



Georgia Supreme Court Clarifies CGL Coverage Analysis on the “Occurrence” Requirement

By Edward R. Stabell, III
and Britton G. White
Brennan Harris & Rominger

The 2013 Georgia Defense Lawyers Association *Law Journal* contained an article entitled “Insurance Coverage Update,” which discussed several recent insurance coverage decisions, with particular emphasis on the issue of the interpretation of commercial general liability insurance policies in the context of construction litigation.

At the time of the *Law Journal*’s publication, the Georgia Supreme Court had heard oral arguments in *Taylor Morrison Services, Inc. v. HDI-Gerling America Insurance Company*, No.

S13Q0462, on certified questions from the Eleventh Circuit Court of Appeals in *HDI-Gerling America Insurance Company v. Morrison Homes, Inc.*, 701 F.3d 662, 668 (11th Cir. 2012), but had not issued a ruling. The two certified questions were as follows:

(1) Whether, for an “occurrence” to exist under a standard CGL policy, Georgia law requires there to be damage to “other property,” that is, property other than the insured’s completed work itself.

(2) If the answer to Question One (1) is in the negative, whether, for an

“occurrence” to exist under a standard CGL policy, Georgia law requires that the claims being defended not be for breach of contract, fraud, or breach of warranty from the failure to disclose material information.

On July 12, 2013, the Georgia Supreme Court answered the first certified question in the negative and the second certified question in the affirmative as to fraud and in the negative as to breach of warranty, marking a significant victory for the insured homebuilder and similarly-situated insureds in the construction industry in Georgia.

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DRI Honors GDLA Immediate Past President Lynn Roberson with Outstanding Bar Leader Award

The GDLA is pleased to announce that DRI honored GDLA Immediate Past President Lynn M. Roberson with the 2013 Fred H. Sievert Outstanding Bar Leader Award during the DRI Annual Meeting in Chicago. Presented annually to a current or past president of a State and Local Defense Organization (SLDO) like the GDLA, the award honors significant contributions towards achieving the goals and objectives of the organized civil defense bar through innovative leadership. The GDLA nominated Roberson

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DRI President Mary Massaron Ross (left) presents GDLA Immediate Past President Lynn Roberson with the Fred M. Sievert Award.



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President's Message

Not too many weeks ago, we paused for a time to honor those veterans, living and dead, who fought for the freedoms all of us enjoy, but which so many of us now take for granted. One of those core freedoms is the notion that no one is above the law. Often referred to as the Rule of Law, Thomas Paine wrote about it in his 1776 publication *Common Sense*:

"In America, the law is king. For as in absolute governments the King is law, so in free countries the law ought to be king; and there ought to be no other." Four years later, John Adams enshrined this principle in the Massachusetts Constitution by seeking to establish "a government of laws and not of men."

As citizens, we all enjoy this freedom; as lawyers, we are tasked with the duty and responsibility of working to preserve it.

But nowhere does this burden fall more heavily than on the shoulders of our judiciary. All of our laws would have little meaning, indeed, were it not for the judges who are sworn to uphold them. I once heard it said that some of the most powerful men and women in our country are our trial court judges at the state and federal level. In their hands is the power, with a single stroke of a pen, to stay an execution, stop a billion dollar construction project that could threaten some obscure species, or declare that a duly-passed law is unconstitutional and cannot be enforced. Such an awesome responsibility we place into the hands of our judges.

As lawyers, we may not always agree with the judge's decision (after all, someone is always going to be on the losing end!), but the system would fail if we did not respect it.

To honor our judiciary, the GDLA sponsors at least one judicial reception each year. The 11th annual reception in Atlanta will again be held at State Bar Headquarters. Mark your calendars to join us on Thursday evening, February 6, 2014, from 5:30 p.m. to 8:00 p.m. I strongly encourage all of you to attend and thank the judges for what they do for all of us.

Speaking of the judiciary, I would be remiss if I did not mention that for some time now, the GDLA has been asked to provide the state's Judicial Nominating Committee (JNC) with input on prospective appointees to the bench. For the past four years, GDLA Past President Bob Travis led our Judicial Relations Committee, and we thank him for his tireless efforts in representing us before the JNC. Andy Holliday has now taken over as chair, so when you see a blast e-mail from him soliciting comments about judicial candidates, please take time to provide your feedback.

More recently, and for the first time, we were asked by the Court of Appeals to submit an amicus brief in a case pending before it (we prevailed, by the way!). For our part, we annually send a copy of the *Law Journal* to all state and federal judges. Also, at the request of former Chief Justice Carley, our award-winning Newsletter is now sent to the appellate bench, in addition to all state and federal judges.

In short, the awareness and the respect of the GDLA among our judges continue to grow!

For the defense,

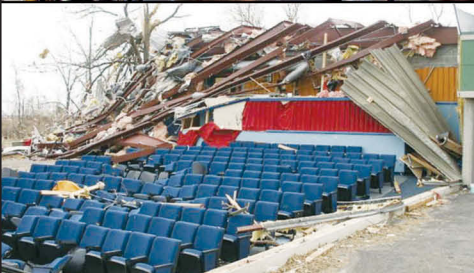
A handwritten signature in cursive script that reads "Theodore Freeman".

Theodore Freeman

Freeman Mathis & Gary, Atlanta



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Member News

GDLA Immediate Past President **Lynn M. Roberson**, a partner with *Swift Currie McGhee & Hiers* in Atlanta was presented the Conspicuous Service to the Stonewall Community Award by the Stonewall Bar Association at its 19th annual awards dinner in October. The award honors a person who has taken a public stand on an issue that benefits the Lesbian, Gay, Bisexual, Trans-gender, Queer (LGBTQ) community. She was recognized for her leadership in advocating that the Atlanta Bar Association sign on to the amicus briefs in the marriage equality cases before the U.S. Supreme Court; the Atlanta Bar was the only mainstream bar association outside of California that opted to do so.

Douglas K. Burrell, a partner with *Drew Eckl & Farnham* in Atlanta, received the David Carr Outstanding Committee Chair Award from DRI during its 2013 Annual Meeting in Chicago. He was recognized for his work chairing DRI's Diversity Committee.

W. Ray Persons, a partner with *King & Spalding* in Atlanta, was inducted into the 2013 Gate City Bar Association's Hall of Fame during a gala in November. Established in 1948, the Gate City Bar Association is the oldest African-American bar association in the state.

Anandhi S. Rajan, a litigation partner since 2001 with *Swift Currie McGhee & Hiers* in Atlanta, is now also a mediator/arbitrator with BAY Mediation & Arbitration Services. Her litigation and mediation practice focuses on personal injury, wrongful death, premises liability, product liability, employment liability and municipal liability cases.

Ashley N. Gowder, formerly with *Vernis & Bowling*, has joined the civil litigation defense practice group at *Lueder Larkin & Hunter* in Alpharetta. She focuses her practice on general insurance defense, automobile negligence, commercial vehicle negligence, coverage and declaratory judgment actions, premises liability and vertical transportation defense.

Chad Eric Jacobs, formerly with *Drew Eckl & Farnham*, has joined *Allen Kopet & Associates* as an attorney in the firm's Atlanta office. He will maintain a general civil defense practice focusing on the areas of general liability, insurance coverage, premises liability, property loss and appellate practice.

GDLA Board of Directors member **Jo A. Jagor**, a partner with *Hall Booth Smith* in Atlanta, was elected to serve as a Board Member and Program Chair of the Georgia Society of Healthcare Risk Managers (GSHRM) for 2013-2014.

Nathan A. Gaffney, an associate with *Hall Booth Smith* in Atlanta, was invited to address more than 125 judges at the State Court Judges Fall Conference on Jekyll Island in October regarding sealing court records and courtrooms.

GDLA Board of Directors member **James W. Purcell**, a partner with *Fulcher Hagler* in Augusta, was elected to serve on the President's Advisory Council of the Children's Organ Transplant Association (COTA). COTA is a national charity that provides fundraising assistance to transplant families. Since 1986, COTA's priority is to assure that no child or young adult is denied a transplant or excluded from a transplant waiting list due to lack of funds.

Nall & Miller in Atlanta announced that **Patrick N. Arndt** joined the firm earlier this year. He concentrates his practice in the areas of construction law, governmental liability, healthcare law, motor carrier litigation, product liability, professional liability and trial practice.

Jake Evans, formerly with *Hawkins Parnell Thackston & Young*, has joined the civil litigation defense practice group at *Lewis Brisbois Bisgaard & Smith*. He focuses his practice on products liability, general litigation defense, premise liability, and transportation litigation.

GDLA Executive Director **Jennifer M. Davis** was appointed by DRI First Vice President Laura E. Proctor to serve on the DRI Annual Meeting Steering Committee.

Case Wins

Sharon H. Reeves and **Callie Dickson Bryan**, partners with *Jones Cork & Miller* in Macon, secured a complete defense victory before Judge Marc T. Treadwell in the Middle District of Georgia, Macon Division, following a four-day trial and approximately one hour of deliberation. Their client, a major chicken processing company, was the defendant in a case alleging employment discrimination and retaliation.

With **J. (Jay) Holder Smith, Jr.** of *Young Thagard Hoffman, Smith & Lawrence* in Valdosta leading the charge – and subbing into the case to replace retiring John Croley of Fitzgerald – Smith and **James (Jim) F. Cook, Jr.**, of Atlanta's *Goodman McGuffey Lindsey & Johnson*, representing the UM carrier, tried a case to a defense verdict on September 18, 2013. The case was tried before Superior

Court Judge Chris Hughes in Fitzgerald, Ben Hill County. The railroad crossing case involved a motorcycle driver crossing the tracks as the cross arms lowered, while on the other side of the crossing the defendant did a U-turn in his pickup truck to go to a different hardware store rather than await the train's passing. It did not work out well for the motorcyclist who suffered a serious humerus fracture when he bent the frame of the pickup truck on impact. It remains to be seen whether the verdict will be appealed.

John L. McKinley, Jr., a partner with *Mozley Finlayson & Loggins* in Atlanta, teamed with firm associate **Aaron A. Miller** to defend a satellite services provider successfully in a case alleging fraud, violations of the state Fair Business Practices Act, trespass, and punitive damages, which was tried to a jury in federal court in Atlanta in July. The company was accused of making intentional misrepresentations about the service and charges under a contract, as well as trespassing on the plaintiff's property. Other claims, including those under the state RICO statutes, were dismissed on a dispositive motion. The jury rendered a verdict in favor of the company on all claims.

In May 2013, **John R. Lowery** and **Janine D. Willis** of *Mozley Finlayson & Loggins* in Atlanta, enjoyed the return of a defense verdict for their client following a week-long, 12-person jury trial, presided over by Judge Thrash in the Northern District of Georgia, Atlanta Division.

The jury deliberated less than a half day before deciding that their client, a supervisor at MARTA, had not illegally retaliated against a former employee whom she had discharged. The jury did, however, return a verdict against MARTA, presumably on the theory that other management-level officials at MARTA had retaliated against the plaintiff.

Following the verdict, Lowery and Willis took over the post-trial

work for MARTA and filed a Motion for Judgment as a Matter of Law, arguing that the verdict against MARTA but in favor of their client, the undisputed decision-maker, was inconsistent.

Judge Thrash agreed and granted the Motion in favor of MARTA, entering judgment against the plaintiff and reversing the award of \$500,000.00 in damages. The ruling also means that counsel for the plaintiff will not recover any of the \$500,000.00 plus in attorneys' fees for which they asked.

Brian J. Duva and a colleague at *Mozley Finlayson & Loggins* in Atlanta recently won a motion for summary judgment on behalf of a trucking company and a truck driver. This victory occurred after more than four years of hotly contested litigation involving a series of car accidents on I-75 in Marietta, Georgia.

The defense team was able to show the court there was no evidence that the defendants failed to act with ordinary care, despite the testimony from the plaintiffs' two motor carrier industry experts who both attempted to blame the truck driver and trucking company for causing the accident. This was a major victory, especially since the plaintiffs were seeking several million dollars in medical expenses alone. *Dogan v. Rockwell Transportation, Inc. et al.*, State Court of Gwinnett County, CAFN: 09-c-10196, Judge Randy Rich.

In another case, Mr. Duva and a colleague won summary judgment on behalf of a trucking company, a truck driver and their insurer on the cause of a plaintiff's back surgery and post-surgical treatments costing approximately \$400,000.00.

The victory was especially noteworthy because the Court found that under *Cowart v. Widener*, 287 Ga. 622, 627 (2010), the plaintiff was required to produce expert testimony on the cause of the back surgery due to her pre-existing back problems. The expert testimony proffered by the plaintiff

in alleged support of the causation element was then struck by the court under a Daubert analysis, leaving the plaintiff with no expert testimony, on causation that could satisfy the *Cowart* requirement.

The Court also struck portions of the plaintiff's surgeon's testimony which were based on his analysis of materials that had been provided by the plaintiff's counsel to the surgeon but which the surgeon never reviewed during the course of treating the plaintiff.

The victory left the plaintiff with no provable special damages. *Whitley v. Boyz Transportation, et al.*, USDC N.D. Ga., CAFN 11-cv-00333, Judge Marvin Shoob.

Hugh B. McNatt of *McNatt Greene & Peterson* in Vidalia and **James (Jim) L. Hollis** of *Balch & Bingham* in Atlanta obtained a defense verdict for Volkswagen AG after a two-week federal jury trial. This wrongful death case involved the tragic death of a 19 year old woman after a severe rear impact with a tree. Plaintiffs pursued a strict liability theory alleging various design defects.

The U.S.-based distributor was dismissed by directed verdict following the close of Plaintiffs' evidence. A jury of seven women and one man then returned a unanimous verdict in favor of the German designer and Mexican manufacturer, finding that there was no design defect that proximately caused Plaintiffs' fatal injuries.

No damages were awarded. *Donna B. Mitchell, and Robert Hector vs. Volkswagen Group of America, Inc., et al.*, Civil Action File No. 1:10-CV-0944-SCJ.

T. Joshua (Josh) Archer and **Anne Kaufold-Wiggins** of *Balch & Bingham* in Atlanta obtained summary judgment in case alleging negligent selection and installation of equipment. *Andrew Jackson and Wyteria Jackson v. Sensus USA, Inc., et al.*, Civil Action File No. 2012CV221244, Superior Court of Fulton County.

Continued on next page



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Partner **C. Jason Willcox** and associate **Christopher (Chris) L. Foreman** of *Moore Clarke Duvall & Rodgers* in Albany were retained by an insurer to review the denial of summary judgment to one of its insureds. Willcox and Foreman were asked to outline the procedure for immediate review and to determine the potential for success with an appeal. The case involved a pedestrian who was crossing a four lane, divided interior roadway leading to a retail shopping complex where she was struck by a motor vehicle. Plaintiff suffered significant injuries, including an open, comminuted fracture of the lower leg, and incurred medical expenses in excess of \$100,000.00.

After obtaining a Certificate of Immediate Review, Willcox and Foreman filed their application for Interlocutory Appeal with the Georgia Court of Appeals. Their application was one of the less than 40 percent granted in 2012. The Court ultimately considered the briefs and trial court record and reversed the trial court's decision.

The Court of Appeals determined that the premises owner was in fact entitled to summary judgment. The Court held that the clear and undisputed evidence established that the plaintiff's knowledge of the alleged hazards that caused her injuries was equal to or greater than that of the defendant premises owner. Plaintiff sought reconsideration by the Court of Appeals, which was denied. Subsequently, the Georgia Supreme Court denied Plaintiff's Petition for Certiorari. The opinion was unreported.

Willcox and Foreman were also successful in obtaining summary judgment on a slip and fall at a grocery store. The plaintiff fell as she walked down the "inherently dangerous" (as classified by the plaintiff) freezer aisle of the grocery store. Plaintiff suffered injuries to her neck, low back and leg. Plaintiff testified in her deposition that she slipped and fell on a "mist." Plaintiff, however, also testified that the mist was not wet; that the

mist had no defined shape or area; that she had no knowledge as to the origin of the mist; and that at no point before, during, or after her fall did she actually view the mist. Despite the invisible and amorphous nature of the "mist" Plaintiff asserted that the grocery store had knowledge of the "mist" upon which she allegedly slipped.

