Georgia Defense Lawyer©

Advancing the Civil Defense Bar©

Summer 2013

Looking for a Silver Lining:

A Little Hope and Change in the Affordable Care Act

By Edwin L. Hamilton
Goodman McGuffey Lindsey & Johnson, Savannah

"[W]e have to pass the [Affordable Care Act] bill so that you can find out what is in it, away from the fog of the controversy."[1] Although the controversy has not yet lifted, Americans should read the bill, and defense lawyers are no exception. You might be pleased to see a few of the provisions.

As defense lawyers, we have all seen shockingly large emergency room (ER) bills as high as $10,000 for one visit. Vehicle photos show that the plaintiff had a low-impact, rear-end collision. The plaintiff went to the emergency room of the local county hospital, was treated and released, and has no health insurance. Your client, the defendant, has a minimum-limit automobile insurance policy. The plaintiff has no uninsured motorist coverage, has no medical payment coverage under her automobile insurance policy, has no health insurance, and is too young and not otherwise disabled to qualify for Medicare. After the ER visit, she hires an attorney and then sees the chiropractor.

The whopper of an ER bill makes it difficult to settle the case without tendering the policy limits or something close to it. You can deal with the chiropractor charges of a few thousand dollars, because she stopped treating after six weeks. After paying her lawyer's contingency fee, the hospital, the ER physician, the radiologist, and the chiropractor, very little money is left to put in the plaintiff's pocket. "How much do I get?" is always the ultimate question for any plaintiff in deciding whether to accept an offer of settlement.

The proverbial elephant in the room is the emergency room bill. The plaintiff had a CAT scan of her head (she complained of a massive headache from the 5-miles-per-hour crash) and pain in her neck, left shoulder and low back. One CAT scan and three MRIs later, the ER bill exceeds $10,000. Worse, the hospital has filed a statutory lien.

Is there any hope in getting that "charitable" hospital to reduce this bill, so that the insurer may settle this claim?

Continued on page 42

Inside This Issue

GDLA Elects Officers and Board

Bylaw Amendment Fails to Pass

The GDLA held its 46th Annual Meeting at The Breakers in Palm Beach, Fla., June 13-16, 2013.

During the business meeting on Saturday, a proposed Bylaws amendment that would have allowed captive insurance firm lawyers and government attorneys to become members failed to pass by a two-thirds majority vote.

Next, GDLA members present unanimously accepted the report of the Nominating Committee thereby electing the 2013-2014 officers and Board of Directors, including Theodore "Ted" Freeman of Freeman Mathis & Gary in Atlanta to serve as President. See pages 36-39 for highlights.

During the Annual Meeting on Saturday, newly-elected President Ted Freeman presented outgoing President Lynn Roberson with a gavel plaque commemorating her year of leadership and service.

FORCON INTERNATIONAL

Providing Forensic Engineering and Expert Witness Services Since 1984

www.forcon.com

Proud Sponsor of the GDLA for over 12 years

Thank you for your business!








We Understand the Importance of Having the Right Expert

FORCON International - Georgia

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

Georgia Defense Lawyer
Volume X, Issue II

Editor-in-Chief:
Sarah (Sally) B. Akins

Georgia Defense Lawyer, the official publication of the Georgia Defense Lawyers Association, is published three times annually. For editorial information, please contact the editor at sakins@epra-law.com.

President's Message

As I write this, I have just returned from a mass swearing-in ceremony in Fulton County where I talked about all of the great things the GDLA is doing. Seeing all of the faces of these young lawyers made me think back to when I was sworn in just a few short years ago—well, maybe it's been more than a few years, but you get the idea. How much things have changed since then. And then it struck me: it is no different than the changes we have seen in the GDLA.

Starting out over 46 years ago as a handful of male insurance defense lawyers, we have evolved to a diverse membership exceeding 700 in number. Our first newsletter looks like it was printed in then-President Salty Forbes' basement; now we have a slick, color publication that just won the Best Newsletter Award from the State Bar for the third consecutive year. (See article on page 9.)

Starting out over 46 years ago as a handful of male insurance defense lawyers, we have evolved to a diverse membership exceeding 700 in number.

Our CLE and *Law Journal* are second to none. And while we may have come into the computer age with a few fits and starts, we now have a first-rate website and a blast email system which has been a huge success.

It is no wonder that DRI honored the GDLA last year by naming us the Outstanding Defense Organization in the entire country.

Yes, there is much to be proud of. But there still is much work to be done, and we cannot rest on our laurels.

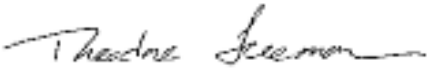
We need an even more diverse GDLA. We need to do a better job of recruiting minorities to our ranks, and we need to reach out geographically to those areas of the state that are under-represented. We need to continue our efforts to get younger lawyers involved and make them feel welcome. I can't say enough about the job Andy Holliday and his Young Lawyers Committee have done to jump start this effort, and as Andy transitions out of being a "young lawyer," I have every confidence that Pamela Lee will ably fill his shoes.

Membership recruitment is not just the job of the GDLA Board of Directors—it is the job of everyone in the organization. We are beginning the second year of our RecruitOne campaign. If you have found membership in the GDLA worthwhile and rewarding, I encourage each of you to reach out to someone you know who is not a member and encourage them to join. We will only be better for it. And you might just win an iPad2 through our RecruitOne membership drive (see page 53).

Finally, I want to thank each of you for the continued support you have shown for our loyal sponsors. Because of them and the increase in membership we have seen, we are now able to operate in the black, which has been a welcome change. Much of the credit for this, of course, must go to our award-winning Executive Director, Jennifer Davis, whose tireless efforts are the envy of every other bar association and organization.

In sum, as I begin my year as President, I have the comfort of knowing there is a solid foundation already in place. Now, we just need to build on it.

For the defense,



Theodore Freeman
GDLA President
Freeman Mathis & Gary, Atlanta

ESI

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

Representative Disciplines and Specialty Areas

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

Selected Areas of Expertise

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

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

Colorado Springs, CO
(719) 535-0400

Fort Myers, FL
(239) 482-0500

Miami, FL
(305) 779-5911

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

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

Ann Arbor, MI
(734) 794-8100

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

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

Omaha, NE
(402) 881-4860

Charlotte, NC
(678) 990-3280

Houston, TX
(281) 448-6060

www.esi-website.com

Member & Legal News

Member News

The GDLA is pleased the announce the creation of the first Editorial Board for this publication, *Georgia Defense Lawyer*. The editors will work with Editor-in-Chief **Sarah (Sally) B. Akins** of *Ellis Painter Ratterree & Adams* in Savannah. Those appointed to serve as editors are: **Christopher L. Foreman** of *Moore Clarke DuVall & Rodgers* in Albany; **Nicole C. Leet** of *Gray Rust St. Amand Moffett & Brieske* in Atlanta; Megan Usher Manly of *Ellis Painter Ratterree & Adams* in Savannah; and **James Scarbrough** of *Mabry & McClelland* in Atlanta.

HunterMaclean in Savannah announced that partner **Kirby G. Mason** was honored at the Savannah Technical College Foundation's annual 2013 Tribute to Community STARs. Every year, the foundation recognizes individuals who have made significant contributions through leadership and community involvement. Ms. Mason is the GDLA Executive Vice President.

At the American Bar Association's Annual Meeting in August 2013 in San Francisco, **Hall F. McKinley, III**, of *Drew Eckl & Farnham* in Atlanta will receive an appointment to the Board of the Enterprise Fund of the Tort Trial and Insurance Practice Section (TIPS). The Board administers the Section's funding of innovative projects for the TIPS Long Range Strategic Plan. He was also reappointed to the TIPS Financial Committee. Mr. McKinley is a GDLA Vice President.

Freeman Mathis & Gary in Atlanta announced that **Wayne S. Melnick**, formerly a partner at Gray Rust St. Amand Moffett & Brieske, has joined the firm as a partner. He will concentrate in local government and business liability litigation. Mr. Melnick is on the GDLA Board of Directors and chairs the Education Committee.

Rita A. Sheffey, a partner with *Hunton & Williams* in Atlanta, received several awards during the Atlanta Bar Association's Annual Meeting in May: 2013 Charles E. Watkins, Jr. Award for Distinguished and Sustained Service and a Distinguished Service Award for her role chairing both the Executive Director and CLE Director Search Committees. She also accepted the Law Firm Service Award (medium sized firms) on behalf of her firm. She also was elected Secretary of the State Bar of Georgia for 2013-2014.

Katie S. Dodd of *Freeman Mathis & Gary* in Atlanta received the Award of Achievement for Outstanding Service to the Public from the Young Lawyers Division of the State Bar of Georgia during its Annual Meeting in June.

Bridgette E. Eckerson of *Mozley Finlayson & Loggins* in Atlanta is serving as Editor-in-Chief of the *Georgia Bar Journal*, which is published by the State Bar of Georgia. She has been a member of its Editorial Board since 2002.

Swift Currie McGhee & Hiers announced that **Roger E. Harris** has joined the firm as a partner. He was previously with Owen Gleaton Egan Jones & Sweeney. He will continue to focus his practice on professional liability, medical malpractice, commercial litigation and trucking/transportation.

Jennifer M. Davis, *GDLA Executive Director,* was appointed by the Supreme Court of Georgia to serve as a lay member of the Investigative Panel of the State Disciplinary Board, which investigates grievances made against lawyers that make it past the Office of General Counsel's screening.

Case Wins

William (Bill) T. Casey, Jr. and **Erica L. Morton** of *Hicks Casey & Foster* in Marietta tried a case arising from a rear-end collision to verdict in Fulton County State Court in May 2013.

A teenage driver was on the way to school when she rear-ended the plaintiff, who was waiting to turn left into his driveway. There was several thousand dollars in property damage to each vehicle, although both remained driveable after impact.

The plaintiff claimed multiple orthopedic and cardiac injuries as a result of the collision, including a heart attack attributed to anticoagulant cessation in connection with a cervical epidural to treat post-collision neck pain and ongoing pain management.

The plaintiff was unable to return to work as a cardiac ICU nurse following the collision, and claimed past wage loss of $243,000 in addition to past medical expenses in excess of $371,000, future medicals, future wage loss, as well as past, present and future pain and suffering. The plaintiff's wife, also a nurse, made a claim for loss of consortium.

The plaintiffs sued the teenage driver and her father under the Family Purpose Doctrine. The defendants admitted fault but argued the injuries claimed by the plaintiffs were not proximately caused by the collision and that the plaintiff, who was morbidly obese with heart disease and diabetes, failed to mitigate his damages. There was competing expert testimony regarding the causal relationship of the cardiac injuries.

After several hours of deliberation, the jury returned a verdict of $50,000 in favor of the plaintiff and

Continued on next page

Welcome New GDLA Members

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

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

Patrick N. Arndt
Nall & Miller, Atlanta

David Atkinson
Magill Atkinson & Dermer, Atlanta

Amy K. Averill
Sutherland Asbill & Brennan, Atlanta

Richard Bruno
Mozley Finlayson & Loggins, Atlanta

Robert H. Burke
Rutherford & Christie, Atlanta

Victoria Morgan Carroll
Cozen O'Connor, Atlanta

Brian J. Duva
Mozley Finlayson & Loggins, Atlanta

Elizabeth M. Eklund
Dennis Corry Porter & Smith, Atlanta

Nathan Gaffney
Hall Booth Smith, Atlanta

Lindsay M. Gatling
Weinberg Wheeler Hudgins Gunn & Dial, Atlanta

Jonathan R. Granade
Casey Gilson, Atlanta

James T. Hankins
Goodman McGuffey Lindsey & Johnson, Atlanta

Hadley E. Hayes
Drew Eckl & Farnham, Atlanta

Zachary S. Lewis
Hawkins Parnell Thackston & Young, Atlanta

Kenan G. Loomis
Cozen O'Connor, Atlanta

W. Jonathan Martin II
Constangy Brooks & Smith, Macon

Lorna McGilvray Norton
Balch & Bingham, Atlanta

Anandhi S. Rajan
Swift Currie McGhee & Hiers, Atlanta

Jatrean M. Sanders
Leitner Williams Dooley & Napolitan, Atlanta

Matthew J. Simmons
Swift Currie McGhee & Hiers, Atlanta

Michele L. Stumpe
Taylor English Duma, Atlanta

Edward J. Tarver, Jr.
Weathington Smith, Atlanta

Monica L. Wingler
Hicks Casey & Foster, Marietta

Kimberly Logue Woodland
Insley & Race, Atlanta

Amanda H. Yenerall
Stewart Melvin & Frost, Gainesville

Member & Legal News

Continued from previous page

in favor of the defendants on the consortium claim. The defendants served a statutory offer of settlement for $225,000 prior to trial; ultimately, the parties entered a high/low agreement. The plaintiffs were represented by Jim and Matthew Poe of James M. Poe, P.C.

In April 2013, **Zach Matthews** of *Hicks Casey & Foster* in Marietta secured a defense verdict following a two-day jury trial in the State Court of DeKalb County in front of Judge Eleanor Ross. **Richard (Richie) C. Foster** attended trial, assisting with case strategy.

The jury consisted of nine African-American females, two African-American males (one was alternate), a Caucasian female and a Vietnamese-American male doctor who worked for the CDC.

Plaintiff was a white male, who owned a "liquor inventorying business" and who slipped and fell at 2:30 a.m. in a Kroger store on a floor that was being waxed. The only defendant remaining by the time of trial was The Kroger Company. Kroger had retained a video of the slip and fall, which showed one caution sign in an arguably obscure location away from the scene of the fall.

On cross-examination at trial, Plaintiff revealed for the first time that he possessed a photo, which he had failed to produce in discovery, showing an additional caution sign at the entrance to the aisle that was being waxed. It was produced and entered into evidence by Plaintiff during his re-direct on day two.

Plaintiff also had five competing explanations for his alleged lost income claim (the bulk of his claimed special damages), which Mr. Matthews outlined via blackboard during cross-examination. According to post-trial jury interviews, this demonstrated Plaintiff's general lack of credibility.

Deliberations took only an hour and a half, and Mr. Matthews was able to steal closing argument and go last, after establishing all necessary arguments during Plaintiff's case in chief. Plaintiff's counsel were Bruce Hagen and Tyler Bridgers of the Hagen Law Firm in Decatur. ❖

NELSON
ARCHITECTURAL ENGINEERS, INC.

Engineering
&
Forensics

Architecture

Industrial
Hygiene
& Safety

Fire
Investigation

Cost
Estimating

1.877.850.8765
www.nae-us.com

NELSON
ARCHITECTURAL ENGINEERS, INC.

EXPERT *FORENSICS*

EXPERT *SOLUTIONS*

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

GDLA Files Amicus Brief in Response to Unprecedented Court of Appeals Request

Both the GDLA and our counterpart on the plaintiff's side, the Georgia Trial Lawyers Association (GTLA), were recently asked by the Court of Appeals to submit *amicus curiae* briefs on the issue of whether a plaintiff could "accept" a defendant's prior settlement offer after the trial court had granted summary judgment against the plaintiff.

This was a first for the GDLA; never before has an appellate court solicited our input in a matter before it. Your Amicus Committee, co-chaired by Rusty Gunn of Martin Snow in Macon and Jeff Ward of Drew Eckl & Farnham in Brunswick, along with the Executive Committee, acted swiftly, agreeing to weigh in on the topic, and, within hours, Marty Levinson of Hawkins Parnell Thackston & Young in Atlanta stepped forward to accept the assignment to write the brief.

On July 5, 2013, the Court of Appeals essentially adopted the GDLA's arguments and affirmed the trial court's denial of the plaintiff-appellant's motion to enforce the purported settlement, holding that there was no mutuality and a lack of consideration and also that acceptance was not made within a "reasonable time" based on the circumstances of the offer.

The case arose from a plaintiff's purported acceptance of the defendant's settlement offer the day after the trial court granted the defendant's motion for summary judgment. After the defendant rejected the purported acceptance and refused to pay, the plaintiff filed a motion to enforce the settlement which the trial court promptly denied. On appeal, the plaintiff-appellant contended that the settlement offer remained pending notwithstanding the grant of summary judgment to the defendant because there was no specific expiration date conveyed in the offer and the offer was never withdrawn. The plaintiff also argued that the settlement offer was a statutory offer of settlement pursuant to O.C.G.A. § 9-11-68 and that such statutory offers cannot be withdrawn prior to their expiration.

The defendant took the position that the Offer of Settlement statute, O.C.G.A. § 9-11-68, does not apply to the case. Notably, however, there are no known Georgia cases dealing with the issue under that statute or otherwise.

> Court agrees with GDLA arguments, holding Plaintiff's purported "acceptance" of earlier-made settlement offer after grant of summary judgment ineffective.

The Amicus Committee accepted the request both because of the unprecedented nature of the request directly from the Court of Appeals and also because the plaintiff-appellant's position, if accepted by the appellate courts, could have far-reaching, negative implications for defendants and, frankly, all litigants in Georgia.

The GDLA believes that ensuring predictability, fairness, and reasonableness in enforcement of settlement agreements is of key importance to all persons and companies involved in litigation of civil matters in Georgia courts. In its brief, the GDLA contended that adopting the plaintiff-appellant's position would have a chilling effect on settlement in civil cases in Georgia without providing any corresponding benefit whatsoever to anyone other than this particular plaintiff-appellant.

