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To Catch a Plaintiff:

Production of Surveillance Evidence Prior to Trial

By Whitney Lay
Drew Eckl & Farnham, Brunswick

The following is a commonplace scenario in a general liability claim. Plaintiff alleges personal injuries as a result of an accident on Defendant's premises. Defendant hires an investigator to perform surveillance on Plaintiff.

In discovery, Plaintiff requests any surveillance videos or photographs and the name of the investigator who obtained them. Defendant discloses the existence of surveillance but objects to its production on the grounds that such evidence is protected by the work-product privilege and/or is outside the scope of discovery because its sole potential use would be to impeach the Plaintiff's testimony at trial. Plaintiff files a motion to compel production of the surveillance. Then comes the tricky part—what happens next?

Background

The Georgia appellate courts have not addressed the issue of whether surveillance is discoverable under the Georgia Civil Practice Act. However, the issue has been addressed multiple times by trial courts in Georgia and also by various federal and state jurisdictions. The determinations reached by those courts vary significantly.

A number of those courts held that surveillance is discoverable, but production is not required until after the defendant deposes the plaintiff. Other courts (including several trial courts in Georgia) held that surveillance is not discoverable at all. There are certainly sound policy considerations and rationales behind both sets of decisions. At the root of the issue are three questions:

- Is surveillance protected by the work-product privilege?
- If so, can a plaintiff show substantial need and undue hardship such that the privilege is overcome?
- Aside from the work-product questions, can a defendant withhold surveillance when its sole

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Inside This Issue

Past President Bubba Hughes Honored with DRI Award

The GDLA is pleased to announce that DRI honored GDLA Past President Edward M. (Bubba) Hughes of Callaway Braun Riddle & Hughes in Savannah with the 2014 Kevin Driskill Outstanding State Representative Award.

Bubba Hughes is congratulated by DRI President John Parker Sweeney (left) and DRI Executive Director John Kouris (right).

The award was bestowed at the DRI Annual Meeting in San Francisco during the awards luncheon on October 23, 2014.

Hughes began his service as the GDLA State Representative to DRI in October 2011. During his three-year term, he made significant contributions toward promoting DRI membership within Georgia, and was consistently ranked at the top among State

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Sarah (Sally) B. Akins

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President's Message

I get tired of hearing the Plaintiff's call to "justice." Ever notice how warped it is—how it seems based on rhetoric, hyperbole, and a desire to instill fear or play on sympathy? A recent example of this is an advertisement I heard over the radio from a plaintiff's firm urging people to place themselves in the shoes of the injured party when they sit in the jury box, despite laws preventing this. The speaker also remarked that while plaintiff's firms are not allowed to ask about insurance coverage at trial, the listeners who sit on the jury should assume that insurance is available. That is not "justice" which is being promoted.

"Our profession is good, if practiced in the spirit of it; it is damnable fraud and iniquity when its true spirit is supplied by a spirit of mischief-making and money catching." Daniel Webster, 1806.

We, the defense bar, are the warriors for justice. We stand up to the bully. We are the ones who ferret out the facts which matter, the ones who point out the laws which control, and the voice of reason promoting a calm, measured approach to the problem. The world is a better and more just place because we are in it.

We are the last chance our clients have for "justice." We are the only ones who can tell our client's story and explain our client's actions in the proper context.

"It's never about the opponent or who we're facing. ... Coach likes to say they're faceless—and they are. It's about us and what we do and how we take everything on the field. It doesn't matter who we play. We're trying to play the way we are capable of playing." Then-Alabama quarterback, AJ McCarron, quoting Coach Nick Saban.

Regardless of who we are opposing, of what obstacles lay in our path, let us strive to do our best in every circumstance.

Let us seek justice for our clients. Let us champion the cause of those who have been accused. Let us promote the public good through concerted efforts to safeguard the defenses of those who have strived to make this world a better place—those who have provided us with food and shelter, who have created the goods we enjoy, who have provided employment for countless individuals, who have provided health care and saved lives. Let us further the rule of law in a civil justice system. Let us advance the common law and the finest traditions of jurisprudence. Let us uphold the honor and dignity of the legal profession and the highest standards of ethical conduct and integrity.

For the defense,

Kirby Mason

Kirby G. Mason
HunterMaclean, Savannah

Past President Honored

Continued from page 1

Representatives for most recruits.

DRI is the leading national organization of defense attorneys and in-house counsel. The GDLA is considered one of DRI's State & Local Defense Organizations (SLDOs). To enhance communication and to coordinate efforts among the defense bar around the country, each SLDO selects a DRI member to serve as a State Representative.

GDLA Immediate Past President Theodore (Ted) Freeman of Freeman Mathis & Gary in Atlanta was appointed by President Kirby Mason to succeed Hughes as State Representative to DRI.

This is the third consecutive year that the GDLA and its leadership have been honored by DRI at its Annual Meeting. Last year, GDLA Past President Lynn M. Roberson of Swift Currie McGhee & Hiers in Atlanta was presented the Fred H. Sievert Outstanding Bar Leader Award. In 2012, the GDLA received the Rudolph A. Janata Award for Outstanding Defense Organization among all SLDOs nationwide. ❖

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Member & Legal News

Member News

Gray Rust St. Amand Moffett & Brieske in Atlanta announced that **C. Michael Denney, J. Skye Wellesley** and **Rishi D. Pattni** have joined the firm. They will maintain a general civil defense practice focusing on the areas of general liability, insurance coverage, premises liability, property loss and appellate.

Matthew P. (Matt) Stone, formerly with *Freeman Mathis & Gary*, has joined the Atlanta office of *Smith Moore Leatherwood*. He is a member of the firm's Transportation Industry Group and 24/7 Rapid Response Team. He is joined there by his team, associates **Shawn N. Kalfus** and **Kori E. Flake**. His practice will continue to focus on resolving motor vehicle liability claims against companies, drivers, and insurers in the trucking and transportation industry.

C. Bradford (Brad) Marsh of *Swift Currie McGhee & Hiers* in Atlanta was re-elected as Chairperson of the Formal Advisory Opinion Board of the State Bar of Georgia.

Womble Carlyle Sandridge & Rice announced **Elizabeth (Lisa) Bondurant** joined the firm's Atlanta office as a partner. She represents insurance companies, financial institutions, employers, ERISA plan fiduciaries, third-party administrators and managed healthcare entities in complex cases involving such issues as ERISA; RICO; life, health, disability, and accidental death benefits; broker, producer and agent disputes; and managed care issues.

