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The Court Has Spoken: A Party's Duty to Disclose Insurance Coverage in Discovery Responses

By Jake Evans
Lewis Brisbois Bisgaard & Smith Atlanta

On February 24, 2014, the Supreme Court of Georgia handed down the *Ford Motor Co. v. Conley*, 2014 Ga. LEXIS 131 (2014) decision. This decision examined whether improper jury qualification stemming from Ford's inaccurate responses to Interrogatories necessitated a new trial. The triggering Interrogatory requested Ford to disclose any casualty and/or liability insurance that it carried. In pertinent part, Ford responded: "Subject to and without waiving its objections, Ford states it has sufficient resources to cover any judgment that could be reasonably rendered in this case, if any."

Along with innumerable other product defect defendants, Ford has responded to similar Interrogatory requests for upwards of 20 years with this exact language. Accordingly, this decision entailed pervasive repercussions for defendants and, more particularly, their discovery responses. This article aims to survey the *Conley* decision, articulate its holding and rationale, and present a procedural framework from which defendants can comply with the Georgia Civil Practice Act following the *Conley* decision.

I. Cursory Survey of O.C.G.A. § 9-11-26(2)

O.C.G.A. § 9-11-26(2) is principally pertinent to this discussion. It dictates that an insurance policy that may satisfy part of a judgment must be disclosed. However, evidence of insurance coverage is not admissible at trial and this disclosure does not waive any admissibility defense. Indeed, Georgia courts have held that, not only is a liability insurance policy not admissible in evidence, but disclosure to the jury of the existence of such contract is grounds for a mistrial. *McKin v. Gilbert*, 208 Ga. App. 788 (1993). Courts have repeatedly adhered to this rule that evidence of insurance coverage is so prejudicial by nature that it should not be admitted unless it is clearly relevant.

Despite the above, in *Conley v. Ford Motor Co.*, Ford did not disclose the existence of excess insurance coverage. Rather, Ford utilized its standard discovery response, which is outlined above. In this case, the jury returned a defense verdict

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Inside This Issue

GDLA Honors Atlanta Judges at 11th Annual Reception

The GDLA hosted its 11th Annual Judicial Reception at the State Bar of Georgia headquarters on February 6, 2014.

This yearly gathering honors Atlanta area judges from state court, superior court, State Board of Workers' Compensation, state appellate courts, and federal court.

Pictured there are GDLA President Ted Freeman (right) alongside his law school classmate and Douglas Superior Court Judge David Emerson. See pages 26-27 for more scenes from the evening.

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President's Message

The year 2014 has brought some exciting changes to the GDLA.

First, we introduced a new logo, as many firms and businesses do over time, to refresh our brand. The first GDLA logo (pictured at right) was created by Past President Salty Forbes' wife Lee, an acclaimed portraiture artist in Savannah. Her design served us well for almost a quarter-century with the addition of the tagline "Advancing the Civil Defense Bar" in recent years.

Lee's contribution during the infancy of the GDLA represents the "all hands on deck" mentality of our founding members, their office staff, and even spouses, who worked together to establish the foundation of success on which we continue to build. We so appreciate Lee's giving the GDLA its first graphic identity.

Next, in conjunction with the logo unveiling, we launched a new website, featuring not only a new design, but also improved functionality that is mobile-friendly. The new site will help you access and manage your membership profile more easily by allowing you to make changes to your information directly yourself.

The exception to self-updating is when you change firms. Because we like to keep up with who's where, ensuring the integrity of our defense-only membership, you will see a link to request firm updates.

We also added a number of fields to the membership profile area, which we believe will enhance the usefulness of our database: primary counties in which you practice, language fluency, other state bar admissions, and law school. Please also take time to check off your practice areas. While these align with our Substantive Law Committees (SLCs), note that SLCs operate much like State Bar sections in that you can be as involved as you wish, while availing yourself of practice-specific CLEs and more.

Within the Members Only area, the "Find a GDLA Member" link now lets you search by these new fields, so please take time to complete your profile and help us make the membership database a more robust resource for everyone.

That way, for example, if you find yourself with a case in Toombs County, you will be able to search for GDLA members who regularly appear there and get some insider's intelligence. Of course, you can always send an e-mail blast, but we believe this will be a helpful, bonus reference tool.

We have also added a diversity field to the membership profile, as we seek to understand our composition and to ensure diversity with CLE speakers, leadership, etc.

So, if you have not already been to the new website and updated your profile, then go to www.gdla.org and click "Login." For your first visit, you will need to click "Reset Password," after which you will be required to enter the month/day/year of your first state bar admission, since that is needed to calculate dues owed annually.

Finally, our association continues to grow, having more than doubled in the last five years to 780 members. We hope you will continue to reach out to your defense colleagues who are not yet members and encourage them to join the GDLA. While we started 47 years ago largely as an insurance defense group, we have expanded our reach to include any lawyer engaged in the defense of a business or individual in Georgia.

This is in line with our national counterpart, DRI, as well as other state and local defense organizations nationwide. We are in regular communication, sharing ideas with the foregoing to foster a unified front for the interests of all of the clients whom we defend. Increasing our ranks truly does advance the civil defense bar, so please help us continue to grow and together achieve that goal.

For the defense,

Theodore Freeman
Freeman Mathis & Gary, Atlanta

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Member & Legal News

Member News

Duncan & Adair announced that the firm has merged with *Dennis Corry Porter & Smith*, both in Atlanta, making GDLA Past President **George E. Duncan, Jr.** a partner and **Jennifer C. Adair** of counsel at the new combined firm. Duncan will continue his practice focusing on general liability and premises liability defense, and Adair will continue her practice focusing on general liability defense. It is noteworthy that Duncan joins fellow GDLA Past Presidents R. Clay Porter and Grant B. Smith at the firm founded by the late Doug Dennis, also a GDLA Past President.

The Litigation Counsel of America (LCA) announced the inaugural Peter Perlman Service Awards, and named **Rita A. Sheffey**, partner at *Hunton & Williams* in Atlanta, among the first class of recipients. The award recognizes LCA Fellows and others within the legal profession who contribute in meaningful ways to society by giving back their time and resources in an effort to improve the lives of others. The award is supported and sponsored by Peter Perlman, the 2013 President of the LCA.

Martin Snow in Macon announced that **J. Slade Edwards** was recently named partner in the firm. Edwards, who has litigation experience in a variety of fields, practices in the firm's litigation section and focuses principally on the defense of medical malpractice lawsuits against doctors, hospitals and other health care professionals. He is a graduate of the Terry College of Business School at the University of Georgia and Walter F. George School of Law at Mercer University. He joins his father, John Edwards, as a second-generation partner in the firm.

Swift Currie McGhee & Hiers in Atlanta announced that **Thomas B. Ward** and **Melissa A. Segel** have been named to the firm's partnership. Both were featured in the *Daily Report's* "New Partners Class of 2014" on March 19. Ward's practice focuses on first- and third-party coverage litigation, property claims, extra-contractual claims, and bad faith, in which he has taken coverage disputes and first-party claims from initial coverage opinions through judgment following jury and bench trials. He received his B.B.A. from Georgia State University in 1999, and his J.D. from Walter F. George School of Law at Mercer University in 2005. Segel practices commercial litigation and insurance coverage with an emphasis on bad faith and arson and fraud. Prior to joining the firm, she worked in the insurance industry for over a decade, specializing in property and special investigations. She received her B.S. from the University of Florida in 1992, and her J.D., *magna cum laude,* from Georgia State University College of Law in 2006.

Also featured in the *Daily Report's* "New Partners Class of 2014" article on March 19, was **Christopher B. Freeman**, who was elected to shareholder by *Carlton Fields Jorden Burt* in the Atlanta office. He concentrates his practice in general business litigation and insurance coverage disputes, including a broad range of cases involving commercial disputes, insurance coverage actions, business torts, product liability, class actions and media law. He received his B.A., with distinction, in 2001 from the University of Virginia, and his J.D. in 2004 from Vanderbilt University Law School.

Mozley Finlayson & Loggins in Atlanta announced that **Allison E. Maloney** has been elected to the partnership. Maloney practices in the firm's construction and transportation litigation group. She attended Davidson College where she received a B.A., graduating *cum laude* in 2002. She received her J.D. from the University of Georgia School of Law, graduating *cum laude* in 2006.

GDLA's Richardson Award Presented at UGA Law School

GDLA President Ted Freeman (left) was on-hand to congratulate W. Matthew Wilson as the recipient of the 2014 Willis J. "Dick" Richardson Jr. Student Award for Outstanding Trial Advocacy at the University of Georgia School of Law. This annual award, sponsored by the GDLA, honors the memory of one the GDLA's founding members. The award was presented on March 28, 2014, by Dean Rebecca H. White, at the 2013 Georgia Law Awards Program in the Hatton-Lovejoy Courtroom.

Brad Marsh, a partner at *Swift Currie McGhee & Hiers* in Atlanta, serves on the Formal Advisory Opinion Board of the State Bar of Georgia, and was elected Chairperson for the 2013-14 term.

Ann Baird Bishop has become a partner with *Sponsler Bennett Jacobs & Adams*, and will be practicing exclusively workers' compensation defense out of its Atlanta office. The entire firm of *A. B. Bishop & Associate*s merged with Sponsler Bennett Jacobs & Adams. The firm is headquartered in Tampa, Florida, and, in addition to Atlanta, has offices in Lakeland, Florida; Fort Myers, Florida; Palm Beach Gardens, Florida; and Los Angeles, California.

Karisa Kopaczewski Klee, formerly with *Carlock Copeland & Stair*, has joined the civil litigation defense practice group at *Lueder Larkin & Hunter* in Atlanta. Klee's practice is focused in the area of workers' compensation and subrogation litigation.

Donald R. Andersen has joined *Taylor English Duma's* Intellectual Property Litigation, Aviation, and Products Liability practices. Previously with *Stites & Harbison*, Andersen brings more than 37 years of experience handling intellectual property, aviation and product liability cases in state and federal courts. Prior to joining Stites & Harbison, he served as associate general counsel for Piper Aircraft Corporation, where he supervised nationwide defense of Piper PA-28 and PA-32 aircraft and participated in trial counsel in cases throughout the U.S.

Charles G. Hoey is now of counsel with the Atlanta office of *Leitner Williams Dooley & Napolitan*. Hoey will continue to focus on the defense of workers' compensation claims, subrogation claims and general insurance defense. He is also a licensed mediator and will continue to provide those services as well. Founded in 1882, Leitner Williams Dooley & Napolitan has grown into a firm with hundreds of years of combined experience in litigation and mediation in Tennessee, Georgia, Mississippi, Arkansas and Kentucky.

Case Wins

Scott Masterson and **Brantley Rowlen**, partners in the Atlanta office of *Lewis Brisbois Bisgaard & Smith*, along with *Swift Currie McGhee & Hiers* partner **Roger Harris** and associate **Shannon Hinson**, obtained a defense verdict on November 22, 2013, in a wrongful death trucking case in Gwinnett County.

Plaintiff Donnie Jean Woods filed suit on behalf of her husband's estate against the defendant driver, Nekia Ramey and his employers, Berger Transfer and Allied Van Lines. Plaintiff alleged that on August 4, 2005, Jimmy Woods was driving eastbound on Georgia Highway 20 in Cartersville, and a van driven by nonparty Jason Lee Green was traveling in front of Woods. Plaintiff further alleged that, at the same time, Defendant Ramey was driving westbound on Georgia Highway 20 in the far left center lane going at least 65 miles per hour, which exceeded the 45 miles per hour speed limit.

As Defendant Ramey's truck approached Green's van, Green's van crossed the centerline and clipped Defendant Ramey's truck. Airbags did not deploy on this initial contact, and both vehicles were steerable. Defendant Ramey then crossed the center line out of his lane of travel and into oncoming traffic. Defendant Ramey traveled approximately 180 feet and was steering right before violently striking Jimmy Woods' vehicle.

Defendant Ramey's truck pushed Jimmy Woods' car more than 64 feet backwards, and flipped and slid to its final rest. Plaintiff contended Defendant Ramey's speed and inattentiveness contributed to his losing control of his vehicle, caused him to crash into Woods and had Defendant Ramey not been speeding, inattentive and overreacted, the second collision with Jimmy Woods would not have happened.

At trial, Defendants maintained the defense that "but for" Green crossing the center line and impacting Ramey, the impact that took Woods' life would not have occurred and, as such, no act or omission attributable to Defendant Ramey caused or contributed to Woods' death. Additionally, Defendants showed the jury that Ramey was attentive and safely traveling at a speed well below the 65 miles per hour alleged by Plaintiff. Plaintiff asked for $30 million in closing. The jury deliberated for just over three hours before returning a defense verdict.

Masterson and Rowlen defended Ramey and Berger Transfer, while Harris and Hinson defended Allied Van Lines. The plaintiff was represented by Pete Law and Edward Piasta of Law & Moran, Douglas Aholt of Chambers Aholt & Rickard, and Ron Lowery.

In another case, *Lewis Brisbois'* **Brantley Rowlen** obtained summary judgment in a medical malpractice and wrongful death lawsuit arising out of the death of a Statesboro nursing home patient who asphyxiated after being at the facility for a mere six hours.

The decedent's husband filed suit in February 2005, alleging Defendant's care and treatment deviated from the standard of care due to alleged failures to provide adequate hydration, nutrition, hygiene and airway management. To support his allegations, Plaintiff retained a registered nurse to serve as his expert. After the close of discovery, Defendant filed a Motion for Summary Judgment on the ground Plaintiff could not establish a causal connection between the nursing home's alleged negligence and the Decedent's injuries because he failed to retain an expert qualified to render an opinion regarding the medical cause of Decedent's death.

Whether or not a registered nurse is qualified to opine as to a patient's cause of death was an issue of first impression in Georgia. Rowlen successfully persuaded the court that an expert must be a licensed physician in order to be qualified to render a medical diagnosis and offer medical causation testimony as to a person's cause of death.

Recently, **Michael J. Rust**, a partner at *Gray Rust St. Amand Moffett & Brieske* in Atlanta, and **Debra K. Haan**, of counsel with the firm, successfully represented the owner of a building in DeKalb County in a lawsuit brought by a former tenant. Plaintiff alleged that it suffered damages and loss of revenue due to roof leaks which Plaintiff claims were caused by Defendant's negligence. Plaintiff also alleged that Defendant breached the lease by failing to refund Plaintiff's security deposit, breached the covenant of quiet enjoyment by entering the leased premises without reasonable advanced notice to Plaintiff, and overcharged Plaintiff for common areas expenses. Prominent among the issues in dispute in the case were the causes of water leaks into the leased premises and the basis for the lost revenue damages claimed by Plaintiff.

In the initial round of discovery, Defendant requested documentation regarding the roof leaks and lost profits among other things. In response, Plaintiff produced few documents and insufficient interrogatory responses. A motion to compel was filed and a hearing was held before Judge Hydrick. After the hearing, the judge ordered Plaintiff to pay $1,000 in attorneys' fees and to supplement the discovery responses and produce relevant documents within two weeks of the entry of a consent Confidentiality Order, which was entered in September 2012.