The GDLA also argued that the defendant-appellee's prior offer could not have been "accepted" by the plaintiff-appellant after the trial court granted summary judgment to the defendant because the subject matter of the purported agreement—i.e., the appellant's claims – had been eliminated, or at least modified significantly, by the time of the purported acceptance. The GDLA expressed its belief that settlement agreements should be based on a good-faith effort by both parties to settle within the same rules that apply to other contracts, and not based on a unilateral "acceptance" by the offeree for less than the original consideration contemplated by the offeror.

Of significant importance to the GDLA and its members in this case is that the Court of Appeals expressly held that since the motion for summary judgment was pending when the defendant's offer of settlement was made, the "reasonable time" for acceptance of the offer was *before* the court had granted the defendant's motion.

Although one of the three judges on the panel concurred in the judgment only, the Court's opinion in this case stands as the only known Georgia appellate decision on the subject and, thus, will likely prove significant in any similar future cases.

It is noteworthy that in affirming the denial of the motion to enforce the settlement, the Court relied on authority and arguments made only in the GDLA brief—not even in that of the defendant-appellee. The Court specifically thanked the GDLA and GTLA "for filing excellent briefs on this issue."

The case is *Graham v. HHC St. Simons, Inc.*, Docket No. A13A0454 (Ga. Ct. App. July 5, 2013).

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 left navigation pane. There you will also find the GTLA brief and the Court's July 5th order in this particular case. ❖

GDLA Wins Bar's Best Newsletter Award Again

The GDLA scored a "three-peat" when this publication, *Georgia Defense Lawyer*, was honored by the State Bar of Georgia with the Best Newsletter Award for the third consecutive year.

The award is presented each year during the State Bar Annual Meeting, held most recently at the Marriott in Hilton Head, S.C., from June 20-23, 2013.

The GDLA entered for the first time in 2011, and that year won the competition among voluntary bars with more than 500 members. Winners are showcased in the State Bar's Annual Meeting program and the *Georgia Bar Journal*, which has served to increase the GDLA's brand recognition.

Another byproduct of garnering the Best Newsletter Award has been enhanced visibility with the bench. After the 2011 awards ceremony, then-Supreme Court Justice George Carley suggested adding the appellate bench to the mailing list. We did so and eventually added all

Newsletter Editor-in-Chief Sally Akins (left) and Immediate Past President Lynn Roberson accepted this year's award at the State Bar Annual Meeting.

state and federal judges, further broadening the GDLA's profile. That heightened awareness was demonstrated recently when the Court of Appeals asked both the GDLA and GTLA to submit amicus briefs (see article on opposite page).

Being consistently recognized as the state's best voluntary bar newsletter represents a significant milestone in the evolution of this publication. The first issue of the *Georgia Defense Lawyer* was published in April 1992, during Salty Forbes' tenure as GDLA President.

Kudos go to the countless contributing authors, which include GDLA members and sponsors, but especially to the newsletter editors: Peter D. Muller of Goodman McGuffey Lindsey & Johnson in Savannah for 2011; Evelyn Fletcher Davis of Hawkins Parnell Thackston & Young in Atlanta for 2012; and Sarah (Sally) B. Akins of Ellis Painter Ratterree & Adams in Savannah for 2013. Executive Director Jennifer M. Davis is also to be commended for pulling together every issue.

"I'm very proud of our award-winning newsletter," said President Theodore Freeman. "I know we will continue to produce a quality publication that serves as a valuable practice tool for our members, as well as a resource for judges, with the ultimate goal of advancing the civil defense bar." ❖

Ninth Annual

What Have They Done Now?
2013 Legislative Legal Update

By Rep. Edward Lindsey
Goodman McGuffey
Lindsey & Johnson, Atlanta

INTRODUCTION

The 2013 legislative session's main focus in regard to the practice of law primarily concentrated on criminal law issues and court organization and procedures. The most significant bills dealt with the rewrite of the Juvenile Justice Code, Criminal Justice Reform Part II, the re organization of the Fulton Courts, and Ethics. All of these bills, except for the Ethics legislation, go into effect on July 31. Ethics legislation will go into effect on January 1, 2014.

CIVIL PRACTICE

HB 94 – Reducing Future Damages to Present Cash Values

This bill involves the calculation of future damages. This allows triers of fact (depending on the circumstances, a jury or judge) to use certain rates to calculate the present day value of certain expenditures such as future medical expenses, living expenses, or lost wages. The trier of fact may reduce the present value based on a discount rate of five percent or any other discount rate as the trier of fact may deem appropriate.

HB 154 – Revisions of Workers' Compensation System

This bill is a product of the Advisory Committee process of the State Board of Workers' Compensation. It caps the length of medical payments for non-catastrophic cases, requires insurers to reimburse for mileage expenses within 15 days (down from 30), changes the interest rate calculated on lump sum payments from seven percent to five percent, and requires a good faith effort for an employee to try a job made available to him or her within the restrictions set our by their physician. This bill helps to provide stability and balance in the workers' compensation system by addressing the needs and concerns of stakeholders.

HB 161 – Oath of Bailiffs

This bill modernizes the oath of bailiffs and makes sure it applies to oaths given in all courts that hold jury trials. It removes antiquated language and tightens the oath by taking into consideration modern technology.

HB 194 – Venue

In a tort or breach of contract suit against a railroad or electric utility, a case is usually heard in the county where the incident occurred. HB 194 applies this same standard to gas utilities.

HB 284 – "Return to Play Act"

This bill enacts the "Return to Play Act of 2013" which is a direct response to the growing information that is being gathered regarding the effects of impacts to the head (concussions). This act places certain requirements on public and private schools that provide youth athletic activities to establish concussion management and return to play policies. A public recreation facility will provide information to parents/guardians, when the children register, on the nature and risk of concussions and head injury.

HB 336 – Demands in Motor Vehicle Accidents

This bill establishes certain guidelines for information which must be included in an offer to settle a personal injury or death claim arising from a motor vehicle accident. The offer should contain the time period within which the offer must be accepted but not less than 30 days upon receipt, the amount of the monetary payment, party(s) that shall be released upon such payment, the type of release and the claims which will be released. The recipient of such offer reserves the right to seek clarification regarding the terms of the offer.

HB 337 – Epinephrine Supply in Schools

This bill authorizes public and private schools to stock a supply of auto-injectable epinephrine. Each school shall designate an employee or agent trained in the possession and administration of the auto-injectable epinephrine to be responsible for the storage, maintenance and distribution of the medication.

HB 382 – Limited Liability for Schools that Make Recreational Facilities Open to Public

HB 382 provides that a governing authority of a school does not waive its sovereign immunity by allowing its recreation facilities to be used by another entity so long as there is a joint-use agreement, and the entity has $1 million insurance policy.

HB 499 – Federal Law Shall Not Establish Legal Basis for Negligence in Malpractice Cases

This bill is a way to ensure that the federal Affordable Healthcare Act (ACA) does not by itself alter the definition of the "the standard of care" or "the standard of duty" that is owed by a health care provider in a medical malpractice or products liability case.

It explicitly provides that rules and regulations arising out of ACA cannot be considered to show either malpractice or reasonableness of care without competent, expert testimony to independently establish a legal basis for either negligence or a required standard/duty of care owed to a patient.

SB 105 – Uniform Fraudulent Transfers Act Exception/ Motor Vehicle Bankruptcy Exemption

This bill creates an exception to the 'Uniform Fraudulent Transfers Act' for non-profit organizations unless such organization was aware or participated in the fraudulent transfer. In addition, Section 2 includes the language from Rep. Jacobs' HB 531. It raises the bankruptcy exemption on motor vehicles from $3500 to $5000.

SB 113 – Personal Service on Corporations

This bill removes a "cashier,"

Continued on page 44

Use of Appellate Counsel: Cost-effective Trial Strategy or Wasted Expense?

By Mark W. Wortham
Hall Booth Smith, Columbus

Is it a Trend?

Perhaps it is just anecdotal evidence, but it seems that over the last few years larger law firms are creating appellate practice groups whose members either exclusively practice as appellate lawyers, or who devote a substantial portion of their practice to appellate practice. Go back 20 years and the lawyers who tried the cases were the lawyers who handled the appeal.

Today there are practice groups specializing in appellate practice. Many of them have as their practice group leader former appellate judges or others who vastly experienced in the appellate courts through practice or tenure. Whatever the former role of the practice group leader and the lawyers within the practice group, one common theme arises: the notion that experienced appellate counsel are necessary to effectively prosecute or defend an appeal. And these days it is not just larger law firms that have experienced appellate lawyers with dozens or hundreds of cases under their belts or "inside baseball" knowledge of the working of the courts. Smaller firms and sole practitioners are retaining counsel to write briefs and orally argue the case. Is it a trend? "Yes." If you have not tried it, should you? The simple answer is, "Yes, in the right case."

Why Should You Do It?

The procedures and proceedings of appellate courts are drastically different from those of trial courts. While the rules in the Supreme Court of Georgia and the Court of Appeals of Georgia are more relaxed than the rules of the Eleventh Circuit, inexperienced practitioners can find themselves in trouble, and whether it is the relaxed rules in state court or the more rigid in federal court, knowledge of the rules can make a marked difference.

Recently, the Court of Appeals of Georgia dismissed an appellant's appeal for the failure to state in its brief how error was preserved in the trial court. The rule is not well-known and it has often been ignored. But only those who read jurisdictional and appellate rule cases (and those who read this article) are now on notice that the Court has grown weary of litigants not following its rules and will no longer tolerate this practice.

The easiest way to lose an appeal is not a rule violation but rather ignorance of the more complex rules of the appellate courts' jurisdiction. In the Georgia appellate courts the jurisdictional statutes and rules are strictly construed to limit appeals. While some practitioners think that the jurisdictional rules are those which tell a litigant whether to file their appeal in the Supreme Court of Georgia or the Court of Appeals of Georgia, those practitioners may one day find themselves with a serious problem. Rather the jurisdictional rules involve a number of statutes in Georgia's Appellate Procedure Act, found in O.C.G.A. Title 5. Appellate practitioners are well-versed in these statutes and rules, as trial lawyers are well-versed in the Civil Practice Act.

Experienced appellate lawyers also know how to preserve error. How many great or good trial lawyers are well-versed in the intricacies of whether they should object to a verdict, how to go about it, and how to preserve error? If you read the reported cases, there are not many. How many trial lawyers know how to preserve error for bad jury charges? Again, not very many if you read the appellate decisions. If retained to sit through trial, an experienced appellate lawyer might be able to help you avoid error that could later overturn your win.

Appellate counsel can also bring a fresh set of eyes to trial or post-trial. Tunnel vision is common amongst lawyers, though we hate to admit it. We take on our client's case, their cause becomes our cause, and their emotions become our emotions. We can lose an objective perspective and an appellate lawyer can be more dispassionate, more scholarly and more "big-picture."

Experienced appellate lawyers also know that three or four good enumerations of error are better than eight or 10. More importantly, they know and can identify when something which is likely error still will not bring about reversal. While you may have ten meritorious enumerations, you only have 30 pages. Why waste them on error that is not going to result in reversal? And if you are attempting to have an interlocutory or discretionary appeal granted, and at best one out of four may be granted, you had better know how to frame your issues. Otherwise, you have to wait until after trial to appeal your issue or settle without ever obtaining a ruling on an issue you felt strongly was just plain wrong.

Proof that experience and expertise in appellate practice has been shown to increase the chance of success is found in a study of certiorari petitions in the Supreme Court of the United States. Experienced appellate lawyers obtained a grant of certiorari in 22 percent of cases while inexperienced appellate lawyers were only successful six percent of the time.[1] But do we really need empirical evidence? As lawyers, yes we do. However, common sense suggests to us that where state Attorneys General and the federal government have lawyers who exclusively handle appeals, experience brought by years of focusing in one area betters the odds that the appeal will be successful.

While none of us likes someone looking over our shoulder, second-guessing our decisions or Monday morning quarterbacking our strategy, appellate counsel can advise as to trends in the law that may allow you to make an argument you may have missed, or simply be a sound-

Compelling numbers build a compelling case.

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

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

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

FORENSIC ACCOUNTANTS

MDD

Making Numbers Make Sense

> mdd.com

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

ing board for a theory you wish to try. Good appellate counsel knows that many judgment calls are just that; a judgment call. A good appellate lawyer will not be looking for your "mistakes," but rather will be looking for ways to defend or overturn the order or judgment.

Finally, oral argument is not the same as arguing to a jury. While many good lawyers can make the transition, many cannot. Not everyone who was good at moot court became a good trial lawyer. The converse is also true. Oral argument before appellate judges is more academic and requires a deep knowledge of the entire record and public policy. This is not to say that those abilities are exclusively possessed by appellate lawyers. Again, it is a matter of knowledge and experience. It has been said that when he was in the Solicitor's office, Chief Justice John Roberts prepared for oral argument in the Supreme Court by thinking of 100 questions the Court might ask him. Such focus is difficult if you are on twelve jury trial calendars over the next three weeks.

When Should You Do It?

Obviously there is no pat answer to the question of when you should retain appellate counsel. Typically the answer depends on money. However, it may depend on the instructions from the client, the complexity of the case, minimal financial exposure or value, repetitive or common issues, a case you feel will likely settle early or many other scenarios. Some industries that are subject to multiple product liability claims in the 50 states sometimes employ an appeal strategy designed to shape the law. They retain counsel early and often. In the more mundane world, the first question should likely be, "Is the case one that is likely to be appealed by the losing side?" If there is a significant amount of money at stake, or if there is a principle at stake, it is cost-effective to retain appellate counsel early in the litigation. And if the other side has "lawyered up" and retained appellate counsel, it is most likely a good idea to retain one as well.

Conclusion

There will always be appeals, and lawyers specializing in appellate work are here to stay. A trend, yes, but not trendy. Retention of appellate counsel is a necessity in some cases, but a waste of money in others. Can you do it yourself, yes. Should you? Maybe not. ❖

Endnote

[1]*Rise of Appellate Litigator*, 29 Rev. Litig. 511, 536 (2010).

Mark W. Wortham is of counsel with Hall Booth Smith in its Columbus office. He chairs the GDLA's Appellate Substantive Law Committee. He has argued many groundbreaking cases in Georgia's appellate courts including decisions that changed the standard of care for day-care providers, the application of the attorney-client privilege to corporate employees, and the manner in which Georgia courts are to apply exceptions to sovereign immunity to the actions of police and fire fighters.

WHAT YOU DON'T KNOW COULD REALLY HURT YOU.

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

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

collisionspecialistsinc.com

CSI
Collision-Specialists-Inc

Collision Specialists, Inc.

Your Accident Reconstruction and
CMV Compliance Experts

Immediate Response Teams, 24/7

770 . 287 . 8734

Serving the entire USA!

3D Documentation and Forensic Analysis: Objects, Environments and Animations

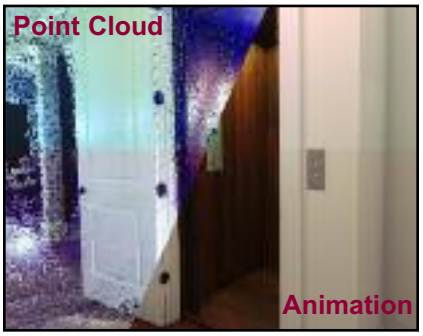
By James M. Peters, P.E., John Swanson, Jason Anderson, P.E., and Paul McCullough, P.E.
S-E-A Limited

In their simplest form, 3D scanners utilize lasers to generate three-dimensional copies to millimeter accuracy of complex real-life objects and environments. The end result of a single scan is a collection of millions of measurable data points—called a "point cloud"—containing relative X, Y, Z locations.

A series of scans are then stitched together to create an exact color copy of the as-built condition, scene, or environment. In the same way that a digital camera, a tape measure, and graph paper are tools of the forensic investigator, 3D documentation belongs in the same toolbox. t is truly limited only by the creative application of the equipment's trained operator and/or engineer.

Modeling/Animation

While the value of 3D documentation with respect to evidence preservation is clearly evident, the value extends beyond the initial investigation. 3D documentation facilitates advanced animation and reconstruction to fully leverage the one opportunity to communicate your case at trial. This underscores the importance of presenting the



necessary facts in a clear and impactful manner. A video based upon real life data, gathered via 3D documentation, can make all the difference in the pursuit to convey "what happened" to a jury.

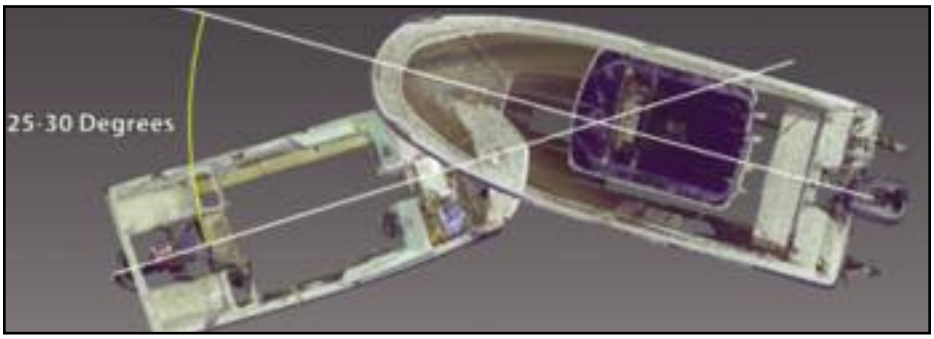
Auto Accident Reconstruction

The reconstruction of an accident begins with the collection of facts and measurements. 3D documentation enables the investigator to have countless of both at their disposal.

Knowing the crush stiffness and crush profile allows for the calculation of crush energy. With 3D documentation, crush profiles can be documented with increased speed and accuracy over traditional documentation methods. It also provides additional data for any future crush analyses if needed.

