Georgia Defense Lawyer©

Advancing the Civil Defense Bar©

Winter 2013

Permission to Speak Freely?

Employees' Statutory Waiver of Confidentiality in Workers' Comp Claims Affirmed by Georgia Supreme Court

By Clay Robertson
McLain & Merritt, Atlanta

For more than a year, employers/insurers, and their defense counsel in particular, have been swimming in a sea of uncertainty and misinformation with respect to their ability to communicate with treating physicians in workers' compensation claims. However, on November 5, 2012[1], the Supreme Court of Georgia unanimously reversed the Georgia Court of Appeals' 4-3 decision restricting "ex parte" communications between defense attorneys and treating physicians.[2] The Supreme Court held that Georgia law requires a claimant to permit an informal "ex parte" interview with a treating physician. In doing so, the Supreme Court specifically noted that neither O.C.G.A. § 34-9-207(a), HIPAA, nor other Georgia substantive law preclude "ex parte" communications between a treating physician and an employer.

Laura McRae sustained a work injury in February of 2006 while working at an Arby's Restaurant when she mistakenly drank lye from a cup that had been left in the break room. Arby's accepted the claim as compensable and commenced income benefits. As part of her claim for benefits, Ms. McRae signed a Board Form WC-207 authorizing the release of medical information to the employer/insurer. Ms. McRae's treating physician subsequently issued a report concluding that she had reached maximum medical improvement and had incurred a 65 percent permanent partial disability impairment rating. Upon receipt of the report, counsel for Arby's attempted to arrange a conference with the treating physician, but the physician refused to meet without Ms. McRae or her counsel present.

Pursuant to O.C.G.A. § 34-9-207(c), which authorizes the Georgia State Board of Workers' Compensation to withhold benefits or remove a hearing from the calendar as long as an employee

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DRI Honors the GDLA as Outstanding Defense Organization

The Georgia Defense Lawyers Association was honored as the recipient of the 2012 Rudolph A. Janata Award, which DRI presents annually to one outstanding state or local defense bar association that has undertaken an innovative or unique program contributing to the goals and objectives of the organized defense bar.

Pictured at right during the awards luncheon at the DRI Annual Meeting in New Orleans in October are (left to right) DRI president Mary Massaron Ross, W. Melvin Haas III, who served as GDLA President during the award-winning time period, and Executive Director Jennifer M. Davis.

In particular, DRI commended the success of the GDLA's membership drive, RecruitOne, as it served to increase the unified voice of the

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President's Message

By the time you are reading this, we will have witnessed the 57th U.S. Presidential Inauguration. As has often been the case, the 2012 election was decided by a distinct minority of Americans eligible to vote. It is difficult to understand why so many citizens care so little about participating in a process that people around the world envy and for which so many of our forebears fought and died.

One need only look back on the people of the Middle East and the risks they took to participate in the voting process once they had won the right to vote and select their leaders. The turnout in the first Iraqi free election was very close to 100 percent. The fact that our own elections turn out less than half of eligible voters speaks to our complacency about our freedoms. But it was not so long ago (in fact, within my lifetime) that some of our citizens were barred from exercising their right to vote. All the more reason to cherish one's right to vote and exercise that right whenever one can.

Look at the recent example of Malala, the young teen girl of Pakistan, who knowingly risked her life to take a stand for a girl's right to an education in a country which has historically marginalized its female citizens. I am not sure I could ever demonstrate the courage of this young girl in opposing the positions of the Taliban. The Taliban—that "organization" which was so threatened by the words of one young girl that they had to send out an assassination squad to eliminate this dire threat to their hopes of returning an entire culture to the twelfth century.

The fact that one young girl's advocacy and opposition is perceived as such a threat by the Taliban demonstrates to us all what strong and virile men make up the Taliban. (I hope my sarcasm is patent.) True warriors are not threatened or intimidated by opposing views. They do not feel the need to eliminate the opposition, but to win it over through education, persuasion, and endurance, qualities which always prevail over mindless violence.

Already we are seeing the world of sanity come to the aid of young Malala. Her own people took to the streets to protest the attack on her and support her position that girls should have the right to an education. Malala's strength has only grown though this barbaric attack on civilization. Her ideas and advocacy have received a far greater hearing because of the efforts to silence her. The Taliban's strength has been greatly diminished by its cowardly assault on this courageous young girl. In light of her struggle and near death experience, her message has become ever stronger. More and more people who were too intimidated to speak out in support of her ideas have been moved to speak out in opposition to her assault. Truth and justice truly are stronger than fear and intimidation. Non violent resistance is far more powerful than mindless violence and intimidation.

In light of the brave struggle of people like Malala, we all must cherish our hard won rights and freedoms. Perhaps it is only in the absence of a thing that we learn to appreciate the having of it. It is hard to imagine most school children in this country fighting and dying for the right to go to school. But if they were actually forbidden an education, perhaps they would appreciate it all the more.

I recall the lawyers in Pakistan taking to the streets in support of the rule of law and all of us wondering if we would have the courage to take such action should our own institutions be threatened. With luck, we will never have to find out. The only way to ensure we maintain our freedoms and rights, however, is to exercise and appreciate them.

For the defense,

Lynn M. Roberson
GDLA President
Swift Currie McGhee & Hiers

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Member & Legal News

Member News

In August, 2012, at the American Bar Association's Annual Meeting in Chicago, **Hall McKinley** began his 3-year term as a Council member of the Tort, Trial and Insurance Practice Section. TIPS is a 24,000 member section of the ABA and the 15-member Council is the board that administrates all TIPS business, diversity and CLE activities. Mr. McKinley is a GDLA Vice President.

Martin A. Levinson of Hawkins *Parnell Thackston & Young* in Atlanta was elevated to partner. He practices in the areas of premises liability, business litigation, product liability, trucking and transportation liability, and general litigation. He is Vice-chair of the GDLA Premises Liability Substantive Law Committee.

The National Bar Association (NBA) presented **Curtis J. Martin II** of *Miller & Martin* in Atlanta with the 2012 Presidential Award for his exemplary service to the legal profession. Founded in 1925, the NBA is the nation's oldest and largest association of African American lawyers and judges. Mr. Martin is a Past President of the Gate City Bar Association, an affiliate chapter of the NBA and Georgia's oldest African American bar association.

Lynette Espy-Williams of *Cozen O'Connor* in Atlanta was installed as President of the Gate City Bar Association on January 24, 2013.

Kevin C. Patrick of *Goodman McGuffey Lindsey & Johnson* of Atlanta is co-chairing the State Bar of Georgia Young Lawyers Division (YLD) Litigation Section's War Stories Lecture Series.

Owen Gleaton Egan Jones & Sweeney announces the following were listed in "Best Lawyers in America" for 2013: **H. Andrew Owen**, **Frederick N. Gleaton**, **Philippa V. Ellis** and **Roger E. Harris**. In addition, **H. Andrew Owen**; **Frederick N. Gleaton**, **Philippa V. Ellis**, and **Rolfe M. Martin** were named Georgia Super Lawyers for 2013 and **Mark Meliski**, **Melissa Reading** and **Derrick Bingham** were named as Super Lawyers Rising Stars.

Hall Booth Smith & Slover announces it has become *Hall Booth Smith*, following the departure of a name partner to a plaintiff's firm. The firm also announces **Jo A. Jagor** and **Kevin D. Abernethy** have been elevated to partner; both are resident in the Atlanta office. Ms. Jagor's practice is primarily devoted to the defense of licensed medical professionals, as well as engineers. She has also represented numerous hospitals throughout the South. She has served on the GDLA Board of Directors since 2002. Mr. Abernethy has extensive litigation experience handling civil rights claims for the City of Atlanta, large complex environmental lawsuits, corporate suits, and claims involving professional negligence. His focus is high exposure cases. In 2011, he was selected as Chairman of the State Ethics Commission, becoming the youngest in Georgia's history; he was reelected in 2012.

Balch & Bingham announces its expansion into Florida by merging with Stoneburner Berry Glocker Purcell & Greenhut and establishing an office in Jacksonville.

Bouhan Williams & Levy has merged with Inglesby Falligant Horne Courington & Chisholm to form *Bouhan + Falligant*. The firm is headquartered in the Armstrong House at 447 Bull Street in Savannah.

Cases of Note

GDLA Vice President **Peter D. Muller** of the Savannah office of *Goodman McGuffey Lindsey & Johnson* obtained a defense verdict in a slip-and-fall case in U.S. District Court in Tampa, Florida in September. The plaintiff claimed that he had fallen in a clear puddle at the entrance to a store, and that the manager had told him that someone had spilled a drink, that the store had paged someone to clean it up, and that the person had not yet done so by the time of the fall. Unfortunately, the store had closed four years before the trial, so all of the employees had been terminated, and they could not remember the specifics of the incident. The plaintiff contended that he had fallen on his knee, damaging his new partial knee replacement, causing ongoing pain, and later requiring a total knee replacement. The defense challenged the plaintiff's credibility as to the incident and causation, relying on the plaintiff's conviction, conflicts in testimony, and expert testimony on artificial joint failures. The plaintiff and his wife sought $795,000 in closing argument. The jury returned a verdict for the defendant within 25 minutes.

GDLA Vice President **Matthew G. Moffett** and GDLA Board member **Wayne S. Melnick**, partners at *Gray Rust St. Amand Moffett & Brieske* in Atlanta, won an important victory for the defense of school districts and administrators. On May 21, 2012, U.S. District Court Judge Harold W. Murphy, Jr., of the Northern District of Georgia granted summary judgment to a Georgia school district and high school principal who had been sued by the parents of a 17-year-old student who had committed suicide. The plaintiff parents had alleged that the district and the principal had been deliberately indifferent to their child and allowed him to be "bullied to death." The facts of this case received national attention when the plaintiff parents were one of the featured stories in the internationally released documentary *Bully* and they engaged in a media-driven campaign to vilify the district and the principal. In a detailed

186-page opinion, the court found that summary judgment was appropriate on plaintiffs' federal § 1983 Due Process, § 1983 Equal Protection and § 504/Americans with Disability Act claims, as well as plaintiffs' state law public nuisance claim.

Carlton E. Joyce and **John B. Manly** of *Bouhan Williams & Levy* in Savannah received a defense verdict in a medical malpractice case in Ware County State Court. Plaintiffs alleged that the defendant, an orthopedic surgeon, implanted too large a humeral head while performing total shoulder arthroplasty causing the joint to become ankylosed (frozen). The patient underwent revision surgery and the subsequent treating physician testified that the defendant should have used a 41 x 15 millimeter diameter head instead of a 48 x 18 millimeter head. The defense argued that sizing is a subjective determination and that the defendant doctor selected the head that afforded the best combination of range of motion and stability after taking into consideration the patient's anatomy. The jury, consisting of nine men and three women, deliberated for approximately two and a half hours before reaching a unanimous verdict. The defense relied on Dr. Clifford R. Wheeless, an orthopedic surgeon in Oxford, North Carolina as their expert.

Michele R. Jones and a colleague at *Carlock Copeland & Stair* in Atlanta recently obtained summary judgment in a legal malpractice case in the State Court of Chatham County, Georgia. The plaintiffs were wealthy investors who formed a LLC and helped fund the acquisition and development of three buildings in downtown Savannah. The condo conversion was initially successful but then failed during the real estate downturn in 2009. The defendant law firm closed sales of condos in the development. The plaintiffs alleged breach of fiduciary duty, aiding and abetting a breach of fiduciary duty, conversion, conspiracy, and professional negligence. They claimed damages of $1.2 million plus punitive damages and attorneys' fees. Defense counsel moved for summary judgment, arguing that even though the law firm represented the LLC that pursued the development and drafted organizational documents for one of the plaintiff investors, the firm owed no duty to the individual investor plaintiffs. The trial court agreed and granted summary judgment, holding that the defendant law firm never represented or owed any duty to the plaintiffs. The plaintiffs filed a notice of appeal. The Court of Appeals of Georgia will probably issue a decision in mid-2013.

Rick Baker of *Owen Gleaton Egan Jones & Sweeney* in Atlanta obtained a verdict for the defense for Ford Motor Company from a Cobb County State Court jury. The case involved breach of state warranty and federal Magnuson-Moss Warranty Act claims. In another unrelated case, the Georgia Court of Appeals upheld a judgment on the pleadings for Mr. Baker's client where the plaintiff failed to file his lawsuit within the statute of limitations and alleged the statute was stayed as a result of fraudulent misrepresentations.

Michael G. Frick, along with his partner, **Beth Boone**, of *Hall Booth Smith* in Brunswick received a defense verdict in a case in Chatham County. Defense counsel represented a general ophthalmologist and her practice group accused of failing to start a patient on steroids and diagnose the patient with temporal arteritis. Two defendant physicians either settled or were dismissed by the plaintiffs prior to trial. Mr. Frick was able to show the jury that the presentation by the plaintiff was atypical for this disease, that the defendant ophthalmologist did not have sufficient information on which to make this diagnosis, and that the defendant ophthalmologist was within the standard of care in her care and treatment of this patient. Plaintiffs asked the jury for $9 million at closing for compensation for the Plaintiff's loss of vision and Plaintiff's wife's loss of consortium claim. The jury deliberated for over 12 hours and returned a defense verdict on all counts. ❖

GDLA Participates in Fulton County Mass Swearing-In

On December 7, 2012, the GDLA participated in the mass swearing-in ceremony for those newly admitted to the bar. Each time Fulton County hosts this event at the Government Center, the GDLA is invited along with other voluntary bar associations to address the group and provide a brief overview of their respective organizations. This time, GDLA Board member and Education Committee Chair Wayne Melnick (photo right) delivered remarks on behalf of the association. Judge Robert McBurney emceed the event, offering words of wisdom and administering the oath. Bjarne Tellman, Associate General Counsel with Coca-Cola Co.'s Bottling Investment Group also offered advice to the freshly minted lawyers. A brunch reception followed the ceremony. ❖

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Welcome New GDLA Members

The following were admitted to membership in the GDLA at the Board of Directors' Fall Meeting.