The trial court determined the defendant was entitled to summary judgment based on a lack of actual or constructive knowledge of the mist upon which Plaintiff allegedly slipped. The trial court held that Plaintiff's description of the foreign substance was "speculative at most, '... like someone blew their breath.'"

The trial court judge held that there was no evidence to establish actual knowledge on the part of the grocery store. Moreover, and pursuant to *Chastain v. C.F. Georgia North DeKalb L.P.*, 256 Ga. App. 802 (2002) the testimony of the plaintiff established that the defendant did not have constructive knowledge of the alleged hazard.

Plaintiff has appealed the trial court's order to the Georgia Court of Appeals. The appellate briefs have been filed and we will keep you informed as to any further developments in the case.

Maureen (Molly) O'Connor of *Mabry & McClelland* in Atlanta recently won a motion for summary judgment "from the bench" in a slip and fall case.

The plaintiff stated in her complaint that [she] "fell on the worn, slick carpet, over the dark, poorly-lit stairway that was her only means of egress from the [defendant's] upstairs office." She had been to the building on three prior occasions and had always used the same entrance and exit. She fell upon exiting wearing three-inch high heel shoes.

She states she lost her balance near the bottom of the interior stairs, stumbled across the tile landing, grabbed the interior door handle, which flew open, and fell down two exterior steps to the asphalt parking lot where she frac-

tured her ankle and sustained some other injuries.

However, Plaintiff's allegations that she fell on the "worn slick carpet" while exiting down the dimly-lit rear interior staircase and that the metal threshold and door latch were defective completely fell apart under cross-examination.

Her claims were based on pure speculation and conjecture. She admitted that there was no defect and she could not remember if the lights were on, upon which step she tripped, if there was a tear in the carpet or something slick that she slipped on, what handrail she was holding, or exactly how it was that she fell.

Defendant argued that not only did the fall happen during the day, the door she reached for had a large window letting in light, there were mirrors lining the wall reflecting light, and there were several lights on at the top and bottom of the stairwell. In addition, photographs taken two years after the fall, that Plaintiff admitted were an accurate depiction of the stairwell, showed no defect in the carpeting, no defect in the metal threshold, and that the door handle was actually a handicap lever that had to be depressed to open.

Plaintiff's counsel argued while there was no discernible defect in the pictures, the photographs only told part of the story; and that while she could not quote from any particular line of Plaintiff's deposition, her testimony as a whole was enough to raise a fact question for the jury. Judge Michael Annis granted Defendant's Motion for Summary Judgment.

Henry D. (Hank) Fellows, Jr., a partner with *Fellows LaBriola* in Atlanta, obtained a summary judgment in the U.S. District Court for the Middle District of Georgia on behalf of the defendant employer in *Renee Huff v. Ramsay Youth Services of Georgia, Inc.*, Civil Action No. 5:11-cv-455 (July 15, 2013). The plaintiff brought the case under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act

of 1967 against the defendant medical center, alleging sex and age discrimination. The federal district court granted a summary judgment in favor of the medical center as to all of the plaintiff's claims.

The plaintiff worked as a mental health technician for the defendant employer, which is a medical facility that provides mental health treatment to children and adolescents.

The plaintiff worked as an at-will employee for the defendant from February 2004, through January 2009. The defendant terminated the plaintiff's employment and the employment of several other employees in January 2009, for failure to complete medical observation records confirming regular checks of patients.

The evidence showed that the defendant had previously warned the plaintiff about failure to document observations of patients. The defendant terminated the employment of four male employees and

three female employees at the same time.

The plaintiff submitted a charge of discrimination to the EEOC in May 2009, and filed suit in November 2011, after the EEOC closed its investigation. On April 18, 2012, the U.S. District Court for the Middle District of Georgia granted the defendant's motion to dismiss the plaintiff's claims for damages because the plaintiff did not disclose her discrimination claims when she and her husband filed a petition for bankruptcy.

On July 15, 2013, the court granted the defendant's Motion for Summary Judgment as to the plaintiff's remaining claims for reinstatement to her former position. As to the plaintiff's Title VII claims, the court reasoned that the plaintiff had failed to make out a prima facie case because she had not shown "similarly situated employees outside of [her] protected class were treated more favorably."

More specifically, the plaintiff failed to demonstrate that "she was treated differently from male employees when she was fired. Accordingly, the court finds she cannot make out a prima facie case of discriminatory discharge based on her sex."

As to the plaintiff's age discrimination claim, the court held that "[t]he Plaintiff has not introduced evidence sufficient to create a genuine dispute that she was replaced by a substantially younger individual."

The court further noted that the individuals referred to by the plaintiff were not "proper comparators" to the plaintiff because they did not engage in "nearly identical misconduct as the Plaintiff." The court therefore granted the defendant's Motion for Summary Judgment as to the plaintiff's age discrimination claim.❖

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Welcome New GDLA Members

The following were admitted to membership at the Board of Directors' Fall Meeting. As part of our RecruitOne II membership drive, we are pleased to recognize the GDLA members who were listed as a referring party on a prospective member's application.

New GDLA members' names are in **bold**; recruiting GDLA members' names are in *italics*:

Charles Benjamin Avery

Cowsert & Avery, Athens

Craig C. Avery

Cowsert & Avery, Athens

Mark Begnaud

Freeman Mathis & Gary, Atlanta

Wayne S. Melnick

Freeman Mathis & Gary

J. Scott Bell

Vernis & Bowling, Atlanta

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Robert (Rusty) R. Gunn

Martin Snow

John David Dean

Young Thagard Hoffman Smith

Lawrence & Shenton, Valdosta

J. (Jay) Holder Smith, Jr.

Young Thagard Hoffman Smith

Lawrence & Shenton

William D. Ezzell

Freeman Mathis & Gary, Atlanta

Dana K. Maine

Freeman Mathis & Gary

Leah C. Fox

Moore Ingram

Johnson & Steele, Marietta

Warner S. Fox

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Savannah
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Hunter Maclean Exley & Dunn

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Dennis Corry Porter &
Smith, Atlanta
Jan Seanor Sigman
Dennis Corry Porter & Smith

John Lowery

Mozley Finlayson & Loggins,
Atlanta

William S. Mann

Hall Booth Smith, Brunswick

Gailya L. McElroy

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James Bates Brannan
Groover, Macon
Duke Groover
James Bates
Brannan Groover



for the award; GDLA President Ted Freeman's nomination letter is reprinted below:

On behalf of the Georgia Defense Lawyers Association, it is my pleasure to nominate GDLA Immediate Past President Lynn M. Roberson for the Fred H. Sievert Award. Lynn truly embodies the criteria – she is an outstanding defense bar leader, who has initiated innovative projects for the betterment of the organization and exercised strong leadership.

To understand Lynn's accomplishments, one must view them through the lens of our association's history. The GDLA was founded in 1967 by a handful of white male defense lawyers who wanted to socialize and informally share war stories and techniques. The GDLA has since grown to more than 700 members, and offers formal avenues for training, networking and communication.

Lynn was elected to the GDLA Board of Directors in 2004, where she was consistently re-elected until she was elevated to one of four Vice President positions in 2007. She served in that capacity until she was elected Secretary-Treasurer in 2010. That election marked the first time a woman had held an officer position in the GDLA. She was then elected Executive Vice President in 2011 and ultimately President in 2012, making her the first woman to lead the GDLA. Lynn was also involved with DRI on behalf of our state and local defense organization (SLDO), serving as Georgia's State Representative from 2008-2011.

During the same period, Lynn was active with the Atlanta Bar Association, the largest voluntary bar in the Southeast with over 6,000 members. She was climbing the ladder there, just as her star was rising in the GDLA. It was clear she was in line to be Atlanta Bar President, and that timing was accelerated when the heir appar-

ent preceding Lynn was appointed to the appellate bench. Lynn's term as Atlanta Bar President-elect and, subsequently, President moved up a year, which translated into her serving simultaneously as Atlanta Bar President and GDLA President.

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bar leader
and so much of
what she does to
inspire others is
intangible.**

To the casual observer, that may have seemed like an impossible feat – or at least one that meant one of the associations would surely suffer. How could one person possibly lead both groups, and do so effectively? But those of us who know Lynn were convinced she was probably the only one could conquer that unprecedented challenge.

The *Atlanta Business Chronicle*, Georgia's leading publication for business and industry, recognized Lynn's prowess and spotlighted her landmark achievement in the August 2012 article, "First Woman to Head Lawyers Group Paid Dues." The article explained the secret to her success wasn't being a woman – it was hard work:

Warner S. Fox, a partner with Hawkins Parnell Thackston & Young in Atlanta and a Past President of the association, said it wasn't Roberson's gender that got her elected to the leadership post. "Lynn's just dynamic," he said. "She's always been tireless in her efforts. I don't know where she finds the time to do it all. ... Under our system, it's her time to be president."

None of us knows how she finds time to do it all – and to do it well. We're almost certain that her day somehow has more than 24 hours in it or that she never sleeps! All of this she accomplished while continuing to be one of the premier premises liability lawyers in Georgia; she is consistently named a Georgia Super Lawyer and among the Top 50 Woman Super Lawyers in our state.

It should also be noted that during Lynn's year as Atlanta Bar President, its Executive Director of 47 years, Diane O'Steen, retired – meaning Diane was at the Atlanta Bar when the GDLA was created! As if that weren't enough, both the CFO and CLE Director of 38 and 27 years, respectively, also retired. Coordinating a nationwide search and conducting hiring interviews for these three critical positions just added more to Lynn's plate. Again, all while she was serving as GDLA President, too.

Although Lynn does not like to highlight her being the first woman GDLA President – "It's not particularly flattering that it took us this long," she says – that may be the reason she was focused on diversity during her tenure. In terms of an innovative project, she appointed the GDLA's first Diversity Committee. Again, we realize that's not innovative by some SLDO stan-

dards, as we may be a bit behind the times, but it was a breakthrough moment for the GDLA.

Additionally, Lynn proposed to the GDLA Board of Directors that we apply for membership in the Multi-Bar Leadership Council (MBLC), which the Atlanta Bar created in 2001 to foster and improve relationships among the members of local bar associations, while focusing on diversity and inclusion. Our membership application is expected to be approved next month, so the GDLA will become part of a larger statewide effort to promote diversity through judicial candidate forums, networking receptions, community service projects and more.

Even before the foregoing efforts during her term as President, Lynn was focused on diversity. One example was during her time as a member of the GDLA's Trial Academy. Lynn recognized the need for the faculty to be more representative of the legal

community. She invited the first African-American faculty to participate and worked to increase the number of women on the team. As chair, for which she served three years, she invited Douglas Burrell to join the faculty. Douglas has since risen to Vice-chair and will Chair the program for 2014. Douglas, picking up the mantle to diversify the faculty, has added an African-American female, as well as a second African-American male, to the distinguished group for this coming year.

It is hard to capture Lynn's extraordinary accomplishments on paper, because she defies the role of a typical bar leader and so much of what she does to inspire others is intangible. Her energy, enthusiasm, dedication and focus are unparalleled. She has left an indelible mark on the entire legal profession in Georgia through her leadership of both the GDLA and the Atlanta Bar. She has made headlines literally and figuratively,

elevating the GDLA's profile by educating so many about our existence as a counterpart to the local American Association for Justice chapter. Just about everyone in the legal community knows Lynn, and now that expansive audience knows what the GDLA is and how membership therein can benefit the civil defense lawyer.

Finally, while most Past Presidents ride off into the sunset – and some SLDOs even struggle to keep them involved – Lynn has taken over as Chair of the GDLA Diversity Committee, and will be our representative to the MBLC.

She has already created a great legacy, but she is never one to rest on her laurels. In Lynn's eyes, her work is never done – being outstanding is never enough, which is why we believe she unequivocally deserves to be honored with DRI's Fred H. Sievert Outstanding Bar Leader Award. ❖



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Analysis of Reliance on Technical Standards in a Worksite Fatality Case

By John Leffler, P.E.
FORCON International

In this litigation, a specialized machine was rented by a college student for use in a school project. The hired machine operator caused the device to contact power lines, resulting in another student's death and a civil suit.

One defendant (the equipment rental agency) filed a cross-claim against another defendant (the renter), based on the indemnification clauses in the rental contract.

The forensic analysis examined the American National Standards Institute's (ANSI) safety standard for the equipment, the rental agency's reliance on (and compliance with) that standard, and the general topic of providing reasonable notice of both responsibilities and potential hazards.

Analysis

1. The incident happened in May, 2009. A post-incident joint inspection of the machine revealed no significant functional defects.
2. We will refer to the renter as Mr. Smith, the machine operator as Mr. Green, and the rental agency as ABCD Rentals. The machine's manufacturer stated that it complied with an ANSI safety standard focused on those machines. The standard categorized ABCD Rentals as a Dealer, Owner, and Lessor of the subject machine. Renter Mr. Smith was categorized as a Lessee and as a User. Mr. Green was categorized as an Operator.
3. Renter Mr. Smith had observed similar machines in use for similar projects, but he had not used one. He advertised online for an operator, as no one involved with the proj-

ect knew how to operate the machine. Mr. Green responded to the advertisement and stated he had significant experience in the position advertised. Based on case testimony, Mr. Green's representation of himself to Mr. Smith was consistent with that of a qualified operator with extensive experience. The testimony of Mr. Green did not reveal a perception on his part that renter Mr. Smith's experience and qualifications were equal or superior to his own.

4. Under the ANSI standard, Lessees of these machines would typically also be categorized as Users. The 2006 version of the standard was considered applicable by ABCD Rentals (per the deposition of the branch manager), and in discovery ABCD Rentals did not reveal any internal safety procedures that were to be followed instead. The 2006 ANSI standard assigned a wide variety of responsibilities solely to the User. Paraphrasing some of the active tasks required of Users by the standard, renter Mr. Smith was responsible for:
 - a. Observing and evaluating Mr. Green's work practices to determine if retraining was necessary, and arranging retraining if necessary.
 - b. Monitoring and supervising Mr. Green's use of the machine to ensure compliance with the standard.
 - c. Directing Mr. Green to maintain safe distances to overhead hazards and conductors.

The foregoing subset of the User responsibilities clearly implies that renter Mr. Smith had to have prior machine operational training and experience that was superior to that of Mr. Green – superior to the level of fulfilling numerous supervisory and technically evaluative responsibilities. Yet in their depositions neither Mr. Smith nor Mr. Green revealed any expectation that 22-year-old renter Mr. Smith would or could have acted as the technical and evaluative supervisor of 37-year-old Mr. Green.

5. The relevant ANSI standard, like all standards written by a committee, had "holes" that could be found in the coverage of a safety topic. ABCD Rentals' nominal reliance on this safety standard was reasonable, but this reliance should have been subsequent to a diligent analysis of the safety processes it prescribed. Some of the deficiencies of the standard were detailed in a "Statement of Best Practices," published post-incident in February 2010 by the standard's Secretariat—and ABCD Rentals was on the committee that prepared that Statement. Selected deficiencies in the 2006 standard (as discussed in the Statement) are outlined below:
 - a. A section under "Responsibilities of Dealers" discussed *Training*, which (paraphrasing) stated that the Dealer must *offer* appropriate training that would facilitate compliance with the standard's requirements by Owners, Users and Operators. The "necessary" content of this

Training was not defined in the standard, however.

- b. A section under “Responsibilities of Dealers” discussed *Familiarization* that was to occur upon the machine’s delivery. It stated (paraphrasing) that for any type of usage, the dealer’s representative (e.g. the delivery driver) must instruct the person receiving the machine (hereafter “receiver”) in four areas:

- i. Showing the receiver where the weather resistant compartment was for storing the operators and safety manuals (i.e. alerting to manual location but not content).
- ii. Confirming that the manufacturer-specified manuals were present (i.e. confirming the presence of manuals but not alerting to their content).
- iii. Reviewing with the receiver the functioning of the machine controls.
- iv. Reviewing with the receiver any model-specific safety devices.

This section thereby required the dealer to perform this Familiarization; it could not be declined if the receiver didn’t want it. But nothing in the standard specified the necessary competence of the receiver, and a neophyte Lessee may not have known who would be best to so designate. The standard indirectly established that Training was supposed to precede any non-Training use of the machine.