Boat Accident Reconstruction

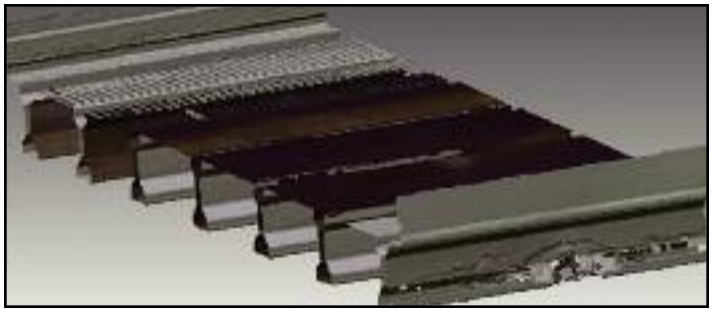
The reconstruction of an accident can be limited sometimes by the very nature of the environment



the accident occurred within. 3D documentation of two boats, stored in different locations, allows for the alignment and orientation of the damaged portions to recreate the collision with respect to all three axes (X, Y, Z). Without the ability to bring real life objects in contact with one another, the real picture might not ever be revealed.

Bridge Damage Evaluation

3D documentation is not limited to evidence preservation, accident reconstruction, or trial animation. It also allows the engineer to facilitate efficient and accurate evaluation of the collected data to assist in the risk mitigation and risk transfer phases of the case management life cycle. When a tractor-trailer damages the underside of a multi-lane freeway overpass, timely understanding of the extent of damage and appropriate remediation measures is required. A setting with emergency repair operations taking place or vehicles racing past investigators at 65+ mph may not allow



COURTROOMSCIENCESINC

WWW.COURTROOMSCIENCES.COM

POSITIVE OUTCOMES ARE NO ACCIDENT. INVOLVE CSI TODAY.

eDISCOVERY SERVICES
LITIGATION PSYCHOLOGY
GLOBAL DEPOSITION SERVICES
PRESENTATION TECHNOLOGY

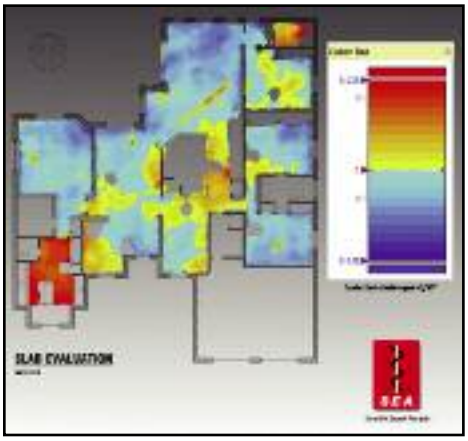
1-877-784-0004

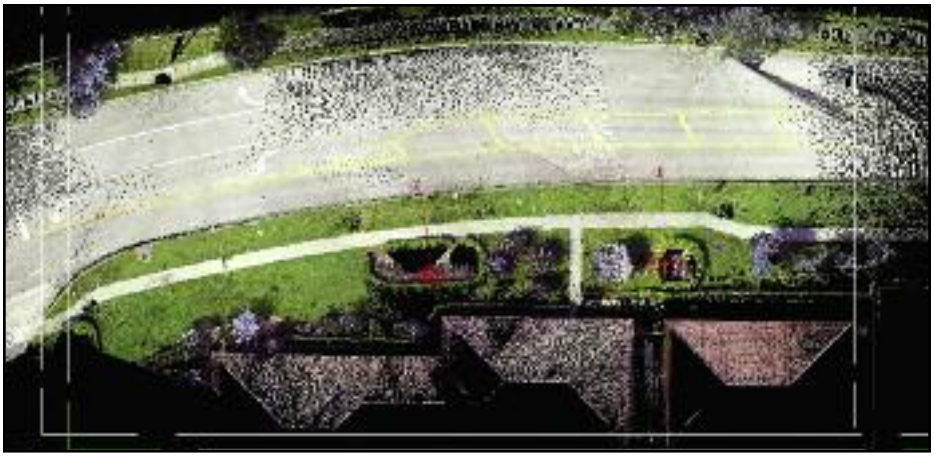
courtroomsciences.com

for accurate documentation of the damage. Shutting the freeway down is expensive and many times impossible. Along with accurate documentation of the damaged overpass from a safe distance, demonstrative figures can be produced to objectively communicate the facts, allowing for expedited resolution of the proposed repair protocols and associated costs.

Floor Elevation Map

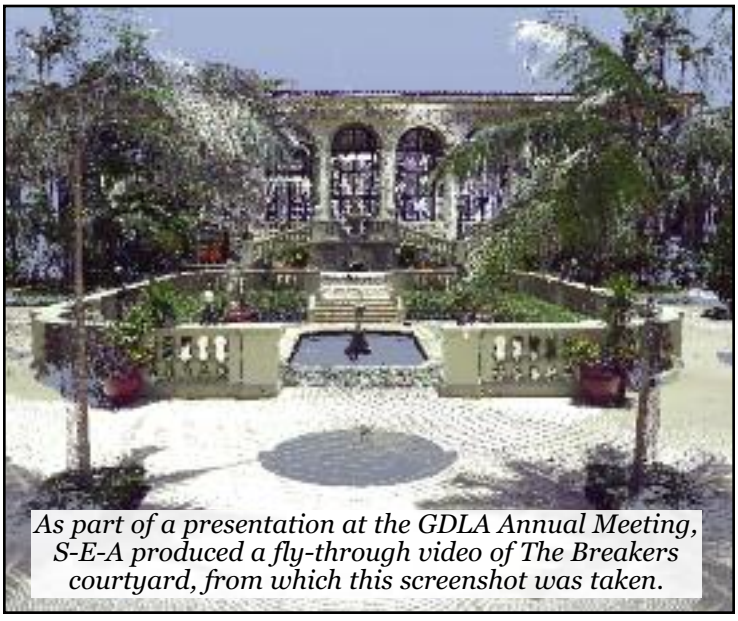
The tolerances of the tool being utilized to collect and analyze data can affect the validity of data and the very outcome of the matter at hand. 3D documentation will not only allow for repeatable data collection and measurements to submillimeter accuracy, it will also eliminate potential errors associated with traditional data collection methods. For example, a floor can be documented to such a detailed level that the construction tolerances for the slab/framing and floor finishes can be accounted for. This data can be analyzed to produce diagrams that will graphically illustrate elevation changes throughout the floor at a single point in time or visually show deviations that occur during an extended period of time. This allows for the rare visualization and comprehension of certain details you are trying to bring to the forefront.





Construction Sites

Construction sites, like accident sites, are in a dynamic state. Sometimes the investigator is called in long after the occurrence in question. As with vehicle accident reconstruction, the dynamic nature of a construction site can limit the evaluation of accidents at construction sites. In many cases, it is nearly impossible to recreate the conditions at the time of the accident. Site information gathered utilizing 3D documentation can be efficiently merged with other data such as construction plans and photographs of the accident scene to accurately recreate the accident site. This data is analyzed to produce a diagram—like the one above—that will graphically illustrate the conditions at the time of the accident.



As part of a presentation at the GDLA Annual Meeting, S-E-A produced a fly-through video of The Breakers courtyard, from which this screenshot was taken.

Fly-Through Videos

With an eye on cost and the need for a measured return on any forensic service, the integration of 3D documentation into an investigator's methodology can deliver dividends. Skilled implementation of 3D documentation of objects, roadway intersections, structures, and construction scenes typically result in an overall cost savings versus traditional manual and purely photographic methodologies. Further, it provides the platform to produce a unique presentation of the facts that can be accessed and referenced throughout the claims process, again with compounding cost effective results.

Fly-through videos can be created from the data collected almost automatically, giving you a perspective that is not readily available using traditional accident reconstruction methodologies.

Let 3D documentation provide you with a view of the next generation of forensic analysis. ❖

GDLA Platinum Sponsor S-E-A has been a multidisciplinary, full service and professional organization providing thorough research, analysis and testing since 1970. Its full-time staff consists of licensed/registered professionals who are court-qualified experts, including the authors (from top to bottom): James M. Peters, P.E., Mechanical Engineer; John Swanson, Visualization Services; Jason Anderson, P.E., Civil Engineer; and Paul McCullough, P.E., Civil/Structural Engineer.

ROCK SOLID CONFIDENCE THAT YOU HAVE THE RIGHT EXPERT WITNESS.

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

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

THOMSON REUTERS™

The Mediation Miracle: Getting the Most Out of Mediation

By David C. Nutter
Miles Mediation & Arbitration Services, LLC

"That was a miracle. I didn't think we had a chance of settling this case." So the satisfied lawyer confides to the mediator after his client has departed with a settlement, leaving behind contentious multi-year litigation. Now, I happen to believe in miracles. I've seen them. And whenever disputing parties voluntarily choose to put aside years of rancor and embrace peace, there is a touch of the divine. But it is helpful to recognize that we, as lawyers and mediators, can take steps to improve the odds of a "mediation miracle."

At the source of many conflicts is poor communication. Proper communication, not surprisingly, is the key to unraveling a knotty conflict. Indeed, mediation is all about communication: what to say, to whom, and when to say it. And, when and how to listen. As we listen to our opponents and consider their needs, new solutions materialize and the entire atmosphere of a conflict is transformed.

In a personal injury case, typically the only person who is unfamiliar with the mediation process is the plaintiff. Often the plaintiff is nervous and possibly fearful of the process. Also, many plaintiffs enter the mediation motivated by anger and a desire "to see justice done."

A client survey conducted by our firm revealed that 74.5 percent of plaintiffs enter the mediation with the belief that any settlement figure should be proportional to their sense of anger and need for justice. These emotions must be addressed for a mediation to be successful. Does money assuage these emotions? The money is a necessary ingredient to a mediated settlement, but it is often not sufficient alone to settle the case.

The best and simplest way for the mediator and the lawyers to address the emotions of fear, anger and the plaintiff's sense of justice, is to let the client speak from the heart—and actually listen to them. So often this is the main thing a party really wants: the freedom to share their heart about a conflict and to be listened to—validated. By listening to the plaintiff, the other participants in the mediation are validating the plaintiff and communicating by their actions that the plaintiff is important. This is so critical to successful mediations. This exercise of validation alone often will lead to an unexpected settlement later in the day and will definitely cause defense dollars to travel farther. A party is much more likely to listen to a mediator or lawyer at the end of the day, when the mediator and lawyers listened to the party at the beginning of the day.

Now you may not actually respect all plaintiffs. But here I am not speaking of the emotion of respect. I am speaking of the discipline of respect. As a choice of your will you can choose to demonstrate respect and validate your opponent regardless of whether they deserve your respect and validation. The question is do you want to reach a favorable resolution at mediation, or do you want to make sure your opponent knows what you really think about them? The first is a business decision, the latter is not.

My practice is to meet with each party separately at the outset of the mediation, before the joint opening caucus. One of my purposes is to validate the plaintiff and let them know I am listening to them. I use this time to meet the plaintiffs and hear their concerns in a safe, non-threatening setting. During the initial meeting, I will tell plaintiffs that in the upcoming opening statements, the defense is interested in hearing their side. Of course, it then becomes important for the defense to actually listen.

The opening statement is a critical moment at the mediation. It is here that the defense attorney and insurance company claim representative have the opportunity to listen and be attentive to plaintiff and plaintiff's counsel. At all costs the defense must avoid any actions that appear as if they are not listening or are not interested. Checking emails, clicking pens, and looking through papers are activities I have witnessed that send the wrong signal to plaintiffs. When this happens in opening statement, it is much more likely that the plaintiff a few hours later will "hold out on principle." When the plaintiff has

not been validated by the defense, the plaintiff feels like they have something to "prove" to the defense. That anger and sense of justice, if not assuaged, will later hinder an otherwise reasonable settlement.

Typically, the defense is viewing the case purely from a risk and monetary value perspective. These are important considerations for the plaintiff as well and cannot be omitted. There are other significant factors at play with many injured plaintiffs, however, such as fear, anger, and the need for justice, which if ignored will hinder settlement even though the money is within the range of risk.

Sensitivity to this issue of validation can also be crucial for the defense at the end of the mediation. Sometimes the difference between walking away with an impasse or a settlement when the gap has been narrowed, is the willingness on the part of the defense for the plaintiff to have the sense of having the last say, to let the mediation end by accepting a last proposal of the plaintiff. At this point, it is not the money. The parties are very close. It is the need for plaintiff validation.

At the same time, while it is vitally important to validate the plaintiff in opening statement and throughout the negotiations, it is equally important to begin to manage expectations. This is a delicate balance. If the defense only validates the plaintiff and does not counter in opening any of the plaintiff's points, the plaintiff often mistakenly assumes that the defense has nothing to say in response. This fosters unrealistic expectations. A mediation miracle is much more likely if clients have realistic expectations about what will happen at the mediation.

As the mediator, I prepare the ground in advance. I tell the plaintiff that in opening statement they should expect to hear negative information about their case. I explain that the defense attorney is required by the State Bar Rules to be a zealous advocate for their client, and is duty bound to point out potential weaknesses in the plaintiff's case. I also point out that it is a great benefit to the plaintiff for the defense to share their trial strategy with plaintiff in advance of trial. The plaintiff should count it a benefit, not an insult.

The best defense attorneys at mediation are then able to communicate very negative information to a plaintiff in a respectful way that the plaintiff is able to hear without being threatened. The defense lawyer is not personally challenging the plaintiff, but doing what is required under the law. Defense attorneys who can walk the balance and validate the plaintiff and yet communicate the negative information necessary to manage expectations are the ones who are most successful at mediation. ❖

David C. Nutter is the leader of Team Nutter at Miles Mediation & Arbitration Services, LLC, a GDLA Platinum Sponsor.

Computed Tomography: The Next Generation of Forensic Analysis Technology

Jonathan Jordan, P.E., CFEI
Engineering Systems, Inc. (ESI)

Introduction

Computed Tomography has been around since the mid-1970s, and is widely recognized for its use in medical diagnostic procedures, where it is known as the CAT (Computed Axial Tomography) scan. Such machines allow scanning only in the axial direction; however, many machines today allow scanning in multiple directions. These imaging machines are simply referred to as Computed Tomography (CT) machines.

In Computed Tomography, an object is x-rayed as it is rotated a full 360 degrees. The data from the x-rays is collected and reconstructed to produce images of the object along the X, Y, and Z axes. There is one set of images per direction—X set, Y set, and Z set. The number of images varies, but it is common to capture 1,500 to 2,000 images in each of the three directions. Each image shows a slice of the object from one end or side to the other; the operator can start with the first slice and slowly move into and through the object one slice or layer at a time such that everything within the object can be viewed.

Computed Tomography (CT) Analysis

Consider the lithium-ion secondary battery cell shown in Figure 1. We refer to this battery cell form factor as 18650 because it is 65mm in length and 18mm in diameter. The leftmost cell in Figure 1 is an 18650 cell, followed immediately by a cross-section of the cell cut approximately in half along its length. While the physical cut does reveal the interior of the cell, it is a destructive procedure and provides only a single cross-sectional view. Although the cell could be cut again, data would be lost with each cut. We are also limited in the number of cuts we can make and the thickness of each slice.

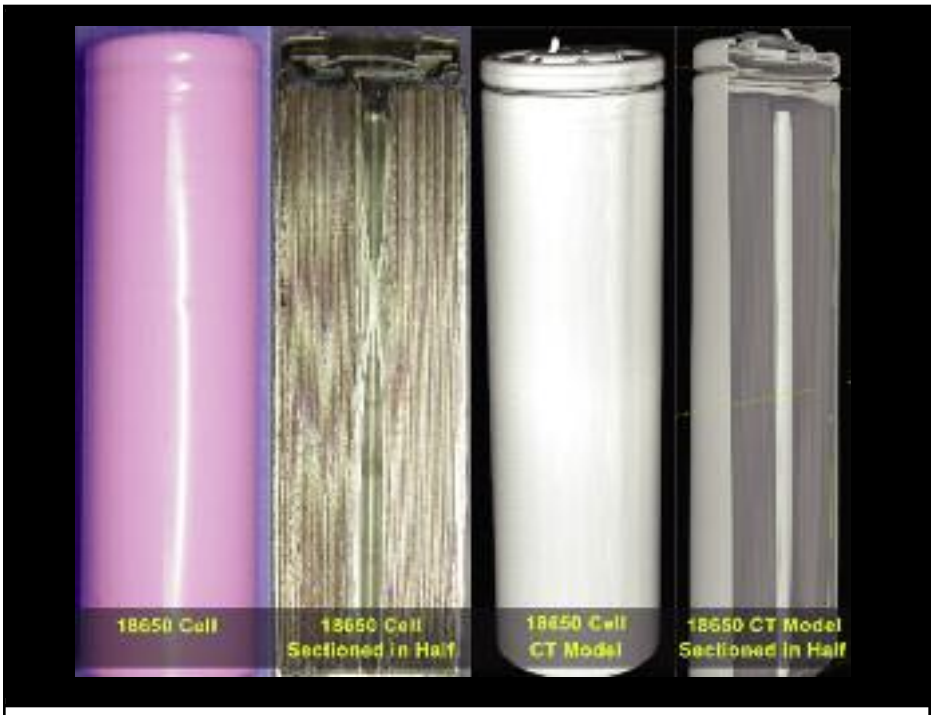


Figure 1: Two Images of a physical cell (left); two images of cell model (right).

