Georgia Defense Lawyer©

Advancing the Civil Defense Bar©

Spring 2013

Georgia Court of Appeals:
Defendants Maintain Their Right to Contribution for Pre-trial Settlements

By Brian T. Moore
and Myles Levelle
Drew Eckl & Farnham, Atlanta

In *Zurich American Ins. Co., et al. v. Heard, et al.*, the Court of Appeals provided clarity to the Georgia Tort Reform statutes and the interplay between O.C.G.A. §§ 51-12-32 and 51-12-33.[1] In its decision, the Court affirmed the legislature's decision to leave O.C.G.A. § 51-12-32 intact as part of the 2005 Tort Reform legislation. The Court's decision was based on a straightforward application of O.C.G.A. §§ 51-12-32 and 51-12-33, and is beneficial to defendants in several regards.

First, the decision provides an avenue for defendants to allocate fault properly amongst joint tortfeasors without the inherent risks of having to try a case. Second, the decision maintains a defendant's right to exercise certain control over its fate in a case, particularly with regard to the allocation of fault and damages. In this sense, the decision maintains a defendant's right to address joint tortfeasors that are either unwilling to participate in global settlement talks or receive preferential treatment from the plaintiff as a result of some on-going relationship, as well as any responsible entities that were not joined to the litigation and were not a part of the settlement negotiations. The decision also preserves a defen-

Continued on page 51

GDLA Honors Atlanta's Judiciary

The GDLA honored Atlanta's judiciary at the 10th Annual Judicial Reception held February 7, 2013, at State Bar headquarters. Pictured above is GDLA President Lynn Roberson (left) with Judge Jane Morrison, then a newly-sworn member of the Fulton State Court bench. See pages 40-41 for more scenes from the evening.

Inside This Issue

RecruitOne II: Membership Drive Could Get You an iPad2

We are pleased to announce RecruitOne II, a membership drive that builds on the success of the first RecruitOne program and expands it.

We have increased the length of time for you to get recruits, and we have added a new prize that should get your competitive juices flowing.

RecruitOne II will run from June 1, 2013 to February 1, 2014. New this time, the GDLA member who recruits the most new members will automatically win an iPad2. If one or more members recruit the

Continued on page 33

FORCON INTERNATIONAL

Providing Forensic Engineering and Expert Witness Services Since 1984

www.forcon.com

Proud Sponsor of the GDLA for over 12 years

Thank you for your business!








We Understand the Importance of Having the Right Expert

FORCON International - Georgia

1730-H Mt. Vernon Road
Atlanta, GA 30338
770.390.0980

Georgia Defense Lawyer
Volume X, Issue I

Editor: Sarah B. "Sally" Akins

Georgia Defense Lawyer, the official publication of the Georgia Defense Lawyers Association, is published three times annually. For editorial information, please contact the editor at sakins@epra-law.com. The editor acknowledges the invaluable assistance of her associate, Megan Usher Manly, in the editing process.

GDLA Officers & Directors

GDLA Offices

Jennifer M. Davis, Executive Director
P.O. Box 191074
Atlanta, Georgia 31119-1074
Tel: 404.816.9455
E-mail: jdavis@gdla.org

President's Message

I am now looking at the downhill side of my term as GDLA president and the view is spectacular!

The GDLA is growing and prospering, thanks in large part to the diligence and dedication of our Executive Director, Jennifer Davis. Those of you who have not yet met her need to do so at your first opportunity as she will brighten your day — guaranteed! Jennifer has faithfully spurned other organizations seeking her expertise because she is so devoted to the GDLA. We have been truly blessed to have her join our association.

Your Board has also been very active and hard working. I am so pleased to have had the opportunity to work side by side with so many fine lawyers dedicated to improving the civil defense bar.

Our Education Committee has been going gangbusters these past couple of years, providing interesting and challenging CLE seminars, both in Atlanta and outside the metro area, in an effort to bring top notch programming to as many of our members as possible. Look for one of their programs to come to your area, thanks to the leadership of Education Committee Chair Wayne Melnick and Vice-chair Brett Miller.

There are many opportunities for veteran and newer lawyers to get involved and make things happen. This newsletter is published three times per year, and you are encouraged to submit articles to Editor Sally Akins. The *Law Journal*, edited this year by Peter Muller, comes out each May, giving our members another great opportunity for exposure as both the *Law Journal* and newsletter are mailed to judges statewide.

If you want to assist with CLE seminars or participate in the Pre-Trial Discovery & Deposition Boot Camp led by Jason Willcox or Trial & Mediation Academy led by Douglas Burrell, just contact me or Jennifer Davis and we will get you plugged in.

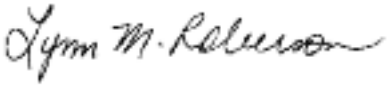
Our Substantive Law Committees (SLC) are becoming even more active with Chair Brian Moore at the helm. For example, the Premises Liability SLC, led by Shane Keith and Marty Levinson, held a lunch and learn CLE with Fulton State Court Judge Wesley Tailor. The SLCs also contribute case law updates for the newsletter and more substantive articles for the *Law Journal*.

The GDLA Annual Meeting takes place at a beach resort every June. If you did not plan to come to The Breakers in Palm Beach this year, then mark your calendars for next year. We will be back at the Ponte Vedra Inn & Club June 12-15, 2014. Don't miss the opportunity to join your fellow GDLA members at one of the nation's historic resorts at affordable pricing (thanks to Jennifer's great negotiating skills and professional connections) to partake of outstanding CLE programming (thanks to the Executive VP, who plans the program annually).

There is always ample time for networking with the best defense lawyers and our wonderful GDLA sponsors, as well as relaxing with your family. You will find, as I have, that our Annual Meetings are a great break from the office and a good opportunity to make new professional connections and enjoy long-time friends.

Nothing can boost your career and professional reputation better than active involvement in your bar association. I am always saying that the best lawyers are active in bar associations, and I am always being proven right!

For the defense,



Lynn M. Roberson
GDLA President
Swift Currie McGhee & Hiers

ESI

ESI is a national engineering and scientific investigation firm that provides service across all 50 states and internationally.

Representative Disciplines and Specialty Areas

- Aeronautical
- Automotive
- Biomechanical
- Boiler/Machinery
- Chemical
- Civil/Structural
- Electrical/Electronic
- Environmental
- Finite Element Analysis
- Fire and Explosion
- Marine
- Materials and Metallurgy
- Mechanical
- Oil and Gas
- Patents and IP
- Polymers and Composites
- Railroad
- Safety
- Utility – Electric/Gas
- 3D Modeling and Simulation

Selected Areas of Expertise

- Automotive (Passenger, Off-Road, Commercial, Industrial) A/R
- Chemical and Manufacturing Processes
- Commercial and Patent Disputes
- Electrical, Elevator, HVAC System Evaluations
- Environmental Inspections (Mold, IAQ, Phase I/II)
- Failure Analysis
- Fire, Explosion, Arson, C/O Investigations
- Medical Devices
- Industrial Safety Investigations
- Metallurgical Laboratories (with SEM), Testing Services
- Municipal, Stormwater and Wastewater Issues
- Intellectual Property
- Porch, Stair, Flooring and Deck Incidents
- Product Failures and Liability Analyses
- Property Casualty and Loss Investigations
- Sprinkler/Fire Suppression Systems
- Windstorm/Tornado/Hurricane Damage Inspections

Los Angeles (Foothill Ranch), CA
(949) 540-7000

Colorado Springs, CO
(719) 535-0400

Fort Myers, FL
(239) 482-0500

Miami, FL
(305) 779-5911

Atlanta (Norcross), GA
(866) 596-3994

Chicago (Aurora), IL
(630) 851-4566

Ann Arbor, MI
(734) 794-8100

Kansas City (Liberty), MO
(816) 415-8340

St. Louis (O'Fallon), MO
(636) 240-6095

Omaha, NE
(402) 881-4860

Charlotte, NC
(678) 990-3280

Houston, TX
(281) 448-6060

www.esi-website.com

Member & Legal News

Member News

GDLA President **Lynn M. Roberson**, a partner at *Swift Currie McGhee & Hiers* in Atlanta, was again named among the Top 50 Women Georgia Super Lawyers. This year, Ms. Roberson was also recognized as one of the Top 100 Georgia Super Lawyers. GDLA Vice President **Sarah B. "Sally" Akins**, a partner at *Ellis Painter Ratterree & Adams* in Savannah, and **Rita A. Sheffey**, a partner at *Hunton & Williams* in Atlanta, were also named as Top 50 Women Georgia Super Lawyers.

GDLA Vice President **Hall F. McKinley III**, a partner at *Drew Eckl & Farnham* in Atlanta, recently attended the Joint Spring Meeting of the American Bar Association's Tort Trial and Insurance Practice Section (TIPS) and the Judicial Division, where he was presented the TIPS Section Leadership in Action Award for serving 20 years as program chair for its Transportation Megaconference. He was also elected to the Board of the TIPS Fellows.

Nall & Miller announced that **Clinton F. Fletcher** has been named partner in the Atlanta office. Mr. Fletcher practices in the areas of products liability, aviation, premises liability, motor carrier, and business litigation.

Owen Gleaton Egan Jones & Sweeney in Atlanta announced that **Derrick L. Bingham** and **Melissa P. Reading** are now partners of the firm. Mr. Bingham's practice includes appellate advocacy, business counseling and litigation, professional liability, insurance coverage, and governmental liability matters. Ms. Reading focuses her practice on defending companies and individuals in civil tort litigation, primarily medical malpractice, product liability, and general personal injury defense.

Balch & Bingham announced that **M. Anne Kaufold-Wiggins** was named a partner with the firm in its Atlanta office. Her practice consists of trial and appellate matters, including products liability and casualty litigation, land use matters, commercial litigation and medical malpractice defense.

HunterMaclean in Savannah announced that **Nicholas J. Laybourn** was named a partner with the firm. His practice areas include medical malpractice, business litigation, transportation law and products liability.

Young Thagard Hoffman Smith Lawrence & Shenton in Valdosta announced that **Brian J. Miller** was named a partner in the firm. His practice areas include the defense of automobile liability claims, premises liability claims, workers' compensation claims, and general insurance defense.

Coleman Talley announced that **C. Hansell Watt IV** was promoted to partner in the firm's Valdosta office. Mr. Watt's practice focuses in the areas of insurance defense, tort liability, professional negligence and malpractice, local government and municipal law.

Curtis J. Martin II, a partner with *Miller & Martin* in Atlanta, was profiled as the "Attorney of the Month" by *Atlanta Lawyer Magazine* and was featured on the cover of the most recent edition.

Lance LoRusso, principal of *LoRusso Law Firm* in Atlanta, has published two books. The first, *When Cops Kill: The Aftermath of a Critical Incident*, takes you through an officer involved shooting and the years after. The second, *The World Class Rainmaker: Raising the Bar in Your Law Practice*, was co-authored with business development coach Robin M. Hensley.

GDLA Executive Director **Jennifer M. Davis** has been reappointed by State Bar President Robin Frazer Clark to a three-year term as a lay member of the Chief Justice's Commission on Professionalism (CJCP). She also serves on the CJCP Subcommittee on Access to Justice.

Evert & Weathersby announced that the Atlanta office has relocated to the Pinnacle Building. The new address is 3455 Peachtree Road, NE, Suite 1550, Atlanta, GA 30326. All e-mail addresses and telephone numbers remain the same.

Goodman McGuffey Lindsey & Johnson announced the relocation of its Savannah office; e-mail addresses and phone numbers remain the same. The new address is 532 Stephenson Avenue, Suite 200, Savannah, GA 31405-5987.

Hawkins Parnell Thackston &Young announced the opening of its newest office in New York City on February 1, 2013. The office is located at 90 Broad Street, 9th Floor, New York, NY 10004; 800.334.8957.

Case Wins

GDLA Vice President **Matthew G. Moffett** and GDLA Board of Directors Member **Wayne S. Melnick**, partners at *Gray Rust St. Amand Moffett & Brieske* in Atlanta, obtained a very defense-favorable resolution to a shooting-injury case in which Plaintiff's counsel sought an "eight figure" verdict.

In this case, Plaintiff was a young woman who was shot and

injured when she and her family were visiting a multiplex movie theatre. Plaintiff and most of her family were inside the theatre when a gang-related fight erupted in the parking lot. Plaintiff knew her older brother was in the parking lot and went outside to check on him. When Plaintiff went outside, she was shot with a stray bullet fired by one of the fight participants. Plaintiff's brother, who was not a gang member but had been mistakenly involved in the fight, was also shot and soon died at the scene.

Mr. Moffett and Mr. Melnick represented the security company hired by the movie theatre chain. During discovery, Plaintiffs' counsel, the author of *The Reptile: The 2009 Manual of the Plaintiff's Revolution*, discovered that the security company had only three officers on duty on the night of the shooting and at the time of the actual fight, none of those officers were actually walking patrol in the parking lot. This was because the one officer that was supposed to walk patrol in the parking lot had gone inside to change the dead battery on his radio and had not had any other office cover his patrol for him. It was also discovered that there had been previous gang-related activity at the movie theatre as well as various prior crimes involving firearms.

Prior to trial, two of the gang members involved in the fight, including the shooter, had been caught and were serving time in Georgia State Prison. Plaintiffs' counsel took evidentiary depositions of each of the gang members and both witnesses testified that they did not see security in the parking lot that night. Each of the gang members also testified that had the security officers been present or intervened when the fight first began, then the fight never would have taken place and certainly would never have escalated into a shooting.

Additionally, Plaintiffs focused a significant amount of their pretrial energies on the fact that Plaintiff still had the bullet inside of her, that t was located too dangerously close to her spine to be removed and that she was suffering from continued emotional injuries as a result of this condition.

The case proceeded to trial and the jury was selected. Following jury selection, Plaintiff's counsel announced that they were not going to proceed to trial and instead opted to accept the five-figure offer that had been made by the insurer of the movie-theatre chain on behalf of all Defendants. As a result, the case was resolved with Mr. Moffett and Mr. Melnick's client, whose insurer had previously denied it coverage based on a policy exclusion, not paying any money to Plaintiff to resolve the case.

GDLA Past President **Grant B. Smith**, a partner with *Dennis Corey Porter & Smith* in Atlanta, reported several recent wins. First, the Georgia Court of Appeals affirmed the trial court's summary judgment for the defendant in a workplace violence case involving a catastrophic brain injury and $1 million in medical expenses. A FedEx Ground switcher operator got into a fight with a contractor driver. The driver's wife settled with the contractor's workers' compensation carrier and the court held the exclusive remedy applied. Jay Sadd represented the plaintiff. *See Carr v. FedEx Ground Package System, Inc.*, 317 Ga. App. 733 (2012).

In another case, Fulton State Court Judge John Mather granted Mr. Smith's motion for summary judgment in a wrongful death case arising out of a multi-vehicle collision involving a Suburban, a minivan, a tractor trailer and several motorcycles. Mr. Smith defended a trucking company executive who was driving the minivan on I-285 in Atlanta, when a Suburban cut sharply from an entrance ramp and hit the minivan. The Suburban then hit the tractor trailer, which contacted the motorcycles. One of the motorcycle drivers was killed. Thomas Cuffie represented the plaintiff and GDLA Board of Directors member **David N. Nelson** of *Chambless Higdon Richardson Katz & Griggs* in Macon represented the Suburban driver. The plaintiff did not appeal.

In the final case, a plaintiff dismissed a claim for wrongful death, resulting from a gasoline tank explosion, in a case before DeKalb County State Court Judge Dax Lopez after Mr. Smith filed a motion for summary judgment on the exclusive remedy provisions of the Workers' Compensation Act.

William D. "Billy" Harrison, a partner with *Mozley Finlayson & Harrison* in Atlanta, obtained a defense verdict in Carroll County Superior Court for an insurance company after a four day trial of a case involving a homeowner's claim for fire damage. The defense showed that the fire was intentionally set by the homeowners, that they had the opportunity to set the fire, and that their financial condition was the motivation for the arson. In an unusual action by the jury, all 12 members signed the verdict form, not just the foreman, which was interpreted by some as a message to the plaintiff regarding his actions. No offer to settle by the defense was ever made before trial.

In a recent arbitration involving the transition of a former Washington Mutual bank broker to Morgan Keegan, **Charles M. Dalziel, Jr.**, a partner with *Gregory Doyle Calhoun & Rogers* in Marietta, not only received an award of no liability, but also affirmative relief for the defendant. The broker, who did not want to join Chase when it took over Washington Mutual bank branches, instead joined Morgan Keegan and had in his possession when he left his branch fifteen notebooks he had compiled over the years, containing customer information. When Chase sued him on the non-solicitation agreement he had signed with Washington Mutual, they also sought return of the notebooks. The defense actually consented to a court order requiring the return of the note-

books and prohibiting the broker from soliciting the clients further pending arbitration, while still being allowed to accept business from customers who initiated contact with the broker. At arbitration, despite the consent to the injunction, defense counsel obtained a defense verdict on all claims asserted by Chase, *plus* a $50,000.00 award for wrongful injunction, as well as an award of attorneys' fees. Close to a million dollars in transactions had occurred with the Washington Mutual/Chase clients after the transition, and these were the claimed damages.

In another case, Mr. Dalziel obtained a defense verdict in a fall 2012 arbitration involving the transition of two managing members of an LLC which primarily traded in bonds to the Atlanta office of Morgan Keegan, beating back claims of breach of fiduciary duty and breach of non-solicitation agreements. The damages claimed in final argument were approximately $1.86 million.

C. Hansell Watt IV, a partner with *Coleman Talley* in Valdosta, successfully defended a mining company in a Title VII employment discrimination lawsuit alleging race discrimination and retaliation. After extensive discovery and briefing of the issues, the lawsuit was dismissed by Plaintiff after Defendant filed its summary judgment motion.

Partner **Chris Collier** and Associate **Jad Dial** of *Hawkins Parnell Thackston &Young* (HPTY) won summary judgment in Fulton County State Court on behalf of the owner and property manager of a local shopping center. The plaintiff filed suit against the property management company as well as the individual owners and managers of the shopping center store where she was employed.

In January 2010, the plaintiff suffered extensive ankle injuries during a snow and ice storm. As she was leaving work, she slipped and fell on "hidden ice" that was located just off the sidewalk exit of the store. The plaintiff was denied workers' compensation benefits because she was off the clock and technically off the property as she had stepped off of the sidewalk prior to her fall.

In defending the case, HPTY conducted significant discovery regarding the plaintiff's prior knowledge of the hazard based on her activities earlier in the day, her observations of the general weather conditions, and her knowledge of conditions created from prior snow and ice storms. HPTY also developed the defense that the management company did not possess superior knowledge of the allegedly dangerous condition. The Court agreed with HPTY, granting summary judgment on January 4, 2013. ❖

In Memoriam: Sandy Owens

By George R. Neuhauser
Nall & Miller, Atlanta

James Sanders "Sandy" Owens, Jr. of Bozeman, Montana and Atlanta, Georgia died Sunday evening, February 10, 2013, at St. Mary's Hospital in Rochester, Minnesota due to complications from surgery. He was 71.

Sandy practiced civil defense law for over 40 years, all with the Atlanta firm of Nall & Miller. He was a leading defense lawyer in a number of areas of practice, including medical malpractice, legal and professional malpractice, trucking law and product liability. In 1994, he spearheaded the firm's efforts to serve as National Product Counsel for the world's largest manufacturer of home appliances, a position the firm still holds today.

Sandy graduated from Emory University in Atlanta and later graduated from Mercer Law School in Macon in 1966. He entered the United States Air Force during the Vietnam War. After his Honorable Discharge, he returned to Atlanta to join Nall & Miller. He was an active member in the Georgia Defense Lawyers Association, the Defense Research Institute, the Georgia Association of Hospital Attorneys, the Atlanta Bar Association and the Atlanta Lawyers Club.

Hundreds of trial attorneys across the state benefitted from Sandy's generous commitment to teaching and mentoring. Since 1985 Sandy gave his time to almost every trial academy in Georgia, teaching as invited faculty at the Atlanta College of Trial Advocacy, the Emory University Law School Trial Techniques Program, and the Georgia Defense Lawyers Association's Trial Academy, where he served as Chairman. As a later Chairman described his service, "I can say without reservation that Sandy is the best lawyer we have had at Trial Academy."

Sandy taught the subtleties of trial advocacy. He would recommend that the trial lawyer might suggest that an impeached witness was "a poor historian," rather than "a liar," his position being that by doing so the advocate allowed the jury to make the bolder conclusion. He was not above the strong statement in the courtroom when that was called for, however. In describing a thoroughly impeached plaintiff in one closing argument, Sandy told the jury "the only time she told the truth was when she contradicted herself." He was one of a kind.

His professionalism and ethics were above reproach, and the tasks of his practice were almost always accompanied with a smile or a laugh. When an adversary was late with discovery responses, rather than a letter threatening a motion and sanctions, the delinquent adversary was more likely to get a note from Sandy reminding him that "my hair is turning gray and my clothes are going out a style waiting on your responses."

In his later years, Sandy escalated his passion for photography to another level. He was an accomplished commercial photographer and was named to the photography staff for the 1996 Olympic Games. He moved to Bozeman, Montana in 2003 with his wife, Chris, and became a regular explorer and photographer of Yellowstone National Park and the Big Sky country that he grew to love so much. He was featured in numerous magazines and galleries in the West and some examples of his work are shown at left.

Sandy is survived by his loving wife, Chris, two sons, Jay and Will, and three step daughters, Carrie, Kim and Pam. He was a fine, skilled trial attorney and an even better gentleman. He will be dearly missed.❖

GDLA's Richardson Award Presented at UGA

GDLA President Lynn M. Roberson (left) and Executive Director Jennifer M. Davis (right) were on-hand to congratulate C. Elizabeth Stell as the recipient of the 2012 Willis J. "Dick" Richardson Jr. Student Award for Outstanding Trial Advocacy at the University of Georgia School of Law.

