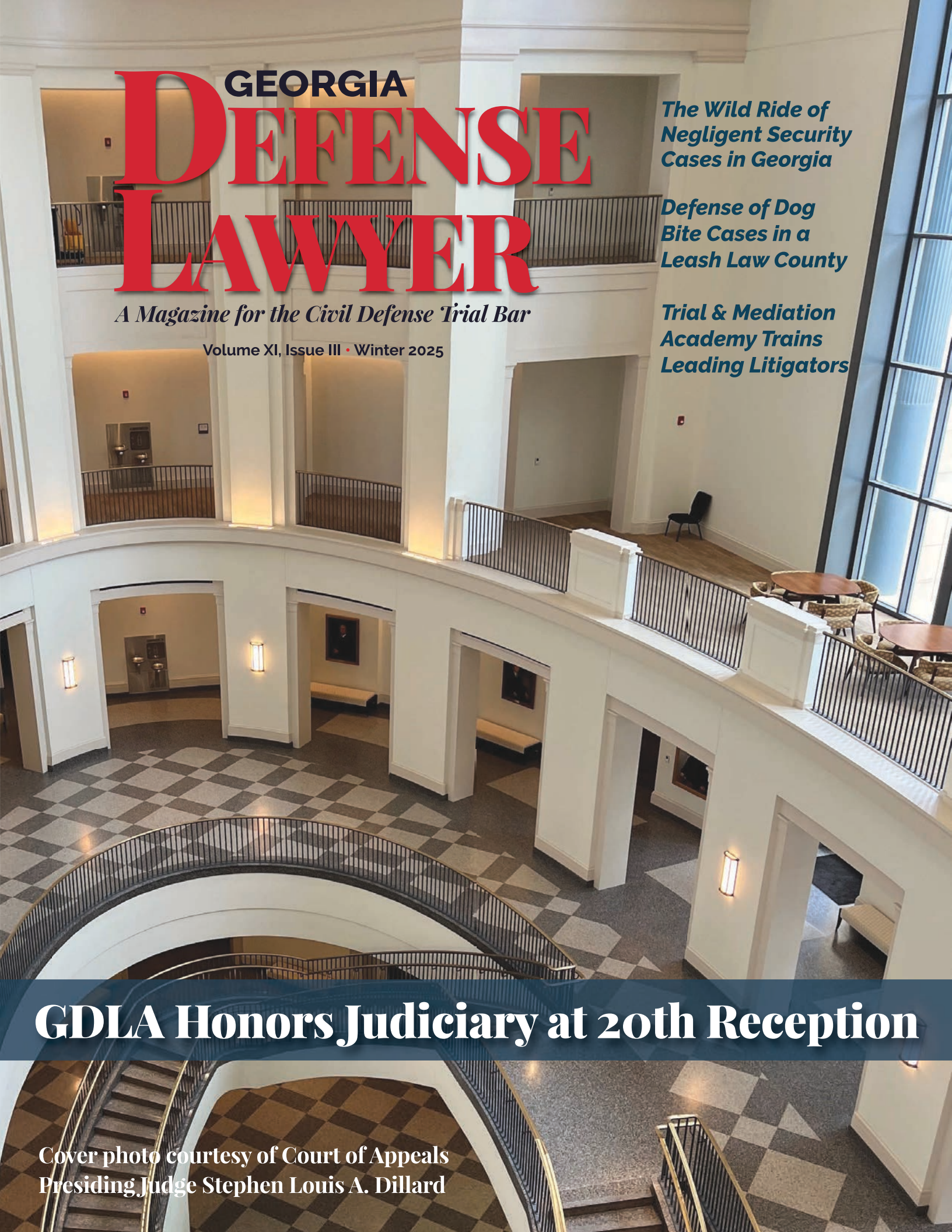

GEORGIA DEFENSE LAWYER

A Magazine for the Civil Defense Trial Bar

Volume XI, Issue III • Winter 2025

The Wild Ride of Negligent Security Cases in Georgia

Defense of Dog Bite Cases in a Leash Law County

Trial & Mediation Academy Trains Leading Litigators

GDLA Honors Judiciary at 20th Reception

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GEORGIA DEFENSE LAWYER
Volume XI, Issue III

President's Message


Bill Casey

As I write this column, GDLA had just hosted its 20th Judicial Reception honoring those on the bench in Atlanta and the surrounding counties. We had judges from a variety of courts, listed alphabetically, respond to our invitation: Alcovy Superior Court, Clayton State Court, Cobb State Court, Cobb Superior Court, Court of Appeals of Georgia, DeKalb State Court, DeKalb Superior Court, Douglas Superior Court, Fulton State Court, Fulton Superior Court, Griffin Superior Court, Henry County State Court, State Board of Workers' Compensation, Supreme Court of Georgia, and the U.S. District Court for the Northern District of Georgia.

This broad turnout from across the metro-Atlanta area and beyond is a testament to the visibility that GDLA has achieved over the last decade. When I was beginning my service on the Board of Directors in 2015, having already been a faculty member of GDLA's (then) Trial Academy for many years, GDLA was often confused with the criminal defense bar. Our counterparts on the other side of the "v."—namely the Georgia Trial Lawyers Association (GTLA)—were well known in the legal universe as the plaintiff's bar.

In 2011, for the first time, GDLA entered the State Bar of Georgia's Best Newsletter Award competition, as sponsored by the Bar's Local & Voluntary Bar Activities Committee. GDLA won the award that year and the five following years. The first year, however, was special since GDLA Executive Director Jennifer Davis (now Ward) was seated next to the late Supreme Court Justice George Carley when GDLA's name was announced as the winner. Justice Carley then commented to Jennifer, "We get GTLA's magazine but not yours." Jennifer immediately added the appellate bench, and the other state and federal judges in Georgia, to our magazine's distribution list going forward. That alone was a great boost to our visibility among those on the bench.

Then in 2015, my good friend Matt Moffett took the helm as GDLA President. In a *Daily Report* covering his election, Matt said, "I plan to focus on expanding the visibility of GDLA by actively dispelling the perception that we're just the insurance defense bar. We're the voice of the entire civil defense bar." He added, "Another misconception is that we're the criminal bar. So, we believe a concentrated effort to reach anyone defending businesses or individuals in civil cases will correct that."

These two milestones enhanced our brand and, as a byproduct, increased our membership. Then four years ago, GDLA formed a political action committee (PAC) and engaged a lobbyist, Kade Cullefer of Troutman Pepper Strategies. For the first time, GDLA was actively countering GTLA's long-time presence and influence under the Gold Dome by providing our members and clients a voice at the Capitol.

In 2022, we successfully worked on passage of the bill referred to as the "Hatcher fix," which remedied the drastic change in the interpretation of the apportionment statute after the Supreme Court's decision in *Alston & Bird v. Hatcher*. In 2024, we had success with the passage of 1) Senate Bill 426 that amended the direct-action statutes for accidents involving motor carriers by limiting the circumstances under which an insurer may be named as a defendant; and 2) Senate Bill 83, O.C.G.A. § 9-11-67.1, that refined the requirements for settlement offers in cases involving motor vehicle accidents. This year, we actively supported the Governor's tort reform package, Senate Bills 68 and 69, which in-

Continued on page 14

Member News & Case Wins

MEMBER NEWS

Hall Booth Smith welcomed **Laura DeMartini** as of counsel and **D. Nathan "Nate" Chong** as an associate in its Atlanta office. DeMartini has extensive experience representing providers including hospitals, skilled nursing facilities, assisted living facilities, and subacute facilities in all phases of litigation related to both general and professional liability claims. She also advises providers on regulatory compliance, assisting with internal investigations, self-reporting requirements, risk management, policy development, and legislative interpretation. She has defended numerous medical professionals in medical malpractice cases and in front of their respective licensing boards. She also represents health care providers in Medicare, Medicaid, quality improvement organization, and private health insurance company audits and administrative actions. DeMartini's practice further extends to representing healthcare entities, staffing firms, and mental health facilities in cases of negligent hiring, retention, and credentialing, along with claims of professional negligence, HIPAA violations, and intentional torts. Chong focuses his practice on medical malpractice, general liability, government affairs, and insurance coverage law.

Tyson & Mendes announced **Marc Wisehart** has joined the firm's Atlanta office as senior counsel. He brings more than 20 years of experience litigating civil matters at the state and federal levels, including professional liability, premises liability, product liability, toxic torts, and trucking liability. Prior to joining Tyson & Mendes, Wisehart worked with several of Atlanta's largest insurance defense firms, served as in-house counsel for a national insurance company, and worked as a complex claims manager for an international insurance company. He has extensive experience defending high-exposure, complex cases and negotiating settlements in multimillion-dollar claims involving catastrophic injuries and alleged wrongful deaths.

With the retirement of **Allan Myers** and the election of former GDLA member **Tripp Wingate** to the Hall County State Court bench, the firm of **Myers & Wingate** has transitioned its law practice to fellow partner, **Ramsey Chambless,** who will be continuing the firm's work as **The Chambless Law Firm**. His practice will remain in the same Gainesville office location and continue to focus on insurance defense and other civil defense related matters.

Rutherford & Christie announced **Quinton R. Beasley** has been elevated to partner in its Atlanta office. He focuses his practice on the defense of national corporations in death and catastrophic injury litigation, dram shop claims, and automobile/trucking litigation. He defends restaurants, trucking companies, and insurance companies against claims brought at all levels. Beasley has been successful in defending cases pre-trial through a strategic motions practices.

Jeffrey M. Wasick, formerly with **Gray Rust St. Amand Moffett & Brieske**, has joined the civil litigation defense practice group in **McAngus Goudelock & Courie's** Atlanta office, where he is practicing general liability with a focus on premises, products, and trucking, as well as catastrophic injury and wrongful death insurance defense.

Hawkins Parnell & Young grew its equity partnership with the addition of **Shane Keith** in Atlanta. Keith is a trial lawyer with over two decades of experience representing the world's largest corporations and leaders in the trucking, hospitality, retail, and manufacturing sectors in cases involving catastrophic injuries, fatalities, product liability, and human trafficking. He is vice-chair of GDLA's Judicial Relations Committee.

C. Bradford Marsh, David M. Atkinson, Terry O. Brantley, Joseph J. Angersola, Lee Clayton, Ashley C. Webber and **Calvin P. Yaeger** announced the formation of **Marsh Atkinson & Brantley** in Atlanta on January 31, 2025. These seven founding partners, along with **Jeff Boyd, Ann Joiner** and **Ben Yancey**, are former partners at **Swift Currie McGhee & Hiers**. Joining them are eight attorneys practicing as counsel and 11 as associates. The majority of the new firm's partners have worked together for decades in several different practice areas. For more than 40 years, Marsh has focused on defending automobile, electrical and heavy equipment product manufacturers and individuals in catastrophic injury, product liability, premises liability, professional malpractice, and general liability cases. Since 1991, Atkinson has defended tort claims, product liability, insurance coverage, bad faith, construction litigation, business disputes, and intellectual property. Brantley handles a broad range of disputes for clients including international auto manufacturers, Fortune 500 retailers, national insurance providers, preeminent consumer and commercial product manufacturers, national restaurant and hospitality companies, and trucking

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and logistics services companies. Angersola defends clients in a variety of disputes, with an emphasis on product liability, personal injury, and commercial litigation. Clayton defends clients in litigation related to catastrophic personal injury and wrongful death, insurance coverage and bad faith claims, professional liability, appeals, and commercial disputes Webber defends some of the world's largest heavy equipment manufacturers, lift truck manufacturers, automobile manufacturers, automotive parts suppliers, power management companies, and one of the nation's largest pharmaceutical companies in cases including product liability, premises liability, professional malpractice, environmental liability, automobile/trucking litigation, and mass torts. Yaeger focuses on tort claims, construction, trucking and transportation, premises, and catastrophic injury and wrongful death matters. Boyd practices in the areas of catastrophic injury and wrongful death, construction law, premises liability, product liability, and trucking and transportation litigation. Joiner represents clients in the transportation, retail, manufacturing, and food, grocery, and beverage industries in a range of areas, including automobile, trucking, product liability, and premises liability. Yancey specializes in the defense of complex product liability, premises liability, and personal injury claims, representing a diverse range of clients from Fortune 500 companies to small businesses, motor carriers, retailers, restaurants, and insurers.

CASE WINS

Jason Darneille of **Gower Wooten & Darneille's** Atlanta office has recorded several recent successes. In the first case, he obtained a defense verdict in DeKalb County in a commercial vehicle case in which Plaintiff underwent a cervical fusion. At trial, Plaintiff's counsel asked for between $1 and $10 million and the jury returned a defense verdict. Plaintiff alleged that Defendants' tractor trailer improperly merged into the lane she was merging into and caused the accident. Defendant contended he was properly merging and the plaintiff ran into him. Defendant was cited but plead nolo contender so there was no mention of the citation. The police officer testified at trial and blamed the defendant but the officer's credibility was diminished for failing to talk to any witnesses. As a result of the accident, Plaintiff claimed she injured her neck and underwent a cervical fusion. Plaintiff's specials were approximately $175,000. Plaintiff had no prior issues with her neck but had a long history of back pain. Plaintiff lied about ever having been to an orthopedic doctor prior to the accident even though she had seen one for her back three days prior to the accident. The jury determined that the accident was 50/50 and returned a defense verdict.

In the second case, Darneille obtained a favorable verdict in Clayton County in an admitted liability rear-end accident. At trial, Plaintiff's counsel asked for approximately $2.2 million and the jury returned a verdict of $50,000. The last offer prior to trial was $50,000, the amount of the policy limits. Plaintiff claimed severe lower back injuries as result of the accident. Plaintiff was recommended injections but did not have any performed due to her fear of needles. Plaintiff treated at Barbour Orthopaedic and had treated sporadically for five years. Plaintiff claimed that the accident had ruined her life and called several before and after wit-

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nesses, including her 25-year-old son who was in a wheelchair due to complications from cancer. The jury focused on the fact that Plaintiff wore heels every day and told Darneille she could not have been experiencing back pain and worn those shoes.

In the last case, Darneille obtained a favorable verdict in Habersham County in an admitted liability rear-end accident. At trial, Plaintiff's counsel asked for $250,000 and defense counsel asked for an award of $25,000. The jury deliberated for less than 20 minutes and returned a verdict of $5,000. Plaintiff claimed to have suffered a shoulder injury as a result of the accident. Plaintiff had approximately $21,000 in past specials and a surgery estimate of $80,000 for a shoulder surgery. The shoulder estimate was two-years-old at the time of trial and the treating doctor testified that he would need to see the plaintiff again to determine whether the surgery was needed. At trial, Plaintiff claimed the surgery was needed and he could not lift his arm over his head. Defense counsel had obtained social media posts of Plaintiff riding motorcycles and going skydiving numerous times. The jury did not believe Plaintiff was injured and returned the small verdict.