After depositions began, it became apparent there were many relevant documents not produced. On the last day of discovery, May 28, 2013, Plaintiff produced 80,000 pages of additional documents. Within those documents were records showing some of the equipment that Plaintiff alleged to have been damaged by roof leaks was inoperable for various other reasons prior to the roof leaks. Also, included in the 80,000 pages were Board of Directors meetings of Plaintiff showing that after depositions had taken place, and long after the Board meetings themselves, the minutes of one meeting had been altered to reference the roof leak. Only after the production of the additional 80,000 pages in May 2013 was Defendant able to discover that the original minutes of one of the Board meetings, circulated in February 2011, included no reference to a leak. The altered meeting minutes had been previously produced.

A hearing was held on these issues during which officers of Plaintiff were called to testify and the court found that Plaintiff offered no credible explanation for the alteration and the production to Defendant of the altered document. Nor did Plaintiff offer any reasonable explanation for its failure to produce thousands of responsive documents until more than one year after they were requested and several months after the court ordered deadline.

Under these circumstances, Judge Hydrick granted the most severe sanction of dismissing Plaintiff's Complaint with prejudice. After a subsequent hearing she also awarded $37,000 in attorneys' fees and expenses for the cost

of having to file these motions in pursuit of discovery from Plaintiff.

The Defendant has a pending counterclaim against Plaintiff which is ongoing. The defense expects an appeal of Judge Hydrick's Order at some point in the future but, for the time being, Plaintiff has paid the attorneys' fees ordered by Judge Hydrick.

On February 11, 2014, after seven days of trial, partner **Milton B. (Burt) Satcher** and associate **Laura M. Strong** of *Owen Gleaton Egan Jones & Sweeney* in Atlanta obtained a defense verdict in the Superior Court of DeKalb County for their client, a psychiatrist practicing in Atlanta. The case was originally filed in 2004 and went to trial only after two separate trips to the appellate courts of Georgia. The plaintiff alleged that the psychiatrist negligently removed him from certain psychiatric medications and that, as a result, he became psychotic and brutally killed his mother. The defense team was able to show that the psychiatrist's treatment of the plaintiff was at all times within the standard of care. Moreover, through extensive fact witness testimony and documentation, the defense was also able to demonstrate that the plaintiff was not psychotic when he killed his mother. The jury took approximately one hour and 45 minutes to reach a verdict for the defendant. Throughout the lengthy course of the litigation, no offer of settlement was ever made on behalf of the defendant.

The Georgia Court of Appeals affirmed a summary judgment award to *Rutherford & Christie* in a construction defect case and the Supreme Court denied certiorari. Partner **Carrie L. Christie** and associate **Courtney Marcelo Norton,** in the firm's Atlanta office, defended a national restaurant chain in the lawsuit brought by a plaintiff who tripped and fell on a concrete wheel stop located in a parking space at the restaurant, and sustained significant and permanent injuries. The plaintiff's expert architect testified that placement directly in front of the restaurant's entrance violated the National Fire Prevention Association Life Safety Code and the American Society for Testing and Materials (ASTM) Standard F 1637-95.

The defense convinced the trial court, Court of Appeals and Supreme Court that the design of the wheel stop was not "hazardous," and its placement did not violate the Life Safety Code, as the "means of egress" did not include parking spaces, which are intended to be occupied by vehicles and, thus, destined to be blocked. Moreover, additional sections of the ASTM specified the size and placement of wheel stops and, ostensibly, allowed them to be used inside parking spaces.

This issue was a case of first impression in Georgia and the win comes at a time when plaintiff's attorneys have been successfully defeating summary judgment through the use of expert testimony. Because the use of wheel stops is prevalent among Georgia businesses, this appellate decision and the denial of certiorari by the Supreme Court sets a favorable precedent that benefits all premises owners with similar construction designs on their property. ❖

Judicial Relations Leaders Appointed: Get Involved with Nominations

President Ted Freeman appointed **David A. Marshall,** (above right) a partner at Atlanta's Hawkins Parnell Thackston & Young, and **Edward T. McAfee**, (below right) a partner with Lewis Brisbois Bisgaard & Smith in Atlanta, to serve as chair and vice-chair, respectively, of the GDLA's Judicial Relations Committee.

The duo takes over for GDLA Past President Robert M. Travis of Byran Cave in Atlanta, who served as chair for several years.

The GDLA's Judicial Relations Committee works with the state's Judicial Nominating Commission (JNC) to vet judicial candidates. The first JNC was established by executive order in 1972 by then-Governor Jimmy Carter, and subsequent governors have followed Carter's example. The JNC's purpose under current Governor Nathan Deal is to recommend candidates to fill vacancies on the supreme court, court of appeals, superior court and state court.

Co-chaired by J. Randolph Evans and Pete Robinson, the JNC interviews candidates then submits to the Governor a list of candidates they feel reflect the most qualified for the position.

As part of the vetting process, the JNC regularly invites input from bar associations and other organizations during its review of judicial candidates. The GDLA is among those included in that process; therefore, GDLA members will be regularly notified of judicial vacancies and candidates by Judicial Relations Committee leaders Marshall and/or McAfee via our blast e-mail system.

GDLA members are strongly encouraged to participate in the important process of vetting judges by e-mailing or calling Marshall and/or McAfee with your perspectives on the judicial candidates, whether positive or negative.

You can find their contact information at the end of each e-mail announcing a judicial vacancy or by visiting "Find a Defense Lawyer" on the GDLA website. ❖

Welcome New GDLA Members

The following were admitted to membership by the Board of Directors at its Winter and Spring Meetings. As part of our RecruitOne II membership drive, in effect during the Winter Meeting, we are pleased to recognize the GDLA members who were listed as a referring party on a prospective member's application. New GDLA members' names are in **bold**; recruiting GDLA members' names are in *italics*. Those new members without a referring party listed were likely admitted at the Spring Meeting.

Abby L. Ammons
Freeman Mathis & Gary, Atlanta
Theodore Freeman & Katie S. Dod, Freeman Mathis & Gary

Brannon J. Arnold
Weinberg Wheeler Hudgins Gunn & Dial, Atlanta

Todd M. Baiad
Bouhan Falligant, Savannah

Melissa Bailey
Carlock Copeland & Stair, Atlanta

Adam J. Beedenbender
Drew Eckl & Farnham, Atlanta
Brian T. Moore,
Drew Eckl & Farnham

Gary D. Beelen
Drew Eckl & Farnham, Atlanta
Douglas K. Burrell,
Drew Eckl & Farnham

William H. Buechner, Jr.
Freeman Mathis & Gary, Atlanta
Katie S. Dod & Wayne S. Melnick,
Freeman Mathis & Gary

David M. Burkoff
HunterMaclean, Savannah
Kirby G. Mason, HunterMaclean

Blair Cash
Downey & Cleveland, Marietta

Philip W. Catalano
Cruser & Mitchell, Norcross
Nola Jackson, Cruser & Mitchell

Max Compton
Drew Eckl & Farnham, Atlanta

Laurie W. Daniel
Holland & Knight, Atlanta
Jeffrey S. Ward,
Drew Eckl & Farnham, Brunswick

William Davis
Hawkins Parnell Thackston & Young, Atlanta

Brian R. Dempsey
Freeman Mathis & Gary, Atlanta
Theodore Freeman,
Freeman Mathis & Gary

Charles Michael Denney, Jr.
Tisinger Vance, Carrollton
John Harris, Tisinger Vance

Kori E. Flake
Freeman Mathis & Gary, Atlanta

Joseph C. Gebara
Fields Howell Athans & McLaughlin, Atlanta
Michael J. Athans, Fields Howell Athans & McLaughlin

W. Drew Gilliland
Bridges Ormand & Nash, Atlanta

Richard E. Glaze
Balch & Bingham, Atlanta

Debra K. Haan
Gray Rust St. Amand Moffett & Brieske, Atlanta

Christina C. Hadley
Hall Booth Smith, Atlanta

Laura E. Hall
Hall Booth Smith, Atlanta
Crystal D. Filiberto,
Hall Booth Smith

Jack R. Hancock
Freeman Mathis & Gary, Forest Park
Theodore Freeman, Freeman Mathis & Gary, Atlanta

Eric T. Hawkins
Hawkins Parnell Thackston & Young, Atlanta

Congrats, RecruitOne II Winners!

We are pleased to announce the winners of the RecruitOne II Membership Drive.

You will recall there were two chances to win an iPad – one for the GDLA member who recruited the most new members during the campaign, and another was a random drawing of those GDLA members who recruited at least one new member.

Ashley Rice of *Waldon Adelman Castilla Hiestand & Prout* in Atlanta was our most avid recruiter and took home that prize, while *Hall Booth Smith's* **Crystal D. Filiberto** in Atlanta won the random drawing.

We also had a drawing among all the new GDLA members for a complimentary 2014 Annual Meeting registration; our winner there was *HunterMaclean's* **Kate Chaplin Lawson** in Savannah.

Congratulations to all of our winners, and thanks to everyone who participated. We are about to cross the 800 members mark, so keep on recruiting!

Paul Henefeld
Appelbaum & Associates, Atlanta
Eve Appelbaum,
Appelbaum & Associates

Taylor W. Hensel
Buckley Brown, Atlanta

Nicholas Hinson
Mabry & McClelland, Atlanta
Walter B. McClelland,
Mabry & McClelland

Shannon S. Hinson
Swift Currie McGhee & Hiers,
Atlanta

Marc Hood
Drew Eckl & Farnham, Atlanta

Christina H. Jay
Drew Eckl & Farnham, Atlanta
Hall F. McKinley III, Drew Eckl &
Farnham

E. Righton Johnson
Balch & Bingham, Atlanta
James L. Hollis & James D.
Meadows, Balch & Bingham

Alison Sawyer Kennickell
Oliver Maner, Savannah

Leland H. Kynes
Holland & Knight, Atlanta
Jeffrey S. Ward, Drew Eckl &
Farnham, Brunswick

Alexa E. Limeres
Waldon Adelman Castilla
Hiestand & Prout, Atlanta
Ashley Rice, Waldon Adelman
Castilla Hiestand & Prout

Molly McCall
McCall Williams, Albany

Kimberly A. McNamara
Waldon Adelman Castilla
Hiestand & Prout
Ashley Rice, Waldon Adelman
Castilla Hiestand & Prout

Michael E. Memberg
Hall Booth Smith, Atlanta

Daniel N. Mills
Hawkins Parnell Thackston &
Young, Atlanta

Lara Ortega
Drew Eckl & Farnham, Atlanta
Douglas K. Burrell,
Drew Eckl & Farnham

Sarah M. Phaff
Constangy Brooks & Smith, Macon

H. Lee Pruett
Levy & Pruett, Decatur

Jeffrey M. Putnam
Scrudder Bass Quillian Horlock
Taylor & Lazarus, Atlanta
Henry E. Scrudder, Jr.,
Scrudder Bass Quillian Horlock
Taylor & Lazarus

Ali Sabzevari
Freeman Mathis & Gary, Atlanta
Wayne S. Melnick,
Freeman Mathis & Gary

Jeffery Randolph Saxby
Hall Booth Smith, Atlanta

Shannon L. Schlottmann
Swift Currie
McGhee & Hiers, Atlanta

Adam Schmidt
Hall Booth Smith, Atlanta

Gregory G. Sewell
Bouhan Falligant, Savannah

Hillary Shawkat
Lueder Larkin Hunter, Atlanta

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

Michael Jo'el Smith
Weinberg Wheeler Hudgins
Gunn & Dial, Atlanta
Douglas K. Burrell,
Drew Eckl & Farnham, Atlanta

Nathaniel J. Smith
Mabry & McClelland, Atlanta
James Scarbrough,
Mabry & McClelland

Terrance C. Sullivan
Insley & Race, Atlanta

Teddy L. Sutherland
Scrudder Bass Quillian Horlock
Taylor & Lazarus, Atlanta

Philip M. Thompson
Ellis Painter
Ratterree & Adams, Savannah
Sarah B. Akins, Ellis Painter
Ratterree & Adams

Drew C. Timmons
Swift Currie
McGhee & Hiers, Atlanta
Daniel J. Kingsley, Swift Currie
McGhee & Hiers

Taylor Tribble
Huff Powell & Bailey, Atlanta

Carol L. Underwood
James Bates Brannan Groover,
Macon

Meka B. Ward
Thomas Kennedy Sampson &
Tompkins, Atlanta

Randi M. Warren
Hawkins Parnell Thackston &
Young, Atlanta
Mary Claire Jagor Smith,
Hawkins Parnell
Thackston & Young

Christopher J. Watkins
Hall Booth Smith, Atlanta
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Confronting the Plaintiff's Reptile Revolution:
Defusing Reptile Tactics with Advanced Witness Training

Ryan A. Malphurs, Ph.D. and
Bill Kanasky Jr., Ph.D.
Courtroom Sciences, Inc.

The well-known "Reptile Revolution" spearheaded by attorney Don Keenan and jury consultant Dr. David Ball is now a ubiquitous threat to defendants across the nation.[1] It is advertised as the most powerful guide available for plaintiff attorneys seeking to attain favorable verdicts and high damage awards in the age of tort reform.[2] Ball and Keenan's Reptile Revolution tactics have allowed mediocre plaintiff attorneys to pull off victories that only great plaintiff attorneys could do in the past. Although this article does not permit the space to fully address Reptile[3] attorney tactics, it is part of a larger article and subsequent program that we offer which applies 25 years of scientific litigation psychology data to directly combat "Reptile" tactics.[4]

While 10 areas of vulnerability exist within litigation from the filing of a case to a jury's subsequent verdict,[5] this article will address only one, and perhaps the most important area, because it serves as the foundation of the Reptile Theory's success – witness testimony. *(Note: The unabridged article can be found in the GDLA Members Only area in the right navigation under "Newsletters.")*

It works, BUT ...

The Reptile Theory first applied to litigation is the brain-child of Ball and Keenan, who went public with their concept nearly five years ago.[6] They borrowed the concept of the reptile brain from neuro-psychologist Paul MacLean who first espoused the theory in the 60s.[7] MacLean theorized that three parts of the human brain reflect stages of human evolution: reptilian (primitive survival based), paleomammalian (emotion, reproduction, parenting), and neomammalian (language, logic, planning). Ironically, the Reptile Theory MacLean advanced has long since been revised and critiqued in neuropsychology scholarship,[8] but this did not prevent Ball and Keenan from adopting it for their purposes.

Where MacLean suggests that the reptilian portion of the brain is responsible for species-typical instinctual behavior, such as aggression, dominance, or territoriality, Ball and Keenan interpret this to mean that reptilian subcortical region of the brain maximizes "survival advantages" and minimizes "survival dangers."[9]

According to Ball and Keenan, "when the Reptile sees a survival danger, even a small one, she protects her genes," which, to the authors, can be correspondingly applied to jurors who may see danger and must "protect [her]self and the community," by awarding damages that punish or deter defendants.[10] If this sounds farfetched, it is.

