specific statements made within analyzed medical records and the items/services included within the plan's tables. The following case scenarios illustrate both appropriate and inappropriate practices for the establishment of life care planning medical foundation:

Case Scenario #1

A 35-year-old male was injured in a motor-vehicle accident and sustained a T-8 complete spinal cord injury. The plaintiff's attorney retained a nurse life care planner to complete a life care plan for the evaluee. The evaluee was treating with a spinal cord injury physiatrist and a urologist. The treating physicians did not respond to the life care planner's requests for consultation. Instead of requesting consultation with another healthcare specialist(s), the nurse life care planner elected to independently

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Mediation Impasse? There's Hope

By Jennifer Grippa
Miles Mediation & Arbitration Services

Impasse: It's the death knell of mediation, the moment when neither side is willing to budge. One side thinks the other is completely unrealistic. The other side thinks their adversary is inflexible and stubborn. The gap between the parties may seem daunting to an outsider, but to a mediator, bridging this divide is most often solvable.

While a large percentage of cases settle at mediation, for the few that result in impasse, there is still hope. The next time you leave a mediation without a settlement, consider the below suggestions, that have worked successfully post-mediation to break an impasse.

Act Swiftly to Keep the Momentum Going

Do not assume, just because the case did not settle, that you did not make any headway with the other side. An advocate who leaves mediation without a settlement may make assumptions because an agreement could not be reached, but they rarely know how the other side is feeling.

Litigators do not have the benefit of knowing what is happening in the other room so they have no visibility into the traction that is made in mediation. They cannot see how the adversary is reacting to information that was exchanged or to discussions about the shortfalls in their claims or defenses, nor can they see their adversary's desire to resolve the case or appetite for continued litigation.

When you cannot see what is happening in the other room, you do not know who is driving the decisions that are being made or what the dynamic is in that room. Is the other party strong willed? Are the attorney and client at odds? Are there multiple decision-makers in the room with differing opinions? Is the other party looking for affirmation from a business partner, other executive, spouse, or close friend who is not there and has not had the benefit of sitting through the mediation? You also do not know how the party has reacted to hearing your evidence and arguments. Some parties are facing hard realities for the first time during mediation.

Although it may appear there was little progress because the other side was not moving as much as you had hoped, sometimes the progress made is deeper than the numbers. Progress can often come in the form of being heard and understood, appreciating the other side's claims or defenses, releasing emotions, and learning more about the weaknesses in one's case. Even hearing things from a neutral as opposed to it coming from the adversary can change people's perspectives. Promptly talk to your mediator about next steps so you do not lose the momentum created during mediation. Even if there is initially an impasse, mediation frequently can provide the traction to start assessing risks, communicating, giving and receiving information, and exchanging additional settlement offers even if they appear far apart. Be proactive and have the mediator follow up.

After a Cool Down, Ask the Mediator to Follow Up

Mediations can be frustrating or exhausting for some people. After a long day of negotiations discussing the difficulties in their case, litigants may need time to cool down and reflect on the events of the day. A good mediator is not just a messenger; she is talking with each side about the strengths and

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How Forensic Accountants Can Help You Manage and Effectively Resolve Cases

By Dayne Grey
MDD Forensic Accountants

If you have not worked with forensic accountants before, an understanding of what they do in litigation support and how they differ from other accountants may be surprising to you. Modern television dramas' common use of the word "forensic" may lead some to think forensic accountants primarily deal with investigating criminal activity. Assignments that involve investigating and quantifying amounts related to criminal fraud charges are certainly part of what we deal with, but forensic accountants are more often retained to assist in a wide array of financial disputes outside of criminal proceedings.

Throughout your career as an attorney you may be involved in numerous cases involving economic damage calculations stemming from a host of circumstances. Those may include cases involving personal injury and wrongful death, business disputes, employment law, divorce, breach of contract or product liability, just to name a few.

When developing your strategy for these cases, the type of financial expert you retain to assist you and your timing to get them involved can have a material impact on your case's ultimate successful disposition.

You are likely immersed in many cases occupying your time with considering various liability aspects and possible defenses, and filing motions and briefs. You may not typically focus on quantifying damages until later in the case. But in cases involving economic damage calculations, consider how important and impactful it could be for you to add a qualified and experienced forensic accountant to your team. In addition, consider how doing so early in the litigation process can make you both more efficient and effective. This could increase the chances of a positive resolution for your client over the result you will get when scrambling to bring someone in late in the process. Retain your expert early, and you will also see the added benefit of your forensic accountant's being better prepared when heading to trial.

Just as different attorneys practice in a wide array of legal matters and not all attorneys are trial attorneys, not all accountants practice in the same areas nor are all accountants forensic accountants. There are a number of different accounting practice areas. Some accountants concentrate on auditing financial statements and others concentrate on tax planning and filings. Cost accountants undertake analysis to help management measure financial results and analyze various operating plan options. Still other accountants wear many hats and perform a mix of these functions, all of which help their clients set up and run their companies more efficiently and report their operating results in periodic financial statements and tax returns.

While forensic accountants have training and experience in many of the primary accounting areas, such as audit, tax, etc., many do not focus their practice in these areas. This allows the forensic accountant the flexibility to be more readily available throughout the year when more traditional accountants may have significant busy seasons, such as January through April when tax accountants may be extremely busy with seasonal work.

When an economic damages measure is involved, a forensic accountant can provide qualified support to you in many facets that relate to the measure aspect of your case. Their experience in the litigation arena makes them uniquely adept at working alongside attorneys and helps them understand the difference between acting in a consultant role and a testifying expert role. Forensic accountants know how to help you navigate through the layers of financial information that are summarized in financial records.

In less time than you might imagine, a forensic accountant will be able to give you feedback on the strengths and weaknesses of the claim for damages. In doing so, he may well give you alternative views that can help you see avenues to resolution you might not otherwise

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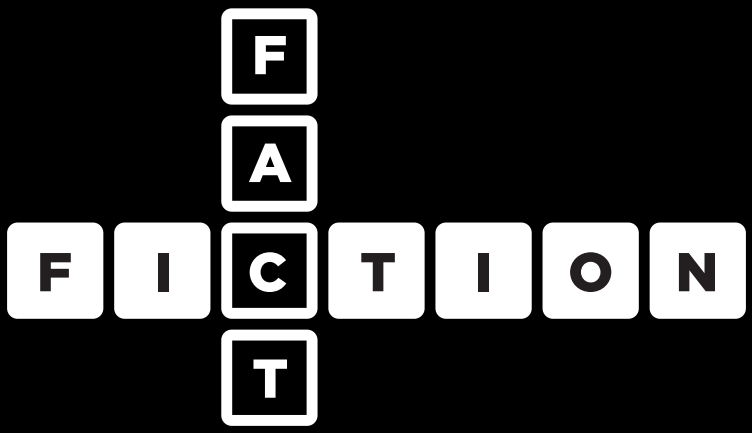

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How to Get the Most Out of Your Expert Witness (According to an Expert Witness)

By Mark Guilford and Toni Elhoms
AccuMed Healthcare Research

With every case, there is immense pressure to get a favorable result for your client. Everything needs to go right for that to happen, including a strong performance from the experts like us at AccuMed. The more synergy between you and your expert, the harder it is for opposing counsel to blunt your arguments and distort the evidence in their favor. Speaking from an expert's perspective, here are some ways to get the most out of your expert witnesses.

1) **Arm Your Expert Heading into Testimony** It is common practice to schedule a prep meeting with your expert before a deposition or trial. However, too often these can be afterthoughts in the crammed schedules of attorneys and experts alike. A quality expert will have reviewed their materials and will come to the meeting with their facts in order. But there is information we need from you that will help us perform well.

Provide intel on opposing counsel, including: What are their examination methods? Are they aggressive or plodding. Do they ask leading questions? Are they analytical or do they opt for a dramatic flair? This kind of information helps us get in the right mind set so we are not caught off-guard by opposing counsel's mode of presentation. It is also helpful to know if opposing counsel is focusing on a specific angle, such as the reading of an MRI or the reliability of a methodology. This can help your expert and become versed on a specific topic that is likely to come up during the deposition.

Finally, it is always wise to ask experts a handful of tough questions to see how they respond. Make them aware you want them to answer these mock cross-examination questions as if they're under oath in a deposition. This practice puts us on our toes every time. You can also assess our answers so we can hone them to be more effective and to the point.

Overall, the main objective is to is to eliminate as many surprises as possible before your expert testifies.

2) **Stay Active During Depositions.** There is no exaggerating the amount of time lawyers spend in depositions. It is tempting to get other work done during these multi-hour slogs. However, this is where experts are most vulnerable to opposing counsel without a judge and jury to keep them in check. Active involvement in the deposition, primarily through objections, is extremely helpful.

We experts are human, and we have been hired to be subject-matter experts—so naturally we want to answer all the questions posed to us. A well-timed form or foundation objection can give an expert the hint and the confidence to decline to answer a question they should not be answering. We often get feedback from our clients on how much they learned about medical billing and coding during depositions, which makes your intel stronger for future cases.

3) **Protect Your Expert.** Seems obvious, right? But all too often attorneys don't object early to misleading or repeated questions. This gives opposing counsel license to continue pushing the boundaries throughout the examination. Establish the rules of the game early. Furthermore, objecting with "asked and answered" will embolden your expert to hold their ground on the answers they already gave. A lot of this begins with your intimate knowledge of your expert's background, qualifications, and opinions. The more the attorney knows about their expert and the information they are defending, the better shot they have at combatting opposing counsel.