David M. Abercrombie
Goodman McGuffey Lindsey & Johnson, Atlanta

Jessica A. Davis
Brennan Harris & Rominger, Savannah

Matthew Ericksen
Gray Rust St. Amand Moffett & Brieske, Atlanta

T. Lawrence Evans
Oliver Maner, Savannah

James Cullen Evans
Hawkins Parnell Thackston & Young, Atlanta

Christopher B. Freeman
Carlton Fields, Atlanta

Elizabeth Gearhart
Drew Eckl & Farnham, Atlanta

Stephanie F. Glickauf
Goodman McGuffey Lindsey & Johnson, Atlanta

Parker M. Green
Rutherford & Christie, Atlanta

Heather Hammonds
Hunter Maclean, Savannah

Jennifer R. Harbaugh
Weinberg Wheeler Hudgins Gunn & Dial, Atlanta

Jeffrey E. Hickcox
McLain & Merritt, Atlanta

Daniel C. Hoffman
Young Thagard Hoffman Smith Lawrence & Shenton, Valdosta

Sean L. Hynes
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Andrea Neculae
Magill Atkinson Dermer, Atlanta

David A. Olson
Drew Eckl & Farnham, Atlanta

Steven D. Prelutsky
Hall Booth Smith, Atlanta

April A. Robinson
Drew Eckl & Farnham, Atlanta

Joshua S. Ruplin
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Megan Michelle Sheller
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Charles A. Shenton, IV
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J. Holder Smith, Jr.
Young Thagard Hoffman Smith Lawrence & Shenton, Valdosta

Mariel Williams
Hall Booth Smith, Columbus

Joshua S. Wood
Weinberg Wheeler Hudgins Gunn & Dial, Atlanta

DRI Honors the GDLA

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defense bar in Georgia by expanding the GDLA membership by 10 percent. The campaign was developed by Membership Committee Co-chairs James D. "Dart" Meadows of Balch & Bingham in Atlanta and Christopher E. Parker of Miller & Martin in Atlanta with inspiration from the *Atlanta Business Chronicle's* successful challenge to metro businesses to "Hire One" new employee. RecruitOne encouraged every GDLA member to recruit at least one new member. The campaign, which ran for six months, resulted in three times the average number of membership applications received during that period. Serving as a national model, RecruitOne programs have since been launched by the civil defense bar associations in Colorado, Ohio and Texas; and North Carolina is now exploring it for their state.

The GDLA's award application also noted the expansion of civil defense focused CLE programming under the leadership of Education Committee Chair and Board of Directors member Wayne S. Melnick of Gray Rust St. Amand Moffett & Brieske in Atlanta and Vice-chair Brett Miller of Mabry & McClelland in Atlanta.

Also noted was the robust amicus program, led by Amicus Committee Co-chairs Robert R. "Rusty" Gunn II of Martin Snow in Macon and Jeffrey S. Ward of Drew Eckl & Farnham in Brunswick.

Finally, this newsletter, *Georgia Defense Lawyer*, was commended for winning the State Bar of Georgia's "Best Newsletter" award for the second consecutive year. Evelyn Fletcher Davis of Hawkins Parnell Thackston & Young in Atlanta served as newsletter editor during that period.

In celebration of the award, the GDLA ran announcement ads in the *Daily Report*, both online and in print. In addition, the *Daily Report* reported on the award in its "In The Trenches" column on November 7, 2012, and the *Atlanta Business Chronicle* included an article and photo in the November 9-15, 2012, edition. ❖

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Obstructive Sleep Apnea: Concerning and Costly

By Mitchell A. Garber, MD, M.P.H., MSME, *Engineering Systems Inc.*

In June 1995, while transiting Alaska's Inside Passage, a cruise ship ran aground of a well-known, charted, and marked submerged rock. No injuries or deaths resulted from the accident, but the repairs and the delay before the vessel could return to service cost the cruise line approximately $27 million.

In July 2000, a tractor-trailer traveling at 65 miles per hour approached a worksite in Jackson, Tennessee and struck a highway patrol vehicle. The patrol car was stopped with its lights flashing. Upon impact, it exploded, caught fire, and was pushed nearly 200 feet. The state trooper inside the patrol car was killed, and the driver of a second vehicle was seriously injured.

In November 2001, a southbound train traveling at 13 m.p.h. from a siding in Clarkston, Michigan proceeded through a stop indication onto a single main track and struck a train traveling northbound at 30 m.p.h. Both crewmembers of the northbound train were killed; the two crewmembers of the southbound train sustained serious injuries. The total cost of the accident was approximately $1.4 million.

In February 2008, an airline flight departed Honolulu on a flight to Hilo, Hawaii. About halfway through the flight, the pilots stopped responding to air traffic control communications. The pilots then passed over Hilo and traveled 26 nautical miles off course over the ocean before resuming radio communications and returning to their destination.

In May 2008, a Green Line transit train traveling at 38 m.p.h. in Newton, Massachusetts struck the rear of another Green Line train, which had stopped at a red signal. The operator of the striking train was killed; one passenger was seriously injured. Three crewmembers and four of the 185 to 200 passengers sustained minor injuries. The total damage was estimated at approximately $8.6 million.

The National Transportation Safety Board (NTSB) is the federal agency charged with investigating transportation accidents and incidents in the United States. In each of the incidents described above, the NTSB concluded that one or more of the vehicle operators was at risk for or had obstructive sleep apnea (OSA), and that the condition may have played a role in the accident. This article describes OSA, how it is diagnosed and treated, risk factors for the disease, clinical and public risks from untreated OSA, and what is currently being done to address these risks, particularly in the transportation industry.

Obstructive sleep apnea occurs when a sleeping person actually stops breathing because their own throat tissue causes a mechanical obstruction of their airway. The affected individual does not get enough oxygen and must partially awaken in order to breathe again. The individual frequently experiences extreme daytime sleepiness, and may fall asleep within minutes in a quiet or monotonous environment. Bear in mind that people typically do not know that they have this condition; individuals who have had the disorder for a long time are usually unaware that this sleepiness is abnormal.

Obstructive sleep apnea is diagnosed through a polysomnogram or sleep study, a clinical procedure which involves monitoring the sleeping patient under controlled conditions. One of the critical assessments in these studies is referred to as the "respiratory disturbance index" or "apnea/hypopnea index," which measures the number of times per hour that the individual shows disturbances in breathing. Though definitions vary extensively, most clinicians consider a patient to have disordered breathing if they experience more than 10 disturbances per hour. In the transportation incidents described above,

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"A New Day In Court"

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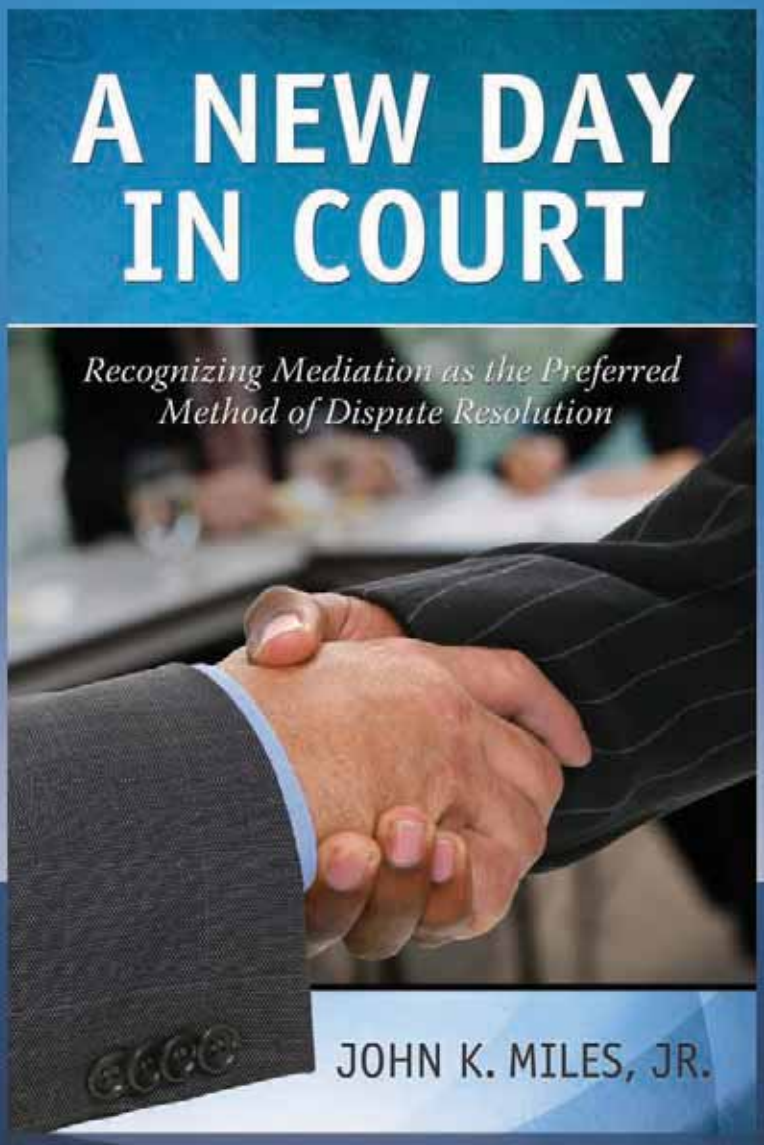

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Risks and Rewards of Going Digital

By Dirk van Rees and Dan Codman
Courtroom Visuals

Good communication is obviously extremely important in the courtroom. Before the digital age, the savvy attorney would bring a blank flip chart into court and write important points down as they made their arguments. This method was quite effective. It is well known that we learn better when seeing in addition to hearing. It is also the way that many of us learned in school. Our teachers stood in front of a blackboard scribbling away as they spoke. This method has many limitations but it worked quite well because attention was focused on what was being said while the point was illustrated at the same time.

A Bit of History

Enter the digital era. Our company began by designing specific exhibits on the computer, which we then printed out and glued to foam core boards. The exhibit was created in a digital format but the final product was not digital—simply ink on paper. Today, printed timelines are now giving way to digital interactive timelines with embedded media including documents, photos and video.

We also started in this industry making scale models, which we still build today. Increasingly though, we are creating digital models. These types of models have the benefit of motion and various viewing angles, including a driver's view inside a vehicle, views inside a building, top down views, views from which experts took photographs. The options are limitless. Digital models can be sophisticated 3-D animations or simple interactive 2-D diagrams.

Site plans used to be colorized versions of blue prints designed to be easier to understand. Printed on metallic paper, they allowed for magnetic objects to be attached to the diagram and manipulated. Today, we have interactive site plans which are like a website home page; you navigate to various other screens containing supporting documentation, photos, videos or even animated tutorials. These types of presentations are designed to be turn-key and easy to operate requiring no special software or training.

When to Go Digital?

When does it make sense to go digital? In the past, if you had a large quantity of videos, photographs and documents it made economic sense to digitize all of your material. There is more than economics at stake here now. You need to consider your audience expectations. Today, we are exposed to technology in the classroom and workplace. Smartphones, social media and entertainment are all driven by digital technology. The expectation in the courtroom is the same. We know that interest level increases as technology is implemented, as do retention and comprehension. Speed and efficiency is greater, and your level of organization and credibility are enhanced through the proper use of digital technology.

What should you consider when planning your presentation? Do you have a budget sufficient to hire an outside vendor or will you develop your own? Do you have sufficient time and skill to develop a presentation? Are you facing a bench trial, jury trial or maybe mediation? Each should be approached differently. Will you need an operator or can you operate the presentation yourself as you argue your case? Is there equipment available at your venue or will you need to bring your own? Will the existing equipment meet your needs? Is the layout optimal or can you make small adjustments to increase the effectiveness of the digital experience? Will lighting be a factor? Is opposing council using technology? Consider the type of equipment you use based on your particular needs.

Past Mistakes

The biggest drawback of going digital is that inevitably, at some point, something will malfunction. The reliability of technology has increased dramatically over the years; however, there are still some inherent risks. One thing we like to advocate is to know, as best you can, your venue ahead of time. Some counties, such as Fulton and DeKalb, require that you have a Rule 22 signed by the judge before you can bring any audio/visual equipment into court. Gwinnett County actually has mobile presentation carts available for use, free of charge, but you have to reserve them ahead of time. Fulton County has presentation screens in the courtroom, but they are undersized and inconveniently placed so the juror could not possibly see what you are presenting. Many of the DeKalb County courtrooms are

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equipped, but we had an experience there once where no one knew how to operate the projector, rendering it useless! Fortunately, we had brought our own equipment as back-up so we were able to set it up at the last minute. Finally, we were at a mediation when the power supply to our laptop literally went up in smoke. Fortunately, we had a back-up power supply that we could use. These are just some of the types of issues that you could encounter.

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The Physiological Effects of 60 Hz Electric Shocks

By James F. Brennan III, PhD
Exponent

The muscles in your body are controlled by electrical signals and the heart, being a muscle, is also dependent on electrical signals. The heart functions by a carefully controlled flow of electricity through the heart muscle. Cardiac muscle cells contract when an electrical signal triggers them. The cells within the heart atria and within the heart ventricles are electrically connected. When one area of the heart muscle is stimulated, this electrical signal is sent to neighboring cells, which also contract, and then send an electrical signal to their neighboring cells.

In a properly functioning heart, the electrical signal to contract starts at the sinoatrial (SA) node at the upper part of the right atrium. The electrical signal is sent down the atria, which contract, and is then delayed momentarily at the atrioventricular (AV) node before passing into the ventricles, which contract to eject blood into the pulmonary artery and aorta. The timing and direction of the electrical signal flow throughout the heart muscle is critical for the heart to function properly. If the electrical triggering of a portion of the heart is improperly timed, the heart muscle may not contract in a controlled manner, causing the heart to quiver as electrical signals randomly propagate throughout the heart. This condition, called ventricular fibrillation, is almost always fatal unless corrected rapidly by re-polarizing the entire heart muscle with a defibrillator.

Electrical shock occurs when a person's body completes the current path in an energized electrical circuit. When there is a voltage difference from one part of the body to another, current will flow. The effects of an electrical shock can vary from none to a slight tingle or to immediate cardiac arrest. The potential severity of the shock depends on several factors such as the electrical resistance of the body and the voltage across the two points contacted, which will determine the amount of current that will flow through the body. The path that the current takes through the body is also very important in determining the potential severity of the electrical shock. Current flow across a finger will have different physiological ramifications than current flow across the heart. Electrocution, which is defined as death by electricity, is usually caused by current flow disturbing heart functionality.

Table 1. Estimated Effects of 60 Hz AC Currents

Current Magnitude	Physiological Effect
1 mA	Barely perceptible
16 mA	Maximum current an average man can grasp and "let go"
~20 mA	Respiratory Paralysis (may be fatal)
~100 mA	Ventricular Fibrillation Threshold (VF most likely fatal)

For a given pathway in the body, the magnitude of the electrical current, measured in units called Amperes (A), is the most important variable which determines the severity of an electrical shock. The magnitude of electrical current is determined by the voltage across the contacted points in the circuit and the resistance of the pathway through which the current flows. There are many resources detailing the effects of electrical shock and at what magnitude these effects occur, which vary somewhat from study to study.