And as Training may have been on a different model of machine, the Familiarization (in turn) was supposed to inform the *already-trained* operator about the controls and safety specifics of the *delivered* machine. This was elaborated upon in detail in the “Statement of Best Practices” document – published with the stated intent of clarifying this two-phase instructional requirement.

6. As revealed in discovery, all ABCD Rentals required prior to delivery was a credit application, credit card authorization, and confirmed insurance coverage. None of those documents outlined any safety responsibilities, and there was no ABCD Rentals testimony that safety responsibilities had been discussed with the renter prior to the rental. The Rental Agreement and Condition & Delivery Report discussed safety, but per ABCD Rentals policy these documents were only provided to renters upon delivery, and nothing in the ANSI standard discussed this issue of notification. If upon machine delivery the neophyte Lessee *did* learn of the ANSI User responsibilities, at that point the rental period would have already begun, the machine would have been delivered, and workers would be onsite waiting to perform the work that necessitated the machine. The neophyte Lessee’s “safe” choices at that point would be to cancel the machine rental (and associated work) or postpone its use until someone could be found with the qualifications necessary to act as the User.
7. In the deposition of the ABCD Rentals branch manager, he stated that he was not required by ABCD Rentals to study or fully comprehend the ANSI standard. He stated that he

had never reviewed all of the User responsibilities in the standard, and that ABCD Rentals had not required him to understand those responsibilities.

Summary of Opinion

In this author’s opinion, had Mr. Smith been made aware of the specific responsibilities that were indirectly assigned to him by ABCD Rentals through their reliance on the ANSI standard, he may have recognized his potential liability, lack of competence to meet those responsibilities, or the possibility that Mr. Green was not an appropriate Operator.

He would then have had enough information to determine whether alternate arrangements should have been made that would have resulted in mitigation or elimination of the conditions that led to this fatal incident.

Case Outcome

A report was prepared by this author, discussing the issues above in detail. ABCD Rentals agreed to dismiss its cross-claim against renter Mr. Smith provided that the author was withdrawn as Mr. Smith’s expert – thereby withdrawing the report as well. ❖



John Leffler, P.E., is a forensic mechanical engineer in the Atlanta office of FORCON International. He specializes in product and vehicle incidents and premises liability. FORCON is a GDLA Platinum Sponsor.

When Going Green Goes Bad

By Deepak Ahuja, M.S., P.E.,
B. Matthew Smith, AIA, NCARB,
Gregory G. Schober M.S., P.E.,
and Marco A. DeLeon, M.E., P.E.
Nelson Architectural Engineers

When Scot and Melissa Hollmann began building their luxury family home among the other million dollar estates dotting prestigious Miramar Lane, the use of an environmentally friendly insulation material seemed like a great way to “go green.” Little did they know, in the span of only a few years, that decision, coupled with the use of an incompatible combination of building materials, would land them in court, battling over a property now worth less than their neighbors’ garages.

At the center of the controversy is a 9000 square foot two-story residence located in what the U.S. Department of Energy rates as a “hot-humid” climate. The exterior featured a lovely natural stone veneer; the interior boasted expensive hardwood paneling. But when the Hollmanns started discovering fungal growth on the walls, they quickly learned that the water intrusion causing it was not stemming from the “usual suspects” – the roof or doors. It came from ... within.

Anatomy of an Envelope

A building envelope is the assembly of materials that separate the exterior environment from the interior of a structure. The envelope serves as the outer shell or “skin” that protects the building from the elements and facilitates climate control within the same. Water *will* penetrate the exterior of a house with an exterior cavity wall. Building envelope components are designed and constructed to shed or drain that water to the exterior and away from the interior of the structure.

As shown in Figure 3, a masonry/stone veneer cavity wall system like the Hollmanns’ typi-



Figure 1 – Fungal growth behind removed wood trim.



Figure 2 – Fungal growth behind wood paneling.

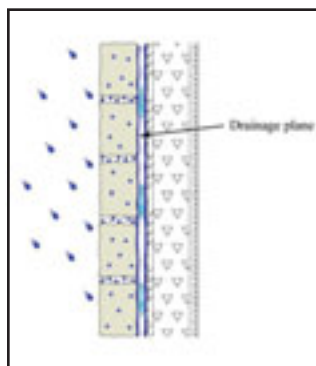


Figure 3 – Properly constructed wall cavity.

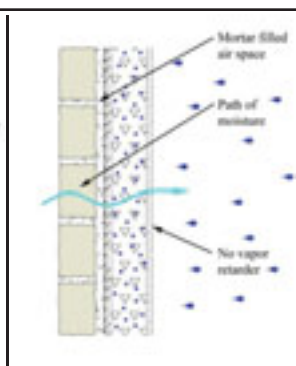


Figure 4 – Moisture passes through wall.

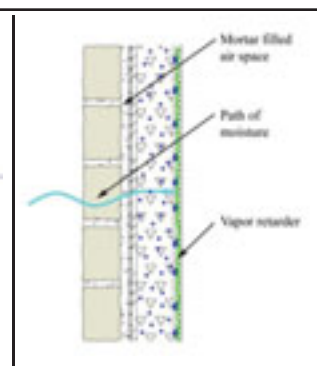


Figure 5 – Moisture blocked by vapor retarder.

cally consists of the following components, listed in order from exterior to interior: brick or natural stone veneer, air space, weather-resistant barrier or vapor retarder, load-bearing wall, and interior wall finish. Thermal insulation is typically used within a wood framed stud wall.

Wall Insulation

Common types of thermal insulation in residential construction include fiberglass batt insulation and cellulose insulation.

Fiberglass Batt Insulation. Fiberglass batt insulation has been used in the construction industry for many years. The main advantages of fiberglass batt insulation include low cost, fairly high R-value, and ease of installation. While fiberglass batt is moisture resistant, its inorganic composition means it does not decompose readily, rendering it a poor choice for

the environmentally conscious.

Cellulose Insulation. Cellulose insulation is made from recycled paper and treated with mold retardants and fireproofing chemicals. It is installed using either dry or wet-spray techniques, with wet-spray being the most common application in residential wall construction. Like fiberglass batt, cellulose insulation is also low cost, with a fairly high R-value. However, cellulose insulation is “hygroscopic,” meaning it absorbs and retains moisture. As a result, wet-spray cellulose insulation in particular has two important application limitations: 1.) it requires an experienced installer, and 2.) it must be allowed to dry properly before it is covered.

According to the North American Insulation Manufacturers Association (NAIMA), studies performed under various humidity conditions indicate that the short-

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est dry time for wet cellulose insulation was *one month* in a dry climate without a vapor retarder in the assembly. With vapor retarders on both sides of the system, it took more than *one year* for the insulation to dry in humid, moderate and dry climates.

Although the exact drying time allowed for the Hollmanns' home is unclear, it definitely was not a year.

Room to Breathe

Making matters worse, the homebuilder did a great job in sealing up the luxury residence – too great. As stated earlier, water will enter a residence with cavity wall construction. Architects and engineers accept this and design for it. Masonry veneer, like the natural stone used in the Hollmanns' residence, is considered porous or absorptive, and both liquid water and water vapor will penetrate the masonry into the air space beyond. The masonry cavity wall assembly, as a result, must be designed and constructed to drain this moisture to prevent it from migrating past the air space and into the interior of the structure.

Exterior walls should be limited to a single vapor retarder to allow a path for moisture that enters the cavity to escape. If vapor retarders are installed on both sides of the wall, moisture can be trapped in the wall insulation and prevent the wall cavity from drying. It is important to recognize that some commonly used materials will function as vapor retarders or barriers when they are not intended to. Examples include interior finishes such as enamel paints and hardwood paneling.

Peeling Back the Layers

When our company was engaged to determine the cause and origin of the fungal growth found by the Hollmanns, a variety of tests were performed. Because high moisture readings were observed throughout the exterior walls and not just within the vicinity of window/door openings, water spray testing was conducted at the exterior which led to the

eventual removal of the exterior stone veneer to inspect the wall cavity. Demolition revealed that the air space was filled with mortar and the mortar was packed against the weather-resistant barrier. When the weather-resistant barrier was removed to observe the OSB sheathing, the sheathing was saturated with water.

Analysis

Our investigation revealed deficiencies in the construction of the building envelope, including the mortar-filled air space. These deficiencies resulted in water intrusion and high moisture conditions within the stud wall, which manifested into deterioration of the cellulose materials in the wall assembly and promoted an environment for mold growth.

Further, moisture was trapped at the back side of the varnished and enameled materials, because these finishes are vapor retarders that prevent intruding moisture and wet cellulose insulation from drying to the inside of the structure.

Conclusions/ Lessons Learned

Cellulose, as a building material, was not the problem in itself. However, the use of cellulose in combination with multiple construction deficiencies, made this home's problem worse. When specifying material components, the project designer must consider the materials' tolerance for common construction defects or imperfections, and the implications thereof. In residential construction, often there is no designer, and the builder is responsible for integrating the various components. Regardless of who is responsible for specifying material components, the following should be addressed:

1. Moisture intrusion is inevitable through masonry/stone and proper drainage of the cavity wall is an intrinsic design requirement. It is imperative that drainage cavities and weep holes are kept clean of mortar

droppings during construction.

2. Designers/builders should be thoroughly familiar with both the requirements and limitations of building materials, including green materials. For example, care should be taken to ensure wet-spray cellulose insulation is allowed to dry and is independently verified prior to enclosing the insulation in the wall system. Additionally, care should be taken to ensure additional moisture is not added to the cellulose insulation by means of condensation or moisture intrusion.
3. Designers/builders should be thoroughly familiar with both the requirements and limitations of the materials and components as it relates to the whole building system. For example, installation of cellulose insulation between two materials that perform as vapor retarders or are semi-permeable materials is not recommended.

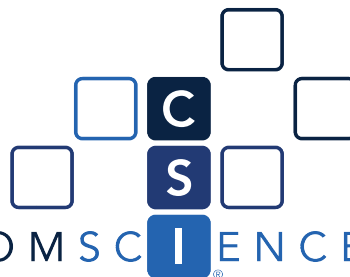
For the Hollmanns' homebuilder, this was an expensive lesson to learn. ♦



Adapted from "Potential Pitfalls of a Green Building Material: A Case Study of Cellulose Insulation," published by American Society of Civil Engineers, 6th Congress on Forensic Engineering, 2012. The authors are pictured top to bottom: Deepak Ahuja, M.S., P.E., Executive Vice President; B. Matthew Smith, AIA, NCARB, Project Director; Gregory G. Schober, M.S., P.E., Technical Director; and Marco A. DeLeon, M.E., P.E., Vice President of Research and Development. Nelson Architectural Engineers is a GDLA Platinum Sponsor.



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Why Sprinkler Systems Fail During Fires

By Andrew Blum, P.E. CFEI
Exponent

INTRODUCTION

Automatic fire sprinkler systems are often considered the most significant component of a building fire protection strategy. When properly designed, installed, tested, and maintained, they can control a fire and significantly reduce deaths, injuries, and property damage. If any of these components are lacking or improperly performed, however, a system's effectiveness is drastically reduced.

Research shows that, between 2007 and 2011, automatic fire sprinkler systems operated in 91% of all fires large enough to cause activation and were effective in 96% of the fires in which they operated, resulting in an overall effective performance rate of 87%. Sometimes fire sprinkler systems are designed and/or installed improperly at the time of original construction. Many times, though, a system's effectiveness is impacted by changes that occur after the initial installation, commissioning and approval of the system. Buildings are dynamic, and in the modern era of design flexibility, structures are increasingly subject to changes in their characteristics, use, and function.

Over time, new tenants replace old ones, walls are removed, added, or altered, and protected commodities can change in type as well as storage configuration. An automatic fire sprinkler system that is initially properly designed and installed may require modifications as a result of these seemingly subtle changes. This article explores recent automatic fire sprinkler system failure data to identify common causes of unsatisfactory system performance across a broad range of occupancies.

In addition, this article will discuss specific examples of recent fires in Georgia where automatic fire sprinkler systems performed unsatisfactorily.



SPRINKLER SYSTEM STATISTICS

An examination of the most recent National Fire Protection Association (NFPA) statistics sheds light on the most common causes of unsatisfactory automatic fire sprinkler system performance. NFPA data compiled from 2007 through 2011 indicate the following primary reasons for unsatisfactory performance:

1. System shut off (42%);
2. Manual intervention defeated system (17%);
3. Water discharged did not reach fire (13%);
4. Not enough water discharged (10%);
5. Lack of maintenance (6%);
6. System component damaged (6%); and
7. Inappropriate system for the type of fire (6%).

Although the categories used to organize and quantify unsatisfactory performance have evolved over time, the common themes remain the same.

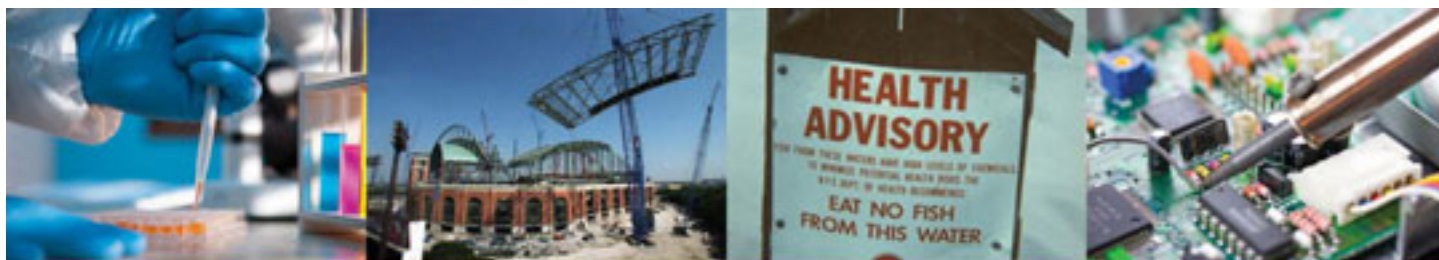
REASONS FOR UNSATISFACTORY FIRE SPRINKLER PERFORMANCE

As described above, the NFPA has cataloged a number of common contributors to unsatisfactory automatic fire sprinkler system performance. The following summarizes and describes the four major categories and highlights case studies of recent

fires in Georgia to provide real world examples of unsatisfactory sprinkler performance during a fire event.

Failure to assure adequacy of system and/or complete coverage of the hazard. The effectiveness of an automatic fire sprinkler system starts with proper design and installation of the system for the given hazard. Failures in this category include instances where the unsatisfactory performance of the system was caused by the inability of the system to apply enough water to control the hazard it protects, and includes initial design errors, partial system installations, installation mistakes, changes to the commodity (i.e. type, configuration, or quantity), and/or changes to the building (i.e. its configuration, use or occupancy).

Case study: partial system installation. A fire in a Georgia university library in July 2003 caused \$6 million in damages, despite the presence and operation of the automatic fire sprinkler system. The library was 200,000 square feet, seven-stories high, and was built of protected noncombustible construction and contained a partial coverage wet-pipe system. The fire started in the building's storage area, which featured only a partial sprinkler system, and the specific point of origin of the fire was not protected at all by the partial system. Thus, the system was not effective at controlling or quelling the fire when it began.



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Failure to maintain operational status of the system. The foundation of achieving satisfactory automatic fire sprinkler system performance is regular inspection, testing, and maintenance of the system and providing a system that is 100% operational before and during a fire event. Failures in this category include instances where the water supply is shut off for any number of reasons prior to or during the fire event (i.e. manual intervention during firefighting activities), inadequate maintenance (including installation deficiencies not captured during acceptance testing or subsequent inspection, testing, and maintenance procedures), component mechanical or corrosion failures, and obstructions to water distribution.

Case study: inadequate maintenance. A fire in a Georgia textile recycling plant in January 2007 caused \$7.5 million in damages and killed one civilian, despite the presence and operation of the automatic fire sprinkler system. The plant was 245,000 square feet, three-stories high and was built of heavy-timber construction. Due to an unknown cause, a fire broke out in a machinery room and spread to the rest of the plant, activating over 75 sprinkler heads. The system was ineffective in controlling the fire as it had not been maintained for quite some time. Maintenance deficiencies included improper sprinkler head clearance, modifications to sprinkler risers to allow the use of garden-type hoses, and system valves not being fully open.