But what if we could see the same view without ever damaging the cell itself? What if we could see not only the cross-section at the halfway point but at any point within the cell? With Computed Tomography, we can. Modern CT machines have reconstruction software that allows us to view images one slice at a time, moving through the object in each of the three directions. The software also creates a model of the object which can be manipulated to view any interior or exterior area.

In Figure 1, the third cell from the left shows a computer model of the 18650 cell created by reconstruction software utilizing data from the CT scan. This model can be rotated in any direction, allowing one to view any of its surfaces. The fourth cell from the left displays a view of the cell model cut in half with software instead of a blade. Using the software, we can then return the model to its original condition, make a deeper or shallower cut, and/or change the direction of the cut. For example, we could cut across the diameter of the cell. We could also cut through the cell at an angle, as shown in Figure 2. Because it is a digital model, the physical specimen is never damaged, and we are unlimited in the number, direction, and orientation of the cuts we can make. The software also provides alternative ways to cut into the object, view multiple surfaces, etc.

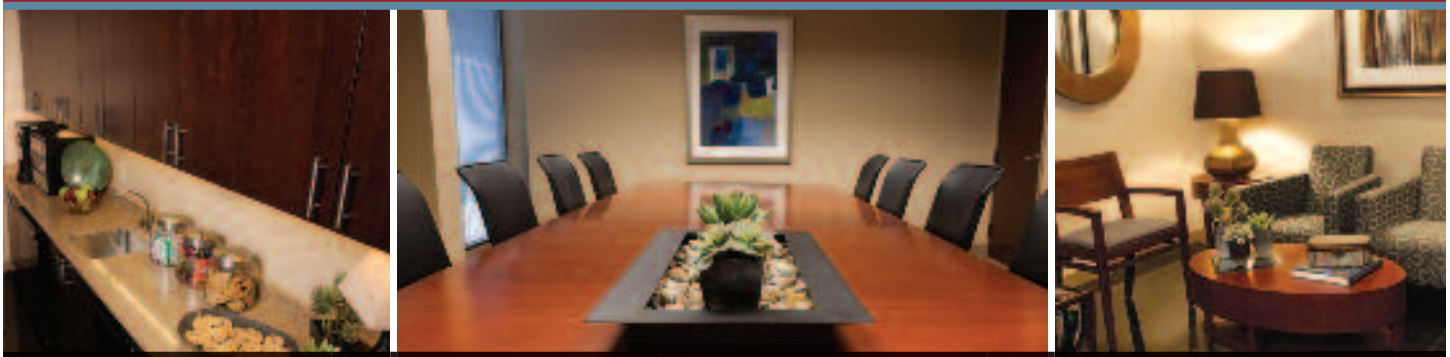
CT scans also capture data about the density of materials within the object. Using the reconstruction software, one can view the entire model along with a graph that shows the different material densities. The graph serves as a window that can be adjusted to display only specific densities in the model.

Consider an electrical connector that has failed internally. We may see evidence of the failure, such as melting on the outside of the connector, but we have no idea what caused it to fail. Suppose the exterior of the connector is an aluminum alloy shell, and the interior contains copper con-

BAY
MEDIATION & ARBITRATION SERVICES
Time Well Spent

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

Effectively Resolving Disputes Since 2002



BAY Mediators & Arbitrators


Bill Allred


Bruce Barrickman


Larry Bogart


Victor Faenza

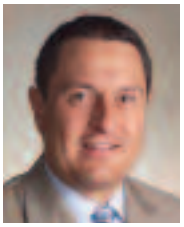

Susan Forsling


Ed Hallman


Tom Harper


David Hendrick


Kevin Hudson


Humberto Izquierdo


Sonny Jester


Patricia Killingsworth


Chris Parker


Bob Persons


Henry Quillian


Jim Stewart


Valerie Tobin


Denny Webb


Dan Weber


Scott Young

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

Figure 2: Cell Model Cut at an Angle

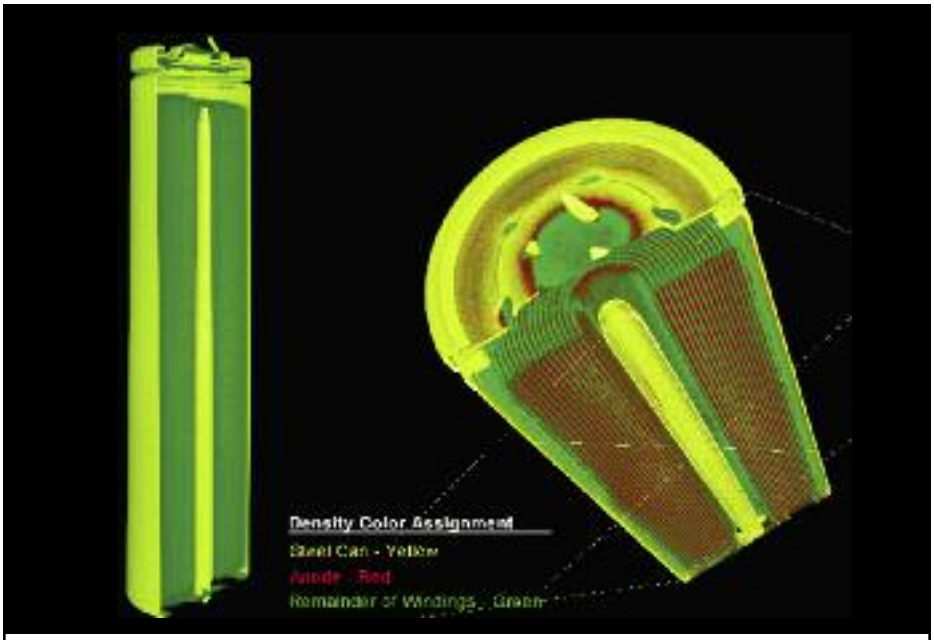


Figure 3: Sample of Material Density Color Assignment

ductors held in place by brass crimped connections. We are interested in the electrical conductors and connections inside the shell. Since copper and brass are denser than the aluminum alloy shell, we can adjust our density graph to show only copper and brass densities in the model image. The exterior shell in our digital model becomes invisible, and we can view and analyze just the material of interest.

The material density graph can also be divided into intervals, and a color can be assigned to each interval to differentiate the densities. Steel, copper, and aluminum are used in the 18650 battery cells previously mentioned. Of the three, steel is the densest, and is used for the can that houses the interior electrodes and the center vent tube. The interior electrodes are comprised of copper and aluminum. If we wanted to view only the can and vent tube, we could adjust the density graph to exclude the less dense materials and show only the steel. However, we may want to see all three densities at the same time.

While the model image is typically grey scale, we can assign colors to the different densities (i.e. yellow to steel, red to copper, and green to the remaining materials), as shown in Figure 3. This allows us to see the entire model, and differentiate one density from another. This can help us identify where a failure occurred, or help us see the extent of the failure. If copper electrodes are the only copper material in a failed battery, color coding this density allows us to distinguish the electrode remains, and highlight copper particles not easily seen.

The images we capture during a CT scan can be used to create a video presentation. Since we can slice the scanned object model in one or more directions, and manipulate it in different ways, the video can be a compelling way to help viewers (i.e. a jury) understand the construction, functionality, or potential failure modes of an object.

In addition to the more advanced capabilities we have already described, it should not be overlooked that CT machines can also simply provide real-time, high resolution x-ray images. X-rays provide only two-dimensional views of an object, thus a specific point in the object can be obstructed, and vital data can go unnoticed. There is also no depth of field in an x-ray view.

While x-rays have these limitations, they are still a common and important tool in forensic analysis. An advantage of a CT machine is that it can provide both real-time x-ray and far more advanced analysis as needed.

Conclusion

Computed Tomography can provide invaluable insight when analyzing an evidentiary object. The object can be fully documented and preserved in its original state, either prior to or in place of a destructive examination. Data from a CT scan can be manipulated to show evidence within the object that may have gone unnoticed, and in some cases, was otherwise unavailable. Whether it is used for inspection and analysis, or to create presentation material for a business meeting, technical discussion, or courtroom setting, CT technology can be a powerful tool in forensic investigation. ❖

Jonathan Jordan, P.E., CFEI, is a Senior Staff Consultant at ESI, a GDLA Platinum Sponsor. He specializes in electrical engineering issues, and has performed numerous investigations into fires allegedly caused by electrical issues. He has extensive experience in product safety failure analysis, resulting in design changes, ODM changes and recalls. His projects have included a wide array of products and components, including electronics, printed circuit boards, appliances, HVAC/R, residential and commercial wiring, motors, power supplies, and battery failure analysis, with an emphasis on lithium-ion battery chemistry. He holds two lithium-ion battery patents.

GDLA Proud Platinum Sponsor

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

GLOBAL
eDiscovery
Litigation Support
Document Solutions

AccessData
Elite Reseller

888.774.5622 | globallebal.com

Appellate Case Law Update

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

JURISDICTION, STANDING, MOOTNESS AND DUE PROCESS: Attorneys who are removed from a case by having their *pro hac vice* admission revoked have standing to appeal, though they are not a party to the case. Settlement of the underlying case does not make the appeal moot and the failure to hold a hearing on disqualification violates due process.

***Ford Motor Company v. Young*, A12A2335 (June 20, 2013)**

Attorneys Alan Thomas and Paul Malek, counsel for Ford Motor Company, appealed the order of the State Court of Cobb County revoking their *pro hac vice* admission. In this products liability action, the parents of a minor sued Ford Motor Company alleging their son's death was caused by Ford's failure to warn of a defective seatbelt.

During discovery the plaintiffs sought the production of any insurance policies that would be applicable to pay any judgment. The defendant's response was that it had sufficient resources to satisfy any judgment that reasonably could be expected to be awarded. Defendant never supplemented its discovery responses as to this request.

The parties later prepared a consolidated pretrial order with the plaintiffs submitting that the jury should be qualified as to defendant's insurers and defendant objecting to any reference to insurance, as Ford had sufficient resources to satisfy any judgment. Later, at the pretrial hearings and on the first day of trial, immediately prior to voir dire, Ford again stated there was no insurance. On the morning of the second day of voir dire, Ford's attorneys informed the trial court they had learned of excess policies just that morning and had disclosed them to opposing counsel. In response, the trial court granted a mistrial and revoked the attorneys' admissions, finding in part that they had violated the Georgia Rules of Professional Conduct. The court then struck Ford's defense that it had adequately warned consumers of the danger of a seatbelt malfunction. The case was later settled.

The Court began its analysis in this case of "first impression" by examining its jurisdiction. While the federal courts and many state courts have addressed this issue, and Georgia has also examined this issue, though not in the context of a revocation of a *pro hac vice* admission based on the Rules of Professional Conduct, the Court of Appeals found it had jurisdiction.

The Court held that the findings of the trial court could have continuing, adverse collateral consequences on the attorneys' careers and because the order bears directly on their interest, they were directly aggrieved by the order. As to the issue of mootness, the Court found that because the trial court's findings could cause long-standing harm to an attorney's reputation, long after the case was concluded, the issue was not moot.

After holding the attorneys had standing, the Court turned its attention to issues of due process and application of the Rules of Professional Conduct. The Court again noted the issue of whether an attorney is entitled to due process before his *pro hac vice* admission is revoked. Again noting that the Eleventh Circuit had addressed this issue, the Court found the reasoning of Eleventh Circuit persuasive on the question of whether such an admission implicates a mutually explicit understanding that creates a limited property interest for the purposes of due process. The Court found that process due was notice of a hearing, notice of the charges and an opportunity to defend those charges.

Finally, the Court determined trial courts may revoke a *pro hac vice* admission on the basis of a violation of the Rules of Professional Conduct without treading into the Supreme Court's exclusive authority to govern disciplinary matters.

JURISDICTION, FINAL JUDGMENT, THE SPECIAL STATUS OF PRISONERS AND DISMISSAL FOR DELAY: It is important to know whether the party has standing, the order or judgment is final and thus directly appealable, or subject to an interlocutory or

discretionary appeal, whether your opponent is a pro se prisoner or when delay may cause an appeal to be dismissed.

***PNC Bank, N.A. v. Tidwell*, A12A0442 (June 8, 2013); *Ledford v. Mobley*, A13A0137 (May 16, 2013); *Toenniges v. Steed*, A12A2404 (Mar. 9, 2012); and *Mercer v. Munn*, A13A0382; A13A0416 (May 6, 2013)**

As seen in the *Ford* case above, the first question the appellate courts always ask is, "Do we have jurisdiction?" Stated more judicial-like, "This court has a solemn duty to inquire into its jurisdiction to entertain an appeal whenever there may be any doubt as to its existence."

In *PNC Bank, N.A. v. Tidwell, supra,* the Court found it lacked jurisdiction over the appeal: "It is well settled that only a party to a case can appeal from a judgment, or one who has sought to become a party by way of intervention and has been denied the right to do so." Factually, the Littletons filed a complaint against National City Mortgage in 2007. Eventually, National City Mortgage stopped filing pleadings and PNC, as successor to National City Mortgage, began filing pleadings.

As there was no order substituting or adding PNC to the action, PNC had no standing to appeal the entry of partial summary judgment against National City Mortgage. On April 15, 2013 the Supreme Court of Georgia granted cert to consider the issue of standing. *National City Mortgage v. Tidwell*, Case No. S12G2011

In *Ledford v. Mobley, supra*, the appeal was dismissed for lack of jurisdiction because the underlying order granting attorney's fees was not directly appealable as a final order, though there was a final judgment in the case that Ledford did not appeal. Ledford appealed the trial court's order granting attorney's fees pursuant to O.C.G.A. § 9-15-14.

The Court began by stating, "It is incumbent upon this Court to inquire into its own jurisdiction." The Court then cited to O.C.G.A. § 5-6-35 (a)(10) that specifically states that appeals from awards under O.C.G.A. § 9-15-14 are by application. Finding that the statute prevailed in defining the underlying subject matter, the Court held that an award of attorney's fees standing alone can never be directly appealed, even where the case has a final judgment.

In *Toenniges v. Steed,* A12A2404 (03/08/2013), the Court determined that a pro se prisoner has no right to directly appeal a civil judgment against him. Acting pro se, Donald Toenniges sued Steed for fraud related to a promissory note.

The trial court granted Steed summary judgment and Toenniges filed a direct appeal. Although the grant of summary judgment on all claims and against all parties is directly appealable, the Prison Litigation Reform Act of 1996, O.C.G.A. § 42-12-1 et seq. requires that a prisoner must file an application for discretionary review in all civil cases.

And in *Mercer v. Munn*, A13A0382 (05/06/2013), the Court of Appeals reversed a trial court's denial of a motion to dismiss an appeal based on the appellant's delay. Munn sued his psychiatrist alleging his doctor's refusal to allow him to bring his Rottweiler into the office for appointments was a violation of the American with Disabilities Act and O.C.G.A. § 30-4-2.

The trial court granted summary judgment to the psychiatrist and Munn appealed. After six months passed, and the trial transcript had still not been filed, Mercer filed a motion to dismiss the appeal, which the trial court denied. Mercer then appealed the trial court's denial of his motion to dismiss.

The Court held that although the record supported the trial court's conclusion that Mercer had not been directly prejudiced by the extraordinary delay, it was indisputable that Munn's failure to procure the transcript has, "discernibly delayed docketing of the record in the appellate court and prevented an appellate decision on the merits at the earliest possible date."

As Munn failed to rebut the presumption that his delay was unreasonable the trial court erred in denying Mercer's motion.

TORT REFORM REDUX: The Supreme Court reviews the Court of Appeals decision regarding the emergency room statute.

***Johnson v. Omondi*, S13G0553**

The Supreme Court of Georgia accepted certiorari to review the Court of Appeals decision in *Johnson v. Omondi*, 318 Ga.App. 878 (2012). This medical malpractice case involves the appropriate standard of care in an emergency department. Johnson presented to the emergency department complaining of pain of chest pain. Eight days earlier Johnson had undergone knee surgery. Omondi performed several of tests and after Johnson's chest pain was resolved, he was discharged. Two weeks later, Johnson began complaining of chest pain and difficulty breathing. He was transported to the hospital and later died from a bilateral pulmonary embolism. Omondi moved for summary judgment and the trial court granted it. Johnson's heirs appealed.

A seven-member panel of the Court of Appeals affirmed the trial court in a 5-2 ruling, finding that there was no dispute of fact on the key issues involving the application of the emergency medical care statute. The majority determined that the Johnsons failed to show that Omondi did not exercise "even slight care," which was a necessary to meet the "gross negligence" standard.

The Supreme Court granted the petition for certiorari on April 29, 2013 to consider the following question: Did the Court of Appeals err in its application of the gross negligence standard for emergency room malpractice under O.C.G.A. § 51-1-29.5(c)?

The case was heard on July 2, 2013. Five law firms filed amicus briefs and a decision is expected by the end of the year. ❖

Employment Case Law Update

By David Cole, SLC Chair
Freeman Mathis & Gary, Atlanta

ADEA: Cat's Paw Liability Requires Showing of But-For Causation

***Sims v. MVM, Inc.*, 704 F.3d 1327, 1330 (11th Cir. 2013)**

A 71-year old plaintiff brought an action alleging age discrimination in violation of the ADEA. Although there was no evidence that the decision maker harbored discriminatory bias against him because of his age, the plaintiff argued that the decision maker acted as a mere cat's paw for his immediate supervisor who was biased.