On another note, if opposing counsel is getting aggressive or demeaning, don't hesitate to step in and make it clear their actions are out of line. This has been highly effective in jarring

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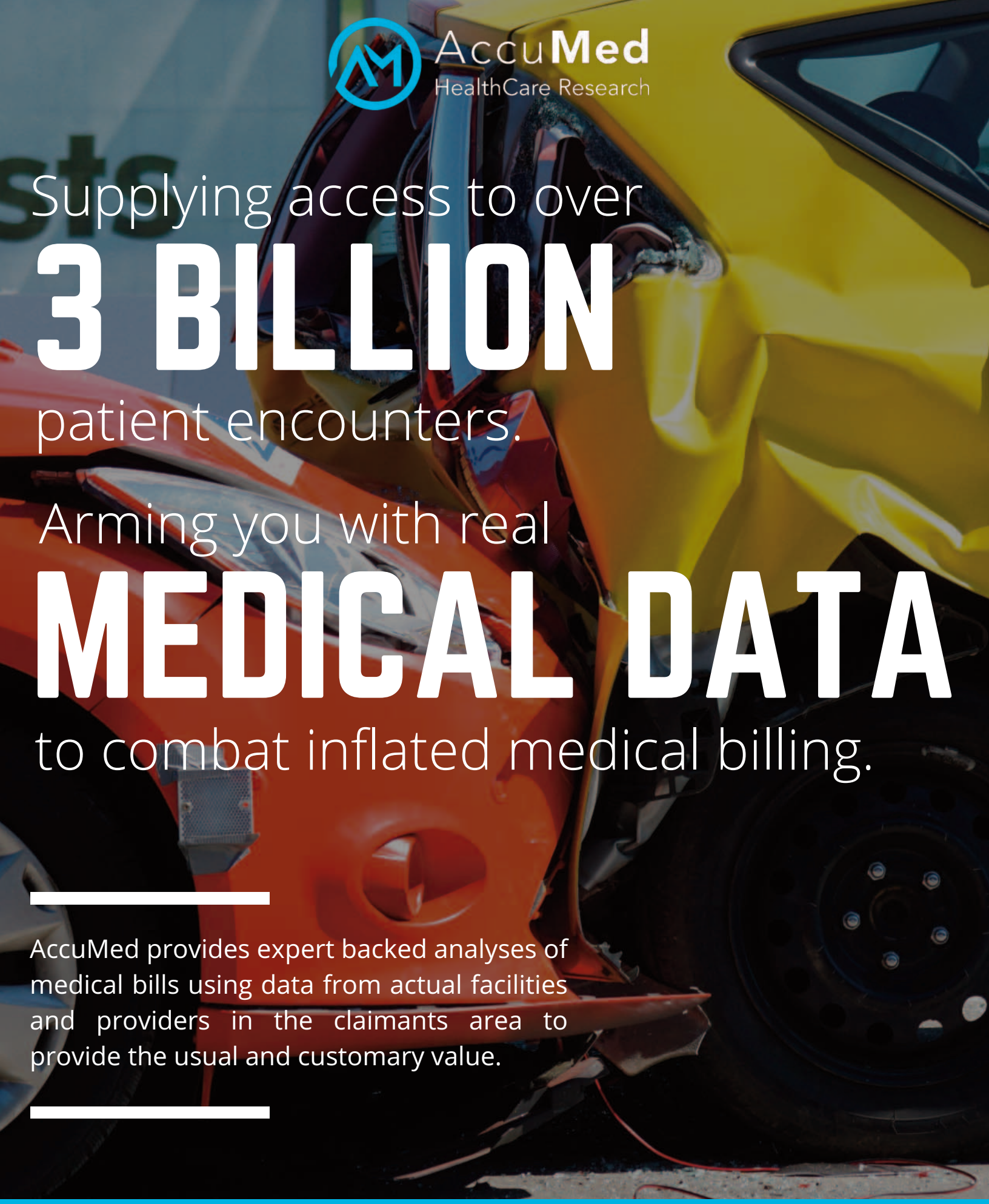

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Risk, You Can't Handle the Risk!

By Cliff D. Bishop (left) and William R. Locke
Exponent

Introduction

In a perfect world, extreme weather and earthquakes would not exist, and society would be at eternal peace with its environment. However, as we have seen in recent years, climate change has not only increased the *occurrence* of severe weather events, it has also increased the *severity* of these events. As a society, how do we assess the threat of severe weather events and earthquakes so that we can better prepare our communities to resist their effects? This article explores this question from a holistic perspective of community risk mitigation through specific case studies addressing actual communities in Georgia.

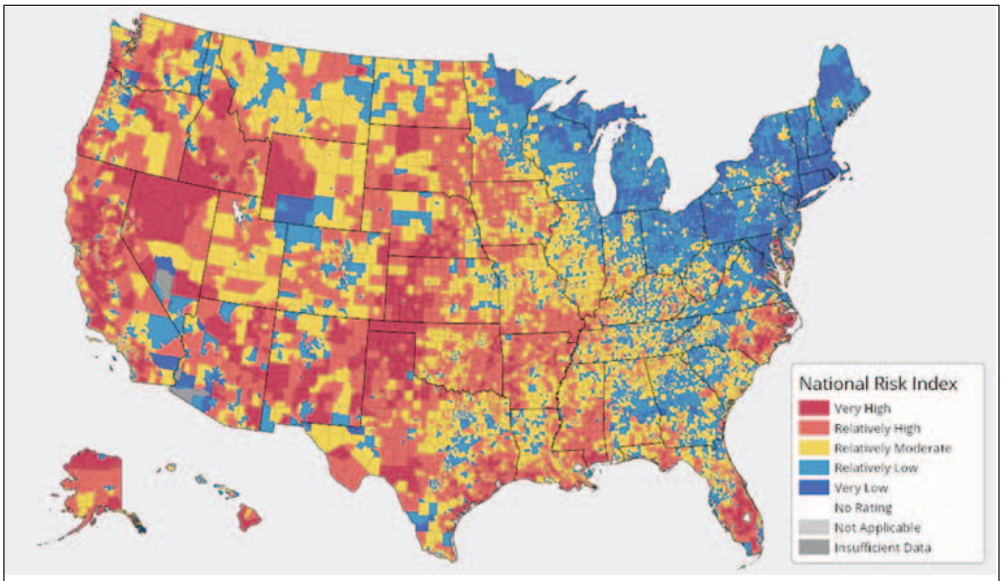

Figure 1. FEMA's NRI map of the United States. Source of Image: fema.gov.

Background

Before diving into the examples, we first need to introduce some background concepts, especially as they relate to probabilities. (*Ugh—we know—but it's like eating your vegetables; it's good for you!*) If we consider just one element in a community—let's say a building—we know that reducing its probability of collapse to zero for every possible extreme weather event or earthquake is practically impossible. From a mathematical framework, the probability of collapse, P(C), can be written as:

$$P(C) = P(C|EW) \times P(EW)$$

where P(C|EW) is the probability of collapse given extreme weather or earthquake, and P(EW) is the probability of the extreme weather or earthquake occurring. The only way to eliminate the probability of collapse altogether would be either to eliminate extreme weather and earthquakes (i.e., P(EW) = 0) or to construct a collapse-proof building given any extreme weather or earthquake (i.e., P(C|EW) = 0). Since eliminating extreme weather and earthquakes is impossible, and constructing collapse-proof buildings is cost prohibitive, building codes provide a means for engineers to reduce the probability of collapse to an acceptable level (e.g., *like the way people accept some risk in driving a vehicle*).

If we take the 10,000-foot view of how this concept can be used to understand overall community risk, you might guess that the number of variables increases significantly (and you would be right!). Fortunately, the Federal Emergency Management Agency (FEMA) recently implemented a web-based National Risk Index (NRI) to help communities understand their risk associated with severe weather and earthquakes (Figure 1). Specifically, the NRI is calculated considering the following three inputs:[3]

- Expected Annual Loss—likelihood and consequence of expected loss based on natural hazards (e.g., extreme weather);
- Social Vulnerability—measure of susceptibility of groups to the adverse impacts of natural hazards; and
- Community Resilience—a community's ability to plan for, absorb, recover from, and adapt to natural hazards.

Using these three inputs, the NRI is calculated for a community, and the risk index is binned into one of the following eight buckets:

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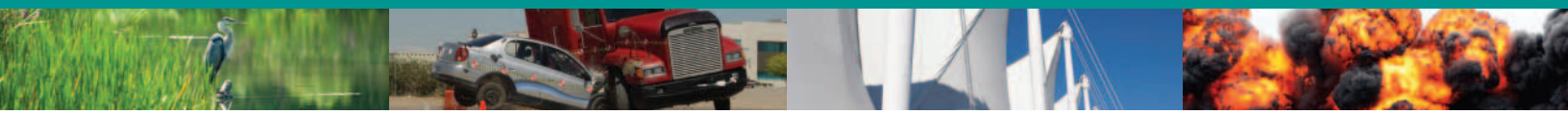

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Apportionment

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the statute require this extremely broad task for determining fault, but still be so narrowly interpreted with respect to damages?

So what can defendants and their attorneys do now that defendants are suddenly paying for someone else's fault—historically known as joint and several liability? Defense lawyers should consider early motions to join at-fault nonparties as indispensable nonparties under O.C.G.A. § 9-11-19. Although third-party complaints are options, in most scenarios this would offer little relief if the nonparty's identity is unknown or lacks assets to pay a large judgment. Force the joinder of the at-fault nonparty so that your client is not forced to seek contribution from a likely insolvent person or entity.

It is difficult to believe the statute was intended to apply to single defendants in such an arbitrary and inconsistent manner when the purpose was to prevent unfair results for defendants. The statute was passed to attract business to our state, not drive it away due to a hostile tort environment. A right of contribution is no substitute for the right to be held liable only for one's own tortious conduct.

Quynn v. Hulsey
(November 2, 2020)

Subsection (e) is an often overlooked but important portion of the apportionment statute. It prevented abrogation of "defenses or immunities" existing at the time the legislation was enacted "except as expressly stated in" O.C.G.A. § 51-12-33].[37] Despite this provision, in the recent case of *Quynn v. Hulsey*, the Supreme Court abrogated the longstanding common-law defense for employers known as the Respondeat Superior Rule.

