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Contingency Planning for Defendants:

Georgia Supreme Court Limits Plaintiff's Recovery Under O.C.G.A. § 9-11-68

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

In a June 2014 decision, the Supreme Court of Georgia reinstituted an even playing field between plaintiffs and defendants under Georgia's settlement statute, O.C.G.A. § 9-11-68.

As reported in the last issue of the *Georgia Defense Lawyer*, the GDLA had filed an amicus brief in *Georgia Department of Corrections v. Couch*, authored by GDLA members Laurie Webb Daniel and Leland H. Kynes of Holland & Knight in Atlanta.

The Supreme Court heard oral arguments on February 5, 2014, and on June 16, 2014 entered its opinion (2014 Ga. LEXIS 489, Docket no. S13G1555 (June 16, 2014)).

The Court rejected the argument that O.C.G.A. § 9-11-68 permits a plaintiff to recover the entire amount of the contingent fee charged by his attorney without showing the time and reasonable value of his attorney's work. In doing so, the Court reversed the Georgia Court of Appeals, which had affirmed a trial court's award of the plaintiff's entire 40 percent contingent attorney's fee after the defendant had rejected a statutory settlement offer from the plaintiff and the plaintiff later obtained a judgment large enough to trigger a fee award under O.C.G.A. § 9-11-68(b).

Although it remains to be seen just how exacting a standard of proof will be required by trial courts and the Court of Appeals going forward, it is clear that this is a significant improvement over the rule set initially by the Court of Appeals on the recoverability of contingent fees in conjunction with O.C.G.A. § 9-11-68 settlement offers.

In the *Couch* case — not to be confused with the Supreme Court's landmark 2012 decision involving apportionment and a plaintiff with the same last name — the plaintiff, David Lee Couch, sued the Georgia

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Inside This Issue

GDLA Elects Officers and Board

Two Bylaw Amendments Pass

The GDLA held its 47th Annual Meeting at the Ponte Vedra Inn & Club, Ponte Vedra, Fla., June 12-15, 2014.

During the Business Meeting on Saturday, two proposed Bylaw amendments passed: 1) changing the title Executive Vice President to be President-elect; and 2) opening membership to government attorneys who do defense work. See article on page 9.

Next, GDLA members unanimously accepted the report of the Nominating Committee thereby electing the 2014-2015 officers and Board of Directors, including Kirby G. Mason of HunterMaclean in Savannah to serve as President. See pages 36 - 40 for highlights.

As is tradition, newly-elected President Kirby Mason presented outgoing President Ted Freeman with a gavel plaque commemorating his year of leadership and service.

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Sarah (Sally) B. Akins

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President's Message

I am honored to have been elected GDLA President because I believe in GDLA's core values of enhancing the standards of trial practice and conduct for all lawyers.

While the general public may not always appreciate the need for having a level playing field when it comes to litigation (unless, of course, an individual finds himself or herself on the defense side of a claim), we know from experience that the credibility and quality of our legal system hangs in a delicate balance, and that the work of organizations like the GDLA is needed now more than ever.

I have to admit that no one from my high school would have selected me as a person most likely to become President of a statewide organization. I don't think anyone from my law school class would have imagined it either. I'm not sure that I would have ever pictured it myself.

Nevertheless, I hope that my being your President serves as an example that anyone who joins a group, gets involved, believes in the cause, and invests time and energy can do more than was previously imagined.

For me, the GDLA is a close-knit group of stellar lawyers with a common goal of leveling the playing field in a plaintiff-oriented world. Despite the adversarial wrangling in the course of litigation, and the competitive drive to obtain clients, the GDLA provides an important and vital network of like-minded individuals who are willing to share their experiences, their wisdom, their talent, their victories and losses for the common good. I am proud to be among this group of lawyers whose resources and expertise have not only strengthened my practice, but also given true meaning to the quote which greets those entering the U.S. Supreme Court: "Equal Justice Under Law."

> *"For me, the GDLA is a close-knit group of stellar lawyers with a common goal of leveling the playing field in a plaintiff-oriented world."*

It is this collaborative process that gives the GDLA strength and vitality, and makes it a relevant organization in the defense of civil suits.

This organization under the leadership of now-Immediate Past President Ted Freeman, and a strong Board of Directors composed of Past Presidents and future ones, has almost 800 members and is growing every year.

This year, the GDLA will take another important step forward by developing a new strategic plan. During the course of this process, the organization will undoubtedly call upon its members to provide feedback, develop or refine its vision and mission, and plan for the future.

Thank you again for placing your trust and confidence in me to lead the GDLA.

For the defense,

Kirby Mason

Kirby G. Mason
HunterMaclean, Savannah

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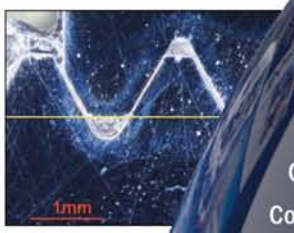




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Member & Legal News

Member News

Savannah-based *Brennan & Wasden,* established in 1989, has expanded its medical and professional negligence practice with the opening of an office in Augusta and the addition of three attorneys there. **James V. Painter, F. Michael Taylor** and **Amanda D. Lynde**, formerly with *Hull Barrett*, joined the firm that now operates as *Brennan Wasden & Painter*. Mr. Painter serves as the managing partner for the new Augusta office. For him, the new venture is a career coming full circle, having entered the profession as an associate with Brennan & Wasden in Savannah in 1994. The new office is located at 801 Broad Street, Suite 501, Augusta, Georgia 30901, and the telephone number is (706) 250-7373. E-mail addresses for all at the firm are now @brennanwasden.com.

Marc A. Hood, formerly with *Drew Eckl & Farnham* has joined *Hicks Casey & Foster* in Marietta. He will maintain a general civil defense practice focusing on the areas of motor carrier liability, commercial insurance coverage, and general commercial insurance defense.

Ann Baird Bishop of *Sponsler Bennett Jacobs & Adams* in Atlanta is the new President of Kids' Chance of Georgia, Inc. She has been actively involved with the non-profit as a volunteer for many years, and was appointed to its Board of Directors in 2010. The Kids' Chance mission is to provide educational scholarships to the children of Georgia workers who have been seriously, catastrophically or fatally injured in work-related accidents.

Catherine McKenzie Bowman of *The Bowman Law Office* has been elected the Savannah Bar Association President for 2014-2015. Ms. Bowman continues her practice primarily in employment and professional and commercial liability defense.

GDLA Board member **Pamela N. Lee** of *Swift Currie McGhee & Hiers* in Atlanta was elected to serve on the Governing Board of Brighten Academy, the 2014 Georgia Charter School of the Year.

Thomas E. (Tommy) Branch III of *Callaway Braun Riddle & Hughes* in Savannah, was appointed by the Mayor and Alderman of the City of Savannah to the Zoning Board of Appeals.

Nicole C. Leet of *Gray Rust St. Amand Moffett & Brieske* in Atlanta was elected Secretary of the State Bar of Georgia Young Lawyers Division (YLD) for 2014-2015. **M. Anne Kaufold-Wiggins** of *Balch & Bingham* in Atlanta and **Brantley C. Rowlen** of *Lewis Brisbois Bisgaard & Smith* in Atlanta are serving as Directors on the YLD Executive Council. Additionally, the following are District Representatives: **Jake Evans** of *Lewis Brisbois Bisgaard & Smith* in Atlanta; **David Hayes** of *Owen Gleaton Egan Jones & Sweeney* in Atlanta; **Kevin C. Patrick** of *Goodman McGuffey Lindsey & Johnson* in Atlanta; and

GDLA Wins Bar's Best Newsletter Award Again

For the fourth consecutive year, the GDLA was honored by the State Bar of Georgia with the Best Newsletter Award for voluntary bar associations with more than 500 members.

The award is presented each year during the State Bar Annual Meeting, held most recently at the Marriott in Amelia Island, Fla. from June 5-8, 2014.

Kudos go to the countless contributing authors, which include GDLA members and sponsors, but especially to the newsletter Editors-in-Chief: **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 B. (Sally) Akins** of *Ellis Painter Ratterree & Adams* in Savannah for 2013 and 2014.

We also thank the 2013-14 Editorial Board, which was created last June: **Christopher L. Foreman** of *Moore Clarke DuVall & Rodgers* in Macon; **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. Finally, Executive Director **Jennifer M. Davis** is to be commended for pulling together every issue.

"I'm thrilled we've continued our award-winning tradition," said President Kirby Mason. "Certainly this publication helps us realize our mission of advancing the civil defense bar." ❖

Alyssa K. Peters and **John L. Weltin** of *Constangy Brooks & Smith* in Macon.

Chambless Higdon Richardson Katz & Griggs in Macon announced that **Christi Horne James** has been named partner in the firm. She concentrates her practice in the firm's workers' compensation group representing employers and insurers, as well as state and local governments. Ms. James also handles general insurance defense, professional negligence, business litigation and real estate. She earned a B.A., *magna cum laude*, from the University of Georgia in 1999, and a J.D., *cum laude*, from the University of Georgia School of Law in 2002.

Jennifer M. Davis, *GDLA Executive Director,* was reappointed by the Supreme Court of Georgia as a public member on the State Disciplinary Board's Investigative Panel for a three-year term.

Case Wins

GDLA Past President **Edward M. (Bubba) Hughes** and **Thomas E. (Tommy) Branch III** of *Callaway Braun Riddle & Hughes*, along with **Todd M. Baiad** and **Gregory G. Sewell** of *Bouhan Falligan*t, all in Savannah, secured a defense verdict in a case involving the operation of a forklift at a hardware/supply store in Toombs County, Georgia. The plaintiffs, husband and wife, alleged that the husband sustained a severe injury, including femoral neuropathy in his right leg when the forklift operator either hit the husband or the trailer the husband was standing on, sending him to the ground. Defendants argued the plaintiff-husband was injured due to his own negligence in standing on a trailer while loading 100 lb. bags of concrete, and that the femoral neuropathy was idiopathic and not related to the incident. The plaintiff-husband, a career bridge crane operator, claimed total disability and, together with his wife, sought in excess of $3 million in damages. The jury trial, before Superior Court Judge Bobby Reeves, lasted five days with the jury returning on Monday of the following week to continue deliberations and to render a verdict in favor of the defendants. *Richard Sean Cloud and Jennifer Cloud v. Home Improvement Wholesale, Inc. and Franklin Tootle*, Superior Court of Toombs County, 13CV13.

Troy Lance Greene and **Hugh B. McNatt** of *McNatt Greene & Peterson* in Vidalia recently tried a negligence case in Toombs County and obtained a defense verdict. The plaintiff alleged a herniated disc in his lower back as a result of a trip and fall over an exposed utility guy wire anchor. The plaintiff was attending a Christmas parade in Toombs County when this occurred. It was the plaintiff's contention the guy wire anchor was abandoned by the utility, but was never removed and constituted a dangerous hazard to the public. The defense was able to present evidence showing the claimant had pre-existing lower back problems related to other incidents and had been discharged by two of his physicians for drug seeking behavior. Also, the defense was able to convince the treating neurosurgeon to reverse his opinion concerning low back surgery recommended early in the case. The plaintiff attacked the defendant on the grounds an inspection performed by the defendant should have revealed the presence of the exposed guy wire anchor in question. However, the defense was able to locate Google photographs of the area from 2008 which indicated the anchor was not exposed at the time of the inspections. The defense was also able to introduce evidence of possible tampering with the guy wire anchor by an unknown third party. The judge allowed the jury to consider the negligence of the unknown third party even though the defense verdict rendered that issue moot. *Googe v. Georgia Power*, Superior Court of Toombs County.

James D. (Dart) Meadows, a partner with *Balch & Bingham* in Atlanta and GDLA Board member, successfully defended SCM Group SpA in a six-day product liability trial in St. Charles County, Missouri ending on May 19, 2014. Plaintiff Stephen Emery was represented by Portia Kayser, Larry Pratt and Jasmine McCormick of the law firm of Baker Sterchi Cowden & Rice. Mr. Emery was severely injured (severed right ear, crushed jaw broken in five places and other injuries) while operating a panel saw, a large industrial woodworking machine at his place of business, D. H. Schmidt in St. Peters, Missouri. Mr. Emery incurred $211,000 in medical expenses and $40,000 in lost wages. He sought unspecified damages for permanent injuries and pain and suffering. Mr. Emery asserted strict liability and negligence claims against SCM alleging defective design, inadequate warnings, instructions and training. All five of Plaintiff's counts (strict liability design defect, negligent design defect, strict liability failure to warn, negligent failure to warn and negligent training) were submitted to the jury. Plaintiff's punitive damages claim also was presented to the jury. The 12-person jury returned a unanimous verdict in favor of SCM on all five counts, finding that SCM was not at fault, that Emery was 100 percent at fault and that no damages should be awarded.

Robert L. Goldstucker and **Laura D. Eschleman**, partners at the Atlanta office of *Nall & Miller,* recently obtained a verdict for a physician and his practice in a medical malpractice case following a six-day trial in Atlanta. The plaintiff alleged the defendant physician should have reappointed the patient every week to 10 days following the application of a fiberglass cast for the diabetic patient's fractured fibula. Instead, the physician instructed the patient to return in six weeks. The plaintiff additionally alleged that the defendant physician failed to respond when the patient and her family members called the office and advised the physician's answering service that the cast was cutting into the patient's toe. The patient developed a cut from the cast, which became infected and resulted in the amputation of the patient's five toes and soft tissue from her left foot. The plaintiff demanded over $800,000 in damages. The defense overcame an incredibly damaging pretrial ruling barring evidence of the patient's noncompliance. The defense was

restricted from placing blame on the patient for walking in her cast and creating the wound, in failing to take antibiotics prescribed for her infection, in failing to follow up with the defendant physician as instructed when the cast was removed, in failing to follow up with her primary care provider as instructed when the cast was removed, and in failing to obtain wound care treatment. Despite the inability to present evidence on any of these issues and the resultant inability to have the jury apportion the parties' comparative fault, the jury came back with a verdict for the defendant physician and his practice.

In a case involving catastrophic burn injuries, **J. Arthur (Art) Davison** and **Elizabeth A. McLeod** of *Fulcher Hagler* in Augusta recently obtained a defense verdict for a chemical manufacturer and well-known home improvement retailer in Aiken County, S.C. The plaintiff in that case sustained severe burn injuries in February 2010 while using a popular, extremely flammable adhesive remover purchased from the defendants. She sustained third degree burns over 36 percent of her body, was hospitalized over five months and underwent nine surgeries. Her claimed medical bills and other special damages exceeded $5.7 million. In 2012, she filed suit against these two corporations asserting claims of strict liability and breach of warranty, claiming the adhesive remover was defective and unreasonably dangerous. The Fulcher Hagler team successfully argued for bifurcation of liability and damages. After a three day trial in April 2014 on the liability issue only, the jury returned a verdict for the defendants.