Case Wins

After two days of trial and 1½ hours of deliberations in DeKalb County State Court, **Jonathan Adelman** of *Waldon Adelman Castilla Hiestand & Prout* in Atlanta successfully limited a plaintiff's verdict to $12,774—considerably less than the pre-trial offer of $45,000 and the plaintiff's request to the jury in the amount of $110,000.

This was a case of clear negligence on the part of the defendant. The plaintiff claimed ongoing injuries to her neck, low back, and sacroiliac joint, despite the fact that she showed up at trial wearing four inch heels. She was transported from the scene of the accident, which involved a significant impact, by ambulance. The plaintiff followed up with an orthopedist, who administered four sacroiliac joint injections between July of 2011 and March of 2014.

The favorable result was largely due to very effective cross-examinations of the plaintiff and her doctor, as well as significant gaps in her treatment. ❖

Welcome New GDLA Members

The following were admitted to membership by the Board of Directors at its Fall Meeting in October:

Ariel I. Adams
Hall Booth Smith, Atlanta

Richard W. Brown
Fain Major & Brennan, Atlanta

Stephen Dermer
Magill Atkinson Dermer, Atlanta

Stephanie Dovalina
Galloway Johnson Tompkins Burr & Smith, Atlanta

Trisha Godsey
Scrudder Bass Quillian Horlock Taylor & Lazarus, Atlanta

David M. Gram
Savell & Williams, Atlanta

Gabriel Hartsell
Galloway Johnson Tompkins Burr & Smith, Atlanta

Jason Hergenroether
Gray Rust St. Amand Moffett & Brieske, Atlanta

Trevor G. Hiestand
Waldon Adelman Castilla Hiestand & Prout, Atlanta

Eric Hoffman
Hall Booth Smith, Atlanta

Olivia G. Mann
Hall Booth Smith, Atlanta

Charles C. Mayers
Attorney at Law, Augusta

Jennifer McNeely
Waldon Adelman Castilla Hiestand & Prout, Atlanta

Sean T. Mims
Hall Booth Smith, Columbus

Stephen B. Moseley
Cowsert & Avery, Athens

Amir Nowroozzadeh
Hicks Casey & Foster, Marietta

Arthur Park
Mozley Finlayson & Loggins, Atlanta

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Hall Booth Smith, Atlanta

Rishi D. Pattni
Gray Rust St. Amand Moffett & Brieske, Atlanta

P. Kyle Perry
Fulcher Hagler, Augusta

Benjamin Pierman
Nall & Miller, Atlanta

Megan E. Quisao
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Todd N. Robinson
Hall Booth Smith, Atlanta

Alyssa Rogers
Rutherford & Christie, Atlanta

Alexander Salzillo
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Aaron I. Salzman
Owen Gleaton Egan Jones & Sweeney, Atlanta

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Bryan Cave, Atlanta

Lauren N. Schultz
Childs & Noland, Macon

Adam P. Smith
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John M. Stephenson
Watson Spence, Albany

Tonya F. Stokes
Dennis Corry Porter & Smith, Atlanta

Mareesa L. Torres
Ellis Painter Ratterree & Adams, Savannah

Abraham C. Varner II
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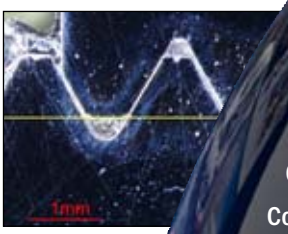




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So What Codes Apply Here?

By Bob Kenney, P.E.
Engineering Systems, Inc. (ESI)

Asking this question is the first step in knowing what should have been done or installed in a property or causality loss claim, in cases of construction defects, and premises and professional liability cases. The question sounds simple, but the answer is complex.

What are Codes?

Codes (and Standards) are not Regulations, but may become such. Codes are typically developed through consensus committees of professionals in their specific field of expertise. This leads to a tremendous amount of scrutiny, resulting in extremely high quality standards.

These codes are guidelines, or recommendations, to promote safety in the broadest context, and for developing uniform standards of operation. When referred to in contract drawings, specifications, or agreements, codes become legally binding. Additionally, when codes are adopted by different states, cities and public municipalities, they become enforceable regulations.

Let's focus on building codes. These are codes that govern the design, construction, alteration and maintenance of structures. The codes specify the minimum requirements to adequately safeguard the health, safety and welfare of building occupants and general public that may be invited into the structure.

The scope of building codes is defined as follows: "The provisions of this code shall apply to the construction, alteration, movement, enlargement, replacement, repair, equipment, use and occupancy, location, maintenance, removal and demolition of every building or structure or any appurtenances connected to such buildings or structures." (2012 International Building Code (IBC) preface). In short, these codes cover every aspect of the building.

Why are Codes Important?

Per the IBC, "The purpose of this [building] code is to establish the *minimum* requirements to safeguard the public health, safety and general welfare through structural strength, means of egress facilities, stability, sanitation, adequate light and ventilation, energy conservation, and safety to life and property from fire and other hazards attributed to the built environment and to provide safety to fire fighters and emergency responders during emergency operations."

Notice the building code includes: structural strength (American Society of Civil Engineering (ASCE) codes), means of egress (National Fire Protection Association (NFPA) codes), sanitation (National Science Foundation (NSF) codes), lighting (National Electrical Code (NEC) codes), ventilation (American Society of Heating and Air Conditioning Engineers (ASHREA) codes), energy conservation (American Society of Mechanical Engineers (ASME) codes), safety to life (Life Safety Code, NFPA 101) codes), and safety to property and emergency responders (NFPA 13 & 25 & 72) codes).

The above code references show how each ties to the other by reference. There are only six codes referenced above. The IBC references 18 pages of codes. Each has its own edition date, which in turn is referenced in different editions of the IBC.