Under that longstanding rule, an employer sued for its employee's tortious conduct was entitled to summary judgment on any direct negligence claims if the employer admitted respondeat superior liability for its employee's negligence.[38] That included claims such as negligent entrustment, training, or retention. This common-law defense was created in 1967 by the Court of Appeals in *Willis v. Hill*,[39] but somehow escaped scrutiny from the state's highest court until 2020 where it was summarily eliminated.

The rationale for the established defense was quite logical.[40] If the employer admitted it would be liable for any of the employee's tortious conduct causing the plaintiff's injury, what purpose could the other claims for negligent entrustment or retention serve? Indeed, a required element of these direct negligence claims is evidence of the employee's prior misconduct or incompetence—something which would clearly prejudice the employee and invite an improper character inference. An alternate theory of the employer's liability arguably served no legitimate purpose when both theories require a finding the employee was negligent.[41] Proof that the employer knew of its employee's prior misconduct is undeniably irrelevant to that employee's negligence and will simply distract from the inquiry into the plaintiff's comparative negligence—in fact, that is what is what the plaintiff *hopes* will happen.[42] If an employer admits vicarious liability, the direct negligence claims served plaintiff no advantage in terms of additional damages other than to give an unfair advantage through introduction of the employee's prior misconduct on other occasions before the incident in question.[43]

In *Quynn v. Hulsey*, an employee driving a company vehicle fatally injured the plaintiff's decedent in a crosswalk at a traffic light. The defendant-driver's employer, who was also sued, admitted its employee was acting in the course and scope of his employment, and, as a result, the trial court granted summary judgment to the employer on the direct negligence claims. The case proceeded to a jury trial solely on the issue of whether the employee was negligent during the incident in question. Ultimately, the jury apportioned 50 percent fault to employer and employee jointly but also found the decedent 50 percent at fault for his own injuries, most likely based on evidence the pedestrian entered the crosswalk while the crosswalk signal was flashing a red hand. As a result, the plaintiff was prohibited from recovering by the comparative negligence doctrine.

On appeal, the Court of Appeals affirmed the trial court's grant of summary judgment under the Respondeat Superior Rule. But the Supreme Court disagreed, holding that the rewriting of O.C.G.A. § 51-12-33 in 2005 had abrogated the common-law rule. According to the Court, Section 51-12-33 required the jury to consider the employer's fault for negligent hiring or retaining the employee, which was previously not allowed under the Respondeat Superior Rule. The Court posited that "[a]ny allocation of relative fault among those persons at fault, which may include the plaintiff, could differ if one person's fault was excluded from consideration."[44] Under Subsections (b) and (c), the jury was required to consider the fault of all persons who are liable and all persons who contributed to the alleged injury or damages.[45] Therefore, even though the employer was listed on the jury verdict form on the same line as the employee, the Court found the jury was improperly prohibited from

hearing evidence under all theories of liability against the employer (not just vicarious liability). No explanation was provided as to how this evidence should be presented to a jury (separate trials, limiting instructions, etc.) to avoid undue prejudice to the employee. Instead, now, any employee involved in an auto accident in a company vehicle could have his prior driving history scrutinized in a subsequent lawsuit.

The response to this decision requires a thorough vetting of boilerplate negligent entrustment, hiring, and retaining claims. Questions need to be answered in discovery: What prior misconduct exists? Were these incidents similar to the misconduct from the incident in question? Did the employer have knowledge of the prior misconduct? Negligent training claims likewise need vetting: Does the claimant require expert testimony to establish the employer failed to properly train his employees? The claims *must* be challenged promptly at the close of discovery with a Motion for Partial Summary Judgment while simultaneously serving an offer under O.C.G.A. § 9-11-68 for a nominal amount. An expert should also be considered to address negligent training claims.

The evidence code may be of some assistance prospectively. The Court of Appeals believed an employee's prior misconduct had little probative value when the plaintiff could recover all damages to which he was legally entitled by proving the employee's liability for the incident in question (through vicarious liability). Trial courts should be asked through motions in limine under Evidence Rule 403 to conclude that the probative value of this evidence is *substantially* outweighed by its prejudicial effect where the employer has already admitted course and scope of employment.

Bifurcated or trifurcated trials may be necessary if the trial court is not willing to exclude the evidence of prior misconduct. Lawyers should be asking the trial court to hold an initial evidentiary phase to determine whether the employee is liable for the accident. Then if the jury finds the employee is liable, the jury considers the fault of the employer. Because a direct negligence claim against the employer can only proceed if the employee committed a tort, the first phase could be the last phase if the employee is exonerated. Without bifurcated proceedings, no limiting instruction will be sufficient to protect the defendant-employee from undue bias by prior negligent acts.

The impact of the *Quynn* decision was clearly understated. What used to be routine and simple two-party car accident cases now are claims requiring multiple phases to avoid a completely unfair trial for defendants. The apportionment

statute, enacted to reform tort litigation, is now the instrument used to expose Georgia employers to greater liability. An employee who ran a stop sign five years ago, received a speeding ticket or was in a fender-bender now potentially exposes his employer to additional direct negligence claims.

It is hard to believe the General Assembly wanted this result when it explicitly stated it was seeking to reduce litigation costs for businesses in Georgia. ◆

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ENDNOTES

[1] Ga. L. 2005, p. 1, § 12; *City of Kingsland v. Grantham*, 342 Ga. App. 696, 698 (2017).

[2] Id.

[3] *Couch v. Red Roof Inns, Inc.*, 291 Ga. 359, 364 (2012).

[4] The author of Georgia's 2004 tort reform legislation, Senator Preston Smith of the 52nd district, noted "Georgia is not the first state to introduce what has commonly become known as tort reform," and "many states have passed similar legislation and we have been behind the power curve." Georgia Senate Weekly Report, 2005 Reg. Sess. No. 3.

[5] Georgia Senate Weekly Report, 2005 Reg. Sess. No. 2. A proponent of Georgia's proposed legislation identified Texas' achievements in support of passage. Georgia Senate Daily Report, 2005 Reg. Sess. No. 10. ("Sen. John Wiles of the 37th went to the well to offer his support for SB 3 and to recognize the success of recent tort reform in Texas.").

[6] *See* TORT REFORM—HEALTH CARE SERVICES, 2005 Georgia Laws Act 1 (S.B. 3).

[7] *Zaldivar v. Prickett*, 297 Ga. 589, 600 (2015).

[8] *Quynn v. Hulsey*, 310 Ga. 473, n.5 (2020). Although the *Quynn* court called this a two-step process, the first step is obviously determining whether the defendants are liable to the plaintiff. *See Id*.

[9] O.C.G.A. § 51-3-12(a)-(c).

[10] *Id.* at (b). But *see Alston & Bird, LLP v. Hatcher Mgmt. Holdings, LLC,* 862 S.E.2d 295, 300, n.2 (2021) (suggesting contribution from at-fault nonparties is available to a defendant in a single-defendant case).

[11] O.C.G.A. § 51-12-33(f)(1).

[12] O.C.G.A. § 51-12-33(f)(2).

[13] *Hatcher*, 862 S.E.2d at 301-02.

[14] *Id.*

[15] The steps identified in *Quynn* seem not to track the order of the statute, which begins with determining the Plaintiff's fault.

[16] *Couch*, 291 Ga. 359.

[17] *Id.* at 362 ("The statutory scheme is designed to apportion damages among 'all persons or entities who contributed to the alleged injury or damages'—even persons who are not and could not be made parties to the lawsuit … .").

[18] *See Atlanta Women's Specialists, LLC v. Trabue*, 310 Ga. 331, 339, 850 S.E.2d 748, 755 (2020) ("[W] e hold that a defendant employee like Dr. Angus, who wants to reduce a potential damages award against him by having the jury apportion damages between him and his defendant employer based on an assessment of the fault of a nonparty co-employee, would have to comply with the requirements of subsection (d) of the apportionment statute."); *Martin v. Six Flags Over Ga. II*, L.P., 301 Ga. 323, 338 (2017) ("In other words, the jury must take the total amount of damages sustained by the plaintiff, identify the persons who are at fault, and award damages according to each person's percentage of fault.").

[19] *See* n. 17, *supra*. See also *Zaldivar*, 297 Ga. at 595 ("Nothing in O.C.G.A. § 51-12-33 suggests that the statute was meant to alter these essential elements of tort liability, that is, to expose defendants to liability to any greater extent than the injuries proximately caused by their breach of legal duty.").

[20] 862 S.E.2d 295, 301-02 (2021).

[21] *Alston & Bird, LLP v. Hatcher Mgmt. Holdings, LLC*, 355 Ga. App. 525, 526-27 (2020).

[22] *Id.* This reduction is obviously logical because it prevents a single defendant from being liable for the fault of others and does not allow a claimant to unjustly recoup damages from a party that did not proximately cause them.

[23] *Hatcher*, 355 Ga. App. at 534-35.

[24] *Id.* ("Because this is an action involving only one defendant, and because the jury found that HMH was 8 percent responsible for the injuries it suffered, the trial court should have reduced this award of compensatory damages by 8 percent rather than 68 percent. O.C.G.A. § 51-12-33(a).").

[25] *Id.* at 534, quoting *Fraker v. C.W. Matthews Contracting Co.*, 272 Ga. App. 807 (2005) ("As we construed a former version of the statute … we made clear that O.C.G.A. § 51-12-33[ ] does not authorize a jury to apportion damages against a nonparty." (internal quotation marks omitted)).

[26] 336 Ga. App. at 534.

[27] *Id.* (emphasis supplied). The Court of Appeals did not address prior decisions concluding that Subsection (b) applies to apportioning damages among defendants, not nonparties because of the use of the word "liable." The term "liable" means that if damages are apportioned to that person, they would be legally responsible to the plaintiff in that amount. Conversely, nonparties could be at fault and be apportioned damages, but are not "liable" to the plaintiff as a result because such apportionment is only used for purposes of calculating the parties' fault. *See* O.C.G.A. § 51-12-33(f)(1); *Zaldivar*, 297 Ga. at 594 ("Subsection (b) of the apportionment statute is addressed to the fault of *defendants who are liable* for the injury to the plaintiff … " (emphasis supplied; internal quotations omitted)).