Richard A. (Rick) Brown, Jr. *Brown Readdick Bumgartner Carter Strickland & Watkins* in Brunswick defended a trucking company in a three-week trial involving issues of apportionment, crashworthiness and enhanced injuries. The jury returned a verdict in an amount less than 10 his client's post-collision settlement offer. The case arose out of a lane incursion incident on I-16 in heavy rain, when a tractor trailer, operated and driven by Mr. Brown's client, came in contact with a Mercury Marquis driven by a non-party in which the plaintiff was a passenger. The sedan left the road, overturned, and the plaintiff was rendered quadriplegic. The tractor-trailer driver contended he was in the right lane and the plaintiff's vehicle must have been on the shoulder, because he never saw it. The plaintiff contended they were in the right lane and the tractor came over into them. Within days of the collision, the trucking-company's insurer tendered its policy limits of $1 million; that offer was rejected. The plaintiff ultimately filed suit against Mr. Brown's clients, the trucking company and the driver, as well as Ford Motor Company, alleging that the vehicle occupied by the plaintiff was uncrashworthy due to a defective roof which crushed in on the plaintiff. Mr. Brown's clients filed an O.C.G.A. § 51-12-33 notice of apportionment seeking to apportion liability to the driver of the car occupied by the plaintiff, and the driver was added to the verdict form. The judge also held that the crashworthiness enhanced injury doctrine survived tort reform and

that, therefore, the jury could apportion the damages between the initial collision and the "enhanced injury" due to a defect, if any, in the vehicle. Although the case settled after the jury had reached, but not yet returned, a verdict, and the settlement is confidential, the jury found the negligence equally apportioned between the driver of the plaintiff's vehicle and the driver of the tractor trailer for the initial collision, and found $175,000 in damages for the initial collision, resulting in an effective verdict of $87,500 against Rick Brown's clients. *Linda Hatfield and Steven Hatfield v. Ford Motor Company, TFX, Incorporated, Veriza Hill, Jr. and Deon Monterral Franklin*, State Court of Bibb County, CA#77639.

In another case, Mr. Brown obtained summary judgment on behalf of a motorcycle distributor in a product liability action in the U.S. District Court, Southern District of Georgia. The plaintiff sustained a significant traumatic brain injury, as well as a fracture of the right femur, broken jaw, and a deep laceration on his neck when he struck a disabled vehicle on his motorcycle. He subsequently received a recall notice for a potentially defective voltage regulator on the motorcycle and filed suit against the distributor of the motorcycle, Kawasaki Motors Corp., U.S.A. (KMC), alleging the voltage regulator failed and led to the collision. When the plaintiffs' expert's testing failed to show a defect, the plaintiffs sought to add additional experts and testing. KMC objected and moved for summary judgment, contending that the plaintiffs had failed to prove a defect. Finding that the plaintiffs had an adequate opportunity to inspect and test, and failed to prove a defect, Judge William T. Moore granted summary judgment in favor of the distributor. While the motion for summary judgment was pending, the plaintiffs attempted to add the Georgia Department of Transportation (GDOT) to defeat diversity and obtain a remand to state court. They also attempted to dismiss without prejudice, but the federal court never ruled on those motions. In an attempt to sidestep the potential dismissal in federal court, the plaintiffs filed suit in the State Court of Chatham County against the motorcycle's Japanese manufacturer, Kawasaki Heavy Industries, Ltd. (KHI) and GDOT. Once the federal court granted summary judgment, KHI moved for summary judgment on the ground that the state court lawsuit was barred by res judicata and collateral estoppel by virtue of the federal judgment entered in favor of the motorcycle's distributor. On the day before the summary judgment hearing in the state court lawsuit, the plaintiffs notified the state court they were dismissing their claims against the motorcycle's manufacture with prejudice. After Judge Moore granted summary judgment in the federal lawsuit, KMC moved for Rule 11 sanctions. The plaintiffs paid $25,000 to settle the potential sanctions award. *Davis v. Kawasaki Motors Corp. U.S.A.*, Case No.: CV412-219, (S.D. Ga.) and *Davis v. Kawasaki Heavy Industries, Ltd and Georgia Department of Transportation*, State Court of Chatham County, Case No.: STCV1300169. ❖

Bylaw Changes Create President-elect Position & Open Membership to Government Lawyers

New Government Defense Substantive Law Committee Also Created

During its 2013 Fall Meeting, the GDLA Board of Directors unanimously approved two proposed amendments to the Bylaws.

The first would open GDLA's membership doors to attorneys employed by and defending a federal, state or local governmental entity or an agency thereof.

The second would codify what has essentially been the practice by changing the title "Executive Vice President" to "President-elect." It also brings us in line with similar organizations.

In accordance with the GDLA Bylaws, proposed amendments must be approved by members at an Annual Meeting. As such, the amendments were presented by then-President Ted Freeman during the Business Meeting on June 14, 2014, at the Ponte Vedra Inn & Club, and both passed unanimously.

With the passage of the Bylaw amendment opening GDLA membership to government defense lawyers — and to accommodate those members who already practice in the governmental arena — the Board approved the creation of a new Substantive Law Committee (SLC).

The Government Defense SLC is intended for those who defend government claims, to include defense of government actions, such as: 1) claims under environmental, health care, securities, OSHA and other regulatory regimes; 2) False Claims Act claims, including Qui Tam actions; 3) citizen suits, such as claims by environmental groups under environmental laws; 4) toxic torts; 5) constitutional claims under state or federal law; 6) state tort claims; and 7) white collar crimes.

Richard E. Glaze, Jr. of Balch & Bingham in Atlanta is chairing the new Government Defense SLC, with W. Taylor McNeill of Chilivis Cochran Larkins & Bever in Atlanta serving as vice-chair.

GDLA members whose area of practice is government defense are encouraged to log in to the Members Only area of our website, select My Profile, then scroll to the bottom to select that SLC to join.

GDLA members are also encouraged to spread the word about membership to their colleagues who work on the defense side for a federal, state or local governmental entity or an agency thereof.

Prospective members can visit the Membership tab on our homepage for the online application. ❖

Welcome New GDLA Members

The following were admitted to membership by the Board of Directors during the Annual Meeting in June.

Sheri Bagheri
Waldon Adelman Castilla Hiestand & Prout, Atlanta

Sherrie Brady
Hawkins Parnell Thackston & Young, Atlanta

C. Ryan Cooper
Scrudder Bass Quillian Horlock Taylor & Lazarus, Atlanta

Sharon P. Horne
Mozley Finlayson & Loggins, Atlanta

Lauren Julian
Drew Eckl & Farnham, Atlanta

Douglas R. Kendrick
Mabry & McClelland, Atlanta

Thomas H. Manning
McRae Stegall Peek Harman Smith & Manning, Rome

Brent Meyer
Carlock Copeland & Stair, Atlanta

Travis J. Meyer
Waldon Adelman Castilla Hiestand & Prout, Atlanta

Madeline J. Mitchell
Hall Booth Smith, Brunswick

Susan K. Murphey
Schulten Ward & Turner, Atlanta

William H. Noland
Childs & Noland, Macon

James V. Painter
Brennan Wasden & Painter, Augusta

John P. Reale
Drew Eckl & Farnham, Atlanta

Elizabeth A. Rose
Drew Eckl & Farnham, Atlanta

William Emery Underwood
Tisinger Vance, Carrollton

Recruit Government Defense Lawyers

GDLA membership is now open to government defense lawyers (see article on page 9).

Know someone who's employed by and defending a federal, state or local governmental entity or an agency thereof? Recruit them to join our ranks! Direct them to the Membership tab at www.gdla.org for the online application. They can also be part of the new Government Defense Substantive Law Committee.

When An Impasse Is All There Is, It Matters

By Gregory J. Parent
Miles Mediation & Arbitration Services, Inc. | Team Parent

Introduction

Mediation has arrived as an accepted medium for getting cases resolved, both pre-suit and at every stage in the litigation — up to and including the weekend before a trial is scheduled to begin. In the last five years, mediation has exploded in popularity and attorneys on both sides have embraced its effectiveness.

While they may not always agree on a case's value, plaintiff's attorneys and defense attorneys all agree on exhausting settlement negotiations at mediation in an effort to minimize risk, save litigation expenses, and expedite resolution of the case before spending countless man-hours prepping for trial on cases that should be settled.

Most parties enter into mediation with hopes of getting their case resolved by the mediator before the close of business that day. Whether court-ordered or stipulated by the parties, mediation is an opportunity for the plaintiff's attorney to get paid and the defense attorney to close a file.

Barring those exceptional circumstances when the chances for settlement are doomed at the outset, usually for reasons wholly unrelated to the motivated parties themselves, every case that goes to mediation starts out with the goal of being compromised in a manner that is suitable to both parties.

More importantly, about 80 percent of those mediated cases actually do settle at mediation. For those cases which end in an impasse, however, the success rate for resolution thereafter is predicated on the conduct and demeanor of the parties immediately following the mediation.

"When the fall is all there is, it matters." -The Lion In Winter

When The Fall Is All There Is, It Matters

At the end of the 1968 movie, *The Lion In Winter*, there is a scene where the three brothers, Richard, Geoffrey, and John are hiding in the dungeon while Henry is coming down to execute them. Richard, the eldest, tells his brothers not to cower but to take it like men, boldly stating, *"He'll get no satisfaction out of me. He isn't going to see me beg."* Geoffrey, the younger brother exclaims, *"My, you chivalric fool, as if the way one fell down mattered."* Richard replied calmly, "*When the fall is all there is, it matters."* That sentiment is never more relevant than at the end of a mediation which ends in an impasse.

On average, one out of every five mediation sends without a settlement between the parties. Impasses happen. The way in which the parties conduct themselves immediately following an impasse, however, may govern whether a case will resolve within a few weeks or ensure that it goes forward to trial.

Mediations are a great forum for the exchange of information and the discovery of subtleties in litigated cases that the parties may not have fully realized beforehand. Often one party discovers information so counter to what was expected heading into the mediation that extra time is needed to complete further discovery and investigation of the facts or medical records. There are times that one party may need to digest everything that happened over the course of the mediation. Other times the parties may get so close to an agreement, yet still be beyond the settlement authority that an adjuster brought with her to the table.

In those cases especially, where an immediate agreement cannot be reached on the day of mediation, it does not automatically mean that negotiations are over. It may just mean that more time is needed. For plaintiffs, that can mean assessing their risk in light of newly discovered information. For defendants, that may mean writing reports, crunching numbers, participating in round tables with other adjusters, or and *running things up the flagpole* to get more authority. Therefore, as suggested in the quotes from The *Lion In Winter*, when an impasse is inevitable, and *the fall is all there is, it matters* how you leave the mediation.

Continued on next page

Conduct Yourself As Though You Plan and Hope to Settle Your Case

If *The Lion in Winter* provides us with a plan on how to handle impasses, our youth sports and children provide us with the blueprint on how to execute the plan. If your children have ever played a sport like soccer, basketball, or tee ball, you know very well that the teams line up at the end of the game so that each player can shake the hand of each opponent. Win or lose, it's a staple at the end of games, followed immediately by the tradition of team parents passing out orange slices and *Capri Suns*. Even the most dedicated little athlete usually gets over the frustration of a loss by the time the *Capri Sun* is drained and their orange is consumed.

There is a lesson to learn from watching our kids. Our children exhibit the exact behavior you should model following an impasse. Most of the time an impasse does not happen on the very last move. Instead, the parties are usually able to see the impasse coming several moves before the end. If the parties are aware of the impending "fall," it matters how you act when the impasse arrives.

Setting aside the client's emotional involvement and personal feelings, mediation is a business decision. Rather than fall into the trap of letting anger or frustration govern your actions, take a deep breath. Take a moment. Be a professional. Be cordial to opposing counsel. And shake hands. Certainly, if you have an emotional client who was overly drained by the process, you should allow them to leave the mediation privately. The attorneys and adjuster, however, should stick around to discuss with opposing counsel the next steps that need to be taken before reaching another decision point.

Sometimes the defense has reporting that must be completed in order to explore whether the insurance carrier has more authority to make increased offers. Other times, the plaintiff may go home and discuss with family members the amount of the last offer on the table and rationalize that the 'bird in the hand' is better than the scary prospect of going forward with a trial. Storming out of mediation in an angry huff, however, precludes any such continuing discussions. It figuratively, and often literally, shuts the door on further negotiations and usually handcuffs the mediator from being able to keep open the lines of communication.

Keep that in mind the next time an impasse seems imminent on the day of mediation. An impasse does not mean a settlement cannot happen further down the road. It is often just an invitation to continue the discussions after further reflection. Either way, the manner in which you conduct yourself upon realizing that there will be an impasse matters ... and it matters a great deal. In my experiences as a mediator, when the parties are as cordial after an impasse as they are at the beginning of a mediation, there is always at least a glimmer of hope of getting the case resolved over the course of the next several weeks.

The opposite is true, however, when a party storms out in dramatic fashion. Such juvenile antics almost always signal a figurative and literal slamming of the door on any future negotiations. For a big metropolitan city, Atlanta is really a very small town when you think about the legal market. Chances are that you will see or work with your opposing counsel again on more than one occasion thereafter. There is no need for either side to act like a jerk following the impasse.

Your Mediator Should Be a Liaison for Continued Settlement Negotiations

A strong mediator will have a feel for the pulse of the parties both during and following mediation. If it is not readily apparent to you where the settlement discussions went off the rails, engage your mediator and gauge their thoughts about how you might keep working towards a compromise. While an impasse should be viewed by the attorneys as an invitation to keep going, impasses should seem like a blaring siren to your mediator. The impasse should signal to the mediator an immediate need to shift his effort into overdrive in order to push, prod, and exhaust all settlement possibilities. A strong mediator will go the extra mile to help keep the parties actively involved in continuing settlement discussions. Moreover, they will initiate the process to take the burden off of the individual attorneys.

Conclusion

Do not allow an impasse to prevent you from resolving your case after mediation. An impasse, if handled properly can just be a hiccup or a small delay in getting your case settled. Impasses happen. How you comport yourself following a mediation matters. Model your behavior after the very kids you drive to and from practice each week just to watch their games on the weekends. Shake hands. Be cordial and show your opponent good sportsmanship. Involve your mediator and seek his assistance as a liaison between the parties for continued settlement negotiations. If you do all of these things in the wake of an impasse, you just might be rewarded with a pay day or a closed file. ❖

Gregory J. Parent is a mediator and Team Leader with Miles Mediation, a GDLA Platinum Sponsor. His unique philosophy regarding mediation is predicated on having been in every professional's seat in the room. He has been a claims adjuster at State Farm, a defense attorney with then-Hawkins & Parnell and Dennis Corey Porter & Smith, in-house with Zurich and Liberty Mutual, and a plaintiff's lawyer.