Despite the misuse of neuropsychology, what Ball and Keenan get right is encouraging plaintiff attorneys to convey "the immediate danger of the kind of thing the defendant did, and how fair compensation can diminish that danger within the community."[11] In order to generate this sense of immediate danger within jurors they "urge plaintiff's lawyers to frame a case so it appears that every defendant *chose* to violate a safety rule."[12] For Ball and Keenan, "every wrongful defendant act derives from a choice to violate a safety rule," and thus the courtroom becomes a safety arena wherein damage awards enhance safety and decrease the danger posed by the defendant.[13] According to Ball and Keenan, jurors serve as the guardians of community safety and the author's formula "Safety Rule + Danger = Reptile" theorizes that the reptile brain "awakens" once jurors perceive that a safety rule has been broken by the defendant, resulting in jurors awarding damages to the plaintiff to protect themselves and society (survival instinct).[14]

Novel Tactics

Ball and Keenan's Reptile methodology can indeed influence juror decision-making, but not because of its ability to tap into jurors' survival instincts. Instead, the authors' formulaic approach applies successful techniques long used by great plaintiff's attorneys: reduce a case to its essence and rhetorically focus a case on a critical issue for jurors (e.g. safety). The case reduc-

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Reptiles and Culture Codes: Do They Matter at Mediation?

By William Allred
BAY Mediation & Arbitration Services

In court, we used to make arguments concerning "duties of care" and "proximate cause." Even as we made those arguments, we realized how ill-defined and confusing those concepts were to jurors. Were there other more reliable ways to communicate? More recently, attorneys have found different means of communicating; methods that rely on how we have been socialized. We see these methods in play with the "Reptile," "Culture Codes" and neurolinguistics. Using these methods, advocates communicate, not by using stilted or archaic terms, but by appealing to basic values and ideas that tend to motivate. These same methods are in play at mediation.

The "Reptile" is a manner of framing evidence and argument to appeal to a juror's subconscious need to feel secure. The "science" behind the "Reptile" is the work concerning the "Triune Brain" offered by Yale neuroscientist Paul MacLean in the 1950s. MacLean theorized that as humans evolved from reptilian ancestors, so did their brains. The reptilian brain was fully automatic, and its sole function was to ensure the animal's survival. When faced with any scenario, the reptilian brain evaluated "should I eat it, fight it, run from it or mate with it?" This was a subconscious process. MacLean offered that behavioral traits of aggression, dominance, and territoriality stemmed from the reptile brain.

MacLean theorized that, as pre-humans evolved, a second part of the brain developed. This limbic brain was responsible for the generation of emotions. Limbic function gave rise to feeding, nurturing and other parenting behaviors – all still at a subconscious level. Much more recently, MacLean said, the third part of the human brain developed – the neocortex. Its functioning generated consciousness, perception, critical and abstract thinking, planning and language. Yet, given any crisis, the reptile impulse always wins. That is, when under stress, said MacLean, humans will always seek security and self-preservation. In a jury setting, the reptile might say: "Society has rules to make us safe. He violated the rule. Another was hurt. He doesn't care that he violated the rule. He makes it unsafe for you too. Therefore, we must eat him (or the equivalent: award a large verdict)."

Manufacturers and Madison Avenue, in turn, have latched onto "Culture Codes." Psychologist Clotaire Rapaille incorporated MacLean's work with his own in the study of "imprinting," a theory which offers that all people attach words or archetypal ideas to things. For example, Rapaille reports that he was only four years old in occupied France when the Americans came into town in their Jeeps and liberated his people. He said during an interview that he could still taste the chocolate the GIs had given him. He concluded that chocolate and Jeeps are forever unconsciously imprinted on his generation's notion of freedom and liberation. Rapaille made a lot of money consulting with auto and tobacco manufacturers to advise them of these archetypal imprints, which he refered to as "Culture Codes," that enabled these companies to link their products with "ideas" or "values" that consumers relate to subconsciously. Perhaps the "Marlboro Man," not a Rapaille creation, best exemplifies the use of imprinted archetypes to motivate others.

Neurolinguistics, more generally, studies how certain words motivate more than others. For example, the plaintiff's bar might use words of Anglo Saxon origin,

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such as "crash," "break" and "rip" instead of French words such as "accident," "fracture" and "rupture." The former tend to communicate more violent cause and effect than their French counterparts.

While the "science" behind MacLean's triune brain has been disproved by testing and Rapaille was discredited by many psychological professionals, there is something to these ideas when it comes to what motivates people.

Those of us who are married know that more than half of what is said between husband and wife is communicated either without words or by *how* words are said. A wife could say "I am going to the store," but coupled with body language and intonation, she really could be saying "*We're out of eggs so* I am going to the store," or "*You are so boring that* I am going to the store." The important message being communicated is the one that is unstated.

Serious discussions result in better outcomes for both parties when each feels secure and on an equal footing with the other. Mediation studies have shown that higher success rates result from sessions where the disputants are made to feel more secure. We also know that in mediation, much is communicated that is not said in literal terms. Over the years as a mediator, I have seen the reptile inhibit the mediation process.

Parties are late to arrive, for example. People are flustered. It seems all would rather just go home. Attorneys ask if the mediation can go forward without openings. The lawyers are short-tempered, aggressive, and impulsive. Mediation here is a challenge because key players are not calm or emotionally secure. When we walk around in a flustered state, we are not listening because we do not want to listen. When we are in such a state, it is all about us. This reminds me of an old sci-fi film where a T-Rex rears back its head and belts out a mighty roar. He is not dealing with anyone. He is there to eat everyone! Compromise rarely works in such environments because all are insecure. Aggression can beget only aggression or submission. A calmer deliberative approach results in far more options for in the negotiating process. Why limit your tool kit? Mediation is a deliberative process. Mediation works when it is paced because people have to slow down, calm down and sit down. Remember, in crisis mode, the reptile wins (*i.e.*, no settlement), and the only way to silence the reptile is to get rid of the tension.

In another scenario, during openings, one of the parties says: "Oh, by the way, my flight leaves at 3:00 p.m." It is very likely that the other side will interpret this as really meaning: "You are not important to me and your case is not important to me." This is especially chilling when such news is delivered by the defense, as many times plaintiffs have filed their claim out of anger toward the defendant or its insurer and are still angry when they come to mediation. Such an announcement will only reinforce such feelings and make it difficult to move past the anger and into a meaningful discussion.

Mediation works better when all are supportive of the process. I find that it takes time to break through the hard feelings that posturing and ill will have built up. Yet, those issues must be dealt with before the parties can move on and think critically about the factual issues of their case and about the trial process they will be left with if they do not settle. There is an old saying at mediator school: "You can't skip the dance." The parties have to be engaged. There has to be a buy-in with the process itself to get to a resolution. If I told the parties ten minutes into the mediation the number they would settle for, my success rate would be zero. Parties have to work themselves away from the numbers they prefer.

At the courthouse, trial calendars are constantly breaking down as cases are called in. Most judges would love to try your case. A trial is one way to resolve a claim or dispute. We spend a lot of time and energy preparing for trials because much of the preparation is aimed at motivating others to accept our message. We prepare the message *and all the many ways we will communicate it* to jurors. Too often, mediation is seen simply as a pre-trial requirement. In reality, mediation is an alternative to trial with results that are more permanent and binding than any jury verdict. Mediations are typically not appealed. It is odd, then, that we do not see more attorneys dedicating more time to preparation for mediation. Off-the-cuff openings are common. Sometimes participants are not mindful of what their actions have communicated or are communicating to the other side beyond what they say. (I had one lawyer say to the opposing party during openings, "You lied, and that is why you are going to lose!") Yet, once the mediation begins, all antennae are up and receptors are aimed and turned on. It's show time! We are sifting through all that we see, sense and hear for messages that remain unspoken in order to gain advantage.

Knowing that we are looking for non-verbal cues, for hidden meaning, and for adept manipulation during a presentation of facts, we should be mindful that the other side is looking for the very same things from us. How we say things and what we allude to or say indirectly are both as important as what we expressly state. These are things we can prepare for prior to mediation in order to enhance our chances of success there. ❖

William (Bill) Allred is a partner at the law firm of Barrickman Allred & Young in Atlanta. He is also a mediator and a founder of BAY Mediation & Arbitration Services. BAY is a Platinum Sponsor of the GDLA.



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How Forensic Accountants Can Help You Manage and Effectively Resolve Cases

By Dayne Grey
MDD Forensic Accountants

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

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

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

You are likely immersed in many cases and considering various liability aspects, possible defenses, filing motions and briefs and you may not typically focus on damage quantum until later in the case development. In cases involving economic damage calculations, consider how important and impactful it could be for you to add a qualified and experienced forensic accountant to your team. In addition, consider how doing so early in the litigation process can make you both more efficient and effective. This could increase the chances of a positive resolution for your client over that achieved when scrambling to bring someone in late in the process The added benefit is the forensic accountant is better prepared when heading to trial and it becomes necessary for your side to name an expert.

Just as different attorneys practice in a wide array of practice areas and not all attorneys are trial attorneys, not all accountants practice in the same areas and not all accountants are forensic accountants. There are a number of different accounting practice areas. Some accountants concentrate on auditing financial statements and others concentrate on tax planning and filings. Cost accountants undertake analysis to help management measure financial results and analyze various operating plan options. Still other accountants wear many hats and perform a mix of these functions, all of which help their clients set up and run their companies more efficiently and report their operating results in periodic financial statements and tax returns.

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

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

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Getting the Most Out of Surveillance Video Analysis

By Peter McCawley
CED Engineering, Inc.

People often don't know the value of an object until they have an expert analyze it – the same is true for surveillance video.

A forensic engineer or "engineering expert" is often brought onboard in the claim/case process to help determine "what happened" or "how something happened". If the incident or accident is captured on video, frequently it is assumed that an engineer is not needed. "Why do we need an engineer to explain to us what happened, when we have it right here on tape" is commonly the mindset. The reasoning is that engineers are used to "reconstruct" accidents; if the incident is on tape then no reconstruction is necessary. In actuality, the reverse is usually true. Having video evidence to work with is often when an engineer can provide the greatest assistance.

Forensic engineers are always trying to eliminate variables and elucidate hard facts regarding an incident. The fewer variables, or unknowns, and the more facts they are working with, the more accurate their findings can be. An engineer reconstructing an accident would always prefer to have access to the vehicle involved in the crash rather than try to reconstruct the accident from some photos and repair receipts. Similarly, having access to video of an incident can be invaluable to an engineer and his clients.

Surveillance videos often contain invaluable information that can only be brought out with in-depth analysis techniques (such as frame-by-frame analysis) combined with engineering analysis.

Opportunistic fraud

A customer falls in a convenience store. It is captured on video, there is no refuting that the event happened. But, was it a slip or trip caused by a hazard or was it the result of a misstep or malfunctioning footwear? There are unique bodily motions associated with each of these events, and a trained biomechanical engineer can review the video to determine what caused the fall.

There may be no question what caused a fall, but there may be disagreement as to whether the fall could cause the injuries claimed. Without video, this can be difficult. An engineer must rely on witness reports of the incident that can vary greatly, and often the individual who suffered the fall will not clearly recall how they fell. Body position and the correct order of what hit what and when are critically important and very difficult to ascertain with the needed degree of accuracy. With a video record of the fall, most of the variables are eliminated. The body's position throughout the event is now known, the forces applied to the body can be determined and the probability of a particular injury resulting from the fall can then be verified.

Assume the worst

Without solid evidence, engineers are often forced to assume the worst-case-scenario in their calculations. For example, a six foot person falls and claims that they hit their head. Without evidence to the contrary, an engineer must concede that individual's head could have fallen unimpeded over that entire six feet before striking the floor at approximately 13 miles per hour. However, the calculated speed and the forces from the event can be drastically altered if a video exists showing the individual, for instance, landed on their rear end before rolling backwards and contacting the ground with their head.

Exact Speeds

A delivery van backs into a bicyclist in a parking lot. It is right there on video, what can an engineer tell you that you cannot already see? After an expert reviews the video you'll know the exact speed of the van. You will know the exact speed of bicycle.

You can determine who could see whom and when. You can determine if the van could have stopped. You can determine if the bicycle could have avoided the

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Appellate Case Law Update

By Mark W. Wortham, SLC Chair
Hall Booth Smith, Columbus

ATTORNEY'S FEES: O.C.G.A § 9-11-68

***Department of Corrections v. Couch* (S13G1555)**

Is a plaintiff entitled to an award of attorney's fees based on a contingency fee agreement when that award includes fees for work performed prior to the rejection of the offer of settlement?

On January 31, 2014, GDLA filed an amicus brief in this case with the Supreme Court of Georgia. The Court heard oral argument on February 5, 2014. The brief was authored by GDLA members Laurie Webb Daniel and Leland H. Kynes of Holland & Knight in Atlanta.

See the article on page 28; to read this amicus brief, as well as any others filed by the GDLA, visit the members' only area of our website and look for "Amicus Briefs" in the right navigation. The parties' briefs are not yet published on Lexis.

HOSPITAL LIENS — STATUTE OF LIMITATIONS

***Hosp. Auth. of Clarke County v. Geico Gen. Ins. Co.*, __Ga.__ (S13G0900, January 27, 2014)**

When the parties agree to settle a personal injury case, the statute of limitations for enforcement of liens begins to run at the time of the execution of the release agreement, rather than the date the parties agreed to settle.

As found by the Court of Appeals, plaintiff received medical treatment at a hospital after he was injured in a motor vehicle collision. He eventually filed suit for the motor vehicle collision, and the hospital filed three liens totaling $66,999.22. On September 10, 2010, plaintiff's attorney wrote a letter to the defendants' attorney accepting defendants' policy limits. On September 23, 2010, defendants' attorney sent a letter confirming the agreement and enclosing the settlement documents and check.

The settlement documents were signed on October 8, 2010 and required plaintiff to satisfy the hospital liens out of the settlement funds and constituted a, "general release ... from all legal and equitable claims of every kind and nature." *Id.*

After the plaintiff failed to pay the liens, the hospital's attorney sent a letter to the insurer on June 7, 2011, attempting to obtain payment. When the insurer did not satisfy the liens, the hospital filed suit on October 6, 2011. The insurer moved for summary judgment, asserting the hospital's action was not timely under O.C.G.A § 44-14-473(a). The trial court denied the motion.

The Court of Appeals granted the insurer's application for interlocutory appeal wherein the insurer argued that the hospital's claim was barred because it had failed to enforce the liens within one year of the September 10, 2010 settlement between the insurer and the plaintiff, as required by O.C.G.A § 44-14-473(a).

The hospital, on the other hand, argued that the action to enforce the lien was timely because it was filed within one year of October 8, 2010, the date the release was executed.

The Court of Appeals reversed the trial court, holding that the action was barred by the statute of limitations, as the settlement occurred, and the determination of liability was final, when the verbal agreement was made. Thereafter, the Supreme Court reversed, holding that "[t]he plain wording of O.C.G.A § 44-14-473(a) must be applied to the facts of this particular case, and the statute itself makes clear that the limitations period begins to run one year from the date of, as is relevant to this case, liability being finally determined by a settlement or release."

The Court's rationale was that although there was an enforceable settlement agreement as of September 10, 2010, liability was not established until the release was executed. Justices Nahmias, Hunstein and Blackwell concurred in the judgment, but noted "that the statutory provision at issue — the last sentence of O.C.G.A § 44-14-473(a) — is difficult to understand and apply."