This annual award is sponsored by the GDLA. It was presented on April 12, 2013 by Prof. Paul M. Kurtz, Associate Dean for Academic and Student Affairs, at the 2013 Georgia Law Awards Program in the Hatton-Lovejoy Courtroom. Following graduation, Ms. Stell will join Insley & Race in Atlanta. ❖

Welcome New GDLA Members

The following were admitted to membership by the GDLA Board of Directors at its Winter and Spring Meetings:

John E. Alday
Waldon Adelman Castilla Hiestand & Prout, , Atlanta

David Atkinson
Magill Atkinson & Dermer, Atlanta

Amy K. Averill
Sutherland Asbill & Brennan, Atlanta

Paul R. Barsness
Rafuse & Hill & Hodges, Atlanta

R. Bradford Brizendine
Weinberg Wheeler Hudgins Gunn & Dial, Atlanta

Stephen W. Brown
Bouhan Falligant, Atlanta

Robert Burke
Rutherford & Christie, Atlanta

Kristen Cawley
Goodman McGuffey Lindsey & Johnson, Atlanta

Daniel G. Cheek
Strawinski & Stout, Atlanta

D. Lee Clayton
Swift Currie McGhee & Hiers, Atlanta

Seth R. Eisenberg
Bovis Kyle & Burch, Atlanta

Charles Wesley Francis III
Waldon Adelman Castilla Hiestand & Prout, Atlanta

Gary S. Freed
Thompson Hine, Atlanta

Nathan Gaffney
Hall Booth Smith, Atlanta

Jonathan R. Granade
Casey Gilson, Atlanta

Hadley E. Hayes
Drew Eckl & Farnham, Brunswick

Denise Hoying
Waldon Adelman Castilla Hiestand & Prout, Atlanta

Jonathan J. Kandel
Freeman Mathis & Gary, Atlanta

Amanda DiOrio Lynde
Hull Barrett, Augusta

Margaret E. McClatchey
Owen Gleaton Egan Jones & Sweeney, Atlanta

W. Jonathan Martin II
Constangy Brooks & Smith, Macon

W. Justin Purvis
Young Thagard Hoffman Smith Lawrence & Shenton, Valdosta

Reneé S. Rainey
Jones Cork & Miller, Macon

Kevin Reardon
Waldon Adelman Castilla Hiestand & Prout, Atlanta

Andrae Reneau
Swift Currie McGhee & Hiers, Atlanta

Jatrean M. Sanders
Leitner Williams Dooley & Napolitan, Atlanta

Matthew J. Simmons
Swift Currie McGhee & Hiers, Atlanta

Melissa A. Segel
Swift Currie McGhee & Hiers, Atlanta

Robert L. Shannon, Jr.
Hall Booth Smith, Atlanta

Adam Sinton
Weinberg Wheeler Hudgins Gunn & Dial, Atlanta

Stephen T. Snow
Bendin Sumrall Ladner, Atlanta

Marcia R. Stewart
Waldon Adelman Castilla Hiestand & Prout, Atlanta

Grant Tall
Insley & Race, Atlanta

Mathew K. Titus
Bovis Kyle & Burch, Atlanta

Thomas B. Ward
Swift Currie McGhee & Hiers, Atlanta

Jonathan Skye Wellesley
Waldon Adelman Castilla Hiestand & Prout, Atlanta

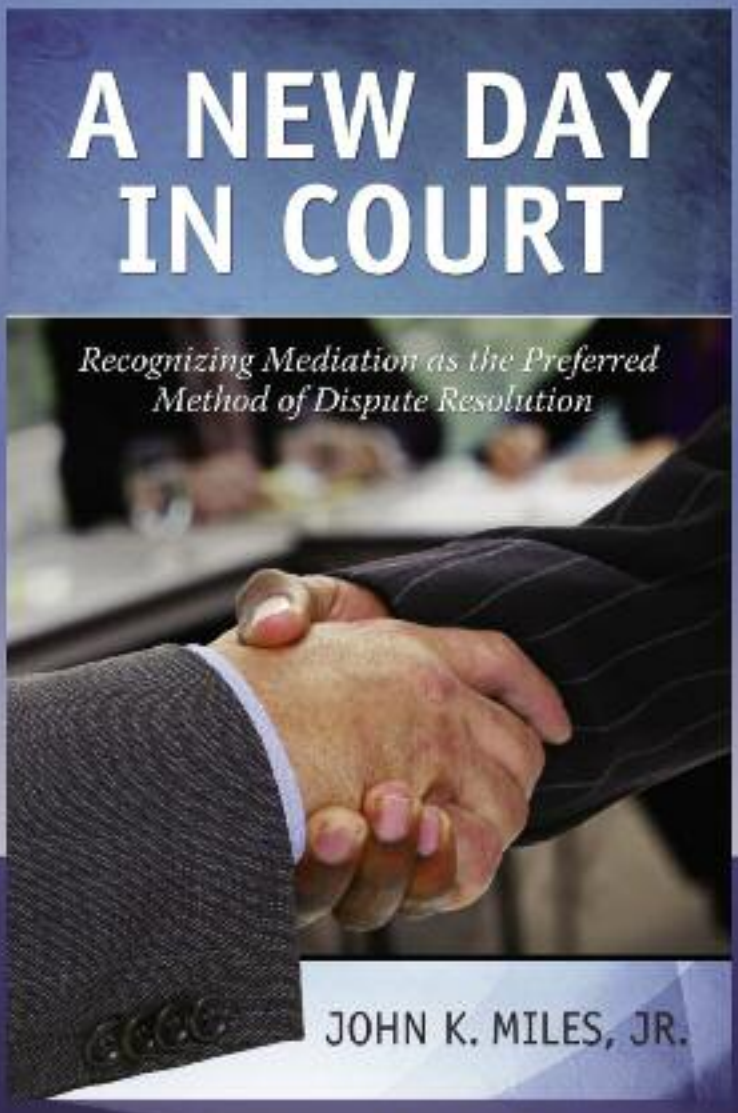
Kimberly Logue Woodland
Insley & Race, Atlanta

David H. Wilson
Hawkins Parnell Thackston & Young, Atlanta

Amanda H. Yenerall
Stewart Melvin & Frost, Gainesville

"A New Day In Court"

The new book from John Miles - now available!



NOW ON SALE AT WWW.MILESMEDIATION.COM
ALSO AVAILABLE ON KINDLE

MILES MEDIATION

www.milesmediation.com

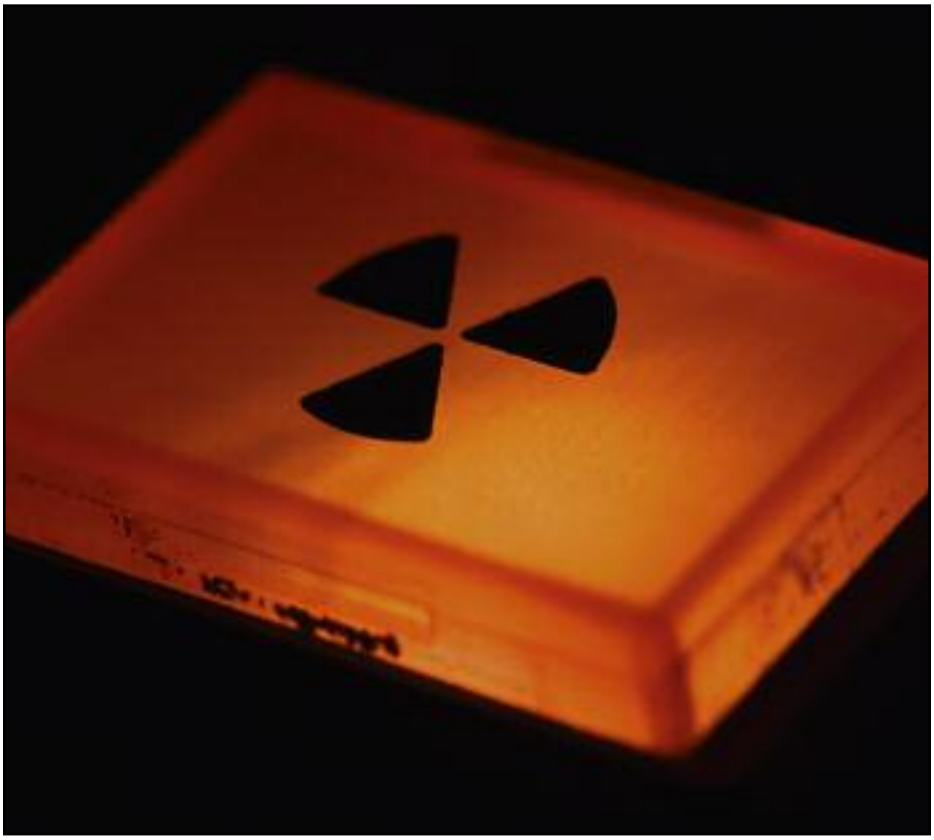
Please contact us for information and scheduling or visit our web site for profiles and booking.

Office: (678) 320-9118 E-mail: info@milesmediation.com

Restrictive Covenants: The Unfair Labor Practice Nuclear Option

By Charles M. Dalziel, Jr.
Gregory Doyle Calhoun & Rogers, Marietta

The 1980s, 1990s and 2000s were heady days for lawyers, like me, whose livelihood depended on defense of claims arising out of restrictive covenants contained in commercial contracts. Previous articles in this publication celebrating the constitutional amendment and legislation that made restrictive covenants more enforceable should have more properly been placed in the *Georgia Plaintiff's Lawyer* newsletter. This article will discuss the current playing field for defense lawyers in cases where the restrictive covenant at issue was signed after the effective date of the statute, and it will highlight some recent developments at the National Labor Relations Board, which offer a different avenue of attacking overbroad covenants.



PRE-AMENDMENT, PRE-LEGISLATION LAW

One of the myths advanced by advocates for the legislation and constitutional amendment, which allowed free enforcement of restrictive covenants, was that Georgia law on this subject was too complicated, and the validity of restrictive covenants was too uncertain. A statement farther from reality is hard to imagine. Georgia courts imposed a traditional reasonableness analysis as to time, territory and scope of restrictions in reviewing the enforceability of covenants. On its face, that type of analysis does indeed suggest the potential for random results.

In practice, however, the courts did not employ a blended "reasonableness" analysis of these factors leading to unpredictable results. In fact, reality was directly contrary to the myth. Case law developed many rules of "per se" unreasonableness. In the salad days of the 1980s, 1990s and 2000s, I described myself as a defense lawyer in a deer stand looking for the vulnerable spot of per se unreasonableness at which to shoot down the overbroad covenant. Defense lawyers like me had a vast arsenal of per se defects to identify. The amazing thing was that companies had lawyers at their headquarters in Minnesota, New York, Illinois or Ohio draft the contracts without regard to Georgia public policy, and these lawyers would draft them directly into unenforceability over and over again, even when defects had been pointed out in previous litigation over their contracts. Some classic drafting errors I saw again and again were: 1) non-disclosure covenants without time limits; 2) non-solicitation of customers covenants without territorial restrictions; 3) covenants not limited to customers with whom the employee had done business; and 4) non-compete territorial restrictions that could move during the time period of the agreement.

Hornbooks and seminar materials were available which listed every case in the area. I could develop a well-reasoned opinion about whether a contract was enforceable in 15 minutes using these resources. I could also identify cases where contracts had been held enforceable, and track the language used in them to draft contracts, maintaining high confidence that the contract I prepared was enforceable.

THE NEW LEGISLATION (O.C.G.A. § 13-8-50, ET SEQ.)

The new legislation very broadly allows for the enforcement of covenants between:

1. Employers and employees;

2. Distributors and manufacturers;
3. Lessors and lessees;
4. Partnerships and partners;
5. Franchisors and franchisees;
6. Sellers and purchasers of a business or commercial enterprises; and
7. Two or more employers.

Assuming that parties involved meet the definitions, the statute presumes enforceability of all restrictive covenants upon a prima facie showing that the restraint complies with the statutory requirements contained in O.C.G.A. §13-8-53, and a showing of legitimate business interest justifying the restrictive covenant. The business or party seeking enforcement is presumed to have 100 percent of the interest in the customer relationships. So, employees who customarily and regularly solicit customers or prospective customers for their employer or who engage in making sales or obtaining orders or contracts for products or services have their careers in the crosshairs of their employers at all times under O.C.G.A. § 13-8-53. The statute exhibits a breathtaking naiveté about how actual customer relationships in sales work. The statute does not take into account whether the employee is required to spend her own money to develop clients; the deficiency is even more striking when one realizes that independent contractors are included in the definition of "employee" if, for example, they have customer contacts. *See* O.C.G.A. § 13-8-51(5).

The weapons against enforcement provided by the statute are relatively weak.

The statute injects uncertainty, not certainty, into the restrictive covenant world.

A defense lawyer with a case involving a covenant executed after the effective date of the new legislation had best be engaged far in

Continued on page 54

Your Insured Tendered a Liability Claim. Now What?

Logistics of Declaratory Judgment Actions to Resolve Insurance Coverage Disputes

By Philip W. Savrin and
Jonathan J. Kandel
Freeman Mathis & Gary, Atlanta

In today's hyper-litigious society, it has become commonplace for businesses and individuals to purchase insurance policies as a way to provide some degree of protection. As insureds purchase policies to cover new risks, the possibility for disputes to develop over coverage increases. Insurers can preserve coverage defenses by agreeing to defend their insureds under a reservation of rights. In addition, both sides can (in certain circumstances) resolve their dispute through a declaratory judgment action. As the Georgia Court of Appeals has eloquently explained, "The purpose of [a] declaratory judgment 'is to permit one who is walking in the dark to ascertain where he is and where he is going, to turn on the light *before* he steps rather than after he has stepped in a hole.'"[1]

When a claim is presented against its insured, an insurer has the option of accepting coverage, denying coverage or reserving its rights while investigating coverage. If the claim is presented prior to a lawsuit, the insurer's ability to preserve its coverage defenses is provided by statute.[2] If the insured has been sued, the insurer must expressly reserve its rights given the conclusive prejudice to the insured if the insurer defends the case without informing the insured of the potential limitations on coverage.[3]

More recently, the Georgia Supreme Court has ruled that an insurer cannot disclaim coverage on some grounds while reserving the right to assert additional grounds in the future. By so doing, the court reasoned, the insurer waives the ability to assert the additional grounds at a later point in time.[4] In addition, Georgia applies a broad standard to whether an insurer owes a defense duty.[5]

In light of these developments, insurers are increasingly turning to the courts for guidance on the scope of coverage under their policies. This article addresses both the legal and practical considerations involved in the decision to proceed with a declaratory judgment action in Georgia.

A. LEGAL CONSIDERATIONS

Whether to seek a declaratory judgment when faced with a liability claim depends in part on whether the insurer owes a defense to its insured. This is so because declaratory judgment jurisdiction turns on whether there is an "actual controversy." The party seeking a declaratory judgment must show that "it is in a position of uncertainty or insecurity because of a dispute and of *having to take some future action*."[6] Because uncertainty as to future conduct is an "essential ingredient" to a declaratory judgment action, an "actual controversy" does not exist if the parties' rights have already accrued.[7] (As discussed below, however, this rule may not apply if the litigation proceeds in federal court.)

Although courts have discretion to hear declaratory judgment actions,[8] Georgia courts regularly hold that an "actual controversy" exists as to the duty to defend when an insurer accepts the defense of its insured under a reservation of rights. If the insurer has denied coverage and refuses to defend its insured, the parties' rights and duties are fixed and there is no uncertainty as to future conduct.[9] Accordingly, if a lawsuit is pending, the insurer ordinarily must have agreed to defend its insured (under a reservation of rights) for there to be an "actual controversy" to support a declaratory judgment.

Even if an insurer defends its

Compelling numbers build a compelling case.

MDD's forensic accounting professionals regularly provide extensive litigation services and expert witness testimony in Federal and State court. Time and again, our economic damage quantification assessments have stood up to the scrutiny of cross examination.

For more information, please contact our Atlanta office at 404.252.0085 or visit us at mdd.com.

Kevin Callahan, CPA | kcallahan@mdd.com
Neal Cason, CPA, CFE | ncason@mdd.com
Dayne Grey, CPA | dgrey@mdd.com

FORENSIC ACCOUNTANTS

MDD

Making Numbers Make Sense

> mdd.com

UNITED STATES • CANADA • UNITED KINGDOM • HONG KONG • AUSTRALIA • SINGAPORE

insured under a reservation of rights, a declaratory judgment is permitted only if there is an *ongoing* uncertainty. This means that a dispute over the duty to defend may not support a declaratory judgment action once the liability case is resolved.[10]

In *Empire Fire & Marine Ins. Co.*, for example, judgment was entered in the underlying liability case after the declaratory judgment action was filed. In rejecting the insurer's argument that the case was not moot since the declaratory judgment action was filed before judgment was entered, the court emphasized that the insurer likely could have prevented the case from becoming moot by seeking to have the underlying liability case stayed.[11] Mootness is an issue both in the trial court and appellate court. In *S. Guar. Ins. Co. of Ga. v. Viau*,[12] for example, the court dismissed the insurer's appeal regarding its duty to defend as moot because the underlying liability case had resolved.

B. PRACTICAL CONSIDERATIONS

Even if an insurer can seek declaratory relief, it does not *need* to do so, as it can defend its insured through final judgment and either resolve the claim at that point or resolve the coverage issue through litigation. Whether it makes sense to seek declaratory relief is determined mostly by practical considerations. The following considerations can assist the insurer in deciding whether to take the additional step of seeking a declaratory judgment from the court.

1. What is the size of the claim? Litigating both the underlying tort claim and coverage issue in a declaratory judgment action could swallow up a minor claim many times over. The insurer may want to consider defending the tort claim under reservation of rights with hopes of a favorable result for the insured, or else resolving the coverage issue either through a compromise of the claim or after a judgment has been entered.

2. Do the same facts relate to both liability and coverage? In some circumstances, liability issues can mirror the coverage question. For example, an insured might defend against a liability claim by claiming the tort was committed by an independent contractor and not an employee for whom the insured would be liable vicariously. The coverage defense, in turn, might be that the policy covers employees of the insured but not independent contractors. If the "employee versus contractor" issue is going to be litigated and resolved in the liability case, an insurer might not want to incur additional costs to duplicate the same efforts in the coverage case, which might further complicate the issues if there are contradictory outcomes. The insurer might choose, instead, to allow the liability case to play out or it could seek to stay the liability case so that it can litigate the fact question in the coverage context.[13]

3. Is this a one-time claim or a recurring claim such that guidance is needed? The costs of litigating a coverage claim in a relatively minor claim might make sense if the insurer needs clarification of its obligations in other matters. For example, an insurer may have an endorsement on a policy that limits coverage for certain types of claims involving assaults and batteries. The claim presented against its insured may be an opportunity for the insurer to receive instruction from the court on the validity and application of the same endorsement in other (and perhaps more serious) claims.

4. Does the insurer want to maintain some control over the underlying litigation? A claim that presents a close question of coverage but a large potential exposure may induce an insurer to seek declaratory relief. In this instance, filing a coverage action could be a vehicle to reach a compromise settlement of a large exposure or to obtain guidance on whether or not the damages would even be owed under the policy.

C. DECLARATORY JUDGMENT ACTIONS

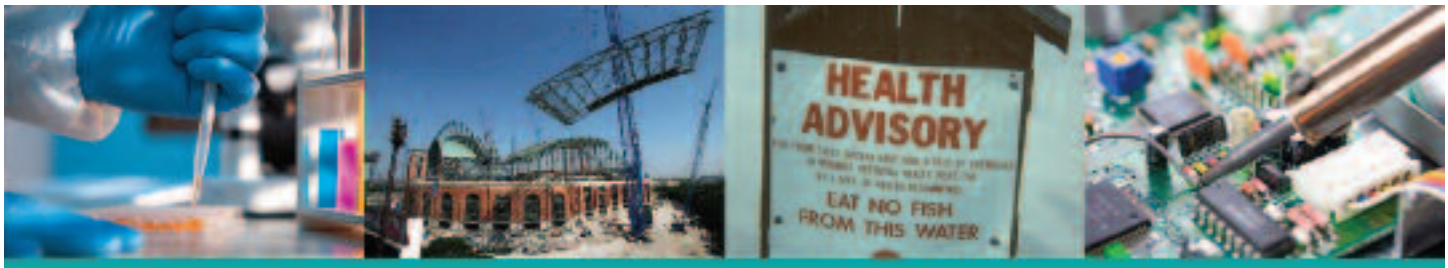
If an insurer has decided to seek declaratory relief, the next questions are: where to file, when to file, and what parties to include as defendants.

1. Where to File. By statute, the superior courts have *exclusive* jurisdiction to hear declaratory judgment actions.[14] If there is diversity of citizenship, the insurer might prefer to litigate coverage in federal court. Federal law allows federal courts to entertain insurance coverage disputes where there is diversity of citizenship between the parties and the amount in controversy meets the statutory requirements.[15]

As with their state counterparts, although federal courts have discretion to hear declaratory judgment actions, the federal courts generally accept jurisdiction unless there is parallel state court litigation that warrants abstention.[16] One open question is whether the state court's prohibition on jurisdiction where the insurer has disclaimed coverage carries over to federal court. That prohibition is clearly a matter of state court jurisdiction and may not apply under federal law.

If the insurer has the option of filing in either state or federal courts, some of the practical considerations influencing the decision are whether the coverage case would be heard by the same judge overseeing the liability case and the speed or expertise of the particular courts where the action might be filed. Depending on the specific issues and jurisdictions involved, filing in one court might be more preferable than another to resolve the coverage dispute.

2. When to File. If an insured rejects an insurer's defense under reservation of rights, then the insurer might file for declaratory relief immediately.[17] Otherwise, the insurer can



Exponent®

Engineering and Scientific Consulting

Exponent is pleased to announce the opening of a new office in the Atlanta Metropolitan Area, expanding its engineering and scientific consulting services to the southeast region of the United States.

As one of the largest engineering and scientific consulting firms in the U.S., Exponent can provide you with access to both our local Atlanta staff, as well as more than 500 other Exponent consultants in over 90 technical disciplines.

Our service areas include:

- Biomechanics
- Biomedical Engineering
- Buildings & Structures
- Civil Engineering
- Construction Consulting
- EcoSciences
- Electrical & Semiconductors
- Engineering Management Consulting
- Environmental Science
- Food Safety and Chemical Regulations
- Health Sciences
- Human Factors
- Materials & Corrosion Engineering
- Mechanical Engineering
- Polymer Science & Materials Chemistry
- Statistical & Data Sciences
- Technology Development
- Thermal Sciences
- Vehicle Engineering

888.656.EXPO
info@exponent.com
www.exponent.com

3350 Peachtree Road NE, Suite 1620 | Atlanta, GA 30326 | 678.412.4800

Exponent is certified to ISO 9001

wait until the appropriate time to seek relief so long as the passage of time does not prejudice the rights of the insured.[18]

In most instances, the insurer will want to file the coverage action as quickly as possible. Doing so will announce to the insured (and the liability claimant or plaintiff) that the insurer has conviction in its defenses, and the earlier the action is filed the earlier a decision will be reached. In some circumstances, however, it might make sense to wait; for example, key facts may need to be resolved in the liability case before the coverage dispute can be resolved. Likewise, if a pivotal issue is being litigated in another court (either by the same insurer or another carrier), the insurer might want to see how the other case is resolved before litigating the coverage question on its own. Generally speaking, the coverage action should be underway if a declaratory judgment is warranted and the liability case is heading toward mediation or trial.

3. Parties to be Included. The insured must be included in the coverage action as the party against whom relief is sought. In both state and federal court, however, a declaratory judgment binds the parties to the lawsuit only.[19] Even though liability plaintiffs have no rights to the policy until a liability judgment is entered, Georgia law provides that they are proper parties to a declaratory judgment action, and indeed encourages them to be included.[20]

Although Georgia law does not require insurers to name the claimant as a party to a coverage action, an insurer's failure to do so simply subjects it to the "possibility of further litigation on the same issue."[21] The federal decisions, however, are somewhat contradictory as to whether claimants "need" to be included for the action to be maintained. In *Mt. Hawley Ins. Co. v. Sandy Lake Props., Inc.,*[22] for example, the Eleventh Circuit denied a tort claimant's motion to intervene as of right in an insurer's declaratory judgment action, finding that it did not have an interest in the policy proceeds.[23] On the other hand, in *Am. Safety Cas. Ins. Co. v. Condor Assocs. Ltd.,*[24] the Eleventh Circuit upheld the dismissal of the insurer's coverage action, finding that the tort plaintiff was an indispensable party without whom complete relief could not be granted under Rule 19. Given this uncertainty as to the requirements of federal law, in an abundance of caution, claimants should be included whenever possible.