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Use of Crash Rate Data to Defend Motor Carriers

By Stephen B. Chewning
FORCON International

Overview

The litigation surrounding crashes involving Commercial Motor Vehicles has become increasingly complex as claimants attempt to advance claims against motor carriers in every aspect of carriers' operations. Increasing in frequency are claims such as improper driver selection and retention systems, inadequate or improper driver training, improper supervision, lack of maintenance, and failure to maintain a proper "safety culture."

These claims are likely to continue to increase based on the recent efforts of the Federal Motor Carrier Safety Administration, which released an Announcement of Proposed Federal Rule Making in April 2014 increasing the minimum liability coverage on Commercial Motor Vehicles to $4.4 million per crash.

Specific Issues

One of the approaches used by those making claims after a crash is to attempt to use data from the Federal Motor Carrier Safety Administration (FMCSA) Compliance Safety and Accountability Program ("CSA Program") regarding the motor carrier involved in the crash. The CSA Program has been in effect since December 2010.

This approach is premised upon the theory that poor scores in one of the Safety Management System (SMS) categories of the CSA Program served as a predictor that the motor carrier was unsafe, and presented a crash risk that should have been corrected.

Following are the seven categories known as BASICs (Behavioral Analysis and Safety Improvement Categories) that the FMCSA uses as part of the SMS to measure safety performance and create monthly CSA scores:

1. Unsafe Driving
2. Hours of Service (HOS) Compliance
3. Driver Fitness
4. Controlled Substance/Alcohol
5. Vehicle Maintenance
6. Hazardous Materials Compliance
7. Crash Indicator (i.e., histories or patterns of high crash involvement, including frequency and severity; collected from state sources)

The Safety Management System (SMS), as part of the CSA Program, has been under critical fire since its inception. Among the many criticisms is the fact that the FMCSA puts motor carriers into groups based on internal decision criterion, and the motor carrier is then evaluated by comparison to this FMCSA-selected peer group.

Many motor carriers that had good scores in the previous system (the "SAFESTAT" system) suddenly found themselves with poor scores in the new SMS, despite the fact that their operations had not changed in any way. It appears that the reduction in their scores resulted from the comparison group into which they had been placed. Thus, the argument can be made that the SMS scores have no value for use as claimants wish to use them, as they are simply group comparisons.

The main focus of the SMS is to reduce crashes, which is also the goal of everyone in the motor carrier industry. The FMCSA has long held that the monitoring of scores in the SMS categories will predict crash risk for a motor carrier. Three studies in 2012, however, showed that the SMS program is not effective in reaching the stated goal of predicting crash involvement of a motor carrier.

In "CSA: Another Look with Similar Conclusions," Wells Fargo Research concluded that, based on its study of large carriers, the SMS scores did not provide any indication of crash risk.

A study by University of Maryland professor James Gimpel titled "Statistical Issues in the Safety Measurement and Inspection of Motor Carriers" revealed that "[a]ccidents are poorly predicted by the BASIC scores."

Similarly, in "SMS BASIC Scores Are Not A valid Predictor Of Crash Frequency," Dr. Inam Iyoob, after conducting a study for the Alliance for Safe and Competitive Truck Transportation, concluded that FMCSA data cannot be used to predict the crash performance of individual carriers.

The General Accounting Office (GAO) has also studied the CSA system in place at the FMCSA. In April 2014, GAO Report 14-114 concluded that the precision and confidence of many SMS scores is limited, raising questions about whether SMS is effectively identifying carriers at high risk for crashes in the future.

There has been extensive motions practice in courts across

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the country relating to the many shortcomings of the FMCSA systems, in an effort to prevent unfair application of the data to motor carrier defendants.

Efforts of defense counsel in this regard have generally been successful, but the wholesale exclusion of the data can present a problem in certain cases. In some situations, there may be areas of the FMCSA data that are actually helpful to the motor carrier defendant, and thus defense counsel could hurt his own case by having the FMCSA ratings excluded in their entirety.

Recommended Approach

For purposes of litigation, there is a simple approach for evaluating the overall safety management performance of a motor carrier that is free of the problems associated with the FMCSA data grouping and scoring programs cited above. Sometimes the simple approach is clearest and best.

First, it is important to keep in mind that the focus of litigation is not the same as the focus of the FMCSA; in litigation, parties are not trying to *predict* crash risk, but are focusing on an event that has already occurred.

As a result, the raw crash data for the defendant motor carrier should be the primary focus of the evaluation of the motor carrier's safety management controls, since the numerical crash data is directly collected, not grouped and processed in any way by the FMCSA.

Motor carries annually report their mileage data on a MCS-150 form, and the number of DOT-reportable crashes for each motor carrier is compiled from police reports submitted to the State Motor Vehicle Authorities (and ultimately to FMCSA). Using those two data points, a crash rate per million miles travelled is computed.

The computed crash rate for the carrier can then be compared to the acceptable crash rates published in Part 385 of the FMCSR. A further comparison can be made to the long-held private industry standard of 1.0 crashes per million miles travelled as a measure of an effective safety management control system. The actual number of crashes per million miles travelled is the ultimate measuring stick to evaluate the effectiveness of any and all of the safety management controls required by Part 385 of the FMCSR. Any shortcomings at a motor carrier will ultimately be reflected in the crash rate.

If a motor carrier travelling 200 million miles per year generates a crash rate of 0.40 crashes per million miles (which is far below all the measurements of effectiveness mentioned above), a Certified Director Of Safety (CDS) can, with great confidence, offer the opinion that the safety management controls in place within the motor carrier are in fact robust and effective at achieving the computed crash rate. A CDS witness should be able to state this opinion regardless of any particular value in a BASIC category should that become an issue.

It should be kept in mind that the crash data reported to the FMCSA involves *all* reportable crashes, even those in which the motor carrier bears no fault whatsoever. A long-overdue study is being conducted by the FMCSA to examine the feasibility of excluding crashes where the motor carrier was not at-fault from the reported and publically-displayed motor carrier data, but as of this writing no action has been taken. Since it is highly unlikely that a motor carrier is at fault in every crash, it can be opined that the performance of the motor carrier is actually better than the computed number.

The approach outlined above would be further enhanced by eliminating the consideration of the FMCSA data, and, in its place, undertaking a physical audit of the crash reports and mileage data in possession of the motor carrier or other sources. Review of individual crash reports can be used to ascertain the exact number of crashes that were in any way due to fault of the carrier, which will of course result in an even lower at-fault computed crash rate.

Lawyers are encouraged to embrace the statistical data of a motor carrier that has a highly positive crash rate, and use that data as both a shield and a sword in the handling of motor carrier crash cases.

Stephen B. Chewning is a certified (ACTAR) vehicle accident reconstructionist with FORCON International, a GDLA Platinum Sponsor. He is also a Certified Director of Safety (CDS) who conducts passenger and commercial vehicle accident investigations, reconstruction and analysis, and provides expert witness testimony. His work includes data retrieval and analysis of engine electronic control modules (ECM) and Federal Motor Carrier Safety Regulations, as well as issues associated with fleet safety, and driver-related issues such as hiring, training, etc.

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Consumer Product Safety: Engineering and Scientific Techniques

By Ginger G. Turner
Exponent

Failure of a product can lead to financial losses, litigation, injury or death, and damage to brand image. Important decisions have to be made throughout the lifetime of the product to ensure that the product is safe. But how safe is safe enough? There are several scientific and engineering techniques that can be used to evaluate the safety of products such as failure analysis, statistical analysis, failure modes effects analysis, and reliability testing (to name a few).

Knowing the benefits and limitations of each of these techniques will help you to manage the safety of your products or your clients' products more effectively, and to obtain the information that you need to make those hard decisions when faced with a potential product recall, product liability litigation, or when bringing a new product to market.

Root Cause Failure Analysis

Root Cause Failure Analysis is the investigative technique used to determine the root cause of a product failure. This analysis helps determine if a failure is related to, for instance, a product defect (i.e., design, manufacturing, or materials), misuse or abuse, or other service-related issues. Additionally, data gathered during failure analysis can help to isolate a potential product defect to a particular batch and provide insight as to the worst-case outcome that results from the identified root cause.

How it's done: The investigation should follow the scientific method, which involves collecting data, analyzing the data, developing hypotheses as to root cause, experimental testing of those hypotheses (which generates more data), and then repeating the process until only one hypothesis (or a limited number) is proven valid. Each investigation is as unique and as complex as the product being investigated. Failure analysis requires investigators with specific engineering and scientific skill sets who are able to think critically, systematically collect and analyze data, and design custom tailored and scientifically reliable experiments. When the product(s) being investigated are involved in litigation or an insurance claim, the failed product(s) are treated as evidence. Examination and testing of this evidence must be coordinated such that all involved parties have the opportunity to have a representative present.

Limitations: Even after all of the data collection and testing involved in a failure analysis, there still may not be enough data to make a definitive determination as to the root cause of the failure. This happens when there is more than one hypothesis that cannot be ruled out with the available data. Often vital information is not known which precludes the investigator from definitively determining the root cause. However, there are often times when some root cause hypotheses have more supporting evidence than others, in which case an investigator can qualitatively rank the likelihood that each of these hypotheses is the actual root cause.

Data gathered during a failure analysis may give some qualitative insight as to the future performance of the product, but a failure analysis, in and of itself, is not meant as the sole technique for predicting failure rates of products in the field.

Statistical Analysis

Statistical Analysis involves collecting and analyzing data related to the design, manufacture, lifetime, distribution, consumer usage, environmental conditions, and/or failure rate of products for the purpose of determining what factors most influence the likelihood that a product will fail. When a statistical analysis is performed

Continued on page 42

Appellate Case Law Update

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

ATTORNEYS' FEES UNDER O.C.G.A. § 9-11-68: Is a plaintiff entitled to an award of attorneys' fees based on a contingency fee agreement when that award includes attorneys' fees prior to the rejection of the offer of settlement?

***Department of Corrections v. Couch*, (S13G1555, June 16, 2012)**

See article on page 1 of this edition for analysis.

FEDERAL APPELLATE JURISDICTION: Federal appellate courts have pendent jurisdiction over otherwise nonappealable interlocutory orders under certain conditions.

***Hillcrest Property v. Pasco County*, __F.3d__ (No. 13-12383, 11th Cir., June 18, 2014)**

In this Section 1983 civil rights action brought by Hillcrest Property, LLC against Pasco County, the County appealed from the District Court's grant of a motion for partial summary judgment in favor of Hillcrest and appealed the District Court's issuance of an permanent injunction concerning one of the County's local ordinances. The District Court also denied Pasco County's summary judgment motion on Hillcrest's substantive due process claim. No final judgment was entered as Hillcrest had a claim still pending in District Court.

On these procedural facts the Eleventh Circuit held that it had jurisdiction over the appeal of the interlocutory order granting Hillcrest's a permanent injunction under 28 U.S.C. § 1292 (a) (1) and pendent jurisdiction over the appeal of the order granting Hillcrest's motion for partial summary judgment, noting that federal courts have pendent appellate jurisdiction over an "otherwise nonappealable interlocutory order" if it is "inextricably intertwined" or "necessary to ensure the meaningful review of an injunctive order."

For rules regarding Georgia appellate jurisdiction, *Cf.* O.C.G.A. § 5-6-34 (a) (4), which states that orders granting or refusing applications for interlocutory or final injunctions are directly appealable; O.C.G.A. § 9-11-54 (b) judgment upon multiple claims or involving multiple parties and the trial court's direction of the entry of a final judgment as to one or more, but fewer than all claims or parties are appealable; and O.C.G.A. §§ 9-11-56 (h) and 5-6-34 (b) regarding the denial of summary judgment.

STATE APPELLATE JURISDICTION: Where a cross-appeal is filed in a timely manner, and is otherwise procedurally proper, the cross-appeal need not be factually related to the issues raised in the main appeal.

***Sewell v. Cancel*, __Ga.__ (S13G1274, June 2, 2014)**

In this appeal the Supreme Court of Georgia reversed the Court of Appeals of Georgia, holding that under O.C.G.A. § 5-6-38 (a) the Court of Appeals' decisions requiring a cross-appeal to be "tied to the appeal of an appealable order" appears nowhere in the text of the statute. The Court specifically overruled decisions going back to 1984.

Procedurally, the Supreme Court granted certiorari to consider whether an appellate court has jurisdiction over a properly filed cross-appeal seeking review of an order that was entered after the filing of the original notice of appeal, but prior to the notice of cross-appeal.

Factually, the case arose out of the dissolution of an anesthesiology practice. Plaintiff physicians believed the practice was over-billing the hospital and informed the practice and the hospital. Subsequently, the practice dissolved. Thereafter, the hospital restructured its anesthesiology department and began efforts to

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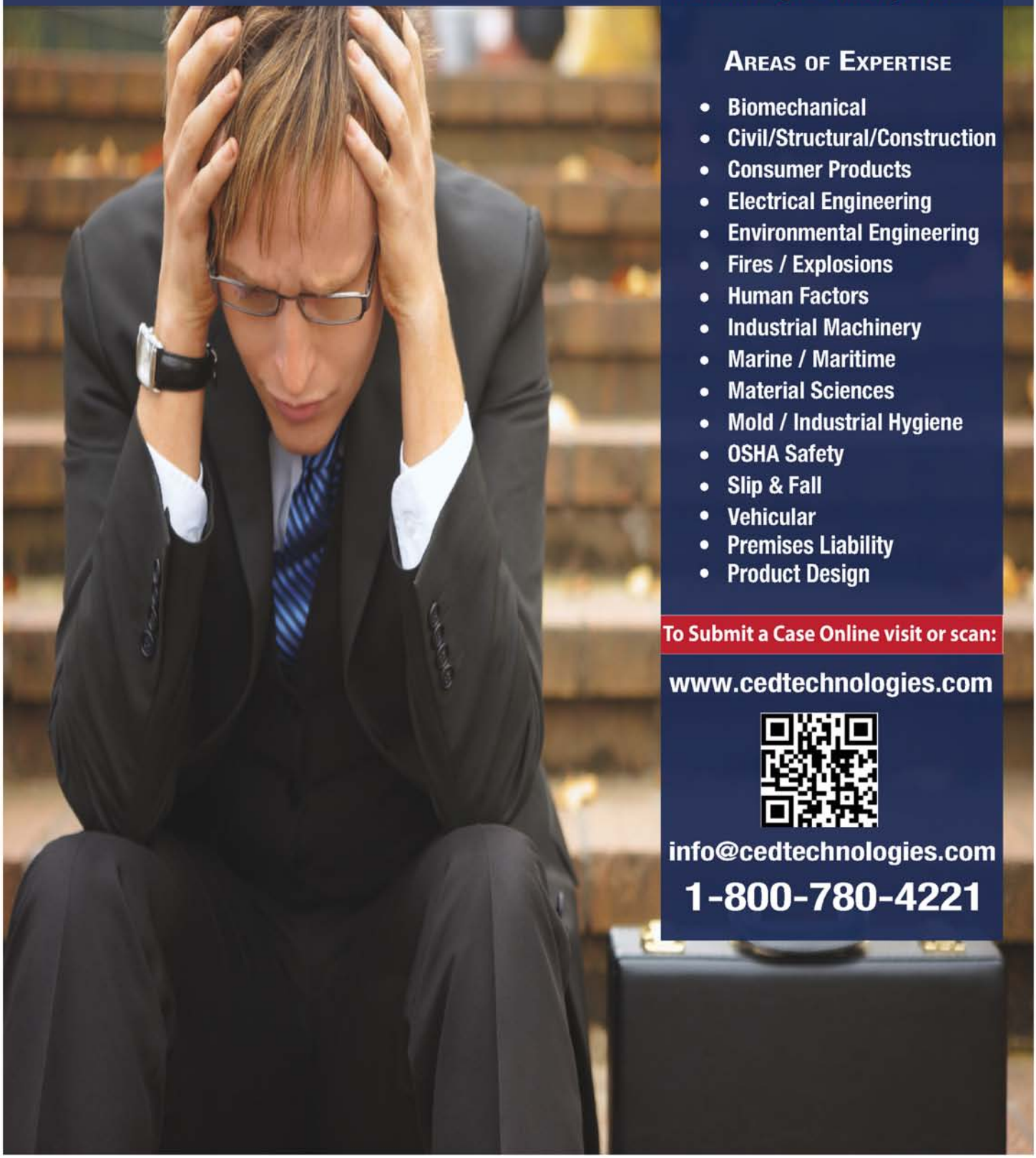

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contract with a new provider. The hospital contracted with a new provider, a new corporation formed by some of the member physicians in the dissolved practice. Plaintiffs, who were not members of the newly created practice, filed suit alleging a scheme to expel them from the practice as retaliation for bringing the billing practices to light.