Carrie L. Christie, Courtney M. Norton, and **Jeffrey R. Scheese** of **Rutherford & Christie's** Atlanta office recently obtained summary judgment in Walton County Superior Court in a dog-related injury case where Defendants' dog jumped up on a package delivery driver on the Defendants' porch. The package delivery driver had to brace herself and hurt her knee in the process. Plaintiff argued that the dog was vicious and was known to be dangerous (having previously "nipped" at the ear of Defendants' friend) and therefore the Defendants were negligent for her injury and liable under a premises liability argument. Defendants argued that the dog was neither vicious nor dangerous under O.C.G.A. 51-2-7 and that Defendants had no prior knowledge of their dog's propensity to jump up to greet strangers. Therefore, they could not be held liable for negligence or premises liability. The defense moved for summary judgment arguing that without prior notice of their dog's propensity to cause the type of injury that Plaintiff alleged, that Defendants could not be liable. The court agreed, holding that "the evidence presented by Plaintiff fails to establish a genuine issue of material fact regarding the dog's alleged vicious propensity, Defendants' knowledge of such tendencies, or the existence of a hazardous condition. Accordingly, Defendants are entitled to judgment as a matter of law."

Partner **Christian G. Henry**, along with associate **S. Tyler Normandia** of **Hall Booth Smith's** Athens office, secured summary judgment on a premises liability case in the State Court of Baldwin County. Plaintiff alleged that she tripped and fell on a small, rounded section of asphalt—a rainwater curb—separating a driveway and sidewalk near the entrance to a private school's administration building. The court found that the alleged hazard over which Plaintiff tripped and fell was open and obvious as a matter of law. Although Plaintiff's expert opined that features of the curb violated the Life Safety Code, the court found that this expert opinion did not present a factual issue since the condition was open and obvious.

Christine Mast and **Bryan Grantham**, partners at **Hawkins Parnell & Young** in Atlanta, obtained summary judgment for their attorney-client in a legal malpractice case arising from a high-profile federal criminal trial. The litigation involved allegations of malpractice against a Georgia attorney stemming from the representation of a client convicted of federal crimes in the underlying case. Following an unsuccessful appeal, the client filed a lawsuit claiming that the attorney mishandled the trial. In securing summary judgment, Mast and Grantham demonstrated that the attorney's representation was exemplary. They argued that all decisions during the trial were strategic and reflected reasonable professional judgment. The defense also established that alternative trial strategies would not have changed the outcome of the case.

Brian Williams, a partner with **Waldon Adelman Castilla McNamara & Prout** in Atlanta, secured a significant victory in a high-stakes trucking accident case. He represented a commercial truck driver and motor carrier in the Superior Court of Banks County following an October 2020 accident that resulted in significant property damage. Despite admitting fault, the defense team focused on vigorously contesting the plaintiff's claims of injury and damages. The plaintiff alleged ongoing restrictions and pain from a closed head injury and spinal injuries. However, through meticulous preparation and persuasive courtroom arguments, the defense team successfully countered these claims by presenting compelling evidence from the plaintiff's prior medical records and demonstrating inconsistencies in his post-accident behavior. After deliberating for two hours and 15 minutes, the jury returned a verdict in the amount of $18,800. This outcome represents a significant victory for the defense, considering the plaintiff's pre-trial demand exceeded $500,000, and the trucking company's insurance carrier had offered to settle the case for $90,000. ◆

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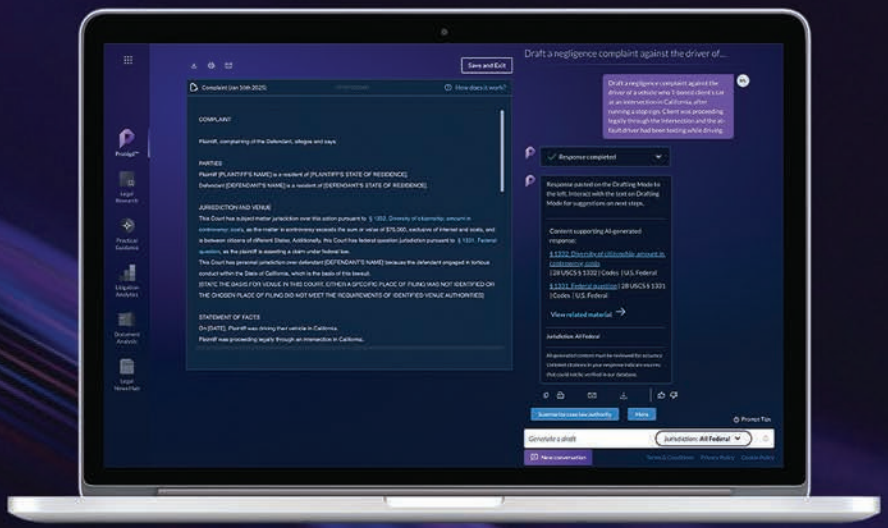

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Welcome, New GDLA Members!

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

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Brittne Ballenger-Jackson
Swift Currie McGhee & Hiers, Atlanta

Evans Blessy
Groth Makarenko Kaiser & Eidex, Duluth

Cynthia Boakye-Yiadom
Groth Makarenko Kaiser & Eidex, Duluth

Jeff Boyd
Marsh Atkinson & Brantley, Atlanta

Joshua Walter Brennan
Waldon Adelman Castilla McNamara & Prout, Atlanta

Ryan Brightman
Waldon Adelman Castilla McNamara & Prout, Atlanta

Kate Daly Cobb
Oliver Maner, Savannah

Caitlin Colley
Moore Ingram Johnson & Steele, Marietta

Nicole Tiffani Corn DeLoach
Fulcher Hagler, Augusta

Samantha Feinberg
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Clayton Franklin
Fieldale Farms Corporation, Baldwin

Justin Garrett Guthrie
Hunter Maclean Exley & Dunn, Savannah

Harrison Hanks
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Sharon Hansrote
Goodman McGuffey, Atlanta

Katie Henderson
Chartwell Law, Atlanta

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Athena Henry
Groth Makarenko Kaiser & Eidex, Duluth

Marsha Herring
Law Office of Robert D. Ream, Loganville

Abriana Horton
Chartwell Law, Atlanta

Madeleine Hoss
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Kaitlyn L Isley
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Alexis Ciara Jones
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GDLA Files Amicus Supporting Cert Petition on When an Action "is Brought" Under the Pre-2022 Version of O.C.G.A. § 51-12-33(b)

GDLA filed an amicus brief in support of Defendant's Petition for Writ of Certiorari in *AU Medical Center, Inc. vs. Dale*, Ga. S. Ct. Case Number S25C0507. GDLA previously filed an amicus brief on April 4, 2024, when the case was pending in the Georgia Court of Appeals.

Defendant AU Medical was one of several defendants initially named in a medical malpractice action. By the time the case was called for trial, AU Medical was the sole remaining defendant due to the dismissal of its settling co-defendants.

AU Medical moved to apportion non-party fault to those settling co-defendants, but the trial court denied the motion because the Court of Appeals held in *Georgia CVS Pharmacy, LLC v. Carmichael*, 362 Ga. App. 59, 71 (2021) that the term "is brought" in Georgia's apportionment statute refers to party status at the time of trial and not at the commencement of the action. AU Medical obtained interlocutory review and in a fractured non-binding en banc decision, the Court of Appeals affirmed.

The question presented by AU Medical's petition is "[w]hether an action 'is brought' within the meaning of the 2005 apportionment statute, O.C.G.A. § 51-12-33(b) (2005), when the plaintiff commences the action or, alternatively, when the action proceeds to trial."

GDLA filed an amicus brief in support of AU Medical's petition arguing that the question presented raises an issue of gravity and public importance. GDLA members, in response to a blast email, identified over a dozen pending matters in active litigation involving this exact issue. There are likely dozens more, if not hundreds. GDLA also pointed out that the Georgia Trial Lawyers Association, in an amicus brief authored by Plaintiff-Respondent's counsel in a separate case, agrees that AU Medical's petition raises an issue of gravity and public importance. GDLA's amicus brief then discusses the flaws in the Court of Appeals' perfunctory linguistic analysis.

GDLA thanks member Matthew D. Friedlander of Webb Daniel Friedlander in Atlanta, who authored this brief, as well as the Court of Appeals brief. The GDLA Amicus Committee is led by Co-Chairs Elissa B. Haynes of Freeman Mathis & Gary in Atlanta and Philip Thompson of Ellis Painter in Savannah. Vice-Chair Patrick Silloway of Balch & Bingham, Atlanta, did not participate in this amicus briefing due to a conflict.

The brief is posted under Amicus Policy & Briefs in the members' only area of our website. ◆

President's Message

Continued from page 5

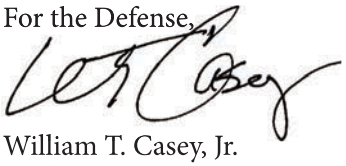
clude all the tort reform measures plus rules on litigation funding companies. Senate Bill 68 passed the Senate on February 21, largely along party lines, and is predicted to pass the House. GDLA member and PAC President Jake Daly has been keeping us all updated on the bills' progress via GDLA eblast.

GDLA submitted proposed legislation designed to address our members' concerns about onerous trial calendars. At press time, we were awaiting word on the likelihood of its being introduced, as well as a final outcome for the tort reform package (SB 68 and SB 69).

We encourage GDLA members individually and your firms collectively to donate to our PAC and help us continue our work at the General Assembly. Checks can be made payable to the GDLA Action Fund, Inc. and mailed to the GDLA P.O. Box.

While many associations lost momentum and membership during COVID, we have remained strong and even grown. The examples of leadership and innovation recalled above continue to influence our success and reach as the voice of the civil defense bar. Your leadership is working every day to make you proud of the work we all do on this side of the "v." We welcome your feedback or ideas and thank you for your support. We are stronger together.

For the Defense,



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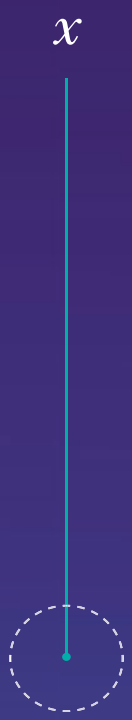

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From *Six Flags* to *Carmichael*: The Wild Ride of Negligent Security Cases in Georgia

By Joseph Kaiser
Groth Makarenko Kaiser & Eidex, Atlanta

Negligent security cases have become more common in recent years in Georgia. These cases are sought out by Plaintiffs' attorneys because of their incredible potential value relative to other personal injury cases and the obstacles that developments in case law have presented to Defendants and their quest to obtain Summary Judgment.

Georgia law requires a landowner to exercise ordinary care in keeping the premises and approaches safe."[1] However, as recently as cases in 2020, the Court has held that "there is no duty to control the conduct of third persons to prevent them from causing physical harm to others."[2] It is also well settled that while a landowner or business owner must exercise ordinary care to protect an invitee from unreasonable risks *of which he has knowledge*, the landowner or business owner is not an insurer of an invitee's safety.[3]

The purpose of this article is to show the path the case law in Georgia has taken and provide an understanding of how we got here but also to illustrate what may possibly lie ahead including an analysis of the applicability of the Restatement (Second) of Torts § 324A, which outlines liability for harm caused by third-party criminal acts, and the voluntary undertaking doctrine, which determines the scope of duty for property owners who undertake a duty to guard a third party's safety.

In Georgia, the legal standard for negligent security has evolved dramatically over the last decade, beginning with *Six Flags Over Georgia II, L.P. v. Martin* which set

into motion the shift in both duties of a landowner and legal burdens for a Defendant. Six Flags began an evolution and expansion to the legal duty of care owed to invitees increasing the emphasis on foreseeability and security measures in commercial areas.

Six Flags Over Georgia II, L.P. v. Martin

The Georgia Supreme Court's ruling in *Martin* was a headline grabbing jolt in the realm of negligent security. The case arose from a brutal attack on a teenager, Joshua Martin, in the parking lot outside of Six Flags Over Georgia amusement park in 2007. Martin sustained permanent brain injuries after being attacked by a group of individuals following a confrontation inside the park. His family sued Six Flags, arguing that the park failed to provide adequate security in light of prior criminal activity in the area. The case was tried to a jury in 2013 in Cobb State Court.

At trial, one of the assailants (who was an employee of Six Flags at the time) testified that he had stored a pair of brass knuckles in a flower bed at Six Flags that day and gave them to a fellow gang member who used them in the attack. There was also testimony that the assailants intended to attack another person but decided to attack Martin instead. The jury awarded $35 million and apportioned fault 92 percent to Six Flags and eight percent to the assailants.

Six Flags appealed the verdict arguing that that the jury's verdict must be reversed because the attack on Martin occurred outside of its "premises and approaches" as defined in O.C.G.A. § 51-3-1, there was insufficient evidence to show that Six Flags' negligence was the proximate cause of Martin's injuries, and the trial court erred by denying its request to include some of Martin's assailants on the verdict form for apportionment of fault.[4]

The Court of Appeals originally held "that the evidence was sufficient to support the jury's verdict, but we nevertheless reverse the verdict and remand the case for a new trial because the trial court erred in denying Six Flags' apportionment request."[5] Notably the Court held that a reasonable jury could have found that the Cobb Transit bus stop was an approach to Six Flags' premises within the meaning of O.C.G.A. § 51-3-1.[6]

The Court held that Six Flags had a duty to protect Martin because the assault was foreseeable

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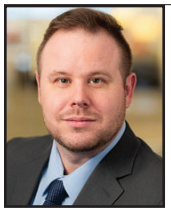

Automobile and Bad Faith Case Law Update

By Samuel M. Lyon
Cozen O'Connor

WHETHER A CITATION ALONE CONSTITUTES "BAD FAITH" UNDER O.C.G.A. § 13-6-11 HANGS IN BALANCE

***McKnight v. Love*, 369 Ga. App. 812 (2023) (S24G0371)**

O.C.G.A. § 13-6-11 allows for the recovery of litigation expenses where, "the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense."[1] Recent cases associated with this code section, specifically the "bad faith" portion, indicate that there are potentially monumental implications for bad faith damages in the context of routine automobile accident cases. This is seen most fundamentally in *McKnight v. Love*, specifically relative to whether the use of a cell phone at the time of an accident constitutes "bad faith."[2]

McKnight stems from a routine rear-end collision, wherein, on November 13, 2019, Anthony Love struck John McKnight from behind.[3] McKnight and Love were traveling on Interstate 20 in DeKalb County, Georgia.[4] The facts show that McKnight stopped his vehicle in response to slowing traffic ahead; Love did not stop in time and caused the collision.[5] In addition to the property damages, McKnight suffered back and knee injuries, requiring a hospital visit and subsequent medical care.[6] Love was cited for following too closely—he pled guilty and paid the fine associated with the citation.[7]

Litigation ensued. During discovery, Love testified that he was not using his phone at the time of the accident.[8] However, upon receipt of his cell phone records, it was discovered that in the 20 minutes prior to the collision, Love had made and received numerous calls on his cell phone.[9] Love moved to strike evidence of these records, but the motion was denied.[10] Love also filed a Motion for Summary Judgment on numerous grounds, including the issues of punitive damages, stubborn litigiousness, and bad faith.[11] While the court granted Love's motions relative to punitive damages and stubborn litigiousness, it denied his motion on whether the presence of a citation alone constituted bad faith.[12] Both Love and McKnight appealed.