CONCLUSION

Given recent decisions in Georgia, insurers are deciding to pursue declaratory relief with increasing frequency. Each case has its own unique facts and factors in this complex area of the law. A working knowledge of the legal and practical considerations is a requirement for all persons involved in litigating insurance questions in Georgia. ❖

ENDNOTES

1 *Pinnacle Benning LLC v. Clark Realty Capital, LLC*, 314 Ga. App. 609, 613 (2012) (emphasis in original).
2 O.C.G.A. § 33-24-40.
3 *World Harvest Church, Inc. v. GuideOne Mut. Ins. Co.,* 287 Ga. 149 (2010).
4 *Hoover v. Maxum Indemn. Co*., 291 Ga. 402 (2012).
5 *Landmark Ins. Co. v. Khan*, 307 Ga. App. 609, 612 (2011) (holding the facts alleged in the complaint must "unambiguously exclude coverage under the policy" for there to be no duty to defend).
6 *Pinnacle Benning LLC v. Clark Realty Capital, LLC*, 314 Ga. App. 609, 613 (2012) (emphasis in original).
7 *Empire Fire & Marine Ins. Co. v. Metro Courier Corp.,* 234 Ga. App. 670, 671 (1998).
8 *Ga. Pub. Serv. Comm'n v. CSX Transp., Inc.,* 225 Ga. App. 787 (1997).
9 *Fireman's Fund Ins. Co. v. Univ. of Ga. Athletic Assoc., Inc.*, 288 Ga. App. 355, 359 n.2 (2007); *Empire Fire & Marine Ins. Co*., 234 Ga. App. at 672.
10 *Id.* at 672-73.
11 *Id.* at 673.
12 203 Ga. App. 806 (1992).
13 *See* O.C.G.A. § 9-4-3; *Richmond v. Ga. Farm Bureau Mut. Ins. Co*., 140 Ga. App. 215, 219 (1976) (insurer can seek "a stay of the main case pending final resolution of the declaratory judgment action").
14 O.C.G.A. § 15-7-4(a)(2); *Mitchell v. S. Gen'l Ins. Co.,* 185 Ga. App. 870 (1988).
15 *Borden v. Katzman,* 881 F.2d 1035, 1037 (11th Cir. 1989) (explaining that 28 U.S.C. § 2201 does not grant federal courts subject matter jurisdiction; subject matter jurisdiction must exist under 28 U.S.C. §§ 1331 or 1332).
16 *See Ameritas Variable Life Ins. Co. v. Roach,* 411 F.3d 1328, 1330-31 (11th Cir. 2005).
17 *Richmond*, 140 Ga. App. at 218-19.
18 *Kelly v. Lloyd's of London,* 255 Ga. 291, 291-93 (1985).
19 O.C.G.A. § 9-4-7 ("no declaration shall prejudice the rights of persons not parties to the proceeding"); 28 U.S.C., § 2202 (notice and a hearing is required before declaratory judgment can issue against an "adverse party"); *Empire Fire & Marine Ins. Co. v. J. Transport, Inc.,* 880 F.2d 1291, 1295 (11th Cir. 1989) (holding ordinary res judicata principles do not apply to declaratory judgments).
20 *See Davis v. Nat'l Indem. Co.,* 135 Ga. App. 793, 794 (1975) (holding that declaratory judgment in favor of insurer was not binding on liability plaintiff's efforts to collect on a judgment); *St. Paul Fire & Marine Ins. Co. v. Johnson,* 216 Ga. 437, 439 (1960) ("if the [injured third parties] are not parties to the declaratory-judgment action [brought by the insurer against the insured] they will not be bound thereby").
21 *Colonial Penn Ins. Co. v. Hart*, 162 Ga. App. 333, 339 (1982).
22 425 F.3d 1308, 1311 (11th Cir. 2005).
23 *See also MedMarc Cas. Ins. Co. v. Reagan Law Group, PC*, 2006 WL 2598250, at *2 (N.D. Ga. Sept. 11, 2006) (holding that a tort claimant did not have a legally protectable interest in an insurer's declaratory judgment action regarding insurance coverage for the underlying liability claims).
24 129 F. App'x. 540, 542 (11th Cir. 2005).

Philip W. Savrin is the lead partner in the Insurance Law Section of Freeman Mathis & Gary in Atlanta. His litigation practice focuses on civil rights defense and commercial insurance coverage disputes. He is also Vice-chair of the Appellate Substantive Law Committee of the GDLA.

Jonathan J. Kandel is an associate in the Labor and Employment Litigation Section of Freeman Mathis & Gary.

WHAT YOU DON'T KNOW COULD REALLY HURT YOU.

Don't let valuable evidence deteriorate.
Protect your clients and their drivers.

We can put the pieces together for you.
Contact us today to find out how.

collisionspecialistsinc.com

CSI
Collision-Specialists-Inc

Collision Specialists, Inc.

Your Accident Reconstruction and
CMV Compliance Experts

Immediate Response Teams, 24/7

770 . 287 . 8734

Serving the entire USA!

Bad Product or Bad Parent?

Exposing Parental Negligence in Product Liability Cases

By Mary Noffsinger
Courtroom Sciences, Inc.

In our society today, we face a bombardment of information, images, and stories about child safety. There are hundreds of websites and even more news stories devoted to safety and injury prevention related to products used by children and their parents. In its most recent safety report, the nonprofit Kids in Danger indicated that, in 2010, more than 44 million units of child products were recalled; 430,000 child injuries were treated in hospital emergency rooms; and there were 118 product-related deaths of children under the age of 15.[1]

Although the total number of recalled child products may have decreased (i.e., there were 11.6 million products recalled in 2011), widely-available reports such as these, along with websites and databases for concerned parents — combined with a tarnished image of corporations and high-profile cases throughout the United States — have heightened the public's awareness and increased companies' exposure to product liability lawsuits.

Negative publicity also surrounds consumers of these products. Everyone can think of recent examples of undisciplined, irresponsible, and even reckless parents in our society today. A Google search of "bad parents" reveals a number of websites devoted to satirically spotlighting photos and videos of parents putting their children in harm's way.

Notwithstanding public sentiments about isolated, highly-publicized cases, attitudes toward personal and corporate accountability can be quite polarizing in the midst of a legal matter. The attributions people make about responsibility and blame are emotionally-charged and carry over into the courtroom. Besides their thoughts about other parents and corporations, jurors — many of them parents themselves — filter evidence through their own life experiences, basic attitudes toward the world and corporations, beliefs about personal responsibility, and their own general personality.

Results from pre- and post-trial research have taught us a great deal about factors that determine litigation outcomes when jurors render judgments about the cause and cost of a child injury or death. Creating positive juror reaction in cases involving parental negligence is viable if pursued with a carefully-formulated strategy, anchored in compelling messages about the conduct and responsibilities of both parents and corporate defendants.

HOW DO JURORS DECIDE WHO'S BLAMEWORTHY?

While philosophers and other experts on ethics and morality may have similar, rational characterizations of blame, there are many ways jurors decide who is blameworthy. Numerous psychological theories on blame, corroborated by the perplexing outcomes of civil trials, demonstrate that laypersons are guided by many — often irrational — extra-legal factors.

Social psychologist Mark Alicke's Culpable Control Model[2] is useful for understanding a juror's decision-making process. "Culpable control" refers to the fact that when evaluating a negative outcome, people are inherently driven to 1) blame (instead of seeking mitigating information); and 2) hold someone culpable based on the degree to which that person exerted control over the situation. In deciding legal matters, this automatic, spontaneous process skews jurors' perceptions of evidence, to the extent they become very irrational, in a way that justifies blame. In many cases, rather than relying on a systematic analysis of facts and evidence, jurors use these moral judgments in making determinations of fault.

In product liability cases, indications of culpable control first emerge as the plaintiff's account of a "tragic injury that could have been prevented" triggers an innate human process within jurors. A range of negative feelings (e.g., sadness, anger) are evoked within jurors in response to learning of a bad outcome. Jurors then seek evidence that supports their inclina-

Continued on page 56

COURTROOMSCIENCESINC

WWW.COURTROOMSCIENCES.COM

POSITIVE OUTCOMES ARE NO ACCIDENT. INVOLVE CSI TODAY.

eDISCOVERY SERVICES
GLOBAL DEPOSITION SERVICES
LITIGATION PSYCHOLOGY
PRESENTATION TECHNOLOGY

1-877-784-0004

courtroomsciences.com

Reconstructing Bicycle vs. Motor Vehicle Accidents

By Peter McCawley
CED Engineering, Inc.

Bicycles and cars have been bumping into each other for quite some time. The first automobile crash in the United States occurred in New York City in 1896, when a motor vehicle collided with and killed a bicyclist. Over a hundred years later, it is still happening at a fairly high rate. In fact, 784, 725, 629, 665, 732, and 693 cyclists died per year in the United States in 2005, 2004, 2003, 2002, 2001, and 2000, respectively. The 761 cyclists killed in 1996 accounted for 2 percent of traffic fatalities, and the 59,000 cyclists injured made up two percent of all traffic injuries.

When a 3,000+ pound vehicle, made of metal and steel, strikes a human body riding a 30 pound or less bicycle, no matter the speed of either vehicle, the consequences are usually bad, and often tragic; if so, reconstructing the accident is usually a necessity.

Investigating and reconstructing motor vehicle accidents is a mature industry. There are very strict guidelines involving the operation of cars in the United States. Billions of dollars of research have gone into safety studies, research, and development of motor vehicles. For the most part, cars behave in a very predictable manner. There are accident reconstructionists with decades of experience and hundreds of accident investigations under their belts. Are these experts qualified to reconstruct an accident involving a bicyclist? Unless these accident reconstructionists have direct experience with biking accidents and bicycle dynamics, limitations and capabilities, and have actually ridden bicycles, maybe not.

Cars and trucks travel in a very foreseeable fashion. They use roads exclusively, entering and exiting them at well-established and distinguishable access points such as ramps, driveways and other roads. Bicycles and bicyclists are not as predictable. They can ride on roads, they can ride on sidewalks, or they can ride on the grass, gravel and dirt between the two. When on the road, bikes may stick to the side, stay in the center of the lane or weave in between traffic, passing cars on the left or right. Bikes can access roads by the traditional access points and angles or they can shoot off curbs from any angle,

with or against traffic. Often it seems that each individual bicyclist travels by his own modified rules of the road.

All of these variables can make reconstructing bicycle accidents a skill unto itself. The unpredictability of bicycles and bicyclists can dramatically raise the skill level needed to determine angles of impact, lines of sight and Delta-V. When looking for an expert to reconstruct a bicycle accident, three things are important:

- Experience reconstructing bicycle accidents;
- Bicycle knowledge; and
- The correct tools.

Experience with actual bike accidents is critical. For all the reasons stated above, you want someone who has investigated bicycle accidents before. Acceleration rates, stopping speeds, and turning capabilities are all vastly different with bicycles than with motor vehicles and related data is much less documented and harder to find.

We all know the expression "like riding a bike," but when it comes to experts, it is not that easy. The National Highway Transportation Safety Administration (NHTSA) estimates that the average American drives approximately 15,000 miles a year. Most adults, including accident reconstructionists, have thousands of hours of driving experience. The same cannot be said for bike riding. Many adults, including accident reconstructionists, can go years without sitting on a bike.

You need an engineer who can put himself "on the bike," just like he puts himself "in the car" in a traditional accident reconstruction. He needs to understand the options the bicyclist had and the decisions he made.

Finally, the accident reconstructionist has to have the right tools. Visibility is often a critical factor when reconstructing bicycle accidents. Trying to determine who could see whom, and when, is a completely different matter with bicycles than it is with cars. Cars come in standard shapes and sizes, travel expected paths, and, most importantly, other drivers expect to see them, and therefore, are looking for them. The same is not true with bicycles. As a result, line of sight and conspicuity become very important. When reconstructing bike accidents, having an animation tool that can determine, and then demonstrate, when and what could be seen during the accident is imperative. ❖

Peter McCawley has an engineering degree from the U.S. Naval Academy and is a Director at CED Engineering, a GDLA Platinum Sponsor. He is based out of CED's Jacksonville office, which is well-positioned to support South Georgia cases.

How to Compete with Star Wars: Technology in Litigation

W. Bruce Barrickman
BAY Mediation & Arbitration Services

Introduction

In order for you to inform or persuade anyone, you must first gain and retain that person's attention. It is probably clear to all of you that most people are distracted easily and have a short attention span. To be effective in mediation or at trial, it is essential that you gain the attention of the people you are attempting to persuade early on. You must then maintain their attention as much as possible throughout the presentation of your case in order to be successful in the representation of your client. The use of technology in the form of PowerPoint presentations, demonstrative evidence, photographs, videotapes and computer-generated animations, if used properly and efficiently, is a very effective way of gaining and retaining the attention of the people whom you must convince to see things your client's way. In today's media-saturated world, people are used to constant stimulation from television, movies and the Internet and tend to multi-task more than any prior generation. If you do not want to lose the attention of the participants at mediation or the jurors at trial, your presentation must be engaging on the same level as entertainment.

Purchasing a Quality Laptop

In many instances, the first item you will need in order to make an effective and persuasive presentation is a high-end, state-of-the-art laptop that has sufficient hard drive capacity, RAM and multi-media cards to smoothly and quickly present PowerPoint and other capacity-demanding presentations. The laptop must be able to burn and read DVDs and CDs.

Graphic Presentation Software

The second item you will need is Microsoft PowerPoint or some other graphic presentation software program. PowerPoint can create graphics as well as multi-graphic and multi-media formats on various slides. One thing that needs to be kept in mind whenever utilizing your laptop, software, and the information that is stored on the laptop, is that it must all be readily located, or the effectiveness of your presentation will be seriously impacted.

Portable Projector & Screen

Even though many courtrooms and mediation services have projectors or televisions to which you can connect your laptop, if you are going to make PowerPoint or similar type presentations on a regular basis in different locations or different courtrooms, you should consider purchasing a portable projector and projector screen. Many times courthouses will only have a certain number of projectors, screens or televisions available and they may already be in use in a different courtroom. Also, if you have your own projector and screen, you can utilize them at depositions or at mediations if those offices are not already equipped.

Colors Utilized in PowerPoint/Conversion Software

For effective PowerPoint presentations, you should be aware that the background color for the slide and the color of the contents on the slide will affect the visibility and impact of the slide. It typically increases the visibility and impact of the slide if you have a background with a darker color and contrasting brighter letters or

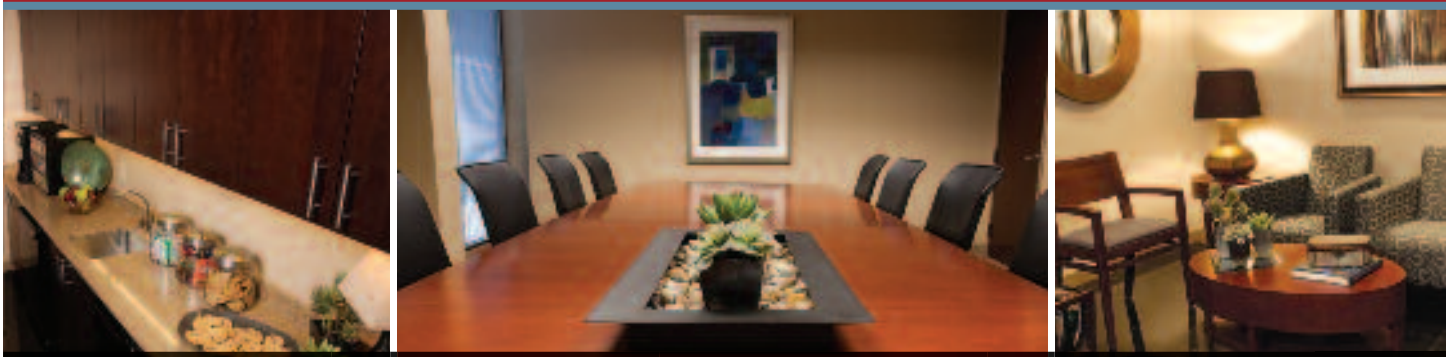
Continued on page 61

BAY
MEDIATION & ARBITRATION SERVICES

Time Well Spent

5775 Glenridge Drive, NE, Suite E100
Atlanta, GA 30328
678.222.0248
www.bayadr.com

Effectively Resolving Disputes Since 2002



BAY Mediators & Arbitrators


BILL ALLRED


BRUCE BARRICKMAN

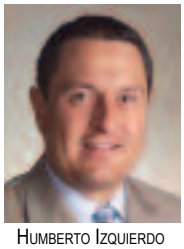

VICTOR FAENZA


ED HALLMAN


TOM HARPER


DAVID HENDRICK


KEVIN HUDSON


HUMBERTO IZQUIERDO


SONNY JESTER


PATRICIA KILLINGSWORTH


CHRIS PARKER


BOB PERSONS


HENRY QUILLIAN


JIM STEWART


VALERIE TOBIN


DENNY WEBB


DAN WEBER


SCOTT YOUNG

Business & Commercial | Civil Rights/Section 1983 | Construction | Divorce & Family | Employment & Labor | Environmental | Franchise & Distribution | Injuries & Accidents | Insurance | Intellectual Property Professional Malpractice | Real Estate & Condemnation | Wills, Trusts & Probate | Workers' Compensation

The Importance of Expert Forensic Data Collection in Litigation

What is forensic data collection and why are good forensic techniques so important in eDiscovery? With reference to data collection, "forensics" refers to methods of collection designed to be thorough, objective, and to maintain data integrity. While eDiscovery has gained recognition as a crucial facet of litigation, the data collected through eDiscovery is only useful if it is admissible as evidence in court.

The goal with good forensic data collection is to ensure that the evidence is collected in a legally defensible manner and is thus fully usable in litigation or regulatory compliance matters.

To be defensible, evidence must be able to withstand a variety of potential challenges based on evidentiary rules and court rules. For example, the so-called *Daubert* rule applies to electronic data as scientific or other specialized evidence, requiring a showing that the evidence is gathered in a reliable manner, by a proven process. To be used in court, Electronically Stored Information ("ESI") evidence must also be properly authenticated, as proven by a legally sufficient chain of custody, maintained during collection. The reliability of electronic data must be maintained as well, with the use of collection methods that do not alter critical aspects of the original data.

Forensic data collection is a merger of two disciplines: the technical and the legal. An eDiscovery consultant must not only understand the technology from which forensic data collection must extract evidence, as well as the best available technology or software with which to approach collection in a given instance, but also must be constantly cognizant of legal requirements and their effects on the process.

Electronic evidence sought in eDiscovery might be located on several different kinds of media, such as internal servers, computer hard drives, a variety of smaller storage devices, discs, cell phones, tablets, PDAs, cloud servers, social media or employees' personal email accounts, just to name a few. These diverse sources present a variety of technical issues in collection, but they can present equally diverse legal questions.

While many data sources may be controlled by an organization's general information governance program, more and more data sources are being created via outside sources and on outside servers that may be located abroad, creating problems with privacy rights, privileges, and other issues.

Methods that constitute "good" forensic data collection thus vary with the circumstances. Forensic data collection is a meticulous and methodical process, involving several steps:

- Identifying sources of potentially-relevant ESI;
- Preparing a forensic data collection plan that fits the legal inquiry, your legal strategy, and the technical requirements for the identified ESI sources;
- Executing the plan or plans in a manner that obtains the desired data, whether it includes deleted files, a timeline of events, the metadata behind data, or other need production.
- Providing expert reports, documentation, and live testimony on the methods and outcome of forensic data collection efforts.

Expert forensic data collection is crucial in eDiscovery, because the failure to exercise due care for the legal rules relating to the admissibility of electronic evidence can make even the best item of evidence worthless for use in court. Worse yet, failed attempts at forensic data collection can leave both an organization and counsel facing the possibility of legal sanctions or an adverse verdict.

The best forensic data collection efforts come from consulting organizations that combine talents. Look for eDiscovery consultants who offer highly-skilled technical departments and access to cutting-edge analytic technology, partnered with litigation experts who stay up-to-date on the latest legal requirements for the admissibility of ESI and who know how to get your evidence into court. ❖

This article is reprinted from the blog of Global Legal Discovery, a GDLA Platinum Sponsor.

GDLA Proud Platinum Sponsor

- Data Mapping & Retention
- Forensic Collections & Analysis
- Data Filtering
- ESI Processing
- Document Imaging / Copy
- Web Based / Managed Review
- Predictive Coding
- Trial Services
- Document Destruction

GLOBAL
eDiscovery
Litigation Support
Document Solutions

AccessData
Elite Reseller

888.774.5622 | globallebal.com

Appellate Case Law Update

By Ben Byrd
Friend Hudak & Harris, Atlanta

MOOTNESS DOCTRINE: An issue is only moot when the appellee can prove that it will not likely recur.

***WMW, Inc. v. American Honda Motor Company, Inc.*, 291 Ga. 683 (2012).**

In this case, the Georgia Supreme Court addressed, for the first time, the issue of when, and under what circumstances, a case will become moot while on appeal.

In the underlying case, WMW, a Honda dealer, sued Honda and another car dealership for violating the territorial restrictions of the Motor Vehicle Franchise Practices Act by planning to open a new Honda dealership within the territory already occupied by WMW. The trial court dismissed WMW's case on the grounds that WMW lacked standing under the Act, and WMW appealed.

While the case was argued before the Supreme Court, Honda sent WMW a letter that it no longer intended to appoint a dealer at the location in question "at this time." Honda then moved to dismiss the appeal on the grounds that the case was moot.

Finding that this issue had not been addressed by the Georgia courts, the Supreme Court looked to and ultimately adopted the mootness doctrine developed in the federal courts. "An appellee's voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed," the court held (citations omitted). Although there is a "narrow exception" to this rule where the "subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur," the party asserting mootness bears the burden of persuading the court that the "challenged conduct cannot reasonably be expected to start up again."

The Supreme Court held that Honda had not carried this "heavy burden." Explaining that an appellee's "post-certiorari maneuvers designed to insulate a decision from review … must be viewed with a critical eye," the court noted that Honda's letter was qualified by the phrase "at this time," which it took to suggest that the offending actions could be resumed in the future. Further, the court deemed the substantive issue on appeal to have importance to the public, not just the parties in front of it. The court, therefore, rejected Honda's mootness argument and proceeded to address the substantive issues presented by WMW's appeal.

OUT-OF-TIME APPEAL; LAW OF THE CASE RULE: There are no out-of-time appeals allowed in civil cases. When an issue has already been passed on by the Court of Appeals, it is the law of the case and will not be revisited.

***Mapp v. We Care Transp. Servs. Inc.*, Georgia Court of Appeals Case No. A13A0604 (Feb. 1, 2013).**

This case dealt with both the rules regarding out-of-time appeals in the civil context and the law of the case doctrine.

Plaintiff Mapp sued the defendants for wrongful death, but the trial court dismissed her complaint. Mapp appealed, and the Court of Appeals affirmed the dismissal. When the case was returned to the trial court, Mapp moved for an out-of-time appeal or to set aside the dismissal. After the trial court denied that motion, Mapp appealed again.

First, the Court of Appeals held that, unlike in a criminal case, an out-of-time appeal is not allowed in civil cases. Second, the Court of Appeals noted that it had already affirmed the trial court's dismissal in the earlier appeal. Therefore, the earlier ruling was the law of the case in the court below. The trial court had no authority to allow Mapp to amend her motion or to take any action, such as receiving new evidence that would affect the finality of the Court of Appeals' decision. "The only action which that court had authority or power to take was to make the judgment of this court the judgment of the trial court and to enter an order [reflecting this court's decision.]" The Court of Appeals again affirmed the trial court's order.

PRESERVING OBJECTION TO JURY CHARGE: A party cannot preserve its objection to a proposed jury charge merely by objecting to a charge at a charge conference; it must repeat the objection after the charge is actually given. However, a party's reference to its earlier objection may be sufficient.

***McDowell v. Hartzog*, Supreme Court of Georgia Case No. S12G0369 (Jan. 7, 2013).**

In this case, the Supreme Court addressed the question of what a litigant needs to do to properly preserve for appeal an objection to the trial court's jury charge.

McDowell and his wife, the plaintiff-appellants, sued Hartzog and his employer after McDowell and Hartzog were involved in a motor vehicle accident. Because there was some evidence that McDowell may have run a stoplight

NELSON
ARCHITECTURAL ENGINEERS, INC.

Engineering
&
Forensics

Architecture

Industrial
Hygiene
& Safety

Fire
Investigation

Cost
Estimating

1.877.850.8765
www.nae-us.com

NELSON
ARCHITECTURAL ENGINEERS, INC.

EXPERT *FORENSICS*

EXPERT *SOLUTIONS*

NAE is a globally-recognized engineering and technology firm specializing in Forensic Engineering and Architecture

before the collision, Hartzog requested a charge on failure to obey a traffic signal. The trial court discussed the requested charge with the parties at a charge conference, and the court agreed to give the charge. McDowell's counsel stated, "As long as it's noted it's over my objection, we are good." The judge gave the traffic signal charge, and after the jury was excused, inquired whether the parties had any exceptions.

McDowell's counsel excepted, reminding the court of the "exceptions that we had, the ones we talked about the other day. ... I know the one on stop lights we excepted to." The jury then returned a defense verdict, and McDowell appealed on the grounds that the jury charge was not attuned to the evidence.

The Georgia Court of Appeals held that McDowell had not preserved his objection. Hearing the case on certiorari, the Supreme Court reversed the Court of Appeals.