These Justices also suggested the General Assembly should amend the statute if they wanted the statute to be "clearly understood and correctly and fairly applied."

MALPRACTICE AFFIDAVIT

***Fisher v. Gala*, __Ga.App.__ (A13A1938, February 6, 2014)**

Where a plaintiff who attaches an expert affidavit to his original professional malpractice complaint later amends the complaint and files an affidavit from a new expert, the trial court errs in dismissing the action based upon a determination of incompetency of the expert who gave the original affidavit.

The Court of Appeals of Georgia reversed the trial court's dismissal of plaintiff's professional malpractice action, based on the trial court's finding that an amended complaint and affidavit did not cure the original defect in the affidavit. Plaintiff filed a medical malpractice action against two neurosurgeons. The neurosurgeons moved to dismiss the complaint, arguing that the physician who gave the affidavit submitted with plaintiff's complaint was not competent to testify regarding the neurosurgical care at issue and the affidavit was thus defective under O.C.G.A § 9-11-9.1.

In response to defendants' motion plaintiff filed an amended complaint along with the affidavit of a new expert, a board-certified neurosurgeon. After the hearing on the motion, the trial court ruled plaintiff failed to show the original affiant-physician was competent to testify and the affidavit was therefore defective.

In addition, the trial court held that Georgia law does not authorize a plaintiff to cure a defect by filing an amended complaint with the affidavit of a different expert. Reversing the trial court, the Court of Appeals stated this issue was controlled by its ruling in *Piscitelli v. Hosp. Auth. of Valdosta*, 302 Ga. App. 746, 752 (2010).

That is, where the plaintiff timely avails himself of the of the cure provision of O.C.G.A § 9-11-9.1(e), and the defendant does not challenge the amended affidavit as deficient, it is error to dismiss the complaint.

AGENCY — ATTORNEY'S SCOPE OF AUTHORITY

***Mori Lee v. Just Scott Designs, Inc.* __Ga.App.__ (A13A1809, February 4, 2014).**

The question of an attorney's authority to do an act, when it is to be determined from disputed facts or undisputed facts from which conflicting inferences may be drawn, must be decided by a jury.

In this case the Court of Appeals reversed the trial court's grant of plaintiff's motion for summary judgment and denial of defendant's motion, holding that there was a jury question on the issue of the attorney's authority to settle the case. Plaintiff sued defendant alleging defendant breached a settlement agreement and seeking specific performance. The basis of defendant's motion for summary judgment was the contention that the attorney collecting the debt had no authority to settle the dispute, and thus there was no settlement agreement to enforce.

After reviewing the facts relevant to the retention of the lawyer, the Court applied general agency principles and found there was an agency relationship between the attorney and the client. But that was not the end of the Court's inquiry, "as an attorney's authority is limited to the particular purpose for which he was retained." *Id.*

In deciding the question of scope of authority, the Court found there was no doubt that the particular purpose of the retention was to collect on a debt. But a factual question remained as to whether the attorney was authorized "to do other things." *Id.*

An important consideration for the Court was the defendant client's evidence that it would not have allowed the attorney or the collection agency it hired to agree to the creation of a distributor relationship with the plaintiff as a part of the settlement.

While there was no evidence of apparent limitations on the authority given to collect the debt, plaintiff had a duty to inquire into the limits of the defendant's lawyer's authority. *Id.* Since there was no evidence that plaintiff made any inquiry, a jury question existed as to whether the plaintiff was negligent in not determining whether the attorney had actual authority to enter into the agreement on those particular terms. ❖

Premises Liability Case Law Update

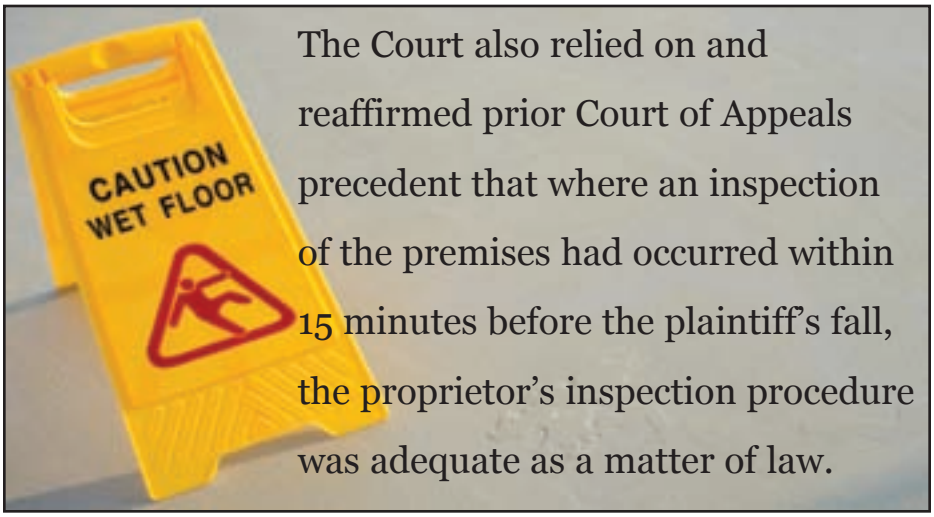
By Martin A. Levinson, SLC Chair
Hawkins Parnell Thackston & Young, Atlanta

SLIP-AND-FALL; SUMMARY JUDGMENT; CIRCUMSTANTIAL EVIDENCE OF ACTUAL KNOWLEDGE OF HAZARD; REASONABLE INSPECTION PROCEDURE: Plaintiff failed to show that store owner had actual or constructive knowledge of wet substance on floor, and, accordingly, store owner was entitled to summary judgment.

***Pirkle v. Quiktrip Corp.*, 2014 Ga. App. LEXIS 34, Case No. A13A1789 (Jan. 24, 2014).**

In this slip-and-fall case, the plaintiff, Pirkle, went to a convenience store early one morning with his brother and another man to buy drinks. At about 7:08 a.m., after paying for a drink, Pirkle turned to walk out of the store and slipped on liquid on the floor. Pirkle's brother saw Pirkle fall and went to help him up. At that time, Pirkle's brother saw "some hand-sized spots of what looked like water" on the floor. Pirkle did not recall seeing any liquid on the floor when he walked into the store, and neither he nor his brother knew how the liquid got onto the floor or how long it had been there. After Pirkle fell, the store manager examined the area and saw "a little splotch of water" that was "the size of a half-dollar" on the floor that did not appear to have been disturbed.

Video footage from a store security camera showed that when Pirkle entered the store, he walked directly across the same area where he would slip and fall just two minutes and 15 seconds later. Pirkle appeared from the video to be looking down at the floor in front of the cash register as he walked in. During a nine-minute period before Pirkle fell, the video depicted several other customers walk across, check out, and stand in the area where Pirkle fell without any issues, and no one reported any spills to the store's employees before Pirkle fell.



About 3½ minutes before Pirkle fell, the video showed a customer holding a drink in one hand and a package of bottles of water in the other. The customer dropped the bottles of water as he approached the front door and bent down to pick them up, but the video showed that the lid was still on his drink. Also, several other people successfully walked through the area after that but before Pirkle fell.

The store owner moved for summary judgment, which was granted by the trial court, and Pirkle appealed.

On appeal, Pirkle contended that the store owner had actual knowledge of the liquid on the floor based on the testimony of another individual who was inside the store at some unknown time before Pirkle fell. The individual testified that he saw an employee mopping the floor in one of the store's aisles and then take his bucket and mop and set them to the right side of the checkout counter. Pirkle argued that the individual's testimony constituted circumstantial evidence that the water Pirkle slipped on was caused by the store employee's mop, but the Court of Appeals disagreed.

The Court held the plaintiff's argument was "speculative at best" and did not constitute a "reasonable inference" that would give rise to a genuine issue of fact as to whether the store owner had actual knowledge of the substance on the floor. The Court also noted that in the surveillance video, although a "wet floor" sign was visible in the aisle, no mop or bucket was present in the store. *Id.* at *7-8.

The Court of Appeals held that there was no evidence the store owner had constructive knowledge of the liquid on the floor before Pirkle fell. First, Pirkle failed to show that a store employee was in the immediate area of the hazard and could have easily seen the substance before Pirkle fell.

The video footage showed that no store employee was in the area in front of the checkout counter for eight minutes before Pirkle fell, and the cashier behind the counter testified by affidavit that from behind the counter, he could not see the area where the drops of water were later found.

Second, the evidence showed that the store had a reasonable

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Portable Video Conferencing

Depose Globally. Stay Locally.

Esquire's portable video conferencing solution is an easy and low-cost way to depose witnesses in other locations.

Participate in fully interactive, multi-party video conferences simply by using an Internet-connected PC, Mac, iPhone, iPad, or traditional VTC system.

Our system is uniquely tailored to meet the needs of litigation professionals involved in high-stakes depositions, arbitrations, and meetings.

Benefits:

- Secure connection with high-quality audio can join multiple locations. Participants can fully interact with the deponent without time delay or video lag.
- Significant cost savings realized through reduced travel expenses and next-generation video conferencing technology.
- Easy-to-access video conferencing capability anywhere there is an Internet-connected PC, Mac, iPhone, or iPad equipped with a webcam.

It's Easy to Get Started:

Step 1:

Esquire will coordinate with all parties involved in the video conference to ensure they have the appropriate technology.

Step 2:

A day prior to the deposition, Esquire will perform a test with each location to ensure smooth connectivity. Each participant will receive an email invitation with the necessary log-in information.

Step 3:

On the day of the deposition, all participants will sign in to the video conference via their computers. Esquire will provide all necessary tech support during the conference.

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GDLA Honors Judiciary at 11th Annual Reception

All those pictured at the reception are identified from left to right: 1. Supreme Court Justice Carol Hunstein and Fulton Superior Court Judge John Goger; 2. Lane Young, Fulton Superior Court Judge Jackson Bedford and Supreme Court Justice Robert Benham; 3. Court of Appeals Judge Yvette Miller and Eddie Tarver; 4. Jim Myers and Court of Appeals Chief Judge Herbert Phipps; 5. Vice President Peter Muller, President Ted Freeman and U.S. District Court, Northern District of Georgia, Senior Judge William O'Kelley; 6. Past President and DRI State Rep Bubba Hughes, DRI National Director Douglas Burrell and DRI Executive Director John Kouris; 7. Anne Gower and Fulton Superior Court Chief Judge Gail Tusan; 8. State Board of Workers' Compensation Judges Elizabeth Gobeil, Viola Drew and Stephen Farrow; 9. Susan Levy, Cobb Superior Court Judge Tain Kell and Sun Choy; 10. Fulton Superior Court Judge Kelly Lee and Rick Brown; 11. Fulton State Court Judges Diane Bessen and Jay Roth; 12. DeKalb Superior Court Judge C.J. Becker and Speer Mabry; 13. Past President Mel Haas and Fulton Superior Court Judge Tom Campbell; 14. Chris Freeman and Xavier Balderas; 15. Moses Kim and Andy Treese; 16. Lee Clayton and Cobb State Court Judge Melodie Clayton; 17. Leah Fox, Past President Warner Fox and Philippa Ellis; 18. Court of Appeals Judge Carla McMillian, David Cole, Court of Appeals Presiding Judge Anne Elizabeth Barnes and U.S. District Court, Northern District of Georgia, Clerk James Hatten; 19. Cobb State Court Judge Eric Brewton and Michael Rust; 18. Chuck Dalziel, Supreme Court Presiding Justice Harris Hines, Ryan Mock and Scott Masterson.


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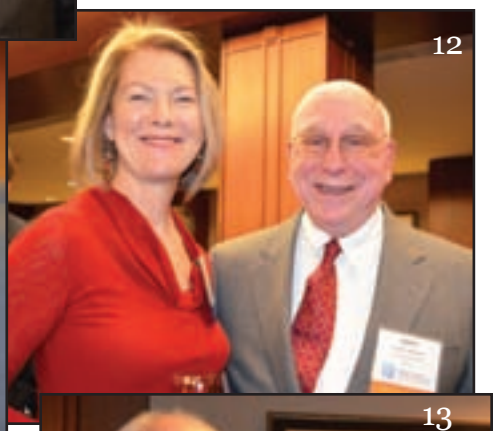
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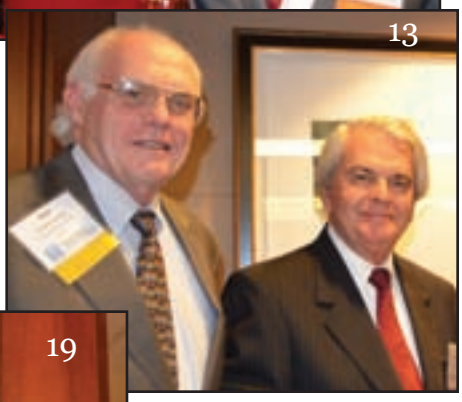
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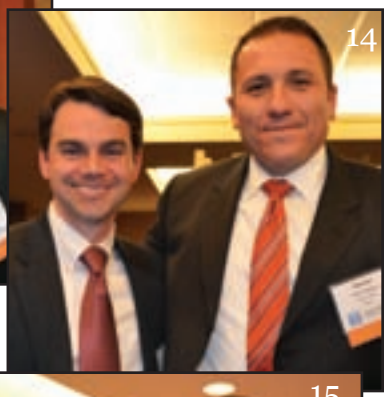
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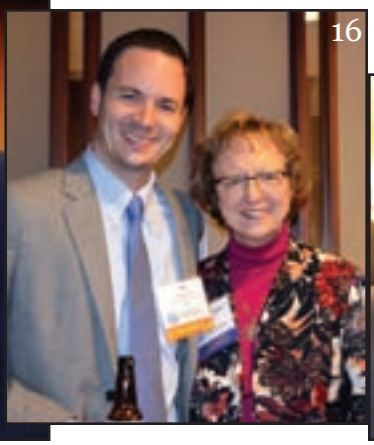
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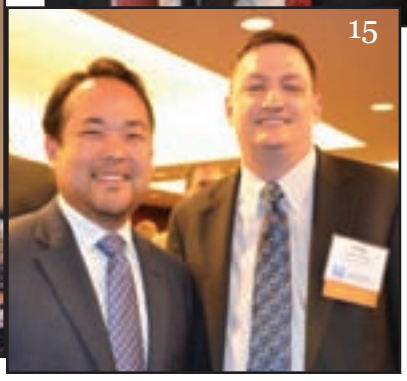
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GDLA Files Amicus Brief in Important Attorney's Fees Case

The Amicus Curiae Committee, co-chaired by Rusty Gunn of Martin Snow in Macon and Jeff Ward of Drew Eckl & Farnham in Brunswick, recently accepted a request to file an amicus brief in an important case regarding the measure of attorney's fees under Georgia's offer of settlement statute, O.C.G.A. § 9-11-68, a part of the General Assembly's 2005 tort reform package aimed at encouraging early settlement of lawsuits.

In *Georgia Department of Corrections v. Couch*, Docket No. S13G1555, the Georgia Supreme Court is reviewing an award of a plaintiff's attorney's full contingency fee under § 9-11-68.