Defects affecting, but not involving, the sprinkler system. By design, the proper operation of an automatic fire sprinkler system during a fire may be dependent on the function of other building systems and features. Failures in this category include instances where unsatisfactory performance of the system during a fire event was caused by conditions or elements that are peripheral to, but not distinctly a part of, the system. Examples include reductions in available water supply, faulty building construction damaging the system, collapse of

building elements (by element failure or by explosion) damaging the system, and lack of compartmentation.

Case study: System damaged by explosion. Two explosions and an ensuing fire in a Georgia sugar refinery in February 2008 caused \$275 million in damages and killed fourteen civilians, despite the presence and operation of an automatic fire sprinkler system. The refinery was 75,000 square feet, 97-feet high and was built of unprotected noncombustible construction. The second explosion ignited fires on several floors and spread throughout the building. The refinery had a complete-coverage combination wet- and dry-pipe sprinkler system, which activated during the event; however, it was disabled by the secondary blast. The system was ineffective in controlling the post-explosion fires as it had been damaged by the initial explosions.

Inadequate performance by the sprinkler system itself. The proper operation of an automatic fire sprinkler system during a fire is dependent on proper operation of the components. Although generally considered reliable, as in any engineered system, components can fail and adversely affect the operation of the entire system. Data has shown, however, that these types of failures are a very small fraction of the overall reasons for failure.

Other causes that contribute to unsatisfactory performance of automatic fire sprinkler systems that do not fit into these categories include: exposure fires starting on the exterior of the building; delays associated with manual fire suppression efforts; general delays in notifying the fire department of a small incipient fire that rapidly grows to a catastrophic size; and other unknown causes. These causes are a relatively small fraction of the reported reasons for unsatisfactory system performance.

CONCLUSION

Automatic fire sprinkler systems are often the first line of defense in an overall building fire protection

strategy. To achieve successful automatic fire sprinkler system performance during a fire event, the system must be designed and installed to discharge the proper amount of water to the proper area in the early stages of the fire in order to control its growth. The most common root cause for unsuccessful performance is a shut off water supply, such that no water is available for fire control. Maintaining automatic fire sprinkler systems in a proper operational status is necessary and fundamental for satisfactory system performance. However, proper maintenance and open water supply valves alone are no guarantee of a satisfactory outcome in the event of a fire. Other building elements and fire protection systems also play a role in the success of the automatic fire sprinkler system during a fire. Unsatisfactory system performance can be attributed to one or many variables not directly linked to the system. As with all engineered systems, automatic fire sprinkler systems have their limitations; however, when they are properly designed, installed, tested, and maintained, they can be expected to provide reliable performance for the protection of the specified hazards. ♦

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Appellate Case Law Update

By Mark W. Wortham, SLC Chair,
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APPELLATE JURISDICTION: Jurisdictional limitations in the trial court

After filing a notice of appeal the trial court loses jurisdiction to modify judgments and orders.

O.C.G.A. § 5-6-46(a) provides that supersedeas immediately attaches upon filing a notice of appeal. It is not necessary for a bond to be filed to trigger supersedeas on appeal, but a bond becomes mandatory if a motion for a bond is filed. O.C.G.A. § 5-6-46(a). It is the effect of supersedeas that prohibits the trial court from modifying judgments or orders after the notice of appeal is filed, thus limiting the trial court's jurisdiction.

***Gomez v. Innocent*, ___Ga.App.____, 746 S.E.2d 645, A13A0550 (July 15, 2013) and *Chung v. Hair Trend USA, Inc.*, 322 Ga. App. 429 (2013)**

Gomez sued Dr. Innocent over a dispute as to veterinary bills and boarding costs. The case was tried before a jury, but before the close of the evidence the trial court announced that it was going to dismiss the case for the failure to state a claim. It then refused to allow Dr. Innocent to testify, refused to allow Gomez to finish his case and denied Gomez the ability to finish his proffer of evidence. The court issued a sua sponte order granting summary judgment in favor of Dr. Innocent and dismissing the case for failure to state a claim. Later the court entered a second order stating it dismissed the case at trial rather than granting summary judgment, but also stating summary judgment was the "actual technical vehicle mechanism dismissing the [p]laintiff's complaint."



On appeal, Gomez argued the trial court lacked authority to issue the second "Final Order", because the order was entered twenty days after his notice of appeal was filed. Citing earlier precedent, the Court of Appeals reversed the trial court holding that, "[a] notice of appeal divests the trial court of jurisdiction to supplement, amend, or modify the judgment while the appeal of that judgment is pending." See also *Chung v. Hair Trend USA, Inc.*, (the filing of a notice of appeal three days after the appellants' filed their motion for relief from the judgment divested the trial court of jurisdiction to decide the motion).

It is noted by the authors that while it is important to understand that the trial court generally loses jurisdiction to modify orders subsequent to the filing of a notice of appeal, that does not mean the trial court cannot enter any order after the filing of the notice of appeal. See O.C.G.A. § 9-15-14;

Trend Switchers v. Wheeler, 310 Ga.App. 573, 713 S.E.2d 720 (2011) (a trial court may award attorney fees after the filing of a notice of appeal). While an appeal is pending, a trial court may also rule on motions to supplement the record, motions for appeal bonds, motions to dismiss the appeal for delay, and motions to determine if juror misconduct occurred.

Lack of subject matter jurisdiction in the trial court does not bar the appellate courts' jurisdiction to rule on the trial court's judgment.

***Ferrell v. Young*, ___Ga. App.____, 746 S.E.2d 167, A13A0560 (July 5, 2013); and *Chandler v. Rohner*, ___Ga. App.____, A13A1407 (August 14, 2013)**

Young filed suit against the Georgia World Congress Center Authority alleging that officer Ferrell arrested him for stealing a cell phone and that after the arrest

Ferrell fondled Young's penis and forced him to commit non-consensual sex acts. Young brought both federal and state law claims based on the alleged sexual assault.

As the complaint alleged the sexual assault claims were in the scope of Ferrell's official duties or employment, the Court found Ferrell's conduct was immune under the Georgia Tort Claims Act. Because the allegations in the complaint established Ferrell's entitlement to immunity for the state law claims, the Court found the trial court lacked subject matter jurisdiction. Lacking jurisdiction, the Court found the trial court's order granting a default judgment against Ferrell on those claims was a nullity. However, the fact that the trial court lacked subject matter jurisdiction did not prohibit the Court of Appeals from reviewing the judgment or order. In reversing the trial court on the state law claims, the Court stated "[w]hen the record discloses that

the trial court lacked subject matter jurisdiction, 'we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.'" *See also Chandler v. Rohner*, (where the Superior Court did not have jurisdiction to terminate a biological parent's parental rights in a legitimation action, the judgment is a nullity, "... but the appeal from such an illegal judgment will not be dismissed, but instead the void judgment will be reversed").

APPELLATE JURISDICTION: Discretionary and Direct Appeals

Ledford v. Mobley, 321 Ga. App. 761, 743 S.E.2d 461 (2013)

Ledford appealed the trial court's award of attorneys' fees pursuant to O.C.G.A. § 9-15-14. The Court of Appeals dismissed Ledford's direct appeal, holding he should have filed a discre-

tionary appeal, as O.C.G.A. § 5-6-35 (a) (10) states that appeals of O.C.G.A. § 9-15-14 awards shall be by application pursuant to O.C.G.A. § 5-6-35 (b). The Court noted that although it had found awards of attorney fees under O.C.G.A. § 9-15-14 were directly appealable, it had done so only in instances where the attorney fees were appealed along with other directly appealable matters.

Morgan v. U.S. Bank National Association, 322 Ga. App. 357, 745 S.E.2d 290 (2013)

Morgan appealed the trial court's order dissolving a temporary restraining order, allowing the bank to foreclose on Morgan's house. At the hearing to determine whether the temporary restraining order would be permanent, the trial court dissolved the TRO. Morgan filed a direct appeal.

The Court began its analysis citing its duty to inquire into its jurisdiction to entertain each



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appeal. While appeals from orders granting or denying temporary restraining orders require an application pursuant to O.C.G.A. § 5-6-35 (a) (9), the Court held that the function and substance of the trial court's order was to deny Morgan interlocutory injunctive relief pending the litigation of the claims raised in his complaint.

As the function and substance of the order was to deny Morgan's request for interlocutory or final injunction, the trial court's order was directly appealable under O.C.G.A. § 5-6-34 (a) (4) as a judgment or order granting or refusing an interlocutory or final injunction.

It is noted by the authors of this update that where a litigant is in doubt of the status of an appeal as either direct or discretionary, reference should be made to O.C.G.A. § 5-6-35 (j). That code section states that where an appeal is subject to a direct appeal but the party files a timely application for a discretionary appeal, the appellate court shall have jurisdiction over the appeal. In order to perfect the appeal, the petitioner must file a notice of appeal within 10 days of the order granting the appeal.

APPELLATE JURISDICTION: Non-Parties Right to Appeal

***Ford Motor Company v. Young*, 322 Ga. App. 348, 745 S.E.2d 299 (2013)**

In a case of first impression, the Court of Appeals adopted persuasive federal precedent in holding that attorneys who are aggrieved by an order of a trial court have standing to appeal and further held that a later settlement of the case does not cause the appeal to be moot.

In this case, two attorneys appealed the trial court's order revoking their admission to practice as pro hac vice counsel for the defendant on the basis of alleged misconduct. Counsel for plaintiffs moved to dismiss the appeal, asserting Defendant's counsel did not have standing to appeal and

that the appeal was moot because it was settled after the attorneys were removed. The motion was denied. Initially noting its duty to inquire into its jurisdiction, the Court of Appeals stated the case presented two jurisdictional issues. The first was standing and the second was mootness.

Regarding standing, the Court began its analysis of this matter of first impression by reviewing the longstanding principle that only a party to a civil case, or one who has sought to become a party by way of intervention, has the right to appeal a judgment. It further noted the only exception to that rule is where a judgment is entered against a non-party; the nonparty becomes a party with standing to appeal.

The Court also recited the rule that a party not aggrieved by the judgment is without the right to except thereto. From this the Court found that since the trial court's order found the attorneys were in violation of Rules of Professional Conduct, the findings may have continuing, adverse collateral consequences on the attorneys' careers. Relying on decisions of the federal courts, the Court concluded that because the attorneys were aggrieved by the disqualification order finding the violations of the rules of conduct, they had standing to appeal.

Turning to the issue of mootness, the Court again found federal precedent persuasive. Citing an Eleventh Circuit case, the Court held that because the disqualification of counsel based on the grounds of candor toward a tribunal found in the Rules of Professional Conduct, the ruling could affect the attorneys' careers beyond the context of this particular case.

The Court also found the attorneys had a limited property right protected by the Fourteenth Amendment and that the trial court's revocation, without the opportunity to be heard, denied them the modicum of due process. The Court then held the trial court properly considered the Rules of

Professional Conduct in deciding the matter and remanded the case for further consideration consistent with the opinion.

APPELLATE JURISDICTION: The Collateral Order Doctrine

***Murphy v. Murphy*, ___Ga.App. ___, 747 S.E.2d 21 (A13A0206, July 12, 2013).**

The collateral order doctrine is sometimes used by the appellate courts to find jurisdiction where the order sought to be appealed (1) completely and conclusively decides the issue on appeal such that nothing in the underlying action can affect it; (2) resolves an issue that is substantially separate from the basic issues in the complaint; and (3) might result in the loss of an important right if review had to await final judgment, making the order effectively unreviewable on appeal. *See Murphy, citing Scroggins v. Edmondson*, 250 Ga. 430, 431-432, 297 S.E.2d 469 (1982).

Applying this test to the appeal of an order denying recusal, the Court *en banc* reversed a three judge panel that previously held the denial of a motion to recuse met the requirements of the collateral order doctrine and allowing a direct appeal of that order. *Murphy*, at 23, overruling *Braddy v. State*, 316 Ga.App. 292, 729 S.E.2d 461 (2012).

In their decision the whole Court cited Supreme Court of Georgia precedent, its own precedent and the language in O.C.G.A. § 5-6-34 (b) to reaffirm that a party who wants to appeal a pre-trial ruling on a recusal motion has the option of seeking an interlocutory appeal or waiting to directly appeal after an adverse final judgment. ❖

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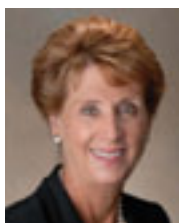
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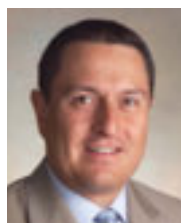
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Business/Commercial Litigation Case Law Update

By Duke R. Groover, SLC Chair,
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HWA Properties, Inc. v. Community & Southern Bank, 746 S.E.2d 609 (Ga. App. 2013)

In a case of first impression, the Georgia Court of Appeals held that a guarantor may contractually waive its legal right to require a borrower to confirm a foreclosure sale prior to seeking a deficiency judgment.

HWA Properties, Inc. (the “borrower”) and Harry Albright (the “guarantor”) appealed the Superior Court of Fulton County’s grant of summary judgment to Community & Southern Bank (the “lender”) and award of judgment on the lender’s note and a guaranty. The borrower and the guarantor contended in part that the trial court erred in awarding the lender a deficiency judgment because the court of appeals had reversed the trial court’s judicial confirmation of the foreclosure sale, in a separate order.

The court of appeals reversed the trial court’s order as to the borrower’s liability on the note, holding that the borrower could not be held liable for a deficiency judgment on the note due to the court’s reversal of the judicial confirmation. The court reasoned that the lender was required to comply with the confirmation requirements of O.C.G.A. § 44-14-161 in order to obtain a deficiency judgment on the note, since it did not obtain a judgment on the note against the borrower prior to the foreclosure sale.

The court of appeals affirmed the trial court’s order as to the guarantor’s liability on the note, however, holding that the guarantor waived his right to require the borrower to confirm the foreclosure sale. The court of appeals noted that the personal guaranty at issue included “an express and comprehensive waiver of any and all defenses to his liability on the entire balance due on the note.” The court stated that even in the absence of such a broad waiver of defenses, the personal guaranty expressly provided that any proceeds from other collateral sold to satisfy the note “shall not reduce, affect or impair the liability of

[the guarantor].” Additionally, the court reasoned that the personal guaranty specifically provided that the guarantor remained liable for any deficiency remaining after a foreclosure sale “whether or not the liability of the [b]orrower or any other obligor for such deficiency is discharged pursuant to statute or judicial decision.”

The guarantor filed a petition for writ of certiorari with the Georgia Supreme Court on August 5, 2013. As of October 15, 2013, the Georgia Supreme Court had not issued an order granting or denying the guarantor’s petition.

Holton v. Physician Oncology Services, LP, 292 Ga. 864, 742 S.E.2d 702 (2013)

Georgia law does not recognize the “inevitable disclosure” doctrine as an independent cause of action for trade secret misappropriation.

Holton was a high level employee for Physician Oncology Services, LP (“POS”) and was responsible for overseeing the operations of seven POS facilities in the Atlanta area. At the time he was hired, Holton executed an employment agreement that contained a noncompete provision under which he agreed to not provide similar services to a competing business within 25 miles of POS’s Atlanta locations. The employment agreement also contained a two-year confidentiality clause.

POS later merged with Vantage Oncology, LLC. Several months after the merger, Holton was terminated without cause. A month after his termination, Holton accepted employment with a competitor of Vantage that had four operating facilities within the noncompete territory in Holton’s employment agreement with POS.

Vantage immediately sought a temporary restraining order and then an interlocutory injunction, alleging that Holton had violated the noncompete and confidentiality provisions of his employment agreement with POS, misappropriated trade secrets under

the Georgia Trade Secrets Act of 1990, and would inevitably disclose and use Vantage’s trade secrets. There was no evidence in the record that Holton had shared any trade secrets, disclosed any confidential information, or shown an intent to use proprietary information. There was also no evidence that Holton had any documents related to Vantage’s trade secrets in his possession. Regardless, the trial court issued an injunction preventing Holton from working for his new employer. The trial court’s order was based, in part, upon the inevitable disclosure doctrine which provides that “a plaintiff may prove a claim of trade secret misappropriation by demonstrating that the defendant’s new employment will inevitably lead him to rely on the plaintiff’s trade secrets.” The trial court’s finding of inevitable disclosure was based on the likelihood of disclosure of matters in Holton’s memory.