As a matter of first impression in this circuit, the Eleventh Circuit considered whether the Supreme Court's decision in *Staub v. Proctor Hosp.,* 131 S. Ct. 1186 (2011) modified the Eleventh Circuit's cat's paw analysis in ADEA cases. In *Staub*, the Supreme Court held that an employer in a USERRA case be liable under a cat's paw theory only if the subordinate supervisor: (1) performed an act motivated by anti-military animus that was intended to cause an adverse employment action, and (2) that act proximately caused the ultimate employment action. The question was whether this same standard applied to cat's paw cases under the ADEA.

The Eleventh Circuit held that the "proximate cause" standard for cat's paw liability in USERRA cases does not apply to cat's paw cases under the ADEA because the two statutes have different burdens of proof. While USERRA (and Title VII) only requires a showing that discrimination was a "motivating factor" in the employment decision, the ADEA requires a showing of but-for causation, which is a closer link than mere proximate causation.

Thus, in a cat's paw case under the ADEA, the Eleventh Circuit held that a plaintiff must prove that the biased supervisor's animus was a "but-for" cause of, or a determinative influence on, the decision maker's ultimate decision.

FLSA: Liquidated Damages Are Discretionary in FLSA Retaliation Claims

***Moore v. Appliance Direct, Inc.,* 708 F.3d 1233 (11th Cir. 2013)**

The plaintiffs brought a FLSA retaliation claim alleging their employer retaliated against them by outsourcing their jobs as delivery drivers because they filed a lawsuit for unpaid overtime. The jury awarded each of the plaintiffs $30,000 in economic damages for retaliation. The plaintiffs then asked the court to award liquidated damages in an equal amount, arguing that the award of liquidated damages is mandatory under the FLSA.

In this matter of first impression for this circuit, the Eleventh Circuit held that liquidated damages for retaliation claims under the FLSA are discretionary, not mandatory. In doing so, the Eleventh Circuit joined the Sixth and Eighth Circuits in this interpretation. The Fifth and Seventh Circuits, however, have reached the opposition conclusion and held that liquidated damages are mandatory in FLSA retaliation cases, just as they are mandatory in cases upon a finding of liability for unpaid minimum wages and overtime.

FLSA: Student Extern Not an Employee Under the FLSA

***Demayo v. Palms W. Hosp., Ltd. P'ship*, Case No. 11-CV-81211, 2013 WL 264691 (S.D. Fla. Jan. 23, 2013)**

The plaintiff, a student extern, filed this action for unpaid wages under the FLSA for work she performed at Palms West Hospital. As a prerequisite to graduating from her surgical technology student program, the plaintiff was required to complete an unpaid student externship, which required her to actively participate in 125 surgical procedures. While working at Palms West Hospital, the plaintiff performed most of the work of a surgical technologist and performed various cleaning and administrative tasks.

Noting that the Eleventh Circuit has not yet addressed whether student externs are "employees" for purposes of the FLSA, the Southern District of Florida held that the totality of the circumstances established the "economic reality" that the student extern was not Palms West's employee within the meaning of the FLSA. Specifically, the student extern understood she would not be compensated for her work and was not guaranteed a job at the end of her externship. In addition, she received hands-on training (participating in over 185 surgical procedures) without conferring a substantial benefit to the hospital because it did not reduce facility staffing levels or payroll, but actually spent time monitoring the plaintiff and providing feedback on her work. Thus, the plaintiff was not entitled to collect minimum wages for the time she spent working at the hospital.

NLRB: Temporary Reinstatement of Discharged Employees Not Just and Proper

***N.L.R.B. v. Hartman & Tyner, Inc.*, 714 F.3d 1244 (11th Cir. 2013)**

The NLRB sought temporary injunctive relief against Hartman & Tyner, Inc., which operates a casino and greyhound racetrack, for allegedly discharging six employees who were involved in a union organizing campaign and for discouraging other employees from engaging in unionization. The NLRB sought temporary reinstate-

ment of the six discharged employees pending a final order from the NLRB in administrative proceedings. The district court denied reinstatement, and the NLRB appealed.

There is a two-part standard for such injunctive relief under section 10(j) of the NLRA: (1) there must be reasonable cause to believe that the alleged unfair labor practices have occurred, and (2) the injunctive relief must be just and proper. On appeal, the Eleventh Circuit upheld the district court's decision that temporary reinstatement was not "just and proper." The district court held there was no lingering threat of additional, unrealized harm flowing from the discharges because the evidence indicated that the union's organization campaign had already "grown cold" more than a week before the discharges occurred. In addition, it noted there was more than a four-month delay between the time of the discharges and the time the NLRB filed its petition. Under these facts, the Eleventh Circuit held there was no abuse of discretion by the district court, and it affirmed the decision.

TITLE VII: Status as Employer is a Non-jurisdictional Element

***Kaiser v. Trofholz Technologies, Inc.*, Case No. 2:12-CV-665, 2013 WL 1294673 (M.D. Ala. Mar. 28, 2013)**

A black female hired by a subcontractor brought race and gender discrimination claims under Title VII against both her subcontractor and the contractor. The contractor argued that the court lacked subject matter jurisdiction because the employee failed to allege facts showing it had an employment relationship with the plaintiff sufficient to create Title VII liability. In response, the plaintiff argued that the contractor qualified as a "joint employer" with the subcontractor. The parties presented extrinsic evidence on this issue, which raised the question of whether the contractor's status as the plaintiff's employer under Title VII was a threshold jurisdictional issue, or an element of the plaintiff's substantive claim.

As the court explained, if this determination were jurisdictional, then a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) would be appropriate and the court could consider the extrinsic evidence in making its decision. However, if it were part of the plaintiff's substantive claim, then the court must treat a Rule 12(b)(1) motion as one under Rule 12(b)(6) and not consider extrinsic evidence.

In *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), the Supreme Court held that whether an employer meets Title VII's 15-employee threshold is an element of a plaintiff's claim for relief, not a jurisdictional issue. Like other district courts in this circuit that have addressed this issue, the Middle District of Alabama applied the reasoning of *Arbaugh* and similarly concluded that one's status as an employer with respect to the plaintiff is a non-jurisdictional element of the plaintiff's Title VII claim. Thus, the contractor's Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction was not the appropriate procedural vehicle for presenting this defense. ❖

Mass Torts Case Law Update

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

Beverly v. Cleveland Electric Company, State Court of Fulton County, CA # 10EV010294 (April 22 - May 1, 2013)

Plaintiff sued a former contractor at a power plant for exposure to fiberglass dust and chemical fumes at the site that allegedly resulted in permanent disability. After an eight-day trial, the jury rendered a defense verdict for Cleveland Electric Company.

Plaintiff was working at Georgia Power Company's Plant Hammond in 2007 for Spartan Constructors. Cleveland Electric hired a subcontractor to install fiberglass piping at the plant. Plaintiff alleged exposure to toxic substances when others cut and ground the piping and assembled it through chemical welding. The exposure to the fiberglass and chemical fumes resulted in breathing problems for the Plaintiff a week after he was assigned to work near the piping project. Plaintiff's shortness of breath, congestion, and coughing resulted in him missing time from work. After being fired by Spartan, Plaintiff worked briefly for another company until mid December 2007, and had not worked since that time.

Plaintiff filed suit against Cleveland Electric and Georgia Power asserting that both companies had failed to warn Plaintiff about the toxic exposures or take precaution against such exposures. Georgia Power obtained summary judgment prior to trial

At the time of trial, Plaintiff had incurred $92,000 in past medical expenses and established a life care plan for future care and medical expenses. Trial commenced on April 22, 2013. Plaintiff called several expert witnesses and treating physicians to testify that Plaintiff suffered from chronic sinusitis and rhinitis caused by the fiberglass exposures, as well as irritant-induced asthma. Cleveland Electric countered with expert medical witnesses denying Plaintiff suffered from those conditions. Cleveland Electric also alleged that Plaintiff's employer, Spartan, knew about the fiberglass work and should have taken precautions to protect the plaintiff.

The jury deliberated about an hour before returning a defense verdict for Cleveland Electric. ❖

How good was your Expert?

When you can't afford to be wrong

The Causation Experts.

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

Contact us today to start building your Strongest Case possible.

CED™

Investigative Technologies Inc.

1-800-780-4221

info@cedtechnologies.com

Premises Liability Case Law Update

By Pamela N. Lee, *Swift Currie McGhee & Hiers, Atlanta*, and Zachary M. Wilson, *Hawkins Parnell Thackston & Young, Atlanta*

SLIP-AND-FALL; SPOLIATION OF EVIDENCE: Defendant grocery store did not spoliate evidence when there was no evidence of any contemplation of litigation at time surveillance videos were destroyed.

***Powers v. S. Family Mkts. of Eastman, LLC*, 320 Ga. App. 478, 740 S.E.2d 214 (Mar. 18, 2013)**

On May 27, 2008, Plaintiff Sylvia Powers slipped and fell inside a Piggly Wiggly Grocery Store owned by the defendant. After paying for her groceries, Plaintiff was attempting to exit the store when she slipped and fell. An independent contractor had been cleaning the floors in the vicinity, although Plaintiff had not seen anyone mopping before the fall. A store manager responded to her fall and saw two "wet floor" signs and a mop machine in the area where Plaintiff fell. When he asked what happened, Plaintiff responded she knew the floor was wet and that she would be okay without any medical assistance.

After Plaintiff left the store, the manager filled out an incident report and conducted an investigation, as he was required to do. The incident report contained preprinted language stating the report was "prepared in anticipation of litigation." He drew a diagram of the scene and took pictures. He then reported the incident to the Defendant's risk manager. The Defendant's third-party administrator contacted Plaintiff as a matter of customer service to ensure she was okay and to follow up on the initial investigation. During this interview, there was no indication of contemplated litigation, nor was there any indication Plaintiff would seek legal counsel.

Following this, the store manager did not take any steps to preserve the video surveillance of the incident and the footage was overwritten in the ordinary course of business. Three months later, Defendant received correspondence from an attorney for Plaintiff, and she subsequently filed suit. During the course of discovery, Plaintiff requested the video surveillance footage.

When Defendant stated it could not produce the footage, Plaintiff filed a motion for sanctions based on the alleged spoliation of evidence. Defendant filed a motion *in limine* to preclude questioning of the store manager regarding an explanation of why he did not save the videotape. Plaintiff's motion for sanctions was denied, and Defendant's motion *in limine* was granted. Plaintiff appealed both decisions.

On appeal, the Court of Appeals affirmed, finding that although the incident report contained pre-printed language stating it was prepared in anticipation of litigation, the testimony of the store manager indicated that he believed Plaintiff was unharmed and did not foresee litigation when the report was prepared. The evidence further showed that the store manager simply followed the routine practices he was required to follow in the course of his business in investigating and following up on a slip-and-fall incident. The Court also relied on previous decisions which held that the "mere contemplation" of potential *liability* and the completion of an accident report following an investigation does not demonstrate knowledge or foresight of contemplated or pending litigation.

As to Defendant's motion *in limine*, the Court reasoned that had Plaintiff been able to question the store manager about the video, it would have created a presumption under O.C.G.A. § 24-4-22 (in effect at the time of the trial) that the claims against Defendant were well-founded. Since the record showed no spoliation had occurred and Defendant did not intentionally destroy any video footage of the incident, allowing such questions would have misled the jury and created undue prejudice. Furthermore, since there was no evidence any of the video cameras would have recorded the incident in question, there was no showing the video footage would have been relevant to the issues being tried.

SLIP-AND-FALL; SUBSEQUENT REMEDIAL MEASURE; PROPRIETOR'S LACK OF SUPERIOR KNOWLEDGE: A subsequent remedial measure, namely cleaning a floor after a slip and fall, is insufficient to show knowledge of hazardous condition

***H.J. Wings & Things v. Goodman*, 320 Ga. App. 54, 739 S.E.2d 64 (Feb. 28, 2013)**

Plaintiff sued Defendant after Plaintiff slipped and fell just inside the entrance to Defendant's restaurant. Plaintiff later claimed the floor was "really slippery and shiny looking." After the incident, an employee of the Defendant assisted Plaintiff in standing up. Plaintiff reported the incident to the store manager, purchased her to-go order of food, and exited the restaurant.

The manager of the restaurant then inspected the area where the fall occurred and then cleaned the area. While Plaintiff speculated that the floor was heavily waxed, she was unable to point to any evidence the floor was waxed at all. Defendant presented undisputed evidence that it did not utilize wax on its floors.

Defendant filed a motion for summary judgment, contending that Plaintiff had not shown evidence of a hazardous condition or of knowledge of any such condition by Defendant. In opposing Defendant's motion, Plaintiff asserted only that the decision to

clean the floor after her fall showed that Defendant had knowledge of a hazard. The trial court denied Defendant's motion and Defendant appealed.

The Court of Appeals reversed, holding that Plaintiff could not rely on the subsequent remedial measure of the cleaning of the floor, as such was inadmissible. Plaintiff also failed to show the evidence was relevant for any reason other than to attempt to show the restaurant recognized the hazardous condition. Accordingly, Defendant was entitled to summary judgment.

APPLICATION OF RECREATIONAL PROPERTY ACT TO MIXED-USE PROPERTIES; INVITEE OR LICENSEE STATUS OF VISITOR TO CEMETERY: Trial court incorrectly granted summary judgment to defendant landowner and lawn maintenance company, as issues of fact existed as to whether Recreational Property Act applied to mixed-use cemetery and whether visitor to cemetery was invitee or licensee.

***Martin v. Dempsey Funeral Servs. of Ga., Inc.*, 319 Ga. App. 343, 735 S.E.2d 59 (2012), reconsideration denied (Dec. 13, 2012)**

Plaintiff was visiting a cemetery owned by Dempsey Funeral Services of Georgia, Inc. and maintained by Magnolia Landcare Group, Inc. Plaintiff's intention for visiting the cemetery was to place flowers on her daughter's gravesite. While walking to the gravesite, the plaintiff's feet became tangled in baling twine used to hold together bales of pine straw. Plaintiff fell and sustained injury. Plaintiff sued both Dempsey and Magnolia, asserting that the baling twine was a trip hazard that had been negligently left on the ground.

The defendants moved for summary judgment based upon the Recreational Property Act, O.C.G.A. § 51-3-20, *et seq.* ("RPA"), which provides that "an owner of land who either directly or indirectly invites or permits without charge any person to use the property for recreational purposes does not thereby: (1) extend any assurance that the premises are safe for any purpose; (2) confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed; or (3) assume responsibility for or incur liability for any injury to person or property caused by an act of omission of such persons." O.C.G.A. § 51-3-23.

The trial court granted the defendants' motion, finding that the cemetery was a recreational property, and that the RPA applied. Alternatively, the trial court found that the plaintiff was a licensee on the property, and that there was no evidence that the defendants had breached the standard of care owed to a licensee.

Plaintiff appealed, and the trial

Continued on page 51

Product Liability Case Law Update

By James L. Hollis, SLC Vice-chair
Balch & Bingham, Atlanta

NEGLIGENT INSPECTION, BREACH OF WARRANTY: Defendant Redding's motion for summary judgment granted because it was a remote wholesale dealer with no duty to end user. Redding sold to S&S Auto with no warranties as to condition, and S&S Auto subsequently sold to end user. Defendant S&S Auto's motion for summary judgment also granted because there was no duty to inspect, its "cursory walk around" and test drive of the van did not constitute such an inspection with the intent that the consumer would rely upon such inspection.

***Wilcher v. Redding Swainsboro Ford Lincoln Mercury, Inc.*, 2013 Ga. App. LEXIS 353 (Ga. App. Mar. 28, 2013).**

In 2008, a Chevrolet Sports Van left the roadway and crashed into a tree after the left front tire malfunctioned and the driver lost control. The passengers brought lawsuits against S&S Auto, who sold the van to its owner Joe Pierce before the crash, and Redding Swainsboro Ford Lincoln Mercury ("Redding") who sold the van to S&S Auto.

Plaintiffs asserted negligence and breach of warranty claims against S&S Auto and Redding on the basis that the van should have been equipped with light truck tires instead of passenger tires and that the sellers should have warned of the danger of driving a vehicle with inappropriate load bearing tires.

The trial court granted summary judgment for both defendants. Plaintiffs also sued Cooper Tire, the manufacturer of the front tire, for strict liability, but the trial court denied Cooper Tire's motion for summary judgment so that issue remained in the trial court. Plaintiffs appealed the grant of summary judgment to S&S Auto and Redding.

The passenger tire that failed was on the vehicle when Redding purchased it as a trade-in from a customer. Redding then sold the van to S&S Auto "as is" with no warranties or representations as to the van's condition. S&S Auto in turn sold the van to Joe Pierce "as is" with no express warranty.

Applying Georgia law, the Court of Appeals affirmed the trial court's decision and held that Redding had no duty to Pierce or the plaintiffs because it was a remote wholesale dealer that did not sell the van directly to the consumer. Redding made no representations as to the safety of the van or its tires to S&S Auto and Redding assumed no obligation and no control of the van after S&S Auto purchased it.

The Court of Appeals also affirmed the trial court's grant of summary judgment in favor of S&S Auto. A retailer who is not a manufacturer has no duty to test a product for a latent or concealed defect, but if it does undertake the duty to inspect or test, it cannot be negligent in its inspection. S&S Auto "did a cursory walk around to observe the general condition of the van" and also took it for a test drive. Plaintiffs argued that amounted to an inspection but the Court disagreed.

In negligent inspection cases the dealer must have conducted the inspection with the knowledge that the consumer would rely upon its findings. S&S Auto did its "cursory inspection" of the van to determine if it wanted to purchase the van from Redding, not to inspect the van for the benefit of the consumer or with the understanding that the consumer would rely upon the results of the inspection.