The IBC and the NEC are only two of the 12 main building codes. In Georgia, there are eight mandatory codes:

- International Building Code, 2012 Edition, with Georgia Amendments
- International Residential Code, 2012 Edition, with Georgia Amendments
- International Fire Code, 2012 Edition, with Georgia Amendments
- International Plumbing Code, 2012 Edition, with Georgia Amendments
- International Mechanical Code, 2012 Edition, with Georgia Amendments
- International Fuel Gas Code, 2012 Edition, with Georgia Amendments
- National Electrical Code, 2011 Edition (No Georgia Amendments)
- International Energy Conservation Code, 2009 Edition, with Georgia Supplements and Amendments

In addition, there are four "permissive" codes that only apply if a local government chooses to adopt and enforce one or more of these codes:

- International Swimming Pool and Spa Code, 2012 Edition, with Georgia Amendments
- International Existing Building Code, 2006 Edition, with Georgia Amendments
- International Property Maintenance Code, 2006 Edition, with Georgia Amendments
- National Green Building Standard, 2008 Edition, with Georgia Amendments

Building Codes Applicability

As can be seen from the brief outline above, knowing what code applies and when can be somewhat confusing. Some codes only apply when the building was originally built. As code editions change, the requirements change. The original building however, does not have to meet the new code unless more stringent safety requirements, such as the Life Safety Code, change as well. Requirements also change if the building is altered, modified or renovated more than a certain amount. Building codes still define the standards for the design, construction, maintenance and renovation of buildings. Buildings that do not meet the applicable standards are in violation of the codes. Building owners, managers and designers can be found liable for accidents and injuries or losses to persons and/or property as a result of building code violations.

Why are there Various Codes?

Since the early 1900s, the system of building regulations in the United States was based on "model" building codes developed by three *regional* model code groups.

- The Codes developed by the Building Officials Code Administrators International (BOCA) were used in the Northeast and part of the Midwest of the United States.
- Codes from the Southern Building Code Congress International (SBCCI) were used in the Southeast.
- The International Conference of Building Officials (ICBO) covered the West Coast and across to most of the Midwest

Initially this worked as it allowed local officials to modify the "model" as appropriate. With time and as more products and companies became national, this system did not work, especially along the edges of the "code" regions. As regional code development became more effective and responsive to the regulatory needs of the local jurisdictions, conflicts began to appear.

A movement developed in the early 1990s to create a single coordinated building code for the country. The nation's three model code groups decided to combine their efforts and in 1994 formed the International Code Council (ICC) to develop codes that would have no regional limitations.

After three years of extensive research and development, the first edition of the International Building Code was published in 1997. The code was patterned on three legacy codes previously developed by the organizations that constitute the ICC. By the year 2000, the ICC had completed the International Codes series and ceased development of the legacy codes in favor of the national successor. The ICC determined that they would collect recommendations to the various codes, and every three years review various recommendations and make appropriate changes to the current code editions. The first amendment to the original 2000 IBC was the 2003 edition.

The ICC cannot force a state, city or municipality to adapt a code. It can only recommend the current code as a "model." Typically, individual states adapt the basic code with amendments as the individual state deems appropriate. The state usually then allows individual cities to amend the state version, as long as it is at least as stringent as the minimum state amended code. For example, the current IBC edition in Georgia is the 2012 edition that was officially adopted by the Department of Community Affairs on January 1, 2014 with state amendments.

In addition to these state codes developed by the ICC, there are federal building codes. These include, but are not limited to:

- Americans with Disability Act of 1990 (ADA)
- Fair Housing Act of 1968 (FHA)

Separately, there are State Fire Laws that adopt codes. These were listed above under the National Fire Protection Association (NFPA) codes. Finally, there are environmental rules that deal with the building site and protecting the environment. These include:

- Georgia Safety Fire Law
  - —Sprinkler Systems (NFPA 13)
  - —Smoke Alarms & Detectors (NFPA 72)
  - —Maintenance & Inspections (NFPA 25)
- Environmental Protection Division (EPD)
  - —Implements state laws, rules, and policies to protect human health and the environment. EPD applies and enforces environmental laws and standards.

How are Codes and Laws Enforced?

The building code creates the office of the Building Official. The Building Official has the authority of interpreting the building code. The Building Official receives any application for a building. The Building Official reviews the construction documents, issues permits, and makes all required inspections per the IBC. The IBC authorizes the Building Official the "Right of Entry" to inspect and enforce the Code. The IBC relieves the Building Official from personal

liability while acting in good faith in carrying out their duties.

A building official however, cannot enforce any ADA, Fair Housing, Fire Safety or EPD regulations. These laws and regulations fall under other state officials.

So What Steps Do You Take?

First, find out the year the building was built. Then check with the state you are in that maintains the date that codes were adopted. In Georgia, that is the Department of Community Affairs (they go back to about 1990). Now you will know what codes were in force at the time that structure was built.

Second, was there any work done in the area of the incident? Then the codes can be assessed to determine applicability and direct causation. Also check if other codes may apply. For instance, just because a handrail was missing does not mean that caused a person to fall.

Finally, you can assess your position and create your strategy. Typically the other expert's report can point you in the direction of the other side's strategy.

Things to look for in the other expert's report are:

- Referring to the wrong code;
- Referring to wrong category of codes;
- Incorrect interpretation of codes; and/or
- Not providing citation to the codes referenced.

The code expert should:

- Determine the applicable building code and if it applies.
- Correctly interpret the provisions of the code.
- Perform the analysis required by the code.
- Determine if a code violation exists.
- Determine if the code violation is a contributing factor.
- Provide an opinion as to the cause and responsibility. ❖

Bob Kenney, P.E., is a principal with GDLA Platinum Sponsor ESI. He specializes in site, building and earth retaining structure failures including due to flood, wind, fire damage, soil erosion and settlement, structural collapse, code violations, product performance defects, failure, and testing. In addition, he has extensive experience with stormwater detention and runoff systems, construction methods and materials, hydraulic and pipeline fuel gas and sprinkler systems, including large roofs, tall retaining walls, billboards, railroads and tunnels, water and wastewater treatment facilities, pump stations and distribution systems, boilers, standing seam roofs, EIFS systems, handrails, windows, doors and cladding. He also has significant experience with building envelope moisture intrusion.

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Deposition Management: Asking the Right Questions

As with Depositions, the Best Questions Yield the Best Results

By Avi Stadler
Esquire Deposition Solutions

The choice of a deposition provider should never be taken lightly. Especially in complex litigation, the service needs to be fast and accurate, but also comprehensive and technologically sound, to meet any challenges that might arise. Engaging the wrong provider—or too many providers—can result in costly delays and inconsistent quality in your deposition transcripts and videos that could impact the outcome of the matter.