Defendants filed a motion for summary judgment and the court granted it as to one of the plaintiffs. That plaintiff filed a notice of appeal, but before the notice was filed, the court entered a second order denying the new corporate defendant's motion as to the remaining plaintiffs. After the notice of appeal was filed, a third order was entered denying the old corporate defendant and the hospital's motion as to the remaining plaintiffs. The new practice defendant and the old practice defendant filed a notice of cross-appeal and the hospital filed its own notice of cross-appeal. The Court of Appeals consolidated the appeals and affirmed the grant of summary judgment against one plaintiff, reversed the denial of summary judgment to the new practice defendant and dismissed the cross-appeals. The Court of Appeals reasoned that it did not have jurisdiction to consider the cross-appeals as it sought to challenge orders issued after the filing of the plaintiff's notice of appeal To hold otherwise, the Court held, would provide a party with no right of direct appeal the ability to challenge orders while the appellant, who had the right to a direct appeal, could not appeal those orders.

In overruling the Court of Appeals, the Supreme Court began by noting the Appellate Practice Act begins with the command that the Act shall be liberally construed to bring about a decision on the merits. The Supreme Court then turned to a construction of the relevant statute, O.C.G.A. § 5-6-38 (a), and noted its previous holdings that a properly filed cross-appeal will lie even as to an order that is not directly appealed on its own. The Supreme Court then reviewed the cases that hold that a cross-appeal must be "tied to" an appeal of an appealable order. It found that the Court of Appeals had never defined what that meant, but it appeared that the Court of Appeals meant a factual nexus between the main appeal and those raised in the cross-appeal.

The Supreme Court also found in one of its opinions its own use of the phrase "tied to," and held that the phrase, was meant to connote a jurisdictional link, not a factual link, between the non-directly appealable issues and the directly appealable ones. Finally, concerning the order that was entered after the notice of appeal, but before the notice of cross-appeal was filed, the Supreme Court reversed the Court of Appeals, holding that the Court of Appeals' own decisions did not support this conclusion. ❖

Auto Liability Case Law Update

By Jonathan M. Adelman (left) and Kevin P. Reardon
Waldon Adelman Castilla Hiestand & Prout, Atlanta


MOTION FOR SUMMARY JUDGMENT AS TO UNINSURED MOTORIST (UM) BENEFITS: Court affirmed the trial court's grant of summary judgment to uninsured motorist carrier holding that a settlement with the liability carrier for $29,000 for punitive damages and $1,000 for compensatory damages pursuant to a limited liability release precluded a claim for uninsured motorist coverage because such a settlement/release is inconsistent with the intent of O.C.G.A. § 33-24-41.1 to allow uninsured motorist coverage for actual injuries or losses.

***Carter v. Progressive Mountain Insurance*, 320 Ga. App. 271 (2013).**

In *Carter v. Progressive Mountain Insurance*, 320 Ga. App. 271 (2013), the Court of Appeals affirmed the trial court's grant of summary judgment to the uninsured motorist carrier. Prior to suit being filed, claimant Velicia Carter settled with the tortfeasor's liability carrier for the policy limits of $30,000 in exchange for a limited liability release. Id. at 271. Carter executed a limited liability pursuant to the provisions of O.C.G.A. §33-24-41.1, but added a condition to the release "that $29,000 of the coverage limit be allocated toward payment of punitive damages and $1,000 toward payment of compensatory damages." *Id.*

As stated by the Court of Appeals, "the limited release provisions of O.C.G.A. § 33-24-41.1 were enacted to provided a statutory framework for a claimant injured in an automobile accident to settle with the tortfeasor's liability insurance carrier for the liability coverage limit while preserving the claimant's pending claim for underinsured motorist benefits against the claimant's own carrier. Id. at 273 (citing *Daniels v. Johnson*, 270 Ga. 289 (1998) and *Mullinax v. State Farm Mut. Automobile Ins. Co.*, 202 Ga. App. 76 (2010). Moreover, the Court of Appeals emphasized that the statute allows a claimant to settle for the liability limits in exchange for the claimant executing "a limited release applicable to the settling carrier and its insured *based on injuries* to such claimants... ." *Id.* (quoting O.C.G.A. O.C.G.A. § 33-24-41.1 (a), (b) [emphasis added]. Accordingly, the Court of Appeals held that the issue was whether Carter was "entitled to condition the limited release on the requirement that punitive damages be allocated to liability coverage for the purpose of substantially exhausting the coverage limits before recovery of underinsured motorist benefits ... and still preserve the right to preserve underinsured motorist benefits." *Id.* at 271-272.

The Court of Appeals held that "[w]ith the above-stated condition added to the limited release [i.e., $29,000 for punitive damages and $1,000 for compensatory damages], Carter failed to accept the limits of [the tortfeasor's] liability coverage and provide the limited release in a manner consistent with the provisions of O.C.G.A. § 33-24-41.1." *Id.* at 275. Therefore, she was not entitled to receive underinsured motorist benefits. *Id.* The Court of Appeals reasoned that "[t]he Georgia uninsured (and underinsured) motorist statute (O.C.G.A. § 33-7-11) is designed to protect injured insureds only as to 'actual loss' within the policy limits." *Id.* at 272 (citing *State Farm Mut. Auto. Ins. Co. v. Adams, 288 Ga. 315 (2010).* In affirming the ruling of summary judgment in favor of the uninsured motorist carrier, the Court of Appeals stated

> the allocation of punitive damages to force exhaustion of liability coverage does not advance the purpose of underinsured motorist coverage to increase available compensation for actual injuries and losses; indirectly shifts payment of punitive damages from the liability carrier to the underinsured motorist carrier, contrary to the purpose of underinsured motorist coverage; and would ultimately increase underinsured motorist coverage premiums ... .

Id. at 274-275. Accordingly, "uninsured motorist coverage under the statute applies only to compensatory damages and excludes coverage for punitive damages." Id. (citing *Roman v. Terrell,* 195 Ga. App. 219 (1990)

and *State Farm Mut. Auto. Ins. Co. v. Weathers, 260 Ga. 123 (1990).*

MOTION TO ENFORCE SETTLEMENT: Court of Appeals reversed the trial court's denial of a motion to enforcement settlement, holding that a settlement demand was accepted when a policy limits check was sent to plaintiff and although the liability carrier included a lien affidavit in the proposed limited liability release, no communication from the liability carrier included language requiring a particular limited liability release to be signed.

***Turner v. Williamson*, 321 Ga. App. 209 (2013).**

In *Turner v. Williamson*, 321 Ga. App. 209 (2013), the tortfeasor's insurance carrier, USAA, received a demand from the claimant offering to settle the claims for the policy limits of $25,000 in exchange for a limited liability release. A claims representative for USAA timely responded to the demand by stating that "the same offer had been extended by USAA," and that "this was acceptable to USAA and that [she] would issue the check ... and send a Limited Liability Release for the clients' signature." *Id.* at 211.

The claims representative, on the same day, sent two letters to the claimants' attorney and included a copy of the release previously sent in December, 2010. *Id.* at 211. The release sent was a limited liability release which also included lien affidavit language pursuant to O.C.G.A. §44-14-470 *et seq.* and O.C.G.A. §49-4-148 and O.C.G.A. §49-4-179. *Id.* at 211.

Two weeks later, the claimants' attorney wrote USAA and advised that his clients had instructed him to reject USAA's counteroffer and suit would be filed against the tortfeasor. *Id.* at 211.

Once suit was filed, the defendant tortfeasor filed a motion to enforce settlement, contending that a settlement agreement was reached as the terms of the settlement were payment of the $25,000 and execution of a limited liability release, both of which his carrier accepted. *Id.* at 211. The plaintiffs replied that there was no settlement because they did not agree to sign a release which contained an indemnification provision as well as language that the tortfeasor denied liability. *Id.* at 211.

The Court of Appeals held that because USAA's response (in both oral and written communications) "demonstrate[d] an unequivocal acceptance of both terms and contained no language conditioning acceptance upon execution of the particular release form," a settlement was reached. I*d.* at 213.

COMPLAINT FOR BREACH OF CONTRACT SEEKING SPECIFIC PERFORMANCE OF AN ALLEGED SETTLEMENT AGREEMENT: the Court of Appeals affirmed the trial court's grant of summary judgment on the tortfeasor's complaint for breach of contract holding that a settlement agreement had been reached and the inclusion of a lien affidavit in the tortfeasor's proposed release did not constitute a counteroffer given that the tortfeasor's attorney invited changes on numerous occasions and nothing indicated that the tortfeasor intended to make a counteroffer with the proposed release nor that the plaintiffs were required to sign the release as a condition of settlement.

***Sherman, et al. v. Dickey, et. al.*, 322 Ga. App. 228 (2013).**

In *Sherman, et al. v. Dickey, et al.*, 322 Ga. App. 228 (2013), the Court of Appeals affirmed the trial court's grant of summary judgment on the tortfeasor's complaint for breach of contract. Prior to the initiation of the tortfeasor's suit, claimants' counsel send a demand to the tortfeasor's liability carrier (First Acceptance Insurance Company) "to settle their claims in exchange for the $25,000 policy limits." *Id.* at 229. The demand "requested receipt of a settlement check, a limited liability release, and affidavits to establish the limits of the available liability-insurance coverage ... ." *Id.*

Notably, the demand specified that the limited liability release "could not include language requiring indemnification or the release of any property-damage claims, but the demand did not include any other restrictions as to what could or could not be included in the release." *Id.*

In response to the demand, the tortfeasor's attorney sent correspondence to the claimants' attorney "seeking clarification on a few points" and included a "sample limited liability release." *Id.* In response, claimants' attorney sent "a draft of a limited liability release" to the tortfeasor's attorney. *Id.* The tortfeasor's attorney replied with "proposed revisions" to the release including an affidavit concerning statutory liens of healthcare providers. *Id.*

Importantly, the reply by the tortfeasor's attorney also specified that "if you do not want your client to sign a release with my proposed changes, please let me know and let's discuss." *Id.* at 230. Claimants' attorney responded by stating that he would "get back to" the torteasor's attorney. *Id.* After receiving no response, the tortfeasor's attorney sent a letter "unconditionally accepting the demand and included a check for the $25,000 policy limit, the requested affidavits, and a limited liability release containing the language [previously] e-mailed to the [claimants'] attorney." *Id.*

Significantly, in the letter unequivocally accepting the demand, the tortfeasor's attorney stated again that the limited liability release was "proposed" and "again invited feedback if the [claimants] disagreed with the proffered changes." *Id.* The tortfeasor's attorney subsequently invited claimants' attorney on two other occasions to "to discuss or make changes to the proposed release." Id. Claimants' attorney eventually responded by returning the check for $25,000 "along with a 'rejection' of what they deemed the [tortfeasor's] counteroffer." *Id.*

In affirming the trial court's grant of summary judgment on the tortfeasor's complaint for breach of contract, the Court of Appeals noted that "if a purported accept-

ance of the [claimants'] settlement offer imposes any new conditions, it constitutes a counteroffer rather than an acceptance." *Id.* at 232. However, the Court of Appeals emphasized that "when determining whether a purported acceptance imposes conditions rendering it a counteroffer, 'our courts have drawn a distinction for precatory words which are words whose ordinary significance imports entreaty, recommendation, or expectation rather than mandatory direction.'" *Id.* at 232 (quoting *Anderson v. Benton*, 295 Ga. App. 851 (2009)).

The Court of Appeals noted that although claimants contended that the inclusion of "lien affidavit language into the proposed limited liability release rendered the purported acceptance a counteroffer," the tortfeasor's attorney "repeatedly invited changes to the proposed release and feedback regarding any concerns the [claimants] might have." *Id.* Moreover, the Court of Appeals stated that "we discern nothing to suggest that the [tortfeasor] intended for the release to constitute a counteroffer or that the [claimants] were required to sign *that particular release* to effectuate the settlement." *Id.* (emphasis included by the Court).