PHARMACEUTICAL PRODUCTS LIABILITY: Plaintiff's causation expert excluded where he had no expertise concerning the two drugs at issue; he had only basic familiarity with the drugs, had not conducted any research, and had not written any articles on the specific drugs. Plaintiff's expert also excluded on failure to warn issue because had never consulted with the FDA on drug package issues or otherwise dealt with regulatory issues.

***Brown v. Roche Laboratories, Inc.*, 2013 WL 2457950 (N.D. Ga. June 6, 2013).**

Plaintiff was given prescription antibiotics Bactrim and Rochephin. She was later diagnosed with Stevens-Johnson Syndrome and Toxic Epidermal Necrolysis, rare and life-threatening drug reactions. Plaintiff sued the drug manufacturers for various claims including negligent failure to warn.

The trial court granted Defendant's *Daubert* motion and found that Plaintiff's causation expert, Dr. Wolff, was not qualified to render the opinions presented in his expert Affidavit. The court found that Dr. Wolff did not have any particular expertise concerning the drugs at issue, nor was he sufficiently knowledgeable about FDA regulatory practice and requirements such that he could render an expert opinion on the efficacy of a warning label. He admitted during his deposition that he had only basic familiarity with both drugs and had not conducted any research or written any articles on the particular drugs.

Furthermore, Dr. Wolff had never consulted with the FDA on the content of drug package inserts and had no experience in "regulatory affairs." Without an expert, Plaintiff could not show there was a defect and could not show causation. Summary judgment for Defendant was granted and affirmed.

DESIGN DEFECT: Plaintiff's design defect expert not required to test alternative design under every conceivable condition in order to prove alternative design did not add new safety hazards.

***Sands v. Kawasaki Motors Corp. U.S.A.*, 2013 WL 1149601 (11th Cir. Mar. 20, 2013).**

Plaintiff was injured when she fell off the back of a jet ski. At trial, Plaintiff's expert testified that there was a reasonable alternative design because he had a patent for a seat back which would have prevented the Plaintiff from falling off the back of the jet ski.

Defendant Kawasaki argued on appeal that the expert should have been excluded as unreliable under *Daubert* because he did not do enough testing on his proposed alternative design.

Defendant argued the expert should have done testing to determine whether the alternative design would add new safety hazards. The 11th Circuit held that the expert was not required to test his seat back under every conceivable condition in order to prove a negative and the trial court did not abuse its discretion in permitting the testimony at trial. ❖

WELCOME BACK, Y'ALL! RECEPTION

PARTICIPATING SPONSOR

CALLAWAY GEER CERTIFIED PUBLIC ACCOUNTANTS

The 46th Annual Meeting kicked off in Palm Beach with the traditional Welcome Back, Y'all! Reception, this year held on The Breakers' Ocean Lawn overlooking the Atlantic. Unless otherwise noted, those pictured are identified left to right: 1. Then-President Lynn Roberson and her husband, Judge Henry Newkirk, with Judge Lawton Stephens and his wife, Mary; 2. Reception sponsors Ansley Callaway, Will and Sharmon Geer from Callaway Geer CPAs; 3. Jason and Annie Lewis, Wendy and Jason Logan, Linda and Past President Mel Haas; 4. Dave Nelson with his wife, Jennifer, and children, Elizabeth and Lanier. 5. Past President Steve Kyle and Executive Director Jennifer Davis; 6. Wayne Melnick with his wife, Laura, and sons, Joss and Xander; 7. Then-Secretary/Treasurer Kirby Mason with her husband, Frank, and daughters, Taylor and Alex; 8. Jeff Ward with his wife, Greer, and daughters, Beth Anne and Mobley Grace; 9. Vice President Sally Akins and her husband, Dale; 10; Rusty Gunn and his wife, Brent; 11. Then-Vice President Matt Moffett and his wife, Diane; 12. Alan Holcomb and Lindsay Gatling.

The Breakers, Palm Beach, June 13-16

BREAKFAST

PARTICIPATING SPONSORS

ESI AND

NELSON ARCHITECTURAL ENGINEERS

Scenes from the business meeting and CLE program, which was planned by then-Executive VP Ted Freeman to focus on avoiding malpractice: 1. Judge Lawton Stephens discusses professionalism in the courtroom; 2. State Bar General Counsel Paula Frederick reviews legal malpractice and ethics pitfalls; 3. Lane Young discusses malpractice on trial; 4. Past President Salty Forbes gives the Nominating Committee report; 5. Platinum Sponsor S-E-A's Jim Peters demos 3D scanning; 6. Plaintiff's lawyer Charlotte Perrell explains how "getting sued is for dummies;" 7. Platinum Sponsor ESI's Mitch Garber explores medical issues in forensic investigations; 8. Past President and DRI State Rep Bubba Hughes presents outgoing President Lynn Roberson with the DRI Award for Exceptional Performance.

2013-2014 Officers and Board of Directors

President
Theodore Freeman, Freeman Mathis & Gary, Atlanta

Executive Vice President
Kirby G. Mason, HunterMaclean, Savannah

Secretary-Treasurer
Matthew G. Moffett, Gray Rust St. Amand Moffett & Brieske, Atlanta

Immediate Past President:
Lynn M. Roberson, Swift Currie McGhee & Hiers, Atlanta

Past President, 2011-2012
W. Melvin Haas, III, Constangy Brooks & Smith, Macon

Past President 2010-2011
Edward (Bubba) M. Hughes, Callaway Braun Riddle & Hughes, Savannah

Vice Presidents
Sarah (Sally) B. Akins, Ellis Painter Ratterree & Adams, Savannah
Craig C. Avery, Cowsert & Avery, Athens
Hall F. McKinley, III, Drew Eckl & Farnham, Atlanta
Peter D. Muller, Goodman McGuffey Lindsey & Johnson, Savannah

Northern District
James (Dart) D. Meadows (2014), Balch & Bingham, Atlanta
Christopher E. Parker (2015), Miller & Martin, Atlanta
Brian T. Moore (2016), Drew Eckl & Farnham, Atlanta

Middle District
David N. Nelson (2014), Chambless Higdon Richardson Katz & Griggs, Macon
Robert (Rusty) R. Gunn, II (2015), Martin Snow, Macon
Jason C. Logan (2016), Constangy Brooks & Smith, Macon

Southern District
James W. Purcell (2014), Fulcher Hagler, Augusta
Jeffrey S. Ward (2015), Drew Eckl & Farnham, Brunswick
James S.V. Weston (2016), Trotter Jones, Augusta

State at Large
George R. Hall, Hull Barrett, Augusta
Jo A. Jagor, Hall Booth Smith, Atlanta
Wayne S. Melnick, Freeman Mathis & Gary, Atlanta

The Executive Committee is composed of the officers (President, Executive Vice President, Secretary-Treasurer) and three most immediate Past Presidents.

President's Reception

Participating Sponsor

S-E-A Limited

Pictured at the President's Reception, held in the magnificent Gold Room at The Breakers, are: 1. Ryan Mock and Pam Harrison; 2. Past President Johnny Foster and his wife, Bobbie; 3. Past President Walter McClelland and his wife, Kathy.

Golf Tournament

Participating Sponsor

Engineering Systems, Inc. (ESI)

Pictured at the annual golf tournament are: 4. Jeff Ward (left) with Dana Braun (right) and his son, Max; 5. ESI's Bear Ferguson with Ben Avery, who won longest drive. Bear and Ben were part of the first place foursome (teammates Will Geer and Chris Garavaglia are not pictured). Ben's father, Vice President Craig Avery (not pictured), was also in the winner's circle with closest to the pin.

Tennis Tournament

Participating Sponsor

Esquire Deposition Solutions

After a rainout last year, the mixed doubles tennis tournament was particularly fun this year. 6. Pictured left to right are (front row) Ali and Sarah Avery with Sharon Jackson; (middle row) Dee Dee Worley, Wayne and Laura Melnick, Craig Avery, Sam Pittard and Andrew Fox; (back row) John and Lynn Leffler with Peter Muller. Winners were Craig Avery (men's), Lynn Leffler (ladies') and Andrew Fox (sportsmanship).

The Breakers, Palm Beach, June 13-16

Closing Dinner

participating sponsor

FORCON International

Pictured at the Closing Dinner, held poolside at The Beach Club at The Breakers, are (left to right unless otherwise noted): 1. President Ted Freeman and his wife, Mary Peironnet, with Past President Warner Fox and his wife, Pat; 2. Joe Stephens and his wife, Christina; 3. Judge Stephens (left) administers the "oath of specific consumption" to Andy Holliday (right), before he is presented a bottle of imported scotch by FORCON's Bill VerEecke; 4. Bill Cowsert and Chris Steinmetz; 5. Judy and Speer Mabry with Brown and Kathryn Dennis; 6. Marty Levinson with his wife, Cathi, and daughter, Lexi; 7. Past President and Meetings Chair Staten Bitting and his wife, Cindy, with Annie and Jim Purcell; 8. Brian and Julie Moore—shortly before baby boy #3, Mercer Elliott, was born a month later.

CLE Explores the Changing World of Slip-and-Fall Defense

The GDLA Education Committee and Platinum Sponsor FORCON International hosted a CLE exploring "The Changing World of Slip-and-Fall Defense" on May 7, 2013, at the Atlanta Fish Market.

John P. Leffler, P.E., a forensic mechanical engineer with FORCON, joined with K. Marc Barré, Jr. of Swift Currie McGhee & Hiers in Atlanta, to present the informative seminar, which tracked a recent article they published in DRI's *For The Defense* magazine.

Each speaker shared valuable insights on the importance of expert opinions being informed by awareness of relevant research and methodologies that correlate tribometer test measurements to actual human slip experiences.

For example, pedestrian falls are often linked to "slippery" walkway surfaces, but building codes and accessibility regulations require adequate walkway "slip resistance" without specifying how it is to be confirmed. That makes proving insufficient traction a complex task.

Mr. Leffler aptly explained technical standards and terms like "F2508" and the "coefficient of friction" in a user-friendly manner for anyone facing a potential jury trial in a slip-and-fall case. He also offered critical new updates about traction testing and the once magic number of ".05."

Mr. Barré guided attendees through recent national cases about the threshold of acceptability for expert testimony, such as *Mincey v. Parsippany Inn* from the New Jersey Supreme Court.

Because the past five years have seen major advances in the scientific foundations for traction analysis—and specifically correlating tribometer measurements to actual human slip experiences—defending a slip-and-fall case is very different in today's world.

Special thanks goes not only to FORCON and our speakers, but also to Education Committee member Kevin C. Patrick of Goodman McGuffey Lindsey & Johnson in Atlanta, who served as program chair. ❖

Pictured at the seminar are (left to right) 1. speakers Marc Barré and John Leffler; Education Committee Chair Wayne Melnick; and CLE Program Chair Kevin Patrick; 2. FORCON's Bill VerEecke, Anandhi Rajan, Michele Stumpe and Immediate Past President Lynn Roberson; 3. Stevan Miller, Barbara Marschalk and Matt Jones; 4. Andy Treese, Nicole Leet and Keith Hayasaka; 5. Erica Morton and Monica Wingler.

Second Speaker Lunch Series Recaps Legislature

On May 30, 2013, the GDLA presented the second lunch program in its newly-created Speaker Lunch Series. Developed by Jacob (Jake) E. Daly of Freeman Mathis & Gary in Atlanta, the concept is designed to offer GDLA members an opportunity to socialize over lunch with other members and even non-members, particularly judges and other elected officials, and to hear presentations on topics of interest to the defense bar.

The program was well attended by both GDLA members and members of the judiciary, including several from the Supreme Court and Court of Appeals. Rep. Wendell Willard, who participated as a panelist in the inaugural lunch program on November 28, 2012, and is the Chairman of the House Judiciary Committee, also attended. The program featured a presentation by Rep. Edward H. Lindsey, who is a member of the GDLA and represents House District 54 in the General Assembly, on the highlights of the 2013 legislative session.

From the defense perspective, one of the most important bills enacted this year was HB 336, which regulates *Holt* demands in cases arising out of motor vehicle accidents. Rep. Willard and the other panelists at the inaugural lunch program debated this issue, and so it was at the top of many attorneys' lists of priorities for this year's legislative session. Rep. Lindsey had previously co-sponsored a bill that would have required a minimum 60-day response time for *Holt* demands and would have required the claimant to furnish complete medical records, but that bill did not pass. Ultimately, HB 336 was limited to cases arising out of motor vehicle accidents and mandates a minimum response time of only 30 days, but it applies only to pre-suit demands and does not require the claimant to furnish complete medical records. Rep. Lindsey acknowledged that although the defense bar did not get everything it wanted on this issue, HB 336 is a step in the right direction.

Rep. Lindsey also discussed several other noteworthy bills enacted this year, including HB 154, which revises the workers' compensation system; HB 361 and HB 362/SB179, which strengthen Georgia's "right to work" laws; HB 242, which rewrites the juvenile justice code; HB 142 and HB 143, which limits certain lobbying activities; and a series of bills that address the organization and budget autonomy of the Fulton County courts. Rep. Lindsey's annual summary of significant legislation appears on page 10.

In closing, he encouraged everyone to become involved in the legislative process. Legislators appreciate hearing from their constituents, and so suggestions for laws are always welcome.

Once again, the GDLA extends a special thank you to Nelson Mullins Riley & Scarborough for hosting this event. The next program is being planned now, hopefully for early fall. ❖

Pictured at the luncheon are (left to right) 1. Jake Daly, Court of Appeals Judge Chris McFadden and Chris Parker; 2. Rep. Edward Lindsey; 3. Rep. Wendell Willard; 4. Supreme Court Chief Justice Hugh Thompson and Justice David Nahmias with Chuck Dalziel; 5. Jay Smith, David Hayes and Maggie McClatchey.

Remember that "hope and change" mantra that was going around roughly five or six years ago? There really is hope for dealing with some high medical bills, and from an unlikely source. The Affordable Care Act[2] (ACA) may provide you some welcome relief.

The ACA now dictates that hospitals and non-profit clinics organized under Section 501(c)(3) of the Internal Revenue Code[3] may not charge an uninsured patient more than either what Medicare would pay for the same service or a calculated rate based upon an average of what health insurers under contract with that facility pay. That provision might be used as a sword to cut outstanding medical bills.

The ACA has been derisively called "ObamaCare" by some. Section 9007 of the ACA contains mandatory provisions that are applicable to "hospital organizations" (hospitals and non-profit clinics organized under Section 501(c)(3) of the Internal Revenue Code (the "Code")). Section 9007 is codified in the IRS Code as 501(r) and applies to entities that operate a facility required by a state to be licensed as a hospital which provides hospital care as its main function. [4]

The legislative history of the ACA shows that certain members of Congress determined that some 501(c)(3) hospitals had engaged in aggressive billing and collection efforts that seemed to run afoul of the hospital's "charitable" status, resulting in the enactment of section 501(r).

As a consequence, Congress mandated that 501(c)(3) hospitals show that they were actually providing "charitable care." Section 501(r) presents new requirements that hospitals must follow in order to continue to be treated for tax purposes as 501(c)(3) charitable organizations.

New Requirements for Charitable 501(c)(3) Hospitals

Section 501(r), added to the Code by the ACA, imposes new requirements on 501(c)(3) organizations that operate one or more hospital facilities (hospital organizations).[5] Each 501(c)(3) hospital organization is required to meet four general requirements on a facility-by-facility basis:

- Establish written financial assistance and emergency medical care policies;
- Limit amounts charged for emergency or other medically necessary care to individuals who are eligible for assistance under the hospital's financial assistance policy;
- Make reasonable efforts to determine whether an individual is eligible for assistance under the hospital's financial assistance policy before engaging in extraordinary collection actions against the individual; and
- Conduct a community health needs assessment (CHNA) and adopt an implementation strategy at least once every three years. (These CHNA requirements are effective for tax years beginning after March 23, 2012.)

Section 501(r) of the IRS Code now requires that hospitals establish written financial assistance policies, and the proposed regulations specify criteria that a hospital's policy must include. Section 501(r) requires that such policies specify the financial assistance available, including any discounts and free care available and the eligibility requirements for an individual to receive such discounts or free care. The financial assistance policy must specify the amounts, such as gross charges, to which any discount percentages specified in the policy will be applied.

Section 501(r)(5)(A) prohibits a hospital from charging patients who are eligible for financial assistance and who receive emergency or other medically-necessary care an amount more than the "amounts generally billed" to other individuals who have insurance covering such care.

Hospital facilities have two methods for determining amounts generally billed. The first is a "look back" method based on actual amounts paid to the hospital either by Medicare only or by Medicare fee-for-service together with private health insurance. The second method is based upon a "prospective" of forward-looking estimate of the amount that the hospital facility would receive from Medicare or other medically-necessary care if the eligible individual were a Medicare fee-for-service beneficiary. Note that many of these IRS regulations are in the comment stage, with final regulations not yet promulgated.

Section 501(r)(5)(B) prohibits the use of a "chargemaster rate" or gross charges, defined as "a hospital's full, established price for medical care that the hospital facility consistently and uniformly charges all patients before applying any contractual allowances, discounts, or deductions." The proposed rules provide that this prohibition on gross charges applies only to patients who are eligible for help under the financial assistance policy.