For the best results, ask the right questions up front. A full understanding of the scope of your case needs, both immediate and future, can enable you to align resources to those needs efficiently and effectively.

The right court reporting provider will welcome your questions, helping you to identify and meet the requirements for location and type of space; reporting and videography; translation services; transcript repository, and more. As important as its offerings, the provider of choice will deliver the technological resources and client service necessary for top-quality, professional deposition management.

Broad Reach, Local Support

You may need to schedule depositions across the country, or around the world. Is your provider where you need to be? Consider the locations in which the proceedings will occur, and could occur, and insist on a national organization with experienced local reporters and videographers.

Single-Source Access Simplifies Deposition Management

Engaging a full-service deposition provider can help you gain time and cost efficiencies. With instant access to a variety of resources, your depositions can be coordinated with minimal time on your part. Ask yourself which of the following your case requires and choose a provider that can deliver every element:

- Certified realtime court reporters with specific industry or matter-related experience
- Interpretation in a variety of languages
- Portable videoconferencing, remote streaming of text and video, and synchronized video
- Online scheduling, calendar management and invoicing
- Online repository with secure, fully-searchable access to transcripts, exhibits and videos
- Mobile access on multiple platforms to case calendars, transcripts, exhibits and videos
- Transcripts delivered in ASCII text and/or enhanced electronic format
- Tools for reviewing and captioning video to create polished PowerPoint presentations
- Flexible space options
- Concierge customer service
- 24/7/365 support

Especially if your firm regularly conducts complex litigation, establishing a relationship with an adaptable, full-service provider can simplify your overall deposition management, giving you increased control over your information and your time.

World-Class Technology Infrastructure Supports Your End-to-End Process

Your deposition provider of choice must offer court reporters with the latest technical training in realtime reporting. It must also feature a reliable technology infrastructure that allows firm administration and litigation teams to manage and share documents efficiently.

Ask for a demonstration of the provider's online case portal, repository and other technical services, making sure each is secure and easy to learn and use. The overall system should enable a streamlined, end-to-end process:

- The case portal should allow depositions to be scheduled quickly, and provide immediate email confirmation. Be sure the system offers sharing of case calendars, notifications of settings and changes, and the ability to review and pay invoices online.
- The repository should provide access to all your case-related

files in one place, with flexible search capabilities that let you instantly search all case files at one time. Look for the ability to batch download documents and share video access within your firm or with expert witnesses, with no additional licensing and no IT support required. A tool for online, multiparty discussions, with the ability to view video and text clips, will enable you to quickly create and finalize your presentations.

A prospective provider that invests in developing and offering new technologies offers a good indicator of its commitment to a healthy overall technology infrastructure. One such emerging technology is portable video conferencing, which enables attorneys to view and interact with witnesses in remote locations using hand-held mobile devices. Another cutting-edge technology is paperless deposition software, which allows litigators to simply bring a laptop or iPad to the deposition—instead of binders or

One such emerging technology is portable video conferencing, which enables attorneys to view and interact with witnesses in remote locations using hand-held mobile devices.

boxes of paper exhibits—to mark and introduce exhibits electronically.

Responsive Customer Service Makes "All the Difference"

Once you've engaged a provider, keep your questions coming. A top-notch, professional case management team will respond immediately to your issues and concerns with real solutions. Deposition management—capturing, managing and presenting your deposition information—is no simple task. Don't shy from asking for assistance in assessing your needs, or from requiring excellent service. With support from a full-service, technologically advanced deposition provider, your firm can produce high-quality depositions, wherever your cases take you. ❖

Avi Stadler has extensive experience in the legal industry and currently serves as General Counsel of Esquire Deposition Solutions, a GDLA Platinum Sponsor. He joined Esquire most recently from Sutherland Asbill & Brennan where he was a member of the firm's litigation department. Prior to that, he was Director of Professional Development at McKenna Long & Aldridge.



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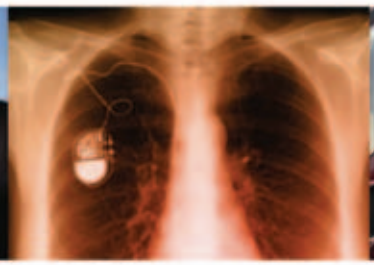


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By Erik Nelson, Ph.D., P.E.
Nelson Forensics

When residents of West, Texas awakened on Wednesday, April 17, 2013, no one expected that their lives would soon be changed forever, and not in a good way. That evening, from the West Fertilizer Company, the town's major employer and supplier of chemicals to farmers since it was founded in 1962, a massive ammonium nitrate explosion would originate, killing 15, injuring more than 300, and damaging or destroying more than 150 residences, schools, and care facilities.

These are significant numbers for any town, to be sure, but when your community covers only 1.6 square miles, they are devastating.

At its epicenter, the blast left a crater 93 feet wide by 13 feet deep. The plant itself was decimated. The nearest rail line was shoved onto the farthest rail. The closest house, 300 feet from the blast, was obliterated. From a forensic engineer's perspective, evaluating this type of distress is perceived as a slam dunk.

Radiating out from the blast, however distress takes on some unique nuances. To better understand these, enter the concept of "blast loading."

Overview of Blast Loading

An explosion creates a shock wave of highly compressed air travelling radially outward from the explosion origin in an effort to reach equilibrium with the surrounding air.

The initiation of most explosions creates an almost instantaneous rise in pressure, which decays rapidly with distance and time. Unique characteristics of blast loading include:

- Quickness: The duration of loading for most explosions is less than a second, making a material's dynamic strength important to consider.
- Decay: Pressures decay proportionally to the distance from the origin.

Figure 1: Diagonal brick fractures with spalling along brick edges

Figure 2: Diagonal fractures with no spalling

Figure 3: Displaced brick veneer with downward deformation of top plate

Figure 4: Buckled brick veneer with adjacent displacement of roof eave

Figure 5: Vertical strut fractured in compression

Figure 6: Fractured vertical strut along ridge and separated purlin supports

Figure 7: Fractured rafters and purlin

Figure 8: Compression fracture in truss web member

- Bounceback: The initial positive phase is followed by a negative phase. The negative phase is the result of a vacuum being created near the explosion origin due to the displaced air from the shockwave.
- Equal Opportunity: All faces of a structure can be positively loaded simultaneously.