O.C.G.A. § 5-5-24(a) provides that "no party may complain of the giving [of] an instruction to the jury unless he objects thereto before the jury returns its verdict, stating distinctly the matter to which he objects and the grounds of his objection." The purpose of this provision, the Supreme Court explained, is to afford the trial court an opportunity to correct the charge while a correction can still be made. The court also noted that an objection made at a charge conference before a charge is given is not sufficient to preserve the issue for appeal.

Nevertheless, the Supreme Court held that in this case McDowell had preserved the issue for review by renewing his objection after the charge was given, although somewhat obliquely. It was clear, the court concluded, that the trial court knew what McDowell was objecting to and why, and therefore the purpose of O.C.G.A. § 5-5-24(a) had been satisfied. "We see no useful purpose in requiring a party to restate verbatim the specific grounds of objection where it is clear from the transcript of the charge conference that the trial court and opposing counsel already are apprised of the basis for the objection," it held. Therefore, the Supreme Court reversed the Court of Appeals and remanded the case to that court for consideration of McDowell's enumeration of error.

APPEALING TEMPORARY RESTRAINING ORDERS (TROs) AND INTERLOCUTORY INJUNCTIONS: An order modifying earlier TRO and interlocutory injunction is directly appealable; failure to secure ruling from trial court prevented appeal of appellant's motion to dissolve TRO.

***American Mgmt. Servs. East, Inc. v. Fort Benning Family Communities, LLC*, Georgia Court of Appeals A12A0980, 734 S.E.2d 833 (Nov. 28, 2012).**

This case dealt with whether an order modifying an interlocutory injunction can be appealed.

The plaintiff-appellees ("FBRC") owned privatized military housing projects in Virginia and Georgia, and FBRC hired the appellant-defendants ("Pinnacle") to manage those properties under a property-management agreement. FBRC sued Pinnacle seeking a declaratory judgment that the property-management agreement had terminated for cause due to Pinnacle's misconduct at the Georgia property. FBRC sought, and was granted, a TRO and interlocutory injunction enjoining Pinnacle from interfering with FBRC's right to audit the Virginia property. A month later, FBRC sought an additional TRO ordering Pinnacle to transfer its management database to FBRC. In August 2010, the court granted the motion but also ruled that FBRC could not "unilaterally remove [Pinnacle] from the [Virginia] project until such time as the Court has heard and decided the declaratory judgment action ... or until further order of this Court."

A year later, FBRC moved the court to lift the restriction on removal of Pinnacle as the property manager at the Virginia project. In October 2011, the trial court modified the August 2010 order by removing that restriction but otherwise leaving the earlier order in place. Pinnacle appealed that order.

FBRC moved to dismiss Pinnacle's appeal on the grounds that TROs and interlocutory injunctions are not directly appealable and that Pinnacle failed to file an application for interlocutory review. The Court of Appeals, however, agreed with Pinnacle that the appeal was proper. "The October 2011 order at issue in this case deleted from the August 2010 order the restriction against the unilateral removal of Pinnacle as property manager, but the order left in effect the remainder of the earlier injunctive relief." "Accordingly," the Court of Appeals held, "the October 2011 order was itself an interlocutory injunction that modified the August 2010 interlocutory injunction, and was thus directly appealable pursuant to O.C.G.A. § 5-6-34(a)(4)."

Pinnacle advanced various arguments as to why the injunction should be overturned. The Court of Appeals, however, noted that, to the extent that Pinnacle's arguments were based on provisions in the 2010 TRO, Pinnacle had not enumerated the entry of that order as error. "A party cannot expand its enumerations of error through argument or citation in its brief." Therefore, the Court of Appeals would not consider arguments related to that order.

Further, the Court noted that Pinnacle had apparently filed a motion with the trial court to dissolve the TRO. Pinnacle, however, failed to obtain a ruling on that motion and, therefore, any appeal of that issue was waived.

Ultimately, the Court of Appeals rejected Pinnacle's substantive arguments and affirmed the trial court's order.

RECORD ON APPEAL; PRESERVING OBJECTION: Party cannot cite to facts not appearing in the record on appeal; a party's acquiescence to ruling by the trial court prevents him from appealing that ruling.

***Forum Group at Moran Lake Nursing and Rehabilitation Center, LLC v. Terhune*, Georgia Court of Appeals A12A0905, 733 S.E.2d 808 (Oct. 31, 2012).**

This case addressed the proper citation to facts on appeal as well as the appellant's need to properly preserve issues for review.

The plaintiff-appellee Loretta Terhune sued the nursing home where her father lived for negligence after he died. She also sued the owner of the nursing home, defendant-appellant George D. Houser. After the trial court struck Houser's answer for discovery violations and granted Terhune a default judgment as to liability, the case proceeded to a trial on damages.

At trial, the plaintiff presented evidence of gross neglect and malfeasance by the defendants in running the nursing home. The court ultimately entered judgment against the defendants for $43 million in compensatory and punitive damages. Houser appealed, contending that the trial court erred in striking his answer, in failing to remove a juror, and in making various evidentiary rulings during the trial.

On appeal, Houser contended that the trial court erred in refusing to allow him to "prove or disprove his relative degree of wrongdoing." The Court of Appeals found that Houser neither identified any specific rulings nor cited to the trial transcript, citing only to affidavits from his wife and an orthopedic specialist he allegedly submitted during the hearing on his motion for new trial. The Court also found that these affidavits did not appear in the appellate record and, even if they had, Houser did not call either of the witnesses to testify at trial. "This court cannot consider the factual assertions of the parties appearing in briefs when such evidence does not appear on the record. Moreover, parties cannot supplement the record merely by attaching matters to or reciting matters in their briefs." The Court of Appeals held, therefore, that Houser had not carried his burden to affirmatively show error by the record.

Further, Houser contended that the trial court had erred by admitting Terhune's father's initial admission assessment into evidence. Houser, however, admitted that he did not object when the document was first introduced. "A defendant cannot acquiesce in a trial court's ruling below and then complain about that ruling on appeal." Accordingly, Houser did not establish error in admitting this evidence. The Court of Appeals affirmed the trial court's judgment.

APPEALING ERRONEOUS JURY CHARGE: Trial court's failure to charge jury on cognizable theory of recovery is harmful as a matter of law.

***Hendley v. Evans*, Georgia Court of Appeals A12A1218, 734 S.E.2d 548 (Nov. 21, 2012).**

This appeal arises from the trial court's failure to properly charge the jury on the plaintiff's theory of recovery.

In the case below, Hendley, the plaintiff-appellant sued Evans, a surgeon, for medical malpractice. Evans performed an angioplasty procedure on Hendley. During the procedure, things went awry, requiring hospital personnel to perform CPR and intubate Hendley. Hendley's blood oxygen saturation dropped, and she suffered brain damage as a result. Hendley contended that her injuries were caused by the negligence of the hospital personnel in performing the CPR and intubation. She also contended that the hospital employees were "borrowed servants" working under Evans and, therefore, Evans was vicariously liable for their negligence.

The trial court, however, refused to charge the jury on Hendley's vicarious-liability theory of recovery. After the jury returned a verdict in Evans' favor, Hendley appealed.

"A charge on a given subject is justified if there is even slight evidence from which a jury could infer a conclusion regarding that subject." While a trial court can reject a requested charge that is incorrect or inapt, "a trial court must instruct a jury on the law as to every controlling, material, substantial and vital issue in the case," the Court of Appeals held. "The failure to charge on a properly asserted and legally cognizable theory of recovery, whether requested or not, or attention be called to it or not, is harmful as a matter of law."

Reviewing the facts presented at trial, the Court of Appeals determined that respondeat superior was a legally cognizable theory of recovery against Evans based on the actions of the hospital personnel. Although the Court of Appeals held that the trial court was correct in rejecting the particular charge that Hendley requested, because it was an inaccurate statement of the law of respondeat superior, the Court also held that the trial court was bound to give *some* charge on the plaintiff's theory of recovery. Its failure to do so required that the judgment be reversed and the case be remanded for a new trial at which the trial court would properly charge the jury.

DELAY IN FILING RECORD APPENDIX: Appeal dismissed due to appellant's 55-day delay in filing record appendix.

Continued on next page

Mass Torts Case Law Update

By Todd E. Schwartz, SLC Chair
Lewis Brisbois Bisgaard & Smith, Atlanta

***Union Carbide Corporation and Georgia-Pacific, LLC v. Fields*, Supreme Court Case Nos. S12C1417 and S12C1393**

The Supreme Court of Georgia granted certiorari to Union Carbide and Georgia-Pacific from the Court of Appeals' decision affirming the grant of summary judgment to Plaintiff dismissing the defendant's Notice of Non-Party Fault.

The Court of Appeals' decision was discussed in a previous case law update in this newsletter.

The Supreme Court set the case on the May 2013 oral argument calendar.

In the orders granting certiorari, the issues for briefing were identical, the court stating as follows:

> This Court is particularly concerned with the following issue or issues:
>
> 1. Did the Court of Appeals, in Division 1 (d) of its opinion, err when it affirmed the award of partial summary judgment to the plaintiffs based on the failure of the defendants to come forward with evidence of exposure to asbestos-containing products manufactured by certain nonparties, notwithstanding that the plaintiffs had alleged such exposure in their own pleadings?
>
> 2. Did the Court of Appeals, in Division 1 (d) of its opinion, misapply the "right for any reason" doctrine when it, in the alternative, affirmed the award of partial summary judgment to the plaintiffs based on the failure of the defendants to come forward with evidence of causation? ❖

Appellate Case Law Update

Continued from previous page

***McAlister v. Abam-Samson*, 318 Ga. App. 1 (2012).**

In this case, the Court of Appeals reviewed the trial court's dismissal of the plaintiff's appeal in response to the plaintiff's 55-day delay in filing his appeal.

The trial court ordered the plaintiff-appellant to pay attorney's fees to the intervenor-appellee, and the plaintiff filed a notice of appeal. The plaintiff's notice of appeal stated that he would prepare and transmit the record appendix, a practice that was allowed under the Court of Appeals' rules at the time. The plaintiff, however, did not transmit the record appendix until 55 days later. On motion by the intervenor, the trial court dismissed the appeal due to the plaintiff's delay under O.C.G.A. § 5-6-48(c).

On appeal, the plaintiff-appellant argued that O.C.G.A. § 5-6-48(c) applied only to the court clerk's delay in transmitting the record, not a party's delay in transmitting a record appendix. The Court of Appeals disagreed. The court acknowledged that the Appellate Practice Act does not mention party-filed record appendices, but, the court concluded, the Act's reference to transmittal by the court clerk does not foreclose party-filed record appendices that are authorized by the Court of Appeals' rules. "[W]ere we to hold that O.C.G.A. § 5-6-48(c) does not encompass a party's decision to take on the responsibility of transmitting a record appendix, an appeal for a delay in filing same could never be dismissed—a result which is patently absurd."

Having decided that the plaintiff's appeal *could* be dismissed, it turned to the question of whether it *should* have been dismissed. The court started from the premise that "a delay of more than 30 days in filing a transcript ... is prima facie unreasonable and inexcusable." But, it noted, "this presumption is subject to rebuttal if the party comes forward with evidence to show that the delay was neither unreasonable nor inexcusable."

Reviewing the record, the court found that the delay was caused by the plaintiff's unreasonable belief that the trial court clerk would be transmitting the record along with the transcript despite the fact that the plaintiff's notice of appeal indicated that the plaintiff would be filing his own record appendix. The court concluded that the plaintiff failed to show that the delay was neither unreasonable nor inexcusable. Therefore, the court concluded, the trial court did not abuse its discretion in dismissing the plaintiff's appeal. ❖

RecruitOne II Membership Drive

Continued from page 1

same number, there will be a drawing between those members.

Like before, every GDLA member is encouraged to recruit (at least) one new member. For every one new member recruited, GDLA members will receive one entry into a grand prize drawing for an iPad2.

So, recruit 10 new members and you'll have 10 chances at an iPad2. Plus, each new recruit's name will go into a grand prize drawing for a complimentary registration for the 2014 GDLA Annual Meeting, set for June 12-15, 2014, at the Ponte Vedra Inn & Club in Florida. (Registration covers a GDLA member plus one spouse/guest.)

In addition, the recruiting GDLA member's name, firm and city will be printed in the newsletter alongside his or her recruit's name, firm and city.

Visit the Membership page at www.gdla.org for a sample e-mail to send prospective recruits. The e-mail includes a link to a GDLA membership benefits page and a membership application.

Between now and the end of the campaign, the GDLA Board of Directors meets three times, at which time they will consider new applicants: June 14, October 26 and February 7.

To ensure you are entered into the iPad2 drawing, ask your recruit to list your name on the application where it says, "Who (if anyone) referred you to the GDLA?"

To see if someone is already a member, go to our website and click on Find a Defense Lawyer. There you can search by last name, firm and/or city.

Reach out to your colleagues in the civil defense bar today, and encourage them to join our ranks to take advantage of the many ways the GDLA can help them and their practice. ❖

RecruitOne was the brainchild of Membership Committee Co-Chair Dart Meadows at Balch & Bingham, who was inspired by the Atlanta Business Chronicle's *successful challenge to metro businesses to "Hire One" new employee. He and Co-Chair Chris Parker of Miller & Martin together fleshed out how our version would work. RecruitOne has since been replicated or is being explored by state defense organizations in Texas, Colorado, Ohio and North Carolina. The success of RecruitOne contributed to the GDLA's winning the DRI Janata Award for Outstanding Defense Organization of 2012.*

Premises Liability Case Law Update

By Martin A. Levinson, SLC Vice-chair, and
David H. Wilson (right),
Hawkins Parnell Thackston & Young, Atlanta

LATENT DEFECT; CONSTRUCTIVE KNOWLEDGE; INFERRED KNOWLEDGE OF DEFECT BASED ON LACK OF REASONABLE INSPECTION PROCEDURE; PROVIDING FALSE INFORMATION: Trial court erred in granting summary judgment to defendant hotel operator where issue of fact remained as to whether Defendant had constructive knowledge of alleged defect in sensor of automatic revolving door due to lack of reasonable inspection procedure, and knowledge of two recent prior incidents involving same or similar revolving door at hotel; but trial court correctly granted summary judgment on Plaintiff's claim that automated voice instructing Plaintiff to "please step forward" had provided false information to Plaintiff or caused her injuries.

***Tyree v. Westin Peachtree, Inc.*, 735 S.E.2d 127, 2012 Ga. App. LEXIS 1035 (Ga. App. Nov. 30, 2012)**

On November 16, 2008, Sylvia Tyree was injured when an automatic revolving door allegedly lurched forward, struck her, and caused her to fall as she was exiting the defendant's hotel. Tyree was at the Westin Peachtree Plaza in downtown Atlanta to have brunch with her family. She had entered the hotel through one of the two automatic revolving doors on the valet parking level of the hotel. When they finished eating, they returned to the valet parking level and used the same revolving door to leave the hotel. The revolving door was not moving when Tyree's cousin stepped in ahead of Tyree. An automated voice then instructed Tyree to "please step forward," and as she did so, the door allegedly lurched forward, striking the back of Tyree's left shoulder, knocking Tyree to the ground and injuring her.

The revolving door was installed in 2001, and was 14 feet in diameter with three wings or door panels. Each door wing had an infrared "wing sensor" designed to stop the door if someone came within a specified distance of the door wings, including while stepping into the doorway. The door's manual provided instructions for daily, weekly, monthly, and annual maintenance and also called for daily checks of the emergency and safety devices and the general operation of the door. The daily check involved a "walk" test to ensure the door's sensors operated properly, including that the wing sensors stopped the door appropriately. The hotel's personnel, however, were not trained to inspect the revolving doors and conducted no daily inspections. The defendants requested service on the revolving doors from third-party contractors on an as-needed basis, but they did not personally service or maintain the doors and had no regular maintenance program for them.

The defendants had planned maintenance done on the door in question on August 4, 2008. At that time, a service technician noted the automated voice was not working, but checked all of the door sensors and found no problems. The defendants placed five service orders for the door between June 11, 2007, and September 8, 2008, the most recent of which revealed that the automated voice was not working. On September 13, 2008, the defendants received a report that a woman was injured when one of the revolving doors stopped on her toe. On October 4, 2008, the defendants received a report that one of the doors suddenly stopped while another woman was walking through it and the door hit her in the face. The defendants apparently did not inspect the doors or request service on them between September 8, 2008, and the date of Tyree's injury (November 16, 2008).

The defendants moved for summary judgment, arguing that the revolving door was an open and obvious condition and that Tyree had at least equal knowledge of how the door functioned because she successfully traversed the door when she entered the hotel. The trial court granted summary judgment in favor of the defendants, holding that they did not have superior knowledge of any alleged defect in the revolving door and did not negligently provide Tyree with false information when a recorded voice told her to step forward toward the door.

On appeal, the Court of Appeals reversed summary judgment on the issues of whether the door was defective and whether the defendants had superior knowledge of any alleged defect. The specific hazard at issue, according to the Court of Appeals, was an allegedly malfunctioning wing sensor — not the door itself — and Tyree's knowledge of that specific hazard was at issue. The court held that the evidence raised a question of fact as to whether Tyree's injury was caused by a malfunctioning door sensor, because the wing sensor should have stopped the door from hitting Tyree when she stepped into the door.

The Court of Appeals also held that the evidence did not show as a matter of law that Tyree had equal knowledge of a malfunctioning wing sensor, both because the door did not malfunction when she used

it to enter the hotel and because there was evidence that the defendants had constructive knowledge of the alleged defect. The court held that the defendants could be inferred to have constructive knowledge of the alleged defect based on their lack of a reasonable inspection procedure and actual prior knowledge of two recent injuries involving the hotel's revolving doors.

Since there was evidence the defendants had actual or constructive knowledge of the alleged hazard, the burden shifted to the defendants to produce evidence that Tyree's injury was caused by her own failure to exercise ordinary care. Although there was evidence that Tyree was looking at her cousin rather than the revolving door at the time Tyree was injured, Tyree denied that she was distracted by anything, said she would not have stepped into the door if there was no room for her to do so, and denied that she tried to step into the door at the last possible second. Accordingly, the Court of Appeals held that there were issues of fact remaining that precluded summary judgment.

The Court of Appeals affirmed the trial court's grant of summary judgment, however, on Tyree's claim that the defendants had provided her with false information through the revolving door's recorded voice. The court held that the recorded instruction of "Please step forward" did not constitute "false information" and there was no evidence that it caused Tyree's accident.

SLIP AND FALL; FAILURE TO FOLLOW REASONABLE INSPECTION PROCEDURE; NATURALLY-OCCURRING SUBSTANCE: Defendant-restaurant owner was not entitled to summary judgment in parking lot slip-and-fall case where Defendant failed to follow its own established inspection procedure and issue of fact remained as to whether piece of wood on which Plaintiff slipped and fell was naturally-occurring.
***Samuels v. CBOCS, Inc.*, 734 S.E.2d 758, 2012 Ga. App. LEXIS 1071 (Ga. App. Nov. 27, 2012)**

Plaintiff Nancy Samuels slipped and fell as she was walking through the parking lot of a Cracker Barrel restaurant owned by the defendant. Samuels was walking to her car when she stepped on a "dark blackish gray" piece of wood resembling a "Lincoln Log" that was about four inches long and a half-inch wide and that rolled when Samuels stepped on it.

There was some evidence suggesting that the piece of wood was a piece of landscaping mulch from a nearby flowerbed.

Jerome Griggs, the restaurant manager on-duty at the time of the fall, was responsible for inspecting the grounds of the restaurant every 30 minutes to an hour throughout his shift, but he had not performed an inspection in roughly seven hours since arriving at 2:00 p.m. that day, nor had any other employee inspected the grounds during that time.

The trial court granted the defendant-restaurant owner's motion for summary judgment, holding that no inspection would have led to discovery of the stick and that no person inspecting would have felt it necessary to remove the piece of wood from the parking lot. The trial court also held as a matter of law, after viewing a video of the parking lot, that the lighting in the area was adequate. Plaintiffs appealed, and the Court of Appeals reversed.

In reversing the trial court's grant of summary judgment to the defendant, the Court of Appeals held that since there was evidence that the restaurant owner failed to follow its established inspection procedure, an inference arose that the owner had constructive knowledge of the foreign object. The Court of Appeals distinguished other appellate decisions where summary judgment was authorized because the foreign object or substance that caused the plaintiff in those cases to slip could not easily have been seen and removed. In that regard, the Court of Appeals held there was an issue of fact as to whether the foreign object on which Samuels slipped could have been discovered through a reasonable inspection of the parking lot.

The Court also rejected the defendant's argument that summary judgment was appropriate because the object in question was "naturally occurring" and "ha[d] not become an obvious hazard" prior to Samuels' fall. Since there was no undisputed evidence that the object was a naturally-occurring substance on the premises, summary judgment in favor of the restaurant owner was inappropriate.

SLIP AND FALL; "RAINY DAY" CASES; UNREASONABLE RISK OF HARM: Granting summary judgment to defendant-store operator was error because issue of fact existed as to whether water some distance away from entrance of store, not immediately adjacent to the entrance, constituted unreasonable risk of harm to invitees, and other issues of fact remained regarding various witnesses' testimony.

***Parker v. All American Quality Foods, Inc.*, 734 S.E.2d 510, 2012 Ga. App. LEXIS 968 (Ga. App. Nov. 20, 2012)**

Frank Parker went shopping at a Food Depot store on a rainy day in December 2009. Shortly after entering the store and retrieving a shopping cart, Parker slipped in a puddle of accumulated water and fell. He noticed after falling that his pants were wet near his hip. Parker subsequently sued the operator of the store.

Parker and his shopping com-

Continued on page 62

Product Liability Case Law Update

By James L. Hollis, SLC Vice-chair, (left)
and Geremy Gregory
Balch & Bingham, Atlanta

DEFECTIVE PRODUCT: In action against manufacturer of dental needle, summary judgment was appropriate in strict liability action because Plaintiff was unable to show that device failed to perform as intended where record showed that needle was not intended for use in the procedure at issue.

***Pryce v. Septodont, Inc.*, 481 Fed. Appx. 497 (11th Cir. June 15, 2012) (per curiam)**

Plaintiff brought suit against the manufacturer of a 30-gauge short dental needle after it broke off in his cheek during a nerve block injection. Plaintiff appealed the District Court's granting of summary judgment.

Plaintiff argued that the testimony of the treating dentist established the needle did not perform as designed. Plaintiff Pryce herself testified that she personally believed it was appropriate to use 30-gauge short needles for nerve block injections and that she did not do anything to cause the needle's breakage. Plaintiff's treating dentist testified that dental needles come in various lengths and widths and different sized needles are used for different types of injections. There was no expert testimony that this needle was defective or that it was appropriate for the nerve blocking procedure at issue.

Applying Georgia law, the Eleventh Circuit held that a plaintiff bringing a strict liability claim must show that the device did not operate as intended and this was the proximate cause of the injuries. The record showed that there were six different sized needles available to the dentist. As explained in the manufacturer's packaging, only one of those needles was appropriate for nerve block injections. The appropriate needle was both longer and wider than the 30-gauge needle used for Plaintiff's injection. The Eleventh Circuit affirmed the granting of summary judgment because Plaintiff was unable to establish that the 30-gauge short needle was intended for use in the nerve block injection that allegedly injured Plaintiff.

DEFECTIVE PRODUCT: Defendants' motion for summary judgment granted in an action against manufacturer of automobile, when Plaintiff was unable to present direct expert testimony that component part was defectively designed or manufactured and Plaintiff was unable rely on circumstantial evidence of product defect when product was destroyed by insurance agent several years after litigation was filed.

***Justice v. Ford Motor Co.*, 2012 U.S. Dist. LEXIS 98973 (N.D. Ga. July 17, 2012)**

Plaintiffs Brannon, David, Erica and Kaleb Justice brought defective design and manufacture claims against Ford Motor Company and Sensata Technologies, Inc. arising from a 2005 fire originating in a model year 2000 Ford Expedition. The 2000 Ford Expedition contained a Speed Control Deactivation Switch (SCDS) that allegedly caused the vehicle to catch fire. The SCDS was the subject of a recall by Ford in January, 2005. Ford sent three recall notices to Plaintiff Brannon Justice between February, 2005 and July, 2005.