The *Couch* case arises from a personal injury suit brought by David Lee Couch, a state inmate, against the Georgia Department of Corrections for injuries he suffered while working at the prison warden's house. Couch served an offer of settlement under § 9-11-68, which the Department of Corrections rejected.

At trial, Couch received a jury verdict of approximately $105,000, which was greater than 125 percent of the settlement offer. Under the statute, Couch was entitled to reasonable attorney's fees incurred from the time of the rejection of the offer through entry of judgment. In his claim for attorney's fees, Couch put on evidence of his attorney's 40 percent contingency fee and, alternatively, a calculation of approximately $92,000 based on hours worked and an estimated rate.

The trial court awarded Couch's attorney's full contingency fee of approximately $49,000. The Department of Corrections appealed the attorney's fee award, and the Court of Appeals affirmed. *Ga. Dep't of Corr. v. Couch*, 322 Ga. App. 234 (2013).

The Supreme Court granted certiorari in part to consider whether an award of a plaintiff's attorney's full contingency percentage is error because it fails to account for the statute's temporal limits. Section 9-11-68 limits the attorney's fees that a litigant may recover to a specific time frame – *after* the rejection of the offer of settlement through entry of judgment.

While the amount of the contingency fee at issue in this case is relatively small ... the outcome of the case has significant implications for civil defendants around the state.

The GDLA's amicus curiae brief provided a full analysis of the problems associated with using contingency fee agreements as a basis for awarding attorney's fees under the statute. The GDLA's brief argued that a court errs if it uses a contingency percentage to award fees in this context because: (1) a contingency fee does not fit the temporal restrictions of § 9-11-68; (2) the terms of a contingency fee contract bind only the parties to the contract; and (3) public policy weighs against awarding contingency fees under this statute.

At oral argument, the justices' questions showed that they had read our amicus brief, which made points not raised by the parties.

While the amount of the contingency fee at issue in this case is relatively small – less than $50,000 – the outcome of the case has significant implications for civil defendants around the state. In other cases pending in Georgia courts, plaintiffs have sought to recover multi-million dollar contingency fees under the statute. For example, in a case that is currently pending in the Court of Appeals, a trial court awarded $13.9 million under O.C.G.A. § 9-11-68 based solely on the contingency percentage without examining hours or rates. *See Landstar Ranger Inc. v. Foster*, Case No. A140063 (Ga. App.) (argued on January 15, 2014).

Section 9-11-68 sets out corresponding provisions for plaintiffs and defendants, which are intended to ensure equal treatment of both sides. *Compare* O.C.G.A. § 9-11-68(b)(1) *and* 9-11-68(b)(2). Because it is rare for defense lawyers to work under a contingency fee contract, awarding a contingency fee under an offer-of settlement statute potentially leads to disparate treatment of defense and plaintiff's counsel. The value of attorneys' services under an offer-of-settlement statute should not turn on whether the prevailing party is a plaintiff or a defendant. The GDLA's amicus curiae brief urged the Georgia Supreme Court to adopt a workable rule that applies consistently to plaintiffs and defendants– a rule that places the burden on the claimant to come forward with proof of hours, rates, and detailed descriptions of the work actually done to show "reasonable attorney's fees" relating to the period "from the rejection of the offer of settlement through entry of judgment."

GDLA members Laurie Webb Daniel and Lee Kynes of Holland & Knight authored the brief. To read this GDLA amicus brief, as well as any past briefs, visit the Members Only area of our website and click on "Amicus Policy & Briefs" in the right navigation pane. ❖

Speaker Lunch Series Explores Judge Self's Life as a Football Referee

On December 11, 2013, the GDLA hosted the third installment in the Speaker Lunch Series. The Speaker Lunch Series offers GDLA members an opportunity to socialize over lunch with other members and even non-members, including judges and other elected officials, and to hear presentations on broad topics of interest that are not necessarily law-related.

The latest program featured a presentation by Macon Superior Court Judge Tilman E. (Tripp) Self III about his weekend job as a college football referee. After judging all week in court, Judge Self spends his fall Saturdays "judging" football games as an official for the Southern Conference, which includes Georgia Southern University, Furman University and The Citadel (Judge Self's alma mater), among others.

For anyone who thinks officiating college football is easy, Judge Self demonstrated otherwise with his explanation of what officials do before and after games that fans never see, as well as what they do during games that is seldom noticed. Before each game, the officials travel to the host school, meet with each other the night before the game, and meet with coaches for each team the day of the game.

While on the field, Judge Self explained the responsibilities of all seven officials and for which types of penalties each official is looking. To complicate matters, however, the officials' responsibilities abruptly change as soon as the play formation changes, and Judge Self's explanation of these shifting responsibilities with a dry-erase board was quite Madden-esque. Finally, after each game the officials are graded so they can improve their performance. Overall, Judge Self showed that judging in court has many similarities to judging on the field.

A recap of the program would not be complete without recognizing several judges of the Court of Appeals who kindly participated in an impromptu question-and-answer session while Judge Self was delayed on I-75. Judges Elizabeth L. Branch, Carla Wong McMillian, William M. Ray, II, and Christopher J. McFadden thought they were attending the program just to see Judge Self's presentation, and so special thanks is owed to them for filling in until Judge Self arrived. We are grateful for their willingness to participate without any notice.

As always, the GDLA wishes to recognize Nelson Mullins Riley & Scarborough for hosting this program at their offices. Stay tuned for an announcement about the next program in the Speaker Lunch Series this fall. ❖

Scenes from the third Speaker Lunch Series luncheon: 1 and 2. Judge Tripp Self explains the intriciacies of his weekend job as a college football referee; 3. Jake Daly, who developed the Speaker Lunch Series concept, with Jim Hollis; 4. (left to right) Michael Broun, Ben Avery, Vice President Craig Avery, Past President Steve Kyle, Colin Moriarty and President Ted Freeman; 5. Court of Appeals Judges Chris McFadden, Carla McMillian, Billy Ray and Lisa Branch went from luncheon attendees to impromptu panelists with the speaker, Judge Self, stuck in traffic. Coincidentally, Court of Appeals Judge Steve Dillard was just ahead of Judge Self on the highway, so they showed up simultaneously.

Trial & Mediation Academy Continues to Train Leading Litigators

Lawyers from across the state made the annual trek to Callaway Gardens for the Melburne D. (Mac) McLendon Trial & Mediation Academy from January 23-25, 2014.

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

Students were guided through the two-and-a-half day experience by a distinguished faculty led by Chair Douglas K. Burrell of Drew Eckl & Farnham, Atlanta; Vice-chair William T. (Bill) Casey, Jr. of Hicks Casey & Foster, Marietta; Past President Jerry A. Buchanan of Buchanan & Land, Columbus; Carrie L. Christie of Rutherford & Christie, Atlanta; William D. (Billy) Harrison of Mozley Finlayson & Loggins, Atlanta; Secretary-Treasurer Matthew G. Moffett of Gray Rust St. Amand Moffett & Brieske, Atlanta; Robert L. (Bobby) Shannon, Jr., of Hall Booth Smith, Atlanta; and Richard H. (Dick) Willis of Bowman and Brooke, Columbia, SC.

Two of the GDLA's Platinum Sponsors were again on-hand to offer wisdom with respect to the mediation component of the seminar. Hon. Susan Forsling of BAY Mediation & Arbitration Services and John Miles of Miles Mediation & Arbitration Services participated in a panel discussion, led by Burrell, addressing the nuts and bolts of mediations. Because it can be just as instructive learning what *not* to do, the panelists and faculty shed light on the good and the bad from their own mediation experiences.

Trial & Mediation Academy employs a modified mock trial format to teach litigation and mediation skills. 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 instruction and demonstrations, students dispersed into breakout groups to work on their skills from opening statements to cross- and direct-examinations to closing.

The first day concluded with a reception and dinner, sponsored by BAY and Miles, featuring a keynote address by Fulton State Court Judge Eric A. Richardson, who discussed professionalism and the Golden Rule from a new judge's perspective.

Trial & Mediation Academy is an exceptional learning opportunity not only for those early in their careers, but also for older attorneys who find themselves needing to brush up on their courtroom skills. Students could repeat the program each year and undoubtedly learn something new. Even the faculty professes to gain new trial tips and strategies every time – and some have been teaching for over 20 years.

Trial & Mediation Academy continues to be the GDLA's premier seminar, geared toward training leading litigators. As one student, Elie Wolfe of Nelson Mullins, explained: "I learned a great amount about becoming an attorney in a way I wouldn't have been able to without stepping foot in a courtroom. I gained confidence from the practice sessions that I will use to benefit my career going forward." Be on the lookout out for a save the date for January 2015. ❖

All those pictured are identified from left to right: 1. Judge Eric Richardson; 2. Program Chair Douglas Burrell; 3. Faculty member Carrie Christie and BAY Mediation's Susan Forsling; 4. Douglas Burrell moderates a panel on mediation nuts and bolts with John Miles of Miles Mediation and BAY's Susan Forsling; 5. Faculty member Dick Willis; 6. Eric Hawkins and Jim Brieske; 7. Christina Jay, Kate Lawson and Lara Ortega; 8. Elizabeth Ford and Beth Bentley; 9. Will Davis and Bo Burke; 10. Students tested their skills in breakout groups with faculty members there to critique; 11. Gary Beelen and Miles Mediation's John Miles; 12. Dan Kingsley, Drew Timmons and John Weltin; 13. Faculty member Bobby Shannon; 14. Faculty member and Secretary-Treasurer Matt Moffett and Michael Smith; 15. Faculty member and Past President Jerry Buchanan; 16. Clint Fletcher and Douglas Burrell; 17. Tommy Branch; 18. Michael Denney; 19. Program Vice-chair Bill Casey; 20. Faculty member Billy Harrison.


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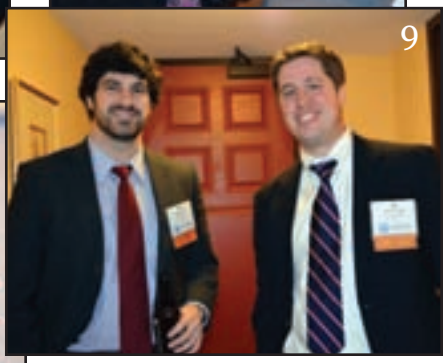
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Board Convenes for Winter Meeting

As is tradition, the GDLA Board of Directors held its Winter Meeting the day after the judicial reception, convening at State Bar headquarters on February 7, 2014.

Those present were: *Executive Committee*: President Theodore Freeman of Freeman Mathis & Gary, Atlanta; Secretary-Treasurer Matthew G. Moffett of Gray Rust St. Amand Moffett & Brieske, Atlanta; Past President Edward M. (Bubba) Hughes of Callaway Braun Riddle & Hughes, Savannah; W. Melvin Haas III of Constangy Brooks & Smith, Macon. *Vice Presidents*: Sarah B. (Sally) Akins of Ellis Painter Ratterree & Adams, Savannah; Craig C. Avery of Cowsert & Avery, Athens; Hall F. McKinley III of Drew Eckl & Farnham, Atlanta; and Peter D. Muller of Goodman McGuffey Lindsey & Johnson, Savannah. *Directors*: Jason C. Logan of Constangy Brooks & Smith, Macon; James D. (Dart) Meadows of Balch & Bingham, Atlanta; Wayne S. Melnick of Freeman Mathis & Gary, Atlanta; Brian T. Moore of Drew Eckl & Farnham, Atlanta; Christopher E. Parker of Miller & Martin, Atlanta; James W. Purcell of Fulcher Hagler, Augusta; Jeffrey S. Ward of Drew Eckl & Farnham, Brunswick. *Past Presidents*: Johnny Foster of Forbes Foster & Pool, Savannah; Warner S. Fox of Hawkins Parnell Thackston Young, Atlanta; Walter B. McClelland of Mabry & McClelland, Atlanta; James E. Singer of Bovis Kyle Burch & Medlin, Atlanta; Robert M. Travis of Bryan Cave, Atlanta. *Guests*: DRI Executive Director John Kouris, Chicago; Trial & Mediation Academy Chair Douglas Burrell of Drew Eckl & Farnham, Atlanta; Education Committee member Ashley Rice of Waldon Adelman Castilla Hiestand & Prout, Atlanta. *Also*

Winter Meeting Scenes

1. President Ted Freeman leads the meeting; 2. DRI Executive Director John Kouris, a special guest at the Board meeting, discusses the evolving defense practice and what keeps DRI leaders up at night; 3. Young Lawyers Vice-chair Jason Logan gives the YL Committee report; 4. Substantive Law Committee chair Brian Moore reports on SLC activities; 5. Education Committee Chair Wayne Melnick outlines upcoming seminars; 6. Education Committee member Ashley Rice looks on as Membership Committee Co-chair Dart Meadows explains his committee's recruiting efforts; 7. Past President Jimmy Singer makes a point.

present: Executive Director Jennifer M. Davis.

Following are highlights:

- Admissions Chair Warner Fox reported the GDLA currently has 713 members. He then presented the applicants for membership, and the Board approved 37 new members (see page 10).
- During the Fall Meeting, the Board unanimously approved a proposed amendment to the Bylaws that would expand our membership to include attorneys employed by and defending a federal, state or local governmental entity, or an agency thereof. He noted it will be voted on at the Annual Meeting, and invited any opinions or discussion before then.
- DRI State Representative and Past President Bubba Hughes reported on DRI developments, most notably a recent leadership meeting that featured Sarah Sladek, author of *The End of Membership*. Sladek discussed generational differences as it relates to membership in voluntary organizations like the GDLA – *i.e.*, what attracts a Boomer to join is very different from that which attracts Gen X and Y, and Millenials.
- DRI Executive Director John Kouris was the invited to speak to the Board, and he discussed a number of hot buttons issues impacting the defense bar nationally and internationally, and the many ways DRI is tackling these. One such effort has been increased amicus brief filings.
- Membership Committee Co-chairs Dart Meadows and Chris Parker reported that membership has increased significantly, having more than doubled in five years. The Membership Committee has expanded and is meeting regularly by teleconference.
- Education Committee member Wayne Melnick encouraged attendance at upcoming seminars. Of particular note was the Appellate CLE, which – after being rescheduled due to the snow storm – will be simulcast from State Bar headquarters in Atlanta to the Bar's satellite offices in Savannah and Tifton. We are pleased to be able to offer this, and future CLE seminars, to members outside the Atlanta area thanks to the Bar's simulcasting capabilities.
- Jennifer Davis reported for Meetings Chair and Past President Staten Bitting on the future meetings schedule, which can always be found on the calendar at www.gdla.org.
- President Freeman reported for the Judicial Relations Committee, sharing the latest judicial appointments under consideration. (*Note*: New leaders of the Judicial Relations Committee were later appointed in March. See article on page 9.)
- Substantive Law Committee (SLC) Chair Brian Moore reported that the SLCs continue to contribute case law updates to the newsletter and substantive articles for the *Law Journal*. The Product Liability SLC has scheduled a happy hour CLE on defending fire litigation claims in February. This will be the second SLC to hold an in-person CLE event.
- *Law Journal* editor Hall McKinley reported on article commitments; he expects to deliver a comprehensive publication when it is produced in May.
- Editor Sally Akins reported that the newsletter continues to receive positive feedback, especially from judges who have said that the case law updates are particularly informative.
- Trial & Mediation Academy Chair Douglas Burrell reported on the success of the 2014 conference. He noted that more experienced lawyers attended this year and, based on their positive feedback, we should focus on marketing our academy for all lawyers, regardless of experience level. (See article on page 30.)
- Sponsorships Chair Craig Avery reported that while our sponsorship revenue is lower than last year, 2013 was an anomaly since we started the sponsorships program. Avery encouraged everyone to continue to thank our sponsors each time, and to remind them that we use them because they support the GDLA. Jennifer Davis reported that Esquire Deposition Solutions had moved up from Gold to the highest level, Platinum; Tiffany Alley Reporting & Video dropped from Gold down to Silver. Sponsors who did not renew their sponsorship packages to support the GDLA are: Callaway Geer CPAs, Courtroom Visuals, Delve Information Resources, Gottschalk Technical Service, ProAssurance, RGL Forensics, and Trial Exhibits.
- President Freeman reported for Website Committee Chair David Nelson on a proposal held over from the Fall Meeting that would institute an experts database on our website. State Bar General Counsel Paula Frederick advised Nelson that client consent may be necessary for future publication of an expert's deposition from a given case. The Board discussed having the GDLA ask the contributing attorney, who would be providing the expert deposition to the database, to certify that his/her client has given permission, or that the arguably confidential or protected information has been redacted. There was discussion about HIPAA implications around medical depositions. Ultimately, the Board voted not to move forward with an expert deposition repository.
- Amicus Committee Co-chair Jeff Ward discussed the latest

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CLE: Skits & Suds "Chopped" Ethics and Professionalism Issues

On February 20, 2014, lawyers young and not-as-young gathered for "Skits & Suds: Chopped" at Manuel's Tavern in Atlanta for one of the best attended Skits & Suds programs to date.