On appeal, the Georgia Court of Appeals sided with the trial court on all findings. In so doing, the court stated that there was no evidence supporting a finding of "clear and convincing evidence" that would implicate punitive damages.[13] Such evidence would have been found from a pattern of dangerous driving, such as intoxication or excessive speeding.[14] The Court was not willing to say that using a cell phone while driving constitutes evidence that is "clear and convincing." Nor would it say that Love's "entire want of care and indifference to the consequences" implicates punitive damages.[15] Similarly, the Court was not willing to state that the admission as to the issue of cell phone usage and continued defense of the matter despite that admission, rose to the level of "stubborn litigiousness."[16] As the Court aptly put it, the defense of the matter hinges on whether that use caused the injuries, creating a bona fide controversy that negates Plaintiff's ability to obtain expenses on the basis of stubborn litigiousness.[17] Despite these two holdings, the Court of Appeals held that the mere presence of a citation itself created a jury question under O.C.G.A. § 13-6-11.[18] As they stated, "indicative of whether a party acts in good or bad faith in a given transaction is 'his abiding by or failing to comply with a public law made for the benefit of the opposite party, or enacted for the protection of the latter's legal rights.'"[19] A "public law," in the context of the ruling, included Love's citation for following too closely.[20]

On May 16, 2024, GDLA filed an amicus brief in the case after the Georgia Supreme Court granted certiorari on the following issue: "Is evidence of traffic law violations by a party sufficient to create a jury question as to whether that party acted in bad faith for purposes of authorizing an award of the expenses of litigation under O.C.G.A. § 13-6-11?" GDLA explained that "bad faith" under O.C.G.A. § 13-6-11 must require evidence showing the intentional disregard of the known rights of another. A traffic citation is not even conclusive of negligence, let alone bad faith. Further, the majority of traffic offenses are "strict liability" offenses in which no mens rea or guilty knowledge need be shown.

On August 21, 2024, the Supreme Court of Georgia heard oral argument on whether the Georgia Court of Appeals "got it right."[21]

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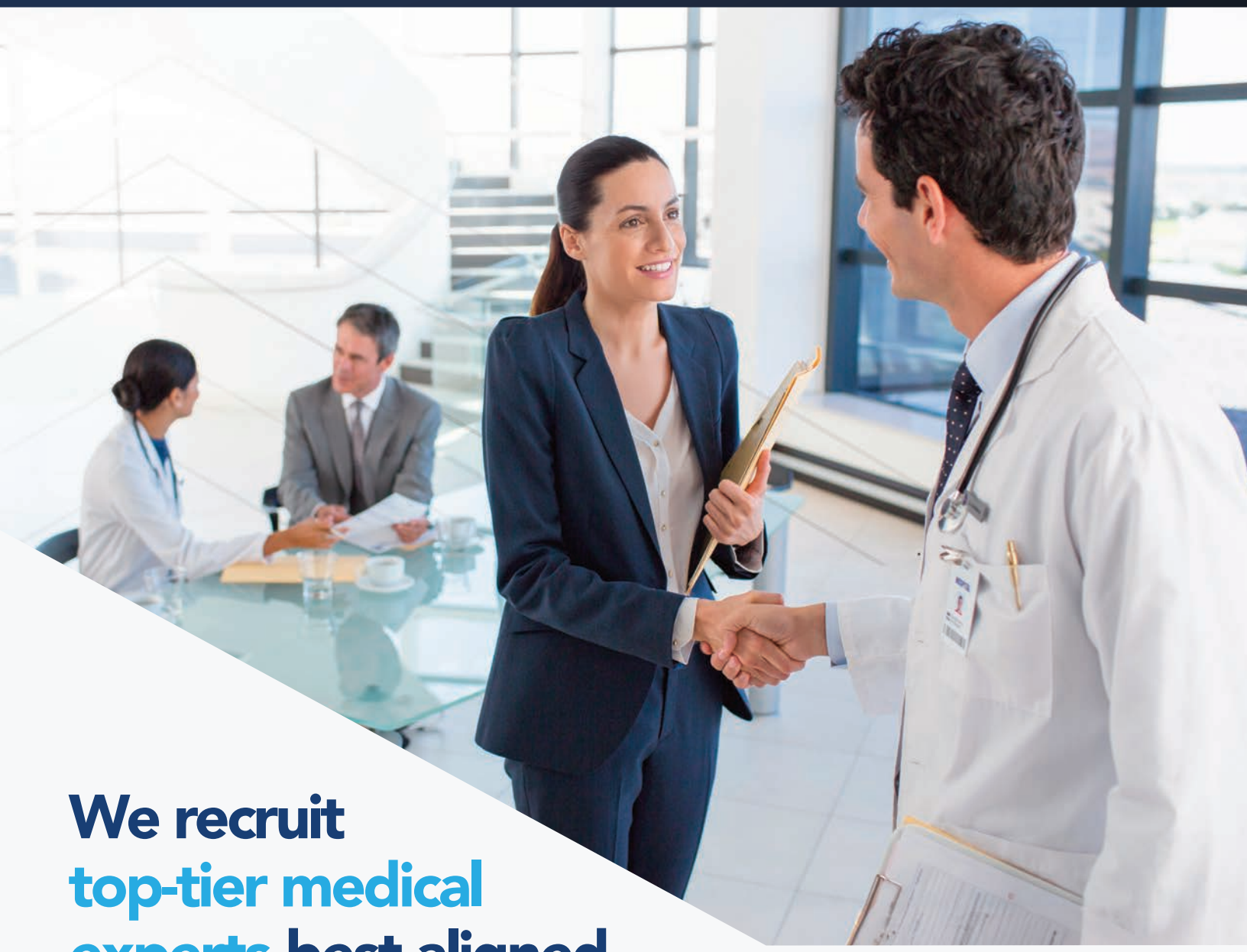

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Premises Case Law Update:
Defense of Dog Bites in a Leash Law County

By G. Lee Welborn
Downey & Cleveland, Marietta

There are certain fact patterns in premises liability cases that make the outcome seem like a foregone conclusion. When it comes to dog bite cases, defense lawyers would prefer not to have facts that involve a pit bull, an elderly lady, or off-leash issues. Is there any hope of successfully defending the dog's owner under those facts?

According to the Court of Appeals' October 16, 2024, opinion in *Harris and Martin v. Martin*, A24A0758, there is more than hope. There is no liability as a matter of law if that is all the plaintiff proves.

Every time plaintiff Marilyn Martin walked by the defendants' Fulton County home, their pit bull barked and growled at her. According to her neighbor, the dog would routinely jump against the chain link fence "like a predator on prey" in an "attempt to get at the adults or children." The neighbor had previously called 911 to report the dog's behavior and even sat on his porch holding a gun in case it ever got out.

The defendant who owned the house had not lived there for years. The co-defendant who owned the dog was traveling out of state. A contractor hired to remodel the kitchen in their absence left the front door unlocked. The dog saw the plaintiff through the glass door as she was walking by, pushed the door handle down and ran outside without a leash. The plaintiff's injuries resulting from the encounter with the dog required hospital treatment and caused permanent scarring.

The plaintiff filed suit in Fulton County, alleging that defendants

violated O.C.G.A. § 51-2-7 which states, "A person who owns or keeps a vicious or dangerous animal … who, by careless management or by allowing the animal to go at liberty, causes injury to another person … may be liable in damages to the person so injured. In proving vicious propensity, it shall be sufficient to show that the animal was required to be … on a leash by an ordinance of a city (or) county … and that said animal was at the time of the occurrence not at heel or on a leash." After the trial court denied defendants' motion for summary judgment, the case went to trial. The jury awarded the plaintiff $66,000. Defendants' motion for JNOV and new trial was denied. The court then awarded attorney's fees to the plaintiff because the verdict exceeded the plaintiff's offer of settlement made pursuant to O.C.G.A. § 9-11-68.

On appeal, the defendants argued that the trial court erred in denying their motions for directed verdict and JNOV because there was no evidence the defendants had prior notice of the dog's vicious or dangerous propensities. None of the witnesses on either side knew of any previous bites or attacks. The defendants testified the dog was nice. The neighbor who was so afraid of the dog admitted he had never spoken to the dog's owners. While the defendants did not contest the fact that the dog was off property without a leash when the plaintiff was injured, they did not know it was happening because both were out of town.

The Court of Appeals reversed the trial court's denial of defendants' motions for directed verdict and JNOV. Georgia law does not presume dogs are vicious or dangerous. Regardless of breed, dogs are presumed to be harmless. For that reason, a plaintiff must provide actual proof of the dog's dangerous nature and his owner's knowledge of that nature. *Steagald v. Eason*, 300 Ga. 717, 719 (2017). Evidence that a dog barked, growled and chased while behind a fence is insufficient to show that the owner knew the dog had a propensity to bite. *Wade v. American Nat. Ins. Co.*, 246 Ga. App. 458 (1) (2000). A dog's barking and growling, without more, will not put an owner on notice of the dog's propensity to attack or bite people. *Custer v. Coward*, 293 Ga. App. 316(1) (2008); *Wade*, 246 Ga. App. at 460 (1).

The record in *Martin v. Harris* and *Martin* contained no evidence, either direct or circumstantial, showing that the defendants knew of any vicious propensity. For that reason, the Court of Appeals found that the trial court erred as a matter of law.

Footnote six of the opinion, which addressed the leash law violation, was important not only to the instant case but also for similar cases in the future. A leash law violation is only significant if the dog's owner was aware of it at the time of

the injury. Where a plaintiff proves the existence of a leash law and proves the dog was unrestrained at the time of the incident, he still must prove scienter. He can do so in either of two ways: (1) by showing the owner had knowledge of the dog's vicious propensity, or (2) by showing the owner knew the dog was unrestrained at the time of injury. *S&S Towing & Recovery v. Charnota*, 309 Ga. 117 (2) (2020). Since the defendants were out of town when the attack occurred, there was no evidence they knew the dog was unrestrained "at the time of injury." Because the plaintiff failed to prove scienter under either of the two methods, the trial court should have granted the defendants' motion for directed verdict and motion for JNOV.

The Court of Appeals did not address its recent decision in *Espinoza v. Morel*, 367 Ga. App. 184 (2023), but it is important for defense counsel to know about it. "I was out of town" is not the silver bullet defense to every dog bite case. Similar to the *Martin v. Harris* and *Martin* case, *Espinoza* involved a dog bite by a dog whose owners were out of town at the time of the incident. According to Espinoza, the second sentence of O.C.G.A. § 51-2-7 did not create an "irrebuttable statutory presumption that an owner of a dog is aware of the dog's vicious propensity" in every instance where an owner is in violation of a government ordinance requiring their animal to be at heel or on a leash." *Id*. Rather, a plaintiff seeking to recover under the second sentence of O.C.G.A. § 51-2-7 must prove both that the owner violated an applicable ordinance requiring the animal to be at heel or on a leash *and* that "the owner had knowledge of the vicious … propensity of the animal." *Id*.

The plaintiff's attorney in *Espinoza* overcame the defense that the defendants were out of town by establishing that the defendants violated a County animal control ordinance requiring the proper tethering of animals. The ordinance required dog owners to ensure that when their dogs were unsupervised and not on a leash, they are securely and humanely enclosed within a house, building, fence, pen or other enclosure. The defendants in *Espinoza* knew they had unlawfully left their dog in an unfenced back yard on a single-line tether when they went out of town, which met the requirement for proving scienter. As a result, the dog was deemed to have a vicious propensity under the second sentence of O.C.G.A. § 51-2-7.

Leash law violations would seem to guarantee plaintiffs success in defeating dog owners' motions for summary judgment. After *Martin v. Harris* and *Martin*, however, it is clear the inquiry doesn't end with verifying the dog was off leash in a leash law county. Knowledge of the violation by the owner is indispensable to recovery. Without knowledge of vicious propensity, and without knowledge of a leash law violation at the time of injury, the trial court should grant the dog owner's motion for summary judgment. ◆

G. Lee Welborn is a partner with Downey & Cleveland in Marietta. His primary practice areas include automobile liability, premises liability—including claims arising from trip and falls and inadequate security—construction litigation, general tort liability and insurance coverage. With more than 35 years of litigation experience, he has served as lead counsel in more than 130 civil jury trials.

Sorting Through Divergent Medical Opinions in the Life Care Plan:
A Methodical and Evidence-Based Approach

By Betsy Keesler
InQuis Global

The life care plan, as a formal, developmental document, has long been considered essential to the medical and rehabilitation process. Because a life care plan outlines provisions to meet the biopsychosocial needs of the evaluee (the subject person of the plan), it requires the input and expertise of multiple healthcare disciplines to create one comprehensive plan tailored to the evaluee's individualized needs. The recommended services and items in a life care plan must have a solid medical and healthcare foundational support. As such, the life care plan is described as a transdisciplinary practice. Naturally, varying and/or divergent opinions regarding the best course of care can arise.

To better understand why acknowledgment and management of divergent healthcare opinions is critical, it is important to establish that the life care planning profession has a peer-reviewed and accepted published resource, *Consensus and Majority Statements* (2018), developed through a Delphi process over the course of 17 years. The Delphi research methodology establishes best practices as agreed upon by experts in the field. The Consensus Statements created the foundation for, and gave rise to, the current *Standards of Practice* resource, now in its fourth edition (2022), published by the International Academy of Life Care Planners (IALCP) and the International Association of Rehabilitation Professionals (IARP). The Consensus Statements and Standards of Practice are a key part of life care planning methodology. Therefore, they provide reliable and trustworthy guidance on ways to compare multiple healthcare recommendations.

Relevant professional statements for managing divergent opinions include the following:

Consensus Statement #84
"Review of evidence-based research, review of clinical practice guidelines, medical records, medical and multidisciplinary consultation and evaluation/assessment of evaluee/family are recognized as best practice sources that provide foundation for life care plans."