[28] *Hatcher*, 355 Ga. App. at 534 ("[T]he apportionment statutes obligates us to distinguish between the trier of fact's determination of damages and that of fault.").

[29] *See Id.*

[30] *Hatcher*, 862 S.E.2d at 301-02.

[31] *Id.* at 300.

[32] *See Id.* at 301 ("Applying subsection (b) to single-defendant cases may well advance some of the intentions behind the Tort Reform Act better than the statute as we interpret it today.").

[33] *See Hatcher*, 862 S.E.2d at 300, n.3. *See also* n. 17, *supra*.

[34] *See Id.*

[35] *Id.*

[36] *See FDIC v. Loudermilk*, 305 Ga. 558, 573, n.13 (2019).

[37] O.C.G.A. § 51-12-33(e).

[38] *Willis v. Hill*, 116 Ga. App. 848, 860 (1967), *rev'd on other grounds*, 224 Ga. 263 (1968). The rule did not apply if there was a valid claim for punitive damages against the employer arising from the employer's direct negligence in hiring, retaining, entrusting, etc.

[39] *Id.*

[40] "Why, then, if there is no need to establish negligent entrustment in order to hold the owner liable, does the plaintiff in the present case seek to expend time, effort and money involved in obtaining and introducing proof to establish this liability link already admitted to exist … ? Is it that proof of yesterday's accidents will be helpful to determine today's responsibilities … ? Is it because the amount of plaintiff's verdict would be enlarged by showing the proof of the driver's previous negligence, thus meeting a jury's reluctance to render a large verdict against the owner without such proof…?" *Id., quoting Perin v. Peuler*, 373 Mich. 531 (1964) (Kelly, J., dissenting).

[41] *See Bartja v. Nat'l Union Fire Ins. Co. of Pitt., Pa.*, 218 Ga. App. 815, 817 (1995) ("The negligent entrustment claim against [the employer] is dependent on the success of the negligence claim against [the employee]").

[42] *See Id.; Willis*, 116 Ga. App. at 862.

[43] Where the employer admits agency and scope of employment under a vicarious liability claim theory, "the plaintiff may recover all damages to which he is legally entitled by establishing the driver's negligence." *Willis*, 116 Ga. App. at 863.

[44] *Quynn*, 850 S.E.2d at 729.

[45] *Id.*

Insurer Wins

Continued from page 34

rendered its property unsafe, thus raising genuine issues for trial. The court further found the record supported the inference that Hopps's operations were reduced to limit the spread of SARS-CoV-2 on its premises and concluded that the fact that the premises were still used in some capacity did not necessarily preclude coverage. The court held that whether the virus was present on the premises, whether it actually caused a physical loss or physical damage to the premises, and the extent of damages due to that "loss" were questions of fact best left for a jury to decide. The court further found there was a genuine question of fact whether Hopps suffered an "actual loss" of income required to trigger Business Income coverage.

After a three-day trial, a federal jury issued a verdict in favor of Cincinnati on all of Hopps's claims. While the verdict sheet offered no details on the jury's reasoning, the arguments on record indicate the jury did not believe that Hopps's business interruption losses resulting from the stay-at-home orders constituted the "physical loss" or "physical damage" to property necessary to trigger coverage under its commercial property policy.

Until this decision, the vast majority of courts across the country that have addressed this issue on summary judgment or on motions to dismiss have held that business losses resulting from COVID-19 shutdown or stay-at-home orders do not involve "physical loss" or "physical damage" to property. With Hopps, the first jury to address the issue has voiced its agreement. This is a good sign for attorneys representing insurers whose COVID-19 business interruption claims are not resolved at the pretrial stage. ◆

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Another Brick in the Wall

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both the *Johnson* and *Smith* cases. The Court of Appeals agreed with Avis's contention in *Johnson* that it was entitled to judgment notwithstanding the verdict on the direct negligence claims because Perry's intervening criminal conduct was a superseding cause and, thus, the sole proximate cause of the plaintiff's injuries.[3] And in *Smith*, the Court of Appeals applied the same reasoning in holding Perry's criminal conduct to be the proximate cause of the plaintiff's injuries.[4] The Court of Appeals also concluded the independent operator and lot owner were entitled to judgment because Perry was not acting "under color of employment" at the time of the incident. The plaintiffs, Johnson and Smith, both petitioned the Supreme Court of Georgia for *certiorari*, which was granted.

The Supreme Court affirmed the judgments of the Court of Appeals in both cases. First, the Supreme Court held that **even if Avis was negligent** in allowing Perry to steal the vehicle, Avis still could not be held liable to the plaintiffs because Avis's alleged actions did not proximately cause the plaintiffs' injuries.[5] The Court emphasized that the result of a defendant's actions must be **probable** according to usual experience, not merely "possible;" otherwise, a plaintiff's claims fail as a matter of law for lack of proximate cause. Probable here means "not unlikely" or such a chance of harm that a prudent person would foresee the risk. "Jury questions on proximate cause do not exist simply because it may be 'possible' to connect a defendant's negligence to an otherwise unforeseen outcome, and to do so stretches the concept of proximate cause beyond its legal limits."[6] The Court found the cases analogous to cases in which a car owner leaves a car unattended with keys inside and a thief steals the car and causes an accident. And even with an adverse inference charge due to alleged spoliation of documents, evidence of "additional thefts by other employees would not increase the likelihood that Avis could have reasonably foreseen that **Perry's** criminal actions would cause an accident with injuries following a high-speed chase several hours after stealing a car."[7]

> *"Perry had no right to access cars on the rental lot after hours; he was simply stealing the vehicle for his own purposes."*

The Court held there was no evidence the defendants did anything more than negligently allow the vehicle to be stolen. Moreover, the evidence **demanded the conclusion** that the accident caused by Perry's criminal conduct was not a probable or natural consequence that could have been reasonably foreseen by the defendants. Perry's criminal conduct was a superseding, intervening cause and the sole proximate cause of the plaintiffs' injuries, and the defendants were entitled to judgment notwithstanding the jury's verdict.

The Supreme Court also examined the plaintiff's claims of negligent hiring and retention in the *Smith* case. Since the incident at issue did not occur during Perry's working hours, the only potential avenue for the plaintiff's claims on negligent hiring and retention was to show that Perry was acting "under color of employment."[8] Generally, an employee can act "under color of employment" in two ways: through a special relationship or by reason and virtue of employment. For example, an employee can act "under color of employment" when that employee commits a tort against someone who has a business relationship or other "special relationship" with the employer and the tort arises out of that relationship.[9] And "[a]n employee may similarly act "under color of" his employment where the employee commits acts that are not authorized by his employment, but does those acts "in a form that purports they are done by reason of his employment duties and by virtue of his employment."[10]

In these cases, the plaintiffs had no special or business relationship with Avis or CSYG, and Perry's theft of the vehicle and subsequent accident after fleeing police were "not connected to his employment duties and were not accomplished by virtue of his employment."[11] Perry had no right to access cars on the rental lot after hours; he was simply stealing the vehicle for his own purposes. There was no evidence that Perry's actions around the time of the crash "purported they [were] done by reason of [Perry's] employment duties and by virtue of his employment." Perry did not interact with the plaintiffs or represent himself to the plaintiffs as an Avis employee.[12] So Perry could not be said to have acted "under color of" employment by Avis or CSYG at the time of the crash.

While the Supreme Court affirmed the Court of Appeals' ruling on this issue, it disagreed with Court of Appeals' reliance on the fact that Perry obviously was acting "against the defendants' interests." Importantly, the higher court held that whether an employee acts against the employer's interest is **not significant** to the analysis. In nearly every case, the Supreme Court explained, an employee's actions which lead to a lawsuit against the employer are against an employer's interest.[13]

The *Avis* case has broad implications on issues of proximate cause and employer liability. First, this case is another in a handful of recent appellate decisions in which the court has decided **as a matter of law** that a plaintiff's claims failed for lack of proximate cause.[14] *Avis* represents another brick in the defensive wall in cases where, for one reason or another, the plaintiff's injuries are too remote or too far removed from a defendant's acts or omissions to proceed to jury. Again, proximate cause is a limit on liability that must attach to claims when the injury is not likely as applied to the specific defendant, specific location, and under specific circumstances. As the Supreme Court held in *Avis*, even assuming a defendant was negligent in its duty and alleged breach, proximate cause must always be examined. And where the facts show a large enough gap in time, circumstances, or otherwise, the plaintiff's claims fail due to lack of proximate cause.

The *Avis* case also further informs us on Georgia law on the issue of employer liability. We now have an explanation of what "color of employment" means as applied to claims of negligent hiring and retention. Previously, this concept had largely only been analyzed in the context of government employees. Importantly, this case shows it is not enough for an employer to argue that an employee's actions were against its interests. In addition, the Supreme Court's opinion in *Avis* suggests the employee's actions, rather than the employer's, control as to whether an employee acts "under color of employment"—which seems both unfair and a major potential pitfall for employers in future cases.