On August 2, 2005, Erica Justice drove the vehicle, and then parked it at David Justice's house. Approximately three hours later, Plaintiffs smelled smoke and found a fire emanating from under the left side of the vehicle's hood. The fire destroyed Plaintiff David Justice's house. Plaintiffs' claims for breach of warranty, misrepresentation, post-sale duty to warn and emotional distress were abandoned in the master complaint filed in the multi-district litigation involving the product. Defendant then filed a motion for summary judgment on Plaintiffs' strict liability and negligence claims arguing that Plaintiffs failed to provide evidence of defective design or manufacture.

Plaintiffs' expert opined that the SCDS was the cause of the fire and that the SCDS exhibited characteristics that the National Highway and Traffic Safety Administration Closing Report ("NHTSA Closing Report") identified in Ford vehicles that made the SCDS most likely to burst into flames. However, the expert acknowledged that he did not believe the evidence he collected was sufficient to satisfy the NHTSA Closing Report criteria for concluding that the fire was caused by a failed SCDS. Plaintiffs' expert did not testify that the SCDS was defectively designed, manufactured and that such defect caused the fire.

The court found that expert testimony was required to support Plaintiffs' defective design and manufacturing claims. The court stated that Plaintiffs were asking the court to allow a jury to conclude by a preponderance of the evidence that a defect existed and caused the fire when Plaintiffs' expert himself was not willing to so opine. This was an inference that a jury could not make solely from human experience in order to reach a verdict.

Plaintiffs also argued that their expert was precluded from examining the SCDS in question because it was destroyed by an insurance agent sent to investigate the fire. The court recognized that Georgia

law will sometimes allow plaintiffs to rely on circumstantial evidence to establish a manufacturing defect when the product failure destroys the evidence so that it is impossible for an expert to inspect it. The court rejected Plaintiffs' attempts to rely on this exception because the destruction of the SCDS did not occur until 2010, five years after the fire, and three years after the suit was filed. The court found that Plaintiffs had ample opportunity to inspect the SCDS and was not willing to reward Plaintiffs' inaction by treating the product as if it was destroyed by the fire.

Finally, the court found that Plaintiffs could not support a defective design claim because they did not produce any expert witness who was qualified to conduct a risk-utility analysis and to opine that the risks inherent in the product's design outweighed the benefits from the product. Accordingly, the court granted Defendant's motion for summary judgment on all remaining claims.

BREACH OF EXPRESS WARRANTY CLAIM AND PREEMPTION: Class III medical device manufacturer's motion to dismiss Plaintiff's express warranty claims denied because these claims were not preempted by Medical Device Act of 1976.

***Cline v. Advanced Neuromodulation Systems, Inc.*, 2012 U.S. Dist. LEXIS 123050 (N.D. Ga. June 15, 2012)**

Plaintiff Sheryl Cline had an implantable pulse generator ("IPG"), a Class III medical device, surgically implanted in her back to relieve chronic back and lower body pain. The IPG in question was designed, manufactured, marketed, and sold by Advanced Neuromodulation Systems, Inc. Plaintiff Cline alleged that the IPG stopped working approximately seven months after it was implanted, so she underwent another surgery to remove the device. Plaintiff Cline alleges that the defendant, after examining the device, wrote to Plaintiff's physician identifying the cause of the device's failure as a defective battery.

Plaintiff alleged she received a user guide for the IPG containing a limited warranty guaranteeing the device to be free from defects for one year. Plaintiff also alleged that she spoke directly with Defendant's territorial manager who told her the battery life of the IPG was guaranteed for at least 10 years.

Plaintiff sued Defendant alleging breach of express warranty, seeking damages for medical expenses, pain and suffering, costs and attorneys' fees. Defendant moved to dismiss Plaintiff's complaint for failure to state a claim. Defendant argued that the express warranty claim was preempted under the Medical Device Act of 1976, as interpreted by the Supreme Court in *Riegel v. Medtronic,* 522 U.S. 312, 128 S.Ct. 999 (2008). *Riegel* held that the Medical Device Act preempted state law claims relating to regulated devices, which the IPG was, if: (1) the federal government has established requirements relating to the device; and (2) the state law claims related to the device impose requirements relating to the safety and effectiveness of the device that are different from or in addition to the federal requirements.

Finding the first prong satisfied, the court focused on whether Plaintiff's breach of warranty claims related to the safety and effectiveness of the IPG such that they were preempted. The court noted that neither the U.S. Supreme Court nor the Eleventh Circuit has addressed whether the Medical Device Act preempts state law claims for breach of express warranty. Other courts have split on this issue, with the 5th Circuit finding such claims preempted and the 7th Circuit finding that such claims were not necessarily preempted.

In this case, Defendant focused its preemption argument on the fact that Plaintiff's express warranty claims related to the device's label, which was approved by the FDA during its review.

Here, the court found that Plaintiff's breach of warranty claims did not concern the safety and effectiveness of the IPG because the FDA's statutorily mandated "effectiveness" review focuses on whether the device works, then weighs the benefit of the device against its risks. The FDA ensures that the device's labeling (which includes its warranty) does not detract from the effectiveness by confusing consumers regarding its use.

The court found that Plaintiff's breach of warranty claims related to the battery did not relate to the efficacy of the device as analyzed by the FDA such that allowing the claim to proceed would not frustrate the purposes of the FDA's review.

The court also found an express warranty claim as alleged by Plaintiff was not based on the coercive or regulatory power of state law, but on a contractual obligation that Defendant freely imposed upon itself. Therefore, the court found that Plaintiff's claims were not preempted by the Medical Device Act and denied Defendant's Motion to Dismiss.

DEFECTIVE PRODUCT: Plaintiffs could not establish personal jurisdiction against foreign manufacturer under Georgia long arm statute where manufacturer sold products through a distributor and there was no evidence of how much revenue manufacturer derived from Georgia sales, or whether this unknown amount was substantial in relation to manufacturer's overall revenue.

***Little v. Hhgregg, Inc.*, 2012 U.S. Dist. LEXIS 99764 (M.D. Ga. July 18, 2012)**

Plaintiff brought negligence, failure to warn, breach of contract and implied warranties and strict liability claims arising from a freezer catching fire. Plaintiff, a retail consumer, asserted claims against: (1) the manufacturer,

Continued on page 63

Trucking Case Law Update

By Matthew P. Stone, SLC Chair
Freeman Mathis & Gary, Atlanta

DIRECT ACTION STATUTE applies to interstate motor carriers; borrowed servant doctrine bars claim against lessor of driver and tractor-trailer; motor carrier's failure to comply with mandatory safety regulations is sufficient evidence of bad faith to get O.C.G.A. § 13-6-11 claim to jury.

***Bramlett v. Bajric*, 2012 WL 4951213 (USDC, ND Ga. Oct. 17, 2012)**

Plaintiffs were injured in a collision with a tractor-trailer driven by Bajric and owned by Hrnic, through his company, DAL Express ("DAL"). Hrnic leased Bajric and the tractor-trailer to DSL Express ("DSL"), an interstate motor carrier based in Indiana that does not engage in intrastate transportation within Georgia and is not registered with the Georgia Department of Revenue. DSL had a liability insurance policy issued by Daily Underwriters ("Daily"). Defendants moved for summary judgment on several issues.

First, they argued that the 2009 amendments to Georgia's Direct Action Statute, O.C.G.A. § 40-2-140, bar Plaintiffs from joining Daily as a defendant because DSL does not engage in intrastate commerce in Georgia. Specifically, Defendants argued that subsections (b) and (c) are separate and distinct (the former deals with interstate motor carriers and the latter deals with intrastate motor carriers) and that only insurers of intrastate motor carriers are subject to a direct action, since the provision allowing their joinder appears in subsection (c)(4). The court, however, rejected that argument because the key statutory language — "under this Code section" — refers to O.G.G.A. § 40-2-140 as a whole; therefore, the joinder provision applies to both interstate and intrastate motor carriers. 2012 WL 4951213 at *2.

Next, Defendants argued that Hrnic and DAL cannot be liable for negligent hiring, retention, training, or supervision because Bajric was operating the tractor-trailer under a lease with DSL. The answer turned on the scope of the bailment relationship and whether Bajric was a borrowed servant of DSL. 2012 WL 4951213 at *4. "[A]n employee of the bailor is a borrowed servant of the hirer (1) if the hirer had complete control and direction of the bailor's employee for the occasion, whereas the bailor had no such control, and (2) if the hirer had the exclusive right to discharge the bailor's employee." *Id.* (internal quotation marks and citations omitted). Under the lease agreement and 49 C.F.R. § 376.12, DSL was required to and did assume complete responsibility and control of the tractor-trailer. Further, DSL interviewed Bajric before entering into the lease; and maintained contact with him while he was driving, inspected his logs, verified his fuel receipts, and organized his shipping routes. That evidence demonstrates the exercise of sufficient control over Bajric and the tractor-trailer "to invoke the borrowed servant doctrine and face vicarious liability." *Id.* Accordingly, neither Hrnic nor DAL could be responsible on Plaintiffs' direct liability claims. *Id.*

Next, the court held that Plaintiffs failed to produce sufficient evidence to support their punitive damages claim against Bajric based on "aggressive driving, aimed at Plaintiffs." *Id.* Plaintiffs presented evidence that Bajric tailgated them for half a mile, "rammed their vehicle" and hit it a second time after they swerved, and gave inconsistent accounts of the event. While that evidence may show Bajric's anger toward Plaintiffs, it "does not support a finding of malice warranting punitive damages." *Id.* at *5.

The court rejected Plaintiffs' punitive damages claim against DSL. Noting that an employer must have "actual knowledge of numerous and serious violations on its driver's record" or disregard its duty to check for such violations to impose punitive damages for negligent hiring. The court found that DSL had obtained Bajric's driving history, which reflected only three speeding tickets. *Id.* at *6. Plaintiffs also pointed to evidence showing that DSL failed to adhere to safety regulations; failed to keep proof of the qualifications of mechanics working on its vehicles; received multiple equipment violations; failed its new entrant safety audit and several roadside inspections; had no safety budget, written training materials, written employee manual, written safety policies, or written annual review of drivers; and destroyed the tractor-trailer despite receiving three preservation letters from Plaintiffs' counsel. The court, however, found that evidence insufficient to support Plaintiffs' punitive damages claim since it had no connection to DSL's hiring of Bajric or the collision. *Id.*

Finally, the court denied Defendants' motion for summary judgment on Plaintiffs' claim for attorney's fees and expenses under O.C.G.A. § 13-6-11 (acting in bad faith, being stubbornly litigious, causing unnecessary trouble and expense). Noting that the term "bad faith" implies "a dishonest purpose" and a "conscious doing of wrong," the court held that evidence of a defendant motor carrier's failure "to comply with mandatory safety regulations" is "some evidence" of bad faith and is sufficient to demonstrate the exis-

tence of a jury question. *Id.* at *8 (citations omitted).

PUNITIVE DAMAGES: Neither employee's cell phone use nor employer's failure to enforce its policy justified an award of punitive damages.

***Ellis v. Old Bridge Transport, LLC*, 2012 WL 6569274 (USDC, MD Ga. Dec. 17, 2012)**

Plaintiff sued tractor-trailer driver Geko and his employer, Old Bridge Transport ("Old Bridge"), for injuries arising from a collision. Defendants moved for summary judgment on Plaintiff's punitive damages claims against Geko based on his use of a cell phone at the time of the collision and against Old Bridge based on negligent training and supervision regarding the use of cell phones while driving.

Noting the settled principle that something "more than the mere commission of a tort is always required for punitive damages," the court focused on two issues: "(1) whether Geko's use of his cell phone at the time of the collision, along with a history of cell phone use while driving, are sufficient to authorize a claim for punitive damages under Georgia law against Geko; and (2) whether [Plaintiff] has presented sufficient evidence that Old Bridge's training and supervision of Geko regarding cell phone use showed an entire want of care that raises a presumption that Old Bridge had a conscious indifference to the consequences of its allegedly inadequate training and supervision." 2012 WL 6569274 at *2.

The court first pointed to *Lindsey v. Clinch County*, 312 Ga. App. 534, 536 (2011), where the Georgia Court of Appeals held that using a cell phone while driving is legal in Georgia and does not, by itself, establish a policy or pattern of dangerous driving sufficient to justify an award of punitive damages. The court went on to reject Plaintiff's punitive damages claim against Geko based on a lack of evidence showing any history of distraction-related accidents or traffic violations or a pattern of dangerous driving or other aggravating circumstances. 2012 WL 6569274 at *2.

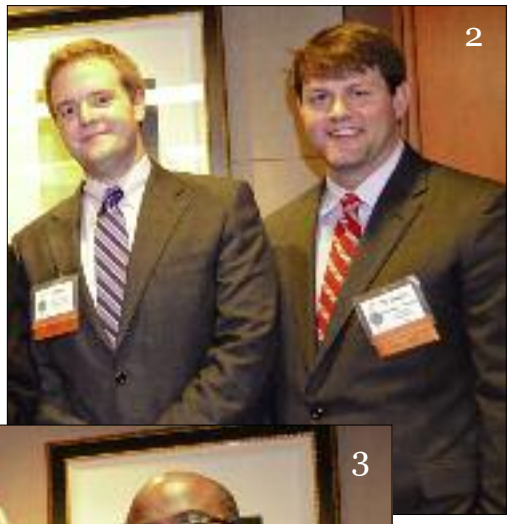
The court then rejected Plaintiff's punitive damages claim against Old Bridge despite evidence of a policy against cell phone use while driving and knowledge that its drivers failed to follow the policy. Specifically, the court held that punitive damages cannot be awarded against "an employer for failing to assure that its employee did not engage in conduct that is otherwise lawful and has been found by the Georgia Court of Appeals not to demonstrate a conscious disregard for safety." 2012 WL 6569274 at *2.

COVERAGE: Court refused to write an MCS-90 endorsement or Georgia Form F endorsement into a liability

Continued on page 64

GDLA Honors Judiciary at 10th Annual Reception

All those pictured at the reception are identified from left to right: 1. Cobb State Court Judge Eric Brewton and Cobb Superior Court Judge Greg Poole; 2. Sean Cox and Brantley Rowlen; 3. Hank Fellows, GDLA Immediate Past President Mel Haas and DeKalb Superior Court Chief Judge Greg Adams; 4. GDLA President Lynn Roberson, Michael Goldman and DeKalb Superior Court Judge Asha Jackson; 5. Tom Curvin and Court of Appeals Presiding Judge Sara Doyle; 6. Clerk/District Court Executive James Hatten and Judge Tom Thrash, both with the U.S. District Court, Northern District. 7. Fulton Superior Court Judges Todd Markle and Kelly Lee with Court of Appeals Judge Michael Boggs. 8. Fulton Superior Court Judge John Goger, GDLA Past President Grant Smith, GDLA Board member Rusty Gunn and Fulton Superior Court Chief Judge Cynthia Wright; 9. Clint Fletcher, Cobb Superior Court Judge Robert Leonard II and DeKalb State Court Judge Dax Lopez; 10. Fulton State Court Judge John Mather, Glenn Bass and Al Adams; 11. Court of Appeals Judge Carla Wong McMillian, Tracey Ledbetter and Fulton State Court Judge Diane Bessen; 12. Sanders Carter, Fulton State Court Judge Jay Roth and Lisa Bondurant; 13. Joe Angersola and Ashley Broach; 14. DeKalb State Court Judge Stacey Hydrick and GDLA Past President Steve Kyle; 15. Kristin Hiscutt, DeKalb State Court Judge Johnny Panos and Phi Nguyen; 16. Michael Rust and GDLA Executive VP Ted Freeman; 17. Sharonda Boyce, Court of Appeals Presiding Judge Herbert Phipps and Eric Mull; 18. Gary Freed and Court of Appeals Judge Chris McFadden; 19. Carrie Christie and Douglas Burrell.❖




8


9


10


11


12


14


13


15


16


18


17


19

Trial & Mediation Academy: Training the Next Generation

The annual GDLA Melburne D. "Mac" McLendon Trial Academy was expanded last year to include a mediation component. Based on positive feedback from that addition, the seminar was officially renamed Trial & Mediation Academy for 2013.

Once again, Trial & Mediation Academy attracted lawyers from across Georgia to Callaway Gardens from January 24-26, 2013. The seminar kicked off with a welcome reception for faculty and students to gather informally on Wednesday evening, before the seminar commenced on Thursday.

The students were then guided through the two-and-a-half day experience by a distinguished faculty led by Chair Matthew G. Moffett of Gray Rust St. Amand Moffett & Brieske, Atlanta, and including: Vice-chair Douglas K. Burrell of Drew Eckl & Farnham, Atlanta; Jerry A. Buchanan of Buchanan & Land, Columbus; William T. "Bill" Casey, Jr. of Hicks Casey & Foster, Marietta; Robert R. "Rusty" Gunn II of Martin Snow, Macon; William D. "Billy" Harrison of Mozley Finlayson & Loggins, Atlanta; Susan J. Levy of Levy & Pruett, Decatur; and Richard H. "Dick" Willis of Bowman and Brooke, Columbia, SC.

It should be noted that long-time faculty member, James S. "Sandy" Owens, Jr., was unable to participate due to illness and subsequently passed away the next month. His loss will be forever felt at Trial & Mediation Academy and beyond. See the In Memoriam tribute to Sandy on page 8.

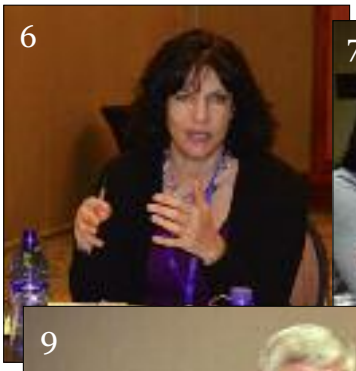
Because of the growing trend toward mediation, two of the GDLA's Platinum Sponsors reprised their presentations from last year: John Miles of Miles Mediation & Arbitration addressed trying your case at mediation, and BAY Mediation & Arbitration's Bruce Barrickman discussed effective use of technology at mediation.

Trial & Mediation Academy employs a modified mock trial format. In advance of the seminar, students were divided into defense and plaintiff's teams; each received a case to study and begin preparing aspects of the trial. Following faculty demonstrations, students dispersed into breakout groups to work on their skills.

Opening day concluded with a reception and dinner, sponsored by BAY and Miles, which featured a keynote address by Court of Appeals Chief Judge John J. Ellington on professionalism considerations at trial.

Trial & Mediation Academy continues to be the GDLA's premier seminar, geared toward training the next generation of leading litigators.❖

All those pictured are identified from left to right: 1. Akua Coppock; 2. Kristen Cawley and Sean Cox; 3. David Hayes and Justin Purvis; 4. Program Vice-chair Douglas Burrell; 5. Zach Matthews; 6. Melissa Segel; 7. Christina Cribbs and Matt Ramsey; 8. Faculty member Dick Willis; 9. Faculty member and GDLA Past President Jerry Buchanan; 10. Allan Galis, Adam Sinton, Brad Brizendine and Jonathan Kandel; 11. GDLA Platinum Sponsor John Miles of Miles Mediation and Seth Eisenberg; 12. Faculty member Rusty Gunn and Reneé Rainey; 13. Lee Clayton, Myrece Johnson, Joe Angersola and Tom Ward; 14. Keynote speaker and Court of Appeals Chief Judge John Ellington with Program Chair Matt Moffett; 15. Maggie McClatchey, Lauren McCulloch and Heather Hammonds; 16. Mathew Titus and Stephen Brown with Bruce Barrickman of GDLA Platinum Sponsor BAY Mediation; 17. Faculty member Susan Levy; 18. Adam Masarek; 19. Faculty member Billy Harrison; 20. Lucas Westby and Daniel Cheek; 21. Faculty member Bill Casey. 22. Attendees practiced their skills in breakout groups with a faculty member there to critique.


6


7

8


9


10


11


12


13


14


15


16


17


18


19


20

21


22

Skits & Suds Hits the Road

Ethics and Professionalism CLE Travels to Macon

On February 28, 2013, lawyers both young and not-so-young gathered for Skits & Suds: Ethics & Professionalism Uncorked at the Fish N' Pig in Macon.

The popular CLE seminar hit the road to Macon after being reprised two years ago, following a brief hiatus, in Atlanta where it garnered rave reviews. The concept was created over 10 years ago by now Past President George Duncan of Duncan & Adair and Board of Directors member Jo Jagor of Hall Booth Smith, both in Atlanta. The program features GDLA members performing skits that bring to life everyday ethical and professionalism dilemmas. The evening also included a beer and wine reception for networking.

This year's fact pattern was developed by GDLA Education Committee Vice-chair Brett Miller of Mabry & McClelland in Atlanta and committee member Sarah Smith of Drew Eckl & Farnham in Atlanta. Jason Logan of Constangy Brooks & Smith in Macon co-chaired the local version with Mr. Miller.

The Macon edition of Skits & Suds featured the same fact pattern used during the Atlanta seminar last summer. The skits again focused on "The Savannah Shore," where the infamous Snooki slipped and fell at a nightclub owned by Pauly D, played by Alyssa Peters, also with Constangy in Macon. Snooki's lawyer, The Situation, played by Mr. Logan, subsequently filed suit. Other characters included Junior Associate J. Woww, played by Molly O'Connor, also with Mabry & McClelland; and Senior Partner, played by Andy Treese of Drew Eckl & Farnham in Atlanta.

We were especially honored to have Macon Superior Court Judge Edgar Ennis there to offer insights collected from a career in practice and on the bench. We were also fortunate to have Professor Patrick Longan, William Augustus Bootle Chair in Professionalism and Ethics at Mercer Law School, there to give guidance as to how each dilemma relates to the Bar's disciplinary rules.

GDLA Education Committee Chair and Board of Directors member Wayne Melnick of Gray Rust St. Amand Moffett & Brieske in Atlanta moderated the seminar. Area Board Members Rusty Gunn of Martin Snow and Dave Nelson of Chambless Higdon Richardson Katz & Griggs, as well as other seasoned Macon litigators, were also on-hand to share wisdom from their years of experience.

The Skits & Suds fact pattern will change each year — as will the different dilemmas faced (i.e., discovery debacles, deposition nightmares, summary judgment crises, etc.) — making this an enlightening and entertaining way to earn CLE annually. Be on the lookout for another Atlanta edition this summer! ❖

All those pictured are identified from left to right: 1. Macon Superior Court Judge Edgar Ennis with Program Co-chairs Brett Miller and Jason Logan; 2. Will Davis and Tom Alexander; 3. "Savannah Shore" actors Alyssa Peters, Jason Logan, Andy Treese and Molly O'Connor; 4. Board member and Education Committee Chair Wayne Melnick moderated (standing); 5. Board member Rusty Gunn and Lara Percifield; 6. Prof. Patrick Longan; 7. Christi Horne and Elizabeth Ford.

How good was your Expert?

When you can't afford to be wrong

The Causation Experts.

- Bio-Mechanical
- Civil/Structural/Construction
- Consumer Products
- Electrical Engineering
- Environmental Engineering
- Fires
- Human Factors
- Industrial Machinery
- Marine
- Material Sciences
- Mold
- OSHA Safety
- Slip & Fall
- Vehicular

Contact us today to start building your Strongest Case possible.

CED™

Investigative Technologies Inc.

1-800-780-4221

info@cedtechnologies.com

CLE Offers Bankruptcy Primer

Bankruptcy. Few words in legal jargon are as recognized by civil defense attorneys yet remain so clouded in mystery. More and more, GDLA members are called upon to defend cases where the plaintiff has filed bankruptcy. For the unknowing defense counsel, this may mean missing out on defenses that he or she had no idea even existed.

For this reason, the GDLA Education Committee offered a one hour lunch-and-learn at Gordon Biersch Buckhead on March 20, 2013.