The popular CLE seminar returned again this year and featured GDLA members reacting to and commenting on everyday ethical and professionalism dilemmas that lawyers will likely face. The evening also included a beer and wine reception for networking.

This year's fact pattern was developed by GDLA Education Committee member Lara Percifield of Mabry & McClelland in Atlanta.

Prior editions of the seminar focused on an auto accident in Springfield involving The Simpsons™ characters, and a slip and fall at nightclub involving the "cast" of "The Savannah Shore." This year, the fact pattern was based on the reality cooking competition, Chopped, where our contestant law firm partner "chefs" were given various ethical and professional "ingredients" to handle during three different rounds.

After each round, an esteemed judging panel chopped a competitor "chef," ending when one competitor was named GDLA Chopped Champion. We were honored to have DeKalb State Court Judge Stacey K. Hydrick, Fulton State Court Judge Robert C. I. McBurney and State Bar General Counsel Paula J. Frederick serve as the judging panel.

Our competing chefs were: Jonathan Adelman of Waldon Adelman Castilla Hiestand & Prout; Edward T. McAfee of Lewis Brisbois Bisgaard & Smith; and GDLA Past Presidents Lynn M. Roberson of Swift Currie McGhee & Hiers and Grant B. Smith of Dennis Corey Porter & Smith – all of Atlanta.

Past President Steven J. Kyle of Atlanta's Bovis Kyle Burch & Medlin moderated the seminar. After a vigorous competition, the judges named "chef" Adelman as the GDLA Chopped Champion.

The Education Committee is planning to take "Skits & Suds: Chopped" on the road, so look for a date in Savannah or Macon later this year. There we will crown yet another GDLA Chopped Champion.

The Skits & Suds fact pattern changes each year – as do the different dilemmas faced like discovery debacles, deposition nightmares, summary judgment crises, etc. – making this an enlightening and entertaining way to earn CLE annually. ❖

All are pictured left to right: 1. "Chefs" Edward McAfee, Jonathan Adelman, along with Past Presidents Grant Smith and Lynn Roberson; 2. Moderator and Past President Steve Kyle; 3. Paula Frederick, Judge McBurney and Judge Hydrick; 4. Jeff Wasick and Program Chair Lara Percifield; 5. Shaun Daugherty, Ann Cox Steedman and Bo Burke; 6. Networking at Manuel's Tavern; 7. Wayne Melnick and Marty Levinson.

Young Lawyers Hold Inaugural Networking Luncheon

The Young Lawyers (YL) Committee held its first networking luncheon for GDLA members ages 36 and under at Gordon Biersch in Midtown Atlanta on March 20, 2014.

Attendees drew table numbers to see where they would be seated for the informal gathering. The goal was to help YLs expand their network by meeting new faces, instead of sitting with colleagues from work, law school or elsewhere. Business cards were seen being exchanged, and future lunch plans were overheard being made, so the event was a success!

Pictured at the luncheon are (left to right): 1. Kasi Whitaker, Katey Stazak, Kori Flake, Shannon Schlottmann and YL Chair Pamela Lee; 2. Rakhi McNeill, Alexa Limeres and Becky Gabelman; 3. Eddie Tarver, Brett Williams and Crystal Filiberto; 4. Adam Masarek, Jake Evans and Lee Kynes; 5. President Ted Freeman, Aynsley Harrow Mull and Eric Mull; 6. Marcia Stewart and Brian Williams; 7. Adam Beedenbender, Vice President Hall McKinley and Board member Brian Moore.

Spring Board Meeting Held in Hilton Head

The GDLA Board of Directors traveled to the Sonesta Resort in Hilton Head, S.C., for its Spring Meeting, April 25-27, 2014.

The weekend commenced with a reception in the hospitality suite, after which everyone walked to dinner outdoors at the Sonesta's Oceanfront Pavilion. The Board meeting was held on Saturday morning, leaving the afternoon free for everyone to enjoy the pool, spa, golf, biking/walking trails and more. Board members and their spouses and guests gathered again in the hospitality suite on Saturday evening for a reception before dispersing to dinner on their own.

Those present were *Executive Committee:* President Theodore Freeman of Freeman Mathis & Gary, Atlanta; Executive Vice President Kirby G. Mason of HunterMaclean, Savannah; Secretary-Treasurer Matthew G. Moffett of Gray Rust St. Amand Moffett & Brieske, Atlanta; Past President Edward M. (Bubba) Hughes of Callaway Braun Riddle & Hughes, Savannah; Immediate Past President Lynn M. Roberson of Swift Currie McGhee & Hiers, Atlanta; Past President W. Melvin Haas, III of Constangy, Brooks & Smith, Macon. *Vice Presidents:* Sarah B. (Sally) Akins of Ellis Painter Ratterree & Adams, Savannah; Craig C. Avery of Cowsert & Avery, Athens; Hall F. McKinley III of Drew Eckl & Farnham, Atlanta; and Peter D. Muller of Goodman McGuffey Lindsey & Johnson, Savannah. Directors: George R. Hall of Hull Barrett, Augusta; Jo A. Jagor of Hall Booth Smith, Atlanta; Wayne S. Melnick of Freeman Mathis & Gary, Atlanta; David N. Nelson, Chambliss Higdon Richardson Katz & Griggs, Macon; Jeffrey S. Ward of Drew Eckl & Farnham, Brunswick. *YL Committee Chair*: Pamela N. Lee of Swift Currie McGhee & Hiers, Atlanta. *Past Presidents*: N. Staten Bitting, Jr. of Fulcher Hagler, Augusta; Walter B. McClelland of Mabry & McClelland, Atlanta. *Guests*: Judicial Relations Vice-chair Edward T. McAfee of Lewis Brisbois Bisgaard & Smith, Atlanta; GDLA's CPA Donald L. James of Daniel & Duncan, Savannah; Barry Murphy and Mike Malloy, Healthcare Marketplace. *Also present:* 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

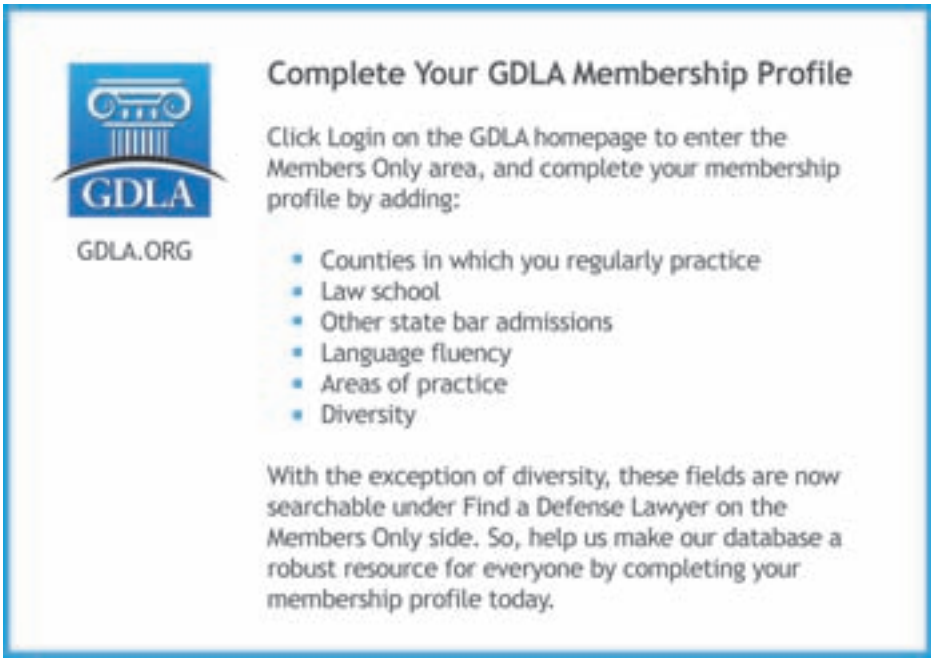
1. Secretary-Treasurer Matt Moffett (left) with Past President Staten Bitting and his wife, Cindy; 2. Vice President Hall McKinley with Ann Hopkins; 3. Past President Lynn Roberson and her husband, Henry Newkirk, with YL Chair Pamela Lee and her husband, Chris; 4. Vice President Peter Muller (left) with Vice President Craig Avery and his wife, Resa; 5. Judicial Relations Vice-chair Edward McAfee; 6. Executive Vice President Kirby Mason and President Ted Freeman; 7. GDLA's CPA Don James; 8. Amicus Co-chair Jeff Ward and Past President Walter McClelland.

Board Convenes for Winter Meeting

Continued from page 33

two requests for amicus briefs. The GDLA accepted a request that originated through DRI, but involved a Georgia case regarding the offer of settlement statute and how it impacts a contingency fee contract. (See article on page 28.) The Board reviewed the requirement that only a GDLA member may author an amicus brief to be submitted by the association. The Board also discussed whether the GDLA would consider amicus briefing on a legal matter or issue proffered by a non-GDLA member. They concluded that a GDLA member would still be required to draft and submit the brief on our behalf.

- As part of its diversity efforts, the GDLA is now actively involved with the Multi-bar Leadership Council (MBLC), which was created by the Atlanta Bar Association; the GDLA was allowed to join the last year. Jennifer Davis and Lynn Roberson attend MBLC meetings, and are working to get us connected into several upcoming MBLC events and projects. Announcements will come via e-mail blast.
- Young Lawyers (YL) Committee Vice-chair Jason Logan discussed the inaugural YL networking lunch. (See article on page 35). The Board discussed creating a separate GDLA publication targeted toward younger lawyers; the YLs will consider their needs and report back.
- Secretary-Treasurer Matt Moffett reported that the year 2013 was even better financially than 2012, which was itself a healthy financial year.
- GDLA has a conflict of interest policy for the Board of Directors, which was adopted at the 2013 Fall Meeting. We have been advised by our CPA that we need not have board members sign it. Rather we need only note its adoption in the minutes and any new Board members should be affirm compliance with it, and that should be noted in the minutes.
- President Freeman reported that our insurance premiums increased, but the GDLA still has all necessary insurance.
- The Board discussed a proposed amendment to the Bylaws to change the officer title Executive Vice President to be President-elect. The intention is to bring the Association in line with other similar organizations in Georgia and nationally. Also, it would essentially codify what has been the practice already, whereby the Executive Vice President becomes President at the end of his/her term unless he/she becomes ineligible or the Nominating Committee decides otherwise. After discussion, the Board approved the proposed Bylaw amendment, which will be voted on at the Annual Meeting. Notice of the proposed change will be e-blasted to the membership.
- President Freeman discussed his desire to create a Strategic Planning Committee. He shared with the Board a long range planning guide developed by DRI for state and local defense organizations (SLDOs). The Board supported the concept, and Freeman encouraged them to suggest to him potential members. He expects the group to hold a kick-off retreat; the Board then voted to pay any hotel expenses associated with that planning session. We are exploring using a facilitator from the DRI Speakers Bureau, since it offers us one free speaker per year. Freeman will name the committee chair by the Spring Meeting, then he/she will constitute the group with Executive Committee input.
- Jennifer Davis reported that the last Speaker Lunch Series was a great success. It featured not only college football referee and Judge Tripp Self, but also an impromptu panel of Court of Appeals judges. (See article on page 29.) ❖



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inspection procedure that was followed at the time of the incident. The store's inspection procedure required employees to inspect the floors every 30 minutes and spot-mop if needed. In addition, at the beginning of each shift, the manager or assistant manager was required to do a walkthrough of the store.

On the morning in question, an employee inspected the store's floors and spot-mopped where it was needed at 7:00 a.m. and again at 7:30 a.m., as indicated in a "Daily Assignment Worksheet" for that morning. The store manager also performed his walkthrough when he came on duty at 6:00 a.m. that morning (a little over an hour before Pirkle fell). The store manager also testified that the front area near the cash registers is very difficult to mop because the store gets busy and that the area had not been mopped within 15 minutes prior to Pirkle's fall.

The Court held that because the area in question had been inspected about eight minutes before Pirkle's fall, the store's inspection procedure was "reasonable" as a matter of law. *Id.* at *11. The Court also relied on and reaffirmed prior Court of Appeals precedent that where an inspection of the premises had occurred within 15 minutes before the plaintiff's fall, the proprietor's inspection procedure was adequate as a matter of law. *Id.* at *11-12. Accordingly, the Court affirmed the trial court's grant of summary judgment to the store owner.

SLIP-AND-FALL; DIRECTED VERDICT; CONSTRUCTIVE KNOWLEDGE OF HAZARD: Trial court correctly denied grocery store's motion for directed verdict, as evidence presented at trial, although "far from overwhelming," was sufficient to permit reasonable jury to find that store had constructive knowledge of puddle of water before plaintiff slipped in it.

***The Kroger Co. v. Schoenhoff*, 324 Ga. App. 619(Nov. 12, 2013)**

The plaintiff in this case slipped and fell in a "clear liquid" in front of the floral display case at a Kroger grocery store in Fayetteville, Georgia as she walked toward the store's self-checkout area. At trial, the jury awarded a verdict of $2,640,000 to the plaintiff and an additional $150,000 to her husband on his loss of consortium claim. Kroger appealed, contending that the trial court erred in denying its motion for directed verdict at trial because there was no evidence that Kroger had actual or constructive knowledge of the alleged hazard.