The Court of Appeals further noted that "it is well settled that the mere inclusion of a release form that is unacceptable to the plaintiff 'does not alter the fact that a meeting of the minds has occurred with regard to the terms of a settlement.'" *Id.* at 233 (quoting *Hanson v. Doan*, 320 Ga. App. 609 (2013)). ❖

Government Defense Case Law Update

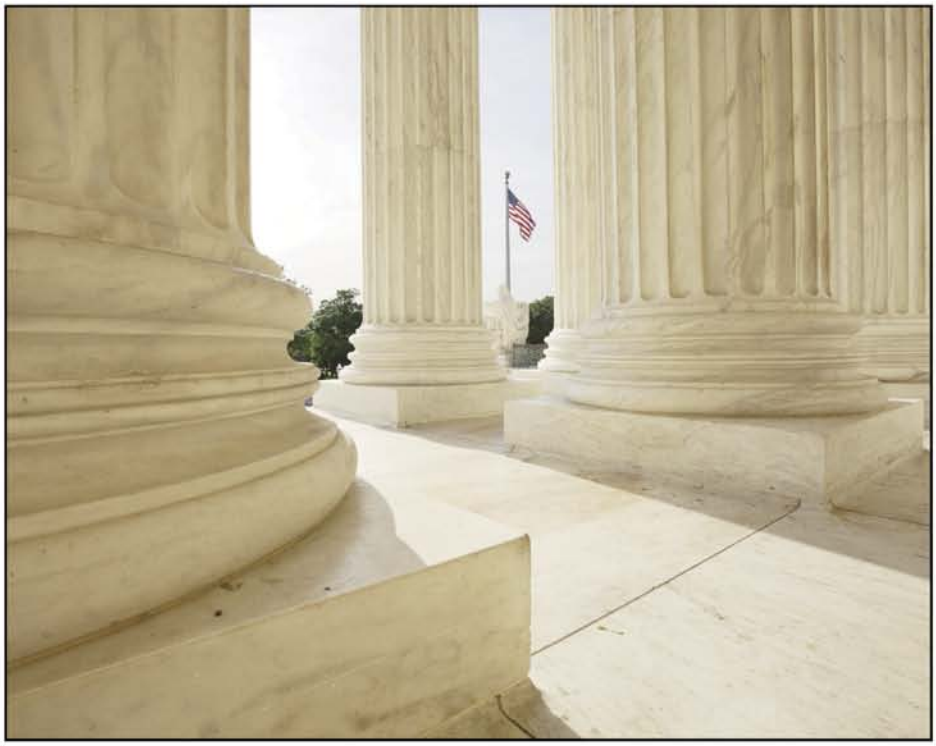
By Richard E. Glaze (left), SLC Chair,
Balch & Bingham, Atlanta, and
W. Taylor McNeill, SLC Vice-chair,
Chilivis Cochran Larkins & Bever, Atlanta

***U.S. ex rel. Lesinski v. South Florida Water Management District*, 739 F.3d 598 (11th Cir. 2014)**

False Claims Act (FCA) liability is limited to those falling within the FCA's definition of "person." In *Lesinski*, the Eleventh Circuit joined other federal circuits in holding that the FCA's definition of "person" should be interpreted to exclude not only states but also any entity that may be fairly considered an "arm of the state." In affirming the district court's decision that the South Florida Water Management District was an arm of the state of Florida, and therefore immune from FCA liability, the Court addressed an issue of first impression in this Circuit and held that courts should employ the Eleventh Amendment arm of the state analysis to determine whether a state entity is a "person" subject to FCA liability. After a nuanced review of the relevant factors — (1) how state law defines the entity; (2) what degree of control the state maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity — the Court concluded that the Water Management District was an arm of the state, not a "person," and could not be sued by a *qui tam* relator under the FCA. It should be noted, however, that local governments and municipalities remain permissible targets of qui tam FCA liability.

***Kaley v. United States*, ___ U.S. ___, 134 S. Ct. 1090 (2014)**

In *Kaley v. United States,* the U.S. Supreme Court held that when challenging the legality of a pre-trial asset seizure under 21 U.S.C. § 853(e), a criminal defendant who has been indicted is not constitutionally entitled to contest a grand jury's determination of probable cause that the assets will ultimately



be subject to forfeiture. In *Kaley*, a grand jury indictment charging the defendants with a scheme to steal prescription medical devices and money laundering also contained an order freezing nearly all the defendants' assets — even assets the defendants had set aside to pay for legal representation. The defendants claimed the asset freeze violated their Sixth Amendment right to counsel by preventing them from hiring the attorney of their choice and sought a hearing challenging the validity of the indictment and the asset freeze. The U.S. District Court for the Southern District of Florida denied the defendants the opportunity to challenge the grand jury's probable cause determination, which would have involved a hearing regarding the facts that supported probable cause for the indictment, and the Eleventh Circuit affirmed. Faced with the potential "strange and destructive consequences" of allowing a judge to "decide anew what the grand jury has already determined, "the Court was unwilling to allow a process that "could result in two inconsistent findings governing different aspects of one criminal proceeding," and therefore held the defendants were not entitled to the hearing.

Practitioners who believe refundable retainers from possible criminal defendants are safe in their trust accounts should take a hard look at this decision.

***CTS Corp. v. Waldburger*, ___ U.S. ___, 134 S. Ct. 2175 (2014).**

The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), which provides causes of action to the government and third parties to recover cleanup costs caused by the release of hazardous substances, includes a provision that preempts state-law statutes of limitation in certain actions seeking the recovery of such costs. In *CTS Corp. v. Waldburger*, a 7-2 majority of the U.S. Supreme

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Court ruled that the preemption provision that applies to statutes of limitation does not preempt North Carolina's statute of repose. The case involved a former owner of an electronics plant that was sued for nuisance 24 years after the property was sold. The district court dismissed the case on the grounds that the applicable statute of repose prevented a tort suit more than ten years after the defendant's last culpable act.

The Fourth Circuit reversed, holding that the remedial purpose of CERCLA favored preemption of the statute of repose, which was similar to a statute of limitations. In reversing the Fourth Circuit's decision, the Supreme Court first discussed the differences between statutes of limitations and statutes of repose and noted that the "statute of repose limit is 'not related to the accrual of any cause of action'" and that "each has a distinct purpose and each is targeted at a different actor."

The Court also noted that the applicable CERCLA provision used the term "statute of limitations" four times, but not the term "statute of repose," and that "other features of the statutory text further support[ed] the exclusion of statutes of repose." In concluding that the statute of repose was not preempted, the Court cited Congress' clear desire to leave many areas of state law untouched, and held that the plaintiffs had "not shown that statutes of repose pose an unacceptable obstacle to the attainment of CERCLA's purposes."

***Gabelli v. SEC*, ____ U.S. ____, 133 S. Ct. 1216 (2013).**

When the Securities and Exchange Commission seeks civil penalties against investment advisers who defraud their clients, it must file suit "within five years from the date from when the claim first accrued." *Gabelli v. SEC* involved a civil action brought by the SEC in 2008 against a mutual fund manager for alleged fraud that occurred from 1999 to 2002.

The defendant argued the suit was barred by the five-year statute of limitations, and the district court agreed and dismissed the action as time barred. The Second Circuit, however, reversed, accepting the SEC's argument that the "discovery rule" applied and that the five-year clock did not begin to tick until the alleged fraud was discovered. The U.S. Supreme Court reversed the Second Circuit's decision, holding the "most natural reading of the statute" at issue was that a claim "accrued" when the allegedly fraudulent conduct occurred, not when it was discovered. The Court also noted that the plaintiff in an SEC enforcement action is not a defrauded individual seeking recompense, but is instead the Government seeking civil penalties.

Unlike an individual victim who relies upon an injury to learn of a wrong, the Government is expressly tasked with investigating potential violations of securities laws. Application of the discovery rule in civil penalty claims, the Court explained, would "hinge on speculation about what the Government knew, when it knew it, and when it should have known it," a particularly challenging task when applied to agencies with "hundreds of employees, dozens of offices, and several levels of leadership."

***United States v. Houser*, ____ F.3d ____, 2014 WL 2767200 (11th Cir. June 19, 2014)**

In *U.S. v. Houser*, the Eleventh Circuit ruled that the provision of "worthless services" can be grounds for conviction under the federal health care fraud statute, 18 U.S.C. §1347. The evidence in the case showed that conditions at nursing facilities owned and operated by the defendant were "barbaric" and "uncivilized" and that the defendant had received up to $33 million in reimbursements from Medicare and Medicaid.

The government argued that conditions were so bad that the services for which defendant was reimbursed were essentially worthless. The jury agreed, and the defendant was convicted of conspiracy to commit health care fraud.

The District Court for the Northern District of Georgia sentenced the defendant to 240 months imprisonment and ordered him to pay restitution to Medicare and Medicaid of nearly $7 million. On appeal, the defendant argued the government's theory of fraud was unconstitutionally vague. As characterized by the defendant, "determining at what point health care services have crossed the line from merely bad to criminally worthless would leave many men of common intelligence guessing."

The Eleventh Circuit rejected the vagueness argument, opining that the defendant had not merely provided deficient services, but instead had wholly failed to provide services he certified to Medicare and Medicaid had been provided to the residents in his homes. Finding that the deplorable conditions caused nursing home residents to be effectively "without necessary services" and that the defendant had actual knowledge of the conditions "through an almost daily barrage of telephone calls, emails and faxes from the administrators," the government had met its burden of proof. ❖

Mass Torts Case Law Update

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

***Fouch v. Bicknell Supply Company, et al.*, Court of Appeals of Georgia, 2014 WL 1097951 (2014)**

The Court of Appeals reversed the trial court's granting summary judgment to the Defendants. Plaintiff Enrico Fouch worked for 11 years as a sandblaster for two different companies. As a result of his work, Fouch developed silicosis and required a double lung transplant. Fouch then sued Mine Safety Appliances Company, the manufacturer of one of the respirators he wore during his career, Bicknell Supply Company, and Miles Supply of Elberton, two of the companies who supplied materials to his employers alleging strict liability for defective design and negligent failure to warn. All defendants filed motions for summary judgment, which the trial court granted. The trial court ruled that Fouch had failed to meet his burden of demonstrating causation between Fouch's use of the Mine Safety respirator and such exposure causing his injuries. The trial court also ruled that none of the defendants owed a duty to warn to Fouch. Plaintiff appealed the trial court's order.

Fouch, at times, did not wear any respirator protection while sandblasting, or instead wore a mask or respirator that provided some protection, but was not designed to be worn for sandblasting. He only wore the defendant's Mine Safety respirator for a short time period during his employment at Superior Granite. Neither of his employers ever provided Fouch with an OSHA approved sandblasting respirator. One of his employers confronted Fouch about not wearing appropriate respiratory protection and offered to purchase such a device as selected by Fouch. Despite the years of experience between Fouch and his employer, Fouch selected a respirator that was not OSHA approved for sandblasting and his employer purchased it anyway. Defendant Mine Safety manufactured at least two other respirators specifically approved for sandblasting.

The Court of Appeals reversed summary judgment on both issues advanced by the trial court. For the causation issue, the Court of Appeals held that since Fouch contracted silicosis, an overexposure to silica dust, he did not have to prove a specific threshold level of silica necessary to induce silicosis. Fouch's expert witnesses had opined that the use of a non-approved respirator would result in an overexposure to silica dust. Brushing *Butler v. Union Carbide Corp.*, 310 Ga. App. 21 (2011) aside, the Court of Appeals held this evidence was enough to defeat summary judgment on the issue of causation. On the duty to warn issue, the Court of Appeals relied upon the testimony of Fouch's expert witnesses' that small employers such as Fouch' s employers, were not aware of the hazards of sandblasting and silica, despite a duty under OSHA to provide adequate respiratory protection to employees. Combined with a perceived factual issue as to whether Fouch was aware of the dangers of sandblasting, the Court of Appeals held that summary judgment was inappropriate in this case. Accordingly, the Court of Appeals reversed the trial court's order.

The defendants have filed separate Petitions for Writ of Certiorari to the Supreme Court of Georgia. The Supreme Court has not yet issued a ruling. ❖

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Premises Liability Case Law Update

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

NON-PARTY APPORTIONMENT AND THIRD-PARTY CRIMINAL ACTS: Defendant property owner not required to show exact identity of non-party owner of adjacent property to permit issue of non-party apportionment to proceed to jury.

***Double View Ventures, LLC et al. v. Polite*, 757 S.E.2d 172 (Docket No. A13A2134) (Ga. Ct. App. Mar. 26, 2014).**

In this case, the plaintiff sued the owner and manager of the apartment complex where he lived after he was physically attacked and shot by unknown persons on the premises. The plaintiff alleged that the defendants were negligent in failing to maintain a fence between the complex and a neighboring convenience store, which he alleged allowed his assailants to access the apartment complex.

Although the fence was located on the property owned by the convenience store proprietor, the trial court did not allow the jury to apportion fault to said non-party. The jury assigned 87 percent of the fault to the defendants and 13 percent to the plaintiff, but none to the non-party assailants. The defendants appealed.

The Court of Appeals held that the trial court erred by removing the non-party neighboring property owner from the verdict form because the following facts created a jury question as to the property owner's fault: the plaintiff was attacked just as he crossed through the fence from the convenience store'spremises to the apartment complex; there was a long history of prior criminal acts on the convenience store's premises; and the defendants had contacted the neighboring property owner about fixing the fence.

Therefore, under Georgia's apportionment statute, the non-party property owner should have remained on the verdict form for apportionment purposes.

The Court of Appeals also held that the defendants' inability to identify the precise corporate entity that owned the neighboring property was irrelevant. Although it would be necessary to identify the precise entity to assign liability as a defendant, for the purpose of apportioning fault, the statute only required the defendants to provide "the best identification of the non-party which is possible under the circumstances."

The defendants also argued on appeal that the jury's failure to apportion any fault to the third-party criminal assailants was error, but the court declined to address the issue on the grounds that its other holdings rendered it moot.

LATENT DEFECTS, DUTY TO CONDUCT REASONABLE INSPECTIONS OF PROPERTY, DEFECTIVE CONSTRUCTION, AND FRANCHISOR LIABILITY: Hotel franchisor not liable for acts of franchisee under agency theory and guest not third-party beneficiary of franchise contract, but franchisee potentially liable for failure to reasonably inspect shower grab bar.

***Bright, et al. v. Sandstone Hospitality, LLC* et al., 755 S.E.2d 899 (Docket No. A13A1811) (Ga. Ct. App. Mar. 26, 2014).**

The plaintiff, a hotel guest, was injured when he fell after a grab bar in the bathtub of his room came loose as he was attempting to get out of the tub. The guest sued both the owner of the hotel and the franchisor (in whose name the hotel was operated).The guest asserted numerous premises liability theories and a defective construction theory against the owner, and argued the franchisor was liable under two theories: (1) the hotel owner was the franchisor's apparent agent; and (2) the guest was a third-party beneficiary of the franchise agreement. The trial court granted both defendants' motions for summary judgment, and the guest appealed.

The Court of Appeals affirmed the grant of summary judgment to the franchisor. As to the apparent-agency theory, the court noted that simply operating under a franchisor's trademark is not sufficient to establish apparent agency. Further, the court found that the unrebutted testimony of the hotel owner established that the hotel displayed a sign at the front desk stating that the hotel was "owned and operated" by the owner. The court held that this fact defeated a claim of apparent agency as a matter of law.

The Court of Appeals noted that a premises owner's failure to conduct reasonable inspections will give rise to constructive knowledge of a defect if the defect would have been discovered through a reasonable inspection.

The Court of Appeals also rejected the guest's argument that he was a third-party beneficiary of the franchise agreement. Although the franchise agreement required the hotel owner to comply with the franchisor's quality assurance inspection program, and the franchisor's manual had provisions relating to the shower grab bar, there was no evidence that the franchise agreement was intended to benefit the guest.

In so ruling, the court relied on Georgia Supreme Court authority, which provides that "an injured party may not recover as a third-party beneficiary for failure to perform a duty imposed by a contract unless it is apparent from the language of the agreement that the contracting parties intended to confer a direct benefit upon the plaintiff to protect him from physical injury." Therefore, summary judgment in favor of the franchisor was appropriate.