Section 501(r) applies to taxable years beginning after March 23, 2010, and the effective date of the rules will be the date the final rules are published in the Federal Register. On April 3, 2013, the IRS issued proposed regulations regarding the community health needs assessment (formal publication was on April 5, 2013). Comments and requests for a public hearing must be received by July 5, 2013. Final regulations are therefore pending. With the

Affordable Care Act in general, we are learning about and feeling the impact of the thousands of pages of the Act itself and the regulations which are being promulgated to implement and enforce it. The only certainty with government is change.

Perhaps this provision of the Affordable Care Act will provide you or plaintiff's attorney with a useful tool in negotiating the ER hospital bill downward to a workable number, because Section 501(r)(5)(A) prevents a hospital from charging more for emergency or other medically-necessary care than the "amounts generally billed" to other individuals who have insurance covering such care, where the patient is financial assistance policy eligible.

Therefore, perhaps the attorneys might convince the hospital of its "billing error," and the $10,000 bill could be rescinded and reissued at the ACA-mandated lower rates. Those rates likely are thousands of dollars less than originally charged, making settlement for a lesser amount with the plaintiff and her attorney more palatable. ❖

Endnotes

[1]Rep. Nancy Pelosi (March 9, 2010).
[2] Patient Protection and Affordable Care Act ("Affordable Care Act"), Pub. L. No. 111-148, 124 Stat. 119, enacted March 23, 2010. A related bill, the Health Care Education Affordability Reconciliation Act of 2010 (H.R. 4872) was signed into law on March 30, 2010 (Pub. L. No. 111-152). The Reconciliation Act amends the Affordable Care Act and related laws.
[3] This provision does not apply to for-profit institutions.
[4] 26 U.S.C. Section 501(r)(2).
[5] Copied from: http://www.irs.gov/Charities-%26-Non-Profits/Charitable-Organizations/New-Requirements-for-501(c)(3)-Hospitals-Under-the-Affordable-Care-Act

Edwin L. Hamilton is a Partner in the Savannah office of Goodman McGuffey Lindsey & Johnson. During more than 25 years of practice, he has focused on the trial of civil cases in State and Federal Courts. He most recently managed litigation as in-house counsel for a large publicly traded retailer. His practice focuses on litigation, claim and risk management and alternative dispute resolution in his representation and counsel to corporations and insurers.. For the last 10 years he has focused on cost-effective management of litigation and claims providing counsel on litigation and risk management, dispute resolution and mediation.

"secretary," and "other agent" from service of process to a corporation. Service is intended for management level persons. The Judiciary Committee agreed that these omitted positions should not receive service of process from the courts on the intended corporation.

CORPORATE

HB 289 – Revision of UCC Article 4 Regarding Transfer of Funds

This bill clarifies when remittance transfers will be applicable within the Uniform Commercial Code operating under the federal Electronic Fund Transfer Act.

SB 61 – Georgia Self-Service Storage Facility Act of 2013

This brings provisions up to date by adding electronic options for notification and advertisements, changes the due date for monthly rental payments, clarifies language regarding notification of enforcement of Owner's lien and changes provisions regarding delivery of the notification.

In addition, it adds Code provisions for a reasonable late fee and a towing option for Owners who have a lien on a motor vehicle or watercraft after 60 days of maturity of the rental obligation. Finally, it adds special treatment for service members who are overseas on active duty.

SB 185 – Article 9, Secured Transactions (UCC)

This bill provides necessary updates to Article 9, Secured Transactions, of the Uniform Commercial Code. In 2009, the Uniform Commercial Code was revised. Eighteen other states have adopted the updates to Article 9. It creates ease of administration and brings Georgia in line with other jurisdictions.

CRIMINAL LAW

HB 55 – Wiretapping Warrants

This legislation allows a superior court judge who has jurisdiction over a particular crime under investigation to issue a warrant with statewide application.

This bill was made necessary by a recent Supreme Court's ruling which placed a multitude of wiretaps in jeopardy of being found unconstitutional. Because modern technology allows criminal enterprises beyond one area or jurisdiction, judges need the ability grant statewide authority for wiretaps.

HB 57 – Synthetic Marijuana

This bill expands the list of substances that are considered illegal by the state of Georgia to include the most recently developed components of synthetic marijuana. It is made necessary because chemists in the business of creating synthetic marijuana adjust their formula to avoid the static description of ingredients in our laws.

HB 78 – Elder Care Abuse

Approximately 84 percent of elder abuse incidents are not reported. Elder abuse victims are more than twice as likely to die prematurely as older adults who are not victims of abuse. Thirty five other states and the District of Columbia already include sexual abuse and exploitation in their statutory definitions of elder maltreatment.

This bill updates and modernizes Georgia's statutory definition of elder maltreatment to include both sexual abuse and exploitation (financial abuse). It also enhances the mandatory reporting of elder maltreatment by adding additional individuals to the list of mandatory reporters.

The final version of the bill also attached HB 3 to it and provides for protection of certain work product when providing testimony.

HB 141 – Posting of Notice Regarding Human Trafficking

HB 141 requires certain businesses (bars, primary airports, bus stations, truck stops, etc.) to post a national human trafficking hotline number. If an establishment fails to comply, law enforcement may notify them and allow 30 days for compliance, or the establishment is fined. Because the desire behind the bill is to include those establishments where someone is most likely to be trafficked and where posting a sign is feasible, HB 141 provides an exception for agricultural day haulers such as a day worker who works in fields. The bill sunsets on January 1, 2019.

HB 146 – Electronic Warrants/Good Behavior Bonds

This bill removes the existing geographic restriction on the location of a judge signing an electronic warrant.

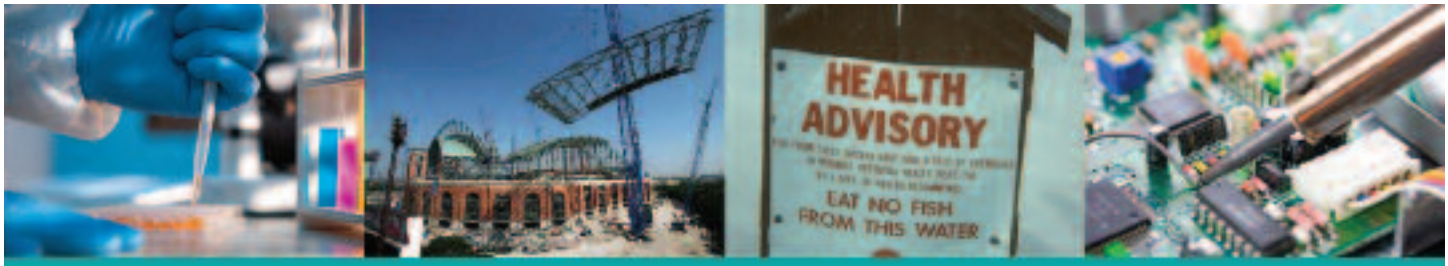
The final version of HB 146 also includes language from Rep. Tom Weldon's HB 145. This language adds additional procedural safeguards in the issuance of a good behavior bond by a judicial officer. It allows any judicial officer authorized to hold a court of inquiry to issue a notice to appear for a show cause hearing to any person whose conduct in the county is sufficient to justify the belief that there exists imminent danger of injury to any person, damage to any property, or disturbance of the peace.

The court may require from the person a bond with sureties for good behavior. At the time of or at any time after the filing of an application for a show cause hearing, the judicial officer may issue an order of arrest for the person(s) named in the application.

Upon the arrest of such person, a hearing shall be held within 24 hours; otherwise, such person shall be released on bond with sureties and reasonable conditions for his or her good behavior until a hearing can be held.

HB 156 – Sexual Exploitation of Children/Romeo and Juliet Exception to Sexting

HB 156 fills a gap in the Code



Exponent®

Engineering and Scientific Consulting

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

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

Our service areas include:

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

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

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

Exponent is certified to ISO 9001

whereby any person having custody or control of a child who is soliciting online for the sexual exploitation of that child will be held criminally liable.

The final version of HB 156 also includes provisions from Rep. Jay Neal's HB 157. This language addresses sexting by minors. It carves out a Romeo and Juliet exception for sexting to ensure minors are not committing a felony.

HB 178 – Georgia Pain Management Clinic

This bill is the "Georgia Pain Management Clinic Act." The abuse of legal pain medications has steadily increased, causing states to take affirmative action in regulating and licensing pain management clinics. States such as Florida, Mississippi, Kentucky, Louisiana and Texas have passed measures that regulate pain management clinics. The GBI estimates that since 2010, the number of pain management clinics has risen from 10 to 125.

All pain management clinics that dispense controlled substances or dangerous drugs shall be registered with the Georgia State Board of Pharmacy and shall be owned by a licensed physician or a hospital. Exceptions will be made for hospice care providers, nursing homes, and chronic pain centers (palliative care).

HB 349 – Criminal Justice Reform Part II

This bill was developed based on recommendations from the Governor's Criminal Justice Reform Council.

The state is granted the right to appeal a pre-trial ruling excluding evidence. Judges may now use their discretion to depart from mandatory minimums for drug trafficking of most substances up to 50 percent in certain enumerated circumstances.

In addition, Section 4 addresses a recent Georgia Supreme Court case, *Wilson v. State*, by removing the word 'knowingly' in regard to the weight of the drugs. This amendment clarifies that the person does not have to have subjective knowledge of the actual weight of the drug in order to be found guilty under the statute.

Departure from mandatory minimums is allowed for drug trafficking of ecstasy when the prosecuting attorney and the defendant agree to a sentence below such mandatory minimum. This flexibility is also extended to other serious violent felonies in Sections 8 through 10. Section 6 further clarifies that a person convicted under a drug statute does not have to have subjective knowledge of the actual weight of the drug in order to be found guilty.

A Council on Criminal Justice Reform is established. Its focus will be providing periodic reviews of criminal and correctional laws.

HB 407 – Ignition Interlock Devices

HB 407 amends Code sections relating to ignition interlock devices by mandating the use for one year when required by the court or applied for by the offender and granted by the court. If a court grants an exemption from the ignition interlock device requirements, the person is ineligible for a limited driving permit or any other driving privilege for one year.

HB 480 – Victim Assistance

When a person under the age of 16 is testifying in a criminal trial concerning a sexual offense, the court clears the courtroom except for certain enumerated persons. HB 480 adds a couple additional exceptions such as victim assistance coordinators and advocates who may remain in the courtroom.

SB 86 – Violation of Criminal Family Violence Orders

The bill expands the definition of a family violence order and distinguishes between a civil family violence and criminal family violence order.

It allows law enforcement to arrest a perpetrator upon probable cause that the offender has violated a criminal family violence order as long as the officer has never had a prior or current familial relationship with the parties involved.

SB 120 – Solicitors for Probate Court

This bill establishes a process for counties to provide solicitors in probate courts that also act as traffic courts. The county has discretion whether to ask for the service, and the district attorney has the right of first refusal to provide it. If the DA declines, the county may contract with a private attorney.

SB 136 – BUI/DUI Changes

This bill lowers the legal limit for Boating Under the Influence (BUI) charges. The legal limit for alcohol consumption will be .08 grams, currently it is .10 grams. The presence of other illegal substances can all suffice for a BUI charge. Appropriate penalties are established for multiple offenses of Georgia's BUI laws.

Children ages 12 through 15 are allowed to operate a personal water craft (jet ski) if they are accompanied by an adult 18 years of age or older, or they have successfully completed a boating education course approved by Department of Natural Resources.

SB 170 – Medical Identity Fraud

This bill adds medical identity fraud to the Code provisions relating to identity fraud.

DOMESTIC

HB 21 – Post-Adoption Agreements

HB 21 codifies parameters for post-adoption contact agreements. No disagreement over post-adoption visitation will set aside an adoption order.

The parties to a post-adoption contact agreement include: the adopting parent(s), birth relative(s), which is defined to include a biological father who is not the legal father and the adopted child if he or she is 14 years of age or older.

A post-adoption contact agreement must contain certain warnings in bold face, be in writing and signed by all parties. It may set forth certain privileges such as future contact and visitation with the child. HB 21 provides for the

ability to modify and/or enforce the agreement.

Any party may file the agreement with the court if the agreement provides for court enforcement or is silent on the issue. Jurisdiction over enforcement continues in the original court granting the adoption petition. Any litigation expense over enforcement is borne by the party that fails to comply or files a frivolous action.

HB 446 – Notification of Family Members Seeking Guardianship

This bill is intended to protect family members who are acting in the best interests of a parent/family member that is suffering from a debilitative disease such as Alzheimer's. Sometimes family members attempt to become guardians or conservators, especially when money is involved, against the desires of other family members and against the interests of the person suffering from the illness.

This bill provides mechanisms that alert court systems and notify family members of individuals seeking to become guardians or conservators of people who are affected by dementia or other debilitative diseases.

SB 193 – Uniform Interstate Family Support Act

This bill updates the Uniform Interstate Family Support Act (UIFSA), last revised in 1996, which provides a substantive and procedural framework for the establishment, modification and subsequent enforcement of support orders among the states. Since then, UIFSA has been modernized to streamline interstate cooperation and to comply with the new Hague Maintenance Convention.

SB 204 – Child Custody Modifications

This bill clarifies that appeals that result from a child custody modification final order are directly appealable to the Supreme Court and the Court of Appeals.

EMPLOYMENT LAW

HB 361 and HB 362/SB 179 – Strengthening Georgia's Right to Work Laws

These bills reaffirm Georgia's public policy as a "right to work" state.

Under HB 361, the right to a secret ballot in union elections is specifically recognized. In addition, a union member who desires to leave a union can do so at any time and cease having his/her union dues deducted from his/her paycheck. These measures will reduce possible intimidation in union elections and assist workers in demanding that their union is responsive to their concerns.

HB 362 passed overwhelmingly in the House earlier in the session but stalled in the Senate. As a result, it was attached to SB 179. The bill assures that no state agency, local government, authority, department, commission, board, or similar entity that contracts for public works construction shall require private

businesses they contract with to use a unionized labor force. This levels the playing field for all bidders on public contracts. In addition, the bill clarifies when a bid bond is required on a public works contract, corrects some cross-references for payment bonds and establishes when public owners have the authority to utilize both liquidated damages and early contract completion incentives when a project schedule is deemed to have value.

HB 393 – Workforce Development

This bill enumerates the powers and duties of the State Workforce Investment Board and provides for ways to measure local workforce areas to guarantee they are providing their areas with the best service possible. It establishes policies regarding quorum, conflicts of interest, and contracting for services. The State Workforce Investment Board is granted the authority to remove local workforce area board chairs and directors who are ineffective or not meeting performance standards. Also the board can remove fiscal agents based on a lack of sound financial policies and recognized accounting standards.

HEALTH CARE

SB 1 – Child's Health Insurance Information and Records

This bill prohibits health insurance policies from denying a parent the right to inspect, review, or attain copies of health insurance records relating to his or her own child. The health insurance records must be equally available to both parents unless a court order specifically removes the right of a non-custodial parent to such information or unless parental rights have been terminated.

SB 158 – Temporary Medical Consent Guardianship

This bill corrects a drafting error in Code section 29-4-18 to clarify that a Physician Order for Life-sustaining Treatment (a specific form to be developed by the Department of Public Health) is voluntarily executed by a patient or his or her authorized representative and a physician.

JUDICIARY

HB 182 – Associate Juvenile Court Judge Hearing

The bill eliminates the 2nd hearing a juvenile may have with the elected or appointed juvenile court judge after an associate juvenile court judge has issued an order/decision.

The final version of HB 182 is double drafted to ensure it complements the new Code sections proposed by Rep. Wendell Willard's HB 242, the Juvenile Justice Reform Bill also known as the Juvenile Code Rewrite.

HB 242 – Juvenile Justice Code Revision

The Juvenile Justice Reform bill substantially revises, supersedes and modernizes provisions relating to juvenile proceedings and enacts comprehensive juvenile justice reforms recommended by the Council.

HB 242 includes language from Rep. Barry Fleming's HB 369 which expands the jurisdiction of Georgia's Superior Court by granting it the power to terminate parental rights, a power currently held exclusively by Georgia's Juvenile Court.

HB 242 also includes language from Rep. Buzz Brockway's HB 219 amending a couple of Code provisions when a child was a victim of sexual abuse or trafficking. It grants court discretion to modify or vacate a delinquency order if the child was adjudicated for a sex crime resulting from a minor being a victim of sexual servitude or exploitation. It addition, it provides for the record to be sealed of a child adjudicated delinquent of a sex crime resulting from a minor being a victim of sexual servitude or exploitation.

HB 435 – Chief Judge of the State Court for Fulton County

This bill is intended to organize the State Court of Fulton County in order to minimize the complexities and redundancies within the court structures and personnel. It outlines the enumerated duties for the chief judge, granting deference to individual decisions of the state court chief judge and a conference of judges. The Chief State Court Judge's salary is adjusted to reflect the responsibilities of the position. Duties include: scheduling regular judge's meetings, managing available court space, making determinations of divisions, selection of jury clerk and oversight, and developing a personnel system.

HB 437 – Creation of Chief Judge of Fulton Superior Court

This bill affects only Fulton County, but the Superior Court (Atlanta Judicial Circuit) is a recognized, independent judicial district which means any bill altering its function must be a general bill.

This bill will provide for a Chief Superior Court Judge and an outline of enumerated duties for the chief judge. These duties include scheduling regular judge's meetings, managing available court space, making determinations of divisions, selection of jury clerk, and oversight and developing a personnel system.

HB 441 – Powers for Administrator of Fulton Superior Court

This bill affects only Fulton County, but the Superior Court (Atlanta Judicial Circuit) is a recognized, independent judicial district, which means any bill altering its function must be a general bill.