At trial, the plaintiff testified that she was watching where she walked but did not see anything on the floor before falling. After she fell, the plaintiff saw a puddle of clear liquid on the floor. There was no evidence that Kroger had actual knowledge of the liquid before the plaintiff fell, but there was no evidence that Kroger's employees had complied with its own inspection procedures on the date in question. Indeed, there was no evidence that Kroger's employees had inspected the area where the plaintiff fell at all on the date in question.

A former Kroger employee testified she had seen water in the floral area on some occasions when she worked at the store. Several witnesses, including Kroger employees, also testified that non-skid floor mats were used in floral areas at times because it was anticipated that shoppers would drip water on the floor as they took flowers out of the vases there. There was some evidence that non-skid mats had been used in the floral area at that particular store on some occasions, but not on the date in question. The Court of Appeals also noted that the fall occurred on a Saturday evening, and thus at the end of an entire shopping day on one of the busiest days of the week for the store.

Based on that evidence, the Court of Appeals held there was a jury issue as to whether Kroger had constructive knowledge of the liquid on the floor prior to the plaintiff's fall. Kroger argued that the motion for directed verdict should have been granted because the plaintiff presented no evidence of how long the liquid was on the floor before she slipped and fell. The Court of Appeals disagreed: "Although this evidence was far from overwhelming, we find that it provided a sufficient basis from which the jury could infer that the spill had been on the floor for a sufficient length of time such that the store employees would have discovered it and cleaned it up had they been adhering to reasonable inspection procedures, and therefore Kroger had constructive knowledge of the hazard." *Id.* at622. Accordingly, the Court affirmed the trial's judgment on the jury verdict in favor of the plaintiff.

Judge Andrews dissented from the majority opinion of the Court of Appeals. Specifically, Judge Andrews believed that since the plaintiff "admitted that the clear liquid in which she slipped and fell was not visible against the white floor as she approached it, as a matter of law, there was no reasonable basis for the jury to find that Kroger had constructive knowledge on the basis that its employee, working 25 feet away from the liquid, could have easily seen and removed it prior to the slip and fall." *Id.* at625. Judge Andrews also would have held that "[a]lthough there was evidence from which the jury could have reasonably inferred that water had occasionally dripped on the floor in or possibly

near the floral department, there was no evidence from which the jury could have reasonably inferred how long the puddle of 'clear liquid' in this case had been on the floor before the [plaintiff's] slip and fall." *Id.* at 628. Judge Andrews believed that "the jury was required to guess or speculate how long the liquid had been on the floor" because "[t]here was no direct proof, and no circumstances, from which the jury could have reasonably found how long the liquid was on the floor prior to the slip and fall." *Id.* Accordingly, Judge Andrews would have reversed the trial court's denial of the store owner's motion for directed verdict.

THIRD-PARTY CRIMINAL ACT; WORKER'S COMPENSATION; EXCLUSIVE REMEDY: Trial court correctly dismissed plaintiff's action alleging injury at the hands of third-party assailant in her employer's parking lot because the action was barred by the exclusive remedy provision of the Georgia Worker's Compensation Act.

***Dawson v. Wal-Mart Stores, Inc.*, 324 Ga. App. 604 (Nov. 12, 2013).**

The plaintiff in this case was attacked and kidnapped in the parking lot at a Wal-Mart store in Baxley, Georgia where she worked. She was walking from her car to the store at around 5:00 a.m. to begin her shift at the store when a man drove his vehicle into her, knocking her unconscious, and kidnapped her. The plaintiff regained consciousness soon thereafter and began struggling with her kidnapper in the moving vehicle, causing the vehicle to run into a ditch. The kidnapper than dragged the plaintiff from the vehicle into a wooded area, where he physically and sexually assaulted her.

During the criminal investigation by police after the assailant was apprehended, the assailant's girlfriend told police that he had gotten angry with her the night before the incident because she had refused to leave work and have sex with him. When the incident occurred, the assailant allegedly was sitting in the parking lot "trying to sober up" from drinking alcohol and possibly using cocaine. The investigating officer theorized that the assailant had attacked the plaintiff because of his anger and frustration with his girlfriend and because the plaintiff resembled her.

The plaintiff sued Wal-Mart, alleging her employer was negligent in failing to make surveillance video available to police more quickly, allowing her assailant to continue his attack for a longer period of time. Wal-Mart moved to dismiss or for summary judgment, contending the plaintiff's suit was barred by the exclusive remedy provision of the Georgia Worker's Compensation Act. In opposing the motion, the plaintiff offered the affidavit of the investigating officer with his theory on the why the assailant had attacked the plaintiff, arguing that it created an issue of fact as to why the incident had occurred. The trial court agreed with Wal-Mart, however, and granted its motion, and the plaintiff appealed.

On appeal, the plaintiff conceded that her injuries occurred "in the course" of her employment; thus, the only remaining issue on appeal was whether her injuries "arose out of" her employment. The plaintiff contended that there was a question of fact as to whether the attack was "personal," such that it did not "arise out of" her employment because there was evidence that the attacker may have attacked the plaintiff due to a resemblance to his girlfriend, with whom he was angry at the time.

The Court of Appeals held that the officer's affidavit was "simply speculation as to [the assailant's] motive without any support by testimony from [the assailant] or anyone else that could create a fact question as to whether [he] attacked [the plaintiff] solely based on her resemblance to a particular person." *Id.* at 609. Here, it was undisputed that the plaintiff and the assailant did not know each other before the incident, and, as a result, the Court concluded it was undisputed that the assailant "randomly attacked [the plaintiff] merely because she was at that location, even if her appearance somehow played a part in his decision to attack" the plaintiff. *Id.* at 609.

The Court also noted that the subject parking lot was "not regarded as a high-crime location for that area," and that the plaintiff "was walking from the parking lot into the store at an early morning hour when it would still have been dark." *Id.* at 609. Accordingly, the Court of Appeals held that the trial court had correctly determined that the attack "arose out of" the plaintiff's employment with Wal-Mart and that her claims were barred by the exclusive remedy provision of the Worker's Compensation Act.

SLIP-AND-FALL; EQUAL KNOWLEDGE; HAZARDOUS NATURE OF CONDITION WITHIN ORDINARY PERSON'S UNDERSTANDING; PRIOR TRAVERSAL: Store owner was entitled to summary judgment despite its actual and/or constructive knowledge of flattened cardboard boxes on floor, as plaintiff had seen boxes and walked across them previously without any problem.

***Houston v. Wal-Mart Stores E., L.P.*, 324 Ga. App. 105, Case No. A13A1525 (Oct. 3, 2013).**

This case involved a slip-and-fall at a Wal-Mart in Morrow, Georgia. Plaintiff Houston was shopping at the store at about 5:00 a.m. one morning when he pushed his cart over and walked across some flattened cardboard boxes that had been left by an employee who was restocking shelves earlier that morning. A few seconds later, he turned around and walked back across the same boxes without his cart, and he slipped and fell to the ground.

Houston sued Wal-Mart and two employees who were working at the store that morning. At the close of discovery, the defendants moved for summary judgment. The incident was captured by one of the store's security cameras, and the defendants relied on a DVD recording of the video footage and screenshots in support of their motion. They also relied on Houston's admission in his deposition that he saw the boxes on the floor, walked across them once without incident, and then slipped and fell on the same boxes as he walked back over them a second time. At one point during his deposition, Houston claimed he had slipped on a piece of white paper rather than the boxes, but he later conceded, after viewing video and photographs, that there was no white paper and that he had indeed slipped on the cardboard. The trial court granted summary judgment to the defendants based on the evidence showing that Hudson had equal knowledge of the hazard before he fell.

On appeal, the Court of Appeals held that Houston was barred from recovering from the defendants because, "[w]hile there was evidence that Wal-Mart had actual or constructive knowledge of the flattened cardboard boxes on the floor, the uncontroverted evidence show[ed] plainly, palpably, and without dispute that Houston had equal knowledge of the presence of the boxes before he slipped and fell on them." *Id.* at 107 (1) (internal quotation omitted). The Court rejected Houston's contention that summary judgment was unwarranted because he did not appreciate the hazard presented by the boxes: "[T]his is not a case where the specific hazard that caused the plaintiff's injury was hidden or outside the realm of an ordinary person's understanding. Rather, large, flattened cardboard boxes in plain and unobstructed view on a store floor are items which any person with ordinary, common sense would recognize as something that might cause a person to trip, slip, or fall." *Id.* at 108 (1). The Court also noted that the case was distinguishable on its facts from others where the plaintiff "lacked knowledge of a difficult-to-see article lying on the floor of the defendant's store before slipping or tripping over it." *Id.* at 108 (1), fn. 3.

Finally, the Court rejected Houston's contention that he "was clearly confused during his deposition regarding the questions posed by the defendants' counsel pertaining to whether or not he saw the boxes on the ground ... before he traversed them." *Id.* at 107(1), fn. 2 (internal brackets omitted). The Court noted there was nothing in the transcript of Houston's deposition or elsewhere in the record indicating he was confused during the questioning, and Houston did not file an errata sheet or a supplemental affidavit indicating such confusion. ❖

Surveillance Video Analysis

Continued from page 20

crash. You will also know the forces exerted on all participants and the potential injuries that could have resulted.

Awareness

The "Open and Obvious" argument can sometimes be problematic. It is often difficult to ascertain if the plaintiff saw a hazard or not. Having a biomechanical engineer review the surveillance tape can be invaluable. Even subtle changes in the plaintiff's gait as they approach the site can be strong evidence that he was aware of an obstacle and adjusted to avoid it.

There are so many variables in any incident or accident. When the event is captured on video many of those variables are quantified. The rigid parameters needed to accurately reconstruct the incident are now present. Often you just need an expert to show you what you have. ❖

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

for Ford. When the Conleys discovered that Ford did have insurance, by virtue of the findings in *Young v. Ford Motor Co.,* 322 Ga. App. 348 (2013), they moved for mistrial.

In examining the Conleys' motion for retrial, the trial court found that Ford's concealment of its insurance coverage from the Conleys was "willful" and "intentional." *Id.* Citing *Atlanta Coach Co. v. Cobb*, 178 Ga. 544 (1934), the court presumed that the Conleys had been harmed by Ford's conduct because, "under Georgia law, the harm is presumed when there is a failure to qualify a jury as to a Defendant's insurance carriers." *Id.* at 13. Thus, the trial court granted the Conleys' motion for retrial. Ford promptly appealed this decision.

II. Georgia Court of Appeals Opinions

The trial court certified Ford's order for immediate review and the Georgia Court of Appeals granted Ford's application for interlocutory appeal. *See* O.C.G.A. § 5-6-34 (b). The Court of Appeals divided equally in the disposition of the appeal – five judges voted to reverse the trial court's judgment, and five judges voted to affirm. Three opinions made up the Court of Appeals' ruling. Because of the equal division of the court, no opinion was truly a majority or a dissent. An equally divided Court of Appeals compels case transfer to the Supreme Court of Georgia.

III. Supreme Court of Georgia Decision

The Supreme Court of Georgia framed the issue as an alleged discovery violation involving Ford's responses about its insurance coverage and the effect of that alleged violation on the qualification of the jury deciding the Conleys' case. *Ford Motor Co. v. Conley*, at 17. As stated above, Ford did not disclose the existence of insurance coverage, despite Interrogatories inquiring about the same. Because of Ford's inaccurate responses, the Conleys reasonably presumed that Ford possessed no insurance coverage for their claims. After Ford's defense verdict, the Conleys discovered that Ford did possess insurance coverage that could satisfy their claims.

In Georgia, this is particularly troubling because O.C.G.A. § 15-12-135(a) dictates that jurors in a civil trial must be qualified as to their relationship with the defendant's insurers. If the jury is not properly qualified, and the party seeking such qualification has properly preserved the issue for review, prejudice to that party will be presumed, and, in the absence of proper rebuttal, a new trial must be ordered. *See Atlanta Coach*, 178 Ga. at 550-52. Based upon this precedent, the Conleys moved for a mistrial.

The Conleys failed to file their motion for retrial within the statutorily designated 30 days from the entry of judgment. Only in *extraordinary cases* will a court grant an untimely filed motion for retrial. Any party filing an extraordinary motion for new trial must meet two requirements:

1) The moving party must show a "good reason" why the motion was not filed during the 30-day period after the entry of judgment. "Good reason" exists only where the moving party exercised *due diligence* but, due to circumstances beyond its control, was unable previously to discover the basis for the claim it now asserts. *See Harper v. Mayes*, 210 Ga. 183 (1953).

2) The moving party must show that the error alleged was materially harmful. O.C.G.A. § 9-11-61.

The Georgia Supreme Court examined whether Ford's Interrogatory responses warranted a retrial under the above standard.

a) Prong One: Could the existence of Ford's insurance coverage have been discovered and raised in a timely manner if the Conleys had acted with due diligence?

The Supreme Court of Georgia concluded that the Conleys acted with "due diligence." The Court noted that, only after Ford's insurance information was revealed during the *Young* proceedings, did the Conleys actually learn that Ford had insurers. The Conleys sought a new trial shortly after this discovery. Because this discovery was made over a year after trial, the motion was egregiously untimely. Ford, therefore, argued that the Conleys waived their right to seek jury qualification and could not justify the untimeliness of their motion for new trial.

The Supreme Court disagreed, affirming the trial court's findings and its holding. The trial court found that the Conleys' failure to discover Ford's insurer was not the Conleys' fault. Instead, it was the result of Ford intentionally misleading the Conleys to believe that Ford had no insurers. The trial court found that Ford's statement that it had "sufficient resources to cover any judgment" could be reasonably understood as an assertion that Ford was self-insured and did not have any insurers who could be liable for a judgment. *Ford Motor Co. v. Conley*, at 30.

Ford argued and Court of Appeals Judge Boggs agreed, that Ford's objections, particularly that the request was "overly broad," sought "irrelevant" "confidential or proprietary" information, and that Ford's response should have alerted the Conleys that Ford had some insurance coverage. The Supreme Court dismissed Ford's argument, noting that due diligence does not require the requesting party to "disbelieve the substantive answers an opposing party has provided in discovery, nor must the requesting party file a motion to compel and then show non-compliance with an order to compel before the trial court can sanction the responding

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party for its discovery abuse, as must be done if the responding party refuses to answer the request at all." *See* O.C.G.A. § 9-11-37; *MARTA v. Doe*, 292 Ga. App. 532, 537 (2008). For this reason, the Court affirmed the trial court's findings that the Conleys were reasonable in reading Ford's discovery responses as asserting that Ford was self-insured and would not utilize any insurance policy to cover a potential judgment. Conleys were further entitled to rely upon Ford's responses as truthful and were not obliged to question them or to seek different responses. The Conleys' due diligence obligation was, therefore, met.

b) Prong Two: Was the inability to qualify the jury regarding Ford's insurance carriers materially harmful to the Conleys?

To obtain a new trial, the Conleys must also show that the error caused them material harm. In Georgia, a failure to qualify the jurors in a civil trial to their relationship with the defendant's insurers causes *presumed* harm. *Ford Motor Co. v. Conley*, at 43. It is a longstanding rule in Georgia that, to ensure the right of trial by impartial jury, a party to a civil case is entitled to have the jury qualified by the court as to any insurance carrier with a financial interest in the case. *See Atlanta Coach Co.,* 178 Ga. at 549-50; *Weatherbee v. Hutcheson*, 114 Ga. App. 761, 764 (1966). Equally longstanding in Georgia is the rule that, where a civil jury was not properly qualified and where the party seeking such qualification has properly preserved the issue for review, prejudice to that party will be presumed, and, in the absence of proper rebuttal, a new trial must be ordered. *See Atlanta Coach*, 178 Ga. at 550-52.