The seminar featured Todd Hennings, Managing Member of Macey Wilensky Kessler & Hennings in Atlanta, who has served as a staff attorney for bankruptcy judges in all three districts in Georgia.

Mr. Hennings provided attendees with a primer on what every civil defense attorney needs to know about bankruptcy, discussing the general concept of bankruptcy as well as specific bankruptcy-based defenses available in civil cases such as judicial estoppel. ❖

Speaker Todd Hennings at left.

Pictured at the CLE are (l-r) Becky Gabelman, Allison Maloney and Rakhi McNeill.

CLE Explores Spoliation

On April 4, 2013, the GDLA Education Committee presented a seminar exploring issues related to spoliation in Georgia, including defending spoliation claims, handling litigation after spoliation sanctions have been assessed, and making spoliation claims against plaintiffs.

Education Committee member Pamela N. Lee of Swift Currie McGhee & Hiers in Atlanta, who also serves as Young Lawyers Committee vice-chair for education, planned the half-day program, which was held at Olmsted in Atlanta. Assisting her as program vice-chair was Andy Treese of Drew Eckl & Farnham in Atlanta.

Stephen L. Cotter, also with Swift Currie, opened the program with an overview of the spoliation standards in Georgia, particularly as applied to unseasoned litigants.

William T. "Bill" Casey, Jr. of Hicks Casey & Foster in Marietta followed with a presentation addressing spoliation claims with seasoned litigants, particularly when key evidence, such as videotaped surveillance, has been lost or destroyed. The presentation included a viewing of surveillance video.

Carrie L. Christie of Rutherford & Christie in Atlanta then presented best practices for advising clients as to the risks versus benefits of video surveillance. She explained that although there are benefits for security, loss prevention, and other business concerns, in certain circumstances the benefits may not outweigh the risk that the client will face a spoliation sanction if the evidence is destroyed.

While the first three speakers addressed attempts at preventing spoliation sanctions, Lisa Richardson of Drew Eckl & Farnham in Atlanta explored how to successfully defend a lawsuit after spoliation sanctions have been handed down, including the ultimate sanction of striking the answer. While the hope of any defense lawyer is that no such sanction will be received, Ms. Richardson offered insights on how to address the situation in the best interests of the client.

Turning the tables, GDLA Board of Directors member and Education Committee Chair Wayne S. Melnick of Gray Rust St. Amand Moffett & Brieske in Atlanta shared how spoliation can be used as a "sword" against plaintiffs who destroy or lose evidence. He discussed the lines of cases developed following *Chapman v. Auto Owners Ins. Co.*, which approved the sanction of dismissal of the lawsuit for certain acts of spoliation. The day after the seminar, he was featured on the front page of the *Daily Report* in an article titled "Spoliation Appeal Dropped in Case of Damaged RVs," which discussed his ability to get a case dismissed as a spoliation sanction.

Rounding out the seminar, Fulton Superior Court Judge Todd Markle reviewed the history of spoliation in Georgia and offered a view of spoliation from the bench. ❖

1. Fulton Superior Court Judge Todd Markle; 2. Pamela Lee, Young Lawyers Committee vice-chair for education and CLE program chair, with Chris Lee. 3. (l-r) Erica Morton, Doug Wilde and speaker Bill Casey; 4. Speaker Wayne Melnick, who is a Board member and Education Committee chair; 5. Speaker Stephen Cotter; 6. Speaker Carrie Christie with John Price; 7. Speaker Lisa Richardson with CLE program Vice-chair Andy Treese.

Board Convenes for Winter Meeting

As is tradition, the GDLA Board of Directors held its Winter Meeting the day after the judicial reception; they convened at State Bar headquarters on Friday, February 8, 2013.

Those present were: *Officers*: President Lynn M. Roberson, Swift Currie McGhee & Hiers, Atlanta; and Executive Vice President Ted Freeman, Freeman Mathis & Gary, Atlanta. *Vice Presidents*: Hall F. McKinley III of Drew Eckl & Farnham, Atlanta; and Peter D. Muller, Goodman McGuffey Lindsay & Johnson, Savannah. *Board of Directors*: Craig Avery, Cowsert & Avery, Athens; Robert R. "Rusty" Gunn II, Martin Snow, Macon; James D. "Dart" Meadows, Balch & Bingham, Atlanta; Wayne S. Melnick, Gray Rust St. Amand Moffett & Brieske, Atlanta; Brian T. Moore, Drew Eckl & Farnham, Atlanta; David N. Nelson, Chambless Higdon Richardson Katz & Griggs, Macon; Christopher E. Parker of Miller & Martin, Atlanta; and James S.V. Weston, Trotter Jones, Augusta. *Past Presidents*: N. Staten Bitting, Jr., Fulcher Hagler, Augusta; Jerry A. Buchanan, Buchanan & Land, Columbus; Johnny Foster, Forbes Foster & Pool, Savannah; W. Melvin Haas, III, Constangy Brooks & Smith, Macon; Steven J. Kyle, Bovis Kyle Burch & Medlin, Atlanta; Walter B. McClelland, Mabry & McClelland, Atlanta; James E. Singer, Bovis Kyle Burch & Medlin, Atlanta; Grant B. Smith, Dennis Corey Porter & Smith, Atlanta; Robert M. Travis, Bryan Cave, Atlanta. *Also present* was Executive Director Jennifer M. Davis.

Following are highlights from the meeting:

- Reporting on behalf of Admissions Chair Warner Fox, Jennifer Davis advised that the GDLA currently has 668 members. Twenty-six individuals were then proposed for mem-

Winter Meeting Scenes

Those pictured are identified left to right unless otherwise noted: 1. Past President Jimmy Singer looks on as Dave Nelson makes a point; 2. Sponsorships Committee Chair Craig Avery announces the 2013 GDLA sponsors; 3. Past President and Judicial Relations Committee Chair Bob Travis gives his committee's report; 4. President Lynn Roberson (right) leads the meeting as Executive Vice President Ted Freeman looks on; 5. Past President Steve Kyle makes a point; 6. Co-chair Dart Meadows gives the Membership Recruitment Committee report as Past President Johnny Foster looks on.

bership and unanimously accepted (see page 10).

- One membership applicant works for the City of Atlanta Law Department. Since the Bylaws currently stipulate only lawyers in private practice can be members, the Board discussed amending the membership requirements. They also discussed admitting captive firm members, which had been tabled at the 2012 Fall Meeting for discussion at this meeting. Chris Parker and Jamie Weston volunteered to draft several options for a Bylaws change — to address both governmental and captive firm lawyers — for consideration at the Spring Meeting.
- Membership Committee Co-chairs Dart Meadows and Chris Parker asked the Board to again review the list of DRI members who are not GDLA members, and contact at least five prospects and report on the results at the Spring Meeting.
- Education Committee Chair Wayne Melnick encouraged attendance at the upcoming Skits & Suds CLE in Macon, as this is the first attempt to offer a seminar outside of Atlanta. He also reviewed topics that will be offered this year; watch your inbox for announcements or consult the calendar at gdla.org.
- Chair Brian Moore reported that the Substantive Law Committees continue to contribute case law updates for the newsletter, as well as articles for the 2013 *Law Journal*. He hopes several will develop a CLE in connection with the Education Committee, as the Premises Liability SLC did last year.
- Meetings Chair and Past President Staten Bitting reviewed the Board's future meetings schedule, which can always be found on the calendar at www.gdla.org.
- Website Committee Chair Dave Nelson reported that a redesigned website is in production. Jennifer Davis is consulting with other state and local defense organizations on best practices for creating a LinkedIn group, so we can create one for the GDLA.
- Sponsorships Chair Craig Avery reported on changes to the 2013 line-up, including Elizabeth Gallo Court Reporting joined as a new Silver sponsor; South Georgia ADR moved up from Silver to Gold; Global Legal Discovery bumped up from Gold to Platinum; Trial Exhibits renewed this year at Gold, having dropped a couple years ago when they were Platinum; private investigator firm Norred did not renew. See page 66 for a list of the GDLA sponsors.
- Trial & Mediation Academy Vice-chair Douglas Burrell reported that the 2013 edition was a success; see article on page 42. In an effort to increase diversity, Douglas proposed adding the following new faculty for 2014: Carrie Christie, Philippa Ellis and Bobby Shannon. The 2014 conference will be held January 23-25, 2014, at Callaway Gardens Lodge & Spa. President Roberson has appointed Bill Casey to serve as vice-chair, while Douglas assumes the chair position.
- A written report from DRI State Rep and GDLA Past President Bubba Hughes advised that the GDLA was presented an award recognizing its recruiting more than 40 new members to DRI, beating the goal of 20.
- Amicus Committee Co-chair Rusty Gunn led a discussion regarding the *Langdale* case that Bill Custer is handling. Past President Jerry Buchanan was able to give some historical background, since he'd been involved at some points. The Board noted that the Executive Committee and Amicus Committee have the decision-making power on amicus briefs, but did acknowledge that it supported filing one in the *Langdale* case. There was also discussion about a case that Dart Meadows is handling; but, as no request had been made yet, there was no decision as the GDLA only responds to requests, rather than initiating briefs.
- Jennifer Davis reported for Treasurer Kirby Mason that the GDLA continues to be in better financial health than it was at the same time the year before.
- President Lynn Roberson announced her plans to nominate Staten Bitting to chair the 2013 Nominating Committee.
- Jake Daly, who developed the Speaker Lunch Series concept, reported on the success of the first event, attracting 55 GDLA members, judges and plaintiff's lawyers. It also resulted in a front page article in the *Daily Report*, "A critical eye on Holt demands: Panelists at Georgia Defense Lawyers Association discuss need for legislation to regulate demands for settlement." He is developing ideas for the next luncheon.❖

Spring Board Meeting Held at Lake Oconee

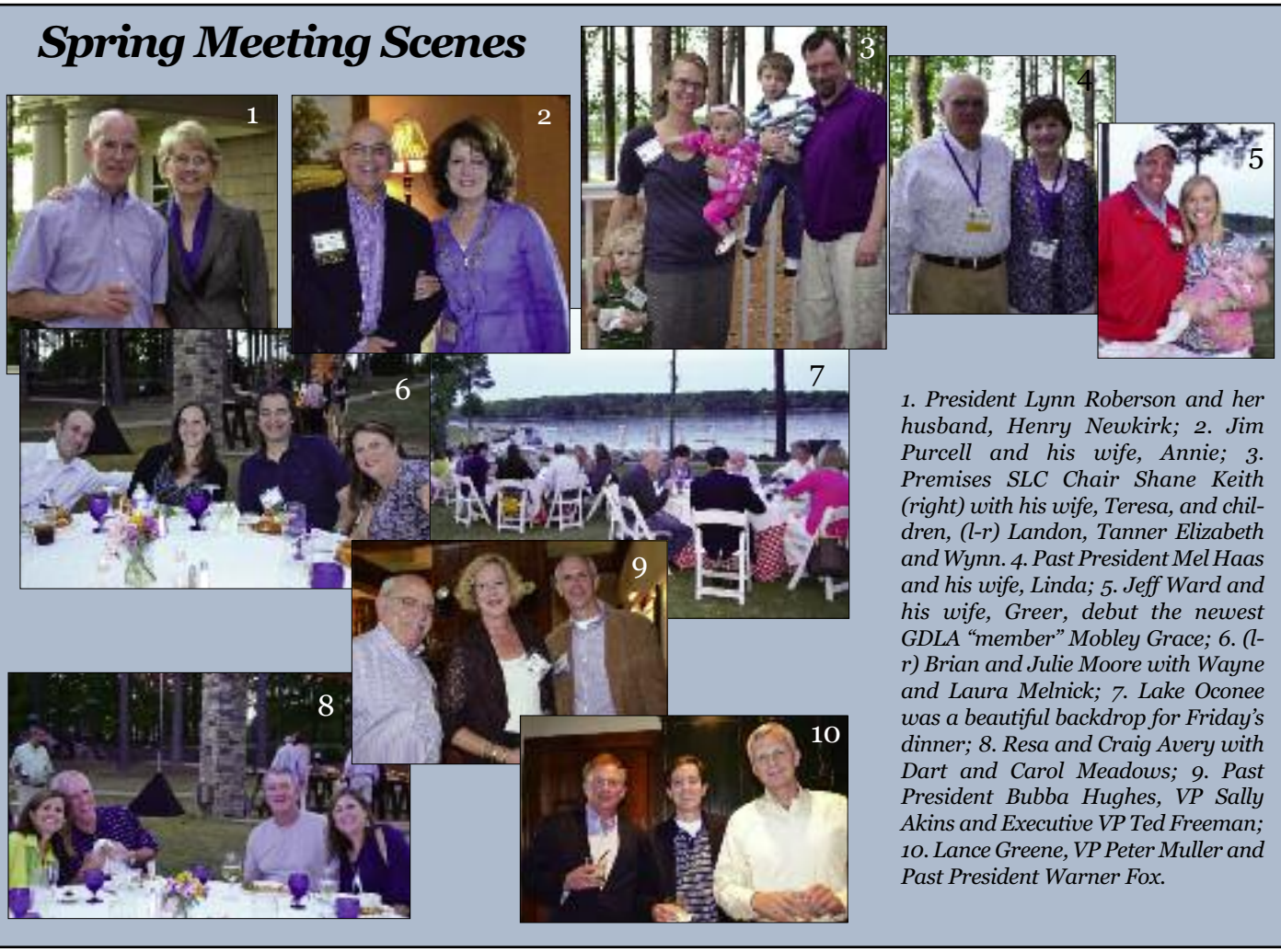
The GDLA Board of Directors traveled to the Ritz-Carlton Reynolds Plantation at Lake Oconee for its Spring Meeting, April 26-28, 2013.

The weekend commenced with a reception in the hospitality cottage, after which everyone walked to dinner outdoors at a beautiful lakefront setting. The Board meeting was held on Saturday morning, then the afternoon was free for everyone to enjoy the pool, spa, golf, walking trails and more. Board members and their spouses and guests gathered again in the hospitality cottage for a reception before dispersing to dinner on their own.

Those present were *Officers:* President Lynn M. Roberson, Swift Currie McGhee & Hiers, Atlanta; Executive Vice President Ted Freeman, Freeman Mathis & Gary, Atlanta; and Secretary-Treasurer Kirby G. Mason, HunterMaclean, Savannah. *Vice Presidents:* Sarah B. "Sally" Akins, Ellis Painter Ratterree & Adams, Savannah; Matthew G. Moffett, Gray Rust St. Amand Moffett & Brieske, Atlanta; Peter D. Muller, Goodman McGuffey Lindsay & Johnson, Savannah. *Board of Directors:* Craig C. Avery, Cowsert & Avery, Athens; Troy Lance Greene, McNatt Greene & Peterson, Vidalia; Robert R. "Rusty" Gunn II, Martin Snow, Macon; Andrew Holliday, Fulcher Hagler, Savannah; Jo A. Jagor, Hall Booth Smith, Atlanta; James D. "Dart" Meadows, Balch & Bingham, Atlanta; Wayne S. Melnick, Gray Rust St. Amand Moffett & Brieske, Atlanta; Brian T. Moore, Drew Eckl & Farnham, Atlanta; James W. Purcell, Fulcher Hagler, Augusta; and Jeffrey S. Ward, Drew Eckl & Farnham, Brunswick. *Past Presidents:* N. Staten Bitting, Jr., Fulcher Hagler, Augusta; Warner S. Fox, Hawkins Parnell Thackston & Young, Atlanta; W. Melvin Haas, III, Constangy Brooks & Smith, Macon; Edward M. "Bubba" Hughes, Callaway Braun Riddle & Hughes, Savannah; and Robert M. Travis, Bryan Cave, Atlanta. *Also present* were Premises Liability SLC Chair C. Shane Keith, Hawkins Parnell Thackston & Young, Atlanta; and Executive Director Jennifer M. Davis.

At press time, the minutes had not been approved, but they will be posted with prior Board meeting minutes in the Members Only area of our website.❖

Spring Meeting Scenes



1. President Lynn Roberson and her husband, Henry Newkirk; 2. Jim Purcell and his wife, Annie; 3. Premises SLC Chair Shane Keith (right) with his wife, Teresa, and children, (l-r) Landon, Tanner Elizabeth and Wynn. 4. Past President Mel Haas and his wife, Linda; 5. Jeff Ward and his wife, Greer, debut the newest GDLA "member" Mobley Grace; 6. (l-r) Brian and Julie Moore with Wayne and Laura Melnick; 7. Lake Oconee was a beautiful backdrop for Friday's dinner; 8. Resa and Craig Avery with Dart and Carol Meadows; 9. Past President Bubba Hughes, VP Sally Akins and Executive VP Ted Freeman; 10. Lance Greene, VP Peter Muller and Past President Warner Fox.

dant's ability to mitigate or cap the total damages at issue through settlement, without being forced to undertake the inherent risks associated with trial. Third, and finally, it is important to note that the decision does not affect or impact the statutory scheme set forth by the legislature, or the previous cases citing or interpreting O.C.G.A. § 51-12-33.

The dispute in *Zurich v. Heard* arose out of the construction of a hotel in Brunswick, Georgia. After completion of the construction project, the hotel suffered water intrusion and related water damage. The owners of the hotel initiated an arbitration action against the general contractor and the architect, among other entities, before the American Arbitration Association. The architect's contract contained a clause that precluded the owner from suing him in the same forum and, as a result, the architect was dismissed from the arbitration. A separate proceeding was then initiated by the owner against the architect in the State Court of Gwinnett County.

Following preliminary litigation, the parties to the arbitration entered into a settlement agreement with the owner before the case proceeded to a hearing on the merits. Shortly after the arbitration settlement, the owner settled its lawsuit with the architect for a nominal sum and dismissed the suit with prejudice.

After funding the majority of the initial settlement, Zurich commenced a separate action for contribution, negligence, negligent misrepresentation, and breach of contract against the architect and the engineer. As part of its suit, Zurich sought damages for a portion of the amount it paid to settle the underlying arbitration (to which it was properly subrogated), as well as the uninsured damages paid by the general contractor.

The defendants in the subrogation action moved for summary judgment, arguing that O.C.G.A. § 51-12-33 (enacted as part of Georgia's "Tort Reform") abolished contribution in Georgia for *all* causes of action arising after February 16, 2005. In response, Zurich showed that O.C.G.A. § 51-12-32 was left entirely intact as part of the 2005 Tort Reform legislation, and that § 51-12-32 expressly provides for contribution following a pre-trial settlement. Citing *McReynolds v. Krebs,*[2] the trial court disagreed and held that:

> [b]ecause of the reference to O.C.G.A. § 51-12-33 contained within O.C.G.A. § 51-12-32(a), there is no longer a right of a 'joint trespasser to contribution from another or others' that can continue, regardless of whether liability is imposed by virtue of a settlement or a verdict.

The practical impact of the trial court's ruling was the complete abolition of contribution in Georgia, despite the fact that O.C.G.A. § 51-12-32 reserved the right to contribution for pre-trial settlements, and the fact that *McReynolds v. Krebs* plainly acknowledged a continuing right of contribution in Georgia. An appeal followed, and the Georgia Court of Appeals unanimously reversed the grant of summary judgment against Zurich with regard to Zurich's right to contribution following its pre-trial settlement.

On appeal, Zurich raised four enumerations of error: (1) that the trial court erred in ruling that contribution and indemnity no longer exist under Georgia law in cases involving pre-trial settlement; (2) that the trial court erred in ruling that the payment by Zurich to the owner was voluntary; (3) that the trial court erred in ruling that Zurich's direct causes of action (negligence, negligent misrepresentation, and breach of contract) were merely "reframed contribution claims"; and (4) that the trial court incorrectly concluded that the parties were independent, rather than joint, tortfeasors. While the Court of Appeals found that the trial court erred as to the first three enumerations (and did not address the fourth by virtue of its ruling), this article focuses on the contribution and apportionment aspects of the Court's ruling, and how the statutory scheme is applied.

Specifically, the Court of Appeals held the right of contribution between joint tortfeasors has not been completely abolished by the legislature's enactment of O.C.G.A. § 51-12-33, and that the trial court erred by holding otherwise. The Court of Appeals reasoned that the plain language of the statutory scheme did not preclude a suit for contribution where the prior proceeding did not advance on the merits to a trier of fact. While O.C.G.A. § 51-12-33 requires apportionment when either the plaintiff is partially at fault or there are multiple defendants, apportionment is only mandated where the case proceeds before a "trier of fact", and the trier of fact makes an ultimate determination as to the proper allocation of fault and the total amount of damages to be awarded. In other words, when apportionment occurs at trial, or should have been raised at trial, then there is simply no right to contribution.

In the unanimous decision, the Court of Appeals reasoned that the plain statutory language in O.C.G.A § 51-12-33 "cannot be interpreted to abolish the right of contribution between settling joint tortfeasors when there has been no apportionment of damages by a trier of fact." In Heard, neither of the underlying cases proceeded to a hearing or trial on the merits and no trier of fact was ever called upon to make a determination as to the total amount of damages. Accordingly, the trial

court's ruling that Zurich was not entitled to seek contribution was reversed.

In addressing *McReynolds*, one of the seminal cases on apportionment in Georgia, the Court of Appeals correctly found that *McReynolds* "does not require a different result. In that case, the trier of fact determined the total amount of damages owed by the defendant, and the appellant conceded that she had no evidence of liability which would support apportionment against another co-defendant that settled before trial."[3]

As set forth by the plain language of O.C.G.A. § 51-12-33, once McReynolds proceeded to trial, McReynolds' exclusive remedy with regard to allocating fault to other parties and "setting-off" damages was apportionment.

The *Heard* decision provides further clarification to the statutory scheme and the relationship between O.C.G.A. §§ 51-12-32 and 51-12-33. However, the impact and benefits go beyond mere clarification of the statutory scheme. From a defense perspective, the decision allows defendants to achieve and obtain a proper allocation of fault without the risk of having to proceed to trial in every case involving multiple defendants. Heard argued that the current statutory scheme required apportionment in all cases involving multiple defendants (regardless of whether they proceeded to trial), and that the failure to seek apportionment precludes a later contribution action. This interpretation of the statutory scheme ignores the plain language of § 51-12-32 and would require all cases involving multiple defendants to proceed to trial in order to achieve an "allocation of fault." In application, such an approach would unnecessarily force defendants to deal with the risk of unpredictable juries and awards at trial, and further erode the potential for settlements.

The unpredictable nature of jury trials and increased burden on the judicial system is also intertwined with the second tangible benefit of the decision. In the decision, the Court appears to acknowledge the difficulty or inability to control responsible joint tortfeasors who do not contribute toward a settlement, particularly at-fault non-parties. In recognizing the right to contribution flowing from pre-trial settlements, the Court affirmed a defendant's ability to exercise some level of control over joint tortfeasors by holding them accountable for their reasonable share of a plaintiff's damages following a pre-trial settlement.

From a defense perspective, however, the greatest benefit is the ability to limit or cap the total amount of damages at issue. While fault can be allocated at trial through apportionment under O.C.G.A. § 51-12-33, thereby limiting a client's percentage of liability exposure, the total award a jury may give is still unpredictable. Through O.C.G.A. § 51-12-32, a defendant (or group of defendants) can cap total exposure through settlement, and then proceed to work out an allocation of the settlement amongst non-contributing co-defendants or at-fault non-parties. Using *Heard* as an example, in the underlying arbitration and state court proceedings the hotel owners sought in excess of $15 million.

Had the arbitration proceeded to a hearing on the merits, the trier of fact could have awarded the full amount of damages sought by the owners. In such event, even if the general contractor obtained a ruling that it was only 20 percent at fault in the proceeding, the end result would have yielded an amount well in excess of the total settlement. If, however, a case can be settled pre-trial for a fraction of the total damages sought, the at-fault parties have limited the total exposure and are left to fetter out liability for a substantially smaller sum.

Finally, the *Heard* decision involved a straightforward and rather simple application of the plain language of O.C.G.A. §§ 51-12-32 and 51-12-33. Under O.C.G.A. § 51-12-33 apportionment is required only where a case proceeds to the merits and the trier of fact is required to make a determination as to the total amount of damages. In contrast, contribution remains viable when a case does not proceed to the merits and no such determination is made or even possible.