The hotel owner was not so fortunate. The Court of Appeals noted at the outset that a premises owner's failure to conduct reasonable inspections will give rise to constructive knowledge of a defect if the defect would have been discovered through a reasonable inspection. Since the evidence showed the hotel owner knew of one other grab bar at the hotel needing repair before the incident, there was a question of fact as to whether the owner exercised ordinary care in inspecting the premises.

The Court of Appeals also held that the guest's defective construction claim should have proceeded to a jury. The guest presented expert testimony that the grab bar was not properly installed, and, under Georgia law, "[i]n cases of defective construction, the owner is presumed to have knowledge of the danger." Accordingly, there were questions of fact for the jury, and the trial court erred in granting summary judgment to the hotel owner.

TRIP AND FALL, BURDEN TO SHOW HAZARD, AND CAUSATION: Plaintiff's failure to identify hazardous condition that caused her to fall required summary judgment to defendant premises owner.

***Bryan Bank & Trust v. Steele*, 755 S.E.2d 828 (Docket No. A13A1987) (Ga. Ct. App. Mar. 5, 2014).**

In this trip and fall case, the Court of Appeals addressed a plaintiff's burden in establishing the existence of a hazardous condition. The plaintiff sued the defendant bank after she tripped and fell while leaving the bank premises. The plaintiff testified that there was metal edging or "fencing" surrounding the flower beds next to the sidewalk, and that she believed she fell because the fencing had been moved so that it protruded onto the sidewalk.

The plaintiff's testimony about how she fell, however, was equivocal, and she could not state with certainty that the fencing caused her fall. Specifically, the plaintiff testified that she was walking on the sidewalk and "all of a sudden [] found [her]self just laying on the ground." When asked if her foot had caught on something or if she had bumped into anything, the plaintiff responded, "[i]t is not really clear to me ... I just remember falling and trying to get up." And when asked if she knew what caused her to fall, she answered, "I really believe it was the — the fencing [b]ecause when they finally got me up to bring me back in the bank ... I did look down, and it looked like the fence was protruding out on the sidewalk ... it looked like something had been moved." But, on further questioning, she conceded the fencing could have been moved as a result of her fall, stating, "I don't know if [the border] had been moved or not, but it looked — it just looked like it was protruding[, a]nd it could have been from me." She also could not state for certain whether the fencing was on the sidewalk before she fell, or only after.

The bank moved for summary judgment, contending the plaintiff failed to establish causation, but the trial court denied the motion. On appeal, the Court of Appeals reversed, distinguishing this case from others where summary judgment was denied despite the plaintiff's inability to state with certainty what caused his/her fall. The court explained that in other cases where summary judgment was denied, the plaintiff could point to other evidence that would allow a jury to infer that a hazardous condition caused the plaintiff's fall.

In this case, the only evidence as to the alleged hazard was the plaintiff's testimony, which was equivocal. Indeed, the plaintiff could not even state that the fencing had been moved — only that it "could" have been moved. That was not enough for a jury to infer the existence of a hazardous condition, so

the trial court should have granted the bank's motion for summary judgment.

TRIP AND FALL, STATIC CONDITIONS, CONSTRUCTIVE NOTICE, AND REASONABLE INSPECTION PROCEDURE: Jury questions on the existence of a hazardous condition and plaintiff's contributory negligence prevent summary judgment for defendant.

***Pinder v. H & H Food Services,* LLC, 756 S.E.2d 721 (Docket No. A13A1758) (Ga. Ct. App. Mar. 24, 2014).**

In many ways, this trip-and-fall case seems to run counter to the Bryan Bank & Trust case discussed above. Here, the plaintiff was leaving a fast-food restaurant when she fell and rolled into the parking lot as she stepped from the sidewalk toward the ramp leading to the parking lot, ending up with her rear end on top of a parking bumper and her foot underneath it. The plaintiff sued the owner of the restaurant. During discovery, the plaintiff produced the following evidence: (1) that while the top of the ramp appeared to be flush with the sidewalk, its sides actually sloped toward the parking lot; and (2) the parking bumper was broken and out of place. The plaintiff also testified that it was very dark in the parking lot at the time of her fall.

The trial court granted summary judgment to the defendant, finding that the plaintiff had not established the existence of a hazardous condition, that the defendant had no knowledge of a hazardous condition, and that the plaintiff was contributorily negligent. The plaintiff appealed, and the Court of Appeals reversed on all grounds.

On appeal, the defendant argued that the plaintiff had failed to show how the parking bumper contributed to her fall, but the court disagreed. It held that when viewing the evidence in the light most favorable to the plaintiff, a jury could find that the unexpected change in the ramp's slope caused the plaintiff to step directly into the parking lot, where she tripped on the broken parking bumper.

The Court of Appeals also disagreed with the trial court on the issue of the defendant's notice. Relying on testimony that the exposed bolt of the parking bumper was rusted, the court held that there was a jury question as to how long the bumper had been broken and out of place. Furthermore, the court found that although the defendant had a procedure by which its employees inspected the premises several times per day, the defendant failed to present any evidence regarding who performed the inspections, or at what time they were conducted, on the date of the plaintiff's fall. The court held that created a jury question as to whether the defendant had constructive knowledge of the hazard.

Finally, the Court of Appeals held that the plaintiff was not barred from recovering even though the alleged hazard was a static condition. Although Georgia law prohibits a plaintiff from recovering when he had equal knowledge of the condition as a result of having negotiated it previously, the court held that there was no evidence that the plaintiff in this case negotiated the ramp or parking bumper on her way into the restaurant. Therefore, summary judgment for the defendant was improper, and the Court reversed the trial court's decision.

TRIP AND FALL, BURDEN TO SHOW HAZARD, CAUSATION, PRIOR TRAVERSAL, AND EVIDENCE ADMISSIBLE ON MOTION FOR SUMMARY JUDGMENT: Defendant restaurant owner entitled to summary judgment where plaintiff failed to present evidence of any defect in restaurant door, and trial court could consider evidence other than affidavits on motion for summary judgment.

***Hayes v. SNS Partnership, LP et al.*, 755 S.E.2d 273 (Docket No. A13A1698) (Ga. Ct. App. March 13, 2014).**

In this case, the plaintiff tripped and fell after her shoe got caught in a self-closing door at a restaurant. After the trial court granted summary judgment in the defendant's favor, the primary question for the Court of Appeals was whether the plaintiff created a question of fact as to the existence of a defect in the restaurant door.

The record showed that the plaintiff had eaten at the restaurant and passed through the door in question several times before without incident. On this occasion, the plaintiff's shoe was caught under the door as she entered, causing her to fall. The plaintiff's daughter testified that the door closed "at a slower speed" and felt "lighter" that day than on previous occasions.

The defendant premises owner presented statements from its employees that the door was operating as expected and in conformance with company standards on the date in question. These statements were not in the form of affidavits, but were sworn statements taken down by a court reporter. The plaintiff argued that the statements could not be considered as evidence because they were not affidavits, but the Court of Appeals disagreed, reasoning that a trial court is not limited to considering affidavits when ruling on a motion for summary judgment, but can also consider any other evidence that would be admissible at trial. Because the sworn statements of the defendant's employees would be admissible at trial to impeach their testimony, the Court held that the trial court could consider them when ruling on the defendant's motion for summary judgment.

Upon consideration of the statements and the other evidence in the light most favorable to the plaintiff, the Court of Appeals concluded that the plaintiff had not created a jury question as to whether there was a defect in the door. The defendant's employees testified that the door was operating properly, and, absent some testimony that there was a specific defect in the door, the lay opinions of the plaintiff and her daughter that the door was hazardous did not create a question of fact. Accordingly, the restaurant owner was entitled to summary judgment. ❖

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Trucking Case Law Update

By Edward T. McAfee
Lewis Brisbois Bisgaard & Smith, Atlanta

***Reed et al. v. Carolina Cas. Ins. Co et al.*., 755 S.E.2d 356 (Docket No. A13A2270) (Ga. Ct. App. March 25, 2014)**

Reed involves a wrongful death action from the estate of a motorist who, along with a passenger, was killed in an accident where his vehicle overturned on an interstate off-ramp, struck the defendant's illegally parked tractor-trailer, and caught fire. The Court of Appeals reversed the trial court's grant of summary judgment for the defendant, stating that where there are no "plain and indisputable answers" regarding the apportionment of negligence and the cause of death, there are questions of fact which must be resolved by a jury.

In granting the defendant's motion for summary judgment, the trial court noted that the plaintiff's .095 blood-alcohol level, unsafe speed, and failure to maintain his lane of travel constituted the plaintiff being at least 50 percent responsible for his own injuries, thus barring recovery. On appeal, the Court of Appeals found that the record showed the cause-in-fact of the plaintiff's death to be a mixture of blunt force trauma and thermal injuries, and, thus, it was unclear if the plaintiff would have died but for the collision and the subsequent fire.

The Court further explained that along with the *per se* negligence of illegally parking the tractor-trailer in violation of state law, "[i]t is reasonably foreseeable that another motorist might negligently lose control of his vehicle at night in wet conditions and strike a tractor-trailer parked in the emergency lane ... and that striking a tractor-trailer possibly might cause a fire." In denying the defendant's motion for reconsideration, the Court further held that even if the plaintiff's failure to exercise ordinary care led to the initial loss of control, the key issue in the case is whether the plaintiff would have died but for the parked tractor-trailer.

***Bruce v. Georgia-Pacific, LLC*, 757 S.E.2d 192 (Docket Nos. A13A1874, A13A1806) (Ga. Ct. App. March 27, 2014)**

Bruce arose out of an injury to a truck driver who fell off a loaded tractor-trailer owned by his employer. On appeal, the Court of Appeals considered whether the loaded bed of a tractor-trailer is a "walking-working surface" which requires OSHA fall protections as described in 29 C.F.R. § 1926.500 *et seq.*Rejecting the plaintiff's argument that OSHA regulations gave rise to a legal duty owed to the plaintiff, the Court first noted that OSHA itself interprets its regulations to mean that "fall protection is not required for employees who are on vehicles and trailers when ... employee must be on the vehicle or trailer to perform his or her duties," as "there is typically no feasible means of providing fall protection."

The plaintiff's argument that the loading of his tractor-trailer was a construction activity subject to OSHA regulations was likewise rejected. The Court of Appeals explained that for an operation to be considered construction for OSHA purposes, it must be work performed on or near a construction site. Further, OSHA-imposed duties only exist between an employer and employee. In this case, the plaintiff was on the premises of Georgia-Pacific, whose employees loaded the truck but were forbidden to climb on trailers.

The Court reasoned that if Georgia-Pacific owed no obligation to its own employees for fall protection from trailers, it owed no such duty to employees of other companies also working on-site. ❖

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Scenes from the Business Meeting and CLE program, which was planned by then-Executive VP Kirby Mason: 1. DRI State Rep and Past President Bubba Hughes (right) presented outgoing President Ted Freeman with the DRI Award for Exceptional Performance; 2. Then-Secretary/Treasurer Matt Moffett gave the financial report; 3. Chatham State Court Judge Greg Sapp offered a view of professionalism from the bench, noting it is a two-way street; 4. Kirby Mason introduced the program; 5. Special guest James Holland, DRI for Life Task Force leader, gave a DRI report and encouraged attendance at the DRI Annual Meeting in San Francisco, October 22-26; 6. Melissa Bailey and 7. Past President Warner Fox provided a post-*Polite* update on apportionment; 8. Madeline Mitchell, Kate Lawson and 9. Leah Fox networked at the inaugural Young Lawyers (YL) breakfast with YL Chair Pamela Lee and YL Vice-chair Jason Logan; 10. Kurt Cady, with Platinum Sponsor Nelson Architectural Engineers — who sponsored each day's breakfast — explored water intrusion investigations; 11. Past President Staten Bitting (right) presented Ted Freeman with the coveted Past President's nametag ribbon, following the election of new officers; 12. Dayne Grey (right) and Joe Hunnius, with Platinum sponsor MDD Forensic Accountants, reviewed what a life is worth; 13. Marty Levinson covered mutuality, timing and other issues involving acceptance and rejection of settlement offers and demands; 14. Taylor Tribble reviewed the life of a medical malpractice trial; 15. Matt Barr explained how Facebook updates could cost you $5.4 million; 16. Alec Galloway and 17. Jim Hollis discussed changes to Georgia's Evidence Code.

President's Reception

Participating Sponsor

S-E-A Limited

Pictured at the President's Reception held in the Inn & Club's Great Lounge are: 1. Jeff and Greer Ward with their daughter, Mobley Grace; 2. Judge Greg Sapp (second from left) and his wife, Theresa (left) with then-Executive VP Kirby Mason (right) and her husband, Frank; 3. Frank and Megan Bedinger; 4. (l-r) Bill Buchanan with Jason and Wendy Logan; 5. Dave and Jennifer Nelson; 6. George Hall (left) with S-E-A's Brian Stacey, who sponsored the reception.

Golf Tournament

Participating Sponsor

Engineering Systems, Inc. (ESI)

Scenes from Friday's annual golf tournament (l-r): 1. The winning team: Hunter Slaton, Judge Greg Sapp, Max Braun and Dana Braun; 2. Ann Hopkins, Hall McKinley and Art Davison tried not to blow away as a storm approached; 3. Heather Uhrinek (center), with tournament sponsor ESI, congratulated Jim Hollis and Past President Jimmy Singer, who were the GDLA members on the second place team; 4. ESI's Mitch Garber, Jeff Ward, Brian Moore and Past President Mel Haas were undetered by the dark clouds.

Hotel Key Cards

Participating Sponsor

Collision Specialists, Inc.

Ponte Vedra Inn & Club, June 12-15, 2014

TENNIS TOURNAMENT

PARTICIPATING SPONSOR

ESQUIRE DEPOSITION SOLUTIONS

Saturday afternoon featured the annual doubles tennis tournament. Pictured there are: (front row) Peggy Roth, Esquire's Jackson Dodsworth, Susan Murphey; Esquire's Lauren Konton; (back row) John Leffler, Ashley and Brandon Rice, Wayne and Laura Melnick, Esquire's Cliff Walker, Joe Murphey, Cathi Levinson, Sandra and Rich Glaze. Winners were John Leffler (men's), Susan Murphey (ladies') and Sandra Glaze (sportsmanship); 2. Wayne Melnick and Ashley Rice (center) prepare to battle on the tennis court with their respective spouses, Laura and Brandon.

SANDCASTLES CONTEST

PARTICIPATING SPONSOR

ENGINEERING SYSTEMS, INC. (ESI)

1. First prize went to Will Harmon and sisters, Taylor and Alex Mason; 2. Maran Wolfe created 3. a monogrammed castle; 4. Brian Moore with sons, Mason (left), Miller and 5. Mercer, constructed the 6. Braves logo; 7. Jason Logan Jr. and Sr. worked on their masterpiece; 8. Jeff and Georganne Wasick helped twins, Phoebe and Claire; 9. Five teams competed for top honors.