What are the Mechanisms of Blast Loading

- Overpressure: Comparable to submerging the structure in

Figure 9: Collapsed ceiling finishes at vaulted ceiling with fractured rafters

Figure 10: Collapsed ceiling finishes at area of displaced ceiling framing

Figure 11: Displaced window frame and fractured glazing

Figure 12: Fractured glazing and inward deformation of window frame

water, overpressure can load all surfaces positively at once; however, due to the rapid decay of the blast wave, the overpressure at the blast-facing side may be much larger than the overpressure on the opposite side.

- Reflected Pressures: Comparable to loading from waves, reflected pressure is directly related to the angle of the reflecting surface versus the angle of the blast wave.
- Dynamic or "Blast Wind" Pressure: Resulting from air movement as the blast wave propagates through the atmosphere, blast wind pressure generally affects enclosed structures less significantly, however, it can contribute to positive loading.
- Ground Motions: Decaying slower than overpressures and propagating farther out from the explosion origin than the blast wave, ground motion waves can have greater impact than the blast wave.

Blast Loading as Evidenced in West

Diagonal brick fractures were observed up to .3 miles from blast. Some diagonal fractures were accompanied by spalling at the edges of the bricks along the fracture, as seen in Figure 1. Figure 2 demonstrates no spalling (see previous page).

Significant brick veneer distress was observed up to .4 miles from the blast, as seen in Figures 3 and 4 on previous page.

Fractured roof framing was observed up to .5 miles from the blast, as seen in Figures 5 through 8 on page 15. Fractured framing included rafters, purlins, purlin supports, vertical struts, truss members, etc. The framing distress was located on slopes facing toward and away from the blast, with a concentration of distress on the blast-facing slopes.

Collapsing ceiling finishes were observed up to .65 miles from the blast, as seen in Figures 9 and 10.

Fractured/displaced windows were observed up to .7 miles from the blast, and found on all elevations of the structures; see Figure 11. Distressed overhead doors, like the one in Figure 12, were observed up to one mile from the blast.

Conclusion

In summary, the evaluation of distress after an explosion like the one in West takes on some of the same characteristics after seismic events like earthquakes, but with some specific nuances relating to blast loading. Understanding these nuances helps forensics engineers distinguish between distress related to the blast and damage due to long term deterioration, weather events, or other perils. For the residents of West, the old real estate adage was true, "It's about location, location, location." ❖

Erik L. Nelson, Ph.D., P.E. is President and CEO of Nelson Forensics, a GDLA Platinum Sponsor. Since 1994, Nelson has provided litigation support and expert testimony within the construction and insurance arenas.

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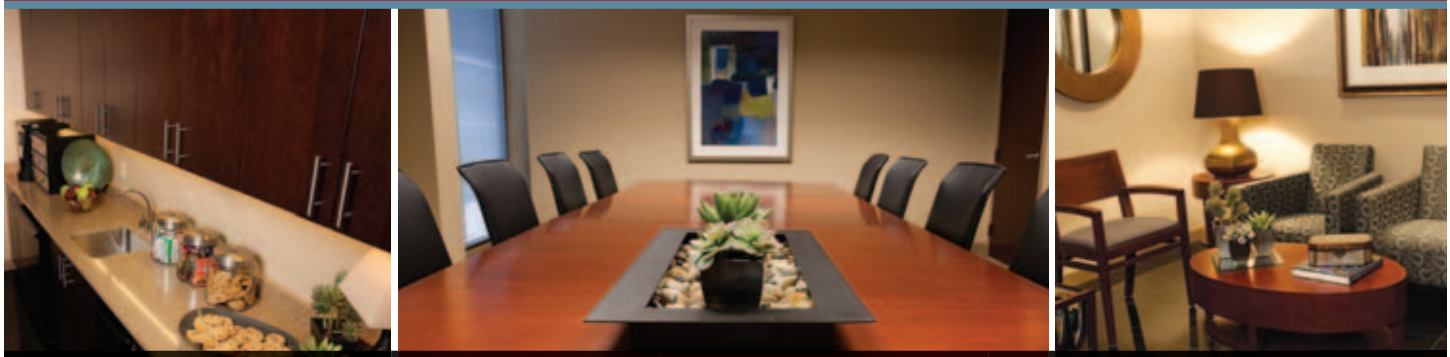

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The Material Impact of Materials

By Nicholas Biery, Ph.D., P.E.
S-E-A, Ltd.

At the heart of nearly every insurance loss or legal dispute, large or small, is a failure of some kind. Sometimes the failure is human, the result of one or more decisions that lead directly to the loss. Other times, the failures are literal, and result from decisions made prior to the loss. They can be failures to use an item or part correctly, failures to install a part correctly, failures to manufacture them correctly, or even failures to design them correctly. On the other hand, it could be that the component is perfectly suited for its intended purpose, but it has been used for another purpose for which it is not well suited. Oftentimes, a failure is a literal one, and parts of a system are broken, bent, cracked or degraded so that their intended function can no longer be fulfilled. In these cases, materials science is a tool that may shed light on the cause.

Materials science is a discipline which sometimes seems mysterious, with a specialized jargon that consists of common words applied to new concepts, such as "grain boundary," "dislocation," "band gap," or "inclusion" (which have nothing to do with wheat, shoulder injuries, missing musicians, or social harmony), and unique words like "eutectic" or "martensite." The language is specialized enough that even other engineers often think that their materials brethren, the metallurgists, ceramists, and polymer scientists, are speaking a different language. Ask a materials scientist or materials engineer why your tile counter top cracked when you put a hot pan on it and you're likely to get a long explanation involving sintering, voids, and their impact on thermal conductivity. Ask why a rope failed and you might get a discussion of common antioxidants and anti-UV agents in plastic fibers. But such obscure knowledge can be of great use when it comes to understanding the cause of a failure.

Materials science can be summarized in many ways, but one (relatively) simple definition is that it is the study of the relationship between the structure and composition of materials and the resulting properties and performance. It also encompasses the methods used to impart or modify the structure and thus the properties, the art and science of turning raw ingredients into the useful metals, plastics, and other engineering materials that are used throughout our modern world. It is the study of how and why things are put together, from the atoms in them to the glue or welds used for final assembly.