Consensus Statement #65
"The life care planner shall methodically handle divergent opinions."

Consensus Statement #75
"Life care planning products and processes shall be transparent and consistent."

Standard of Practice #17
"The life care planner, as an educator, facilitates understanding of the life care planning process, the life care plan, and work product.

Practice competencies:
a. Maintains objectivity and assists others in understanding the content of the life care plan.
b. Provides information about the life care planning process to involved parties.
c. Provides follow-up consultation as appropriate and permitted to facilitate understanding and interpretation of the life care plan."

To begin fleshing out all available medical opinions, the life care planner should consider several distinct sources of information which can provide the necessary medical foundation to support recommendations for a life care plan.

A thorough review of medical records is the logical starting point for gathering relevant healthcare data, as these records represent the factual history of treatments already received. Importantly, the medical records unveil which treatments were tolerated by the evaluee and led to favorable outcomes. Essentially, too, the medical records disclose which treatments were considered or implemented but deemed not feasible to utilize or were not tolerated by the evaluee. Sometimes, the projected future healthcare needs, as recommended by the treating provider(s), will be outlined in the medical record as well. Finally, medical records serve as a critical cross-reference source when reviewing life care planning recommendations.

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All Is Not What It Seems, or When Is a Dollar a Dime?

By John E. Kocke and Pamela Hernandez
J.S. Held

Introduction

Welcome to the strange and mysterious world of medical billing. If ever there was an industry in which the charges and the payments have no correlation, the medical industry is it.

Medical Center / FY Ending 12/31/2022	
Total Patient Revenue	$4,370,603,459
Discounted	$3,954,756,548
Net Patient Revenues	$415,846,911
Percent of Charges Accepted as Payment	**10%**
Percent Discounted	**90%**

Medical billing can indeed be quite perplexing. The disparity between what is charged and what is actually paid can be staggering. The concept of "sticker price" in healthcare often doesn't reflect the final amount due, especially with the complexities of insurance networks and out-of-network charges.

This article examines those price disparities and how they evolved into the manner in which our healthcare system determines charges today. In fact, to answer the question posed by this article's title, we need look no further than the table below. But (and there's always a big but) the story doesn't end here. The table below doesn't mean that everyone pays 10 percent on the dollar. If a person ends up being treated at this or any other hospital, and that individual is "out of network" (OON), that person could face a huge co-pay, giving the hospital a windfall. Most hospitals we have researched have discounts ranging from 65 percent to 90 percent. This means that while the listed price might be high, the actual payment can be much lower, depending on various factors like insurance agreements and network status.

If someone has assets, but no insurance, that person may be faced with being hounded to the point of bankruptcy before the hospital backs off. Or–and this is the kicker–you are in-network, but you or your child may need a specialist. Let's say you require the services of a plastic surgeon to repair a facial laceration. Assuming it's after hours, a holiday or a weekend, the hospital will call whoever is on duty and that provider might not be in your network. It sounds crazy. You ask yourself: "I'm at an in-network hospital, how can the doctor be OON?" But it happens.

Consider this real-life scenario further: A plastic surgeon's bill was being negotiated after he was called out on a weekend to repair a little girl's face from a fairly significant laceration. This doctor was not in the insured's network, and not inclined to reduce his fee of $40,000. He finally relented, and reduced it 25 percent, down to $30,000, but only if he could collect it within 15 days. The girl's parents ended up accepting this but had to access a home equity loan to pay the bill.

Then there are the patients the hospital really likes to see–those injured in some type of accident where there is a third-party liability payer with significant insurance and/or assets. Here the hospital usually looks to collect a significant portion of its charges as it knows the patient can request payment from the insurance company of 100 percent of the billed amount. In this case, the amount would be 90 percent more than the hospital's usual collection.

Even when patients go to an in-network hospital, they can still face exorbitant fees if the specialist they need isn't covered by their insurance network. This can lead to significant financial strain, as seen in the case previously mentioned. Negotiating medical bills can be daunting, and it's unfortunate that families sometimes have to resort to extreme measures, like taking out loans, to cover these unexpected costs. It's a stark reminder of the importance of understanding one's insurance coverage and the potential pitfalls of out-of-network care.

You might ask yourself, "How did we get here?" How is it one hospital charges X for a medical procedure, and another hospital charges 5X or maybe even 10X for the same thing. Surely the hospital charging X isn't charging below their cost. And they aren't. To understand how, we need to take a short journey back to the beginning and a little beyond to see how our medical industry evolved from the horse and buggy doctor paid with chickens, to the $40,000 hospital visit to make sure a little girl isn't scarred for life.

The Evolution of the Health Insurance Industry

The American health insurance system was established and became publicly available in the United States during the Civil War. The plans were accident based, provid-

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Business Valuations Leading to Inflated Damages Figures

By Michael Shryock
Point to Point Forensics

Forensic accountants are frequently retained in cases wherein a plaintiff has been injured or has claimed some manner of breach of contract ("a loss event"), and he has asserted the reduction of his business' value as a measure of damages. The scenario usually goes something like this: the plaintiff's financial expert is provided with financial statements and told to evaluate the fair market value of the plaintiff's business as of a specific date prior to the loss event. After arming herself with this first value in the equation, the plaintiff's expert then either performs a second valuation or just says she understands the business is now closed or essentially worthless. The difference between the first value and the second (which might be zero dollars) then results in the claimed damages figure. It might seem risky for the plaintiff to ask his expert to make this aggressive type of calculation, especially given the complexity involved in the calculations contained within a business valuation. Why should the plaintiff's expert not just stick to a lost profits calculation based on a projection for the business over a specific period during which the plaintiff was impacted, which would be more cut and dry with fewer variables? Why open that expert up to dozens of potential landmine questions on the witness stand about the discretionary rate and the multiple selections she had to make to calculate the value? Quite often, the answer is the plaintiff does not want his expert to know essentially anything about the events leading up to and/or following the loss event.

Rather than having to justify the recent downturn in business before

the loss event or the fact that the plaintiff was never really active in the business to begin with, the expert is kept blind to the details and events that occurred after the date of the valuation, as well as the extent to which the plaintiff's business was impacted by the loss event. The plaintiff's expert simply reviews the financials and gives her "fair and independent" valuation figure. And, quite often, the plaintiff's expert further insulates herself from attacks by making her business valuation "conservative" through low revenue growth projections and/or selections of high discount rates, etc. As such, the defendant's reputable financial expert might reach a similar figure. For example, the plaintiff's expert says the business was worth $3 million before the loss event, and the defendant's expert says $2.6 million. Meanwhile, both sides know the business is now shut down, so why can't they just meet in the middle at $2.8 million? Is there anything wrong with that? Quite often there is, and the primary problem does not reside within the minutia of the business valuation calculation, but rather in the idea that a business valuation is an appropriate measure of damages to begin with. Sometimes, a plaintiff wants to get out of a potentially unsuccessful or overly time-consuming business before the loss event. Other times, the business valuation completely ignores the pivot that the plaintiff made to another field or business, or the proceeds that he received for the business. In other instances, the plaintiff is still in business, but less successful, and the plaintiff wants to blame the diminution in value on the defendant, when in fact it has little or nothing to do with the defendant's actions. All these scenarios would indicate a business valuation measure done prior to the loss event could potentially grossly overstate the plaintiff's damages figure.

All that being said, there are times when a business valuation can be an appropriate measure of damages. For instance, if a business owner, who was intimately involved in the operations, passes away, or if some bad act is done to severely harm the business' reputation and finances, then an accurate business valuation might be an appropriate component of damages. And there are some instances where it is debatable–*i.e.*, it is unclear what occurred to the business after the loss event and why. However, in many cases, the business valuation approach to damages is just a convenient way to avoid uncomfortable facts about the business, which, if considered, would indicate that the plaintiff's business' problems had little to do with the defendant's actions. In the sections that follow, we will examine three actual case examples (with some details altered) to illustrate some of these issues:

Case Study 1:
Construction Company Shuts Down Due to Non-Payment

In this case, the plaintiff fell into a change order dispute with the general contractor (GC) on a project.

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Michael Shryock founded Point to Point Forensics in 2022, drawing from his more than 20 years of forensic accounting experience and his exposure to a wide range of claim types, from sole proprietors and homeowners up to Fortune 500 companies and major industrial construction projects.

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

De-Mystifying Concussion

By Robert Allen, Au.D.
The Concussion Center

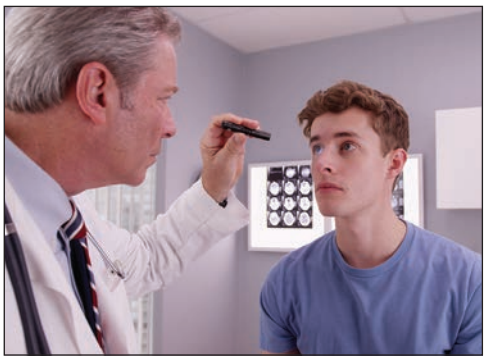
A concussion, as defined by the American Congress of Rehabilitative Medicine (ACoRM), is a traumatic brain injury characterized by a temporary disruption of normal brain function. This disruption can manifest as alterations in mental state or consciousness. Symptoms often arise immediately following the injury but may also surface within minutes or hours. While they typically resolve within days, prolonged symptoms can occur. Concussions can be caused by direct blows to the head or by rapid acceleration and deceleration of the brain due to impacts to the head, neck, or body.

Recent research has better defined the biomechanical forces necessary for concussions in adults. We're referring to G-forces. The typical G-force range for concussions in adults is approximately 70 to 120 Gs, with an average of 95 Gs being highly likely to cause a concussion. For context, whiplash occurs at 4.5 Gs, a sneeze at 2.9 Gs, and a punch from a heavyweight boxer around 58 Gs. These numbers are lower for children, with the average force for probable concussion between 30 and 60 Gs for 11-year-olds.

Pathophysiology

Understanding the pathophysiological mechanisms underlying concussion is essential for comprehending its symptoms, diagnosis, and management. At the time of injury, three primary events occur within the brain:

1. **Neuronal depolarization:** The brain's neurons experience a surge of electrical activity, using a significant amount of the energy resources.



2. **Cerebral hypoperfusion:** There is a temporary reduction of blood flow, potentially as a protective measure against hemorrhage. However, this decreased blood flow can limit the delivery of essential nutrients.
3. **Glutamate-induced excitotoxicity:** The release of glutamate, a neurotransmitter, causes calcium to enter the brain's mitochondria, leading to cellular damage. This damage to the mitochondria reduces the production of ATP, the energy source for the brain.

Following the initial injury, the brain enters a state of reduced energy production due to mitochondrial dysfunction. The symptoms patients experience are a result of these functional changes in the brain, not structural damage.

Clinical Concussion Phenotypes

There are six key areas that must be evaluated as part of a concussion diagnosis:

1. Cognitive impairment/fatigue (including sleep problems)
2. Ocular motor abnormalities
3. Vestibular dysfunction
4. Post-traumatic headaches
5. Cervical involvement
6. Anxiety/mood/behavioral changes

These symptoms are essential for diagnosing a concussion as they are defining clinical features of the condition. A comprehensive understanding of a patient's symptom presentation is crucial for effective evaluation, rehabilitation, and recovery. A concussion is simply a label for a constellation of symptoms that occur after an injury. Without defined clinical pathways, a concussion diagnosis does little more than categorize symptoms.

Diagnosis

Recent advancements in research have significantly improved concussion diagnosis and management. A better understanding of the condition's pathophysiology has led to the development of rigorous diagnostic criteria and evidence-based management strategies. The ACoRM has established diagnostic guidelines for concussion, outlining six key criteria:

1. Plausible mechanism of injury (e.g., direct blow to the head or rapid acceleration/deceleration)
2. Clinical signs of acute physiological disruption (e.g., loss of consciousness, altered mental status, amnesia, neurological signs)
3. Acute new or worsening symptoms (e.g., altered mental status, physical symptoms, cognitive symptoms, emotional symptoms)
4. Supporting clinical examination and laboratory findings (e.g., cognitive deficits, balance impairment, ocular motor abnormalities, elevated biomarkers)
5. Normal or abnormal neuroimaging (note that normal neuro-imaging is common in mild traumatic brain injury)
6. Symptoms not better explained by other factors (e.g., pre-existing medical conditions, drug or alcohol use)

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GDLA Co-Sponsors Gate City/ GABWA Judicial Reception

In an ongoing effort to promote diversity within our association and the bar generally, GDLA was again pleased to be among the bar associations co-sponsoring the Annual Judicial Reception of the Gate City Bar Association and Georgia Association of Black Women Attorneys (GABWA). The event was held on August 15, 2024, at King & Spalding's offices in Atlanta. GDLA President Bill Casey brought greetings from GDLA as each sponsoring association was given the opportunity to speak briefly. ◆


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1. President Bill Casey delivered greetings from GDLA. 2. This annual reception brings together a variety of voluntary bar associations, including our colleagues on the other side of the "v." Pictured with GTLA Treasurer Natalie Woodward are (l-r) Scott Masterson, President Bill Casey, and Frank Bedinger. 3. President Bill Casey and Brookhaven Municipal Court Chief Judge Bryan Ramos. 4. GDLA Executive Director Jennifer Davis Ward, Fulton Superior Court Judge Paige Reese Whitaker, and Supreme Court Justice Carla Wong McMillian. 5. President Bill Casey with DeKalb State Court Judge Ana Maria Martinez, and Fulton Superior Court Judge Rachel Krause.

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

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Trial & Mediation Academy Continues to Train Leading Litigators

The Melburne D. "Mac" McLendon Trial & Mediation Academy was again held at Callaway Gardens Lodge & Spa from August 21-24, 2024.

The conference kicked off on Wednesday evening with a networking reception and dinner featuring a keynote address on professionalism by Fulton State Court Judge Susan E. Edlein.

Students were guided through the two-and-a-half day learning experience by a distinguished faculty: Chair Anne D. Gower of Gower Wooten & Darneille, Atlanta; Vice-chair Brannon J. Arnold of Weinberg Wheeler Hudgins Gunn & Dial, Atlanta; Douglas K. Burrell, Chartwell Law, Atlanta; GDLA Pas President William T. "Bill" Casey, Jr., Swift Currie McGhee & Hiers, Atlanta; Carrie L. Christie, Rutherford & Christie, Atlanta; Sean Gill, Gower Wooten & Darneille, Atlanta GDLA Past President Matthew G. Moffett of Gray Rust St. Amand Moffett & Brieske, Atlanta; Dallas Roper, James Bates Brannan & Groover, Macon; and Richard H. "Dick" Willis of Williams Mullen, Columbia, S.C.