47th Annual Meeting, Ponte Vedra, June 12-15

CLOSING DINNER
PARTICIPATING SPONSOR

FORCON INTERNATIONAL

Pictured at the Closing Dinner held at the Surf Club Patio shortly after a torrential downpour are: 1. Past President Mel Haas with his wife, Linda, and Past President/Meetings Chair Staten Bitting and his wife, Cindy; 2. Past President Johnny Foster (left) was one of the lucky winners of a bottle of Jameson Special Reserve 12 Year Irish Whiskey presented by FORCON's Bill VerEecke, the evening's sponsor; 3. Allison Maloney and Lori Leonardo; 4. Jason Lewis with his wife, Annie, and two of their three sons, Carter (left) and Henry; 5. Past President Bubba Hughes with his wife, Debbie, and Sally Akins; 6. Ali Kennickell with her husband, Trip; 7. Harvey Gray and Beth Ann Taratoot; 8. Andy Treese and his son, Calvin; 9. Rich Glaze and his wife, Sandra.

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

Continued from page 19

on products that are already in the field, this data can be used to quantitatively compare the performance of the product of interest to similar products in the field and to predict future failure rates. A statistical analysis can be used as a part of a product risk assessment (when predicting product future performance) or as part of the failure analysis (to provide evidence to support or refute the root cause hypotheses).

How it's done: Data is gathered from a multitude of sources, including the product designer and manufacturer databases, administrative databases, and testing. Data gathered from the product designer and manufacturer database could include internal tracking of product design changes, customer complaints and returns, product yield data, data on expected product life, data on length of product warranty, manufacturing locations, manufacturing dates, and/or customer shipping data. Administrative databases may include additional customer complaints, news media coverage, police accident reports, and/or fire department reports. Testing data can come from the product designers and manufacturers or may be generated during failure analysis of products from the field.

Once the data is collected, a technical professional well-versed in statistics and data analysis can create visual aids to display large amounts of data in condensed form, making it easier to draw conclusions regarding product performance. Predictions on future performance of a product may be made to varying degrees of confidence.

Limitations: Confidence in the predictions made during a statistical analysis is dependent on the quantity and quality of the available data. A higher confidence may generally be placed on predictions that rely on larger data sets and data that is expressed quantitatively. Conclusions drawn from the data also hinge on the skill level of the professional who is analyzing the data. A data set that is analyzed using an inappropriate statistical distribution or technique may produce misleading results.

> *"Never let a good crisis go to waste."*
>
> *–Winston Churchill*

Failure Modes Effects Analysis

Failure Modes Effects Analysis (FMEA) is typically used during the design phase of a product as a tool to qualitatively predict the failure modes and rates of products. Product designers can use an FMEA to make a more robust product by modifying a existing design to minimize high risk failure modes before a failure ever occurs. An FMEA can also be used as part of a failure analysis to develop hypotheses regarding root cause and to provide evidence to support the relative likelihood of the occurrence of these hypotheses.

How it's done: Several technical professionals with a variety of skill sets generate a worksheet that lists and qualitatively ranks the risk of a wide variety of failure modes. The "severity" and "likelihood" of each failure mode are ranked (typically from 1 to 5) on independent scales, then combined to give an overall "risk" rating. Failure modes with a higher "risk" rating are usually investigated further with data analysis or testing to refine the ranking system for these high risk items.

Limitations: FMEA is generally a qualitative analysis and is most useful in comparing the likelihood and severity of one failure mode to another. An FMEA is the collective estimation of the professionals involved in the analysis, and therefore may only be as reliable as the professionals who create the FMEA. An FMEA that considers only a particular subsystem or component may be more effective and efficient than a full-system, interdisciplinary FMEA in some cases, especially if that FMEA is performed as part of a failure analysis.

Reliability Testing

Reliability Testing includes several testing techniques geared toward inducing failures in the laboratory that may mimic failures that could occur in the field. Typically, reliability testing involves subjecting a product to conditions that cause the product to age more quickly. Reliability testing can provide quantitative predictions on future product field performance such as mean time to failure and most common failure modes. However, great care must be exercised when extrapolating future performance based on accelerated (short term) testing. Reliability testing is often used in the product design phase, but can

also be useful during failure analysis to provide additional data to support or refute root cause hypotheses.

How it's done: Specialized test equipment is used to subject the product to extreme environmental conditions such as temperature, humidity, and vibration. Facilities equipped for reliability testing will generally have a pre-set collection of tests to choose from which can be tailored to individual needs. Data created from testing may be analyzed by the same lab that performed the testing, by the product designer/manufacturer, or by a third party consultant with specialized expertise.

Limitations: Test conditions may not accurately represent conditions in the field, which may limit the accuracy of field performance. Confidence in predictions of future performance is generally increased when the sample size or test time is increased.

Conclusion

This article presents just a sampling of the engineering and scientific techniques at your disposal. Managing product safety requires a conscious effort to collect data regarding product performance and a thoughtful approach to conducting the appropriate analysis and testing during the lifetime of the product. When presented with a new safety concern, it is good practice to take stock of available techniques and to educate yourself as to the basic procedure along with the benefits and limitations of each technique.

This knowledge will assist you in collecting the information you'll need to make important decisions regarding product safety. As Winston Churchill once said, "Never let a good crisis go to waste." Likewise, never miss an opportunity to learn from failure. ❖

Ginger G. Turner, Ph.D., P.E., CFEI is a licensed electrical engineer and a certified fire and explosion investigator who evaluates electrical products for specific safety, technology and intellectual property concerns. As a technical consultant with GDLA Platinum Sponsor Exponent, Dr. Turner performs on-site inspections, custom tailored laboratory testing, background literature research, and expert witness services. She is based in Atlanta.

Continued from page 1

Department of Corrections after he was injured while he and several other Walker State Prison inmates were painting the warden's house.

Before trial, Couch made a settlement offer of $24,000 pursuant to O.C.G.A. § 9-11-68. The defendant rejected Couch's statutory settlement offer, and the case proceeded to trial. The jury returned a verdict of $105,417 for Couch (well over the 125 percent threshold under O.C.G.A. § 9-11-68(b)(2) for recovery of attorney's fees by a plaintiff after a rejected offer). Based on O.C.G.A. § 9-11-68(b)(2) and Couch's 40 percent contingency fee agreement with his attorneys, the trial court ordered the defendant to pay Couch $49,542 in attorney fees — 40 percent of his total recovery, after appeal, including post-judgment interest — as well as $4,782 in litigation expenses.

On appeal, the Court of Appeals affirmed the trial court's award with little elaboration. The Court of Appeals quoted but effectively ignored the specific mandate of O.C.G.A. § 9-11-68(b)(2) that only those attorney's fees *incurred after rejection of the prevailing party's offer of settlement* could be awarded under the statute. *See Ga. Dept. of Corrections v. Couch*, 322 Ga. App. 234, 238-39 (2) (2013).

The Court of Appeals went on to hold that the court below had correctly allowed Couch to recover the entire 40 percent contingent fee because the contingent fee "was fixed by the judgment entered on the verdict, and the fee awarded by the trial court reflected that percentage," and because evidence of reasonableness of the hours worked and the rates charged was *presented* to the trial court. *Id.* at 239 (2).

The Supreme Court granted *certiorari* to consider two issues in *Couch*, the first of which involved sovereign immunity. After finding the Court of Appeals had ruled correctly on that issue, the Supreme Court moved on to the second question: whether the Court of Appeals erred by failing to prorate the plaintiff's contingent fee to reflect that some of the fees were incurred before the settlement offer was rejected.

In the opinion, authored by Justice David Nahmias, the Supreme Court held that the trial court and the Court of Appeals erred in calculating the amount of attorney's fees to be awarded to the plaintiff.

First, although Couch's attorneys presented evidence of the hours worked and a reasonable rate for his attorney's services, there was no evidence the trial court actually *considered* either. There was evidence presented to the trial court that Couch's attorneys worked nearly 370 hours on the case, at a billing rate of $250 per hour, after rejection of Couch's statutory settlement offer. But the high Court's "review of the record ... and in particular the transcript of the hearing on attorney fees and the trial court's order, reveal[ed] no indication that the court relied on that evidence, rather than exclusively on the contingency fee agreement, in determining the amount of the award." 2014 Ga. LEXIS 489, *34 (3(a)).

That was error, according to the Supreme Court, because "while the trial court was entitled to consider Couch's contingency fee agreement with his attorneys and the amount it would have generated as evidence of their usual and customary fees, the court erred in calculating what amount of attorney fees was reasonable based *solely* ... on that agreement rather than on evidence of hours, rates, or other indications regarding the value of the attorneys' professional services actually rendered." *Id.* at *38 (emphasis supplied).

Arguably the more significant part of the Supreme Court's opinion, however, concerned the specific time period to be considered in

> *Arguably the more significant part of the Supreme Court's opinion, however, concerned the specific time period to be considered in calculating the attorney's fee award.*

calculating the attorney's fee award. The Court held that the Court of Appeals and the trial court erred in ignoring the specific time limitation of O.C.G.A. § 9-11-68(b)(2) regarding calculation of the portion of attorney's fees that the plaintiffs could recover.

Specifically, the Court explained that under the offer of settlement statute, "plaintiffs are not entitled to recover all of their attorney fees in the case, only the 'reasonable attorney's fees and expenses of litigation incurred by the plaintiff or on the plaintiff's behalf *from the date of the rejection of the offer of settlement through the entry of judgment*.'" 2014 Ga. LEXIS 489, *38 (3(b)), *quoting* O.C.G.A. § 9-11-68(b)(2) (emphasis in original).

In that regard, the Supreme Court specifically rejected the lower courts' reliance on provisions of Couch's contingent fee contract with his attorney to establish the timeframe for which a plaintiff's attorney's fees could be recovered from the defendants under O.C.G.A. § 9-11-68.

The timing and amount of counsel's entitlement to recover attorney's fees from his client under their agreement, the Court held, was a completely separate issue from Couch's entitlement to recover attorney's fees *from the defendant* under O.C.G.A. § 9-11-68(b).

Furthermore, the Supreme Court rejected Couch's argument that the entire contingent fee was automatically recoverable pursuant to O.C.G.A. § 9-11-68(b). The Court explained that "[a]lthough Couch may not have been obligated by contract to pay any fees until the final judgment was entered in his favor, his attorneys were performing services and incurring fees on his behalf from the start of the lawsuit (and likely for some time before that)." 2014 Ga. LEXIS 489, *40 (3(b)).

And where a contingent fee agreement is in place,"[i]f the client prevents the contingency from happening, the attorney remains entitled to reasonable attorney's fees for his services that have been rendered on behalf of the client," to be calculated by *quantum meruit*. *Id.*, *citing Ellerin & Assocs. v. Brawley*, 263 Ga. App. 860 (2003) (internal quotations omitted).

The Court also noted that "[t]his conclusion accords with the common sense understanding that attorneys are accruing reasonable fees as they work on a case; they simply are not entitled to collect the amount of fees agreed to under a contingency fee contract from their client until the conditions of the contract have been met." *Id.* at *40.

The Supreme Court also admonished that "Couch's approach ... gives no import to the time limitation set forth in § 9-11-68(b) and ... places determinative weight on the existence of a contingency fee agreement in the calculation of the reasonable attorney fees due under the offer-of-settlement statute." The Court explained that this was an unreasonable interpretation of O.C.G.A. § 9-11-68 and would be unfair to defendants:

> Under [Couch's] view, where a contingency fee contract entitled an attorney to payment from his client at the time the judgment was entered (rather than some time thereafter), then based entirely on the existence of that contract between the plaintiff and his lawyer, a defendant would be required to pay for 100 percent of the services provided by the lawyer on the matter, even if the lawyer worked intensively for many years on the case before a settlement offer was made and rejected and comparatively little between the time the offer was rejected and a higher judgment was entered, and even though the reasonable value of the lawyer's services could not be determined based on the contingency contract. We do not believe the statute bears this interpretation.

Justice Nahmias went a bit further, taking a moment to note the factual and legal deficiencies in Couch's argument (which had been accepted by the trial court and the Court of Appeals):

> Ironically, the analysis that Couch endorses actually would result in no attorney fees being awarded under § 9-11-68(b) in this and other contingency fee cases where the agreement provides that the lawyers are entitled to payment only after a final judgment has been entered. This is because § 9-11-68(b) authorizes an award only of fees incurred "through the entry of judgment" at trial, not right afterwards and not after appeal — which, according to the trial court, was the trigger point for the contingency agreement between Couch and his lawyers.
>
> *Id.* at *41-42.

The Supreme Court's opinion clearly established that if a plaintiff has agreed with his counsel to a contingent free arrangement that will not permit the plaintiff to circumvent the time requirement of O.C.G.A. § 9-11-68. Rather, whether the offeror is a plaintiff or a defendant, the recovery of attorney's fees after rejection of a statutory offer of settlement and a later, qualifying judgment in the offeror's favor will only include those attorney's fees and litigation expenses reasonably incurred *after* rejection of the offer. ❖

Martin A. Levinson is a partner in the Atlanta office of Hawkins Parnell Thackston & Young. He chairs the GDLA Premises Liability Substantive Law Committee.

GDLA Wins Second Prize in MBLC Cook-off

The Multi-Bar Leadership Council (MBLC) held its Second Annual Taste of MBLC Diversity Celebration & Cook-Off competition on Saturday afternoon, April 26, 2014, at Grant Park in Atlanta.

The GDLA debuted as a competitor this year, so we were thrilled to take home second prize in the entrée category.

Kudos goes to our chef Lara Percifield of Mabry & McClelland in Atlanta. She and her husband, Paul Thompson, created carne adovada tacos; the delectable, from-scratch dish featured New Mexico red chile braised pork, cabbage radish slaw, crema, and even fresh tortillas that they made on the spot using a camp stove.

Our chefs were ably supported by Jennifer M. Guerra of Gray Rust St. Amand Moffett & Brieske, Atlanta, and Sarah M. Phaff of Constangy Brooks & Smith, Macon, who helped with plating, setup, cleanup and more.

Competitor bar associations were judged in three categories — appetizers, entrées and desserts — with first and second prizes being awarded. These real life judges channeled their inner celebrity food critic to judge the culinary creations: Gwinnett State Court Judge John F. Doran, Jr.; Fulton State Court Judge Susan E. Edlein; Court of Appeals Judge Christopher J. McFadden; Fulton State Court Judge Jane Morrison; DeKalb State Court Judge Alvin T. Wong; and Atlanta Municipal Court Judge Christopher E. Ward.

The GDLA was edged out in the entrée category by the Stonewall Bar's scallop and yellow tail ceviche with pineapple, peppers and red onion. The South Asian Bar Association of Georgia took first place in the appetizer category for its bhelpuri, an Indian street food made with puffed rice and chickpea noodles. The Georgia Association of Black Women Attorneys placed second with its curried crab cake with mango salsa and mini-stuffed mushrooms appetizer. The dessert category winner was Gate City with tiramisu; the Georgia Asian Pacific American Bar's forbidden rice pudding with cinnamon rose infusion took second place.