To that end, the decision leaves intact both the current statutory scheme and each of the prior decisions citing or interpreting O.C.G.A. § 51-12-33. As noted by the Court, its decision is neither impacted by the Supreme Court's decision in *McReynolds v. Krebs*, nor does it impact that decision. Rather, it simply maintains the status quo and upholds the current statutory scheme. ❖

ENDNOTES

[1]A12A2544, March 28, 2013.

[2]*McReynolds v. Krebs,* 290 Ga. 850, 725 S.E.2d 584 (2012).

[3]A12A2544, March 28, 2013.

Brian T. Moore is a partner with Drew Eckl & Farnham in Atlanta. His civil litigation practice includes an emphasis in construction litigation representing local, regional and national construction companies, design-build firms, subcontractors and suppliers in an array of disputes. He also serves on the GDLA Board of Directors and chairs the Substantive Law Committee program.

Myles Levelle is an associate with Drew Eckl & Farnham in Atlanta. His practice focuses on civil litigation with an emphasis in insurance defense.

ROCK SOLID CONFIDENCE THAT YOU HAVE THE RIGHT EXPERT WITNESS.

Thomson Reuters Expert Witness Services is the leading authority in expert witness search and referral. Our research team uses proven methodologies to screen more than one million experts and find those who best match your needs. We will discuss your case facts, present qualified candidates, and arrange introductory interviews with any candidates of interest to you. You pay a negotiated fee only if you retain an expert we present. So you have nothing to lose – and the right expert to gain – with a Thomson Reuters Expert Witness search.

For more information, please visit TRexpertwitness.com/placement or call 1-888-784-3978.

THOMSON REUTERS™

Continued from page 13

advance of the transition of the employee into new employment so that a transition plan can be established. Prospective employers must allow an experienced attorney to review the restrictive covenant under the scope of the attorney-client privilege, and then develop a transition plan for avoiding the application of, or obtaining a modification of, the restrictive covenant. The weapons against enforcement provided by the statute are relatively weak.

The statute injects uncertainty, not certainty, into the restrictive covenant world. It intends to "provide statutory guidance so that all parties may be certain of the validity and enforceability of such provisions and may know their rights and duties according to such provisions." O.C.G.A. § 13-8-50.

The legislature's execution of this aim was unimaginably bad. Rather than the certain "no express time limited period, no enforceability" rule that applied to confidentiality agreements under previous law, the current O.C.G.A. § 13-8-53(e) says a confidentiality agreement can last as long as the information "remains confidential." Huh? How long is that? Certainly a period less certain than an express time limit.

The legislature's allowing judicial modification — allowing but not requiring it by saying in O.C.G.A. § 13-8-54(b) that the court "may" modify non-compliant provisions — destroys and does not promote certainty. In my pre-legislation practice, with the per se rules available at my fingertips, I had plenty of certainty whether a covenant was enforceable or not, and I knew it could not be modified by a court.

Legislation like this encourages lawyers who defend these cases to seek other avenues of attack. My recent reading has revealed one avenue that I had not expected.

JD(NY)-03-13

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT maintain or enforce the provisions contained in our Mortgage Banker Employees Agreement entitled "Proprietary/ Confidential Agreement" and "Non-Disparagement," and **WE WILL NOT** in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL notify you that the version of the Proprietary/Confidential Information Rule, and the Non-Disparagement Rule that was contained in our Mortgage Banker Employment Agreement are rescinded, void, of no effect, and will not be enforced, and that we will not prohibit employees from discussing the terms and conditions of their employment in a manner protected by the Act.

WE WILL furnish all of our mortgage bankers will a revised version of the Mortgage Banker Employment Agreement where all unlawful provisions have been rescinded.

QUICKEN LOANS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.
2600 North Central Avenue, Suite 1800, Phoenix, Arizona 85004-3099.
(602) 640-2160. Hours: 8:15 a.m. to 4:45 p.m.

NLRB CHALLENGES TO CONFIDENTIALITY, NON-DISCLOSURE, NON-DISPARAGEMENT AND EMPLOYEE AT WILL PROVISIONS, PRIMARILY IN MANUALS

Unfair labor practice charges before the National Labor Relations Board (NLRB) are an available avenue for fighting some of the claims asserted in restrictive covenant ligation. For example, in *Quicken Loans, Inc. and Lydia E. Garza*, Case No 28-CA-75857, Garza, one of the defendants in a raiding case brought by Quicken Loans against six employees for violation of non-compete agreements and on other grounds, responded with an unfair labor practice charge. The administrative law judge (ALJ) ruled in response to that charge that several of the standard employer-imposed employment agreement provisions were overbearing and violated the employees' rights to engage in concerted activities for mutual aid or protection. The standard confidentiality agreement prohibiting discussion with others of "non-public information" was construed as limiting employee conversations among themselves and thus a violation of Section 7 of the National Labor Relations Act. The unbelievable kicker of this opinion was the ALJ's order that Quicken post at its offices nationwide the notice on the previous page.

While the *Quicken* facts may have been unusual, the notice Quicken had to give regarding its heavy-handed, one-sided "agreement" is encouraging to defense lawyers. A similar ALJ-imposed revocation of handbook language regarding employment at-will was directed in *American Red Cross Arizona Blood Services Region and Lois Hampton*, 2012 WL 311334 (N.L.R.B. Div of Judges). In that case not only did the employer have to kill its overbroad language publicly, but the discharged employee was also awarded reinstatement and make whole compensation.

CONCLUSION

While I have not yet advised clients to seek relief through the NLRB, these decisions have been described as signaling a trend to employers requiring them to scrutinize the enforceability of their employment agreements and manuals for reasons unrelated to the new Georgia restrictive covenant legislation. The best advice for any defense lawyer to give any employee presented with a post-amendment covenant to sign is to take all steps possible to resist signing, short of getting fired over it.❖

Charles M. "Chuck" Dalziel, Jr. is a member at Gregory Doyle Calhoun & Rodgers in Marietta. He focuses his practice on commercial litigation, and is deeply involved in litigation and arbitration involving trade secrets, restrictive covenants, and unfair competition. He is a member of the GDLA Employment SLC.

Continued from page 20

tion to blame the individual or entity they believe to be the cause of those negative emotional reactions. This desired "evidence" often takes the form of another key element to the plaintiff's story: the portrayal of a company who chooses profits over safety, fails to take responsibility, and communicates dishonestly with its consumers and the general public.

As it goes with human nature, jurors selectively pay attention to evidence that corresponds with their attributions of blame while minimizing or even dismissing contradictory evidence. Applicable to all industries and causes of action, the concept of culpable control is helpful for conceptualizing what happens inside the minds of jurors as they listen to and evaluate the evidence.

OTHER COGNITIVE BIASES AFFECTING BLAME

As exemplified by culpable control, cognitive biases are involuntary, unconscious beliefs or attitudes that — although simply part of human nature — skew reality. Biases affect each of us as we approach new situations, and these innate biases greatly impact jurors' important decision-making process. A few cognitive biases have particular relevance to product cases involving parental negligence.

Hindsight Bias. People overestimate the foreseeability of an event because they know how that event turned out. These are the "shoulda, woulda, coulda" interpretations jurors make about the conduct of both companies and individuals. In product liability cases, jurors listen for information in the form of "if only" reasoning, particularly in relation to proximate cause evidence, to support their use of hindsight bias. Commonly observed during mock deliberations, jurors decide liability through discussions about actions the company or parent "should have" taken, assuming that party could have predicted, and thus prevented, the injury.

Attribution Error. When attempting to explain others' behavior, all individuals have a tendency to cite personality- or trait-based causes for that behavior and to minimize or disregard situational explanations. In evaluating a parent's conduct relevant to a child's injury, jurors may refer to a parent as an irresponsible or careless person (focusing on personality factors) rather than blaming something situational that may have occurred on a one-time basis, such as "he was running late that day." However, jurors may also consider the conduct of a corporation as resulting from it being greedy, dishonest, or profit-driven, versus, for example, it being unable to foresee a particular use of a product.

Base-Rate Fallacy. People are influenced more by salient, individual cases than by base rates drawn from the greater population. Remember the Kids in Danger report? There were 118 child product-related deaths in 2010. That number represents .00003 percent of children under the age of 15 in the United States and .0005 percent of children under the age of five, although jurors do not think in terms of these overall incident rates. In fact, some jurors report a firmly-held belief that "one incident is too many."

Certainly, social norms and context-specific biases also may play a role in juror decision-making. For example, some products are generally believed to have more inherent risks than others (e.g., ATVs, BB guns), and a parent may be presumed to be more liable in cases involving these products. Whether a parent's level of experience makes them more or less culpable varies, as jurors have commented that a woman "should have been more cautious" both where the woman was a first-time mother and where she was a mother of more than one child. Jurors also consider situation-specific contexts (e.g., what the parent was doing that day) and the age of the child, and they also rely on widely-held expectations of what parents should and should not do, all of which can be quite powerful in determining the outcome of a case that involves parental negligence.

CORPORATIONS: MORE BLAMEWORTHY THAN INDIVIDUALS?

In a society with a seemingly constant barrage of negative messages about corporations, individuals do have higher expectations about the conduct of corporations compared to the conduct of individuals. While the actions of individuals and corporations are evaluated using much the same criteria, more is expected of a "reasonable corporation" — in the way of responsible decisions, causation, and foresight — than a "reasonable person." The higher standard for corporations results from perceptions of their having a higher duty than individuals, as well as a professional responsibility to be knowledgeable about potential risks and to guard against those risks being placed upon consumers. The threshold for "punishable" conduct is much lower for corporations than for individuals.

As evidenced by the outcomes of several recent trials (e.g., children's pharmaceutical warning cases, child seat design defect cases), plaintiffs have been able to successfully capitalize on the presence of irrational, morally-driven, emotional triers of fact with strong views about corporations. The ensuing consequences for defendants may be unexpected and devastating. However, reducing blame on the reasonable company, and

shifting blame toward a careless or even reckless parent, is attainable. Pre-trial research and tactical voir dire both facilitate the identification of jurors predisposed to blaming defendants; however, witnesses are the primary means through which the jury evaluates each party in an effort to make ultimate conduct determinations and to attribute blame.

The Critical Importance of Corporate Witnesses. Juror responses in post-trial interviews and focus groups consistently reveal the critical importance of witness performance. In weighing the evidence and arguments, jurors look to defense witnesses to provide information that either supports or conflicts with the plaintiff's story. Bad witness testimony lowers the threshold for findings of unreasonable or reckless behavior on the part of the defendant — increasing the likelihood of a plaintiff verdict and higher damage awards. Conversely, when jurors perceive a witness to be credible, trustworthy, and in conflict with the negative portrayal by plaintiff's counsel, the conduct scale tips in favor of the defense.

Jurors seek information, largely from witnesses' nonverbal communications, that either supports or dispels the opposition's characterization of them and the side for which they are testifying. Prior to appreciating testimony content, jurors evaluate a witness' persona, tone, and communication style in determining whether that witness is truthful and likeable. In fact, impressions of character among witnesses can outweigh even the best causation arguments and amplify the impact of sufficient ones. Truly, a case can be won or lost, regardless of the causation evidence, depending on positive or negative assessments made by the jury regarding character and conduct of not only the participants in the story itself, but also the conduct and character of the witnesses and attorneys on display in the field of battle — the courtroom.

In hearing corporate witness testimony, jurors are especially interested in the extent to which individuals accept responsibility for their own actions; appear open and not evasive, arrogant, "shifty," or self-serving; respond on-target during direct and cross-examination; and demonstrate the company's efforts to be transparent in their motives, goals, and internal and external communications. Importantly, jurors cite company conduct – in the form of dishonest communication — more often than perceived product danger as a reason for favoring the plaintiff in these cases.

Shifting Blame. Even in cases involving child injury or death, defendants may be able to shift the conduct scale in a favorable direction and overcome even the direst of circumstances. In the simplest of terms, success with a jury comes down to knowing the audience, delivering a persuasive and relevant message, and using optimal communication strategies. The particular approach employed will be case-specific and will depend on nuances of the fact pattern, as well as a variety of other variables (e.g., venue, nature of the injury).

Knowing the Audience. In order to gauge the extent to which jurors may be influenced by anti-corporate bias, irrational thinking, cognitive biases, or biases specific to your case, research is key. Pre-trial research provides an exploration of juror reactions to specific case issues, witnesses, and evidence, as well as a greater understanding of jurors' attributions of blame. A supplemental juror questionnaire allows for the ability to dig deeper into each juror's life experiences, attitudes, and belief systems that will affect their ultimate decision making. Strategic voir dire elicits valuable information about risky jurors, while protecting good ones. Establishing rapport with the jury pool by asking non-threatening open-ended questions (e.g., "How do most companies feel about their products' safety?") then hitting them with critical bias inquiries (e.g., "I am interested to know to what extent you believe corporations choose profits over safety. How many of you suspect this is the case?" "How many of you are fairly certain this is the case?" and "Who believes lawsuits are an effective way to hold companies responsible for their actions?") is essential.

Crafting the Reasonable Company Story. When themes or simple concepts resonate with members of the jury, they enter the deliberation room with conviction in their beliefs and are armed with persuasive explanations to counter their opponents. Given the negative attitudes toward corporations and the higher standard to which they are held, some jurors are unlikely to ever believe that a product is as safe as it should be. However, telling the company story to demonstrate how the company fulfilled its duty is often enough to raise questions in jurors' minds about liability.

One effective approach includes: 1) describing the history of the product's conception, research, development, testing, and market launch; 2) presenting the company's efforts to identify and address various consumer uses of the product; and 3) explaining the company's response to any reported problems in the form of product improvements. At each step it is important to emphasize all that the company did within its control. Jurors want to hear each and every painstaking step the company took to execute its power in the best interest of consumers, particularly when a child is involved. Jurors expect to hear and see information indicating that a company: 1) made a safe product; 2) complied with and even exceeded government standards; 3) extensively and intentionally tested the product; 4) educated consumers through warnings and instructions; 5) communicated honestly; and 6) responded to needs for improvement.

Crafting the Negligent Parent Story. There has certainly been an increase, in theory, regarding the importance of personal duty or responsibility — indi-

viduals must do what they can to protect themselves from possible harm. In reality, however, it seems society's adherence to this value is tenuous, as people have come to expect corporations and governmental agencies to protect us from ourselves. Nonetheless, a strong theme of personal responsibility is often effective in providing 1) a foundation for the development of the reasonable company story; 2) a framework for characterizing the conduct of the plaintiff; and 3) a means of keeping the potential for juror anger and excessive damages from escalating out of control.

Jurors who otherwise would be predisposed to favor the plaintiff may begin searching for evidence to indicate that the injured party was in fact responsible, due to cognitive dissonance. Cognitive dissonance occurs when individuals attempt to simultaneously hold thoughts that conflict with each other (i.e., "dissonant" beliefs or ideas), resulting in the experience of discomfort. To resolve the distress of accepting, for example, that the bad outcome "could happen to anyone" while also believing "this won't happen to me," jurors often shift their focus toward analyzing the plaintiff's choices and decisions made leading up to the incident. Blaming the plaintiff for causing the harm resolves jurors' uneasiness and reinforces the idea that "this won't happen to me, because I would not make the same choices the plaintiff made."

Beliefs about the duties and responsibilities of parents may vary to some degree, but most people agree that a parent's duty in using a product includes: 1) informing oneself about the product; 2) providing a safe environment for the child; 3) assessing the risk of danger to the child in using the product; and 4) attentively monitoring the child and the contiguous environment.

Hindsight bias may cause jurors to blame parents for a failure to fulfill these duties, because, if they had, the injury would not have happened. In addition, jurors compare a parent's degree of knowledge to their own experience and products they themselves have used, warnings they have read, and their awareness of available information resources. Certain types of jurors will place an extremely high personal responsibility burden on plaintiffs (e.g., believing that life events, whether good or bad, are caused by controllable factors such as one's attitude, preparation, and effort), while others will always shift the blame to the corporation (e.g., persons who report a string of experiences wherein their complaints and grievances have fallen on deaf ears). Additionally, some jurors will find fault with a warning, regardless of how explicit it is. Although parents' knowledge is not informed by science or product testing per se, it is a reasonable argument to make that a responsible person with information available at every turn has had ample opportunity to be armed with sufficient knowledge.

The parent's power comes down to weighing options and making choices. Just as a company's decision-making process is described step-by-step, the parent's decisions about purchasing the product, then using it and under what conditions, must be illuminated.

The parent's power comes down to weighing options and making choices. Just as a company's decision-making process is described step-by-step, the parent's decisions about purchasing the product, then using it and under what conditions, must be illuminated. For the jurors to ultimately determine an injury was caused by circumstances well within the power of the parent, one message is indispensable: regardless of our familiarity with products and the environment in which we use them, we should never fully surrender responsibility for our own safety or the safety of our children.

Eliciting the "If Only" Plaintiff's Story. Counterfactual thinking occurs when a person considers alternative realities, in which past events could have been undone. During trial, jurors engage in counterfactual thinking by imagining "if only…" or "what could have happened… ." As jurors generate a list of counterfactuals, blame shifts toward the party they believe could have changed the outcome of the event by selecting an alternate course of action. Hindsight bias and cognitive dissonance combine synergistically to reinforce jurors' counterfactual thinking.

The stage can be set for identifying understandable or reasonable conduct through evidence and testimony (particularly that provided

by experts). Jurors will begin to ascertain what would have been reasonable choices for the plaintiff, given the same circumstances. Through the plaintiff's testimony itself, jurors will engage in counterfactual thinking to assess whether the plaintiff made reasonable choices or less safe, even risky, choices. They will compare the parent's actions (i.e., "risky decisions") one-by-one before, during, and after the incident that ultimately produced the bad outcome with those that would have been reasonable and safe, and would have led to a positive or neutral outcome. For example, "If the plaintiff followed the instructions for assembly, the product would have worked the way in which it was intended." The messages derived from counterfactual thinking can be quite powerful, particularly when complemented by expert testimony on the design, safety, and use of the product.

To demonstrate the important transfer of power from the company (as the product maker) to the parent (as the product user and supervisor of the child), it is beneficial to contrast all the various actions the plaintiff could have taken to prevent the incident with what the plaintiff contends the company should have done. Also advantageous would be presenting evidence demonstrating that the less-than-reasonable decisions the plaintiff made would have neutralized the benefit of anything the company could have conceivably done in the situation to reduce the risk of injury. Through this approach, jurors' assessments of the plaintiff's conduct begin shifting from reasonable and ordinary toward careless or reckless. Spotlighting the plaintiff's decision to either not read or read but ignore warnings is not sufficient for establishing unreasonable conduct; however, it may bolster jurors' other counterfactual reasoning.

OPTIMAL COMMUNICATION STRATEGIES

Just as important — if not more so — than the message itself is the means by which it is communicated. In general, jurors are quite tolerant of lawyers who aggressively advocate for their client, but in a child product liability case in particular, jurors become sensitive to any indication that the "victim" parent is being bullied.

Actions Speak Louder Than Words. More than 90 percent of our communication, and thus the actual message we convey, is nonverbal. As aforementioned, jurors evaluate witnesses, including those testifying for the defense, based on a multitude of factors unrelated to testimony content. Just as with other witnesses, jurors scrutinize the plaintiff in search of information about her conduct and character. Even in deposition testimony, the plaintiff's body language, response style, and expression of emotions provide clues to her vulnerabilities. Jurors carefully observe a grieving parent in court as a source of comparison to themselves (and to answer the critical question, "Could this happen to me?") and to evaluate the parent's decision making prior to, during, and after the incident.

In spite of the legitimate sympathy for the plaintiff's loss that jurors may experience, they are intuitive in spotting indications of undesirable motives on the part of the plaintiff — customarily, greed and vengeance. As previously described, attribution error often compels individuals to find evidence of character flaws in explaining bad outcomes. Jurors who label parents as "losers" or "selfish" will look to their demeanor for validation of these characterizations and not to defense counsel's own descriptions of them. Jurors criticize a parent who does not answer a question on target, who is perceived as "overly emotional" or not sufficiently emotional, who appears angry, greedy, or vindictive, who sounds argumentative, or who seems evasive.

During cross-examination, jurors are perceptive when it comes to things such as defense counsel's body language and proximity to the witness. Paralinguistics are also a key component of nonverbal communication. The pitch, tone, rate, intonation, and volume of speech used when arguing or examining witnesses (especially during cross-examination of the plaintiff) can convey respect, aggression, sensitivity, contempt, or authenticity in the eyes of the jury. To an extent greater than in other types of cases, jurors will react negatively to defense counsel's doing or saying anything in a product liability case that could be perceived as demeaning or humiliating to a witness or disrespectful to the court proceedings.

During cross-examination of a grieving parent in particular, jurors are sensitive to word choice, voice tone and volume, the witness' personal space, the sincerity of sympathy expressed by counsel,and the extent to which counsel pursues his own agenda at the expense of the witness' emotional well-being. Generating a parent's account of the timeline of events in her own words, in minute-by-minute segments, can be beneficial; however, in some cases, it may be prudent to limit cross-examination to a few basic inquiries (particularly when the plaintiff is likeable, credible, and sympathetic). Highlighting what the jury perceives to be "minor" testimony inconsistencies may be interpreted as bullying the witness. Rather, giving the parent an opportunity to "correct the record so the truth can be known" is likely to be better-received. Finally, jurors have criticized corporate defense counsel for avoiding responsibility and even "mudslinging" in response to arguments or testimony about aspects of plaintiffs' lives that may seem unrelated to the incident (e.g., criminal history, employment status). Any negative information about the parent, particularly that which places blame on her for causing the injury, should be elicited as a matter-of-fact and in as non-threatening a manner as possible. While testimony about a plaintiff's character may be vitally important for the jury's attribution of blame, it should manifest itself as a result of

a fact-finding approach that is presented in an informative, "reporting the news" fashion.

Jurors certainly have more commonalities with parents and children than they have with corporations. Therefore, being sensitive and empathetic with plaintiff-parents of an injured or deceased child is paramount. Jurors will often find a way to excuse a neglectful parent if they perceive the defense is insensitive to that parent's loss. This response may be further magnified when the defendant has chosen to file a formal pleading against the grieving parents, such as one alleging negligent supervision. It is painful psychologically for a juror who is a parent to sit in judgment of another parent. Many, if not all, jurors in a particular case may contemplate their own conduct regarding product usage, warning labels, and product safety to forgive certain conduct of a parent because it reflects what happens in "real life."

"Prove It" with Hard Evidence. To overcome pre-existing biases, jurors often look to evidence such as the product itself, safety policies and reports, consumer inquiries and complaints data, police reports, phone records, purchase receipts, corporate communications (e.g., emails) about product safety or testing, and any documentation that supports a timeline or sequence of events leading up to the incident. Jurors may be critical of arguments and cross-examinations that seem to be designed only to support defendant's agenda of winning at all costs and that are not explicitly supported by evidence. Thus, testimony and demonstrative evidence that is intended to be indicative of parental negligence should be presented in a manner that appears to be fact-finding, objective, and a reflection of defendant's "search for the truth."

You Can Lead a Horse to Water… Considering all of the possible juror obstacles to overcome, it is vitally important (especially with today's younger, more skeptical, better-informed jurors) to present the plaintiff's choices in contrast to reasonable and common decisions people in similar situations usually make, but to draw no adamant conclusions. In fact, encourage jurors to consider even more alternatives the plaintiff ignored or actively chose not to consider. And then, finally — and perhaps most importantly — empower the jury to draw their own conclusions and make their own determinations about how to rate the conduct of both parties. Younger jurors in our society want to act independently with respect to "figuring it out." These Generation X and Y jurors are very discerning of any attempt to manipulate or encroach upon their self-reliance. For them, it is all about understanding the duties and responsibilities of both the plaintiff and the defendant and then deciding who failed or did not fail in fulfilling those duties and responsibilities.