Table 1 illustrates the magnitude and effect of 60-Hertz (Hz) alternating current (AC) determined by the National Institute for Occupational Health and Safety in their publication "Worker Death by Electrocution" (Publication No. 98-131) for the chest pathway.

A voltage which produces only a mild tingling sensation under one circumstance can produce a lethal shock under other conditions. Many people are familiar with Ohm's Law, i.e., $V = I \cdot R$. When a body completes an ideal circuit by connecting two points at different voltages V, the resistance R of the body between these two points will determine the magnitude of the current flow I. The resistance depends on the amount and type of body tissue in the current path.

Electrical resistance varies widely within the human body for bone, fluids and various tissues. The minimum resistance, given in IEC Standard 60479-1, between hand-to-hand for the most conductive 5 percent of the population is about ~900 Ohms at a 120 V potential, which would allow ~130 milliamperes (mA) of current to flow. Actual currents are not usually this high because the skin increases the overall resistance of the current path.

Tests conducted on human volunteers and cadavers found that resistance depends on the applied voltage, e.g., at 25 V, resistance was

Continued on page 47



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Anyone Can Give An Opinion, Not All Should

By Douglas R. Morr, M.S., P.E.
S-E-A Ltd.

The Daubert era has made expert witnesses the target of many legal arguments and tactics. It is on the shoulders of the experts to ensure that their investigation, analysis, and testimony meet not only the scientific scrutiny of their peers, but also the admissibility requirements of the courts.

It is a dangerous game to issue reports with opinions that "help" one side's cause at the time they are issued, if those opinions will not hold up to the legal scrutiny that can follow. This may require some additional investigation and/or analysis time up front, but having such a sound scientific approach to every case protects both the expert witness and their clients from the potential attacks that may come later in a case. The days of "It is so because I say so" are long gone. Legally referred to as "ipse dixit,"providing opinion testimony without a sound scientific basis beyond "my experience" has been ruled inadmissible in many courts.

A Supreme Court Opinion from Texas (Case No. 09-0224) on June 18, 2010, highlights the danger of experts issuing reports or providing testimony that does not meet these fundamental principles of scientific inquiry. In this case, the Court reversed an appellate court's judgment and brought an end to wrongful death and survival claims against the defendants. This case stemmed from a fatal dwelling fire at a rental residence. During their investigation, the police found a badly burned recliner, a damaged pole-style floor lamp, and other furniture covered in soot and smoke in the living room. Also identified in this room were candles, melted wax, and an ashtray on the table next to the recliner. Throughout the rest of the house smoking paraphernalia, ashtrays, a marijuana pipe, and marijuana cigarette butts were found. The police documented this entire scene with just two photographs. The fire marshal declared the fire accidental and of unknown origin. The property owner discarded the burnt household items after the authorities concluded their investigation.

The parents of one of the decedents filed a civil suit alleging that the pole-style floor lamp found next to the recliner, allegedly a halogen lamp purchased from the defendants, caused the fire. The plaintiff's expert attributed the fire to "nonpassive failure" of the lamp, igniting the recliner below. It was his opinion that the halogen bulb exploded, sending burning shards of glass onto the recliner. He ruled out smoking materials as the cause because none were found in the immediate "area of origin." He also ruled out the candles as the cause because there would not have been wax remaining. In the end, the nonpassive failure of the lamp was "consistent with the facts of this case and . . . wholly consistent with our knowledge of fire science."

The defendant's expert testified that "the more likely cause of the fire was careless disposal of smoking materials." The defendant moved for summary judgment asserting that there was no evidence of any element of the plaintiff's causes of action, no evidence that the lamp was a halogen lamp, and no evidence it was purchased from the defendant. The trial court overruled the defendant's objections and admitted the plaintiff's expert testimony, but granted the

defendant's Motion for Summary Judgment. On appeal, the Texas Court of Appeals reversed the trial court's decision, and the defendants then sought Supreme Court review.

The defendant contended that the plaintiff's expert testimony constituted no evidence of defect or causation because his opinion lacked factual substantiation and was therefore conclusory. They also contended that his testimony constituted no evidence that the lamp was more likely to have caused the fire than any other obvious potential sources.

The Court found that the plaintiff's expert did not say why a burning cigarette could not have caused the fire. He also failed to address how he ruled out smoking materials on the basis of not having found evidence of burnt cigarettes in the "area of origin," when there was likewise no evidence of charred or exploded glass anywhere in the house to support his theory. The Court opined, "An expert's failure to explain or adequately disprove alternative theories of causation makes his or her own theory speculative and conclusory." Further, they opined that establishing a general foundation for a theory does not establish it as a fact for a specific event and results in "little more than speculation." In the end they found that the plaintiff's expert "may be qualified in fire research, but his testimony in this case lacks objective evidence-based support for its conclusions." They further found,"A claim will not stand or fall on the mere ipse dixit of a credentialed witness."

At the upper echelon of forensic engineering firms, a significant amount of time is spent training each investigator or engineer about the requirements of providing opinions in reports and in testimony. When an investigator or engineer from one of these firms puts forth a written report, or provides testimony in litigation matters, they already have ensured that they have applied an evidence-based investigation and analysis through the use of the scientific method and are not simply opining based upon mere ipse dixit. ❖

Douglas R. Morr, M.S., P.E., leads S-E-A's Biomechanical Practice Group in conducting investigations, analyses, and research relative to injury mechanisms and injury causation. During his tenure at S-E-A, Doug has conducted hundreds of accident investigations and reconstruction analyses and has provided testimony in state and federal courts. Capitalizing on his design, testing, ergonomics, and workplace safety background, Mr. Morr also oversees the biomechanics research and testing programs at S-E-A's Research Center including specifically the Roll Simulator, Minor Impact Simulator and Drop Tower. Mr. Morr has been the principal investigator on multiple Roll Simulator projects with both private and public entities including testing of occupant response and protection in ROVs during real-world rollover events.

Appellate Case Law Update

By Mark W. Wortham
Chair, Appellate SLC
Hall Booth Smith, Atlanta

JURISDICTION AND FINAL JUDGMENT: An award of attorney's fees under O.C.G.A. § 13-6-11 is considered a part of the underlying case, and where the judgment reserves the amount to be awarded, it is not a final order for purposes of a direct appeal. In contrast, attorney's fees awarded under O.C.G.A. § 9-15-14 may be considered ancillary and post-judgment for the purpose of determining whether a judgment is interlocutory or final.

***Scotter v. Stephens*, 291 Ga. 79 (2012)**

Robert White executed a deed of gift naming his wife Florence as trustee of the children of he and his wife. Florence died intestate and Call was appointed successor administrator of the estate. She filed suit requesting to be appointed successor trustee, that she be given the authority to sell the real property of the trust, free of all claims that some of the children had and that she recover attorney's fees from one of the children, Maria.

In a May 2008 order the trial court granted the relief requested and also found Maria had been stubbornly litigious, ordering her to pay attorney's fees, with the amount to be determined later. One of the children filed a notice of appeal of this order, which was later dismissed by the Supreme Court. Approximately three years later in June 2011, the court entered an order granting attorney's fees to Call against Maria. Two children filed notices of appeal of that order and sought to appeal the earlier order as well.

Upon motion by Call, in September 2011, the trial court dismissed the appeals and entered an order preventing the defendants from filing any further documents without prior written permission from the court. Two of the children requested permission to appeal the order dismissing their appeals which was denied. The children then filed a writ of mandamus to allow them to appeal the order dismissing their appeals. Another judge heard the writ and denied it.

In its analysis the Court noted the case involves multiple claims and multiple parties and that under O.C.G.A. § 9-11-54(b) a trial court may direct entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. The Court also noted the May 2008 order was unresolved. As there were one or more claims that remained pending, that order was not final.

The Court then found the unresolved final accounting was sufficient by itself to make the May 2008 order interlocutory and then distinguished attorney's fees awarded under O.C.G.A § 9-11-54 and § 13-6-11. The Court held attorney's fees under Title 13 are considered a part of the underlying case and where the judgment reserves the issue of fees, the order cannot be a final order for purpose of a direct appeal. However, the June 2011 order was final and the defendant children could appeal that order.

As the trial court dismissed those appeals and then barred the defendants from judicial review, the mandamus petition should have been granted and the trial court was directed to give the defendants permission to file an appeal of the order denying their request to file an appeal. All other orders complained of could then be reviewed under O.C.G.A. § 5-6-34(d).

JURISDICTION AND FINAL JUDGMENT: Make sure you know whether the order or judgment is final and subject to a direct appeal or subject to an interlocutory or discretionary appeal.

***Mays v. Rancine-Kinchen*, 291 Ga. 283 (2012); *West Hamryka v. City of Dawsonville*, 291 Ga. 124 (2012); and *Patel v. Epps*, 317 Ga.App 214, 731 S.E.2d 62, (2012).**

In the above cases, the importance of knowing the status of the order or judgment is critical, as the first question the appellate courts ask is whether they have jurisdiction. In *Mays v. Rancine-Kinchen*, *supra*, Mays, the executor of an estate, appealed an order from the probate court dismissing two counts raised by the widow's caveat, but leaving three counts pending. On jurisdictional grounds the probate court then transferred the issue regarding a trust to the superior court. The Court interpreted O.C.G.A. § 5-6-34(a)(9), which states in pertinent part that direct appeals are authorized from "all judgments or orders sustaining motions to dismiss a caveat to the probate of a will." Noting the probate court's order did not fully resolve the caveat, the Court found that similar orders, which reserve ruling on substantive issues in a case, have been determined to be interlocutory in nature. As such, a direct appeal could not be had and the appropriate procedure would be to follow the procedures set forth in O.C.G.A. § 5-6-34(b).

In *West Hamryka, supra,* the Court dismissed the plaintiffs' appeal from the grant of partial summary judgment to the defendant city on three of nine counts in the complaint that involved the city's approval of a rezoning request. Note the Court was confused as to whether it had jurisdiction, having initially dismissed the appeal for a failure to follow the discretionary appeal procedures in O.C.G.A. § 5-6-35. The Court reinstated the appeal granting plaintiffs' motion for recon-

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sideration and then found that the appeal was a discretionary appeal and again dismissed the case.

In *Patel, supra,* the Court of Appeals dismissed Patel's direct appeal for lack of jurisdiction. The court held that under the Auditors Statute, found at O.C.G.A. § 9-7-1, *et seq.,* she was required to follow the discretionary appeals procedure in O.C.G.A. § 5-6-35 (a)(1). In its published ruling on the motion for reconsideration, the Court noted that the discretionary appeal procedure required by O.C.G.A. § 5-6-35 (a)(1) does not apply where, in contrast to the present case, the special master is appointed pursuant to Uniform Superior Court Rule 46.

DISMISSAL OF APPEAL: The trial court correctly dismissed the defendant's appeal as it did not abuse its discretion in finding that a 55-day delay was inexcusable.

***McAlister v. Abam-Samson*, ____ Ga.App. ____, (A12A0862, 10/12/12)**

McAlister filed a notice of appeal on February 17, 2011 that directed the clerk of court to file a transcript of evidence and proceedings in the record on appeal, and noted that the parties would be responsible for filing their own record. In August 2011, an intervenor in the case filed a motion to dismiss McAlister's appeal due to a failure to file the record index. At the hearing on the motion, McAlister's counsel testified that he spoke to the clerk's office and was advised they would send everything to the Court of Appeals; that he received and made payment on a bill from the clerk's office; and that he was under the assumption that when the clerk said they sent everything over that everything had been sent.

In his appeal, McAlister argued in part that O.C.G.A. § 5-6-48(c) does not contemplate a failure to transmit the record index. The Court of Appeals began its analysis by noting the record appendix is a judicially sanctioned method of transmitting the documents relevant and necessary to the appeal. He further argued there was a conflict between the Supreme Court Rules 67 and 69, which were adopted by the Court of Appeals, and O.C.G.A. §§ 5-6-43 and 5-6-48(c). And, alternatively, McAlister argued that even if there was no conflict, the delay of 55 days was not unreasonable nor inexcusable.

In its holding, the Court found the appellate court rules were not inconsistent with the above statutes. And in its analysis of the question of delay the Court found a delay in the transmission of the record appendix to be approximately two months. The Court found if McAlister had transmitted the record appendix within two months of the filing of the transcript with the Court of Appeals, the case could have been docketed in Court's September term. The delay placed the appeal in the next term. Having previously held that a delay of more than 30 days in filing a transcript is prima facie unreasonable and inexcusable, but subject to rebuttal, the Court found that the failure to follow up with the clerk of court regarding the filing of the record was not rebutted and therefore inexcusable.

DUTY OF THE COURT OF APPEALS ON REMAND WITH DIRECTION FROM THE SUPREME COURT: Where the Supreme Court reverses a portion of the decision of the Court of Appeals, the Court of Appeals must determine whether the portion of its decision that was not reversed is consistent with the Supreme Court's decision.

***Mayor & Aldermen of the City of Savannah v. Batson-Cook*, ____Ga.App. ____, (A11A0768, 08/29/2012).**

In a case involving a dispute over the construction of an underground parking garage, the Supreme Court reversed a portion of the Court of Appeals' opinion, holding that the Court of Appeals erred in applying the abuse of discretion standard of review when it affirmed the trial court's denial of the City's motion to recuse the judge. The Supreme Court held that the trial judge should have assigned the motion to recuse to another judge and directed the Court of Appeals to remand the case to the trial court for disposition by another judge. When the Supreme Court only addresses one division of the Court of Appeals' opinion the Court must: (1) read the Supreme Court's opinion within the context of the opinion being reversed; (2) determine whether any portions of the opinion being reversed were neither addressed nor considered by the Supreme Court; and (3) enter an appropriate disposition with regard to those portions that are consistent with the issues addressed and considered by the Court of Appeals.

JURY SELECTION: A civil litigant, who appeals a trial court's refusal to excuse an allegedly unqualified juror, does not have to show that he or she used all of her peremptory strikes as a prerequisite to proving the harm required to establish error.