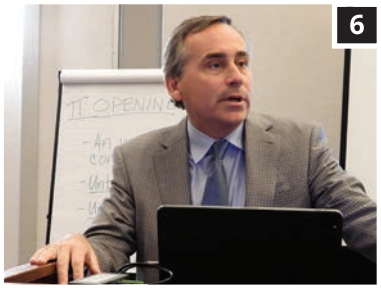
GDLA Platinum Sponsors BAY Mediation & Arbitration and Henning Mediation & Arbitration teamed up via their mediator representatives, Sarah Stottlemyer and Nick Moraitakis, respectively, to impart best practices for settling a case before trial. The duo conducted a mock mediation of the case at hand, separating the classroom into plaintiff's and defense counsel to help make decisions as the negotiations progressed.

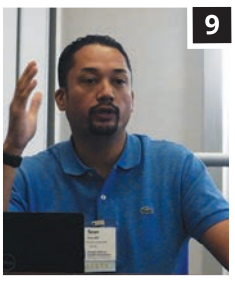
Trial & Mediation Academy employs a modified mock trial format to teach litigation skills. In advance of the program, students are given a mock case to prepare as if going to trial. Following faculty instruction and demonstrations, students disperse into breakout groups to work on their skills from opening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

For the first time, the faculty presented a "Best of the Best Award" to eight standout participants. See photo below.

Save the date for the next Trial & Mediation Academy set for August 20-23, 2025, again at Callaway. The Academy is an exceptional learning opportunity not only for those early in their careers, but also for experienced attorneys who want to brush up on their courtroom skills. Students could repeat the program and 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. ◆

Congratulations to the inaugural GDLA Trial & Mediation Academy Best of the Best Award Recipients! *Pictured left to right are: Candace Rodgers, McAngus Goudelock & Courie, Atlanta; Cayton Chrisman, Nelson Mullins, Atlanta; Josh Snell, James Bates Brannan Groover, Macon; Ainsley Fagan, Gower Wooten & Darneille, Atlanta; Madison Voyles, Lueder Larkin & Hunter, Savannah; Sim Mithwani, Gray Rust St. Amand Moffett & Brieske, Atlanta; Garret Drogosch, Hawkins Parnell & Young, Atlanta; and Jeff Scheese, Rutherford & Christie, Atlanta.*





1. Faculty and students of the 2025 Academy. 2. Regina Taylor and Judge Susan Edlein. 3. Academy Chair Anne Gower, Sean Hickey, faculty member Carrie Christie, Chris Willis, Josh Snell, faculty member Dallas Roper, and Academy Vice-Chair Brannon Arnold. 4. Anelise Codrington, Academy Chair Anne Gower, and faculty member Dick Willis. Anelise won a Buccee's prize pack after guessing what the real case settled for at mediation. 5. BAY's Sarah Stottlemyer and Henning's Nick Moraitakis. 6. Faculty member and GDLA Past President Matt Moffett. 7. Faculty member and GDLA President Bill Casey. 8. Faculty member Douglas Burrell. 9. Faculty member Sean Gill.

CLE Explores the "No Fear" Cross Method

On Thursday, February 6, immediately preceding the 20th Judicial Reception at the State Bar, GDLA members gathered for a CLE seminar, The "No Fear" Cross Method–Witness Prep and Control, presented by Richard H. "Dick" Willis (photo right). We had a record CLE turnout.

He is a partner at Williams Mullen in Columbia, S.C., where he is an adjunct professor at the University of South Carolina's Rice School of Law. He is a long-time faculty member of GDLA's Trial & Mediation Academy.

Willis discussed two trial skills on which every defense lawyer can improve: witness preparation and cross examination. He said both are process methods that can be learned. He explained that knowing your witness is well prepared for a difficult cross examination, and that you can control your crosses to achieve your objectives, are sources of confidence in court.

With the help of some good (and not so good) movie cross demonstrations, Willis reviewed these methods as attendees watched their effectiveness. ◆

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GDLA Honors the Bench at 20th Judicial Reception

GDLA hosted its 20th Judicial Reception at State Bar Headquarters on February 6, 2025. This annual (pandemic years aside) gathering honors Atlanta and surrounding area judges from the appellate courts, state and superior courts, State Board of Workers' Compensation, as well as the federal bench. Almost 200 judges and members enjoyed an evening of networking outside the courtroom. ◆

1. DeKalb Superior Court Chief Judge Shondeana Morris, President Bill Casey, and Douglas Superior Court Chief Judge Cynthia Adams. 2. Alycen Moss, Fulton Superior Court Judge Rachel Krause, and Karen St. Amand. 3. Nate Greene, Karl Broder, and Court of Appeals Judge Elizabeth Gobeil. 4. Court of Appeals Judge Anne Elizabeth Barnes and Anne Gower. 5. Henry State Court Judge Ralph Bailey and Andy Treese. 6. Treasurer Marty Levinson, Court of Appeals Judge Jeff Davis, and Charles Beans. 7. Elliott Ream and Rick Baker. 8. Brigid Judge and Michael Goodin with U.S. District Court Judge Mark Cohen and U.S. District Court Judge Leigh Martin May.

9. Fulton Superior Court Judge Kelly Ellerbe and Mark Lefkow. 10. Henry State Court Judge Chaundra Lewis, Vice President Candis Jones Smith, and DeKalb State Court Judge Yolanda Mack. 11. Michael Becker and Michelle LeGault. 12. Honey Shaw, Deborah Nogueira-Yates, Mitchell Puckett, DeKalb State Court Judge Mike Jacobs, Past President Peter Muller, and Barbara Marschalk. 13. Fulton Superior Court Judge Eric Dunaway, Michael Robson, Meg Daly, and Shea Maloney. 14. Camille Dizon, Elissa Haynes, and President-Elect Ashley Rice. 15. Eric Proser, Fulton Magistrate Court Judge Catherine Koura, and Vice President Jason Logan. 16. Bo Gray, DeKalb Superior Court Judge Stacey Hydrick, and Jeff Schwartz. 17. Shane Keith and Rick Sager. 18. Trace Sexton and Kate Whitlock. 19. State Board of Workers' Comp Chairman Ben Vinson and Katie Rouse. 20. Marc Bardack, Cobb Superior Court Chief Judge Eric Brewton, and Kevin Branch.

***Pictured enjoying the 20th Judicial Reception**: 21. Executive Director Jennifer Davis Ward and Cobb State Court Judge Ashley Palmer. 22. Brad Carver, Pearson Cunningham, and Blake Walker. 23. Robert Ingram and Hank Fellows. 24. Philippa Ellis, Court of Appeals Judge Ken Hodges, Brad Marsh, and Fulton State Court Judge Eric Richardson. 25. Zach Matthews and Matt Sessions. 26. Carrie Christie, Fulton Superior Court Judge Alice Benton, and Fulton Superior Court Judge Paige Reese Whitaker. 27. Court of Appeals Judge Chris McFadden, Ane Wanliss, Sheetal Brahmbhatt, and Shawn Kalfus. 28. Danielle Glover, Alec Young, Fulton Superior Court Judge Belinda Edwards, Cody McCollum, and Robert Luskin.*

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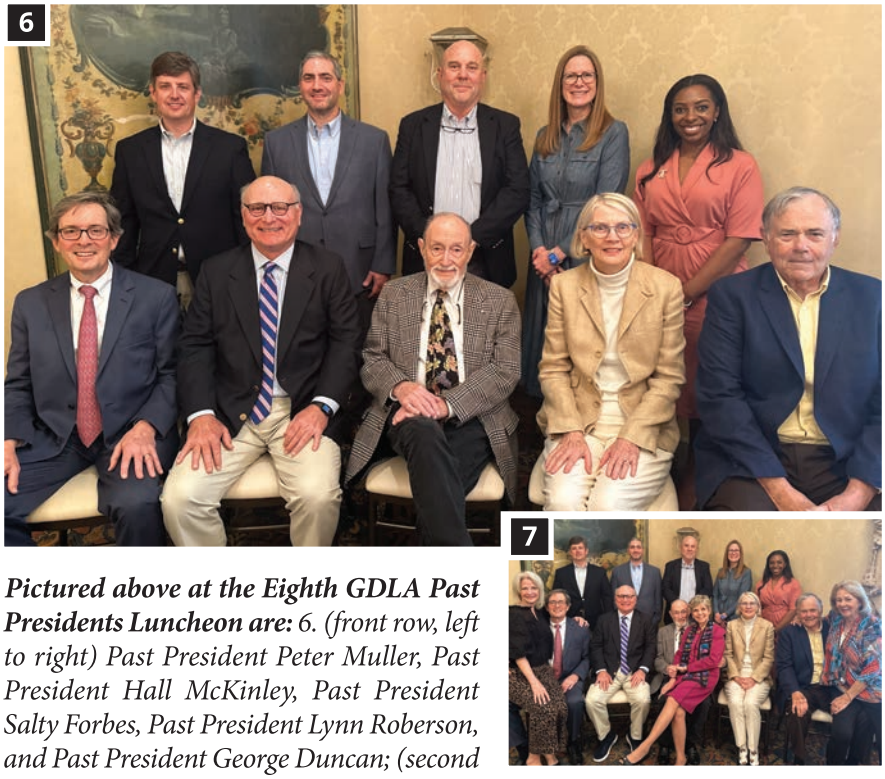
GDLA Holds Winter Meeting; Past Presidents Honored

As is tradition, the GDLA Board of Directors held its Winter Meeting the day after the 20th Judicial Reception, convening at State Bar Headquarters on February 7, 2025.

GDLA's Political Action Committee President Jake Daly reported with GDLA's lobbyist, Kade Cullefer, on our efforts under the Gold Dome especially with respect to the Governor's tort reform legislation. Immediately following the meeting, Past Presidents, officers, and Vice Presidents adjourned to the Capital City Club downtown for the Eighth Past Presidents Luncheon.

Those present were Executive Committee: President William T. "Bill" Casey, Jr., Swift Currie McGhee & Hiers, Atlanta; President-Elect Ashley Rice, Waldon Adelman Castilla McNamara & Prout, Atlanta; and Treasurer Martin A. "Marty" Levinson, Hawkins Parnell & Young, Atlanta. Vice Presidents: Jason D. Logan, Constangy Brooks Smith & Prophete, Macon; and Candis Jones Smith, Lewis Brisbois, Atlanta. Board members: Jacob E. "Jake" Daly, Freeman Mathis & Gary, Atlanta; George E. Duncan, Jr., Dennis Corry Smith & Dixon, Atlanta; Anne D. Gower, Gower Wooten & Darneille, Atlanta; Karen K. Karabinos, Chartwell, Atlanta; Barbara Marschalk, Drew Eckl & Farnham, Atlanta; Dallas Roper, James Bates Brannan Groover, Macon; Shepard R. Smith, James Bates Brannan Groover, Athens; Joseph D. Stephens, Cowsert Heath, Athens. Past Presidents: Hall F. McKinley III, Drew Eckl & Farnham, Atlanta; Peter D. Muller, Goodman McGuffey, Savannah; and Lynn M. Roberson, Swift Currie, Atlanta (retired). Other attendees: GDLA lobbyist Kade Cullefer. Troutman Pepper Strategies, Atlanta; DRI State Representative Robert Luskin, Chartwell, Atlanta; and Executive Director Jennifer Davis Ward. ◆

Pictured above at the Board's Winter Meeting are: *1. President Bill Casey. 2. Barbara Marschalk and Past President Peter Muller. 3. GDLA's lobbyist, Kade Cullefer. 4. PAC President Jake Daly. 5. Past President Lynn Roberson.*



Pictured above at the Eighth GDLA Past Presidents Luncheon are: *6. (front row, left to right) Past President Peter Muller, Past President Hall McKinley, Past President Salty Forbes, Past President Lynn Roberson, and Past President George Duncan; (second row) VP Jason Logan, Treasurer Marty Levinson, President Bill Casey, President-Elect Ashley Rice, and VP Candis Jones Smith. 7. Joining their husbands for a fun photo are former first ladies Lisa Muller, Lee Forbes, and Gini Duncan.*

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Negligent Security Cases

Continued from page 16

based on the park's knowledge of prior violent incidents. The ruling focused on two key points:

1. Foreseeability of Crime: The Court emphasized that Six Flags was aware of a history of violent incidents on or near the premises, and this knowledge imposed a duty to take reasonable security measures.

2. Proximate Cause: The court extended the scope of liability by holding Six Flags accountable, even though the attack occurred in a parking lot adjacent to the park. The court deemed this area to be within the "zone of influence" of the business.

This case set a precedent in Georgia for expansive interpretations of foreseeability and proximate cause in negligent security claims. It reinforced the idea that property owners must take into account not only on-premises criminal activity but also potential dangers posed in areas surrounding their business.

Foreseeability and Duty of Care

The seeds for the Six Flags decision were sown in *Killebrew v. Sun Trust Bank* (1995) and *Sun Trust Bank v. Killebrew* (1996) and *Sturbridge Partners, Ltd. v. Walker* (1997), where the concept of foreseeability as a basis for a property owner's duty was explored. These cases illustrate the moving goalposts on this subject.

In *Killebrew*, a Sun Trust Bank customer was shot by a robber while using an ATM in the parking lot. Killebrew brought suit against Sun Trust alleging failure to exercise ordinary care and negligent infliction of emotional distress. Sun Trust moved for Summary Judgment arguing that prior crime that was unreported and unknown to them, but was reported to the police, was insufficient to give them knowledge of a risk of criminal activity on its property so as to require it to take reasonable precautions to protect customers from similar risks.[7] Summary Judgment was granted and the Court of Appeals reversed the grant of Summary Judgment citing that while Sun Trust did not have actual knowledge of the prior crime, the existence of a police report of the prior crime and the testimony from Sun Trust's security chief that it was the security department's duty to investigate all crimes occurring on bank property created a jury question as to the bank's constructive knowledge.[8]

However, the Supreme Court reversed, holding that there is no authority in this State imposing a duty upon a property owner to investigate police files to determine whether criminal activities have occurred on its premises, and the testimony by the bank's security chief did not establish that its duty to investigate crimes on its property encompassed seeking out police reports of incidents not reported to the bank.

This case was then remanded to the trial court where there was evidence that the bank stationed an employee in the parking lot who looked like a security guard, but who was in fact there only to prevent patrons at nearby restaurants from parking on the bank's property. Thus, it appeared to the public that defendant bank's ATM was protected and more secure than other ATMs (and many may have patronized that ATM because of that misleading appearance), but the bank knew that it was not.[9]

The trial court again granted Summary Judgment and the Court of Appeals reversed that grant of summary judgment holding that summary judgment based on the landowner's lack of duty was also improper.