This bill grants the Superior Court of Fulton County budget independence. After county funds have been appropriated for the operation of the court, the court administrator, with the approval of the chief judge, has authority to make changes to line item appropriations.

HB 442 – Fulton State Court, Budget Oversight

Courts are a separate branch of government responsible for executing their constitutional mandates. This bill recognizes that separation, allowing Fulton County State Courts to have the ability to address unanticipated budgetary challenges in a way that will still

allow the state courts to perform their duty.

HB 443 – Chief Judge for Magistrate Court of Fulton County

This bill establishes a Chief Judge for the Magistrate Court of Fulton County. After appointment by the Governor for a single four-year term, subsequent terms will be elected in nonpartisan elections. The bill also provides for the appointment of magistrates, to provide for the assignment of responsibilities, and to provide for the filling of vacancies.

HB 451 – New Judgeships

State appropriations have been set aside for two new judgeships. This bill provides for the appointment of two new judgeships in the order of priority suggested by the Judicial Operating Council. One new judgeship will be in the Chattahoochee circuit and one in the Oconee circuit. The Governor will provide initial appointment of the new judgeships.

It also provides for the election and term of the Chief Judge of the Chattahoochee Judicial Circuit and changes the county circuit dates for the Griffin Circuit. The Griffin Circuit includes Fayette, Pike, Spalding and Upson Counties.

SB 66 – Increased Contempt Penalties

This bill raises the ceiling of fines for a contempt that a superior or state court may impose from $500 to $1000.

REAL ESTATE

HB 160 – Vacant and Foreclosed Real Property Registry

This bill prohibits the assignment of legal malpractice claims to a non-injured party. It also provides cleanup language to the new Code section added to the Property title last year dealing with vacant and foreclosed real property. Finally, it prohibits future fees on transfers except in limited circumstances such as homeowner's association dues, service fees, and real estate broker fees.

HB 434 – Mechanical and Materialmen Liens to include Amount Due and Interest

This bill expands the amount a materialman can receive when he files lien. It is in response to a Court of Appeals decision that limited what expenses can be gained from a materialman's lien. Under this law, all contracted for services and interest may be included.

HB 458 – Increasing the Allowance of Insurance Deductibles on Condo Users

This bill increases the maximum allowable casualty insurance deductible imposed by condominium associations on condominium unit owners from $2,500 to $5,000.

SB 139 – Collections of Closing Fees

Lending companies making small loans to individuals with less than impressive credit need a way

to recoup costs for running credit checks on potential customers. Approximately four out of 10 applicants get accepted; however, credit checks are performed for all applicants.

This bill allows any lender or seller to collect a one-time closing fee at the time of making a loan or extending credit in order to defray the cost of investigation and verification of a borrower's or purchaser's credit report.

The closing fee may amount up to four percent of the face value of the loan or credit extension or total amount of the sales contract but shall not be more than $50. Lenders or sellers may retain no more than $25 from the collected closing fee on loans or contracts that have been prepaid in full within 90 days, refunding the rest to the borrower. The closing fee shall not constitute interest or be considered an additional charge.

The House added language which allows Federal and state government departments, agencies, authorities, and instrumentalities and their authorized agents to sell or issue checks.

TAX LAW

HB 164 – Sale Tax Exemption of Airplane Parts

Currently, Georgia offers an exemption of sales tax on materials used for maintenance of aircraft that are repaired or maintained within the state, but are registered outside of the state. This bill extends that exemption until June 30, 2015.

HB 266 – Auto Tag Tax

This is the annual update bill that aligns the Georgia Revenue Code with the Internal Revenue Code, but also makes adjustments to ad valorem taxes for used cars (HB 80) to prevent unintended consequences for leased and rented vehicles.

The bill extends certain income tax deductions at the current levels and allows certain retirement income for airline pilots to be eligible for a refund as long as the pilot files an amended return by Nov. 15 of this year. The bill also clarifies Research and Development credits can be used beyond 2012 when the credit is earned, as the statute is currently written it is unsure if the credits are only available for 2012.

…AND JUSTICE FOR ALL

HB 142 & 143 – Ethics Reform

These bills strengthen Georgia's ethics laws by placing limitations on lobbyist spending. This bill grants rule-making authority to the Georgia Government Transparency and Campaign Finance Commission. It establishes a $75 cap for lobbyist gifts to individual legislators and forbids the practice of buying tickets to sporting events or paying for recreational activities such as golf. It also restricts travel expenses.

This bill does NOT infringe on a person's individual freedom to contact an elected official and express his/her personal views.

HB 150 - Reproduction of Mug Shots for Profit

This bill is intended to crack down on websites that charge fees to have DUI mug shots removed from their website. A person who publishes on his/her website arrest booking photos for purposes of commerce is deemed to be transacting business in Georgia. An individual, who meets certain criteria, may request that his/her photo be taken down without fee or compensation. The website is allowed 30 days to comply.

CONCLUSION

Your involvement in the legislative process is desperately needed, and I urge you to get involved directly with your local legislator or through the Bar. To see the entire bills, visit the Georgia General Assembly website at www.legis.ga.gov. ❖

Rep. Edward H. Lindsey (R-Atlanta) is a GDLA member and partner at Goodman McGuffey Lindsey & Johnson. He has served three terms as House Majority Whip and five terms representing District 54.

Continued from page 33

court's decision was reversed. The Court of Appeals held there was a jury question as to whether the RPA applied, as the cemetery had both commercial and recreational uses. The Court held that the RPA *may* apply to properties where commercial interests are mixed with recreational interests and that a balancing test is required to determine whether the property's character merits application of the RPA.

The defendant property owner argued that the cemetery was open to the public at all times, and was used for picnics, walking, and jogging by the public. However, Plaintiff argued that the property owner was "in the cemetery business," had been paid for interment of Plaintiff's daughter, and sold gravesites as a part of its business. Taking these factors into account, the Court of Appeals ruled that an issue of fact existed as to whether the RPA applied.

The Court of Appeals also found that whether plaintiff was an invitee or a licensee was a question of fact to be decided by the jury. While past Georgia cases have established that a person entering a cemetery to attend a funeral has the legal status of an invitee (*see, e.g., Smith v. Poteet*, 127 Ga. App. 735 (1972)), the legal status of a person who subsequently visits a decedent's gravesite after the occurrence of a funeral had never been addressed by Georgia's appellate courts. The Court of Appeals held that there was a sufficient question of whether the property owner knew of plaintiff's intention to visit the gravesite to create an issue of material fact to be decided by a jury.

SUPERIOR KNOWLEDGE OF LANDOWNER; DOCTRINE OF ANIMALS *FERAE NATURAE*: In the final chapter of this well-known case, the Court of Appeals affirmed previous ruling that doctrine of *Ferae Naturae* does not act as exception to landowner's duty to exercise ordinary care in keeping premises safe such as would confer immunity from liability for any harm caused by a wild animal.

***The Landings Ass'n, Inc. v. Williams*, 318 Ga. App. 760, 736 S.E.2d 140 (Nov. 27, 2012)**

The estate and heirs of decedent Williams sought to recover damages from the joint owners of a lagoon where Williams was killed by a large alligator while walking in a residential community. The trial

court had denied the defendants' motion for summary judgment, and the Court of Appeals affirmed. Defendants appealed to the Supreme Court, which reversed the Court of Appeals' decision on the basis that Williams had equal knowledge of the threat of alligators within the community and, therefore, that the defendants were entitled to judgment as a matter of law. *See The Landings Ass'n. v. Williams*, 291 Ga. 397, 728 S.E.2d 577 (2012).

However, the Supreme Court opinion did not address the portion of the Court of Appeals' previous opinion, which dealt with the doctrine of *ferae naturae* as it related to premises liability. Division 2 of the Court of Appeals' previous opinion, which was not addressed by the Supreme Court, held that under Georgia law the doctrine of animals *ferae naturae* does not operate as an exception to Georgia's general principles regarding a landowner's duty to exercise ordinary care in keeping its premises safe such as would confer a blanket immunity from liability for any harm caused by a free wild animal on the owner's land.

The Court of Appeals held that, even though this issue was not addressed by the Supreme Court, the Court of Appeals' opinion in this regard is consistent with the Supreme Court's ruling.

Therefore, pursuant to the Court of Appeals' opinion, a landowner with notice of problematic wild animals on a property will not be relieved from liability for injury caused by such animals simply because they are wild. There must still be a determination made of the knowledge of both the property owner and the victim regarding the presence and danger of such animals.

SLIP-AND-FALL; SPOLIATION OF EVIDENCE: Court of Appeals upheld sanctions for spoliation against defendant grocery store where store failed to preserve video surveillance of area where plaintiff's fall occurred despite knowing that plaintiff was seeking medical treatment resulting from alleged incident; but reversed trial court's decision to exclude testimony of store employee who would have provided innocent reason for repositioning store surveillance camera.

***The Kroger Co. v. Walters*, 319 Ga. App. 52, 735 S.E.2d 99 (Nov. 29, 2012)**

Plaintiff filed suit against Defendant Kroger after slipping and falling on a piece of banana in the meat department of Defendant's store. During discovery, the trial court granted a motion for sanctions and struck Defendant's Answer on the ground that Defendant had engaged in spoliation by destroying video footage that allegedly could have shown the area where Plaintiff fell.

After Plaintiff fell, the store co-manager came to the scene and spoke to Plaintiff and a witness. The co-manager later testified Plaintiff said he was okay, but was limping slightly. Plaintiff gave the co-manager his name and continued shopping. There was no threat or other indication of a lawsuit at that time.

Following Defendant's stated procedure of investigating every such incident, the co-manager began to investigate the accident later that day. He spoke to store employees and downloaded from the Kroger website a six-page incident check list which he completed. The list contained language that the report was made "in anticipation of litigation" and instructed the user to mail the completed form to the store's third party administrator of claims.

The co-manager reviewed surveillance video from the time of the incident. Store policy dictated that if the cameras covered the area of the fall, the viewer was required to transfer the file to a CD or DVD to preserve it, as the video system records over itself every 17 days. The co-manager failed to preserve the video. Although the co-manager later testified that none of the cameras captured the incident, he also testified he could not recall reviewing the videos that day, he did not know why he failed to make a copy, and he could not be sure the system was actually working at the time. Within 14 days of the fall, and before the tape had been overwritten, Plaintiff told the co-manager he was seeking medical treatment for injuries from the fall.

The co-manager testified, in addition to the fall itself, the videos might have shown when the store aisles were inspected, how and when the banana came to be on the floor of the meat department, and whether any employees were in the vicinity at the time of the fall. He also stated that if he looked at the video, he should have noted his findings in the incident report, yet the report did not reference viewing any video. Finally, he admitted he had a still camera at the store and should have taken photos of the scene but did not do so.

At his deposition, the co-manager claimed the camera nearest the fall had not been moved or repositioned since the day of the fall. Subsequently, Defendant produced an exemplar video showing the view of each camera in the store. The camera at issue did not show the area of the fall. When the other store manager was deposed in his office, he testified none of the cameras had been repositioned since he began managing the store in 2004, and they would have to be manually turned to do so. However, when the parties and attorneys viewed a live feed of the camera at issue, the camera at issue was not pointed in the same direction as the exemplar and, instead, pointed directly at the location of the fall.

Plaintiff filed a motion for sanctions. The trial court held Defendant had spoliated the video evidence, which could have been preserved at minimal expense, that the spoliation prejudiced Plaintiff, and that Defendant had acted in bad faith. Based on its ruling, the trial court denied Defendant's motion for summary judgment.

The Court of Appeals affirmed the finding of spoliation, holding that Defendant had failed to show it did not have notice of likely litigation as a result of the incident. Given the fact that the co-manager had begun to investigate the incident and knew the Plaintiff was

claiming an injury as a result of the incident before the videotape had been overwritten, some evidence supported the trial court's conclusion that Defendant had submitted a false exemplar from the camera at issue to the Court, from which a negative inference could arise. Taken as a whole, the Court of Appeals found sufficient facts to uphold the trial court's order of sanctions.

However, the Court of Appeals reversed the trial court's grant of Plaintiff's motion *in limine* to exclude the testimony of the manager of the store's meat department, who claimed to have been the person who repositioned the camera.

The identity of the witness was not disclosed until a week before trial, but according to Defendant's proffer at trial, the witness would have testified that he had re-aimed the camera in question to respond to shoplifting in that area of the store.

The Court of Appeals held that the trial court abused its discretion in excluding the witness as the proper remedy would have been a continuance. The Court also held that the exclusion of the witness was harmful to Defendant as the proffered testimony would have been relevant to causation, damages, and attorney's fees. Accordingly, the Court of Appeals reversed that portion of the trial court's decision and remanded the case for a new trial.

APPORTIONMENT OF DAMAGES BETWEEN PROPERTY OWNER AND INTENTIONAL TORTFEASOR: Court of Appeals applied the recent Georgia Supreme Court decision of *Couch v. Red Roof Inns, Inc.*, 291 Ga. 359, 729 S.E.2d 378 (2012) in the two cases below. In both cases, the Court of Appeals relied upon the *Couch* decision to reverse the trial courts' ruling that apportionment of fault to both known and unknown intentional tortfeasors was impermissible and would relieve the property owner of the duty to keep premises safe.

***Hickory Lake, L.P. v. A.W.*, 320 Ga. App. 389, 739 S.E.2d 836 (Mar. 14, 2013)**

Plaintiff filed a premises liability action against Defendants property owner and management company after she was raped by an unknown assailant at an apartment complex owned, operated, and maintained by Defendants.

Defendants filed a notice of intent to seek apportionment of damages against the unknown assailant and to have the jury instructed accordingly pursuant to O.C.G.A. § 51-12-33. Plaintiff objected, arguing that to allow apportionment to the unknown tortfeasor would impermissibly relieve the property owner of its duty to keep its premises safe pursuant to O.C.G.A. § 51-3-1. The trial court agreed and ruled in Plaintiff's favor.

On interlocutory appeal the Court of Appeals reversed. Citing the Supreme Court of Georgia's decision in *Couch v. Red Roof Inns, Inc.*, 291 Ga. 359, 729 S.E.2d 378 (2012), the Court of Appeals held that apportionment of damages to an unknown, intentional tortfeasor is permissible pursuant to O.C.G.A. § 51-12-33.

***Six Flags Over Ga. II, L.P, et al. v. Martin*, 320 Ga. App. 52 (Feb. 28, 2013)**

Plaintiff was assaulted by four persons at a bus stop located near Six Flags amusement park. Plaintiff filed suit against Six Flags, a parking lot management company, and the four individuals who perpetrated the assault.

Before trial, Plaintiff filed a motion *in limine* to exclude all evidence and all argument relating to apportionment pursuant to O.C.G.A. § 51-12-33. The trial court granted the plaintiff's motion, finding that O.C.G.A. § 51-12-33 is not available "in premises liability cases where one defendant is alleged to have committed an intentional tort."

While the appeal of the trial court's ruling was pending with the Court of Appeals, the Supreme Court's decision in *Couch* was published. Accordingly, on appeal, the Court of Appeals applied the ruling in *Couch* to reverse the trial court's decision.

The Court of Appeals found that "fault," as used in O.C.G.A. § 51-12-33, encompasses intentional torts, and therefore apportionment was proper even where one of the defendants is alleged to have acted intentionally.❖

Advancing the Civil Defense Bar©

The Georgia Defense Lawyers Association thanks its sponsors for partnering with the civil defense bar to help GDLA members deliver quality service to their clients.

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

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

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

PLATINUM

BAY Mediation & Arbitration Services, LLC
www.bayatl.com

CED Investigative Technologies, Inc.
www.cedtechnologies.com

Collision Specialists, Inc.
www.collisionspecialistsinc.com

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

Daily Report
www.dailyreportonline.com

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

Exponent
www.exponent.com

FORCON International Corp.
www.forcon.com

Global Legal Discovery, LLC
myglobaldiscovery.com

MDD Forensic Accountants
www.mdd.net

Miles Mediation & Arbitration Services, LLC
www.milesmediation.com

Nelson Architectural Engineers, Inc.
www.nae-us.com

S-E-A Limited
www.SEAlimited.com

Thomson Reuters Expert Witness Services
www.roundtablegroup.com

GOLD

Callaway Geer Certified Public Accountants
www.callawaygeer.com

DecisionQuest
www.decisionquest.com

Esquire Deposition Solutions
www.esquiresolutions.com

ProAssurance
www.galawic.com

RGL Forensics
www.rgl.com

South Georgia ADR Service
www.southgeorgiaadr.com

Tiffany Alley Court Reporting & Video
www.tiffanyalley.com

Trial Exhibits, Inc.
www.trialexhibitsinc.com

SILVER

Courtroom Visuals, Inc.
www.courtroomvisuals.com

Delve Information Resources, Inc.
www.delveinfo.com

Elizabeth Gallo Court Reporting, LLC
www.GeorgiaReporting.com

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

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

Southern Medical-Legal Consulting, LLC
www.southernmlc.net

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

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

- Obtain an exclusive topic in your practice area.

- In-house counsel survey practice area topics requested include Labor & Employment, Intellectual Property and Real Estate

- 2013 Event dates

Completed:
January, March, July
Upcoming:
September 25th, December 5th

Run a Professional Announcement

- This is a perfect way to honor firm members, congratulate partners or highlight new hires.

- Place your firm's Professional Announcement in our paper or take advantage of our new Professional Announcement emails sent to our proprietary email database.

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

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

DAILY REPORT
An ALM Publication

After 41 years our work speaks for itself.

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

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

S-E-A

Scientific Expert Analysis™

800-743-7672
www.SEAlimited.com