***Stolte v. Fagan,* 291 Ga. 477 (2012)**

Plaintiff contended the trial court erred in refusing to strike four jurors for cause. She asserted the four jurors were predisposed in favor of medical professionals and against malpractice plaintiffs. The Court of Appeals found the plaintiff failed to prove the trial court's refusal to strike four allegedly biased jurors caused her harm. The Supreme Court reversed, holding that the Court of Appeals erred in concluding the plaintiff could not prove she was harmed by the trial court's refusal to strike the four jurors, because she did not show that she had been forced to exhaust her peremptory strikes. The Court held that the rule adopted in criminal cases more than 25 years ago, that does not require the exhaustion of peremptory strikes as a condition of establishing harm, should also apply in civil cases. The Court stated it could not discern any sound reason for limiting the scope of the rule to criminal cases. ❖

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Employment Case Law Update

By David A. Cole
Chair, Employment SLC
Freeman Mathis & Gary, Atlanta

NLRA: Licensed Practical Nurses Can Be Supervisors Not Covered by the Act

***Lakeland Health Care Associates, LLC v. N.L.R.B.*, 696 F.3d 1332 (11th Cir. 2012)**

Lakeland Health Care, a nursing and long-term care facility, refused to bargain with the United Food and Commercial Workers Union (UFCW) following a certification effort by the union to organize Lakeland's licensed practical nurses (LPN). The UFCW petitioned the NLRB seeking a representation election, and Lakeland opposed the petition on the grounds that the LPNs could not be represented by a union because they were "supervisors" under the National Labor Relations Act (NLRA). The NLRB ruled in favor of the union, but Lakeland refused to bargain. The dispute eventually reached the Eleventh Circuit.

The only issue before the Eleventh Circuit was whether the NLRB's determination that the LPNs were not supervisors was supported by evidence in the record. The Eleventh Circuit vacated the NLRB's decision and held that LPNs were supervisors because they used discretion and independent judgment to initiate the process to discipline, suspend and terminate certified nursing assistants (CNAs).

The court acknowledged that employers must offer more than a mere "paper showing" of supervisory status, but concluded that the unrebutted testimony established that LPNs were responsible for supervising and disciplining the CNAs.

Although supervisory status cases are always fact sensitive, this decision could have significant impact within the health care industry by giving health care providers ammunition to argue that their LPNs are supervisors.

TITLE VII: Cumulative Evidence of Racially Hostile Work Environment

***Jones v. UPS Ground Freight*, 683 F.3d 1283 (11th Cir. 2012)**

An African-American UPS driver brought a race discrimination suit against the company under Title VII and § 1981. The employee supported his race claims with evidence that he regularly found remnants of bananas (pieces and peels) on his delivery truck (either on the steps or laying on the back of the trailer) at the UPS terminal where he parked.

The district court granted summary judgment to the employer, finding that the appearance of the bananas on the plaintiff's truck was not racially motivated and, even if it was, the conduct did not create a hostile work environment.

On appeal, the Eleventh Circuit reversed and held that summary judgment was not appropriate. The Eleventh Circuit noted that use of monkey imagery historically had been used as a racial insult to African-Americans. It also reasoned that a racial motive behind the remnants of banana peels could be inferred by the facts that there was no evidence that bananas were discarded on any other trucks, and that no other refuse was found on or around the plaintiff's truck.

The Eleventh Circuit held that once these facts were combined with other evidence that the plaintiff's trainer had referenced training "your kind" before, that many employees at the UPS terminal wore shirts and hats bearing the Confederate flag, and that some employees may have attempted to intimidate the employee in one instance, a genuine issue of fact existed for trial, and summary judgment was not appropriate.

FLSA: Minimal E-mail Use during Lunchtime Held Not Compensable

***Lewis v. Keiser Sch., Inc.*, 11-62176-CIV, 2012 WL 4854724 (S.D. Fla. Oct. 12, 2012)**

The plaintiff alleged that she spent time during her lunch hour sending work e-mails. In addition, she attempted to assert that the e-mails themselves evidenced that she performed other work related to the e-mails during her lunch hour as well. The plaintiff argued that, due to the e-mails and e-mail related work, she should have been paid for her lunch hour under the Fair Labor Standards Act (FLSA).

The evidence showed that the plaintiff clocked herself in and out of lunch and did not show that her employer forced her to continue working through lunch knowing that she had clocked out. Under such circumstances, the court said it was "unwilling to attribute to Keiser actual or constructive knowledge of work being performed off the clock, when Lewis' own records indicate otherwise."

In addition, the court determined that the plaintiff had not shown that the time she spent drafting and sending the e-mails would have put her over 40 hours in any particular week. In this regard, the court reasoned that the e-mails "were not lengthy and could not have taken more than a few minutes to draft and send."

Citing the 1946 Supreme Court case of *Anderson v. Mount Clemens Pottery Company*, it stated that "when an FLSA claim concerns only a few seconds or minutes of work beyond the scheduled working hours, such trifles may be disregarded."

FLSA: Volunteer Firefighter Did Not State Claim for Unpaid Wages

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Premises Liability Case Law Update

By Martin A. Levinson, (left) SLC Vice-chair,
and Zachary M. Wilson
Hawkins Parnell Thackston & Young, Atlanta

EQUAL KNOWLEDGE; EXPERT TESTIMONY ON INSPECTION PROCEDURE; CONTRADICTORY TESTIMONY OF PARTY: Summary judgment in favor of defendant storeowner was proper in "rainy day" slip-and-fall due to plaintiff's contradictory deposition testimony, and trial court properly struck conclusory, unhelpful affidavit of plaintiff's purported expert.

***Hayward v. The Kroger Co.*, A12A0877, 2012 Ga. App. LEXIS 817 (Ga. App. Oct. 4, 2012).**

Plaintiff Frances Hayward sued the owner of a grocery store after she slipped and fell in the foyer between two sets of double doors at the store's entrance. At the time of her fall, the 78-year-old plaintiff was wearing high-heeled boots. It had been raining for several days at the time Hayward fell.

An employee of the store testified that at the time of Hayward's fall, pursuant to the store's policies for spills and wet floors, "caution" signs had been posted outside both sets of doors and mats had been placed and replaced in the foyer area. Although Hayward denied seeing any mats or signs, photographs of the scene immediately after Hayward's fall showed mats and signs as the manager had testified. The assistant store manager also testified that the foyer area was mopped as often as every 10 to 15 minutes prior to Plaintiff's fall.

When asked during her deposition whether she saw anything on the floor before falling, Hayward replied, "It had rained. . . . [I]t had stopped raining, but the floor was still wet, you know, like damp." After a break in the deposition, Hayward testified that she did not realize the floor was wet until after she fell, when she noticed that her "coat was soaking wet on the floor."

In support of her claims, Hayward presented the affidavit of Rosanne Masone, a purported grocery store risk management. The trial court granted the store's motion to strike Masone's affidavit, holding that Masone's testimony was not necessary to determine whether the store's procedures were adequate. The trial court also granted the store's motion for summary judgment, holding that Hayward had equal knowledge of the presence of rainwater in the foyer prior to her fall.

Hayward appealed, and the Court of Appeals affirmed. The Court held that the trial court did not abuse its discretion in striking Masone's affidavit because the subject on which her testimony was offered, "the common problem of accumulated rainwater at the entrance to a store during rainy weather," was not a subject requiring expert testimony. The Court also held that Masone's affidavit testimony was properly stricken as it was conclusory and unsupported by factual evidence.

The Court of Appeals also affirmed the grant of summary judgment in favor of the grocery store. The Court held that Hayward's testimony was contradictory as a matter of law as to whether she noticed the floor was wet before she fell and that she had provided no satisfactory explanation for the contradiction. Accordingly, pursuant to the rule of self-contradictory testimony of a party set forth in *Prophecy Corp. v. Charles Rossignol, Inc.*, 256 Ga. 27 (1986), the Court held the trial court had properly "discounted" Hayward's deposition testimony that she did not realize the floor was wet until after she fell.

The Court of Appeals also reiterated the law relied on in other "rainy day" slip-and-fall cases, holding that even without Hayward's admission, she was charged with knowledge, by virtue of the fact that it was raining outside, that "water is apt to be found in any area frequented by people coming in from the rain outside" and Hayward should have "expect[ed] or anticipate[d]" there to be "some accumulation of water" on the floor of the grocery store. As a result, Hayward could not show superior knowledge on the part of the store, and the grant of summary judgment to the store was proper.

EQUAL KNOWLEDGE OF LATENT DEFECT: Summary judgment in favor of homeowner was appropriate in deck collapse case where Plaintiff could not show superior knowledge of the defect by homeowner.

***Thomas v. McMillan*, A12A1295, 2012 Ga. App. LEXIS 808 (Ga. App. Oct. 2. 2012).**

Plaintiff Theodore Thomas was checking on defendant Thomas McMillan's house while McMillan was out of town. When Thomas went outside and stood on the house's deck, he heard a crack and the deck collapsed. McMillan subsequently told Thomas that he did not understood why the deck collapsed, and Thomas testified he had no reason to believe that McMillan knew there was anything wrong with the deck before the incident.

An inspection report prepared for McMillan less than five months before the incident noted that bolting and flashing were not visible on the ledger of the deck and were recommended. However, the inspector indicated that the "overall condition" of the deck was "adequate," and the inspector did not circle any of several options on the report regarding the condition of the ledger of the deck: "Visible Rot / Susceptible Water Infiltration / Siding Damaged / Not Properly Secured / Improperly Secured to Cantilevered Joist." During discovery, the principal of the construction company that built the house,

which was also named as a defendant in the lawsuit, testified that McMillan told him after the accident that he "knew something wasn't right about the deck."

McMillan moved for summary judgment, and the trial court granted McMillan's motion. Thomas appealed, contending that McMillan's alleged admission, the contents of the inspection report, and some ambiguous testimony by the co-defendant's principal created issues of fact precluding summary judgment in favor of McMillan.

The Court of Appeals affirmed the grant of summary judgment to McMillan, holding that Thomas could not meet his burden of proving McMillan had actual or constructive knowledge of any defect in the deck. The Court first noted that there was no evidence definitively showing what caused the deck to collapse. The Court also held that the inspection report did not serve to notify McMillan of a dangerous defect in the deck because the report listed the deck's condition as "adequate" and none of several available options which might have suggested a more serious problem was selected in the report. Although the report "recommended" installation of bolts and flashing on the ledger of the deck, "the report did not explain that their absence would pose a safety hazard."

Finally, the Court held that McMillan's purported statement that he "knew something wasn't right about the deck" was "too general" to establish McMillan had superior knowledge of an unspecified defect in the deck.

CAUSATION: Summary judgment in favor of premises owner was appropriate where Plaintiff presented no evidence as to why she fell while stepping down from landing to sidewalk on premises.

***Anderson v. Canup*, A12A1527, 731 S.E.2d 786, 2012 Ga. App. LEXIS 760 (Ga. App. Aug. 30, 2012).**

Plaintiff Linda Anderson fell and seriously injured herself while exiting defendant Lamar Canup's insurance agency. Anderson testified that she stumbled and fell while attempting to step down from a landing to the sidewalk as she was attempting to exit the building. During her deposition, Anderson testified that she did not remember what happened and was not sure how she fell. She also testified that she "may have misjudged the height of the step," and she conceded that numbness in her legs resulting from diabetic neuropathy may have played a part in her fall.

Canup moved for and was granted summary judgment by the trial court due to Anderson's failure to establish the element of causation.

The Court of Appeals affirmed the grant of summary judgment. Although there was evidence of prior traversal of the landing area by Anderson, the Court of Appeals relied solely on the absence of any

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Trucking Case Law Update

By Alexander T. Galloway, III
Chair, Trucking SLC
Moore Ingram Johnson & Steele, Marietta

ACTION FOR PUNITIVE DAMAGES against an employee driver and his employer based on a wrongful death claim and negligent maintenance, hiring, training, and retention.

***Ortiz v. David Ralph Wiwi; Rolar, Inc.; and Great West Casualty Co.* – 2012 WL 4468771 (M.D. Ga. Sep. 26, 2012)**

Plaintiff brought a wrongful death action against Ralph Wiwi ("Wiwi"), Rolar, Inc. ("Rolar") and Rolar's insurance provider. There was an accident between Plaintiff's decedent and Wiwi. There is no question that at the time of the accident Wiwi was driving a tractor-trailer in furtherance of his job with Rolar. As part of its complaint, Plaintiff moved for punitive damages against Wiwi and Rolar based on its wrongful death claim and negligent maintenance, hiring, training, and retention claim. The defendants moved for summary judgment on the plaintiff's claim for punitive damages but the defendants did not move for summary judgment on the plaintiff's wrongful death claim generally.

The Court began its discussion by noting it is well settled that a plaintiff is not entitled to punitive damages based on a wrongful death claim. While an estate may recover punitive damages in connection with the injuries of the deceased the plaintiff did not assert an estate claim in this case.

The Court then moved on to the plaintiff's negligence claims. First, the Court found that there were no facts in the record to support Plaintiff's negligent maintenance claim. Plaintiff's "bare-bones assertion" of negligence was not enough to withstand summary judgment. Second, the Court found that there insufficient facts to support Plaintiff's negligent hiring, training, supervision and retention claims as well.

Generally when an employer admits there was a respondeat superior relationship like Rolar did here a plaintiff cannot make out a claim for punitive damages. But if the employer was independently negligent based on its negligent hiring of an employee or negligently entrusting a vehicle to the employee punitive damages are appropriate. However, the standard for punitive damages is high and must be proven by "clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of conscious indifference to consequences." Here, Plaintiff did not have any evidence that Rolar actually knew that Wiwi was an unsafe driver. Instead, when Rolar hired Wiwi he was an experienced driver with a safe driving record and a valid CDL license. Also, Rolar required Wiwi to pass a pre-employment road test.

The Court also found that the plaintiff did not have a valid claim for punitive damages based on negligent training because nothing in the Federal Motor Carrier Safety Regulations requires a carrier to train its drivers. Here, Rolar went above and beyond by making Wiwi pass a road test even though Wiwi had a valid CDL license. Additionally, Plaintiff's claim for negligent entrustment failed "because no reasonable jury could find that Rolar had actual knowledge that Wiwi was an incompetent or habitually reckless driver." Instead, Wiwi had a clean driving record when he was hired by Rolar and Wiwi's drug tests were clear as well. Finally, the Court found that Plaintiff's claim for negligent supervision failed because Rolar did not know or have any reason to know that Wiwi had "tendencies to engage in certain behavior" that would lead to an auto accident. Wiwi did not have any accidents or any moving citations in the five years before the accident. Additionally, the Court noted again Wiwi's drugs tests were negative and he passed Rolar's pre-employment driving test. Ultimately the Court found that the record was devoid of any evidence showing Rolar knew or should have known that Wiwi would pose a risk to other drivers on the road.