On the other hand, this case does not mean an employee will be held to have acted under "color of employment" simply because the employee's actions have some conceivable connection with his employment. Rather, an employee must act in a way that suggests he is acting by reason of his employment duties and by virtue of his employment. In the proper case, an employer still may escape liability for the off-the-clock actions of an employee not done in furtherance in the employer's business. ◆

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ENDNOTES

[1] *Johnson v. Avis Rent a Car Sys., LLC,* Nos. S20G0695, S20G0696, 2021 Ga. LEXIS 199 (May 3, 2021).
[2] A background check of Perry would have revealed convictions for reckless driving, DUI, prior car theft and eluding police.
[3] *Avis Rent A Car Sys., LLC v. Johnson,* 352 Ga. App. 858 (2019).
[4] *Avis Rent A Car Sys., LLC v. Smith,* 353 Ga. App. 24 (2019).
[5] The Court did not address whether Avis had any duty to protect the plaintiffs from harm.
[6] *Johnson v. Avis Rent a Car Sys., LLC,* Nos. S20G0695, S20G0696, 2021 Ga. LEXIS 199, at *13 n.15 (May 3, 2021).
[7] Id. at *15.
[8] Id. at *17, citing *Harvey Freeman & Sons v. Stanley*, 259 Ga. 233, 233-34 (1) (1989).
[9] Id. at *17, citing Harvey Freeman & Sons, 259 Ga. at 234(1).
[10] Id. at *18, citing Culpepper v. United States Fid. & Guar. Co., 199 Ga. 56, 58 (1945).
[11] Id. at *22.
[12] The Supreme Court specifically held that "[t]he fact that Perry wore an Avis shirt when he stole the SUV does not suggest that he was acting 'under color of employment' at the time of the collision, because the evidence presented at trial showed that Perry was wearing the shirt to cover up his crime if the police stopped him rather than as a means of representing to Smith that he was acting as an Avis employee when he collided with her." Id. at *21-22.
[13] *See, e.g., Tyner v. Matta-Troncoso,* 305 Ga. 480 (2019) (affirming grant of summary judgment to out-of-possession landlord because there was no evidence that landlord's negligent failure to repair gate latch proximately caused pit bull attack); *Goldstein, Garber & Salama, LLC v. J. B.*, 300 Ga. 840 (2017) (holding dental practice could not be held liable for employee's sexual molestation of patient of the practice because employee's criminal actions were intervening cause of plaintiff's injuries); *Cowart v. Widener*, 287 Ga. 622 (2010) (holding that plaintiffs' claims failed as a matter of law because there was no evidence that defendant's failure to secure medical assistance promptly was the proximate cause of decedent's death); *St. Jude's Recovery Ctr., Inc. v. Vaughn*, 354 Ga. App. 593 (2020) (holding operator of inpatient rehabilitation center could not be held liable for rape of center resident off premises due to absence of proximate cause).

Rising Jury Verdicts

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Act is a more diverse and larger jury pool that better represents the actual composition of Georgia counties. At the same time, however, the larger, more diverse jury pool has favored the plaintiffs, and jury verdicts have increased rather dramatically since the Act went into effect.

In analyzing the impact of the Act, we looked at jury verdicts rendered in wrongful death actions involving corporate defendants by comparing the mean and median of jury verdicts rendered before the Act took effect with the mean and median of those verdicts rendered after. Recognizing that correlation does not necessarily mean causation, there is no dispute jury verdicts have increased significantly since the Act took effect. Based upon our analysis, the Act has made jury pools in Georgia friendlier to plaintiffs.

Using CaseMetrix, the *Daily Report*, and Westlaw, we analyzed jury verdicts rendered in Georgia wrongful death actions involving corporate defendants: (1) ***after*** July 1, 2012, the date the jury pool provisions in the Act took effect; and (2) from September 1, 2008 through July 1, 2012, the period immediately ***before*** the jury pool provisions of the Act took effect.

A. Post-Act Jury Verdicts

Excluding settlements from my analysis, I looked at more than 60 wrongful death jury verdicts involving corporate defendants between July 1, 2012 and July 1, 2019 falling into four general subject matters: 1) vehicle accidents; 2) products liability; 3) premises liability; and 4) medical malpractice.

In terms of exposure, the mean and median of the Post-Act plaintiff verdicts are as follows:

- Mean: $17,270,000.00
- Median: $7,560,000.00

B. Pre-Act Jury Verdicts

I looked at more than 40 jury verdicts in the years prior to the Act, falling into that same four general subject matters. Two observations are immediately apparent. First, despite our review of the same sources for jury verdicts, prior to the Act, approximately forty percent (40 percent) of wrongful death verdicts were in favor of the corporate defendants. After the Act, one can nearly count wrongful death verdicts in favor of corporate defendants on one hand (fewer than five).

Second, the mean and median of verdicts are substantially lower than those post-Act wrongful death verdicts. In terms of exposure, the mean and median of the pre-Act plaintiff verdicts are as follows:

- Mean: $4,158,427.17
- Median: $1,600,000.00

II. The Apportionment Statute

Interestingly, my verdict research shows the apportionment statute has not substantially reduced verdicts. In fact, in many cases, little, if any, fault is apportioned to non-parties or verdicts are higher, leaving significant sums to be awarded against the remaining corporate defendant(s). The most obvious area where apportionment seems to fail defendants is in negligent security cases where no fault is apportioned to the criminal actor, like in the CVS case discussed above. The reason for this result is it is difficult to objectively quantify. Some jurors interviewed indicated that they assumed the non-parties had reached settlements outside of court and had already paid their share of the damages. Others thought that if the non-party was actually at fault that it would have been involved in the trial—taking the absence of the non-party as an indicator of a lack of fault.

In wrongful death cases with corporate defendants with apportioned verdicts:

- Mean: $16,210,000.00 with a $3,500,000.00 post-apportionment judgment reduction
- Median: $7,500,000.00 with a $2,700,000.00 post-apportionment judgment reduction

III. An Angry Jury

Finally, our research indicates juries are increasingly less tolerant of corporate defendants with: (1) other prior, similar incidents; (2) bad corporate representatives; and (3) bad documents. Simply and obviously, the best way to avoid a nuclear verdict is not to make the jury angry. In fact, the divisiveness of a big corporation-versus-the-individual is driven by anger. Many juries have a perception that a corporation has only one goal in mind—money. In fact in interviews, jurors tend to believe corporations are unethical and will do anything to maximize their profit. There is a mistrust of our corporate clients.

In cases, where a corporate defendant had a prior, similar incident and took no corrective action or fails to accept any responsibility, juries tend to return significantly higher awards citing that the incident could have been prevented. For example, we have seen prior reports of criminal activity with little or no response create astronomical verdicts in recent years.

Similarly, where corporate representatives are not likeable or where they lack credibility or empathy, corporate defendants can expect to be penalized. Choose your corporate representatives wisely. They should not be defensive or angry. Representatives should place a priority on safety, not simply increasing profits. If the corporation made a mistake, and the issue is simply one of damages admit the mistake and narrow your case to the dispute of damages. If corporate representatives are quibbling or appear to be hiding the truth, then expect the jury to penalize the corporation for its representative's behavior.

Finally, be wary of bad corporate documents. Juries often become angry with corporations who violate their own internal policies. Here, the results are often worse than a failure to follow the law. Having taken the time to recognize a need and draft an internal policy to address the need, only to have the corporation ignore or violate its own policy is another way to anger a jury. If a corporation is going to have a policy, then the corporation should train on the policy and enforce it—or risk having the policy used against itself. Regular review of corporate policies is necessary to remove policies that are no longer applicable in practice or that should be updated.

IV. CONCLUSION

Jury verdicts are on the rise. The Act has made Georgia jury pool sfriendlier to plaintiffs. The apportionment statute is not providing the defense bar with the relief it expected. And, finally, angry juries are dangerous. ◆

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ENDNOTES

[1] In fact for 2020/2021, the American Tort Reform Foundation ranks our Peach State as sixth on its Judicial Hellhole list. https://www.judicialhellholes.org/hellhole/2020-2021/georgia/
[2] O.C.G.A. § 15-12-120 (*2011).*
[3] O.C.G.A. § 15-12-40.1(e).
[4] O.C.G.A. § 15-12-40(a).
[5] See, e.g., *Al-Amin v. State*, 278 Ga. 74, 77 (2004).
[6] See, e.g., *United States v. Ovalle*, 136 F.3d 1092, 1107 (6th Cir. 1998).

Constructing a Defense

Continued from page 39

The Georgia Court of Appeals first emphasized that to succeed on his negligence claim, the plaintiff had to introduce evidence "which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact" of the plaintiff's injury.[14]

The Court then rejected the plaintiff's argument that the shooting would have been prevented by employing a competent security guard, since there was no evidence that the guard's duties would have included patrolling the parking lot at the specific time and place of the shooting. Additionally, there was no evidence that the absence of a security guard's patrol car made the shooting more likely than not to occur.

The Court further noted there was no evidence that a security guard would have been likely to observe or prevent the altercation. Lastly, there was no evidence that the assailant entered the complex through the broken gate. As such, the plaintiff had failed to show any allegedly inadequate security measures were the proximate cause of his injuries.

A Fighting Chance for Defendants in Premises Liability

At times, it certainly seems the deck is stacked against premises owners, occupiers, and managers in premises liability cases. But by focusing on the key defenses available, and armed with some recent favorable decisions from Georgia's appellate courts, defendants in these cases do have a fighting chance.

Elissa Haynes is a partner at Drew Eckl & Farnham in Atlanta. She focuses her defense trial practice on negligent security, premises liability, personal/catastrophic injuries, wrongful death, and religious institution liability. She chairs GDLA's Amicus Curiae Committee and is President of the State Bar of Georgia's Young Lawyers Division.

ENDNOTES

[1] The exception, of course, would be if the prior police reports show your client's actual knowledge (i.e., a report reveals that the investigating police officer spoke with the convenience store manager about the reported crime). In that scenario, it will be hard to argue that your client had no knowledge of prior crime.
[2] 348 Ga. App. 761 (2019) (finding Plaintiff could not rely on crime grids, evidence of "rampant crime in the area" and convenience store operator/co-defendant's knowledge of prior crime to show property owner's knowledge when there was no evidence of such actual knowledge).
[3] *Days Inns of America, Inc. v. Matt*, 265 Ga. 235 (1995) ("Simply put, without foreseeability that a criminal act will occur, no duty on the part of the proprietor to prevent that act arises.")
[4] A good example is *Piggly Wiggly v. Snowden*, 219 Ga. App. 148 (1996) where knowledge of a propensity for crime was shown by testimony from Piggly Wiggly store managers that male employees routinely walked female employees to their cars at night because they considered the parking lot unsafe. There was also evidence the managers had repeatedly suggested hiring a security guard for the parking lot.
[5] 267 Ga. at 787 (emphasis added).
[6] 264 Ga. App. at 462 (emphasis added).
[7] 303 Ga. App. at 723 (emphasis added).
[8] *Bolton*, 348 Ga. App. at 762.
[9] Id.; *See also Fair v. CV Underground, LLC*, 340 Ga. App. 790, 792 (2017) ("but even if an intervening criminal act may have been reasonably foreseeable, the true ground of liability is the superior knowledge of the proprietor of the existence of a condition that may subject the invitee to an unreasonable risk of harm.")
[10] 356 Ga. App. 703 (2020).
[11] 311 Ga. 588 (2021).
[12] Id. at n. 15.
[13] 2021 WL 4979135, *1 (Ga. Ct. App. Oct. 26, 2021).
[14] *Id.* (citing *George v. Hercules Real Est. Servs. Inc.*, 339 Ga. App. 843, 845 (2016)) (punctuation omitted).