However, the Court also noted in its holding "[l]ooking at the bank's false security guard from a slightly different perspective, the evidence of his presence also gives rise to a jury question with respect to an alternative cause of action based on § 311 of the Second Restatement of Torts: one who negligently conveys false information and thereby causes physical harm to another who reasonably relies on that information is liable for such harm."[10]

In *Walker*, the Georgia Supreme Court held that a landlord could be liable for failing to prevent a sexual assault in an apartment complex because the presence of prior criminal acts made the assault foreseeable. The prior criminal acts alleged were three daytime burglaries at the property which occurred within two months prior to the assault.[11]

The Court also reiterated that "In determining whether previous criminal acts are substantially similar to the occurrence causing harm, thereby establishing the foreseeability of risk, the court must inquire into the location, nature and extent of the prior criminal activities and their likeness, proximity or other relationship to the crime in question."[12]

Both of these cases broadened the applicability of the legal concept of foreseeability and knowledge (even imputed knowledge) of potential risk to invitees in determining whether a property owner had a duty to provide security. In many ways, *Martin's* broadening of these duties by holding Six Flags responsible for an off-premises incident is not all that surprising.

The Restatement (Second) of Torts § 324A and Third-Party Criminal Acts

The Restatement (Second) of Torts § 324A provides a limited path to a cause of action against a landowner in a negligent security

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case when a landowner has affirmatively undertaken a duty to protect the security of a third party. This section states that a possessor of land can be liable for harm caused by third parties when they fail to exercise reasonable care to discover that such acts are occurring or when they fail to protect against such acts if they should be aware of the likelihood of harm AND they have undertaken a duty to ensure the safety of a third party.

Section 324A provides: One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.[13]

Stated otherwise: A "voluntary undertaking" imposes a legal duty to protect a third person from the harm of another arising only when a defendant undertakes a service that it should recognize as "necessary for the protection of a third person."[14]

The most common pathway for a claim under the voluntary undertaking doctrine has been for cases involving a failure to inspect where such an inspection is explicitly for the safety of others (i.e. heavy machinery, food safety).[15] However, under the restatement, such an inspection MUST be for the explicit purpose of ensuring a third party's safety. Georgia courts have held that inspections for other purposes (such as underwriting, or valuation) would not trigger § 324A liability.[15]

Traditionally, Georgia courts have applied § 324A liability in narrow circumstances and declined to expand it when there is evidence of a violent intervening act by a third party. In negligent security cases, this liability under Restatement (Second) of Torts § 324A creates a bit of a pitfall. Sparking the question … can you have liability even when you do provide security?

The general concepts that, 1) when a party voluntarily assumes a duty—such as providing security—they must carry out that duty with reasonable care, and 2) if the property owner negligently performs the undertaking, they can be held liable for any harm that results, are not well settled concepts of law. The issue for landowners and business operators is whether it creates a situation where they have a "duty to the world" or essentially are "damned if they do" and "damned if they don't." This broadening of the legal duty mixed with a broadening definition of foreseeability culminated with the *Carmichael* decision.

Georgia CVS Pharmacy, LLC v. Carmichael

The Carmichael case was actually three separate cases *Georgia CVS Pharmacy, LLC v. Carmichael, Welch et al v. Pappas Restaurants*, Inc., and *Welch et al v. Tactical Security Group, LLC)* that the Court of Appeals combined for appellate purposes because of similar facts and issues.

Carmichael arose out of a shooting that occurred at a CVS store in Atlanta during an armed robbery. Carmichael thereafter filed a premises liability claim against CVS. Following a trial, the jury awarded damages to Carmichael, finding CVS to be 95 percent at fault for Carmichael's injuries and Carmichael five percent at fault, but apportioning no fault to the shooter.[18]

The *Welch* cases arose out of a shooting that occurred in a parking lot of a Pappadeaux' restaurant. Pappadeaux's parent company Pappas had contracted with Tactical Security, Inc., to patrol the parking lot. Welch died in the incident and his spouse filed suit against Pappas Restaurants and Tactical Security for wrongful death raising several claims, including one for premises liability based on the defendants' alleged negligence in securing the property.[19]

In *Carmichael*, CVS ultimately appealed arguing that the apportionment of no fault to the shooter was void because it did not account for the fault of all persons who potentially contributed to the shooting. The Court of Appeals held that the verdict was not void because the jury "'considered' the fault of all who potentially contributed," including the shooter, and because, the court reasoned, the jury could have decided, based on the evidence, not to assign any fault to the shooter.[20]

In *Welch*, the trial court denied summary judgment, but the Court of Appeals reversed, holding that the shooting was not reasonably foreseeable and that the defendants' liability was therefore precluded. The Court of Appeals also declined to hold that Tactical owed any duty to the Welches under § 324A of the Restatement (Second) of Torts.[21]

The cases were combined for appeal and the Supreme Court noted that the reason for doing so was "that the case law that has developed over the years in Georgia premises liability cases involving third-party criminal activity has not plotted a clear roadmap for parties, litigators, or trial courts."[22]

To plot this roadmap, the Supreme Court posed five questions and resolved them as indicated by "Answer" as set forth below each:

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1. For a claim brought under O.C.G.A. § 51-3-1 that alleges negligent security, to what extent, if at all, is proof that the underlying criminal act occurring on the premises was reasonably foreseeable part of the plaintiff's burden to prove the elements of duty, breach, or proximate cause?

Answer:

The reasonable foreseeability of third-party criminal conduct is properly considered as part of a proprietor's duty to exercise ordinary care in keeping the premises and approaches safe under O.C.G.A. § 51-3-1, and this is a determination the factfinder must make.

A factfinder determining that third-party criminal conduct was reasonably foreseeable and thereby gave rise to a duty to protect invitees from that harm does not itself establish the proprietor's liability for the plaintiff's injury. Instead, a factfinder must go on to address the next element of negligence: to determine whether the proprietor acted reasonably in the face of the particular foreseeable risk or whether the proprietor breached its duty to do so.[23]

2. In light of the answer to the first question, is the question whether a criminal act occurring on the premises was reasonably foreseeable generally for the judge or the factfinder?

Answer:

Only in "plain and palpable" cases where reasonable minds cannot differ as to the conclusion to be reached, can the Court reconcile this issue. But in most circumstances, whether the third-party criminal acts were foreseeable under the facts of a particular case—thus triggering the duty to protect against them—is a question for the factfinder (unless no rational juror could find the criminal act reasonably foreseeable).

3. What is the legal test for determining whether a criminal act occurring on the premises was reasonably foreseeable? For example, is reasonable foreseeability determined based on the totality of the circumstances, or is some more specific showing required, such as prior, substantially similar crimes occurring on or near the premises?

Answer:

The pertinent question is whether the totality of the circumstances relevant to the premises gave the proprietor sufficient "reason to anticipate the criminal act" giving rise to the plaintiff's injuries on the premises. This determination is not susceptible to a mechanical formulation and instead must be made on a case-by-case basis.[24] While evidence of substantially similar prior crimes—crimes with a likeness, proximity, or other relationship to the criminal act at issue that give a proprietor reason to anticipate such an act occurring on the premises—may often be one of the most probative considerations in answering that question, it is not a required consideration, and other circumstances may be relevant, too. And unless the court determines that no rational juror could disagree on the answer, that question is one for the jury.[25]

4. Regarding *Carmichael*, when apportioning fault, can a rational fact finder determine that an intentional tortfeasor whose actions directly caused the plaintiff's injuries bears no fault for those injuries?

Answer:

The jury was instructed to consider "the fault of all persons or entities whose negligence contributed to the injury or damage," However the jury apportioned no fault to the shooter. CVS argued that the verdict was repugnant and inconsistent.

However, the Court held that the jury could have reasonably believed that the shooter acted deliberately, as opposed to negligently, with an intent to do harm. Accordingly, because the verdict can be construed in a way that is consistent, we reject CVS's argument that it is void due to inconsistency.[26]

5. Regarding *Welch v. Tactical Security Group, LLC*, under Georgia law, does a party rendering security services to the owner or occupier of property in a premises-liability case owe a duty of care to third parties under any of the bases set out in Section 324A of the Restatement (Second) of Torts?

Answer:

Recall that in *Welch*, the trial court denied summary judgment on these grounds, the Court of Appeals reversed that denial and Plaintiff sought Certiorari.

The Court notes: Initially, cases considering Section 324A often did so in the context of negligent inspection claims. But negligent undertaking claims brought pursuant to Section 324A are not so limited and can arise in other contexts.[27]

Because of this broadening, the Court held that a party providing security services still may be held liable in tort for the negligent performance of voluntarily undertaken duties because that party has a duty to use reasonable care in carrying out its voluntary undertaking and that Section 324A can apply to premises liability claims.[28]

WHEN DOES THE RIDE END

The Court in *Carmichael* openly recognized the implications of their decision:

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> "In rendering our decision, we are mindful of the economic and policy arguments advanced by the parties and the amici. But such considerations are reserved to the General Assembly."[29]

To their point, in 2023, CVS announced the closure of as many as 900 stores in 2023-2024.[30] While CVS stated other reasons, the implications of *Carmichael* cannot be ignored. The reality is that beginning with *Six Flags v. Martin*, the courts in Georgia have been all over the place on duties owed by landowners in a number of circumstances. The Court in *Carmichael* recognized this and sought to clarify these areas of the law. Unfortunately for Property and Casualty insurers the *Carmichael* decision created several challenges among them are:

- Apportionment is rendered generally moot in the context of a third-party tortfeasor;
- The near impossibility of obtaining summary judgment in negligent security cases; and
- The potential for liability whether or not you provide security under 324A, which can now clearly be applied to premises cases

The wild ride of these cases revolving around the negligent security subset of premises liability cases in Georgia began in earnest with the *Martin* case. The ride came back into the station with the *Carmichael* case. Given the *Carmichael* decision, it appears unlikely the Court will revisit these issues and they have handed it off to the legislature.

On August 7, 2024, Governor Kemp addressed the Chamber of Commerce's legislative luncheon and made tort reform the main theme.[31] The same commitment was made in 2023 before Governor Kemp walked back that promise as the legislative session neared.[32] At press time, he had introduced a tort reform package, and Senate Bill 68 was making its way through the General Assembly. The issues created by the *Carmichael* decision pose a huge threat to the business community. Hopefully, the final tort reform product passed by the Legislature will positively reshape the premises liability law, particularly with respect to negligent security. ◆

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ENDNOTES

1 OCGA § 51-3-1
2 *Stanley v. Garrett*, 356 Ga. App. 706, 710 (2020); see also *May v. Stat*e, 295 Ga. 388, 398 (2014)
3 Lau's Corp. v. Haskins, 261 Ga. 491, 492 (1), 405 S.E.2d 474 (1991)
4 *Six Flags Over Georgia II, L.P. v. Martin*, 335 Ga. App. 350, 350, 780 S.E.2d 796, 799 (2015), aff'd in part, rev'd in part, 301 Ga. 323, 801 S.E.2d 24 (2017), and vacated sub nom. *Six Flags Over Georgia II, LP v. Martin,* 343 Ga. App. 134, 806 S.E.2d 228 (2017)
5 *Id.*
6 *Id* at 359–60.
7 *Killebrew v. Sun Trust Banks, Inc.*, 216 Ga.App. 159, 160–161(1), 453 S.E.2d 752 (1995).
8 *Sun Trust Banks, Inc. v. Killebrew*, 266 Ga. 109, 109, 464 S.E.2d 207, 208 (1995) See also *Savannah College of Art & Design v. Roe*, 261 Ga. 764(2), 409 S.E.2d 848 (1991).
9 *Killebrew v. Sun Trust Banks, Inc.*, 221 Ga. App. 679, 680, 472 S.E.2d 504, 506 (1996)
10 *Id.*
11 *Sturbridge Partners, Ltd. v. Walker*, 267 Ga. 785, 785, 482 S.E.2d 339, 340 (1997)
12 See *Days Inns of America, Inc. v. Matt*, supra; *Lau's Corp. v. Haskins*, supra; *Shoney's Inc. v. Hudson*, 218 Ga.App. 171, 460 S.E.2d 809 (1995); and *Henderson v. Kroger*, 217 Ga.App. 252, 456 S.E.2d 752 (1995).
13 Restatement (Second) of Torts § 324A
14 *Goodhart v. Atlanta Gas Light Co.*, 349 Ga. App. 65, 74 (2019).
15 *Hyde v. Schlotzsky's*, 254 Ga. App. 192, 193 (2002). (food hygiene and safety inspections); *Huggins v. Aetna Casualty & Surety Co.*, 245 Ga. 248, 249 (1980) (negligent safety inspection of paper roller machine).
16 *Bing v. Zurich Servs. Corp*., 332 Ga. App. 171, 172 (2015), *Erickson v. Walker,* 359 Ga. App. 630, 630 (2021)
17 *Brown v. All-Tech Inv. Grp*., Inc., 265 Ga. App. 889, 898 (2003)
18 *Georgia CVS Pharmacy, LLC v. Carmichael*, 316 Ga. 718, 719, 890 S.E.2d 209, 218 (2023)
19 *Id*.
20 *Georgia CVS Pharmacy, LLC v. Carmichael*, 362 Ga. App. 59, 63-67 (1), 70-71 (3), 865 S.E.2d 559 (2021).
21 *Pappas Restaurants, Inc. v. Welch*, 362 Ga. App. 152, 154-163, 867 S.E.2d 155 (2021).
22 *Georgia CVS Pharmacy, LLC v. Carmichael*, 316 Ga. 718, 720, 890 S.E.2d 209, 218 (2023)
23 *Id* at 723
24 *Id* at 726
25 *Id* at 732
26 *Id* at 739-740
27 *Id* at 741, See Restatement (Second) of Torts § 324A cmt. b ("This Section applies to any undertaking to render services to another, where the actor's negligent conduct in the manner of performance of his undertaking, or his failure to exercise reasonable care to complete it, or to protect the third person when he discontinues it, results in physical harm to the third person or his things."
28 *Carmichael* at 743
29 *Id* at 744
30 https://www.thestreet.com/retail/cvs-is-permanently-closing-hundreds-of-stores-for-a-surprising-reason
31 https://www.gachamber.com/news/capitol-beat-highlights-tort-reform-for-2025-general-assembly/
32 https://www.ajc.com/politics/politics-blog/pg-am-kemp-hits-the-brakes-on-tort-reform-effort-for-2024/JI5VMGANVFE2DNWMTMEH656ZII/

Automobile and Bad Faith

Continued from page 18

Counsel for Love urged the Court to rule that the use of a cell phone while driving is evidence of negligence, but is not evidence of bad faith. According to Love's counsel, bad faith is implicated by "conscious indifference" or the "intent to cause harm," not just "poor judgment" while operating a motor vehicle. Love's counsel argued that evidence of using a cell phone while driving is evidence of ordinary negligence, not akin to the enumerated traffic violations that could give rise to an award of punitive damages. Love's counsel requested the Court enter an order stating that, as a general matter, evidence of a traffic violation alone is not sufficient to create a jury question as to bad faith.