RIGHT OF ACTION against a motor carrier and its insurer under O.C.G.A. § 40-1-112(c)

***Markham v. Hall Worldwide Transportation LLC, and Star Insurance Company* – 2012 WL 3552850 (S.D. Ga. Aug.15, 2012)**

Plaintiff brought this action against Hall Worldwide Transportation, LLC, ("Hall") and its insurer Star Insurance Company. Plaintiff's complaint stated that Hall's driver negligently operated a tractor trailer and caused an accident which allegedly harmed the plaintiff. Plaintiff's complaint also stated that Star was listed as the registered insurer for Hall at the time the complaint was filed and that Star was a proper party pursuant to O.C.G.A § 46-7-12(e). O.C.G.A. § 46-7-12(e) read, "It shall be permissible under this article for any person having a cause of action arising under this article in tort or contract to join in the same action the motor carrier and its surety, in the event a bond is given."

Since the time this lawsuit was filed O.C.G.A § 46-7-12(e) was repealed and the Georgia General Assembly passed the Georgia Motor Common Carrier Act of 2012. That acted included a new statute, O.C.G.A § 40-1-122(c), which has very similar language to O.C.G.A § 46-7-12(c): "It shall be permissible under this part for any person having a cause of action arising under this part to join in the same action the motor carrier and the insurance carrier, whether arising in tort or contract."

The District Court noted that the previous version of the statute provided "a right of action against not only the carrier but directly against its insurer as well." (Internal quotations marks omitted). The Court went on to hold that O.C.G.A § 40-1-112(c) now "provides a right of action against both a motor carrier and its insurer" just like O.C.G.A § 46-7-12(e) did.

MOTION FOR SUMMARY JUDGMENT: Driver of truck 1 who quickly applied his breaks potentially the proximate cause of an accident that occurred when the driver of truck 2 quickly applied his breaks to avoid hitting truck 1 and

crossed over the center line hitting and killing another driver.

***Hayes v. Crawford* – 317 Ga. App. 75 (2012)**

Plaintiffs brought this wrongful death action against two tractor-trailer drivers Luther Sisson and Terry Crawford. Crawford was driving southbound on a highway 61 and Sisson was driving approximately 100 feet directly behind Crawford. The two drivers approached an intersection where a passenger car was stopped with its left turn signal blinking waiting to turn on to the cross street. The intersection was preceded by a small hill and after Crawford crested the hill he suddenly slammed on his brakes to avoid hitting the stopped car. Crawford's brakes locked, smoke rose from his tires and his truck began to skid but he was able to stop three feet from hitting the stopped car. To avoid hitting Crawford, Sisson slammed on his brakes but his brakes locked up causing him to skid and cross over the center lane and collide with a flatbed truck driven by the plaintiffs' father.

After plaintiffs dismissed Sisson and his insurer the trial court granted summary judgment for Crawford. The plaintiffs appealed the trial court's decision arguing that questions of fact remained as to whether Crawford was negligent and whether he was the proximate cause of the accident. The Court of Appeals reversed concluding reasonable minds could differ on these questions. The Court noted that it previously held that a jury could find that a "motorist who came to a complete stop on a highway without warning was a proximate cause of the collision between two vehicles following the motorist." In this case Crawford was not entitled to summary judgment because there were facts showing that even though there was a hill before the intersection a driver could still see the intersection clearly. Also, there was conflicting testimony about whether Crawford was talking on the phone at the time of the accident. The evidence also suggested that if Crawford was more attentive to the roadway he would have had enough time to stop his tractor safely. Additionally, there was some evidence that Crawford erroneously assumed the car at the intersection was still moving and it was not until he realized the car was stopped when he slammed on his brakes causing Sisson to slam on his brakes as well.

Even though the Court noted that the record would support a jury finding that Sisson's negligence was the sole proximate cause of the accident the Court found that it was not an indisputable case and reasonable minds could disagree.

NEGLIGENCE: Court of Appeals found that there is a duty to inspect an article (here a tractor-trailer) before allowing other people to use it and this duty arises from the bailor-bailee relationship.

***Thorpe v. Sterling Equipment Company, Inc. et. al.* –315 Ga. App. 909 (2012)**

In this case plaintiffs' father, Leon Maxwell, was killed while driving a truck for Coastal Logging. The driver was killed when his truck stopped and the timber he was hauling shifted forward and crushed the cab. The truck he was driving was purchased by John Lane who owns both Sterling Equipment and Coastal Logging. After personally inspecting the truck, Lane bought it for Sterling Equipment then leased

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Inaugural GDLA Speaker Lunch Series Debates Tort Reform's Future

On November 28, 2012, the GDLA presented the inaugural lunch program in its newly created Speaker Lunch Series. The Speaker Lunch Series is designed to offer members an opportunity to socialize over lunch with other members and even non-members, particularly judges and other elected officials, and to hear presentations on topics of interest to the defense bar.

The inaugural program was well attended by both GDLA members and the judiciary, with several current and former judges of the Court of Appeals and a few current and former superior court and state court judges in attendance. Because of the topic, the luncheon also attracted plaintiff's lawyers and in-house counsel.

The program featured a panel discussion on the future of tort reform in Georgia by Rep. Wendell Willard, Chairman of the House Judiciary Committee; Bill Custer, a partner at Bryan Cave and a member of the Law & Judiciary Committee of the Georgia Chamber of Commerce; and Buck Rogers, a partner at Fried Rogers Goldberg and the President-elect and Legislative Co-chair of the Georgia Trial Lawyers Association (GTLA).

The focus of the discussion was on regulating *Holt* demands. From the defense perspective, the principal problems with *Holt* demands are that they are often made when defense counsel has insufficient information with which to evaluate the claims and that defense counsel is given too little time to respond. While reputable plaintiff's attorneys will provide documentation to support their demand and sufficient time for defense counsel to evaluate the demand, there are many who will not, preferring instead to abuse the procedure in an attempt to extract big settlements under the threat of a bad-faith claim if the demand is rejected.

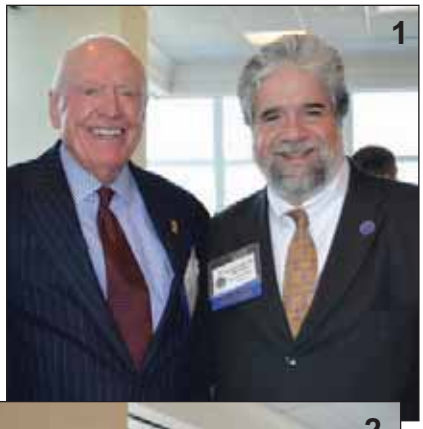
Last year, a bill co-sponsored by GDLA member Rep. Ed Lindsey would have given insurers at least 60 days to respond to a *Holt* demand and would have required the demand package to include complete records of the plaintiff's medical treatment. That bill was not enacted, but Rep. Willard said that a similar bill is likely to be introduced in the upcoming legislative session. Mr. Custer said the Georgia Chamber of Commerce is concerned about *Holt* demands because of the way in which they have been abused over the last 20 years. According to Mr. Rogers, the GTLA does not support abusive *Holt* demands and is "ready, willing, and able" to work with defense attorneys, insurance companies, and legislators to come up with acceptable ways to regulate *Holt* demands and bad-faith claims.

The speakers also addressed concerns about the costs associated with e-discovery. Mr. Custer said that the Georgia Chamber wants the General Assembly to consider e-discovery regulations because the sometimes-staggering costs often cause companies to settle cases of doubtful liability simply because they cannot afford to litigate. To that end, a Chamber task force is working with the State Bar of Georgia to draft e-discovery guidelines that can be presented to the legislature. Mr. Rogers responded that the GTLA cannot take a position on this issue until it knows what the Chamber's proposal is, but his overall concern would be ensuring that the ability of individual plaintiffs or small classes of plaintiffs to gain access to evidence is not unfairly limited.

Overall, the program was a resounding success and drew compliments from many of the judges and other attendees. The GDLA's intent is to have future programs on a quarterly basis, so stay tuned for the next program in late winter or early spring of 2013. The GDLA extends a special thank you to Nelson Mullins Riley & Scarborough for hosting this event. ❖

Scenes from the Speaker Lunch Series

1. Retired Court of Appeals Judge Marion Pope and Court of Appeals Judge Chris McFadden. 2. Court of Appeals Chief Judge John Ellington with plaintiff's lawyer Tom Pope. 3. GTLA's President-elect Buck Rogers provides the plaintiff's perspective on the panel. 4. Rep. Wendall Willard, House Judiciary Chairman, previews the upcoming session. 5. Jake Daly, who developed the GDLA Speaker Lunch Series concept, welcomes everyone. 6. GDLA Past President Grant Smith, Court of Appeals Judge Anne Elizabeth Barnes and Andy Treese. 7. GDLA Past President Steve Kyle makes a point regarding *Holt* demands. 8. Pictured before the luncheon are (l-r) Tom Bishop, Senior VP, General Counsel & Chief Compliance Officer at Georgia Power; speaker Bill Custer, Georgia Chamber of Commerce's Law & Judiciary Committee member; former state rep Boyd Pettit; and Kade Cullefer, Vice President-Legal with the Georgia Chamber of Commerce.



GDLA Board of Directors Convenes at Brasstown Valley for Fall Meeting

The GDLA Board of Directors convened for its Fall Meeting at Brasstown Valley Resort in Young Harris, Georgia, during the spectacular fall foliage weekend of October 19-21, 2012.

In attendance were: *Officers:* President Lynn M. Roberson of Swift Currie McGhee & Hiers, Atlanta; Secretary-Treasurer Kirby G. Mason of Hunter Maclean, Savannah. *Vice Presidents:* Sarah B. "Sally" Akins of Ellis Painter Ratterree & Adams, Savannah; Hall F. McKinley III of Drew Eckl & Farnham, Atlanta; Matthew G. Moffett of Gray Rust St. Amand Moffett & Brieske, Atlanta; *Board of Directors:* Jo A. Jagor of Hall Booth Smith, Atlanta; Craig Avery of Cowsert & Avery, Athens; Robert R. "Rusty" Gunn II of Martin Snow, Macon; Christopher E. Parker of Miller & Martin, Atlanta; James D. "Dart" Meadows, Balch & Bingham, Atlanta; Wayne S. Melnick, Gray Rust St. Amand Moffett & Brieske, Atlanta; Brian T. Moore of Drew Eckl & Farnham, Atlanta; James W. Purcell of Fulcher Hagler, Augusta; Jeffrey S. Ward of Drew Eckl & Farnham, Brunswick; and James S.V. Weston of Trotter Jones, Augusta. *Past Presidents:* N. Staten Bitting, Jr. of Fulcher Hagler, Augusta; Morton G. Forbes of Forbes Foster & Pool, Savannah; Steven J. Kyle of Bovis Kyle & Burch, Atlanta; Walter B. McClelland of Mabry & McClelland, Atlanta; Robert M. Travis of Bryan Cave, Atlanta. *Also present* was Executive Director Jennifer M. Davis.

The group gathered for a welcome reception in the hospitality cottage, then hitched a hayride to the Stables Tack Room for a cookout. After dinner, everyone roasted marshmallows to make s'mores.

The Board Meeting took place on Saturday morning until noon, then the afternoon was free to enjoy. Activities included horseback riding, hiking, golfing, watching college football and visiting Crane Creek Winery for its annual harvest festival. That evening, everyone gathered again for a reception in the hospitality cottage then adjourned to dinner on their own.

Following are highlights from the Board Meeting:

- Both the 2012 Spring Meeting and Annual Meeting minutes were unanimously approved.
- The Association currently has 676 members. Those individuals listed on page 7 were approved for membership.
- Membership Committee Co-chair Dart Meadows discussed the final results of the RecruitOne membership drive, which increased our membership by 10 percent. The Board discussed repeating it, and decided to run it later in 2013 with the same prizes to be offered.
- Jennifer Davis provided a list of DRI members in Georgia who do not belong to the GDLA. She will e-mail them an invitation to join that includes an announcement that DRI named the GDLA as Outstanding Defense Organization of 2012. The Board was encouraged to contact those they know.
- Chair Wayne Melnick presented the Education Committee report. There have been two seminars since the last Board Meeting: 1) Skits & Suds—June 21, RiRa Irish Pub, Atlanta; and 2) Sweating the Small Stuff: How Nanotechnology is Changing Failure Analysis, October 9, 2012, Atlanta Fish Market (sponsored by Exponent). His committee is beginning to select topics for the next year, which will include taking Skits & Suds on the road to Macon.
- Chair Brian Moore reported on the Substantive Law Committees. He has encouraged them to have meetings with their members once a year, perhaps in connection with the Annual Meeting. They also continue to contribute case law updates and *Law Journal* articles.
- Judicial Relations Committee Chair Bob Travis provided a report on both open and filled positions on the bench.
- Meetings Chair and Past President Staten Bitting presented the future meetings schedule, including the 2013 Annual Meeting at The Breakers in Palm Beach, June 13-16.
- Jennifer Davis reported on behalf of *Law Journal* editor Peter Muller that the deadline for articles is March 15.
- Jennifer Davis reported on behalf of Website Committee Chair Dave Nelson and Vice-chair Lance Greene. She had revised the "About Us" verbiage on the website to include recent happenings—DRI award, State Bar awards, etc. The Board agreed to create a LinkedIn group for the GDLA. She also presented a new website design to highlight current news and events, and make it easier for her to update directly. It was approved.
- Newsletter Editor Sally Akins reported that he *Daily Report* had offered to include our newsletter alongside other voluntary bar newsletters on their website. We will explore whether we could just post the first page as a teaser for potential recruits.
- Sponsorships Chair Craig Avery reported we have a new in-kind Platinum sponsor—the *Daily Report*—since our last meeting. We have run ads in the paper and online at no charge as a result of that partnership. The Board was presented a spreadsheet of projected sponsorship revenue in light of the 2013

increase in rates for long-time sponsors. The Board had approved the rate increase for new sponsors in 2012, and grandfathered in then-current sponsors until 2013.