On appeal, Holton challenged, in part, the trial court’s ruling that Vantage was likely to prevail on the merits of its claim for inevitable disclosure of trade secrets. Noting that its decision in *Essex Group, Inc. v. Southwire Co.*, 269 Ga. 553 (1998), does not stand for the proposition that Georgia adopted the inevitable disclosure doctrine in that case, the Georgia Supreme Court held that the inevitable disclosure doctrine is not an “independent claim under which a trial court may enjoin an employee from working for an employer or disclosing trade secrets.” Accordingly, the court reversed the part of the trial court’s order relying on the doctrine to enjoin Holton from working for his new employer or disclosing trade secrets or other confidential information.

Notably, the Georgia Supreme Court declined to address whether the inevitable disclosure doctrine may be applied to support a claim for threatened misappropriation of trade secrets under the Georgia Trade Secrets Act of 1990. ♦

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Mass Torts Case Law Update

By Todd E. Schwartz, SLC Chair
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***Georgia-Pacific, LLC v. Fields; Union Carbide Corporation v. Fields*, 293 Ga. 499 (2013)**

The Supreme Court of Georgia reversed the trial court's order, and the Court of Appeals' affirmance, granting summary judgment to the plaintiffs on the issue of assignment of tort liability to non-parties pursuant to O.C.G.A. § 51-12-33.

In the trial court, certain defendants in an asbestos personal injury case filed Notices of Non-Party Fault pursuant to the statute.

The plaintiffs filed a motion for summary judgment on the issue of non-party fault, arguing that the defendants had failed to present any evidence of exposure to, or liability by, the non-parties listed in the Notices. One of the plaintiffs' arguments in the trial court was

that the defendants could not rely upon the allegations in the plaintiffs' complaint or accompanying sworn information sheet to create an issue of material fact.

The trial court granted the plaintiffs' Motion for Summary Judgment and the Court of Appeals affirmed the order.

The Supreme Court granted the writs of certiorari to Georgia-Pacific and Union Carbide and reversed the grant of summary judgment. The Court held that "the admissions and allegations upon which the defendants wished to rely in meeting the motion for summary judgment were admissions of fact," and, generally, "either party may avail himself of allegations or admissions made in the pleadings *of the other*." (Emphasis in original; quotations

and citations omitted).

The Court additionally held that the admissions, which were included in the plaintiffs' original complaint but had been omitted when the plaintiffs amended their complaint, were not "wip[ed] ... from the record for all purposes" by virtue of their withdrawal on amendment; the plaintiffs could still tender those admissions into evidence.

Thus, the Supreme Court held, the trial court had erred by not allowing the defendants to use those admissions from the original complaint to defeat the plaintiffs' Motion for Summary Judgment, and the trial court's order was therefore reversed. ❖

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Premises Liability Case Law Update

By Ben M. Byrd
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SLIP-AND-FALL; PROOF OF HAZARDOUS CONDITION: Plaintiff's conjecture that oil on the approach to a bowling lane caused her to fall did not create a triable issue.

Taylor v. Thunderbird Lanes, LLC, Ga. Ct. of App., Case No. A13A1070 (Sept. 24, 2013)

In this slip-and-fall case, the Court of Appeals addressed what evidence a plaintiff must put forth to create a question of fact concerning the existence of a hazardous condition and the causal connection between that hazard and the plaintiff's fall.

The plaintiff went to the defendant's bowling alley to bowl with her family. Her daughter-in-law bowled first without any problems. When plaintiff took her turn to bowl, however, she slipped and slid four feet into the lane. When the plaintiff's son came to her aid, he noticed a significant amount of oil in the lane where the plaintiff landed. The plaintiff then sued for her injuries, but her case was dismissed on summary judgment.

The plaintiff was an experienced bowler who understood that it is hazardous to cross a lane's foul line. However, her contention was that there "must have been" oil in the *approach* area, before the foul line, that caused her to slip.

On appeal, the issue for the court was whether the plaintiff had established the existence of such a hazardous condition. In her deposition, the plaintiff testified that she believed she slipped on oil that had been wrongly applied to the approach side of the foul line. However, she conceded that because she was concentrating on bowling, she did not notice oil on the approach and did not know for a fact that oil on the approach caused her to fall. Likewise, while her son testified that he saw significant oil in the lane past the foul



line, he could not say that there was oil before the foul line. In contrast, the defendant presented evidence that its lane-oiling machine was designed to apply oil only on the foul side of the line.

Based on this testimony, the court concluded that plaintiff's testimony concerning the existence of a hazardous condition was "conjecture" and did not create a triable issue for the jury. As a result, the Court of Appeals affirmed the grant of summary judgment to the defendant.

THIRD-PARTY CRIMINAL ACTS; SPOILIATION: Summary judgment for defendant was proper because plaintiff failed to present evidence that assault was reasonably foreseeable; there was no spoliation of evidence by defendant because notice of potential liability is not the same as notice of potential litigation.

Whitfield v. Tequila Mexican Rest. No. 1, Inc., Ga. Ct. of App., Case No. A13A1139 (Sept. 5, 2013)

This case arose from one restaurant patron's stabbing by

another patron and presented several legal issues, including whether the restaurant could have reasonably foreseen the assault and whether the restaurant had a duty to preserve potential evidence.

The plaintiff alleged he was eating at the defendant's restaurant when another patron became disruptive and aggressive to the plaintiff's companions. When two of the plaintiff's companions went to the parking lot to call the police, the disruptive patron followed them and accosted them. The plaintiff went to the parking lot to intervene, an altercation ensued, and the disruptive patron stabbed the plaintiff. The plaintiff filed suit against the defendant restaurant. At the conclusion of the discovery period, the trial court denied the plaintiff's motion for sanctions for spoliation and granted the defendant summary judgment on all claims asserted by the plaintiff.

Plaintiff appealed the trial court's ruling and the Court of Appeals affirmed the entirety of the trial court's order. On appeal, the Court disagreed with the plaintiff's claim that the defendant should have foreseen the disruptive patron's actions. The record did not contain evidence of similar

assaults, nor did the defendant have any prior encounters with the plaintiff or his companions. While the plaintiff argued that the amount of alcohol the disruptive patron had consumed and his actions towards the defendant's other customers should have put the defendant on notice, the Court of Appeals disagreed. Even if the disruptive patron's drunken state was evidence that he could become violent, the Court held the plaintiff had equal knowledge of the disruptive patron's drunken state. Further, the Court held, the relevant issue was not the patron's blood alcohol level, but his propensity toward violence while drunk. Because the plaintiff had not presented evidence of any such propensity, summary judgment was proper.

The plaintiff also argued that the defendant should have been sanctioned for destroying the disruptive patron's electronic ticket, which plaintiff claimed would have shown how long the patron was at

the restaurant and how much alcohol he had been served. Again, the Court of Appeals disagreed. A spoliation claim cannot survive unless the spoliating party was under a duty to preserve evidence, and to meet this standard the plaintiff must show that the defendant knew the plaintiff was "contemplating litigation." Knowledge of an injury alone is not enough. "In other words," the Court held, "notice of potential *liability* is not the same as notice of potential *litigation*." Because the plaintiff could not show that the defendant was on notice of a potential suit by the plaintiff, the defendant had no duty to preserve any evidence, and no spoliation occurred.

SLIP-AND-FALL; CONSTRUCTIVE KNOWLEDGE OF HAZARD; JURY CHARGES: Trial court was not required to give constructive knowledge charge as it was not adjusted to the evidence. However, court erred by failing to

respond to the jury's question asking for the meaning of constructive knowledge.

Lamar v. All Amer. Quality Foods, Inc., Ga. Ct. of App., Case No. A13A0494 (July 16, 2013)

This slip-and-fall case addressed the doctrine of constructive knowledge in the context of the court's instructions to the jury. Plaintiff Lamar slipped and fell while shopping at the defendant's grocery store. Lamar did not see what caused her to fall, but her clothes were wet after she fell.

Evidence showed that store employees were working in the same aisle when plaintiff fell and the store manager found a Burger King cup where Lamar fell and concluded the cup was the source of the water that caused plaintiff to fall.

At the charge conference, Lamar's lawyer submitted a proposed jury charge on constructive knowledge. The proposed charge,

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however, only addressed constructive knowledge that arises when a foreign substance has been present long enough to be discovered with ordinary diligence and there is an employee in the area who could have seen the substance. The proposed charge did *not* address constructive knowledge arising from the defendant's failure to have reasonable inspection procedures in place.

The court refused to give Lamar's jury charge, but it did reference constructive knowledge in a different charge based on the Georgia Supreme Court's decision in *Robinson v. Kroger*. During deliberations, the jury asked the court, "Can we get another meaning of constructive knowledge?" The court responded to the jury that it had already been fully charged. After the jury returned a defense verdict, Lamar moved for a new trial and, after her motion was denied, plaintiff appealed the judgment.

On appeal, Lamar first argued that the trial court erred by not charging the jury on constructive knowledge arising from defendant's negligent inspection policies. The Court of Appeals disagreed. The party requesting a charge must do so in writing, and Lamar had addressed defendant's inspections only verbally, if at all. Therefore, Lamar had waived any request to charge the jury on that point. Furthermore, the court did not err in refusing to give the charge as Lamar requested in writing because there was no evidence showing how long the water had been on the floor, rendering such a charge not adjusted to the evidence.

Lamar also raised as error the trial court's failure to respond to the jury's request for a further explanation of constructive knowledge. Although the need for jury instructions is generally left to the trial court's discretion, the trial court has a duty, "when faced with a question from the jury to clarify any confusion as to the applicable issues of law as raised by the evidence at trial." In this case, despite

instructing the jury on the basic law of constructive knowledge, the trial court "neither instructed the jury on the inferences authorized by law that allow a plaintiff to establish the defendant's constructive knowledge of a hazard nor gave an instruction regarding a proprietor's duty to inspect for hazardous conditions." Therefore, the charge was inadequate, and the plaintiff was entitled to a new trial.

THIRD-PARTY CRIMINAL ACT; OUT-OF-POSSESSION LANDLORD: Assault on club patron was not foreseeable; Landowner was an out-of-possession landlord and therefore not liable to patron.

Boone v. Udoto, 747 S.E.2d 76 (Ga. App. July 15, 2013)

Plaintiff Boone was a patron of the Sandtrap Club & Lounge when another patron, Thomas, started an altercation and had to be removed by a security guard. A third patron warned the security guard that Thomas was "crazy" and may come back with a gun. Thomas did come back with a gun and began shooting, at which point Boone left the club. Unfortunately for Boone, he came across Thomas in the parking lot as he was looking for his car and Thomas struck him in the eye with his gun, blinding him. Boone sued both the club owners and the landowner for negligence.

On appeal, the question was whether Thomas's actions were foreseeable to the club owners. The Court of Appeals held, as a matter of law, that Thomas's actions were not foreseeable. In making this finding, the Court relied chiefly on the lack of evidence of any prior gun violence at the club and the rapidity with which the situation with Thomas escalated. The Court distinguished Boone's case from other cases in which there was "an escalation of ongoing altercations between the plaintiffs and their assailants." Those cases, according to the Court, did not "involve an assailant injuring a random patron with whom he had no prior contact." Ultimately, the Court held

that despite the warning to the club that Thomas might return to the club with a gun, Boone's encounter with Thomas in the parking lot was essentially "random" and not foreseeable. Therefore, the club owners could not be held liable.

Boone also argued that the landowner could be liable because it retained the right to inspect the premises. Again, the Court of Appeals disagreed. A landlord who "fully part[s] with possession and the right of possession of the premises" is not liable to a third party who is injured by the tenant's negligence. Importantly, a landlord's right to inspect is not the equivalent of the right to possess the premises. "Landlords still fully part with possession of leased premises when they retain limited entry or inspection rights for landlord-related purposes."

In this case, the club owners were responsible for repairing and maintaining the club. Although the landlord did have the right to inspect and enter the premises and could, "in its own discretion, increase security at the sole cost of the Club Owners," such limited rights do not "evidence such dominion and control of the premises so as to vitiate the landlord's limited liability under O.C.G.A. § 44-7-14." Therefore, summary judgment in the landlord's favor was proper.

CONTRIBUTION/INDEMNITY; THIRD-PARTY APPORTIONMENT: Apportionment statute barred landowner's common-law claim for indemnity from designers and builders of premises for third-party's negligence claim when landowner did not assert respondeat superior or other vicarious liability; Apportionment statute also barred landowner's common-law apportionment claim.

Dist. Owners Ass'n, Inc. v. AMEC Env. & Infrastructure, Inc., 747 S.E.2d 10 (Ga. App. July 8, 2013)

A jogger brought a premises

liability suit against appellant District Owners Association (“DOA”) for injuries he sustained when he jumped over a wall on DOA’s property and fell over 30 feet. DOA, in turn, filed a third-party complaint against the firms that designed and built the wall and neighboring parking deck in question, asserting claims for common-law indemnity and common-law apportionment on the grounds that the third-party defendants were negligent in their design and construction of the premises.

The third-party defendants moved to dismiss DOA’s claims on the grounds that they were barred by O.C.G.A. § 51-12-33 as amended in 2005. The trial court agreed with the third-party defendants and dismissed DOA’s claims. On appeal, the Court of Appeals affirmed the trial court’s decision on both counts.

As to DOA’s contribution claim, the Court held that the Supreme Court has already held that the statute clearly states that

apportioned damages “shall not be subject to any right of contribution.” On the other hand, the Court of Appeals itself has recently held that a claim for contribution still exists “if a person is compelled to pay damages because of negligence *imputed to him* as a result of a tort committed by another.”

However, the Court of Appeals found that DOA’s purported “indemnity” claim was not based on an allegation of imputed liability or vicarious liability. Instead, DOA’s complaint alleged that the third-party defendants were joint tortfeasors. Because O.C.G.A. § 51-12-33 specifically bars contribution claims between joint tortfeasors, DOA’s “indemnity” claim failed as a matter of law.

The Court of Appeals also found DOA’s common law apportionment allegations lacking. DOA argued that, although O.C.G.A. § 51-12-33 provides a specific mechanism for apportioning fault to non-parties, an independent common-law claim against non-

parties was still viable. The Court of Appeals disagreed.

“[I]f the General Assembly had intended to create such a cause of action when it enacted the statute [O.C.G.A. § 51-12-33] it would have said so,” the Court held. “Furthermore, and contrary to DOA’s contention, not only did O.C.G.A. § 51-12-33 fail to create a cause of action for apportionment, it abrogated such actions under the common law. Indeed, it is unnecessary for a statute ‘to expressly say, this is intended to preempt the common law.’”

The Court of Appeals went on to clarify that there was nothing in its or the Supreme Court’s earlier decisions to suggest that indemnity claims based on imputed or vicarious liability were precluded by O.C.G.A. § 51-12-33. However, common-law claims for contribution and apportionment are barred by that statute. ❖



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Product Liability Case Law Update

By Brooke Walker Gram
Balch & Bingham, Atlanta



PRODUCT DEFECT; JURY CHARGES ON AFFIRMATIVE DEFENSES; SPOILIATION OF EVIDENCE: Trial court did not err when giving jury charges on affirmative defenses of assumption of the risk and misuse of product. Trial court did not err when charging the jury on spoliation, despite there being no evidence Plaintiff acted in bad faith when failing to preserve the evidence.

Lee v. CNH America, LLC, et al., __ Ga. App. __, 746 S.E.2d 243 (Ga. Ct. App. July 9, 2013)

Robert Lee purchased a tractor manufactured by Defendants CNH America, LLC and CNH Italia. Three days after receiving the tractor, Lee's body was found trapped between the elevated cultivator and the rear tractor wheel with the tractor's engine running. His wife, Plaintiff Hazel Lee, brought a products liability suit against the manufacturers, alleging the tractor was defectively designed. After a defense verdict at trial, Plaintiff appealed, contending that the trial court erred in charging the jury on assumption of the risk, misuse of product, and spoliation.