McKnight's counsel, on the other hand, argued bad faith is implicated where the rule was promulgated in the interest of public safety. During oral argument, the Supreme Court was quick to push-back on this argument, stating that nearly every traffic law is enacted in the interest of public safety and that the intent of the General Assembly is irrelevant to the mindset of the alleged tortfeasor as applied to the creation of bad faith.

At press time, the Supreme Court had not issued its decision. If the Court sides with McKnight, the introduction of bad faith damages solely tied to the issuance of a citation is likely to balloon in the months and years ahead. ◆

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ENDNOTES

1 O.C.G.A. § 13-6-11 (2020).
2 *McKnight v. Love*, 369 Ga. App. 812, 812 (2023).
3 *Id.*
4 *Id.* at 813.
5 *Id.*
6 *Id.*
7 *Id.*
8 *Id.*
9 *Id.*
10 *Id.* (evidence of Love's cell phone records were permitted, but evidence that Love failed to use hands-free technology in his vehicle were struck).
11 *Id.* at 814
12 *Id.* at 820.
13 *Id.*
14 *Id.* at 817, 819.
15 *Id.* at 820.
16 *Id.* at 821.
17 *Id.* at 821–22.
18 *Id.* at 823.
19 *Id.* (quoting *Nash v. Reed*, 349 Ga. App. 381, 383 (2019)).
20 *Id.*
21 Georgia Supreme Court, S24G0371 *Love v. McKnight*, GaSupreme (August 21, 2024), https://www.gasupreme.us/oa-august-21-2024/.

Life Care Plans

Continued from page 22

When permitted, the life care planner should conduct a formal evaluation and assessment of the evaluee, for the purpose of understanding the evaluee's biopsychosocial needs in greater depth. In an optimal circumstance, a cohesive look would be taken at psychological and socioeconomic factors within the evaluee's history, in addition to the biological/medical narrative, leading to a complete representation of this transdisciplinary practice. However, in the setting of litigation, this is not always possible. When reviewing a life care plan, the life care planner may not be permitted to speak with the evaluee or the treating healthcare providers.

Other formal medical evaluations, either in-person or through medical records review, may be completed and reported by an independent evaluating medical expert to provide the necessary medical foundation for the life care plan or the review of one. It is imperative the life care planner consult with all independent medical experts and clearly document such consultation.

Another often overlooked but important source of medical foundation for the life care plan is the deposition testimony of treating and/or evaluating providers and the evaluee. Through such testimonies, healthcare experts have been known to change the trajectory of a life care plan by contradicting their previously reported opinion or, conversely, providing additional future recommendations not previously disclosed through the medical records or endorsed through consultation. Likewise, evaluees have been known to contradict themselves relative to what they have previously reported to their healthcare provider, as found in the medical records.

Finally, the review and analysis of clinical guidelines and peer-reviewed literature is essential. Clinical practice guidelines are the gold standard outlining best healthcare practices. These guidelines, usually developed by medical organizations and academies, are intended to provide sound rationale to guide clinical treatments for the safe delivery of effective healthcare to all individuals. Peer-reviewed literature should be considered, as it represents expert scholarly research, work, or ideas which have been critically scrutinized by other experts of the same field prior to acceptance for publication. Such a peer-reviewed process ensures the scientific quality and validity of the research, as well as the credibility of the reported information.

Armed with an analysis of the evaluee's medical records, assessment of the evaluee, consultation with the treating and/or evaluating healthcare provider(s), review of the deposition testimonies, and clinical guidelines/peer-reviewed medical literature, there should be adequate medical foundation and individualized data established to begin formulating a life care plan or construction of the logical review of one.

Differences of opinion and/or inconsistencies in best practices may come to light through the analysis and comparison of these varied sources of information. These differences can create a divergent opinion scenario, thus leading to contradiction in future healthcare recommendations. The Consensus Statements and Standards of Practice specifically instruct the life care planner to methodically and objectively manage these emerging differences of opinion.

Specific questions to consider when comparing conflicting medical opinions include:

- Is the rendering expert consultant and/or treater acting within his/her scope of practice?
- Do the medical records give any indication of which treatments provided were beneficial and which ones were not suitable for the evaluee?
- Do the medical records indicate what the treating provider was planning for the future?
- Do the medical records give any indication the evaluee has reached maximum medical improvement and/or if future medical/health care is indicated?
- Are the future care recommendations individualized for the evaluee?
- Are the recommendations reasonable and attainable?
- Can the evaluee realistically implement the recommendations from where he/she lives?
- Has the evaluee made any statements as to whether or not he/she intends to pursue the recommendations?
- Do the clinical guidelines and standards of practice support the same recommendations given by the treating and/or the evaluating healthcare professional?
- What medical information/opinions are discovered through deposition testimony?
- Within deposition testimony, have any parties contradicted themselves or changed their opinions regarding future care needs?

The life care planner should acknowledge when divergent opinions and contradictions exist. Such differing recommendations/opinions may dictate the need to provide more than one life care plan option in the development of a reasonable, relevant, and appropriate plan individualized to the evaluee. If one recommendation is chosen over another, the life care planner should be prepared to ex-

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plain the rationale for making such a decision. Moreover, the rationale for the choices made should follow accepted methodology, standards, and consensus, while being fully transparent and unbiased. Regardless of whether the life care planner is creating or reviewing a plan, it is incumbent upon the planner to indicate where divergent medical opinions lie and how he/she plans to deal with the range of findings.

In closing, it is the life care planner's responsibility to present a life care plan containing feasible treatment and care options, in a transparent and understandable way, using the proper application of peer-reviewed methodology, standards, and consensus. The life care planning process, when followed accurately, should produce a document which aids the evaluee and the trier of fact in making informed and appropriate decisions. ◆

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When is a Dollar a Dime?

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ing insurance coverage for injuries related to travel by railroad or steamboat. With advancements in medicine such as the identification of infectious agents, the development of new medical technologies such as blood pressure meters, radiography, vaccines, and antitoxins, the public's trust in medical institutions greatly increased.

The initial insurance companies and laws for health and accident included:

- 1735 - The Friendly Society was the first mutual insurance company in the United States started in Charleston, S.C., but it quickly went out of business in 1740.
- 1759 - Presbyterian Ministers Fund was one of the first insurance companies in the United States. It paid annuities either to ministers (who had paid into the fund) if they were sick or ailing or to their families upon the ministers' deaths.
- 1847 - Massachusetts Health Insurance of Boston offered early group medical policies with a comprehensive benefits list.
- 1850 - Franklin Health Assurance Company of Massachusetts began providing accident insurance.
- Early 20th Century, Maritime - The Jones Act allowed seamen injured on the job to get compensation from their employers,
- Early 20th Century, Railroads - Initially railroad insurance primarily covered physical assets such as losses from train derailments and infrastructure damage. Insurance syndicates specifically designated for railroads were created. Eventually, employee liability and third-party coverage were included.
- Early 20th Century, Workers' Compensation - According to the Office of Social Security, "the federal government was the first to establish a workers' compensation program, covering its civilian employees with an act that was passed in 1908 to provide benefits for workers engaged in hazardous work. The remaining federal workforce was covered in 1916. Nine states enacted workers' compensation laws in 1911."
- 1929 - The Baylor Plan was developed into what is now known as Blue Cross.

The Depression stalled the insurance development process, but along came World War II and things started to change more rapidly. The three major contributors to these changes were:

- Wage and price controls–no raises
- Union demands–better benefits
- Rosie the Riveter–for the first time, millions of women entered the workforce

With wages frozen, the best employers could do was offer health insurance for all the "Rosies" and their families. But it wasn't a third-party payer system. Rather, "Rosie" paid the bill and brought the receipt to her employer for reimbursement.

Post-World War II, we experienced the following events:

- Proliferation of employee benefits including health insurance–an employee still pays and is reimbursed by the employee's insurance instead of an employer system.
- Successful health insurance prevented government intervention until the mid-1950s expanding into the 1960s and beyond. (Note: In 1946, US President Harry Truman introduced a bill in Congress to completely socialize the medical industry, much like the British had just done. The bill even went so far as to guarantee an income to individuals who were unable to work because of an illness. Strong lobbying by newly formed insurance companies prevented the bill from passing.)
- 1954 - Birth of Social Security Disability–This was based on the 1946 disability bill which failed in Congress.
- 1965 - Medicare and Medicaid programs were introduced.

The 1950s was the calm before the storm, but it was mostly successful. Then along came Medicare. For the first time, millions of individuals would be enrolled into a health insurance program, all at once. It really was a monumental task and brought about some special problems, most specifically: How would they pay the anticipated number of medical bills in a timely manner? To meet these obligations, Medicare had to figure out the following:

- The need for uniformity: Medical providers were used to billing however they felt, including just writing a receipt for a payment and handing it to the patient with no description or indication of what it was covered. This was no longer going to work for a simple reason: The patient would not pay the bills. Instead, the doctor would have to send their bill into Medicare which would then pay the doctor. This led to the creation of both the Health Care Financing Administration (HCFA) form on which doctors and other professionals bill today, and the Uniform Medical Billing Form (UB04) that medical facilities use for billing.
- The need for bulk processing: Luckily, this occurred during the early stages of commercial computing. So, Medicare had some help and didn't have to process all

billing by hand, although, unlike today, there was still a lot of physical handling to be done.

- The need for fairness: This brought about the biggest change. With third-party payment, the medical provider was no longer in control. The third-party payers decided what they would be paid based on various criteria. The reasoning behind this was to make sure a provider in one part of the country wasn't paid significantly more or less than a provider in another part of the country for the exact same service. Medicare turned to the Harvard Business School to help solve this problem. Their solution was the Relative Value Resource Based System (RVRBS), with payments for all services becoming a multiplier of the lowest value of the number one. For Harvard to do this, they needed the American Medical Association (AMA) to create an identifier system for everything that would be billed or invoiced. This resulted in the Current Procedural Terminology (CPT Codes). Fairness in billing and payments meant a system based on the community of the United States, with adjustments made for geographical locations based on cost-of-living factors.

Medicare and the Current Pricing of Healthcare Services

With Medicare up and running, the insurance companies looked at what they were doing and decided to adopt many of their innovations, including the most important–third-party billing. The adoption of third-party billing by insurance companies marked a major change. By having doctors bill them directly and setting payment terms, insurers gained more control over healthcare costs and services. This change aimed to streamline the billing process but also led to increased administrative complexities and debates over fair compensation for medical services. This became known as "the beginning of the end!"

With the above in mind, Medicare must know what doctors or other medical providers are charging their patients for whatever service they may render. Medicare must know what it costs providers to render a service, and what amount doctors are reimbursed by payers for a given service.

According to the Center for Medicare and Medicaid Services (CMS), most Medicare-certified providers are required to submit an annual cost report to CMS with facility characteristics, and with cost and charge data by cost center for all patients, not just for those on Medicare. This information assists Medicare in its calculations for provider reimbursements in the following year, based on an average cost-plus basis to reach a national payment, which is geographically adjusted.

The annual cost report submitted by Medicare-certified providers is a crucial part of how Medicare determines reimbursements. By collecting detailed data on costs and charges for all patients, CMS can calculate more accurate reimbursement rates. This process helps maintain a balance between covering the costs of healthcare providers and managing the overall expenses of the Medicare program. It's a complex system, but it's designed to ensure that providers are fairly compensated while keeping healthcare accessible for patients.

That brings us to the present where the healthcare marketplace or business model is highly unusual in that the pricing of medical services is opaque, non-transparent, and with little to no correlation with the actual costs to provide that service. Medical providers can charge whatever they want, even when that list price is nowhere close to what typically gets paid. When billed charges are way out of line with payments, then that is not a true marketplace. Instead, it is reflective of an artificial market that needs critical analysis to determine a value that is consistent with what typically gets paid for similar services.

Conclusion

All the above seems to place the medical billing world in Wonderland, where Alice discovered "down is up, and up is down." It's a land where a charge is not a charge, but a made-up number. It's a land where Joe pays one price, and Bob another, for the exact same service. And this is an open secret. Right there on a bill you may see "amount charged $100,000" as compared to "amount due $20,000." Of course, the "amount due" number is the variable. It changes based on who is paying. But, what else can one expect where everything in the medical billing world is confusing, surprising, and abnormal? America's medical billing system is, indeed, a strange world. ◆

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Inflated Damage Figures

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The plaintiff's owner asserted that he had received a promise from the GC that a change order would be approved, but it never was due to lack of support documents. The plaintiff claimed that due to this lack of approval and non-payment of approximately $500,000, he was forced to shutter the business, which was valued at $2.5 million by the plaintiff's expert prior to the non-payment. Plaintiff's expert then valued the business at zero dollars after the shutdown (the owner was essentially retired and equipment sold off), and the expert consequently found the damages to be $2.5 million. By performing a business valuation, without questioning the causal link between the business' shuttering with the non-payment, the plaintiff's financial expert had ignored the following:

- A key employee estimator/manager left the plaintiff's company prior to the non-payment–*i.e.*, they had already ceased bidding on new projects before the loss event.
- The owner had a serious health condition prior to the non-payment, making it increasingly difficult for him to run the company–*i.e.*, he had other reasons to shut the business down.
- The two years working on the defendant's project had been, by far, more successful for the plaintiff's than the prior three years had been. Essentially, the plaintiff had endured far worse financial setbacks in prior years but had weathered those problems and still had essentially no debt to speak of after the loss event. Based on its history, the plaintiff did not need to shut down but, instead, the owner chose to shut it down.
- Email records indicated that the owner was already contemplating closing the business prior to the non-payment.
- To top it all off, the valuation damages did not consider the value that the plaintiff had obtained from selling off his equipment when he shut down, which was a major error. Essentially, if diminution of business value is the proper measure of damages, then the expert must consider the ending value of the impacted business as part of the equation. In this case, the equipment sales yielded the ending business value.

All of these issues were pointed out in the defendant's expert report, which led to a more favorable settlement.