- Trial Academy Chair Matt Moffett announced we will keep the same 2.5 days format at least for this year, while expanding the mediation focus and changing how the faculty demonstrates opening statements. The Board reviewed the final financial report from the 2012 program where attendance increased from the prior year.
- On behalf of DRI State Rep Bubba Hughes, Jennifer Davis reported that the GDLA won the 2012 DRI Janata Award for Outstanding Defense Organization. See article on page 1.
- Amicus Committee Co-chairs Rusty Gunn and Jeff Ward reviewed a recent request to file a brief in *Villanueva v. First American Title*, which deals with whether legal malpractice claims should be assignable. The Amicus Committee had declined the request and the Board affirmed their decision. The Board discussed whether the person drafting an amicus brief on our behalf should be a GDLA member or have a membership application pending. They agreed the person who requests it does not necessarily have to be a GDLA member.
- Treasurer Kirby Mason reported that we are ahead of last year at the same time. This is likely attributable to increased membership and CLE revenue.
- President Lynn Roberson asked the Board to consider whether the GDLA needed to formalize its diversity efforts, as it already has a diversity statement in place. She explained the North Carolina Defense Association is willing to share their program materials to help us get started. Douglas Burrell, a GDLA members and head of the DRI Diversity Committee has offered to help our group get going. The Board agreed to create a Diversity Committee, and Jo Jagor volunteered to lead the effort. ❖

Scenes from the Fall Meeting

1. President Lynn Roberson (right) with her husband, Henry Newkirk (center) and Past President Walter McClelland at Friday's reception. 2. Dart Meadows and Secretary-Treasurer Kirby Mason at the Board meeting. 3. Wayne and Laura Melnick enjoyed horseback riding. 4. Hayride shuttle to dinner on Friday. 5. Sally Akins, Craig Avery and Brian Moore visit on Friday night. 6. Past President Salty Forbes makes s'mores. 7. Jim Purcell and President Lynn Roberson at the Board meeting.

Third Annual Pre-Trial Discovery and Deposition Boot Camp a Success

Deposition Boot Camp, chaired again by C. Jason Willcox of Moore Clarke DuVall & Rodgers in Albany, was completely revamped this year to encompass all pre-trial discovery. The course materials were even changed to be the case study used in Trial & Mediation Academy, so there is continuity for continued learning between the two seminars.

The two-day CLE was subsequently renamed "Pre-Trial Discovery & Deposition Boot Camp" and held August 16-17, 2012 at State Bar Headquarters.

The workshop combined lectures and demonstrations from an expert faculty with practical exercises to help students learn and apply critical skills. Presentations included planning your strategy for discovery, identifying deponents, preparing plaintiff and defendant deposition outlines, questioning the deponent, defending the deposition, ethical considerations during depositions, using documents and creating exhibits in depositions, preparing for motions for summary judgment through depositions, preparing your witness to be deposed, and knowing the deponent through social media.

Macon Superior Court Judge Tilman E. Self, III discussed "Professionalism: A View from the Bench" during Thursday's luncheon. The first day concluded with a networking reception, giving students time to get acquainted and to ask the faculty questions on an informal basis.

State Bar Past President S. Lester Tate, III of Akin & Tate in Cartersville returned this year as Friday's luncheon speaker, addressing "The Plaintiff's Perspective: How the Other Side Sees Us." As a former defense attorney turned plaintiff's lawyer, Mr. Tate offers a unique perspective from both sides of a case.

Additional faculty were: Thomas Peter Allen III of Martin Snow, Macon; GDLA Executive Vice President Ted Freeman of Freeman Mathis & Gary, Atlanta; Jo A. Jagor of Hall Booth Smith, Atlanta,; Wayne S. Melnick of Gray Rust St. Amand Moffett & Brieske, Atlanta; Brett A. Miller of Mabry & McClelland, Atlanta; GDLA President Lynn M. Roberson of Swift Currie McGhee & Hiers, Atlanta; and Sonja R. Tate of Fulcher Hagler, Augusta. ❖

Scenes from Boot Camp

1. Program Chair Jason Willcox discusses using documents and creating exhibits in depositions. 2. Pete Allen reviews preparing for MSJs through depositions. 3. Lester Tate shares the plaintiff's perspective. 4. (l-r) Jatrean Sanders, Ashley Gowder, Mary Claire Jagor and Jessica Davis. 5. Brett Miller (right) leads a breakout. 6. Sonja Tate (right) shares a point with Ashley Gowder during a breakout. 7. Rustin Smith talks with Andrew Murdison at the reception. 8. Executive VP Ted Freeman (left) leads a breakout. 9. Lauren McCullough, Becky Gabelman and Crystal Filiberto. 10. Hays McQueen and Allan Galis. 11 Wayne Melnick shares tips for surviving "Depositionland"—much like Zombieland. 12. Jake Evans and Bobby Thomas visit at the reception. 13. Judge Self discusses professionalism. 14. At the reception are (l-r) Heather Hammonds, Tommy Branch, Megan Scheller and Mariel Williams.

CLE Explores Nanotechnology

On October 9, 2012, GDLA members gathered at the Atlanta Fish Market for a CLE luncheon sponsored by Platinum sponsor Exponent. "Sweating the Small Stuff: How Nanotechnology is Changing Failure Analysis" was led by Eric Guyer, PhD, PE, Principal Engineer and Atlanta Office Director for Exponent.

What was once science fiction now completely surrounds every American—whether we know it or not. Industries currently utilizing nanotechnology include: automotive, sporting goods, consumer electronics, pharmaceuticals, medical devices, textiles and protective coatings, to name a few. The rate of integrating such technologies into average, everyday products and devices has far outpaced the associated analytical test methods that exist and are commonly used to evaluate other low-tech products.Dr. Guyer discussed the significant implications for experts evaluating products, which in turn, has implications for attorneys representing product manufacturers.

Pictured at the seminar are 1. Exponent's Eric Guyer and Kevin Patrick. 2. Bill Strickland and Education Committee Chair Wayne Melnick. 3. (l-r) President Lynn Roberson, Leilani Robinson and Lauren Bell. 4. Jimmy Scarbrough and Andy Treese. ❖

GDLA & ESI Sponsor Charity Golf Tourney

For the third year, the GDLA teamed up with longtime Platinum sponsor Engineering Systems, Inc. (ESI) to sponsor the Swing for Siblings Charity Golf Tournament.

The tournament, which was held October 12, 2012, at the Trophy Club of Atlanta, is an annual fundraising event for Camp To Belong Georgia.

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

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

Pictured at left, Curtis Martin prepares to tee off. Pictured above before the shotgun start are (l-r) Edward McAfee, Mike Stevenson of ESI, and Robert Luskin.

unjustifiably refuses to sign a required medical release, Arby's filed a Motion to Dismiss Ms. McRae's hearing request, or in the alternative, to request an Order authorizing the treating physician to communicate with an Arby's representative. The Board issued an Order directing Ms. McRae to sign a medical release expressly authorizing the treating physician to meet privately with a representative of the Employer/Insurer and discuss or provide medical information about her claim. When Ms. McRae refused to sign the Board-ordered medical release, her hearing request was removed from the hearing calendar.

The appellate division of the State Board of Workers' Compensation and the superior court upheld the Board's order. However, a majority of the Court of Appeals reversed, holding that O.C.G.A § 34-9-207 provides no support for the claim that an employer is entitled to engage in ex parte communications with a treating physician. Arby's appealed to the Georgia Supreme Court who granted *certiorari*. Several interested groups filed briefs of *amicus curiae*, including the author of this article on behalf of the Georgia Defense Lawyers Association.

While the Court of Appeals acknowledged that this case involves a workers' compensation claim, the slim majority held that private communications should be restricted in workers' compensation claims similar to the extent that they are in medical malpractice actions. However, discovery in Georgia workers' compensation claims is very different than other cases and it must be treated accordingly. Unlike plaintiffs in personal injury and medical malpractice cases, workers' compensation claimants specifically waive confidentiality by virtue of filing a claim.

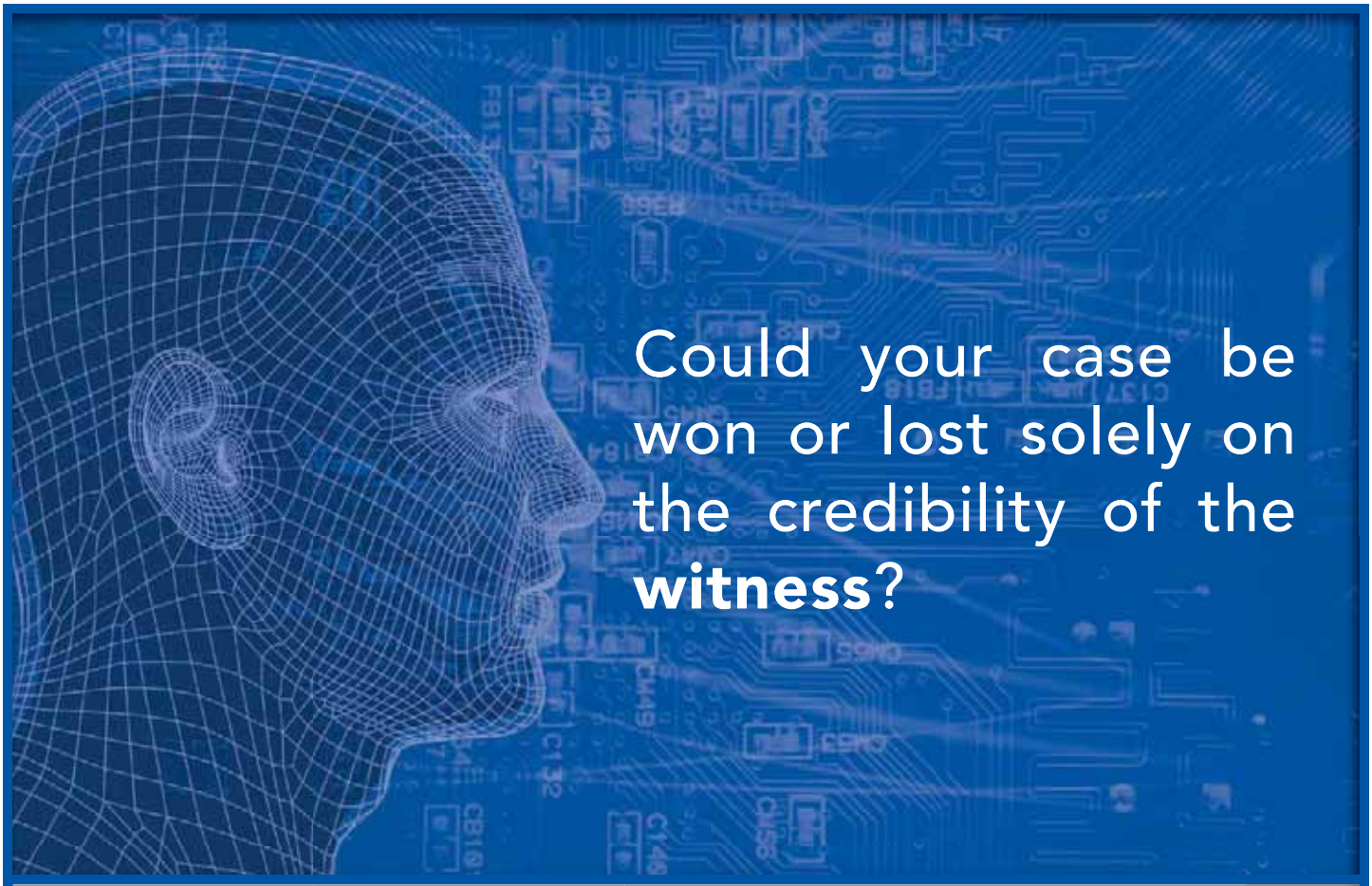
The relevant provision of the Georgia Workers' Compensation Act is O.C.G.A. § 34-9-207(a) which provides:

> "When an employee has submitted a claim for workers' compensation benefits or is receiving payment of weekly income benefits or the employer has paid any medical expenses, that employee shall be deemed to have waived any privilege or confidentiality concerning any communications related to the claim or history or treatment of injury arising from the incident that the employee has had with any physician, including, but not limited to, communications with psychiatrists or psychologists. This waiver shall apply to the employee's medical history with respect to any condition or complaint reasonably related to the condition for which such employee claims compensation. Notwithstanding any other provision of law to the contrary, when requested by the employer, any physician who has examined, treated, or tested the employee or consulted about the employee shall provide within a reasonable time and for a reasonable charge all information and records related to the examination, treatment, testing, or consultation concerning the employee." (Emphasis added)

However, despite the clear language of the statute, the Court of Appeals majority held "[n]othing in the Act indicates that 'information' was intended to mean anything but tangible documentation." Citing an *amicus curiae* brief, the Court of Appeals majority held that to construe "information" to include private communications between defense counsel and treating physicians "necessarily defines information in a bizarre existential manner . . . as being matter residing in the mind of treating physicians . . . " However, all medical opinions reside in the mind of treating physicians, even after they are put to paper. The opinion has no more or less informational value based on the fact that it was written down. Of course, treating physicians possess information which they do not always reflect in their notes. Otherwise, it would never be necessary to take medical depositions. Certainly, anyone who has deposed a physician will agree that information is often shared during a deposition that would have otherwise never have been revealed. The General Assembly clearly intended "information" to include any knowledge or data, regardless of whether it was memorialized.

In his dissenting opinion cited by the Supreme Court, Judge Stephen Blackwell noted that "[w]here the language of a statute is plain and unambiguous, judicial construction is not only unnecessary but forbidden." The Supreme Court held: "Under the unambiguous language of § 34-9-207 (a), any privilege the employee may have had in protected medical records and information related to a workers' compensation claim is waived once the employee submits a claim for workers' compensation benefits or is receiving weekly income benefits or the employer has paid any medical expenses. The occurrence of any one of these triggering events waives the employee's privilege in confidential health information and the information may be released by a treating physician."

While giving the term "information" its generally accepted meaning, the Supreme Court determined that "information," as properly interpreted, includes "knowledge or data that is communicated to another, regardless of whether the knowledge or data has been memorialized in any tangible medium or exists only in the memory and voice of the person com-



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municating it."

The majority opinion of the Court of Appeals correctly noted that O.C.G.A. § 34-9-207 was added to the Act to facilitate the collection of medical data and streamline the workers' compensation process. However, as most who practice workers' compensation defense would agree, if left undisturbed, the Court of Appeals' opinion would have frustrated that process by essentially requiring employers/insurers to depose treating physicians in virtually every claim where additional information and/or clarification was sought.

Nevertheless, the Court of Appeals majority concluded that giving defense counsel "unbridled" access to privately communicate with treating physicians would create numerous potential "dangers," including a) the potential to influence the physician's testimony; b) to probe into irrelevant but highly prejudicial matters; and c) the disclosure of information never disclosed to the patient. In reaching this conclusion, the Court of Appeal cited the *Baker* decision which did not even involve a workers' compensation case.[3]

More importantly, the Court of Appeals gave no explanation as to how these supposed potential "dangers" could occur in a workers' compensation setting. Of course, a meeting with a treating physician has the potential to influence the physician's testimony. However, the Court's decision in *Baker* further explained that the potential to influence the physician's testimony in a medical malpractice case can be a danger "by encouraging solidarity with or arousing sympathy for a defendant health care provider."[4] No such concern exists in a workers' compensation claim. Moreover, communications by claimants and their counsel with treating physicians are equally likely, if not more, to influence the physician's testimony.