The Georgia Court of Appeals upheld the defense verdict. First, the Georgia Court of Appeals held that the trial court's pattern jury charge on assumption of the risk was supported by evidence that Lee knew or should have known the danger flowing from any potential defect with the tractor's fast raise and lower system. This system permitted the user to flip a single switch to quickly raise or lower any implement attached to the tractor. The salesperson who sold the tractor to Lee explained the fast raise and lower system to him prior to his purchase. Specifically, the salesperson explained to Lee the proper procedure for adjusting height con-



trols on the back of the tractor. The salesperson also demonstrated the procedure "half a dozen or more times" before asking Lee to practice using the fast raise and lower system. The salesperson did not explicitly tell Lee that he would be exposing himself to danger or risk if he failed to turn the engine off. However, Lee and the salesperson turned the engine off each time they adjusted the height control on the back of the tractor. There was also evidence that Lee read the operator's manual for the tractor, which contained several warnings to turn the tractor engine off before servicing or adjusting the tractor or its implements.

Next, the Georgia Court of Appeals held that the trial court's pattern jury charge on the affirmative defense of misuse of product was supported by the evidence. The tractor operator's manual and decals on the tractor instructed the operator to turn the engine off when going behind the tractor. Given the evidence that Lee was found behind the tractor with the engine running, the jury was authorized to consider whether Lee's use, i.e., leaving the tractor running while being behind the tractor, was abnormal, whether the

abnormal use was foreseeable, and whether Defendants gave adequate warning against such misuse.

Last, the Georgia Court of Appeals held that the trial court's spoliation charge was supported by the evidence. Less than two months after the accident, but before Plaintiff filed the lawsuit, Defendants' counsel asked to inspect the tractor. Defendants' counsel was not permitted to inspect the tractor. However, the tractor was inspected by two consultants on behalf of Plaintiff. The tractor was then stored in unknown conditions in Florida, and eventually moved to an enclosed building in Alabama that "may not have had climate control." Defendants' counsel was not permitted to inspect the tractor until over two years after Lee's death. By that time rust had formed on the adjustment knob of the tractor.

On appeal, Plaintiff claimed the charge was not appropriate because there was no evidence that she acted in bad faith when failing to preserve the tractor in its original condition. The Georgia Court of Appeals held that a spoliation charge may be appropriate even where the spoliator has not acted in bad faith.

ASBESTOS EXPOSURE; APPORTIONMENT OF DAMAGES: Plaintiffs' motion for partial summary judgment was denied. Plaintiffs moved the court to preclude Defendants from presenting evidence that nonparty entities contributed to Plaintiff Rhonda Fields' asbestos exposure. Plaintiffs had initially named the nonparty entities as defendants, but had withdrawn the entities as defendants following a settlement. The Georgia Supreme Court held that because Plaintiffs' original complaint and sworn statement were admissible factual admissions, there was sufficient evidence creating a factual dispute as to the nonparty entities' liability.

Georgia-Pacific, LLC, et al. v. Fields, et al./ Union Carbide Corp. et al. v. Fields, et al., Nos. S12G1393, S12G1417, 2013 WL 4779544 (Ga. Sup. Ct. Sept. 9, 2013)

Plaintiff Rhonda Fields suffered from peritoneal mesothelioma allegedly as a result from childhood exposure to asbestos dust. Plaintiffs' original complaint accused Georgia-Pacific, Union Carbide and several other companies of mining, manufacturing, selling, and distributing products that led to her childhood asbestos exposure. Plaintiffs subsequently settled with several of the named defendants. After the settlement Plaintiffs amended their Complaint, dropping the claims against those defendants.

The remaining Defendants filed a Notice of Fault of Non Party pursuant to 51-12-33(d). In response, Plaintiffs moved for partial summary judgment, asking the trial court to preclude the remaining Defendants from presenting the potential fault of the nonparty entities for purposes of apportioning potential damages. The remaining Defendants argued that allegations contained in the Plaintiffs' complaint and "sworn information" precluded summary judgment as to the potential fault of nonparties.

The trial court disagreed and granted the Plaintiffs' motion, and the remaining Defendants appealed. The Georgia Court of Appeals affirmed the trial court's decision. The Court of Appeals found that Plaintiffs' original complaint and sworn information, asserting claims against the nonparty entities, were not "evidence" for the purposes of defeating summary judgment.

On Certiorari, the Georgia Supreme Court reversed the two lower court rulings, holding that the remaining Defendants could seek to reduce damages by presenting evidence of the potential fault of nonparty entities. First, the Supreme Court disagreed with the Court of Appeals determination that Defendants could not rely on Plaintiffs' original complaint and sworn information. The Court reasoned that allegations contained in these documents were admissions of fact, i.e., that Plaintiff had been exposed to asbestos-containing products which the nonparty entities had produced or distributed.

Continued on page 54

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Professional Liability Case Law Update

By James S.V. Weston, SLC Chair
Trotter Jones, Augusta



Georgia courts continued to address expert witness qualifications in medical malpractice cases. At issue in *Hankla v. Postell*, WL 5508611, Case No. S12G1964 (October 7, 2013), was whether a physician could opine on the standard of care applicable to a nurse midwife. A unanimous Supreme Court of Georgia held that the expert witness qualification statute, O.C.G.A. § 24-7-702(c) (former O.C.G.A. § 24-9-67.1), required the physician expert to have more than “personal experience in her medical practice with the procedure at issue” to qualify as an expert supporting the defendant nurse midwife. The proffered physician expert, Dr. Brickman, was a board-certified obstetrician and gynecologist who had significant experience in the medical procedure at issue. However, she did not supervise, teach, or instruct nurse midwives during three of the five years before the subject procedure. The nurse midwife argued that Dr. Brickman qualified as an expert on nurse midwifery because she satisfied the “active practice” provisions of O.C.G.A. § 24-7-702(c)(2)(A). The Georgia Court of Appeals previously held in *Postell v. Hankla*, 317 Ga. App. 86 (2012), that since Dr. Brickman and the defendant nurse midwife were not members “of the same profession,” the proper analysis was under O.C.G.A. § 24-7-702(c)(2) (D). *Id.* at 88-89 (1). Since it was undisputed that Dr. Brickman did not supervise, teach, or instruct nurse midwives during the relevant “three of the last five years,” as required by subparagraph (c)(2)(D), she was not competent to testify as to the nurse midwife’s standard of care. *Id.* at 89 (1). The Supreme Court of Georgia agreed. Both courts looked closely at the “grammatical structure” of O.C.G.A. § 24-7-702(c)(2), and found that satisfying the



“active practice” element alone will not qualify a physician expert to render an opinion on a “non-physician health care provider’s” standard of care.” The Supreme Court of Georgia clarified the issue as follows:

Thus, to qualify as an expert in a medical malpractice action under O.C.G.A. § 24-7-702(c), the witness must (1) have actual knowledge and experience in the relevant area through either “active practice” or “teaching” and (2) either be in the “same profession” as the defendant whose conduct is at issue or qualify for the exception to the “same profession” requirement set forth in subparagraph (c)(2) (D). Under the exception, a proffered expert who is a physician is permitted to qualify as an expert as to a non-physician health care provider, but only if she has knowledge regarding the rele-

vant standard of care “as a result of having ... supervised, taught, or instructed” such non-physician health care providers.

(Emphasis in original.) *Hankla*, pp. 5-6.

Attorneys defending physicians, hospitals, and other health care providers must be mindful of *Hankla*, not only in challenging the qualifications of plaintiffs’ experts, but also in considering and hiring defense experts. A physician expert who will be identified to defend the care of nurses and other “non-physician health care providers” must satisfy *Hankla* and the provisions of O.C.G.A. § 24-7-702(c)(2)(D). Thorough and careful vetting of potential experts is imperative.

The Georgia Court of Appeals also addressed the “same profession” issue in *Bacon County Hosp. & Health Sys. v. Whitley*, 319 Ga. App. 545 (2013). The plaintiff sued a hospital and its physical therapist employee for the alleged negligent

performance of electrostimulation therapy. In support of her claim, she submitted the affidavit of a chiropractor from Florida, who testified that the physical therapist “deviated from the professional standard of care of physical therapy” in treating the plaintiff. Relying on *Postell v. Hankla*, *supra*, the Court of Appeals reversed the trial court’s ruling that the chiropractor was qualified to render such an opinion. Although the chiropractor had “performed physical therapy treatments for many years, ha[d] been trained in physical therapy, and [was] licensed as a physical therapist in states other than Florida,” he did not practice as a physical therapist when the alleged negligence occurred. *Bacon County Hosp.*, 319 Ga. App. at 549-550. He was actually a licensed physical therapist in Colorado and Indiana, but he did not *actively practice* during three of the five years before the plaintiff’s treatment at issue. *Id.* at 549, n. 2. The court also noted that “even under Florida law chiropractic medicine and physical therapy are not the same professions. Although the occupations clearly have some overlap in activities, they are defined differently, are governed by different regulatory boards, and are subject to different licensing requirements.” *Id.* at 550. Georgia law also categorizes the professions separately: O.C.G.A. § 43-9-1, *et seq.* regulates the practice of chiropractic, while O.C.G.A. § 43-33-1, *et seq.* controls the practice of physical therapy. *Id.* Applying “the clear statutory requirements for expert witness qualifications in medical malpractice cases,” the Court of Appeals held that the chiropractor did not qualify as an expert in physical therapy. *Id.* As a result, the plaintiff’s complaint was dismissed for failure to file a proper affidavit against the hospital and physical therapist. *Id.*

In *Shekhawat v. Jones*, ___ Ga. ___, 746 S.E.2d 89 (Ga.2013), the Supreme Court of Georgia ruled that physicians employed as faculty members by Georgia

Regents University (which includes the Medical College of Georgia) are entitled to official immunity under the Georgia Tort Claims Act. The Court overruled *Keenan v. Plouffe*, 267 Ga. 791 (1997), which had previously caused confusion and misapplication of the law with regard to official immunity for state-employed physicians. In *Shekhawat*, Justice Hunstein determined that *Keenan* was wrongly decided, because it “conflated the test for official immunity with that for sovereign immunity in distinguishing between medical and governmental discretion and between the physician’s duty to the patient and his duty to the State.” Rejecting *Keenan*’s “convoluted analysis,” *Shekhawat* held that the proper test for determining a state-employed physician’s official immunity is “whether the physician was acting within the scope of his state employment in performing the treatment that is the subject of the malpractice action.” Since the defendant physicians submitted affidavits stating they were employees of the Medical College of Georgia when they rendered the subject care, they were entitled to official immunity. Although *Shekhawat* dealt specifically with Medical College of Georgia physicians, it should apply to other “state-employed physicians” who treat patients at prisons and through Community Service Boards.

The Court of Appeals in *Norred v. Teaver*, 320 Ga. App. 508 (2013), overruled extensive precedent in holding the limitation period for a retained “foreign object” claim begins to run on the discovery of the object, regardless of whether it was intentionally or unintentionally left in the body. In granting summary judgment to the defendant dentist, the trial court followed authority that held malpractice claims arising from objects *intentionally* left in the body (in this case, a cotton pellet inserted in the plaintiff’s tooth) are subject to O.C.G.A. § 9-3-71(a)’s two-year “general statute of limitation for medical malpractice.” *Id.* at 509-

510. Since the dentist purposefully left the cotton pellet in the plaintiff, it was not considered to be a “foreign object.” *Id.* Consequently, the trial court held that O.C.G.A. § 9-3-72, which states that a plaintiff has one year from the discovery of foreign object to file suit, did not apply. The Court of Appeals reversed, finding that the trial court’s ruling and prior cases applying O.C.G.A. § 9-3-72 were “incorrect and contrary to the plain language of the statute.” *Id.* at 512 (1). As the courts in the *Hankla* decisions did, Judge Boggs scrutinized the specific statutory language in determining that the application of O.C.G.A. § 9-3-72 did not turn on whether the health care provider intended to leave the object in the patient.

O.C.G.A. § 9-3-72 provides a one-year limitation period following the discovery of ‘a foreign object’ that is ‘left’ in a patient’s body. The term ‘left’ is past tense and past participle of the verb ‘leave’ which is defined as ‘to cause or allow to remain.’ Webster’s Unabridged Dictionary (2nd ed. 1983), pp. 1034, 1032. And ‘foreign’ is defined as ‘not originating in the person or thing specified.’ *Id.* at p. 717. It follows then, that under the plain language of O.C.G.A. § 9-3-72, the limitation period begins to run upon the discovery of an object not originating in the person’s body that is caused or allowed to remain in the body. *It is immaterial under the plain meaning of this language whether the object is caused to remain intentionally or unintentionally.*

(Emphasis added.) *Norred*, *id.* Since there was no dispute that the cotton pellet was a “foreign” object, the plaintiff timely filed her complaint within one year of finding it in her tooth. *Id.* at 513. ❖

GDLA Joins Multi-Bar Leadership Council, Strengthens Diversity Efforts

Several years ago, the GDLA Board of Directors adopted the following diversity statement:

The Georgia Defense Lawyers Association (GDLA) is an association for all lawyers who practice law principally in the area of civil litigation representing defendants. The GDLA has always maintained an open membership policy and has welcomed into its membership defense lawyers of all backgrounds, regardless of gender, ethnicity, race or national origin. In order to reinforce its open membership policy,

GDLA wishes to express its strong commitment to the goal of diversity in its membership. The Association recognizes that the promotion and retention of a diverse membership is vital to the success of the organization as a whole. Diversity provides for a broader and richer environment by drawing on the wealth of varied perspectives and experiences and fosters creative thinking and solutions beneficial to all of its members.

The GDLA embraces and encourages diversity in all aspects of its activities, and is committed to creating a climate that supports and promotes diversity in its organization and membership.

Since its passage, the GDLA has sought ways to focus on increased diversity in its membership and on its Board. Recently, those efforts have shifted into high gear.

Multi-Bar Leadership Council (MBLC)

During her term as President last year, Lynn M. Roberson actively sought to realize this statement's vision. While simultaneously serving as the Atlanta Bar Association's President, Roberson became keenly aware of a program with which she felt the GDLA should become involved to bolster our diversity efforts.

That program is the Atlanta Bar's Multi-Bar Leadership Council (MBLC), which was formed in September 2001 by then-Atlanta Bar Association President Seth Kirschenbaum.

The purpose of the MBLC is to foster and improve relationships among the members of local bar associations. Roberson commenced the MBLC application process during her presidential term, and it was approved in October.

The GDLA joins these associations who are already members:

- Atlanta Bar Association
- DeKalb Bar Association
- DeKalb Lawyers Association
- Gate City Bar Association
- Georgia Asian Pacific American Bar Association
- Georgia Association of Black Women Attorneys
- Georgia Association for Women Lawyers
- Georgia Hispanic Bar Association
- Gwinnett County Bar Association
- North Fulton Bar Association
- Sandy Springs Bar Association
- State Bar of Georgia Diversity Program
- State Bar of Georgia Young Lawyers Division
- South Asian Bar Association of Georgia
- Stonewall Bar Association

GDLA Diversity Committee

Because of Roberson's leadership in the diversity area, President Ted Freeman asked her to chair the GDLA Diversity Committee. Jo A. Jagor was appointed to serve as Vice-chair alongside members Lervette Blair and Douglas Burrell.

Diversity Outreach

In an effort to raise awareness of the GDLA among a diverse audience and expand our ranks from that pool, the GDLA embarked on a couple initiatives. First, we co-sponsored the annual judicial reception held by the Gate City Bar and the Georgia Association of Black Women Attorneys (GABWA). The event was held on August 20, 2013, at King & Spalding. See photos 2-5 on opposite page.

Next, prior to the GDLA's being approved for MBLC membership, the GDLA was pleased to serve as a Silver Sponsor for the 2013 Seth Kirschenbaum Diversity Award Reception presented by the MBLC. The event was held on September 24, 2013, at State Bar Headquarters, and honored award recipient Joy Lampley Fortson with the Department of Homeland Security. See photo 1 on opposite page.

Finally, several GDLA Board of Directors members attended the Gate City Bar's Hall of Fame Gala on November 2, 2013, at the Grand Hyatt Atlanta. The evening honored the 2013 inductees into the Gate City Hall of Fame: GDLA member W. Ray Persons of King & Spalding; DeKalb Superior Court Judge Michael E. Hancock; and Timothy Jefferson, Sr., Executive Vice President and Chief Legal Officer at Grady Memorial Hospital. ♦



1. GDLA member Rita Sheffey (right) congratulates the 2013 Seth Kirschenbaum Diversity Award recipient, Joy Lampley Fortson (left), at the MBLC reception in her honor. The GDLA sponsored the event.