Life Care Plan

Continued from page 42

define all medical care and services for the evaluee's life care plan. The nurse life care planner did not refer to or cite her review of published clinical practice guidelines or empirical research related to the evaluee's primary diagnosis or related complications, nor did she describe medical records in the life care plan which defined the evaluee's likely need for future medical treatments, surgeries or services.

In summary, the methods by which the life care plan was established for this scenario were inappropriate based upon published IARP and IALCP standards and the *Journal of Life Care Planning* consensus statements. The nurse life care planner breached her scope of professional practice by independently determining that the proposed medical care, treatments and services of her life care plan were medically necessary for the evaluee due to the motor-vehicle accident.

Case Scenario #2

A 35-year-old male was injured in a motor-vehicle accident and sustained a T-8 complete spinal cord injury. The plaintiff's attorney retained a nurse life care planner to complete a life care plan for the evaluee. The evaluee was treating with a spinal cord injury physiatrist and a urologist. The treating physicians did not respond to the life care planner's requests for consultation. The nurse life care planner elected to independently compose and release her life care planning tables which included all aspects of medical care, treatments and services for the evaluee without obtaining necessary medical foundation through consultation and collaboration with a licensed physician(s) and/or other healthcare provider(s). Also, direct reference of published clinical practice guidelines and empirical research to establish accepted standards of care for the evaluee's diagnosis and clinical issues/complications was not described in the life care plan by the nurse life care planner. Finally, the nurse life care planner did not make any direct connection between the information reviewed from the evaluee's treatment records and the type, frequency and duration of future medical care as detailed within her submitted life care planning tables. After releasing the life care plan to the referral source, the nurse life care planner sent the

> *Ultimately, the proposed life care plan was authored by the nurse absent appropriate medical foundation from a licensed physician and/or other healthcare providers.*

treating spinal cord injury physiatrist a copy of her narrative report and life care planning tables with a request for him to endorse the documents through signature.

In summary, the nurse life care planner breached her scope of professional practice by independently determining all aspects of the proposed medical care and treatments within her life care plan were medically necessary for the evaluee due to the motor-vehicle accident. Post-hoc endorsement by a licensed physician cannot erase a breach of professional standards by the life care planner. Ultimately, the proposed life care plan was authored by the nurse absent appropriate medical foundation from a licensed physician and/or other healthcare providers.

The nurse life care planner ventured outside her scope of her professional practice the moment she submitted the life care plan to other parties absent necessary medical foundation.

Case Scenario #3

A 35-year-old male was injured in a motor-vehicle accident and sustained a T-8 complete spinal cord injury. He was treating with a spinal cord injury physiatrist and urologist who agreed to assist the life care planner with the development of a life care plan. The nurse life care planner retained by the plaintiff attorney, sent the treating physiatrist and urologist as well as the evaluating psychiatrist an introductory letter and medical care questionnaire for reference during their planned consultations.

The life care planner completed telephonic consultations with all three physicians and recorded all medical responses and comments received regarding the evaluee's future care requirements due to the motor-vehicle accident. As requested, the medical information from the consultations was documented and submitted to each physician for their review. The physicians returned their responses with signature endorsements. The confirmed medical foundation was directly utilized during the development of a life care plan for the evaluee.

Treatment ranges were utilized when the consulted physicians offered variable frequencies for the evaluee's future care. Also, the life care planner referenced published clinical practice guidelines and empirical research to further analyze the standards of care for a person with a T-8 complete spinal cord injury. Finally, the medical records as reviewed by the life care planner from the treating surgeons and pain management physician specialist detailed several likely future surgeries and interventional procedures for the evaluee as related to the motor-vehicle accident.

hese medical records were documented thoroughly within the life care plan for foundational purposes and the surgeries and pain management procedures described through the records were included in the life care planning tables.

Conclusion

In summary, the overall methods by which the medical foundation was established for this case scenario are appropriate based upon published IARP and IALCP standards and the *Journal of Life Care Planning* consensus statements.

According to authoritative sources for the field of life care planning, a life care planner should endeavor at all times to function in analogous terms to the role of a "general contractor" when developing their life care plans. Like general contractor, life care planners originate from a variety of different educational and professional backgrounds. Rarely, if ever, would it be the case that a single life care planner has all necessary expertise, qualifications and licensures to appropriately comment in full upon each and every category/item as necessary for life care plan development. Like a general contractor, who must follow required codes and construction guidelines and must utilize expert foundational input for the planning and construction of a home, the life care planner too must rely upon the informed opinions and licensed/credentialed expertise of others to develop a final evidence-based life care plan.

In fact, the collective field of rehabilitation is built upon seeking foundation from *(and relying on)* a skilled medical, psychological and allied health treatment team to optimize patient outcomes. The compared role of the life care planner to that of a "general contractor" is described in greater detail within the published treatise and current edition of the *Life Care Planning and Case Management Handbook* (Chapter 1: Life Care Planning: Past Present, and Future, Pages 15-20) with original source reference emerging from a publication within the *Journal of Life Care Planning* (Weed, R., 2002, Volume 1, Number 2, Pages 173-178).

In summary, published life care planning standards of practice and consensus statements serve as fundamental guidelines by which an evidence-based life care plan is evaluated and determined to be appropriate for the evaluee. The establishment of appropriate medical foundation is a critical aspect of the standard life care plan developmental process. When proper medical foundation is not established or well documented at the time of a life care plan's release, it will not be possible to conclude that the items/services detailed are medically necessary due to any alleged injury(s), accident(s) and/or other chronic medical condition(s) of the evaluee. The life care planner that bypasses or attempts to supersede the necessary steps, methods and/or accepted parameters required to establish appropriate medical foundation is subject to significant risk. The credibility and overall validity of their life care plans will likely be questioned and determined fundamentally flawed by other reviewing life care planners and/or involved parties.

The development of an evidence-based life care plan is intended to be a collaborative process that produces a detailed and comprehensive document that can serve as a lifelong guide for the evaluee relative to the future delivery of healthcare services. The plan should be well researched, transparent and accurately describe the medical foundation as received and/or gathered by the life care planner. In conclusion, the proper investment of time for research, data analysis, detailed consultation(s) and the documentation of appropriate medical foundation are cornerstones for the development of an evidence-based life care plan and should never be neglected by the life care planner. ◆

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Expert Witness

Continued from page 48

some sense into the offending attorney. From experience, this goes a long way to ingratiate us to you. Experts love working with attorneys who are willing to protect them from abusive behavior.

Finally, we want to be highly involved in any Daubert-type motions against us. We know our subject matter inside and out and have lots of resources at our fingertips to write strong replies. Give your experts plenty of time to review and even write portions of these replies. We are an invaluable resource for these replies and are highly invested in the results of the motion.

4) **Challenge Your Own Expert.** As you may know, experts tend to be conservative in their opinions and that is mostly a good thing. There is fear of being discredited or even disqualified from testifying in a case. Sometimes this comes at a cost of not having strong opinions in your case. Challenge your expert to consider more variables, more outcomes and more alternatives. Additionally, try to shoot holes in their opinions and share those concerns with them. A good expert will take that criticism and use it to reinforce their opinions—be it by having a more fully developed rationale for their methods or by improving their methodologies.

To sum it up, try not to think of your expert as simply a component in your case. Instead, consider them a tool or weapon in your arsenal. This tool needs to be used at the right time and leveraged in the right way. Your expert should be able to handle themselves in certain situations, but this is also a combined effort with the retaining attorney. ◆

Mark Guilford is the Chief Executive Officer of AccuMed Healthcare Research, a GDLA Platinum Sponsor. AccuMed provides medical billing review to assess the inflation of bills by plaintiff's attorneys. He is a qualified expert witness in data analytics specific to assessing the reasonable value of billed charges for medical care.

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Forensic Accountants

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consider. He may well have industry data at his fingertips or be able to speak to key trends that need to be considered in a measure or compared to the other side's damage projections. The forensic accountant can work with you in preparing requests for crucial discovery items and assist you in crafting key financial interrogatory questions.

When opposing counsel inundates you with voluminous, disorganized records, an experienced forensic accountant can help organize them in an efficient manner and determine what key records were provided, as well as identify those that are missing. He can work with you to focus on key points of the financial measure and develop a strategy to analyze and test the plaintiff's damage claim, first at a high level and then strategize with you to consider whether a more detailed review is necessary.

A forensic accountant can provide unique, logical feedback in reviewing deposition testimony, either by helping you prepare key questions ahead of time, sitting in during the deposition itself and/or reviewing the transcripts after the fact for inconsistencies in testimony that may be useful in negotiations or at trial. When sitting in during live testimony, the forensic accountant knows how to conduct himself and gain a feel for the "flow" of your questioning. He will work with your preferences on when and how to alert you to areas where answers may be unclear or where additional questioning might be useful.

A forensic accountant will use his staff appropriately to help with micro tasks and manage fees. Depending on the role you expect him to play, while each case develops differently and strategies may shift, he should be able to give you a budget of the range of fees expected to be incurred when acting as a consultant compared to accepting a designation as an expert preparing for trial testimony.