The Court of Appeals' concern regarding defense counsel probing into "irrelevant but highly prejudicial matters" was equally misplaced. Certainly, information irrelevant to the workers' compensation claim would not be useful to the defense, so one would expect that inquiry into irrelevant matters would cease once the matter was determined irrelevant. Regardless, the administrative law judge will necessarily exclude and refuse to consider anything not relevant or prejudicial to the workers' compensation claim.

Finally, the Court of Appeals expressed concern regarding the potential disclosure of "information" never disclosed to the patient. Ironically, this use of the word "information" is in direct conflict with the majority's prior limitation of "information" as being only documents and tangible items. Nevertheless, as the Supreme Court noted in *Baker*, this information includes "mental impressions not documented in the medical record."[5] While this might be a concern in a medical malpractice case, no such concern exists in a workers' compensation claim. Treating physicians often provide mental impressions through deposition that are not reflected in their medical notes. However, the disclosure of this information is certainly necessary and helpful in resolving the issues in a particular claim.

In rejecting the Court of Appeals' rationale, the Supreme Court simply noted that their decision in this case is not controlled by their holding in *Baker*, because that was a medical malpractice case, and thus the disclosure was subject to HIPAA's requirements. Although the Court acknowledged in that case that "the substantive right to medical privacy under Georgia law endures," an employee waives this right under O.C.G.A.§ 34-9-207 (a) with respect to a compensable injury once a claim for workers' compensation benefits has been submitted, weekly income benefits have been received, or any medical expenses have been paid by the employer. As a result, the Court held that an employer may seek relevant protected health information informally by communicating orally with an employee's treating physician.

Among the most important aspects of the Supreme Court's ruling in the *Arby's* case is the Court's clarification that HIPAA does not apply as a bar to communications with treating physicians in Georgia workers' compensation claims. With very little explanation, the Court of Appeals majority refused to affirm the superior court's holding that the medical privacy constraints of HIPAA are inapplicable in workers' compensation proceedings. However, because workers' compensation insurance is not a "health plan," HIPAA simply does not apply. The Department of Health and Human Services (HHS) clarifies in the privacy regulation that HIPAA is not intended to impede disclosures necessary for workers' compensation programs. In fact, the HIPAA regulation specifically excludes workers' compensation or similar programs:

> Standard: Disclosures for workers' compensation. A covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers' compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault.[6]

Of course, this means that a medical provider may disclose otherwise HIPAA-protected health information "as authorized by and to the extent necessary to comply with" O.C.G.A. § 34-9-207. Because the Georgia Workers' Compensation Act requires the treating physician to disclose information and records when requested, HIPAA is made inapplicable by the regulations' own provisions.

Thus, the Court of Appeals majority's conclusion that "the Privacy Rule" applies in the context of workers' compensation proceedings is simply incorrect.

As a result, the Georgia Supreme Court discerned no legal

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grounds for prohibiting ex parte oral communication between a treating physician and an employer to the extent confidentiality is waived by an employee in a workers' compensation case. The Court held that O.C.G.A. § 34-9-207 (a) does not expressly prohibit ex parte communications and HIPAA's privacy provisions do not preempt Georgia law on the subject of ex parte communications because HIPAA exempts from its requirements disclosures made in accordance with state workers' compensation laws.

In concluding, the Court noted that the General Assembly contemplated expeditious determination of workers' compensation claims through a system designed to avoid cumbersome procedures and technicalities of pleading, and to reach a right decision by the shortest and quickest possible route. As a result, the Court held "We believe a complete prohibition on all ex parte communications would be inconsistent with the policy favoring full disclosure in workers' compensation cases, as well as the goal of our workers' compensation statute of providing equal access to relevant information within an efficient and streamlined proceeding so as not to delay the payment of benefits to an injured employee."

Nevertheless, while the Supreme Court has clarified that the law authorizes "ex parte" communications between an employer and a treating physician, it does not make them mandatory for medical providers. The opinion makes it clear that O.C.G.A. §34-9-207(a) does not "demand" that physicians agree to be interviewed "ex parte." Physicians are free to agree to these meetings or decline them. They are also free to set their own conditions for the meeting. Consequently, there may be situations where cooperation between the claimant and employer are still required in order to obtain the requested information. However, as a result of the *Arby's* decision, neither a claimant nor their attorney can prevent such a meeting from taking place. ❖

[1] *Arby's Restaurant Group, Inc., et al. v. McRae*, S12G0714 (November 5, 2012).
[2] Justice Blackwell was disqualified from participating in the opinion because he authored a dissenting opinion while he was a Judge with the Court of Appeals. *See McRae v. Arby's Restaurant Group*, 313 Ga. App. 313 (721 SE2d 602) (2011).
[3] *Baker v. Wellstar Health Systems, Inc.*, 288 Ga. 336 (2010).
[4] Id. at 338.
[5] Id. at 338.
[6] See 45 C.F.R. § 164.512(l)

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the respiratory disturbance index for the vehicle operators varied from 68 to 89; essentially, these operators were waking up at night more than once a minute in order to breathe.

Treatment for OSA commonly begins with the use of a device worn at night to deliver air pressure and hold the airway open. The device is typically a mask or nasal "pillows," and the treatment is referred to as "continuous positive airway pressure" or CPAP. The mask may be uncomfortable, but must be used every night to be effective—a single night without the device will leave the individual essentially untreated, at least in terms of daytime performance.

Other treatments are also available: these include surgery, oral appliances worn at night, weight loss, and for some patients, simple changes in sleeping position. Weight loss can often have a dramatic effect, but may be difficult to achieve until the individual has been treated for the disorder. In some cases, it may be necessary to repeat a sleep study after treatment to ensure that the treatment is effective.

Who is at risk for the disorder? First and foremost, snorers. Not all snorers have obstructive sleep apnea, but everyone with OSA snores. If an individual has an airway obstruction but continues to breathe, they will make noise. The snoring may be mild or it may be dramatic; pauses in breathing may often be audible and quite concerning to sleep partners.

Obesity is a significant risk factor for obstructive sleep apnea, and accounts for the remarkable increase in the prevalence of the disease over the last quarter-century. In 1980, only 15 percent of U.S. adults were obese, based on a definition of obesity using a body mass index (BMI) of 30 or above. For reference, a 5'10" individual would need to weigh about 210 pounds to reach a BMI of 30. As of 2011, nearly 36 percent of the U.S. adult population was obese, with an even more marked rise in the extremely obese population. Of the individuals with an average BMI of 40 (nearly 280 pounds for our 5'10" individual), studies have shown that more than 50 percent have undiagnosed OSA. Independent of body weight, a large neck circumference or collar size has also been associated with an increased risk of obstructive sleep apnea, particularly once it reaches more than 17 inches in men or 16 inches in women.

High blood pressure has also been very strongly associated with obstructive sleep apnea, though it is likely that this is an effect of the disorder rather than a cause. One study involved men whose blood pressure could not be well controlled on three or more medications; 96 percent of these men had previously undiagnosed obstructive sleep apnea. In addition to high blood pressure, individuals with untreated obstructive sleep apnea are at a substantially elevated risk of heart disease, stroke, pulmonary embolus (a potentially fatal condition in which a clot from the leg travels to the lung), and many other serious medical conditions.

Beyond the risks that OSA poses to the people who have it, there is also the danger that individuals with untreated OSA may pose to the public. There is the obvious problem of an individual who falls asleep while operating a vehicle or other dangerous equipment. In addition, the risk of an accident is increased by fatigue-related impairment of psychomotor and cognitive function, particularly when it comes to tasks that require vigilance. Studies have shown that individuals with untreated OSA may have up to a 7-fold increase in the risk of a motor vehicle accident; this exceeds the risk elevation for individuals with a blood alcohol level of 0.10 percent.

In recent years, government agencies, academic organizations, employers, and others have given substantial attention to OSA. Screening protocols for commercial drivers and other vehicle operators have been identified or recommended. At least one major trucking company has implemented a screening and treatment program for obstructive sleep apnea. This program resulted in a reduction in the number of accidents, a decrease in health care costs, and an improvement in driver retention. Over the last several years, almost every major U.S. newspaper and most transportation trade publications have published articles about OSA.

Obstructive sleep apnea is an often-unrecognized contributor to serious accidents. It is a dangerous disorder to the individuals who have it (often without knowing it), to the public exposed to these sleepy workers, and to the companies that employ individuals with untreated OSA. Companies (especially transportation companies) that have not implemented education and evaluation programs to address the risks associated with this disorder are doing a disservice to the employees, the public, and their own bottom line. Workers who ignore the advice of their spouses, health care providers, or employers regarding screening, evaluation, or treatment are jeopardizing their own health and the safety of those around them. ❖

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Premises Liability Case Law Update

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evidence of causation. Specifically, the Court succinctly held that since "Anderson admitted that she does not know what caused her to fall, and there is no evidence in the record as to the cause of her fall . . . the trial court did not err in granting summary judgment to Canup."

THIRD-PARTY CRIMINAL ATTACK; SUPERIOR KNOWLEDGE; ASSUMPTION OF THE RISK: Material issues of fact existed precluding summary judgment in favor of MARTA as to whether it had superior knowledge of danger to patron from several individuals who attacked him.

***Bennett v. Metro. Atlanta Rapid Transit Auth.*, A12A0158, 316 Ga. App. 565 (July 3, 2012).**

Plaintiff Reginald Bennett sued MARTA after he was assaulted and injured by several persons at a MARTA station. Plaintiff had gotten into a verbal altercation with two individuals a few minutes earlier, but the situation appeared to have been diffused after a MARTA station agent arrived on the scene and threatened to call police if the individuals did not disperse. The station agent then departed and returned to his office for lunch. A few minutes later, while Bennett was waiting for a bus, he was attacked by five to 10 individuals while others watched. The station agent returned to the scene a few minutes later, but by that time, the attack had already occurred.

The trial court granted summary judgment to MARTA, holding that Bennett assumed the risk of his injuries by participating in the initial verbal altercation and had superior knowledge of the attack. Bennett appealed, and the Court of Appeals reversed.

On appeal, the Court of Appeals held that genuine issues of material fact existed as to whether Bennett assumed the risk and whether MARTA had superior knowledge of the attack that resulted in Bennett's injuries.

The Court based its decision in part on the testimony of the MARTA station agent to the effect that he was experienced in breaking up verbal altercations, as he did in this case, but that typically he stays in the area to ensure that no further altercations occur. The Court reasoned that because the agent left the area to finish his lunch despite knowing that further altercations can sometimes occur in such situations, there was a material issue of fact as to whether the MARTA station agent had superior knowledge that a further altercation could occur.

The Court also concluded that Bennett had not "assume[d] the risk that he would be physically assaulted by a gang of 10 or more men because he had words with a rude woman and her companions on an elevator, or that he had superior knowledge that the gang would assault him." In that regard, the Court relied on Bennett's self-serving testimony that he was not arguing with the individuals in the elevator, but rather was "just telling them that they were not going to 'whup [his] ass' that day." The Court of Appeals accepted Bennett's testimony that he believed that the earlier threats and his retorts were "just words being thrown out" and that he did not think they would attack him because "[h]e had heard 'trash talk' all his life, and 'never got assaulted from trash talking, from having somebody talk trash to me and by me responding to trash talk.'" Accordingly, the Court of Appeals held that material issues of fact remained for trial. ❖

Employment Case Law Update

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***Freeman v. Key Largo Volunteer Fire & Rescue Dept., Inc.*, 12-10915, 2012 WL 5358983 (11th Cir. 2012)**

A volunteer firefighter brought an FLSA suit against the local fire department. The plaintiff alleged that he was an employee, not a volunteer, entitled to minimum wage and overtime. The district court dismissed his complaint for failure to state a claim. On appeal, the Eleventh Circuit analyzed whether the complaint sufficiently alleged facts that he was an employee of the fire department under the economic reality test.

Under the economic reality test, the Eleventh Circuit considers whether the alleged employer (1) had the power to hire and fire, (2) supervised and controlled work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records. As applied to the facts alleged in the complaint, the court held that the plaintiff was not an employee. The fire department required permission to hire paid employees, but there were no allegations that it requested or received permission to hire the plaintiff. In addition, the plaintiff's allegations made clear that his work schedule was primarily controlled by him, not the fire department, and that he typically only worked a couple days each week. In addition, the fire department did not maintain an employment file on the plaintiff (other than W-2 forms). ❖

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generally above 1,750 Ohms; and at 225 V, it was generally above 775 Ohms. External conditions can affect these values, such as the presence of perspiration and wet environments. Voltages over 600 V can rupture human skin, reducing the hand-to-hand resistance of the human body to its internal resistance of about ~575 Ohms, allowing more current to flow, thus causing greater damage to internal organs. Entrance and exit wounds generally are present when this occurs.

Several studies have found that the threshold where a person perceives electrical current flow is ~0.5 to 1 mA, where a shock might be perceived but no uncontrolled startle reaction resulted. Shocks just above the perceptible level can be dangerous, not because they will cause physiological harm, but because a person may be startled and his or her reaction may be hazardous, e.g., it may lead to a fall or contact with dangerous equipment.

At higher current levels, involuntary muscle contractions will result. Depending on the contact points of a body that completes the electrical circuit, the current flow may cause a person to involuntarily grasp a conductor or get locked into a circuit. The person is involuntarily held or frozen to the energized conductor and cannot "let go" unless the power is turned off or he or she is physically removed from contacting the circuit. If the contact is not somehow broken, then the person's skin resistance may decrease due to perspiration, tearing of skin, or a tighter grasp, and increase the current flow, possibly causing death.

Electrical shocks with a current path through the respiratory centers (RC) can result in respiratory arrest. The main RC is located in the medulla oblongata, which is the lowermost part of the brain stem, and controls respiratory movements. Injury to this center may lead to central respiratory failure, which would necessitate mechanical ventilation. Electrical shocks with current flow through the respiratory centers, such as possibly from the head to a limb or between two arms, could lead to respiratory arrest, usually with a grave prognosis.

As mentioned, the typical mode of death in electrocutions is related to interference of the electrical signals which control heart functionality. A ~50 mA shock at 60 Hz with a current path through the chest that lasts greater than 2 seconds can produce ventricular fibrillation. This threshold increases to ~500 mA for shocks that last less than 0.2 seconds. Cardiopulmonary resuscitation (CPR) should be administered promptly until more advanced resuscitation means become available.

Burns are a common shock-related injury, which occur when an electric current flows through tissue or bone, generating heat that causes tissue damage. The body cannot dissipate the heat generated by current flowing through the resistance of the tissue and therefore burns occur.