Scenes from the Gate City/GABWA Judicial Reception, sponsored by the GDLA: 2. Court of Appeals Judge Lisa Branch, GDLA President Ted Freeman and Supreme Court Justice David Nahmias; 3. GDLA member and current Gate City Bar President Lynnette Espy-Williams welcomes everyone; 4. GDLA members Jatrea Sanders, who is Gate City's Assistant Secretary, and Douglas Burrell; 5. Court of Appeals Judge Chris McFadden, Fulton State Court Judge Eric Richardson and GDLA Immediate Past President Lynn Roberson, who chairs the GDLA Diversity Committee.



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GDLA Board of Directors Holds Fall Meeting at Barnsley Gardens

The GDLA Board of Directors headed north to Adairsville, Ga. for its Fall Meeting at Barnsley Gardens Resort, October 25-27, 2013.

Those present were **Executive Committee:** President Theodore Freeman of Freeman Mathis & Gary, Atlanta; Executive Vice President Kirby G. Mason of HunterMaclean, Savannah; Immediate Past President Lynn M. Roberson of Swift Currie McGhee & Hiers, Atlanta; Past President Edward (Bubba) M. Hughes of Callaway Braun Riddle & Hughes, Savannah. **Vice Presidents:** Craig Avery of Cowser & Avery, Athens; Hall F. McKinley III of Drew Eckl & Farnham, Atlanta; and Peter D. Muller, Goodman McGuffey Lindsey & Johnson, Savannah. **Board of Directors:** David N. Nelson of Chambless Higdon Richardson Katz & Griggs, Macon; George R. Hall of Hull Barrett, Augusta; Jo A. Jagor of Hall Booth Smith, Atlanta; Pamela N. Lee of Swift Currie McGhee & Hiers, Atlanta; Jason C. Logan of Constangy Brooks & Smith, Macon; James D. (Dart) Meadows, Balch & Bingham, Atlanta; Wayne S. Melnick of Freeman Mathis & Gary, Atlanta; Brian T. Moore, Drew Eckl & Farnham, Atlanta; James W. Purcell, Fulcher Hagler, Augusta; and James S.V. Weston of Trotter Jones, Augusta. **Past Presidents:** N. Staten Bitting, Jr. of Fulcher Hagler, Augusta; Morton G. (Salty) Forbes of Forbes Foster & Pool, Savannah; Steven J. Kyle, Bovis Kyle & Burch, Atlanta. **Also present** was Executive Director Jennifer M. Davis.

The group gathered for a welcome reception in the Red House hospitality cottage, then strolled across the village green to enjoy dinner outdoors at the Beer Garden. Temperatures dipped lower than predicted, but everyone kept warm while roasting marshmallows over a fire pit and making s'mores.

The Board Meeting took place on Saturday morning until noon; then the afternoon was free to enjoy a variety of activities, including a fall festival hosted by Barnsley with pumpkin carving and more. That evening, everyone gathered again for a reception in the Red House then adjourned to dinner on their own. Many later enjoyed a Halloween party hosted by the resort at the manor ruins.

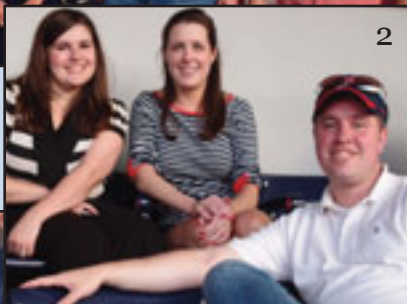
At press time, the Board meeting minutes were not finalized; they will be posted to the GDLA website after Board approval. ❖



1. Dart and Carol Meadows, Resa Avery, Ann Hopkins and Hall McKinley, and Craig Avery warm up by the fire; 2. Enjoying the welcome reception are GDLA Past Presidents Staten Bitting and Bubba Hughes (l-r center) and their wives, Debbie Hughes (left) and Cindy Bitting (right); 3. GDLA President Ted Freeman leads the Board meeting; 4. Visiting during Friday's dinner are (l-r) Jamie Weston, Margaret Hall, Jim and Annie Purcell, and George Hall; 5. Brian and Julie Moore are ready to brave the elements at the outdoor dinner; 6. Peter Muller makes a point at the Board meeting.

GDLA Young Lawyers Enjoy a Braves Night

The GDLA Young Lawyers (YL) Committee joined with Platinum Sponsor S-E-A Limited and Gold Sponsor RGL Forensics to plan an evening at Turner Field. Watching the Braves take on the Phillies on August 13, 2013, were: 1. Dan Kingsley, YL Committee Chair Pamela Lee, RGL Forensic's Michael Shryock and Zach Matthews; 2. (l-r) YL Committee Vice-chair Katie Dod, Sarah Smith and Bo Burke; 3. Myles Levelle and Jeff Costolnick; 4. (l-r) Ashley Gowder, Crystal Filiberto, RGL's George Willis and Brett Miller.



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Spoliation CLE Reprised in Savannah

Following the success of the CLE seminar, “Properly Handling Spoliation Issues,” held in Atlanta in April, the GDLA Board of Directors asked the Education Committee to consider taking it on the road to Savannah.

Board member Pamela N. Lee of Swift Currie McGhee & Hiers in Atlanta accepted the challenge, and assembled another impressive faculty line-up for the Savannah version.

Held at The Savannah Golf Club on July 26, 2013, the low country edition – like its Atlanta counterpart – explored issues related to spoliation in Georgia, including defending spoliation claims, handling litigation after spoliation sanctions have been assessed, and making spoliation claims against plaintiffs.

Lee opened the program with a general overview of spoliation, including the current law and standards in Georgia and the Eleventh Circuit.

Susan J. Levy of Levy & Pruett in Decatur discussed best practices for defending a charge of spoliation.

Nicholas J. Laybourn of Savannah’s HunterMaclean explored strategies for successfully defending a lawsuit after spoliation sanctions have been entered.

During the Atlanta seminar, GDLA Board of Directors member and Education Committee Chair Wayne S. Melnick of Freeman Mathis & Gary in Atlanta shared how spoliation can be used as a “sword” against plaintiffs who destroy or lose evidence. For the Savannah version, GDLA Vice President and local member Peter D. Muller of Goodman McGuffey Lindsey & Johnson put together an updated presentation on how to turn the tables.

Finally, Chatham State Court Judge Gregory V. Sapp offered a view of spoliation issues from the perspective of the bench.

This seminar represents the second CLE held outside of Atlanta. The Education Committee is mindful that the GDLA is a statewide association, and wants to offer more programming outside the metro area. Look for future seminars to hit the road. ♦



1. Chatham State Court Judge Gregory Sapp discusses spoliation cases from the perspective of the bench; 2. (l-r) Harvey Gray talks with speaker Peter Muller; 3. (l-r) Clay Ratterree shares experience from a spoliation case that he handled, as GDLA Past President George Duncan looks on; 4. (l-r) Will Mann, Hadley Hayes and Elizabeth Ford listen during the seminar; 5. Speaker Susan Levy (left) discussed best practices for defending a spoliation claim, as Program Chair Pamela Lee looks on; 6. Nick Laybourn explores strategies for defending such claims.

Mediation 360° CLE Examines All Sides of Personal Injury Case

On August 9, 2012, before a packed house of more than 35 attorneys, the GDLA Education Committee presented Mediation 360°, a seminar exploring all sides of a recent personal injury case resolved through mediation.

GDLA Platinum sponsor Miles Mediation hosted the CLE at its Concourse building office. Education Committee members Ashley Rice of Waldon Adelman Castilla Hiestand & Prout in Atlanta and Jason Logan of Constangy Brooks & Smith in Macon served as program co-chairs for the 2.5 hour event.

The program began with an introduction from Greg Parent, Miles Mediation's newest Team Leader, on the growing importance of mediation as a tool for limiting client exposure and reducing litigation costs. Parent then turned the seminar over to veteran Team Leader, Joe Murphey, who moderated a roundtable discussion among participants in a recent mediation for which he served as mediator. Decatur trial attorney Bruce Hagen gave the audience insight into the plaintiff's point of view, and offered interpretation of the opposition's moves. Mark Amos of Sharon Ware & Associates represented State Farm in the case; he provided the underinsured motorist carrier's take on the case's true value, as well as the defense's advantages and recognized weaknesses should the case have proceeded to trial. In addition, State Farm mobile task representative, Melanie Thompson, shared the claims adjuster's strategy for reining in a potentially high exposure case without upsetting her company's customer, the plaintiff.

The informal format was designed to incorporate spontaneous Q&A from the audience. Following the roundtable session, attendees enjoyed a hearty lunch spread from Maggiano's while listening to mediator David Nutter's entertaining presentation on professionalism considerations during mediation.

The course materials included John Miles' book, *A New Day in Court*, which details mediation tactics, advantages of early dispute resolution, and his empirical study of motivating factors among mediation participants.

The GDLA Education Committee, under the direction of Chair Wayne Melnick of Freeman Mathis & Gary in Atlanta, developed the "360°" format to explore a case – or mediation – from every angle, by involving plaintiff's counsel, defense counsel and the judge or mediator. If you have a case that would work well in this format, in which all the players are willing to share strategies and lessons learned, please contact Executive Director Jennifer Davis at jdavis@gdla.org. ♦



1. GDLA Education Committee Chair Wayne Melnick visits with John Miles and David Nutter of Miles Mediation, a GDLA Platinum Sponsor; 2. State Farm's Melanie Thompson shares the adjuster's strategy; 3. Program Vice-chair Jason Logan talks with Chris Parker; 4. Miles Mediation's Greg Parent welcomes everyone; 5. Miles Mediator Joe Murphey (right), who moderated the panel discussion, listens as plaintiff's lawyer Bruce Hagen explains his side of the case; 6. GDLA President Ted Freeman (right) talks with panelist Mark Amos; 7. Program Chair Ashley Rice visits with David Cole.

CLE Addresses Hot Issues in Medical and Psychological Claims

The GDLA Education Committee hosted a CLE exploring “Hot Issues in Medical and Psychological Claims” on October 8, 2013, at Maggiano’s Buckhead. The seminar featured a nurse explaining how to read medical charts, and three doctors examining some of the most subjective areas of psychological disorders and pain medicine.

Cindy Lifsey, an R.N. with GDLA Silver Sponsor Southern Medical-Legal Consulting, opened the program with an overview of medical terminology, abbreviations and documentation in medical charts that gave attendees a “decoder ring” to uncover treatment information needed to support, or disprove, a case. Lifsey gave attendees a booklet with a dictionary of common prefixes, word roots and suffixes to make reading any medical chart faster and easier. She also included the most common abbreviations and offered tips on what doctors do not want attorneys to know might be missing from, or really is in, a medical chart.

Next, Tracey Marks, M.D., with Marks Psychiatry, explored Post-Traumatic Stress Disorder (PTSD) from a forensic point of view. She explained the differences between PTSD requirements presented in the *Diagnostic and Statistical Manual of Mental Disorders (DSM) IV* and *DSM-V*, and used fascinating lawsuit examples of what qualifies as PTSD under *DSM-V* as opposed to the old diagnostic criteria. One difference she highlighted is that *DSM-V* is clearer about what it considers to be “trauma.” In this edition, sexual assault is specifically mentioned, and it includes repeated or recurring exposure to a traumatic event like you might see with first emergency responders. *DSM-V* does not take into consideration the person’s response to the trauma and removed the language of responding with “intense fear, helplessness or horror.” Dr. Marks also explained that the latest edition is more focused on the behavioral symptoms and has four diagnostic clusters instead of three. Additionally, *DSM-V* eliminated the distinction between acute and chronic, and added a separate set of criteria for children plus a subtype called “with prominent dissociative symptoms, depersonalization or derealization.”

Lastly, Randy Rizer, M.D., and Keith Raziano, M.D., with The Physicians Spine and Rehabilitation Specialists of Georgia, addressed Complex Regional Pain Syndrome (CRPS), which has also been known as Reflex Sympathetic Dystrophy (RSD) or Causalgia. There are two clinically identical categories of CRPS: Type I is RSD, which occurs without a nerve injury; and Type II is Causalgia, which occurs following a nerve injury. Despite multiple definitions and criteria, the doctors aptly explained that CRPS is not a subjective diagnosis. The *American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment* 5th Edition has objective criteria, and a patient must have eight or more signs as observed by the physician. Under the *AMA Guides* 6th Edition there are four diagnostic criteria. Most importantly, there is no faking CRPS as was obvious from patient photographs shown during the presentation. Although the latest edition changes the diagnostic criteria for CRPS, the doctors reported that treatment protocols have not altered – activity, stimulation and desensitization are critical. The goal is to prevent cases from becoming chronic. To achieve this, the doctors noted, it is important to diagnose early, treat quickly and treat aggressively. Narcotic use and desensitization are deathblows to getting patients back to work.

Education Committee Members Maureen (Molly) O’Connor of Mabry & McClelland in Atlanta and Jason Darneille of Crim & Bassler in Atlanta served as program co-chairs. ❖



Pictured at the seminar are: 1. Program Co-chair Jason Darneille (left) and GDLA Past President Warner Fox (right) with speakers (l-r center) Dr. Keith Raziano and Dr. Randy Rizer; 2. Speaker Dr. Tracey Marks; 3. Cindy Lifsey, R.N., with Southern Medical-Legal Consulting; 4. Tom Alexander and Caroline Owings; 5. Bill Dallas and Erica Morton.

CLE Explores Defending Construction Defect Claims Using Hurricane Dolly Case Study

The GDLA Education Committee teamed with Platinum Sponsor Nelson Architectural Engineers to host a CLE on "Qualitative v. Quantitative Testing: A Case Study in the Wake of a Destructive Water Event" on September 19, 2013, at Fado Irish Pub. This CLE was designed to be helpful to the attorney defending construction defect claims related to water intrusion.

Kurt W. Cady, S.E., P.E., Nelson's Atlanta Branch Director, was the featured speaker, and he discussed common misconceptions between qualitative and quantitative testing methodologies used by experts when assessing water intrusion damage. Qualitative analysis essentially is subjective; whereas, quantitative analysis is objective.

Cady, who has a detailed understanding of concrete materials, shared with attendees the various ways to minimize, and if necessary, defeat extensive water damage claims based on faulty expert opinions. As an illustration, he used the destruction caused by Hurricane Dolly on a condominium complex to explain actual tests that measure moisture content, as well as proper procedures for restoring a building damaged by water intrusion.

Education Committee member Kevin C. Patrick of Goodman McGuffey Lindsey & Johnson in Atlanta served as program chair. ❖



Pictured at the seminar are: 1. Mathew Titus and Andy Treese; 2. (l-r) Chuck Dalziel, GDLA Education Committee Vice-chair Brett Miller and Myles Levelle; 3. GDLA Past President Grant Smith with speaker Kurt Cady of Nelson Architectural Engineers, a GDLA Platinum Sponsor; 4. Program Chair Kevin Patrick and Speer Mabry.

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Georgia Defense Lawyer Fall 2013

GDLA Holds 4th Annual Pre-Trial Discovery & Deposition Boot Camp

The GDLA held its 4th Annual Pre-Trial Discovery & Deposition Boot Camp on September 26-27, 2013, at State Bar Headquarters. C. Jason Willcox of Moore Clarke DuVall & Rodgers in Albany again chaired the program.

The workshop combines lectures and demonstrations from an expert faculty with practical exercises during breakout sessions to help students learn and apply critical skills.

Presentations included planning discovery and deposition basics – strategy and issues in written discovery and identifying deponents; preparing plaintiff and defendant deposition outlines; questioning the deponent – plaintiff and witness; defending the deposition; ethical considerations in depositions; using documents and creating exhibits; preparing for motion for summary judgment

through depositions; preparing your witness to be deposed; and knowing the deponent through social media.

On Thursday, State Bar Past President S. Lester Tate, III of Akin & Tate in Cartersville reprised his role offering “The Plaintiff’s Perspective: How the Other Side Sees Us.” As a former defense attorney turned plaintiff’s lawyer, Tate offered a unique perspective from both sides of a case.

The first day concluded with a networking reception, giving students time to get acquainted and to ask the faculty questions on an informal basis.