In studies of attitude change and persuasion, psychological research is clear that people are more strongly convinced of an assertion with minimal of external inducement. In other words, facts — such as the conditions under which a product was used and a parent's actions just prior to the incident — will produce more beneficial results for the defense if simply delivered to the jury in the course of providing complete information about the event, as opposed to sounding more like argument.

CONCLUSION

There are many barriers to defending products cases involving children, but particularly where parental negligence is to be addressed. In our society, anti-corporate bias is widespread, as are stories and images of products endangering the lives of children. It is critical to understand the role of relevant preexisting attitudes and beliefs, life experiences, and general attributions of blame in juror decision making — whether or not a matter ever reaches trial. These issues are particularly important to consider when audiences have extensive experience in the content domain at issue. Jurors who are parents will form opinions quickly and in an intractable manner.

In their efforts to blame someone, jurors instinctively apply a variety of cognitive strategies to reach an ultimate decision as they make critical determinations about the cause and cost of a child's injury or death. If the jury hears a reasonable company story through trustworthy and likable witnesses, parental negligence can be pursued as a defense. To shift blame toward a parent, jurors must: 1) trust corporate witnesses; 2) believe the company fulfilled its duty, informed by knowledge, and executed its power in the best interest of consumers; and 3) focus on the plaintiff's choices in contrast to available and safer options. Success depends on the ability to emphasize the parent's personal responsibility and choices, using a sensitive, fact-finding, hard evidence-based approach that empowers jurors as ultimate decision makers.❖

REFERENCES

[1] Kids in Danger (2012, March 26), "A measure of safety: Children's product recalls in 2011," Chicago, IL, retrieved from http://www.kidsindanger.org/docs/reports/A_Measure_of_Safety032612.pdf.

[2] Alicke, M. D. (2000), "Culpable control and the psychology of blame," Psychological Bulletin, 126, 556-574.

Mary Noffsinger, Ph.D., is a Litigation Psychologist with GDLA Platinum Sponsor Courtroom Sciences, Inc., a full-service, national litigation consulting firm with offices in Dallas, Chicago, and Atlanta. Her expertise in complex psychological concepts translates into powerful insights, bridging the gap between psychology and law. Mary systematically evaluates and trains fact and expert witnesses for deposition and trial, using a blend of techniques in communication science, cognitive psychology, and personality and learning theories.

Continued from page 24

images for the content. For you to be able to have the contrasting background and colors, it is often necessary to change the format of the content to Word or some other format that can be modified. There is relatively inexpensive software that will convert audio, video and audio-video content to any format that you need.

Preparing to Use PowerPoint at Trial

A PowerPoint presentation can often be effective and persuasive in the opening session of a mediation or for your opening statement at trial. If you are using PowerPoint in your opening statement at trial, you need to make sure that the trial court judge has approved the presentation and its contents. Using PowerPoint effectively in your opening statement will give the jury both an oral and visual presentation of your position, will provide you with an outline for what you are going to say, and will make it easier for the jury to follow your evidence when it is presented.

Numerous Exhibits

If you are going to have numerous exhibits at trial or have exhibits you want the jury to be able to see while the witness is testifying, a copy of the exhibits should be put in a format that can be presented to the jury on a projector screen or television while the witness is being examined. Also, if the exhibits are in this format and have been pre-approved by the court and opposing counsel, you can often effectively use these exhibits in your opening statement. It is imperative, however, that you confirm with the court and opposing counsel the admissibility of an exhibit or obtain approval of demonstrative evidence before showing them to the jury.

Numerous Photographs

If you have multiple photographs that you intend to use at a deposition, in mediation, or at trial, it is often effective and efficient to save those photographs onto your hard drive, a flash drive or a CD or DVD and show those on a projector screen, monitor or television. As long as you have a monitor and opposing counsel agrees, you can frequently introduce a CD of the photographs as an exhibit to the deposition, provide a copy of the CD to all counsel at the deposition, and show the photographs on a flat screen monitor or projector screen that you bring to the deposition.

Adobe Photoshop Elements

Another software program that you should consider learning is Adobe Photoshop Elements. The potential for effectively utilizing Photoshop cannot be addressed in an article of this length. Review the capabilities of Photoshop on Adobe's website and consider how you can effectively utilize those capabilities in preparing exhibits and demonstrative evidence, and in examining witnesses. When utilizing Photoshop, it is imperative that you always consider what will need to be done to get whatever you do in Photoshop into evidence. Also, if you want to learn Photoshop, you can find very good video tutorials on learning basically any type of visual, video and/or audio software program at www.Lynda.com.

SnagIt

Another software program that is very helpful is SnagIt, which allows you to copy portions of things appearing on your computer screen and then save them to a separate file. With this software you will be able to capture portions of a photograph, videotape, website and other things displayed on your computer.

Aerial Websites

Most people are aware of aerial maps on Bing, Google Earth, MapQuest and TerraServer, but the capabilities of these aerial maps are often overlooked or underused by attorneys. Many times it is advantageous to have an aerial photograph of an accident scene or other areas that are relevant to the case. Also, when you have a case in which changes in the terrain, bodies of water or structures are important, you can often find aerial photographs taken at different periods of time on TerraServer, Google Earth or U.S. Geological Service maps.

Utilizing Videos

If you intend to present a video at mediation or at trial, it is important that you make sure the video is in a format that can be read and projected by the laptop. There are various software programs that can 1) convert audio and video files to any type of format that is readable by your video software; 2) enhance the appearance of a poorly made or deteriorated video; 3) cut and splice portions of a video; and 4) convert single photographs into a movie. Whenever you use software to alter a piece of evidence, it is essential that you obtain approval from opposing counsel and/or the court before utilizing the altered evidence.

Conclusion

If you have any questions about what specific hardware or software to purchase, please feel free to contact me. ❖

W. Bruce Barrickman is an AV-rated litigator and mediator. He frequently speaks on the effective use of technology by attorneys at various stages of the litigation process, including at mediation. He is a founder of BAY Mediation & Arbitration Services, LLC in Atlanta. BAY is a Platinum Sponsor of the GDLA.

Continued from page 35

panion both testified there were no warning signs posted inside the store.

The store manager testified that immediately after Parker fell, there was a nickel-sized drop of water on the floor nearby. The manager said store employees often inspected and mopped the premises, but did not say whether there was a schedule or routine for inspections or mopping the floor. The store manager also testified that he saw water near the entrance of the store and in the area where Parker fell, and used a damp mop to remove the water from those areas, about five to ten minutes before Parker fell.

The trial court granted the store operator's motion for summary judgment, and Parker appealed. The Court of Appeals reversed, holding that questions of fact remained as to the store operator's negligence that precluded summary judgment.

The Court of Appeals held that the trial court erred in concluding as a matter of law that the water on which Parker allegedly slipped was not an unreasonable risk of harm because it was rainy that day. The Court of Appeals distinguished a prior Court of Appeals' opinion holding that the normal accumulation of water at the *entrance* to a business during a rainy day did not constitute an unreasonable hazard as a matter of law; Parker did not slip at the entrance to the store, but was able to enter the store, retrieve a shopping cart, and pass six checkout stations before slipping and falling.

Citing the Supreme Court of Georgia's decision in *Dickerson v. Guest Services Co. of Virginia*, 282 Ga. 771 (2007), the Court of Appeals held that the rule regarding accumulation of water at the entrance to a business on a rainy day "cannot properly be applied to a portion of an interior space where an invitee has no reason to expect water to accumulate on the floor."

The trial court relied on the fact that there was "no evidence of anything approaching an unusual quantity of standing water on the store's floor," but the Court of Appeals held that this was error because the presence of "an unusual quantity" of water is not *required* to show an unreasonable risk of harm, but rather only serves as one of many possible abnormal risks that can be created by a proprietor. *See Roberts v. Outback Steakhouse of Fla.*, 283 Ga. App. 269, 270 (2007).

The Court of Appeals also held that the testimony of Parker and his companion that there were no warning signs inside the store and that a mop had to be brought from the back of the store to mop the floor after Parker fell created issues of fact precluding summary judgment in light of the store manager's testimony that the store's procedures were to post warning signs and to keep a mop at the front of the store.

DECK COLLAPSE; LACK OF EVIDENCE OF SUPERIOR KNOWLEDGE: Defendant-homeowners were entitled to summary judgment because there was no evidence they had knowledge of any defect in the deck at their house before it collapsed.

***Thompson v. Oursler*, 318 Ga. App. 377 (Oct. 16, 2012)**

William Ourlser, Jr. was standing on the wooden deck at Robert and Peggy Thompson's house when it suddenly detached from the house and collapsed. Oursler and his wife, who were guests of the Thompsons at the time of the incident, sued the Thompsons alleging they negligently failed to inspect and maintain the deck.

Oursler testified that he had been a guest at the Thompsons' house and had been out on the deck a number of times and had walked underneath the deck before the day it collapsed. Oursler did not observe anything about the deck or how it was attached to the house that made him suspect it was unstable or structurally unsound. Oursler testified the deck looked weathered and needed to be painted or stained, but he said that was only a cosmetic issue. Oursler said he had no reason to believe the wood of the deck was cracked or broken or that the deck was unsafe.

Apparently Oursler did not present any evidence that the Thompsons knew or should have known the deck was unsafe. There also was no evidence presented by either side as to why the deck detached from the house and collapsed.

The Thompsons moved for summary judgment, the trial court denied their motion, and the Thompsons appealed.

The Court of Appeals reversed, holding that the absence of any evidence that the Thompsons knew or should have known the deck would collapse, Oursler could not recover from them for his injuries. Since Oursler was a social guest, and thus a licensee, at the time of the incident, the Thompsons owed Oursler only the duty not to willfully or wantonly allow a dangerous, static condition in the deck to cause him injury.

Because there was no evidence the Thompsons had knowledge of a defect or dangerous condition in the deck that caused it to collapse, the trial court erred in denying the Thompsons' motion for summary judgment.❖

Continued from page 37

Ningo Hicon International Industry Company; (2) the distributor, Haier America Trading, LLC; and (3) h.h.gregg, Inc., the retailer. Ningo Hicon manufactured the freezer in China and shipped it to Haier in China for distribution. Haier then sold the freezer to h.h.gregg who sold it to Plaintiff.

Ningo Hicon moved to dismiss Plaintiff's claims for lack of personal jurisdiction, arguing it was a Chinese company with no offices, distribution centers, or personnel in Georgia; its employees have never been to Georgia to conduct business; and it did not market or advertise in Georgia. Plaintiff argued that Georgia's long arm statute, O.C.G.A. § 9-10-91, extended to the boundaries of due process and analysis under the long arm statute was, therefore, unnecessary.

The court first held that the Georgia long arm statute falls short of the boundaries of due process. The court then analyzed the third prong of Georgia's long arm statute, which extends jurisdiction to a defendant that "[c]ommits a tortious injury in this state caused by an act or omission outside this state if the tort-feasor regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state." Plaintiffs argued that personal jurisdiction was proper because Ningo Hicon derived substantial revenue from goods used in Georgia. Plaintiffs submitted evidence that h.hgregg realized $326,850.00 in revenue from Georgia based on the sale of products manufactured by Ningo Hicon. However, Plaintiffs were unable to establish what revenue Ningo Hicon itself derived from these sales.

The court noted that Ningo Hicon did not sell directly to h.hgregg, but sold to Haier, who then sold the products to h.h.gregg. Based on this, the court found that Ningbo Hicon's revenue was substantially removed and distinct from h.h.gregg's. Accordingly, the court found that Plaintiffs were unable to identify any portion of Ningbo Hicon's revenue derived from Georgia and were also unable to demonstrate that this amount was substantial when compared to Ningbo Hicon's entire revenue. The court found no personal jurisdiction under Georgia's long arm statute and granted Ningo Hicon's motion to dismiss.

DEFECTIVE PRODUCE/ ASBESTOS EXPOSURE: Georgia Supreme Court grants petition for certiorari to consider whether apportionment of fault under O.C.G.A. § 51-12-33 at trial requires a defendant to put forth evidence of liability on the part of the nonparty.

***Union Carbide Corporation v. Fields*, 315 Ga. App. 554 (March 20, 2012)**

Plaintiffs brought product liability claims based on asbestos exposure. Defendants pleaded the affirmative defense of nonparty fault in their answer. Plaintiff moved for partial summary judgment to stop Defendants from presenting the potential fault of nonparty entities for the purpose of apportioning damages. The trial court granted Plaintiff's motion for partial summary judgment with respect to 45 nonparty entities. Defendants appealed to the Court of Appeals on 16 of those entities.

The Court of Appeals (Miller, Ellington, and Doyle) unanimously affirmed the trial court's decision, explaining that Defendants must produce evidence of fault or negligence by the nonparty for the jury to consider the nonparty in the apportionment of damages. The Court of Appeals found that Plaintiffs produced no evidence that the parties in question were at fault in any way. The Court of Appeals considered five companies originally named in Plaintiffs' complaint but removed in subsequent amended complaints. Because the verified or unverified allegations of a complaint are not evidence for defeating summary judgment, and because Defendants did not offer evidence of exposure to asbestos from one of these companies, there was no evidence of nonparty liability. The Court of Appeals also found that Plaintiff's sworn information statement identifying the non-parties as causing her injuries was insufficient evidence because the information statement was based on information and belief.

On February 4, 2013, the Supreme Court unanimously granted Defendants' petition for certiorari to consider the following questions:

1. Did the Court of Appeals err when it affirmed the award of partial summary judgment to Plaintiffs based on the failure of the defendants to come forward with evidence of exposure to asbestos-containing products manufactured by certain nonparties, notwithstanding that the plaintiffs had alleged such exposure in their own pleadings?
2. Did the Court of Appeals misapply the "right for any reason" doctrine when it, in the alternative, affirmed the award of partial summary judgment to the plaintiffs based on the failure of the defendants to come forward with evidence of causation?

The case was assigned to the May 2013 oral argument calendar.❖

Continued from page 39

policy where the insurer was not asked to and did not intend to provide coverage for its insured's motor carrier operations.

***Grange Mut. Cas. Co. v. Pinson Trucking Co., Inc.*, 2013 WL 443619 (USDC, MD Ga. Feb. 5, 2013)**

This declaratory judgment action stems from an underlying collision involving several injuries and deaths caused by an employee of Pinson Trucking Co. ("Pinson") driving a Pinson truck-tractor leased to Lumber Transport ("Lumber"). Pinson and Lumber were both for-hire motor carriers operating commercial motor vehicles for the purpose of transporting property. Only Lumber was authorized by the USDOT to transport property across state lines and within Georgia. Because Pinson did not have motor carrier authority and could not haul goods for hire, it leased its truck-tractor to Lumber and, under the lease, provided a driver. Lumber had exclusive possession, control, and use of the tractor and assumed complete responsibility for the operation of the tractor. Under the lease, Lumber agreed to and did provide liability insurance to Lumber, Pinson, and Pinson employees through a policy issued by Great West Casualty Co. ("Great West").

Grange Mutual Casualty Co. ("Grange") issued a "commercial package" policy to Pinson. At the time it issued the policy, Grange knew that Pinson was a for-hire motor carrier operating motor vehicles for the purposes of transporting property in interstate and intrastate commerce, but neither it nor Pinson intended the policy to provide liability coverage for Pinson-owned vehicles leased to Lumber. Rather, the policy was intended to and did provide general liability coverage for people on Pinson's premises, property damage coverage for Pinson's buildings, and a commercial automobile coverage endorsement covering two scheduled vehicles — a pick-up truck and a motor home. The Grange policy did not contain an MCS-90 endorsement or a Georgia Form F endorsement.

After the limits of the Great West policy had been exhausted and the limits of a separate excess policy had been substantially reduced, Grange refused to pay a settlement demand by two claimants and filed this declaratory judgment action to determine whether its policy provided coverage to Pinson and its driver. Defendants argued that Grange's policy should be rewritten to include $750,000 of coverage, the minimum amount required for an MCS-90 endorsement, because "Grange had actual knowledge Pinson was a for-hire interstate motor carrier." *Id.* at 4. Grange contended "that no authority supports incorporating an MCS-90 endorsement into a general commercial liability policy issued to a business that happens to be a motor carrier." *Id.* (internal marks omitted).

The court rejected Defendants' argument, holding that neither Grange nor Pinson intended to insure Pinson's tractor; Pinson intended, and the lease agreement provided, that Lumber would provide the required insurance for Pinson's tractor; and Grange, despite knowing that Pinson was a motor carrier, only intended to insure Pinson's pick-up truck and motor home. *Id.* at 4-5.

The court also rejected Defendants' public policy argument that the claimants would not get the benefit of the minimum coverage required for an interstate motor carrier unless the court rewrote the policy to include an MCS-90 endorsement. The court emphasized that "Grange did not undertake to insure Pinson's trucking operations" and that coverage exceeding the statutory minimum had been available through Lumber's insurers.

The court rejected Defendants' arguments that the Georgia Form F endorsement should be written into the Grange policy for the same reasons.

SPOLIATION: Court of Appeals rejects imposition of the "most extreme sanction" based on trial court's erroneous findings.

***Sentry Select Ins. Co. v. Treadwell*, ___ Ct. App. __ 734 S.E.2d 818 (2012)**

Plaintiff sued tractor-trailer driver Martin, Premier Transportation ("Premier"), and insurer Sentry Select Insurance Co. for injuries stemming from a rear-end collision. Plaintiff moved to strike Defendants' answer based on alleged spoliation of Martin's logbooks, GPS data, ECM data, and investigative material. The trial court granted the motion and struck Defendants' answer based, in part, on a finding that Defendants had destroyed the ECM data and "results from the investigation."

The court first noted the established principle that notice of liability is not the same as notice of litigation and that notice of an injury, alone, is not notice of contemplated litigation sufficient to trigger the rules of spoliation. 734 S.E.2d at 820. The court rejected Defendants' argument that they were unaware of contemplated litigation, noting that Plaintiff's attorney had sent a letter of representation shortly after the collision, stating that Plaintiff was still treating and he would be back in touch regarding settlement. Additionally, Premier's vice president testified that he was aware of

possible litigation and that, in his experience, every highway collision "does involve a claim." *Id.* Finding "ample evidence" that Premier was aware of contemplated litigation, the court affirmed the finding of "some spoliation" but remanded for consideration of the appropriate sanction. *Id.* at 820-21.

The court found sufficient evidence that Defendants destroyed Martin's logbooks and GPS data but held that Plaintiff had not pointed to evidence supporting a finding of spoliation as to the ECM data or investigation materials. As to the former, Plaintiff claimed that Defendants failed to use the correct software to download the ECM, resulting in a failure to retrieve "hard brake" data. The court rejected that argument, finding that Plaintiff had failed to show such data was stored in and could have been retrieved from the ECM: For there to be spoliation, "the evidence in question must have existed and been in the control of a party." *Id.* at 822. Accordingly, the trial court erred in finding spoliation as to the ECM data. Likewise, the trial court erred in finding spoliation as to the investigative results because Plaintiff did not mention it as a ground for her spoliation claim and the trial court did not state the basis for its conclusion.

Based on the foregoing, the court held that striking Defendants' answer — the "most extreme sanction" — was not warranted and remanded the case for further consideration of the appropriate sanction. *Id.* at 822-23.❖

Support the 2013 GDLA Sponsors

Advancing the Civil Defense Bar

The GDLA thanks its sponsors for partnering with the defense bar to help our members deliver quality services to their clients.

The GDLA encourages members to use these sponsors when the need arises. Should you have the opportunity to employ one or more, please let them know their sponsorship was a key factor. That helps them measure their return on investment, which ultimately helps us retain their valuable support.

All ads in this newsletter are from our sponsors — Platinum is full-page, Gold is half-page and Silver is quarter-page in size.

The sponsors are listed below alphabetically by level and can also be found in the Members Only area of the GDLA website. Just click on "GDLA Sponsors" in the left navigation. Online you will find their contact information, as well as a brief description of their services. There you will also find a listing of sponsors sorted by type of services offered.

PLATINUM

BAY Mediation & Arbitration Services LLC
www.bayatl.com

CED Investigative Technologies, Inc.
www.cedtechnologies.com

Collision Specialists, Inc.
www.collisionspecialistsinc.com

Courtroom Sciences, Inc. (CSI)
www.courtroomsciences.com

Daily Report
www.dailyreportonline.com

Engineering Systems, Inc.
www.esi-website.com

Exponent
www.exponent.com

FORCON International Corp.
www.forcon.com

Global Legal Discovery, LLC
myglobaldiscovery.com

Matson Driscoll & Damico LLP
Forensic Accountants
www.mdd.net

Miles Mediation & Arbitration Services LLC
www.milesmediation.com

Nelson Architectural Engineers
www.nae-us.com

SEA Limited
www.SEAlimited.com

Thomson Reuters Expert Witness Services
www.roundtablegroup.com

GOLD

Callaway Geer Certified Public Accountants
www.callawaygeer.com

DecisionQuest
www.decisionquest.com

Esquire Deposition Solutions
www.esquiresolutions.com

ProAssurance
www.galawic.com

RGL Forensics
www.rgl.com

South Georgia ADR Service
www.southgeorgiaadr.com

Tiffany Alley Court Reporting & Video
www.tiffanyalley.com

Trial Exhibits, Inc.
www.trialexhibitsinc.com

SILVER

Courtroom Visuals
www.courtroomvisuals.com

Delve Information Resources, Inc.
www.delveinfo.com

Elizabeth Gallo Court Reporting
www.GeorgiaReporting.com

Georgia Academy of Mediators & Arbitrators
www-.georgiamediators.org

Gottschalk Technical Services, Inc. (GTS)
www.gts-storage.com

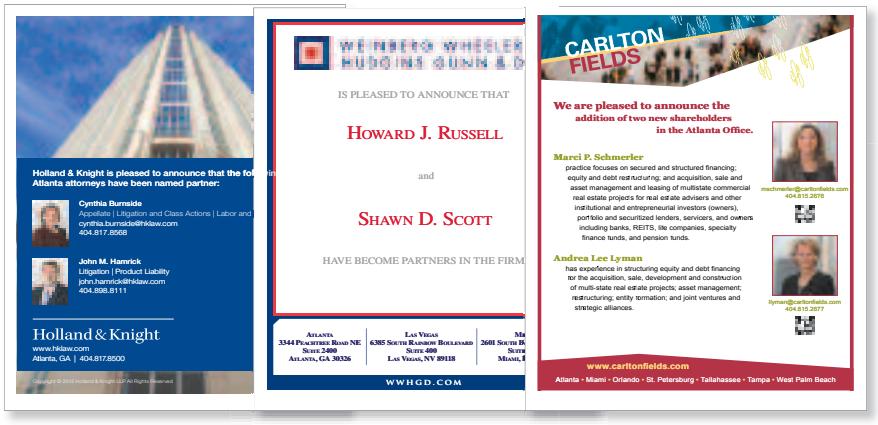
Southern Medical-Legal Consulting LLC
www.southernmlc.net

Don't miss any opportunity to partner with the *Daily Report:*

Speak to an in-house counsel only audience at one of our seminars.

- Obtain an exclusive topic in your practice area.
- In-house Counsel Survey practice area topics requested include Labor & Employment, Intellectual Property and Real Estate
- **Seminars in 2013** - June 27th, September 25th, December 4th

Run a Professional Announcement



- This is a perfect way to honor firm members, congratulate partners or highlight new hires.
- Place your firms Professional announcement in our paper or take advantage of our new Professional Announcement emails sent to our proprietary email database.

If you have any questions or for more information, please contact:

Susan Campbell, Esq., Director of Client Services
scampbell@alm.com • 404-419-2820

DAILY REPORT
An ALM Publication

After 41 years our work speaks for itself.

However, we'll be glad to send someone with expertise in case anyone has questions.

At S-E-A, we've been investigating and revealing the cause of accidents and failures since 1970. S-E-A also has the capabilities and physical resources to recreate accidents, fires and many other occurrences under simulated conditions to arrive at replicable and accurate answers that withstand scrutiny. We've always stood behind our work and we'd like to remind you that we'll also stand beside it, and you, in court. Any Questions?

S-E-A

Scientific Expert Analysis™

800-743-7672
www.SEAlimited.com