GDLA chef Lara Percifield and her husband, Paul Thompson, alongside Jennifer Guerra, show off our second place trophy and flash a "V" for victory! 2. Scoring the dishes were Judges John Doran, Susan Edlein, Chris McFadden and Jane Morrison; 3. Sarah Phaff helps Lara Percifield plate her creation; 4. The GDLA's award-winning dish. Next stop, MasterChef!

Additionally, there was an award for best representation of the competition theme "Around Atlanta, Around the World." The Stonewall Bar took the prize there.

GDLA member Greg Presmanes of Bovis Kyle Burch & Medlin in Atlanta, and his band FOG (Friends of Greg) added good music to the mix of good food, making it a great day of family fun.

The success of the event was due in large part to MBLC officer and event chair Shatorree Bates, and her hard-working MBLC member-volunteers: Adriana Sola Capifali, Ana Martinez, Dawn Jones, Mariana Pannell, Robert Lewis, Shiriki Cavitt and Xavier Carter. Event sponsors were Alston & Bird, King & Spalding and 108B Catering.

The MBLC was created in 2001 by then-Atlanta Bar Association President Seth Kirschenbaum to foster and improve relationships among local bar association members. Certainly the cook-off fulfilled that mission by adding a competitive spirit to the camaraderie!

Including the GDLA, MBLC member organizations are: Atlanta Bar Association, DeKalb Bar Association, DeKalb Lawyers Association, Gate City Bar Association, Georgia Asian Pacific American Bar Association, Georgia Association for Women Lawyers, Georgia Association of Black Women Attorneys, Georgia Hispanic Bar Association, Gwinnett County Bar Association, North Fulton Bar Association, Sandy Springs Bar Association, South Asian Bar Association of Georgia, State Bar of Georgia Diversity Program, State Bar of Georgia Young Lawyers Division and Stonewall Bar Association. ❖

CLE: An Insider's View on Appellate Advocacy

The GDLA was pleased and honored to welcome Justice Keith R. Blackwell of the Supreme Court of Georgia and Judges Elizabeth L. (Lisa) Branch and Stephen Louis Dillard to its Appellate Advocacy CLE seminar on April 15, 2014.

The CLE was presented to a live audience at State Bar Headquarters and simulcast to audiences in Tifton and Savannah. (Our special thanks to those who endured rescheduling from the original date in January 2014, which had to be cancelled due to "Snowmageddon.")

Justice Blackwell kicked off the seminar with pointers on written and oral advocacy before the court. He urged lawyers to write and argue in plain English, using conversational language and reference to parties by name, rather than their role in the case. With regard to the law, he reminded members to be lawyers to be cognizant of the distinction between the holding of a case; the explanation of the holding, and the dicta — and when and how the Court is bound by precedent.

Near the end of the day he joined a comment made by Judge Dillard to let counsel know that "95 percent of briefs could be better if they were shorter."

Judge Branch addressed professionalism, reminding members that their reputation is the equivalent of their "permanent record" and should be protected. Recalling the vetting process for her judicial appointment, she urged counsel to consider whether they are ready for an email to go out that asks simply "what do you think" about a given lawyer?

She also suggested that professionalism consists of three "Cs" — competence, conduct and courage. Competence refers to your knowledge of the facts and the law of your case, and focusing on the issues that matter. "If you have 13 enumerations of error, we start to wonder if you have any [with merit]." Conduct refers, in part, to interaction between counsel. Attorneys often think their behavior will not come to the attention of the Court of Appeals, but it often does — in deposition transcripts, briefing, or even at oral argument. Conduct may also involve something as simple as appearing professional in court — and counsel who work in business casual or even less formal offices should consider keeping a suit on the back of their office door for court appearances. With regard to Courage, she encouraged counsel to be candid with their clients, even if they are reporting bad news, and to be candid with the Court — even if it means saying "I don't know" the answer to a question and seeking leave to file a supplemental brief.

1. Judge Lisa Branch; 2. Justice Keith Blackwell; 3. Justice Blackwell talks with Paul Ivey (left) and Mark Wortham; 4. Program co-chairs Andy Treese and Katie Dod; 5. Robert Ingram, Judge Branch and Bill Allred; and 6. Judge Stephen Dillard.

Judge Dillard completed the presentation by offering tips on advocacy as well as insight into the administrative practices of the Court of Appeals, including the Court's "two term" rule. Identifying the members of your panel can be helpful in the briefing stage in that it helps to know the judicial philosophy of your audience, even though they do not change the law or facts of your case.

When it comes to briefing, Judge Dillard and his staff attorneys check each cite — so page citations are useful to save time. As to oral argument, he emphasized the importance of being prepared to have a conversation with the Court, rather than reading a script.

Judge Dillard also discussed the two-term rule, which requires both the Supreme Court of Georgia as well as the Georgia Court of Appeals to rule on their cases within two terms of docketing. Both Courts take great pride in complying with the rule, despite the particularly high caseload in the Court of Appeals. The practical impact of the rule is that as the deadline approaches, judges may not have as much time as they would like to analyze the thoughts and opinions of their colleagues, particularly if the original panel is not unanimous and the case is circulated to an additional four judges. Judge Dillard has previously responded to these situations by authoring a concurrence *dubitante*, i.e. a concurrence which may not be cited as precedential.

The seminar received rave reviews. Thanks goes to our speakers, as well as to GDLA Education Committee members and Program Co-chairs Andy Treese of Allen McCain & O'Mahony and Katie S. Dod of Freeman Mathis & Gary, both of Atlanta.

This was the first statewide simulcast CLE, and we hope to offer more in the future to reach members outside of Atlanta. We are grateful that the State Bar allows related organizations to use not only their space, but also their technology. ❖

CLE: Defending Fire Litigation Claims

Atlanta's second ice storm — this time in February — claimed yet another GDLA seminar, having it cancelled and pushed to May 8, 2014. The Product Liability Substantive Law Committee produced the seminar, "Breaking the Legs of the Product Liability 'Stool': Defending Fire Litigation Claims," in coordination with GDLA Platinum Sponsor S-E-A, Ltd.

Held at Gordon Biersch Midtown, the seminar ran from 4:00 to 5:00 p.m. and was followed by a networking happy hour.

As Chairman of the NFPA 921 Committee, S-E-A's Senior Fire Investigator Randy Watson was uniquely equipped to offer guidance on defending such claims.

He shared a detailed study of effective defense strategies in product liability fire litigation, recognizing that the success of every such defense depends on the ability to withstand a vigorous attack launched by the plaintiff. His presentation was geared toward helping attendees understand the basis for defending a plaintiff's allegations, so they are better prepared for countering that attack.

Mr. Watson likened product liability fire subrogation claims to a four-legged stool, meaning fire origin, fire cause, evidence and expert. Meanwhile, he said fire defense cases should also be built on four "legs" — alternate origin, alternate cause, spoliation of evidence and *Daubert* challenges to the expert. He went on to explain in detail how to "break those legs," forcing the stool to collapse and increasing the defense's opportunity for success using NFPA 921.

Following a very extensive presentation, Mr. Watson made himself available to attendees during the networking reception to answer specific questions emerging from the seminar or any of their pending cases.

Thanks goes to Mr. Watson and S-E-A, as well as Product Liability SLC leaders James D. (Dart) Meadows, Chair, and James L. Hollis, Vice-chair, both with Balch & Bingham in Atlanta, for their work in producing this event. ❖

Pictured above at the seminar are: (l-r) 1. Chris Anulewicz, Righton Johnson, Brooke Gram and Jim Hollis. Mr. Hollis serves as Vice-chair of the Product Liability SLC, which produced the event; 2. S-E-A's Brian Stacey, Ryan Siekmann and Randy Watson with Brian Mohs; 3. Randy Watson and GDLA Past President Steve Kyle; 4. Amer Ahmad and Shannon Schlottmann.

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- OCTOBER 1, 2014
- DECEMBER 4, 2014

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DAILY REPORT

CLE: Women in the Law Explores Different Paths, Similar Goals

On May 15, 2014, the GDLA Education Committee presented "Women in Law: Different Paths, Similar Goals," a luncheon seminar aimed at exploring the changing roles of women in the legal profession and the various paths local women attorneys have taken to achieve success.

The well-attended program, hosted at Watershed on Peachtree, not only allowed attendees to learn about business development strategies for success, but also provided attendees with an excellent networking opportunity over lunch.

Education Committee member Sarah Smith of Drew Eckl & Farnham in Atlanta served as chair for the seminar with assistance from program Vice-chairs Katie S. Dod of Freeman Mathis & Gary and Lara Percifield of Mabry McClelland, both in Atlanta.

Natalie R. Kelly, long-time Director of the State Bar of Georgia's Law Practice Management Program, opened the seminar with an hour long-presentation focusing on the many roles women attorneys play in society, effective networking tips, and the benefits of a strong mentoring relationship.

She encouraged all attendees to be active participants in their careers with written plans detailing their personal goals. Ms. Kelly insisted that a written plan must also include specific, time-sensitive steps to achieving those goals and must be revisited and revised frequently to be effective.

Ms. Kelly then led a panel of distinguished women attorneys though a discussion of each of their distinctive careers paths and the advice they had to offer other women lawyers.

The panel consisted of former defense lawyer and now Fulton County Superior Court Judge Kelly Lee Ellerbe, Karen K. Karabinos, a partner at Drew Eckl & Farnham, and Lynnette D. (Lynne) Espy-Williams, Immedi-ate Past President of the Gate City Bar Association and a member at Cozen O'Connor.

Each provided valuable insight into career options available to women attorneys and gave powerful advice on the trials and tribulations faced by women in everyday practice. They also shared the value of being involved with organizations such as the GDLA, Gate City Bar, DRI, etc.

Attendees were also encouraged to ask questions of the panel, which prompted discussion on a wide variety of topics, ranging from how to make a successful client pitch to obstacles faced by women as they pursue election to state office.

The diverse perspectives offered by each of the panelists was appreciated, as best stated by attendee Elizabeth Rose of Drew Eckl & Farnham: "As a young lawyer at the beginning of my career, I appreciated hearing about the unique challenges women face in the legal field and ways to overcome those challenges in order to succeed. Each of the panelists offered a different perspective and provided the insight they gained on how to best network and develop business as a woman attorney."

Afterward, as the seminar concluded, attendees were able to meet and continue discussion individually with the panelists and Ms. Kelly.

The Education Committee would like to thank each of the speakers not only for volunteering their time, but also for contributing such valuable insights and guidance that together made this inaugural seminar such a success! ❖

1. The turnout was great for the GDLA's inaugural women-focused CLE at Watershed on Peachtree; 2. Panelist and Fulton County Superior Court Judge Kelly Lee Ellerbe visits with Program Chair Sarah Smith; 3. State Bar Law Practice Management Program Director Natalie Thornwell opened the program and moderated the panel; 4. Panelists Karen Karabinos and 5. Lynne Espy-Williams shared personal experiences from their careers as women in the profession, realizing their paths may have been different, but the goals of success and fulfillment are shared.

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CLE: Update on Accident Investigation Technology

Technology has changed litigation, as well as accident investigation — and on June 26, 2014. GDLA Platinum Sponsor Collision Specialists, Inc. (CSI) hosted a CLE to update our members on recent advances in technology available to assist with accident investigation and reconstruction.

The happy hour seminar was held at The Ellis, and concluded with a networking reception on the second floor balcony overlooking Peachtree.

CSI's Jeffrey A. (Jeff) Kidd, a retired state trooper and the president of CSI, discussed the type of data that can be obtained from ECM and CDR modules ("black boxes") in passenger and commercial vehicles.

A key point is that there will frequently be information available that was not available to law enforcement. Only a few law enforcement agencies in Georgia (primarily in the metro Atlanta region) have the equipment necessary to download vehicle data, and even fewer of those have the manpower and resources to do so in anything but a case involving a fatality and a prosecutable crime. It is therefore important to determine what may be available and how to preserve/download it.

To this end, a fee-based online resource is available to help determine, based on a VIN search, what type of information may be available for a specific vehicle.

As part of its investigation efforts, CSI has equipment to download information from most vehicles and has developed contacts to assist with downloading others.

Mr. Kidd also reviewed steps which may be necessary to prevent inadvertent spoliation — including securing the keys to a vehicle an in extreme cases, asking a tow truck driver to drop the transmission out of a commercial vehicle before moving it from the scene.

He further discussed recent improvements in reconstruction technology — including the use of drones to take overhead photographs and video, as well as 3D laser-scanning technology to create images of scenes and vehicles, including precise measurements of crush data.

The event was presented by the GDLA Education Committee with assistance from the Auto Liability Substantive Law Committee, chaired by Ashley Rice of Waldon Adelman Castilla Hiestand & Prout in Atlanta, and the Trucking Substantive Law Committee, led by Chair John L. McKinley, Jr. of Mozley Finlayson & Loggins and Vice-chair Zach Matthews of Swift Currie McGhee & Hiers, both in Atlanta. ❖

Pictured at the networking reception after the seminar are (l-r): 1. Bo Burke and David Sawyer; 2. Zach Matthews and John McKinley; 3. Christina Jay, Sheri Bagheri and Nicole Leet; 4. Edward McAfee with CSI's Jodie Kidd and Jeff Kidd.

CLE: Trial Strategies & Tactics Lunch-and-Learn

Preparing for trial can be a daunting task. With that in mind, the GDLA Education Committee and Young Lawyers Committee jointly produced a CLE program, "Trial Strategies & Tactics," designed to alleviate some of the trepidation.

The lunch-and-learn was held on July 17, 2014, at Seasons 52 Buckhead, Atlanta. The seminar featured GDLA Past President Lynn M. Roberson of Swift Currie McGhee & Hiers in Atlanta, a seasoned defense attorney with over 30 years of experience.

Ms. Roberson has completed more than 80 jury trials and over 35 appeals. Drawing from her vast experience, she conducted a primer on preparing for trial, including strategies for defending your case and tactics for which to be on the lookout from the plaintiff's side.

While the presentation was targeted toward attorneys with less trial experience, several experienced litigators also attended and shared insights from their cases.

1. The CLE attracted a crowd 2. (l-r) Program Chair Pamela Lee, speaker and GDLA Past President Lynn Roberson, and Marcia Stewart; 3. Ben Avery and Andy Treese.

Special thanks goes not only to our speaker, but also to those who were instrumental in producing the seminar: Pamela N. Lee, Seminar Program Chair & YL Committee Chair, of Swift Currie McGhee & Hiers in Atlanta; Katie S. Dod, YL Committee Vice-chair of Freeman Mathis & Gary in Atlanta; Jason C. Logan, YL Committee Vice-chair, of Constangy Brooks & Smith in Macon; Erica L. Morton, Education Committee Chair, of Hicks Casey & Foster in Marietta; and Andy Treese, Education Committee Vice-chair, of Allen McCain & O'Mahony in Atlanta. ❖

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