This article briefly touched upon some of the physiological effects resulting from electrical shocks. Several parameters, such as the voltage, frequency, waveform shape, current duration, contact surface area, contact pressure, skin condition, and moisture level all are important in evaluating electrical injury cases. All these parameters could not be detailed here, but several resources are available for further study. ❖

Following are references used in preparing this article:

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AC Guyton, "Textbook of Medical Physiology - 8th Edition," Philadelphia: Saunders, 1991 (ISBN 0-7216-3087-1.)

"Worker Deaths by Electrocution," National Institute for Occupational Safety and Health Publication #98-131, Cincinnati, OH: NIOSH, 1998.

"Effect of Current on Human Beings and Livestock," International Electrotechnical Commission (IEC) Standard 60479.

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the truck to Coastal Logging.

Plaintiffs brought this action against both Sterling Equipment and Lane himself as the company's principal. The trial court granted summary judgment for both Sterling and Lane. The Plaintiffs appealed claiming that the defendants owed Maxwell a duty to inspect the truck under Restatement 2d of Torts § 388. The plaintiffs also argued that the defendants owed Maxwell a duty to inspect the truck based on the bailor-bailee relationship between Sterling Equipment and Coastal Logging, Inc. Additionally, the plaintiffs' argued that Lane was personally liable for any negligent acts he participated in and that there was evidence to support this claim.

The Court of Appeals disagreed that there was a duty to inspect under Restatement 2d of Torts § 388. While this section does require a supplier of chattel to warn to a user of any defects the Court found no law to support the claim that this section also imposed a duty to inspect the chattel. However, the Court agreed that bailor-bailee relationship between Sterling Equipment and Coastal Logging created a duty to inspect.

The Court held that a bailor has a duty to exercise ordinary care to inspect the bailed article (here the truck) and make sure it is in a safe condition. The defendants argued that any duty Sterling possessed was superseded by Coastal based on the language in the lease between Sterling and Coastal. The Court agreed that lease agreements can shift this duty from the bailor to the bailee but found that here the language did "clearly and unambiguously" shift that duty.

Finally, the Court also held that a jury could find Lane personally liable for negligently inspecting the truck when he bought it. An officer of a corporation who takes part in the commission of a tort is liable for that tort. Lane was the only person who inspected the both truck and the headache rack which is the device that is supposed to protect people in the cab. The Court found that this was enough evidence to suggest Lane committed a negligent inspection and therefore summary judgment was improper.

DAUBERT MOTIONS AND MOTIONS FOR SUMMARY JUDGMENT: Tractor-trailer accident between two trucks. District Court allowed expert to testify on some issues but others because the expert did not do an appropriate investigation and his opinion would not be helpful to the jury.

***Barnes v. 3/12 Transportation, Inc., and Castlepoint Florida Insurance Company*. – 2012 WL 1014810 (S.D.Ga. Mar. 23, 2012) – Case no. CV410-178**

This opinion comes out of a case currently in the United States District Court for the Southern Division of Georgia. In this case the plaintiff was driving his tractor trailer on Interstate 95 and started having transmission problems. Knowing he needed to exit the highway he moved over to the outermost lane where he was hit from behind by the defendant's employee. The employee was also driving a tractor trailer and testified that plaintiff slammed on his brakes before impact. The employee further testified that he could not see the plaintiff's truck nor could he avoid hitting plaintiff's truck because of the other cars on the road.

In preparation for trial, the plaintiff hired an expert who was going to testify that plaintiff was traveling at 40-45 miles per hour, that the plaintiff's rear taillights were on, and that defendant's employee had a clear view of plaintiff's truck. In response, the defendants made a *Daubert* motion to exclude the expert's testimony. Additionally, the defendants moved for summary judgment on the grounds that plaintiff failed to provide evidence that defendant's employee violated the standard of care and that plaintiff was contributorily negligent. In its Order, the District Court granted in part and denied part the defendants' *Daubert* motion and denied the defendants' motions for summary judgment.

In regard to the expert's testimony the Court ruled that his testimony on both the speed of the car and functionality of the truck's lights would not be helpful to the jury and therefore he could not testify as an expert. This testimony would merely be a restating of admissible evidence which does not require any specialized analysis or expertise. The Court was particularly concerned that the expert did not inspect the taillights himself but merely examined deposition testimony. But the Court did allow the expert to testify on the issue of how the employee's response time to the accident compared with other drivers on the road.

The Court denied defendants' original and amended motions for summary judgment because there were too many questions of fact. The Court also cited to a number of Georgia cases supporting the idea that car accident cases are better suited for the jury. Here, there was conflicting evidence about whether defendant's employee acted reasonably when he hit the plaintiff's truck, whether there were actually other cars on the road, and whether the plaintiff's taillights were working properly. The Court also disagreed with the defendants' argument that summary judgment was appropriate because plaintiff was comparatively negligent. Instead, the Court found that issues of negligence of both parties are questions for the jury.

EVIDENCE/PROOF OF DAMAGES: Following a jury verdict resulting from a wreck between two tractor-trailers, the Eleventh Circuit found that lump sum awards are valid when the defendant fails to specifically request that the jury's distribution of damages be broken down into categories.

***Free v. Baker*, 469 Fed. Appx. 786 (11th Cir. 2012) – Case not selected for publication in Federal Reporter – Case no. 11-10509**

This appeal comes from a case in the Middle District of Alabama, which involved a collision between two tractor-trailer trucks in North Carolina. Plaintiff entered the right lane and defendant driver crashed into plaintiff's truck propelling it down the highway and through a guardrail where it overturned. After a jury verdict for the plaintiffs the District Court entered judgment in favor of the plaintiff driver for

$483,750 and denied defendants' motion for judgment as a matter of law. The issue on appeal was whether plaintiff had sufficient evidence to establish that the defendants proximately caused some of his injuries.

Applying North Carolina law the Eleventh Circuit found that plaintiff was entitled to all of the damages the jury awarded him. The defendants argued that some categories of damages were inappropriate. But the Court noted that the jury awarded damages in a lump sum and it makes no sense for the defendants to argue that some categories of damages are inappropriate when the damages were not broken down into separate categories. The Court found that the defendants were not entitled to judgment as a matter of law on the damages award when the defendants both allowed the jury to return a lump sum of damages and admitted that the plaintiff was entitled to at least some damages.

Furthermore, the Court found that even if the defendants had properly presented and preserved the issue of whether there was sufficient evidence to support a lump sum award the defendants would still lose because there was enough evidence to support the verdict. At issue was whether the testimony of a medical expert was sufficient to prove a causal link between the plaintiff's neck injury and the truck accident. Plaintiff's expert's testified that his post accident treatment of the plaintiff was "definitely" related to the wreck and that the wreck aggravated plaintiff's preexisting back condition. The defendants argued that the plaintiff's doctor's testimony was too speculative and conjectural. But the Court was persuaded that the doctor's testimony was "consistent and unequivocal." The Court was also persuaded by the fact that the doctor's opinion was based on 20 years of treating the plaintiff. Finally, the Court noted that the defendants had a chance to put on an expert as well. Calling it a classic "battle of experts" the Court noted that the jury weighed the creditability of each expert and sided with the plaintiffs.

***DAUBERT* MOTIONS, MOTION FOR SUMMARY JUDGMENT, AND FRCPS: Tractor-trailer was parked in the emergency lane when he was hit from behind by a car carrying plaintiff. Issue of general negligence was inappropriate for summary judgment while some issues of negligence per se were appropriate for summary judgment.**

***McGarity v. FM Carriers, Inc.* - 2012 WL 1028593 (S.D. Ga. Mar. 26, 2012) – Case no. CV410-130**

This opinion comes out of a case currently in the United States District Court for the Southern Division of Georgia. In this case a driver employee was driving a tractor-trailer for the defendant corporation. During the early morning the employee was driving his truck when he noticed his taillights flicker and decided to stop in the emergency lane to investigate. At the same time plaintiff was traveling on the same interstate in a car driven by his friend. The two friends were returning home from a bar where they had dinner and consumed alcoholic beverages. According to the plaintiff, his friend drove the vehicle off the roadway and collided with the rear of the tractor-trailer. The truck driver testified the truck's lights and emergency flashers were on but he had not placed any hazard devices behind his trailer. Defendant moved for sum-

mary judgment. Defendant also moved to exclude one of plaintiff's experts and to have one of plaintiff's affidavits struck. Plaintiff's moved to exclude some of defendant's experts as well.

Defendant first moved for summary judgment on the issues of negligence and negligence per se. In regard to negligence the Court found that summary judgment was inappropriate because there were conflicting explanations about the friend's use of the emergency lane. There were also disputes about whether the friend's intoxication contributed to the accident or if it was reasonable for defendant's employee to park in the emergency lane. The Court also analyzed the plaintiff's various negligence per se claims based on the transportation section of the Code of Federal Regulations. The Court found that the defendant was not entitled to summary judgment on the majority of plaintiff's claims because factual disputes still existed. But the Court did grant summary judgment to the defendant on the three of the negligence per se claims. For one the plaintiff did not have enough evidence to support its claim that defendant failed to install and properly maintain a wiring system. Another regulation was inapplicable because it only applied to trucks manufactured after a certain date. Finally, plaintiff did not produce any evidence to support its claim that defendant was negligent per se by failing to install and maintain lamps, reflective devices, and associated equipment.

The Court also granted Defendant's motion for summary judgment on plaintiff's strict liability claim because it found that nothing in Georgia case law supported the idea that parking a tractor-trailer in an emergency lance is an inherently dangerous activity. The Court also granted Defendant's motion for summary judgment on plaintiff's claim for punitive damages because there was nothing in the record to suggest that Defendant "caused the accident though a pattern or policy of dangerous driving or that any aggravating acts were made with a conscious indifference to the consequences."

The defendant also filed a *Daubert* motion to prevent plaintiff's expert on accident reconstruction from testifying. Ultimately the Court found that plaintiff's expert could testify both about how stopping a tractor trailer in the emergency lane is unsafe and that defendant's employee violated federal regulation by not placing warning devices behind his vehicle. But the Court did limit the expert's testimony on the issues of the expert's interpretation of the Federal Motor Carrier Safety Regulations, how the lack of reflective tape contributed to the accident, and about the performance of the rear impact guard in the accident. The court also barred the expert from testifying that the plaintiff's vehicle would have continued driving in the emergency lane without incident because this opinion was too speculative.

The Court granted the defendant's motion to strike one of plaintiff's affidavits because it was an affidavit of a rebuttal witness. According to FRCP 26(a)(2)(D)(ii) a party must disclose the use of an expert to rebut evidence identified by the other party within 30 days. Since plaintiff did not disclose this affidavit within 30 days of defendant's disclosure the Court found the affidavit was time barred.

The Plaintiff also filed three *Daubert* motions to prevent three of defendant's experts from testifying. But the Court denied all of these motions. In regard to the first witness the Court found that the expert was well qualified to testify about the Federal Motor Carrier Safety Regulations and the mere fact that the expert's opinion conflicted with one of plaintiff's experts was not a valid reason to prevent him from testifying. The Court also ruled that the defendant's accident reconstruction expert could testify as well. This expert relied upon accepted principles of accident reconstruction in reaching his conclusions. Additionally, while the plaintiff can cross examine the expert at trial about his use of an official GBI toxicology report the mere fact that data might be flawed does not prevent an expert from testifying.

Finally, the Court found that the defendant's expert in toxicology could testify as well particularly because the foundational evidence used to form his opinion was sufficiently reliable. This expert relied on official toxicology reports from the GBI as well as the Georgia Uniform Motor Vehicle Report from the incident.

UNINSURED MOTORIST Claim: Plaintiff could not recover under the Uninsured Motorist statute when she did not have any corroborating eyewitness testimony to support her claim.

***Bituminous Insurance Company v. Coker* – 314 Ga.App. 30 (2012)**

A tractor-trailer driver died after being in an accident with an unknown vehicle and the driver's wife brought an action under the Uninsured Motorist statute. According to the plaintiff, a vehicle stopped very suddenly in front of her husband's truck and when he tried to stop the truck the lumber on his trailer moved forward and crushed the cab. The plaintiff sought to recover under the Uninsured Motorist policy that was carried by her husband's employer. The defendant insurance company moved for summary judgment on the grounds that there was "an absence of evidence to show that the plaintiff's description of the accident was corroborated by eyewitnesses as is required by O.C.G.A § 33-7-11(b)(2)." The trial court denied the motion but granted the defendant a certificate of immediate review. On Appeal, the Court of Appeals reversed because plaintiff could not produce any corroborating eye witness evidence.

The Court noted that O.C.G.A § 33-7-11(b)(2) allows a plaintiff to recover under the Uninsured Motorist statute so long as the "claimant's description of how the accident occurred [is] corroborated in its material allegation." In this case there were four eyewitnesses who saw the accident. The first witness testified that she did not see any cars in front of the tractor trailer. The second witness testified that saw an unidentified car but did not see any cars in front of the tractor trailer at the intersection where the plaintiff said the unidentified car was. The third witness saw a car too but could not identify whether it was traveling in front of or behind the tractor trailer. Finally, the fourth witness testified that he saw an unidentified car as well but testified that it was in a proper braking position. The Court noted that while three out of the four witnesses saw unidentified cars none of them could corroborate the plaintiff's material allegation that the driver of the unknown vehicle negligently caused the accident. The Court found that the statute absolutely requires corroborating eyewitness evidence and without it a claimant cannot make a successful Uninsured Motorist claim. ❖

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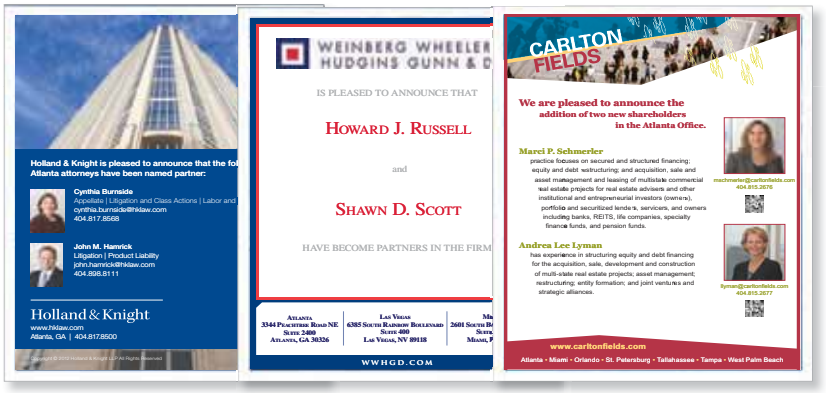

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