This is not to say that the materials scientist is the ultimate expert, able to address every aspect of every case where something is broken, bent, cracked or degraded. There are times where the cause of failure is clear and unambiguous, and there are times where understanding the failure mechanism is a small aspect of a large case. Caution is necessary, however. Without understanding the why and how of a failure, it is possible (and unfortunately quite common) that a component that failed as a result of an incident is interpreted as a cause. An example is a broken bolt in a motorcycle steering mechanism. The injured driver is quite likely to attribute his accident to the failure of the bolt. A materials scientist can tell you by looking at the fracture whether it was caused by years of cyclic stresses, or by hitting an obstacle at high speed. Testing may reveal whether it met the manufacturer's specifications for performance. Armed with this knowledge, liability may be directed at the designer, the manufacturer, the supplier, or the user. Similar questions arise in many accidents, where the failure mode of a component, and an investigation of its properties, can determine whether it was the cause of the accident or a casualty.

Materials experts spend much of their time using microscopes, studying the fine details of fractured and broken things, using specialized tests to determine what was used to make them and how, and if there might have been some unfortunate additions to or omissions from the recipe. Established scientific methodologies enable the materials

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Premises Liability Case Law Update

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

PATENT DEFECT; EQUAL KNOWLEDGE OF HAZARD: Defendant/landlord not liable for trip-and-fall on landlord's property where Plaintiff/tenant had equal knowledge of hazard, even though hazard had become obscured by grass.

***Milledgeville Manor Partners, LLC v. Lewis*, 2014 Ga. App. LEXIS 561 (July 22, 2014).**

This case arises from an incident in which a tenant, Lewis, fell in a hole in the ground on her landlord's property after she had seen and reported the hole to her landlord. Prior to Lewis' fall, she informed the groundskeeper for the property and another employee of the landlord about the hole. Lewis did not check after that point to see if the hole had been repaired. About 2 ½ weeks later, Lewis stepped into the hole, fell, and fractured her ankle. Lewis claimed she could not see the hole that day because grass had grown over it and hidden it from her view.

Lewis sued her landlord, and the landlord moved for summary judgment. The trial court denied the landlord's motion for summary judgment, and the landlord appealed. The Court of Appeals reversed, holding that Lewis' admissions confirmed that she had actual knowledge of the hazard, in that "She noticed the hole well in advance of her injury, watched the hole widen over time, and personally reported it to the groundskeeper and another" employee of the landlord.

The Court of Appeals specifically relied on the Supreme Court of Georgia's holding in *Landings Association v. Williams*, 291 Ga. 397 (2012), in which a plaintiff's decedent was held to have "either knowingly assumed the risks of walking in areas inhabited by wild alligators or failed to exercise ordinary care by doing so." *Id.* at 399. Just as the Supreme Court held in *Williams* that

the decedent's lack of knowledge that alligators in a specific lagoon were large and aggressive was irrelevant because she knew there were wild alligators in the general vicinity, The Court of Appeals held Lewis' actual knowledge of the hole precluded her from recovering.

There also was no jury question, the Court of Appeals held, on whether Lewis exercised reasonable care. "[E]ven though the hole ... was hidden by overgrown grass, the lack of visibility does not alter the undisputed fact that Lewis was aware of its existence, thereby triggering a heightened burden for her to exercise greater caution."

STATIC DEFECT; DUTY TO LICENSEE; CONSTRUCTIVE KNOWLEDGE; BUILDING CODES; DUTY TO INSPECT PREMISES: Owner of apartment not liable to licensee when deck railing collapsed, even though railing did not comply with building code, because deck was not built by owner, no evidence owner knew of alleged defect in railing, and no evidence railing violated building code when built.

Rogers v. Woodruff, 328 Ga. App. 310 (July 15, 2014) (physical precedent only).

Cory Woodruff sued Janice Rogers after he fell from a deck at Rogers' house when a railing collapsed while Woodruff was visiting Rogers' daughter, Kelly, who was living in an apartment above Rogers' garage. The deck was constructed in 1996 by a prior owner; Rogers purchased the property in 2006.

On the night of the fall, Woodruff, Kelly, and some others went to a bar and drank alcohol, though the specific amount of alcohol consumed by Woodruff was in dispute. After they returned to Kelly's apartment, Woodruff went onto the deck outside the apartment with another man, Hayes, who was interested in Kelly. Although Woodruff and Hayes deny they were fighting, Kelly and another witness heard loud voices, saw and heard Hayes get slammed against the door, and apparently heard Woodruff crash through the deck railing and fall to the concrete below. Woodruff claimed he fell when the railing collapsed as he leaned against the railing, while Hayes said Woodruff

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DAILY REPORT

Product Liability Case Law Update

By Brooke Walker Gram
Balch & Bingham, Atlanta

PREEMPTION AND PARALLEL CLAIMS; THE MEDICAL AMENDMENTS OF 1976: Defendant Advanced Neuromodulation Systems, Inc. moved to dismiss Plaintiff's claim. The district court found that the Medical Device Amendments of 1976 (MDA) preempted Plaintiff's Georgia state law strict liability and negligent manufacturing claims based on an "implied" performance standard and alleged failure to carry out design validation testing, and failure to warn claims. The Court found Plaintiff's Georgia state law negligent manufacturing claim based on two prior recalls of the same medical device was not preempted by the MDA. The Court also found that Plaintiff stated a claim for breach of express warranty because Plaintiff and manufacturer were in privity by virtue of a limited warranty given by Advanced Neuromodulation Systems, Inc.

***Cline v. Advanced Neuromodulation Systems, Inc.*, ____ F. Supp. 2d _____, 2014 WL 1624084 (N.D. Ga. March 31, 2014)**

Plaintiff asserted Georgia state law claims against Advanced Neuromodulation Systems, Inc., the manufacturer of an implantable pulse generator. Specifically, Plaintiff asserted breach of warranty, negligent manufacturing and failure to warn, strict liability, breach of implied warranty, material misrepresentation and violation of Georgia Uniform Deceptive Trade Practices Act (UDTPA). Advanced Neuromodulation Systems, Inc. moved to dismiss, arguing Plaintiff's claims were preempted by the Medical Device Amendments of 1976 (MDA). In

response to Advanced Neuromodulation Systems, Inc.'s motion to dismiss, Plaintiff withdrew her claims of breach of implied warranty and violation of the UDTPA. The Court granted in part and denied in part Advanced Neuromodulation Systems, Inc.'s motion to dismiss.