On Friday, we were honored to have Court of Appeals Chief Judge Herbert E. Phipps give his insights on professionalism at trial.

The seminar concluded with the viewing of a videotaped deposition of Donald Trump by Ben F.

Easterlin of King & Spalding, in which Trump — and his lawyer — unwittingly demonstrated how *not* to act when being deposed.

Additional faculty members included: Thomas Peter (Pete) Allen III of Martin Snow, Macon; Jo A. Jagor of Hall Booth Smith, Atlanta; Curtis Martin, II of Miller & Martin, Atlanta; Wayne S. Melnick of Freeman Mathis & Gary, Atlanta; Brett A. Miller of Mabry & McClelland, Atlanta; Erica L. Morton of Hicks Casey & Foster, Marietta; GDLA Immediate Past President Lynn M. Roberson of Swift Currie McGhee & Hiers, Atlanta.

See the next page for photo highlights from the seminar and reception. ❖



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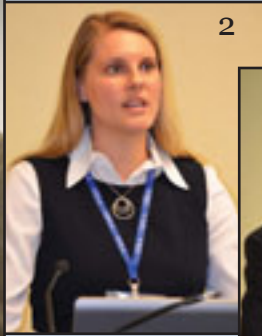


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Scenes from Boot Camp



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1. Program Chair Jason Willcox (left) with Lester Tate, who revealed how the plaintiff's side sees us; 2. Erica Morton explains how to question deponents; 3. Andy Treese explores investigating the investigation; 4. Court of Appeals Chief Judge Herbert Phipps visits with Eddie Tarver; 5. (l-r) Elizabeth Googe, Kate Lawson, Whitney Lay and Brittany Bolton enjoy the reception; 6. William Ezzell and Melissa Bailey listen during a breakout session; 7. Wayne Melnick (aka Huntington) delivers his "Rules for Surviving Depositionland" presentation (aka how to prepare your witness for depositions); 8. Pete Allen (center facing camera) leads a breakout session; 9. Larry Evans and Will Davis talk after day one; 10. Brett Miller covers strategy and issues in written discovery; 11. GDLA Immediate Past President Lynn Roberson discusses ethical considerations during depositions; 12. Curtis Martin addresses how to defend depositions.

GDLA and ESI Sponsor Annual Charity Golf Tournament

For the fourth year, the GDLA teamed up with longtime Platinum Sponsor Engineering Systems, Inc. (ESI) to sponsor the Swing for Siblings Charity Golf Tournament. The tournament, which was held October 28, 2013, at the Roswell Country Club, is an annual fundraising event for Camp To Belong Georgia.

An international non-profit, Camp To Belong has been actively reuniting brothers and sisters who have been placed in separate foster, adoptive or kinship homes through summer camp programs and year-round events since 1995. In Georgia, it is a partner of Camp Twin Lakes.

ESI covered the greens fees and provided lunch to the first 40 golfers who registered. The tournament concluded with an awards banquet and silent auction, featuring sports memorabilia, fine jewelry, and more. ❖



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Georgia Supreme Court Clarifies CGL Coverage

Continued from page 1

This decision clarified the Georgia Supreme Court's decision in *American Empire Surplus Lines Insurance Company v. Hathaway Development Company*, 288 Ga. 749 (2011), as well as disapproved and overruled some earlier decisions from the Court of Appeals. As predicted in the Journal article, the Court embraced the reasoning used in other jurisdictions such as Florida, Wisconsin and Texas, on an issue that has resulted in split of authorities across the country.

The *Taylor Morrison* case arose out of a California class action lawsuit brought by a class of homeowners against their homebuilder, Taylor Morrison Services, Inc. f/k/a Morrison Homes, Inc., alleging that their homes were improperly constructed due to faulty foundations. The alleged defects in the foundations caused physical damage to the homes including water intrusion, cracks in the floors and driveways, and warping of the floors. The plaintiffs' allegations contained causes of action for breach of warranty, misrepresentation and fraud.

Taylor Morrison was insured through a standard commercial general liability (CGL) policy issued by HDI-Gerling America Insurance Company. The policy's insuring agreement promised to "pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." In order for the insurance to apply, the "bodily injury" or "property damage" must have been caused by an "occurrence" that takes place within the coverage territory and policy period. The term "occurrence" was defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The CGL policy also contained several exclusions from coverage, including those commonly known as the "business risk exclusions." One such business risk exclusion is the "your work" exclusion, which

excludes from coverage damage to the insured's own work. Notably, the "your work" exclusion contains an exception for instances where the damaged work was performed on the insured's behalf by a subcontractor.

HDI-Gerling brought a declaratory judgment action against Taylor Morrison alleging that the CGL policy did not provide coverage for the class action claims. The district court agreed and found that there was no coverage, reasoning that the claims did not constitute an "occurrence" under the policy because the only "property damage" alleged was damage to the work of the insured (i.e., the homes that Taylor Morrison constructed). On appeal to the Court of Appeals for the Eleventh Circuit, that court noted the absence of any clear controlling precedent from the Georgia Supreme Court, and it consequently certified the two questions recited above.

At first blush, it would appear that the Georgia Supreme Court addressed this issue just two years ago in *Hathaway* when it held that "an occurrence can arise where faulty workmanship causes unforeseen or unexpected damage to other property." In *Hathaway*, it was undisputed that a subcontractor's faulty work had caused damage to surrounding properties that were also being constructed by the general contractor. Given that the definition of the term "occurrence" in standard CGL policies does not expressly contain any distinction as to which property is damaged, some courts began to question whether the "other property" component was required in order to constitute an "occurrence," or whether that fact just happened to exist in *Hathaway*. By analyzing the issue of whether other property was damaged in determining whether an "occurrence" took place, it appeared that some courts, notably the Georgia Court of Appeals in *Custom Planning & Development, Inc. v. American*

National Fire Insurance Company, 270 Ga. App. 8 (2004), were improperly conflating the business risk exclusions analysis with the definition of "occurrence."

The Court began its discussion in *Taylor Morrison* with an analysis of the definition of the term "accident," given that an "occurrence" is defined as an "accident" in all standard CGL policies. The Court drew from several different dictionary definitions of the term "accident" in giving it its usual and common meaning, and it concluded that standing alone, the term does not convey information about the identity of whose interests are injured by the accidental happening. This conclusion is consistent with the Court's decision in *Hathaway*, when it cited with approval to the Texas Supreme Court's decision in *Lamar Homes v. Mid-Continent Casualty Company*, 242 S.W.3d 1 (Tex. 2007), which had held that a "deliberate act, performed negligently, is an accident if the effect is not the intended or expected result." Therefore, the Georgia Supreme Court held that the term "occurrence," as used in standard CGL policies, "does not require damage to the property or work of someone other than the insured."

In answering the first certified question in the negative, the Court made an important point that some prior courts and litigants often seem to overlook – "an 'occurrence' alone is not enough to give rise to coverage under a standard CGL policy." In other words, once a court concludes that an "occurrence" exists, that by no means ends the inquiry as to coverage. It must next determine whether the occurrence caused "property damage" or "bodily injury" within the meaning of the policy, and if so, whether there are any applicable exclusions from coverage, such as the business risk exclusions. Courts may even face an additional step if there is an applicable *exception* to an exclusion, such as the subcontractor exception

to the “your work” exclusion. The Court noted that “these other requirements of coverage are inherently better suited than the requirement of an ‘occurrence’ to limit coverage in faulty workmanship cases to instances in which the faulty workmanship has damaged other, nondefective property or work. ... The sounder analytical approach is to avoid conflating the several requirements of the insuring agreement and the exclusions, and instead, to let each serve its proper purpose.” The Court borrowed from the well-reasoned analysis used in other jurisdictions in *U.S. Fire Insurance Company v. J.S.U.B., Inc.*, 979 So.2d 871 (Fla. 2007) and *Lamar Homes* that had noted that an overly narrow definition of the term “occurrence” would render largely superfluous the business risk exclusions and exceptions thereto.

The Court noted that its construction of the term “occurrence” was not inconsistent with several prior decisions of the Court of Appeals that had seemingly reached different conclusions. In *SawHorse, Inc. v. Southern Guaranty Insurance Company*, 269 Ga. App. 493 (2004), the court had concluded that there was no CGL coverage due to the business risk exclusions in the policy, *not* because the defective construction was not an “occurrence.” As such, *SawHorse* did not even address whether an “occurrence” requires damage to work other than that of the insured. Similarly, in *McDonald Construction Company v. Bituminous Casualty Corporation*, 279 Ga. App. 757 (2006), the court decided the case based on whether the claim “arose from an obligation to pay damages for ‘bodily injury’ or ‘property damage’ resulting from such an ‘accident.’” In fact, the court expressly side-stepped the issue of whether the faulty workmanship involved constituted an “occurrence” under the policy.

However, the Georgia Supreme Court disapproved of the Court of Appeals’ reasoning in *Custom Planning & Development, Inc. v. American National Fire Insurance*

Company, 270 Ga. App. 8 (2004), to the extent that it treated the “other property” requirement as a component of the “occurrence” requirement, as well as its suggestion in dicta that a breach of warranty claim *never* can involve an “occurrence.” Nevertheless, the Court suggested that the result in *Custom Planning* would be the same under the new *Taylor Morrison* analysis and declined to overrule it outright. Presumably, the Court’s harmonization of the result in *Custom Planning* with *Taylor Morrison* was due to the fact that in *Custom Planning*, there had already been a determination through arbitration that no other property had been damaged from the insured’s faulty workmanship, and thus the “your work” exclusion would have been triggered to result in no coverage. However, the work at issue in *Custom Planning* had been performed by a subcontractor of the insured, which could have created coverage through the subcontractor exception to the “your work” exclusion. It is not known whether the CGL policy involved in that case contained the standard subcontractor exception to the “your work” exclusion, as this exception was not cited or discussed in the court’s opinion. If it had contained a subcontractor exception, the resulting *Custom Planning* may well have been different.

In addressing the second certified question, the Court limited its consideration to claims of fraud and breach of warranty generally, as opposed to breach of warranty based upon failure to disclose material information. The Court did not consider breach of contract claims, as the litigation at issue did not involve such claims. First, the Court addressed fraud. The Court found it difficult to conceive a set of facts in which a claim of fraud could be caused by an “accident,” given that the elements of fraud include scienter and intent to induce a party to act or refrain from acting. The Court did not completely rule out the possibility that a fraud claim could possibly constitute an “occurrence,” but instead concluded that in “most circumstances,” a claim for fraud is incompatible with the notion of an “accident” and will not involve an “occurrence.” Therefore, it answered the second certified question in the affirmative with respect to fraud.

Second, the Court addressed claims for breach of warranty and found them to be sufficiently distinguishable from fraud in the context of whether there has been an “occurrence.” Although the making of a warranty, express or implied, “undoubtedly is an intentional act, the breach of a warranty may not be.” The Court noted that a breach of warranty could, but not necessarily always, be intentional. Therefore, it answered the second certified question in the negative with respect to breach of warranty. Again, the Court disapproved of the language from *Custom Planning* that appears to suggest that a breach of warranty claim can never involve an “occurrence,” although it stopped short of overruling it. However, the Court did overrule *Forster v. State Farm Fire & Casualty Company*, 307 Ga. App. 89 (2010), which had relied upon *Custom Planning* to conclude that any construction defects constituting a breach of warranty were not covered under the policy. ❖



Edward R. Stabell, III is a partner with Brennan Harris & Rominger in Savannah. For the past 20 years, he has represented clients throughout the state in the areas of insurance defense, transportation, construction, professional malpractice, coverage, bad faith, and complex commercial and bankruptcy litigation. He chairs the GDLA’s Insurance Coverage Substantive Law Committee.



Britton G. White is an associate at Brennan Harris & Rominger, and practices primarily in the areas of insurance defense and civil litigation.

Second, the Supreme Court rejected the plaintiffs' argument that the amendment to the Complaint effectively withdrew the admissions of fact contained in the original Complaint and sworn information. The Court reasoned that the amendments do not have the effect of deleting such allegations from the record for all purposes; rather, the amendments prevent the original admissions from being used as "solemn admission in *judicio*." Thus, the Georgia Supreme Court reversed the trial court's grant of summary judgment.

DESIGN DEFECT; DEFECTIVE WARNING; NEGLIGENT RECALL: Defendant Bad Boy Enterprises, LLC's motion for partial summary judgment was denied. Trial court held (1) that no physical evidence was required to establish that an intermittent open circuit existed because of a design flaw; (2) that an inadequate warning claim does not fail as a matter of law even though undisputed evidence showed that Plaintiffs did not read the alleged inadequate warning; and (3) that Defendant Bad Boy Enterprises, LLC was not entitled to summary judgment because issues of material fact existed as to whether the recall was reasonable, even though a Consumer Product Safety Commission-approved corrective plan was followed, and even though there was no evidence the recall would have remedied the alleged defect that caused the accident.

***Silver, et al. v. Bad Boy Enterprises, LLC, BB Buggies, Inc., and Textron Inc.*, No. 4:12-CV-5 (CDL), 2013 WL 4495831 (M.D. Ga. Aug. 20, 2013)**

Plaintiffs' daughter, Elle Silver, was injured while driving a 2008 Bad Boy Buggy Classic vehicle ("2008 Buggy") designed and man-

ufactured by Defendant Bad Boy Enterprises, LLC ("BBE"). The 2008 Buggy was sold directly to Jimmy Hardin, a friend of Plaintiffs. Elle, who was 13, had permission to operate the 2008 Buggy. While Elle was driving the 2008 Buggy around a "gravel loop," the vehicle tilted and fell on its side. As a result of the accident, Elle's left foot and part of her left leg were severed.

Plaintiffs asserted, among other claims, that (1) the 2008 Buggy was defectively designed because it would accelerate without any input from the driver; (2) the 2008 Buggy was defective for failing to adequately warn that a minor child should not operate the vehicle; and (3) BBE undertook a duty to recall the 2008 Buggy but failed to exercise reasonable care in conducting the recall program. The trial court denied BBE's motion for partial summary judgment as to the three claims.

With regard to the design defect based on unintended acceleration, Plaintiffs contend that the 2008 Buggy had an intermittent open circuit in its electrical system causing the unintended acceleration. BBE argued that while an intermittent open circuit can cause unintended acceleration, BBE denied that the 2008 Buggy contained an intermittent open circuit because Plaintiffs' expert found no physical evidence to support such a finding. However, Plaintiffs' expert testified that if the 2008 Buggy surged, despite stable pressure on the accelerator, then an intermittent open circuit could have existed despite the lack of physical evidence.

The trial court rejected BBE's position because Elle and her friend testified that the 2008 Buggy unexpectedly surged forward right before the crash. Thus, the trial court found factual disputes existed as to whether the 2008 Buggy had an intermittent open circuit because of a design flaw in the vehicle's electrical system.

With regard to the failure to warn claim, Plaintiffs contended that the 2008 Buggy's warning label should have warned that minor children should not be permitted to operate the vehicle. BBE argued that the claim failed as a matter of law because Plaintiffs and Elle admitted they did not read the "Important Information" that accompanied the 2008 Buggy. The Important Information warned buyers that children should not operate the vehicle. The 2008 Buggy's warning sticker also stated the vehicle should only be operated by an "authorized driver." The trial court found that because Plaintiffs based part of their claim on BBE's failure to specifically warn that minor children should not operate the vehicle on the 2008 Buggy's warning sticker, it was a jury question as to whether BBE adequately warned Plaintiffs that a minor should not operate the vehicle.

Plaintiffs' negligent recall claim against BBE related to a 2009 recall to fix pedal circulatory burnout issues. Hardin, the purchaser of the 2009 Buggy, never received notification of the recall. BBE argued that the 2009 recall was reasonable as a matter of law because the corrective action plan was approved by the Consumer Product Safety Commission and BBE did not deviate from that plan. Further, BBE argued that there is no evidence the 2009 recall would have remedied the alleged defect that caused the accident. However, Hardin testified that had he been notified of the recall he would have told Plaintiffs. Plaintiffs further testified that had they been told of the recall, they would not have let Elle operate the 2008 Buggy. The court also noted that Plaintiffs argued the 2009 recall was negligently implemented because BBE's solution only addressed one potential cause of the problems. Thus, the trial court denied summary judgment on this claim. ❖



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