Let us consider two examples of how a forensic accountant's involvement was helpful to the successful handling and outcome of a case:

Case Study #1

Your client was charged with causing a motor vehicle accident and you are defending him and his insurance carrier against a lawsuit brought by the driver of the other car. The plaintiff, a 63-year-old man, claims he is no longer able to drive long distances in his car and that has affected his ability as a builder to visit job sites and prepare timely bids. The complaint presents estimated damages at $4.8 million.

You immediately retain a forensic accountant to evaluate the claimed damages presented by the plaintiff and to prepare a discovery request list for financial documentation in support of the claimed damages. In response, the insured eventually produces eight banker boxes of disorganized records which the forensic accountant and her staff go through and organize. Shortly after providing the documents, the plaintiff amends his claim to $2.5 million.

You ask that the forensic accountant do some high-level analysis of the records provided and give you her verbal assessment of any financial impact on the plaintiff's business. You ask that at this time she not incur the time to prepare her own independent calculation.

In reviewing the plaintiff's financial records the forensic accountant reports that the plaintiff's business revenue earned was actually slightly lower following the accident, but that she does not believe the reduced revenue stream would support the degree of plaintiff's claim for damages.

The forensic accountant also notes wages on the plaintiff's personal tax return and copies of two W-2s that tie to the reported wages for the two years following the accident. A review of two large transactions in the corporate bank records and some capital gains reported in the plaintiff's personal tax return leads to the plaintiff's admission under oath that he had been in the process of selling his business in the year prior to the loss and that the W-2 wages were paid to the plaintiff by the successor company.

You are able to negotiate a significantly reduced settlement with the plaintiff's attorney over the next few weeks before trial.

Case Study #2

You are hired to represent a disability carrier in a lawsuit brought forward by one of its insureds. This plaintiff previously filed a disability claim in 2008, alleging partial disability back to March 1998 and total disability as of 2008. The plaintiff's alleged medical condition was not well documented. The plaintiff's occupation was reported as a loan originator and president of a mortgage company operating in a large metropolitan area. His policy carried a $12,000 maximum monthly benefit. The plaintiff's ownership in the mortgage business (an S-Corporation) ranged from 40 percent in the earlier years to 100 percent by 2008.

The forensic accountant you retain reviews personal and business income tax returns, as well as the transcript of an interview with the plaintiff, and he performs his own mortgage industry research. His analysis reveals that while the plaintiff was claiming disability going back to 1998, his income during the late 1990s through mid-2000s showed considerable growth. Through research the forensic ac-

countant is able to tie the growth years to lower interest rates and finds that declines in later years correspond to the real estate crisis and lack of easy sub-prime financing. The forensic accountant also uncovers that in 2004, the plaintiff purchased a chain of self-service car washes. This was discovered through analysis of the plaintiff's financial records and tax returns and had not been previously disclosed by the plaintiff. Over the course of four years the plaintiff lost over $2.5 million from the car wash business. Both the decline in the mortgage business and the financial strain of the car washes created a significant income loss for the plaintiff, both unrelated to any claimed disability.

Through analysis the forensic accountant is able to show the plaintiff's decline in income and the ultimate filing of his disability coincided with the decline in the real estate market. He also assists you in putting together a list of key questions and discussion points to be potentially addressed with the plaintiff's attorney or utilized at trial. Using this information you are able to negotiate a minimal settlement through the plaintiff's attorney before going to trial.

Summary

The challenges of proving a case involving financial analysis can be greatly alleviated throughout the process with the assistance of an effective, experienced forensic accountant. A forensic accountant's damage quantification and expert report are based on a thorough review of key factors, financial and otherwise, resulting in a tailored assessment of the damage measurement. By working together with you to enhance your team's efforts, forensic accountants can serve as a consultant, providing invaluable preliminary insight, requests, queries and advice, and if needed, can step into the role of an expert witness whose findings are properly supported when presented in a court of law. ◆

Dayne Grey, a licensed CPA in Georgia and Tennessee, is a partner with MDD Forensic Accountants, a GDLA Platinum Sponsor. He has quantified damages for wide range of claims related to business interruption; extra expense; inventory and physical damage; construction delays; builders' risk; financial condition; and product liability and recall. He has provided his expertise on numerous litigation files, having reviewed and analyzed transcripts, prepared inquiries for witnesses under oath and assisted with all aspects of discovery, including the preparation of document requests and interrogatories.

Risk

Continued from page 50

- Insufficient Data
- Not Applicable
- No Rating
- Very Low
- Relatively Low
- Relatively Moderate
- Relatively High
- Very High

The details of the calculation process are discussed within the specific case studies presented below.

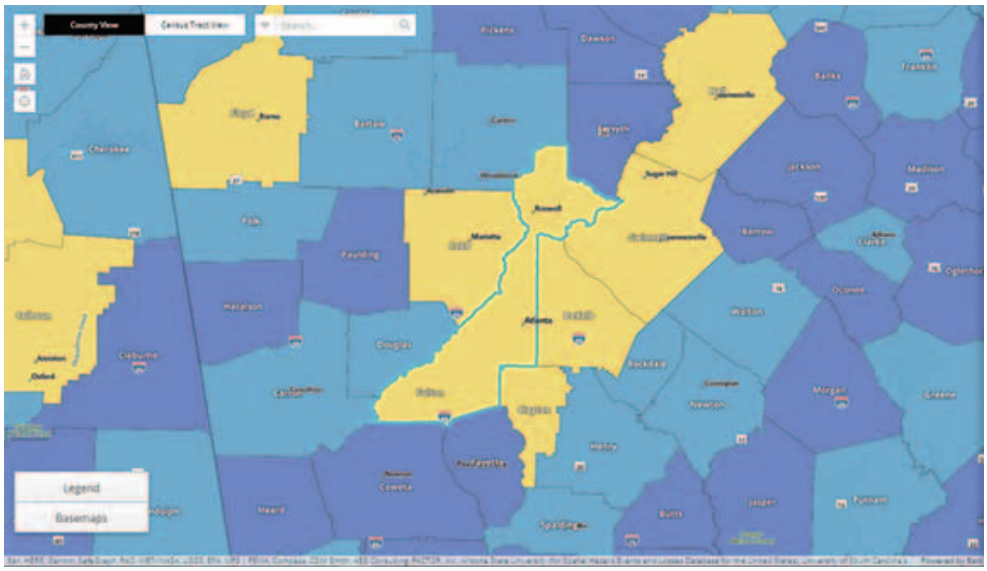

FIGURE 2. NRI map centered on Fulton County (outlined). Yellow shading indicates a relatively moderate risk index. Source of Image: fema.gov.

Case Study 1
Fulton County, Georgia

Fulton County is the most populous county in Georgia and the home to its capital city, Atlanta. The county was cleaved from DeKalb County in 1853; however, its etymology is somewhat in doubt. The county was reportedly named after famous steamboat inventor Robert Fulton[4] or was it a civil engineer named Hamilton Fulton who proposed a connection via railway from Milledgeville (then the state's capital) through Fulton County and all the way to Chattanooga, Tennessee?[5] We'll table this question for a later date, in an oaken room, over a glass of port. Suffice it to say Fulton County grew from its humble beginnings as one of the last counties created in the state to the most populous, with one million plus inhabitants as of the 2020 census.[6]

Overall Risk Index

Fulton County's NRI bin is *relatively moderate* with approximately 87 percent of U.S. counties, and almost 95 percent of Georgia counties, having a lower risk index. An excerpt from the NRI maps is shown in Figure 2 which indicates that Fulton County's risk index is similar to those of other counties in metro Atlanta, such as Cobb, DeKalb, Clayton and Gwinnett.

Hazards

In the parlance of risk assessment, the likelihood of an extreme weather event or earthquake is referred to as the *hazard*. To calculate a risk index for a community, FEMA's web-based tool first categorizes the various hazards that may impact the community, using similar bins as described above for the risk index. Fulton County has *relatively moderate* hazards with respect to hail, lightning, and riverine flooding, which is probably not a surprise to anyone who has lived through a summer in Atlanta with thunderstorms almost every afternoon.

Fulton County has *relatively high* hazards with respect to tornados and winter weather—again, likely not surprising to local denizens. Interestingly, the hazard score for earthquakes is almost double that of hurricanes (although the risks of both are relatively low). Maybe the recent uptick in television/movie filming has made us feel like Hollywood in more ways than one… .

Expected Annual Loss

A common risk metric, referred to as *expected annual loss*, involves annualizing long-term costs associated with one or more hazards. Costs can include a variety of negative outcomes associated with the hazard, such as the "three Ds," meaning death, dollars and downtime. Fulton County practically leads the state in expected annual loss, with over 99 percent of Georgia counties having a lower value. This includes an estimated loss of building value of approximately $23 million and 1.87 fatalities per year. This is most likely a result of the over $130 billion in building value and the highest population—that is, a fraction of a big number is still a big number.

Social Vulnerability

Fulton County's social vulnerability score is *relatively low*, with only 13 percent of Georgia counties having a lower score. The calculation of social vulnerability comes from research performed at the University of South Carolina (USC), which considered a number of societal variables in this assessment,[7] including race/ethnicity, age, income, number of hospitals,

renters vs. owners, and housing values.

Community Resilience

Fulton County's community resilience score is *relatively low*, with only about 40 percent of Georgia counties having a lower score. This score is again calculated by USC using six factors: human well-being, economic/financial, infrastructure, institutional/governance, community capacity, and environmental/natural. If we take just one variable as an example from the environmental/ natural category, we might explore one sub-variable, e.g., natural food supplies. As Fulton County is a fairly urban environment with a large population, the natural food supply production as a proportion of the population is likely low, thus contributing to lower overall community resiliency.