The Court reasoned that based on *Reigal v. Medtronic, Inc.*, 552 U.S. 312, 321-22 (2008), state law claims are generally preempted by the U.S. Food and Drug Administration's (FDA) regulatory authority over medical devices. The U.S. Supreme Court established a two-prong test for claim preemption under the MDA: (1) courts must determine if the federal government has established requirements relating to the device; and (2) if so, courts must evaluate whether a state claim imposes requirements relating to the safety and effectiveness of the device that are "different from or in addition to" federal requirements. The FDA has specifically enacted the MDA to regulate medical devices, such as the implantable pulse generator at issue. The MDA requires that manufacturers of surgically implantable devices, like the medical device at issue, obtain premarket approval from the FDA before the devices are made commercially available. The Court followed the reasoning in *Reigal* and found that the MDA's premarket approval process for this type of medical device satisfies the first prong of the preemption test.

However, the Court noted that an exception to preemption exists for state law "parallel claims" premised on an injury that is casually linked to the violation of FDA regulations. The Court reasoned parallel claims escape preemption because they do not impose any additional duties on a defendant beyond requirements of federal law, and therefore, do not satisfy the second prong for preemption. The Court found that to adequately plead a parallel claim, a plaintiff must claim the violation of a particular federal regulation and set forth facts pointing to a specific premarket approval requirement that has been violated. A plaintiff must also allege a cognizable link between the regulatory violation and the injury alleged.

First, the Court found that Plaintiff's breach of express warranty was proper. The Court found that the parties were in privity under Georgia law based on the limited warranty given by Advanced Neuromodulation Systems, Inc. The Court reasoned that

privity of contract between the manufacturer and ultimate consumer is established when the manufacturer extends an express warranty to the ultimate consumer. The Court did not address whether the MDA preempted Plaintiff's breach of express warranty claim because the Court had already ruled that Plaintiff's claim for breach of express warranty was not preempted by the MDA in a prior order.

Second, the Court found that Plaintiff's strict liability claim was preempted by the MDA because Georgia's strict liability provision does not require the violation of any standard of care, "let alone a standard that parallels federal regulations." Third, the Court closely examined Plaintiff's negligent manufacturing claims. The Court rejected Plaintiff's argument that her parallel negligent manufacturing claim could be based on an "implied" performance standard to last ten years and on Advanced Neuromodulation Systems, Inc.'s alleged failure to carry out design validation testing.

The Court held that Plaintiff's negligent manufacturing claim based on two prior recalls of the same medical device was not preempted. The Court found that the FDA's recall of the medical devices was "highly suggestive" of violation of a federal requirement. The Court ultimately held that Plaintiff's state claim for negligent manufacturing on this alleged violation of a medical devices' premarket approval requirements is "genuinely equivalent" to the requirements imposed under federal law; since it is premised on violations of federal duties established by the FDA, Plaintiff's negligence claim does not impose state requirements that are different from or in addition to federal law.

Lastly, the Court ruled that Plaintiff's negligent failure to warn claim was preempted by the MDA. Plaintiff argued that Advanced Neuromodulation Systems, Inc. failed to timely file Medical Device Reports (MDRs) and adverse event reports, as required by the FDA. Plaintiff argued she was harmed as a result of Defendant's failure to warn Plaintiff and the general public by timely filing MDRs and adverse event reports with the FDA. While the Court agreed that the FDA imposed an MDRs requirement, the Court found that Plaintiff failed to plausibly allege that any reporting failure was the proximate cause of her injury as there were no allegations that had Advanced Neuromodulation Systems, Inc. filed the proper MDRs, the information would have reached Plaintiff or her physician in time to prevent her injury.

PRODUCT DEFECT; FRAUDULENT JOINDER: District court found no fraudulent joinder of non-diverse car dealership. The court found there was a sufficient connection between Plaintiffs' liability claims asserted against Defendant General Motors, LLC and the negligence claim asserted against non-diverse Defendant Thornton Chevrolet, Inc. because the claims arose from the same incident and because the alleged ignition switch defect was a component of Plaintiffs' claims against both Defendants.

***Melton v. General Motors, LLC, et al.*, No. 1:14-CV-1815-TWT, 2014 WL 3565682 (N.D. Ga. July 18, 2014)**

Brooke Melton was involved in a fatal car accident. Her parents, Plaintiffs Kenneth and Mary Melton, filed their original lawsuit against General Motors, LLC and Thornton Chevrolet, Inc. on June 24, 2011, asserting multiple claims against General Motors, LLC and one claim of negligence against Thornton Chevrolet, contending that a defective ignition switch in the Chevrolet Cobalt caused the fatal car accident. On August 22, 2013, based on information received from General Motors, LLC during the case, Plaintiffs settled their claims against General Motors, LLC. Plaintiffs voluntarily dismissed their claims against Thornton Chevrolet.

After General Motors, LLC launched a recall of vehicles with defective ignition switches, including the 2005 Cobalt, Plaintiffs filed another action against both General Motors, LLC and Thornton Chevrolet, Inc., rescinding the 2013 settlement agreement and renewing their prior claims against General Motors, LLC and Thornton Chevrolet, Inc. Plaintiffs' claims against General Motors, LLC included strict liability, negligence, and breach of implied warranty claims. Plaintiffs' sole claim against Thornton Chevrolet, Inc. was a negligence claim based on Thornton Chevrolet, Inc.'s failure to properly diagnose why the engine in the Cobalt was abruptly shutting off when the vehicle had been serviced by Thornton Chevrolet, Inc.

General Motors, LLC removed the action from Cobb County State Court based on diversity jurisdiction. General Motors, LLC contended that Plaintiffs fraudulently joined Thornton Chevrolet, Inc., a Georgia dealership, in order to defeat federal diversity jurisdiction. General Motors, LLC argued that there was no real connection between the claims asserted against it and the negligence claim asserted against Thornton Chevrolet, Inc. Plaintiffs moved to remand.

The Court granted Plaintiffs' Motion to Remand. Citing, *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287 (11th Cir. 1998), the Court agreed that fraudulent joinder can be found where a diverse defendant is joined with a non-diverse defendant as to whom there is no joint, several, or alternative liability and where the claim against the diverse defendant has no real connection to the claim against the non-diverse defendant. However, the Court found that, for two reasons, there was a "sufficient connection" between the liability claims asserted against General Motors, Inc. and the negligence claim asserted against Thornton Chevrolet, Inc. First, the Court found all of the claims arose from

the same March 10, 2010 car accident. Second, the Court found that the alleged ignition-switch defect is a component to Plaintiffs' claim against both defendants as Plaintiffs assert General Motors, Inc. is liable for having designed the ignition switch and that Thornton Chevrolet, Inc. is liable because it failed to diagnose and correct the alleged defect.