Ford argued that the objection to improper qualification was not properly preserved, precluding the grant of the Conleys' requested new trial. The Court disagreed, asserting that "the Conleys' failure to raise the issue of qualifying Ford's insurers earlier was excused because Ford misled them into believing no such issue existed." *Ford Motor Co. v. Conley*, at 49. The Court elaborated, stating that this is not a case in which the Conleys knew of the ground for qualifying the jury, or could have discovered that ground by the timely exercise of ordinary diligence. *Id.* at 56. Thus, the Court found that the error was materially harmful to the Conleys.

c) Supreme Court of Georgia's Conclusion

The Court held that the trial court did not abuse its discretion in granting the Conleys' extraordinary motion for new trial. This conclusion was based on the finding that the Conleys acted with due diligence in raising their qualification claim, and this failure to qualify raised an unrebutted presumption that the Conleys were materially harmed.

IV. Case Takeaway: How Are Defendants with Liability Coverage Impacted by *Conley*?

The *Conley* decision has notable and emphatic discovery repercussions for defendants. Through the *Conley* decision, the Supreme Court of Georgia fortified O.C.G.A. § 9-11-26 (2) and demonstrated a willingness to back it by judicial force. Granting a retrial based upon an untimely motion requires *extraordinary* circumstances. Finding extraordinary circumstances under the present facts illustrates the Court's genuine conviction that O.C.G.A. § 9-11-26(2) need be enforced.

Going forward, regardless of the amount of coverage, defendants should disclose an insurance carrier and the amount of coverage. Not doing so could subject defendants to a mistrial, based upon the jury not being qualified as to a defendant's insurers. After *Conley*, pleading ignorance will be unfruitful. The Court has firmly established that violating O.C.G.A. § 9-11-26(2) by not disclosing insurance coverage that could satisfy a potential judgment entails legal consequences.

To avoid these consequences, it is recommended that defendants disclose coverage at the outset. For defendants currently in litigation, it is recommended that they supplement the discovery requests necessary to comply with O.C.G.A. § 9-11-26(2). ❖

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tion and rhetorical tactics simplify decision-making for jurors and persuade them of the plaintiff's case.[15] Large damage awards tend to come from juries who believe a defendant knowingly broke a rule, but is unwilling to admit it or tries to back out of a prior admission. Establishing the case's "rule" or principle early in the case is Ball and Keenan's specialty and lays the foundation for the reptile plaintiff's attorney.

The novelty and effectiveness of Ball and Keenan's approach is twofold: 1) a long distance perspective to litigation – instead of focusing on framing jury issues as trial approaches, Ball and Keenan are teaching attorneys to focus on jury issues at depositions or as early as possible in a case, so that 2) defendants naively agree to a seemingly innocuous rule, law, code, or principle that they broke or deviated from and thus must now live with the violation of their own rule or law. The defendant has now been framed in light of knowingly violating a rule or principle or forced to backslide out of it at trial, a tactic which erodes a witness' credibility with jurors. Either instance is a nightmare-come-true for defendants, because a low dollar case has exponentially increased and the plaintiff has begun to see real opportunities to exploit at trial. Preventing Reptile plaintiff attorneys from gaining leverage by increasing a defendant's exposure is the critical first step in combating reptile tactics. Other vulnerabilities clearly exist, but witness testimony at deposition and at trial are by far the most important strategic elements where Reptile plaintiff attorneys lay the foundation for their cases and it is why we address this issue in the article.

Witness Testimony

Defendant's Deposition Testimony: Plaintiff attorneys have learned the quickest path to profits involves settling a case in excess of its actual value by forcing a defendant to pay. They accomplish high value settlements by manipulating defendants into providing damaging testimony, specifically by cajoling them into agreement with multiple safety rules. Once these admissions are on the record, and often on videotape, the defense must either settle the case for an amount over its likely value, or go to trial with dangerous impeachment vulnerabilities that can severely damage the defendant's credibility. This problem is caused by inadequate pre-deposition witness preparation that focuses exclusively on substance and ignores the intricacies of the Reptile strategy. In other words, if defendants are not specifically trained to deal with Reptile questions and tactics, the odds of them delivering damaging testimony is high.

Defendant's Trial Testimony: When the defendant agrees to a safety rule on the witness stand, gets trapped, and then tries to weasel out of it, the obvious contradiction quickly leads to juror dislike and distrust that is often incurable. Again, the primary mistake is insufficient witness preparation that focuses on the science/medicine more than the manipulative Reptile techniques. The "gotcha moment," when the defendant gets boxed in by plaintiff's counsel and begins to respond emotionally (*i.e.*, argumentativeness, defensiveness, or anxiety), typically results in a serious mess that is difficult to clean up during defense counsel's rehabilitation efforts. The irony here is that it is the defendant that goes into survival mode cognitively, not the jury. Ball and Keenan claim that jurors award damages to protect themselves and the community from the dangers of the defendant. In reality, jurors award damages to punish the defendant who breaks safety rules, not to protect themselves or the community.

Witness Training

A black box analysis of how and why Reptile plaintiffs defeat defendants at deposition and trial reveals that the defendant witness is ultimately trapped by an agreement to one or more safety rules which creates a clear contradiction between the rule and their conduct in the specific case at hand. The Reptile attorney has two tiers of attack against defendants during adverse examination: (1) the safety rule attack and (2) the emotional attack. The safety rule attack is a "word game" in which the defendant needs to decide on whether to accept or reject the plaintiff attorney's language. The emotional Reptile attack attempts to force the defendant witness out of high road cognitive processing (patient, thoughtful, meticulous) and into low road cognitive processing (instinctual, spontaneous, survival). By forcing low road cognition, the Reptile plaintiff attorney can generate a response that will likely be negatively perceived by the jurors, thus hurting the defendant witness' credibility.

The Reptile plaintiff attorney has become an expert at cleverly planting big picture safety questions that on the surface appear to be "no-brainer" in nature. These questions focus on the following big picture principles:

- Safety is always top priority
- Danger is never appropriate
- Protection is always top priority
- Reducing risk is always top priority
- Sooner is always better
- More is always better

Hypothetical safety questions are more specific and often take the form of an if-then statement, like "Doctor, you would agree that if you see A, B, and C symptoms, then the standard of care requires you to order tests X and Y, correct?" These deceptive questions are effective because they provide just enough information (compared to the big picture safety questions) to lure defendant witnesses into providing an inflexible, absolute answer. By definition, the safety rule and hypothetical safety questions are inherently flawed because they lack the proper specificity to allow for a specific answer. Therefore, the only honest answer to a vague, general question is a vague, general answer like:

- "It depends on the circumstances"
- "Not necessarily in every situation"
- "Not always"
- "Sometimes that is true, but not all the time"
- "It can be in certain situations"

Bottom line: training a witness to withstand these reptilian attacks goes far beyond traditional "witness preparation." Instead, more sophisticated witness training is needed, as the witness must undergo cognitive and communicative restructuring. Witnesses must literally develop a new process of thinking and communicating through intense operant conditioning methods to ensure cognitive and communicative changes take place. This type of training requires doctoral level consultants with extensive experience evaluating and training humans in the employment of psychological and communicative strategies.

Nightmare at Trial

Attorney: "Doctor, patient safety is your top priority, isn't it?"
Doctor: "Yes, of course."
Attorney: "And the emergency procedure you chose to perform during Mr. Smith's surgery wasn't very safe because it resulted in his death correct?"
Doctor: "That's true, but you have to understand that I-"
Attorney: (with emphasis) "Doctor you didn't make Mr. Smith's safety your top priority, and because you are ignoring your own rule, you put Mr. Smith and perhaps all of your patients in danger, didn't you?"

It is at this point the Reptile Plaintiff attorney has his or her claws into the witness. Jurors simplify the case to be one in which the doctor knowingly put his patient at risk and violated his own safety rule. While the Reptile theory offers a more aggressive plaintiff strategy erroneously packaged in neuro-psych wrapping, Ball and Keenan's guidance can certainly be effective at all points in the litigation timeline and can lead to increased economic exposure for your client. This article dealt with witness training because it is the first and most potent attack technique employed by the Reptile plaintiff attorney, and we urge you to develop new advanced techniques for witness training prior to deposition and trial. Thwarting reptilian attacks by reinforcing a solid defense foundation ensures protection for your client, minimizes your exposure, and offers you greater leverage in settlement discussions or in preparation for trial. ❖

ENDNOTES

[1] For the widespread impact of the Reptile Theory see Ken Broda-Bahm, "Taming the Reptile: A defendant's response to the plaintiff's revolution," *The Jury Expert* v.25.5, 2013; Ken Broda-Bahm "Defendants: Be the Mongoose," www.persuasivelitigator.com, 12/26/13; Kathy Cochran, "Reptiles in the Courtroom," www.dri.org 1/12/10; Bill Kanasky, Jr. "Debunking and Redefining the Plaintiff Reptile Theory" *Under Review* 1/14; David C. Marshall, "Lizards and Snakes in the Courtroom: What every defense attorney needs to know about the emerging plaintiff's reptile strategy" *For The Defense*, 4/2013; Minton Mayer, "Make Boots Out of that Lizard: defense strategies top beat the reptile," *The Voice* v12.38, 2013; Pat Trudell, "Beyond the Reptilian Brain," www.zenlawyerseattle.com, 2010; Stephanie West Allen, Jeffrey Schwartz, and Diane Wyzga, "Atticus Finch would not Approve: why a courtroom full of reptiles is a bad idea," *The Jury Expert* v.22.3, 2010.
[2] See www.reptilekeenanball.com for promotional material.
[3] By "Reptile plaintiff attorneys" we do not mean to demean plaintiff attorneys practicing these tactics, but simply offer a term less burdensome than "plaintiff attorneys who practice 'reptile' tactics."
[4] See Kanasky, William Jr., "Debunking and Redefining the Plaintiff Reptile Theory," *Under review*, 2014.
[5] Deposition testimony, ADR, Motion en liminies, Supplemental juror questionnaire, *voir dire*, opening statements, graphics, trial testimony, closing arguments, and jury instructions.
[6] See David Ball & Don Keenan, *Reptile: the 2009 Manual of the Plaintiff's Revolution*. Balloon Press, 2009.
[7] See Paul D. MacLean, *The Triune Brain in Evolution: Role in Paleocerebral Functions*, Springer, 1990; and Reiner, A. "An Explanation of Behavior." Science 250 (4978): 303–305.
[8] For discussions of weaknesses surrounding the Reptile Theory see Striedter, G. F. (2005) Principles of Brain Evolution. Sinauer Associates; Patton, Paul (December 2008). "One World, Many Minds: Intelligence in the Animal Kingdom". Scientific American. Retrieved 29 December 2008; Butler, A. B. and Hodos, W. Comparative Vertebrate Neuroanatomy: Evolution and Adaptation, Wiley; Smith CU., 2010, The triune brain in antiquity: Plato, Aristotle, Erasistratus. Journal of the History of the Neurosciences, 19:1-14.; and Ben Thomas "Revenge of the Lizard Brain," Blog.Scientific American.com 9/7/12.
[9] David Ball & Don Keenan, *Reptile: the 2009 Manual of the Plaintiff's Revolution*. Balloon Press, 2009, Pg. 17.
[10] Ibid, Pg. 17, 19, 73.
[11] Ibid, Pg 30.
[12] David C. Marshall, "Lizards and Snakes in the Courtroom: What every defense attorney needs to know about the emerging plaintiff's reptile strategy" *For The Defense*, 4/2013, Pg 65.
[13] Supra 9, Pg. 51.
[14] Ibid, Pg. 51
[15] We believe jurors more commonly reflect a decision-making model called "Sensemaking," pioneered in the 1960s and 70s to explain group decision-making. Sensemaking has been adopted by the Department Of Defense and other high risk organizations to improve collective problem-solving in high stress environments. For more on the influence and widespread use of Sensemaking see Dennis Gioia and Kumar Chittipeddi, "Sensemaking and Sensegiving in Strategic Change Initiation," *Strategic Management Journal* 12 433-448; Maryl Louis, "Surprise and Sensemaking: What newcomers experience in entering unfamiliar organizational settings," *Administrative Science Quarterly* 25 226-251; Maryl Louis and Robert Sutton, "Switching Cognitive Gears: from habits of mind to active thinking," *Human Relations* 44 55-76; Ryan A. Malphurs, *Rhetoric and Discourse in Supreme Court Oral Arguments*. New York: Routledge Press, 2013; William Starbuck and Frances Milliken, "Executives personal filters: What they notice and how they make sense," *The Executive Effect*. Donald Hambrick (ed). (Greenwhich CY: JAI 1998); Karl Weick, *Making Sense of the Organization* (Malden, MA: Blackwell 2001); Karl Weick, *Sensemaking in Organizations* (Thousand Oaks, CA: Sage 1995).

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Forensic Accountants Help Manage and Resolve Cases

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financial information that are summarized in financial records.

In less time than you might imagine, a forensic accountant will be able to give you feedback on the strengths and weaknesses of the claim for damages. In doing so, he may well give you alternative views that can help you see avenues to resolution you might not otherwise consider. He may well have industry data at his fingertips or be able to speak to key trends that need to be considered in the measure of damages or compared to the other side's damage projections. The forensic accountant can work with you in preparing requests for crucial discovery items and assist you in crafting key financial interrogatory questions.

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

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

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

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

Case Example One

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

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

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

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

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

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

Case Example Two

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

The forensic accountant you bring in to assist you reviews personal and business income tax returns, the transcript of an interview with the plaintiff, and per-

forms his own mortgage industry research. His analysis reveals that while the plaintiff was alleging disability going back to 1998, his income during the late 1990s through mid-2000s showed considerable growth. Through research, the forensic accountant is able to tie the growth years to lower interest rates and finds that declines in later years correspond to the real estate crisis and lack of easy sub-prime financing. The forensic accountant also uncovers that in 2004, the plaintiff purchased a chain of self-service car washes. This was discovered through analysis of the plaintiff's financial records and tax returns and had not been previously disclosed by the plaintiff. Over the course of four years the plaintiff lost over $2.5 million from the car wash business. Both the decline in the mortgage business and the financial strain of the car washes created a significant income loss for the plaintiff, both unrelated to disability.

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

Summary

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

Dayne Grey, a licensed CPA in Georgia and Tennessee, is a partner with MDD Forensic Accountants, a GDLA Platinum Sponsor. He has quantified damages for claims – ranging from under $10,000 to over $200 million – related to business interruption; extra expense; inventory and physical damage; construction delays; builders' risk; financial condition; and product liability and recall. He has provided his expertise on numerous litigation files, having reviewed and analyzed transcripts, prepared inquiries for witnesses under oath and assisted with all aspects of discovery, including the preparation of document requests and interrogatories.

After 41 years our work speaks for itself.

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

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