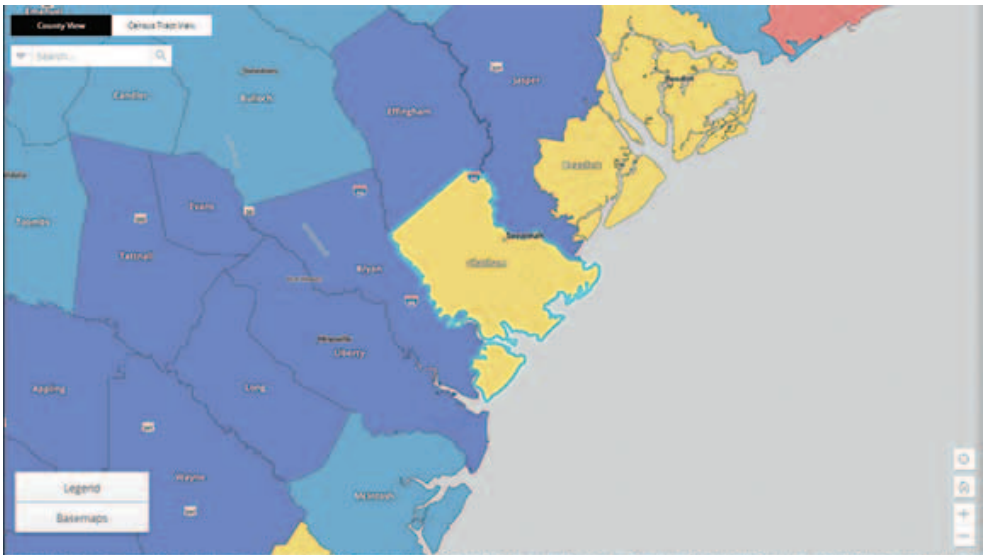

FIGURE 3. NRI map centered on Chatham County (outlined). Yellow shading indicates a *relatively moderate* risk index. Source of Image: fema.gov.

Case Study 2
Chatham County, Georgia

Chatham County is one of the oldest counties in Georgia and one of six coastal counties. The county seat is the city of Savannah, which is the oldest in Georgia (founded in 1733 by General Oglethorpe). Savannah is renowned for its planned layout including gridded streets interposed with immense public parks.

Many movies were filmed beneath the moss-draped live oaks of Savannah, including one of the authors' favorites, *Midnight in the Garden of Good and Evil*. The population of Chatham County per the 2020 U.S. Census was approximately 300,000.[8]

Overall Risk Index

Similar to Fulton County, Chatham County's NRI bin is *relatively moderate* with approximately 91 percent of U.S. counties, and almost 97 percent of Georgia counties, having a lower risk index. The NRI map for Chatham County is shown in Figure 3. Nearby counties have somewhat lower risk indices, except for coastal Beaufort and Charleston Counties, in neighboring South Carolina.

Hazards

The *relatively moderate* hazards affecting Chatham County are coastal flooding, earthquakes, ice storms and tornados. Not having lived in Chatham County, the authors will leave it to the locals to educate us on the local ice storms apparently ravaging your warm, ocean-front county. As for *relatively high* hazards, heat waves, lightning and wildfires make the list.

Expected Annual Loss

The expected annual loss is *relatively moderate* for Chatham County, with 97 percent of Georgia counties having a lower value. There is an expected annual loss of $13.5 million to buildings and approximately one fatality per year. These losses are lower than for Fulton County, but with a smaller total building value ($30.8 billion) and a smaller population, probably not unexpected. However, as a fraction of the total building value and population, the losses for Chatham County are higher than those of Fulton County.

Social Vulnerability

In contrast to Fulton County, Chatham County's social vulnerability score is *relatively moderate*, with just over 50 percent of Georgia counties having a lower score.

Community Resilience

Chatham County's community resilience is much higher than Fulton County's, with a score of *relatively high*. Over 99 percent of Georgia counties have a lower score. Without knowing more specifics about the local community, it is difficult to surmise why this may be the case, but as civil/structural engineers, we will advocate that the multi-faceted

Continued on next page

Risk

Continued from previous page

transportation infrastructure probably has something to do with it.

Reducing Risk

After reading this far, following along with the example data, responding to a few emails, doodling on your notepad, etc., you are probably left with only one burning question: We have this great big tool to help us look at community-wide risk, but how do *I* use it to help *me or my clients*?

Understanding Risk

The first step in reducing risk is understanding the factors that contribute to risk. We have seen from the examples above how the NRI can be used to understand the hazards facing a specific community as well as the level of social vulnerability and community resiliency. These metrics are incorporated into this national model precisely to give community members, of which you are a subset, the ability to determine what factors drive overall community risk.

Analyzing Risk

Once you know your community's risk factors, you can begin to analyze how these factors impact your own (or your client's) risk. For example, a business operating in a community with high hurricane hazard may consider building retrofit or insurance options that are much different than a business operating in a community with high earthquake hazard. A business in a community with high social vulnerability may have a difficult time recovering customers and workers following a severe weather event or earthquake. Similarly, supply chain disruptions may be problematic for a business in a region with low community resilience.

Communicating Risk

Communication is arguably the most important aspect of a relationship, and the same is true for risk management. Once you have analyzed the factors contributing to risk, the next step is communicating risk to the appropriate stakeholders. The best approach for communicating risk to stakeholders at the highest level is to keep the message simple and straightforward, highlighting the most important risk factors and their potential impacts on the interests of the stakeholders. When speaking to various teams within an organization, the best practice is to provide each team with the specific information that affects their work—e.g., Forklift Joe doesn't need to know supply chains are at risk, save that for the CEO and Supervisor Kim in distributions.

Mitigating Risk

Now, the question on everyone's mind is, "I have identified and communicated the risk, how do I address it?" A good starting point is to know your states mitigation plan! Georgia was one of the first states to implement a State Hazard Mitigation Plan that met the federal requirements of 44 C.F.R. Part 201;[9] this should be a primary resource when developing any mitigation strategy. When dealing with risks specific to a geographic region, utilizing mitigation strategies developed by local governments will also be a good resource; some municipalities even offer their own consultation services for managing and mitigating risks.[10]

If you or your client wants to develop a more tailored strategy, seek the aid of scientists and engineers experienced in risk assessment and mitigation for an individualized and detailed mitigation strategy that fits your needs.

Ultimately, to effectively mitigate risk, it is important to identify the factors that drive the risk. The NRI can serve as a useful tool to help architects, engineers, contractors, developers, owners, lawyers, and other vested parties identify the risk factors affecting their communities so that their specialized services and knowledge can be applied to mitigation strategies associated with those risk factors.

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ENDNOTES

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3 https://www.fema.gov/
4 https://www.fultoncountyga.gov/inside-fulton-county/about-fulton-county/history
5 https://www.georgiaencyclopedia.org/ articles/counties-cities-neighborhoods/fulton-county
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8 *Op. Cit.*
9 Hazard Mitigation Planning | Georgia Emergency Management and Homeland Security Agency
10 Risk Management (fultoncountyga.gov)

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Meditation Impasse

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weaknesses of their case and the risks each side bears as an alternative to a negotiated agreement. These conversations can be uncomfortable but are important as parties weigh how they intend to proceed.

In the days following mediation, litigants are thinking about new facts they were unaware of, legal arguments they had never heard before, or how a jury might react when it hears the other side's case. The power of reflection post-mediation should not be underestimated. Litigants are often thinking about things they may not have considered before mediation, such as whether the damages are collectible, if some of their claims may be disposed of on summary judgment, or whether certain evidence will be excluded through motions *in limine*. Almost always, the litigants are also reflecting on the costs they have spent to date and how much more time and money they will have to invest to get through a trial and possibly an appeal. If the case is a highly emotional one, letting the parties cool down for a couple of days while the mediation discussions sink in can be helpful.

Have the mediator follow up to see where things stand, whether there have been any further thoughts, or what other information is needed to be able to respond to the last settlement offer. Sometimes a call or email from the mediator gives the lawyer a reason to reach out and have another conversation with the client about next steps. These conversations frequently result in a willingness to make some kind of offer or demand, which keeps the settlement discussions continuing.

Have the Mediator Ask for More Information

An impasse at mediation can have a number of causes, among them a misunderstanding of the facts, the need for more authority, or a lack of information. The mediation may be the first time the defendants are digging into the plaintiff's damages calculations and the support behind the numbers. There are instances where documents were not produced in time to evaluate them before mediation or not produced at all. Alternatively, documents were produced, but the other side did not read them. Even when everyone has all the documents, it is not uncommon to see one side assume their adversary understands the basis for the calculations, but in reality, the other side has questions about how the numbers were derived. Usually, a party needs more information to be able to move beyond an impasse.

Many times the mediator can get the parties to provide that information in an expedited manner. If you need information, have the mediator follow up. Follow up calls from the neutral asking whether and when the information has been produced can light a fire to get things done. If the amount of authority is the issue, tell the mediator what you need to see in order to ask for more. The mediator likely has a way to deliver the message to your adversary in a manner that might be better received than if it were coming from you. People are sometimes more receptive to considering things when it comes from the neutral versus the adversary.

The Mediator's Proposal

Another tactic is to ask the mediator to make a mediator's proposal. Some mediators do this before the parties leave the mediation, but it also can be useful to do this shortly after the mediation on the heels of the cool down period. This is a settlement proposal that comes from the mediator as opposed to one of the parties. Each side responds only to the mediator. If both sides say yes, there is a settlement. If one side says no, they never find out whether the other side said yes or no.

Seeking a mediator's proposal can help move the needle. It sheds light on how a third-party neutral views the case. It is also particularly helpful where the mediator provides a context for the number, explaining the reasoning for the proposal or why it makes sense considering the facts or the litigation alternative. Even if the mediator's proposal is not accepted, it often opens the door for a counter-proposal from one side, which keeps the negotiation and conversations continuing. If the settlement communications are ongoing, a resolution is likely.

Conclusion

The next time you leave a mediation feeling like a settlement is hopeless, ask your mediator for ideas on how to overcome the impasse so you do not lose the progress you made. The neutral's insights can be useful, and a proactive mediator can help keep the lines of communication open. She may also be better at delivering information in a way that resonates with the other side. In the unlikely event of an impasse, a mediator's follow up could make all the difference. ◆

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