Case Study 2: Franchise Company Sold at a Discount Due to Injury

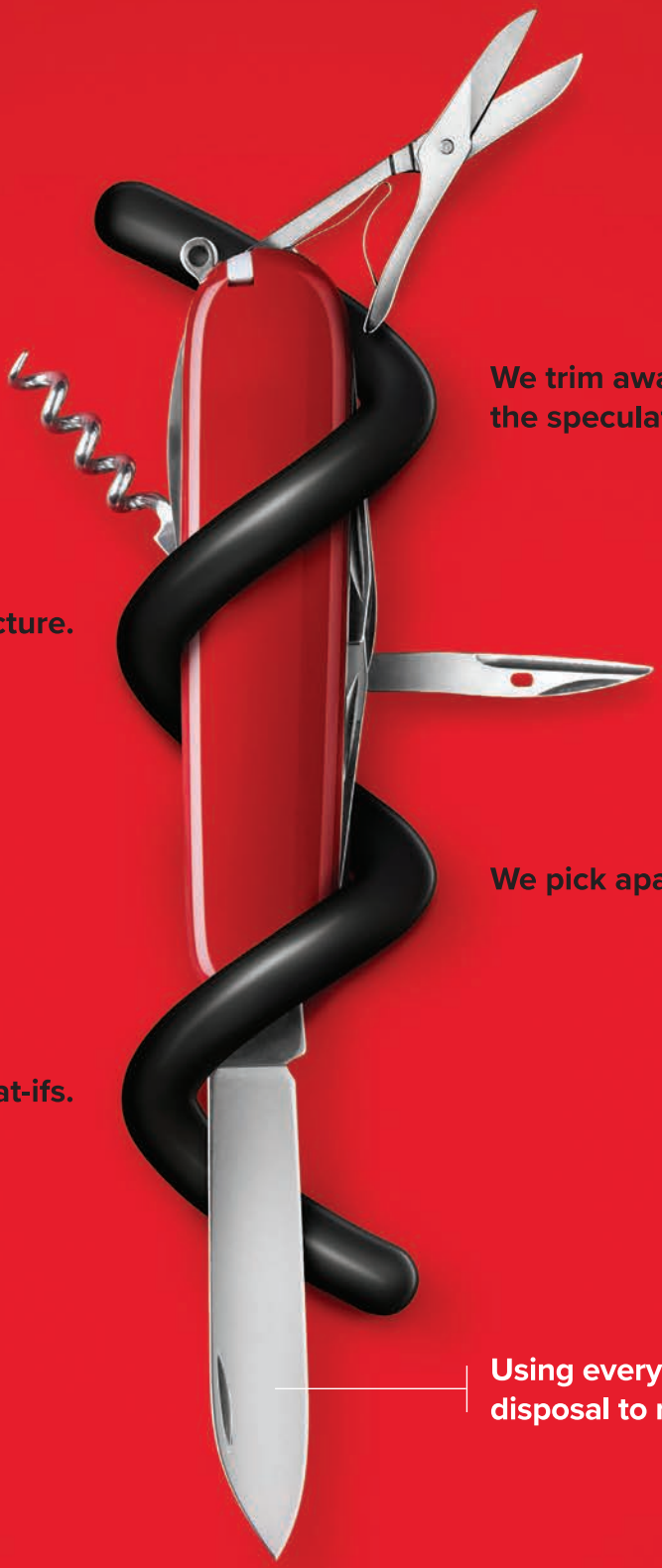
The owner of a service and supply business (franchised) was injured in an accident. The owner claimed to be unable to do many of the physical aspects of the job and travel around to clients, causing her to sell the business at a much lower price than she would have expected had she continued to work and grow the company. The plaintiff's expert's report did not take into account the following issues:

- In spite of the plaintiff's business usually incurring losses and the plaintiff's owners (a married couple) receiving little or no salary during the six years leading up to the accident, the plaintiff's expert projected that this business would have sold for $1.5 million, but for the accident. It seems illogical that a company that struggled to generate any financial benefit for its owners for many years would be able to sell for any significant amount above the value of its trucks/assets.
- The plaintiff's business had the most profitable year in its history the year after the accident, making it seem unlikely that the injury negatively impacted the business;
- Two years after the accident, the owner sold the business and then began working as a sales representative for another company, making a significantly higher salary than she had ever earned from her own business. Her husband, who had also been a full-time employee of the plaintiff with little to no pay, also took a better-paying job. This should have been considered as mitigation to the plaintiff's damages calculation but was not.
- Despite years of low profits and little to no salaries for the owners, the plaintiff's owners were able to sell the business (due to the franchise name and territory control) for significantly more than they had paid. Common sense tells us that the plaintiff's financial position had improved over time, and the business' value had not been harmed after the accident.

Based on the points above, the most equitable measure of damages would have likely either been the extra wages for employees who covered the plaintiff during her downtime or perhaps profits from lost sales during that period, but these topics were not covered at all by the plaintiff's expert. After in the defendant's expert outlined these issues in his report, the case settled for far lower than the plaintiff's claimed amount.

Case Study 3: Healthcare Provider's Office Shrouded in Mystery

In this case, the owner of a healthcare practice claimed that his practice had been permanently impacted by his injury in an accident. He claimed to be no longer able to see patients and properly run his practice. The measure of damages was referred to as lost wages, but it was essentially a lost profits claim



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from the business that ran into perpetuity, which bears similarities with a business valuation. The blind spots of the calculation included:

- Plaintiff's expert did not explain why the plaintiff's profits were in a state of decline in the years leading up to the loss event, including a loss of over $100,000 during the year immediately preceding the accident.
- The plaintiff would not provide production reports or any other information to demonstrate how frequently the owner was seeing patients prior to or after the accident.
- Plaintiff's expert did not explain why the plaintiff had restructured his practice several years before the accident, with a significant cut to the number of service providers.
- In the plaintiff's expert's summary calculation, he assumed 100 percent disability, even though it had been demonstrated that the plaintiff's owner had been working, at least to some degree, since the accident.

Once again, ignoring the facts of the case and refusing to provide or review potentially harmful support documents resulted in an overstated damages amount being asserted by the plaintiff's expert. This case settled more favorably after these issues were highlighted in the defendant's expert report.

Summary

The allure to the plaintiff of the business valuation is often the simplicity of the approach. While the calculation is nuanced, the expert's written report can be short, the expert does not have to be bothered with the business' results after the loss event, and the damages figure can be easily inflated. The remedies for the defense in these situations include: 1. Making thorough and robust document requests for pre- and post-loss event financial records; 2. focusing in depositions on the plaintiff's company history and the activities of the plaintiff after the loss event; and, 3. potentially retaining a financial expert to assist in those areas and provide a rebuttal report. ◆

Michael Shryock is a principal and the CEO at Point to Point Forensics, a GDLA Platinum Sponsor based in the Atlanta area. He has over 23 years of experience in forensic accounting, including damages calculations, investigations, construction disputes, and business valuation issues. He holds the Chartered Financial Analyst designation, the Certified Fraud Examiner credential, and a B.S. in finance from the University of South Carolina.

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De-Mystifying Concussion

Continued from page 28

Evaluation and Management

A longstanding challenge with concussion has been the subjectivity of symptoms and lack of easily obtained objective findings. However, advancements in understanding the injury have enabled clinicians to more accurately diagnose and manage patients.

Diagnostic Testing

- Cognitive function tests:
  - Computerized or clinician performed exams to assess areas of impairment such as working memory, reaction time, and visual processing.
  - Electrophysiologic event related potential (ERP) and auditory processing evaluations to understand the neurophysiological abnormalities.
  - Electroencephalography (EEG)
- Vestibular and Ocular Motor exams:
  - Videonystagmography
  - Posturography
  - Electrophysiology
- Cervical exam:
  - Physical examination
  - Cervical range of motion
  - Joint position error
  - Nerve conduction studies
  - Electromyography
  - Imaging
- Post-traumatic headaches:
  - Physical exam
  - EEG
  - MRI/CT
  - Characterization of the head
- Anxiety/Mood/Behavioral changes:
  - Anxiety screening
  - Nervousness and mood scales
  - Psychological/neuropsychological evaluation

These tests provide objective evidence of impairment and inform therapy and recovery. For example, a patient with abnormal ocular motor function may benefit from physical therapy to improve eye movements and reduce dizziness.

Addressing Confounding Factors

It's important to rule out other potential causes for symptoms, such as cervical injuries and malingering. A qualified provider using appropriate diagnostic tools can help to identify if a concussion is the most likely cause, or if some other factor is more likely to be the cause.

Myths Debunked

Despite significant advancements, misconceptions about concussion persist. Here are some common myths followed by the facts:

- You must hit your head to have a concussion.
  - A concussion can occur without direct head impact. Any force to the neck or body that causes rapid acceleration or deceleration can induce it.

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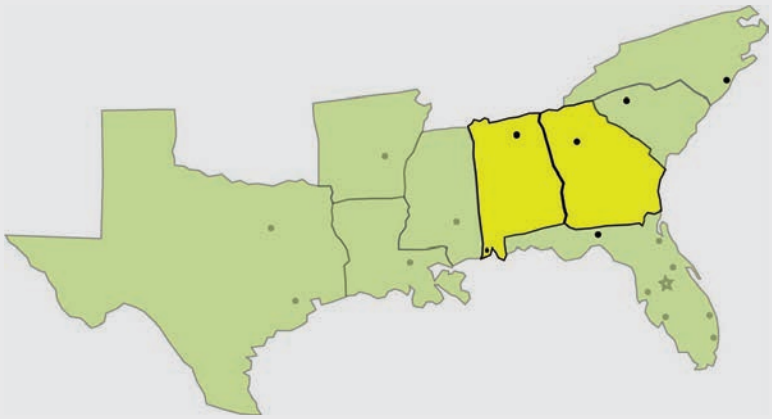

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- If you didn't lose consciousness, you didn't have a concussion.
  - Loss of consciousness is not essential for a concussion diagnosis; any alteration in mental status, such as confusion, disorientation, or difficulty concentrating, is indicative.
- Oxygen therapy can help concussions.
  - Oxygen therapy has not been shown to be effective in treating concussions. This theory is based on research for stroke management, but no evidence has been found to support oxygen therapy for concussions.
- Rest is the only treatment for concussion.
  - While rest is important in the initial recovery phase (first 48 hours), sub-symptom threshold exercises, such as the Buffalo Concussion Treadmill Test and its derivatives have shown to be incredibly effective in concussion treatment and recovery. Exercise is medicine.
- There is a single test that can diagnose concussion.
  - A definitive diagnosis of concussion requires a comprehensive evaluation that includes multiple tests and a thorough assessment of symptoms.
- A concussion is not a brain injury.
  - A concussion is a brain injury, even if mild.

While concussion has often been viewed as a minor injury, recent research and clinical guidelines have significantly improved our ability to diagnose and manage it. Continued efforts to educate the public and promote evidence-based practices are essential for ensuring optimal care for concussion patients. ◆

Robert Allen, Au.D., is the Chief Clinical Officer of The Concussion Center, a GDLA Platinum Sponsor. He is involved in evaluation, management, rehabilitation, and recovery of patients suffering from concussion/mild traumatic brain injury.

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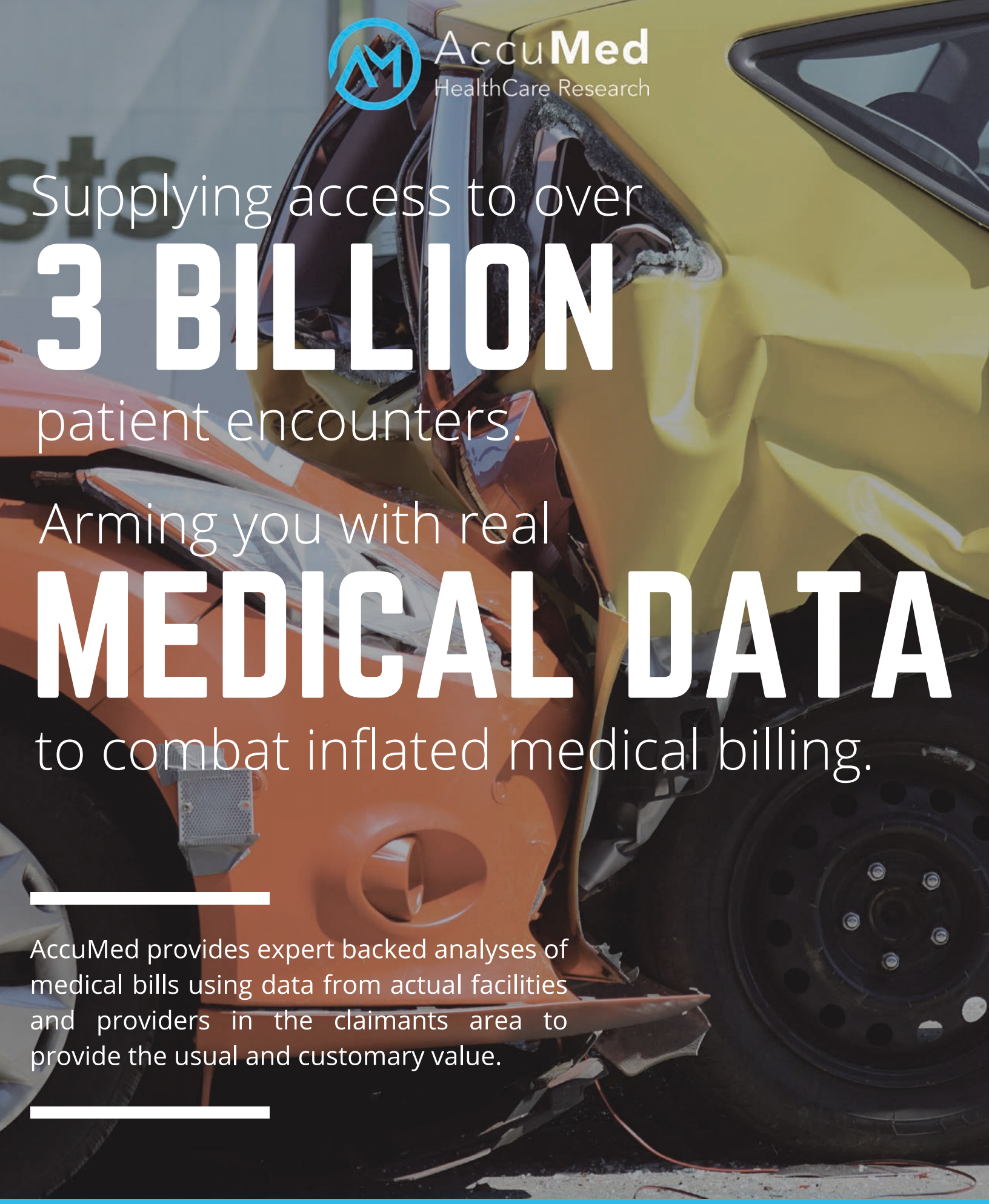

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