Further, the Court found General Motors, Inc.'s argument that Plaintiff only added Thornton Chevrolet, Inc. as a defendant to defeat diversity unpersuasive. The Court reasoned the motive of Plaintiffs is not important as long as Plaintiffs intended to pursue a judgment against Thornton Chevrolet, Inc.

INEFFECTIVE WARNING LABEL; LEARNED INTERMEDIARY DOCTRINE; The Eleventh Circuit Court of Appeals upheld the district court's grant of summary judgment in favor of Defendants Roche Laboratories, Inc. and Hoffman-La Roche, Inc. The Eleventh Circuit found that under Georgia law, the reasoned decision by a treating physician to administer antibiotics to a patient severed any causal link between an alleged ineffectiveness of warning label for the antibiotic and the patient's injury.

***Brown v. Roche Laboratories, Inc., et al.*, 567 Fed. Appx. 860 (11th Cir. 2014)**

Plaintiff Dawn Brown brought claims against Roche Laboratories, Inc. and Hoffman-La Roche, Inc. ("Roche") alleging that she had a severe allergic reaction to Rocephin, an antibiotic manufactured by Roche, and that the antibiotic's warning label failed to state specific cautionary procedures to follow before administering the drug to penicillin-sensitive patients. Plaintiff had developed a sinus infection that her physician treated with Bactrim, a sulfonamide antibiotic manufactured by another defendant in the case, Eon Labs, Inc. Thirteen days after taking Bactrim, Plaintiff returned to her physician complaining of fever, neck pain, headaches, and blisters in her throat and mouth. Plaintiff's physician thought she had bacterial meningitis and treated the illness by giving her two injections of Rocephin, a cephalosporin antibiotic manufactured by Roche. Soon after receiving the Rocephin shots, Plaintiff's symptoms worsened and she was eventually diagnosed with Stevens-Johnson Syndrome and Toxic Epidermal Necrolysis, two forms of a life-threatening skin condition that can be caused by adverse reactions to a drug.

Roche filed a motion to exclude Plaintiff's causation expert and a motion for summary judgment. The district court granted Roche's motion to exclude. The district court, alternatively, found that Plaintiff's claim was otherwise barred under the learned intermediary doctrine. The district court found that the undisputed evidence in the case showed that the physician who administered the Rocephin to Plaintiff knew of Plaintiff's penicillin sensitivity and the risks of cross-reactivity between penicillin and Rocephin, and therefore, there was no causal connection between Rocephin and Plaintiff's injury.

The Eleventh Circuit, applying Georgia law, upheld the district court's determination. The Eleventh Circuit found that Plaintiff could not prove that the failure of Roche to warn her physician to test and substitute an alternative antibiotic for penicillin sensitive patients was the proximate cause of Plaintiffs' injury.

"The Eleventh Circuit applied Georgia's learned intermediary doctrine and held "if a manufacturer of a prescription drug warns a patient's physician of any risks or hazards of the drug, and despite the known risk of harm, the physician administers the drug, the manufacturer is insulated from liability for injuries suffered by the patient."

The Eleventh Circuit applied Georgia's learned intermediary doctrine and held "if a manufacturer of a prescription drug warns a patient's physician of any risks or hazards of the drug, and despite the known risk of harm, the physician administers the drug, the manufacturer is insulated from liability for injuries suffered by the patient."

Accordingly, because it was undisputed that Plaintiff's physician knew she was sensitive to penicillin and knew that there was a possible cross-reactivity between penicillin and Rocephin when he decided to treat Plaintiff with Rocephin, there was no causal link between the alleged ineffectiveness of the warning label for Rocephin and Plaintiff's injury as a matter of law. ❖

Trucking Case Law Update

By Zach Matthews
SLC Vice-Chair
Swift Currie McGhee & Hiers, Atlanta

TORTS: *Mastec North America, Inc., et al v. Wilson*, 325 Ga.App. 863 (2014)

This road wreck/negligence case involved a truck driver (operating a pickup truck) who allegedly ran a red light and struck the plaintiff while on his way to pick up a work crew in the course and scope of his duties for his employer, Mastec. Due to conflicting testimony at the scene, both the plaintiff and the defendant driver were cited for running the red light. The defendant driver independently entered into a plea deal, in which he pled guilty to an allegedly "reduced" violation of "driving too fast for conditions" under O.C.G.A § 40-6-180. He did so without the advice of counsel in an effort to avoid any further legal fees.

In the subsequent civil lawsuit, counsel for the plaintiff argued that the driver's employer, Mastec, should be subject to punitive damages based on a theory of negligent hiring, retention, supervision, and entrustment. At the time of his hire, Mastec performed an MVR background check on its prospective new driver (even though Mastec is not technically subject to the Federal Motor Carrier Safety Regulations), which showed that the driver had three speeding tickets, as well as one conviction for failure to stop. All of the convictions were more than three years old and within six months of being hired, the driver completed a defensive driving course required by Mastec.

The trial court denied the defendants' joint motion for partial summary judgment on the issue of punitive damages, but the Court of Appeals reversed. In its opinion, the Court of Appeals acknowledged that as a general rule, the admission of course and scope of employment will entitle a defendant employer to summary judgment on claims of negligent hiring/retention because the driver's negligence is "duplicative" of the allegations against the company. However, in the case of punitive damages allegations an exception to the general rule exists, which could entitle the plaintiff to present evidence of negligent hiring/retention to a jury. The Court further explained that in order for a punitive damages claim for negligent hiring/retention to survive summary judgement (where course and scope has been admitted), the plaintiff must show convincing evidence either (1) demonstrating that the defendant employer should have known that its employee was a habitually reckless or dangerous driver or (2) that the employer acted with the requisite want of care sufficient to raise a presumption of conscious indifference to the consequences in hiring, retaining, supervising, or entrusting its employee with a company vehicle.

In the case at issue, Mastec's driver had never previously received a ticket while behind the wheel of a commercial vehicle. In addition, the driver's admission—via pleading guilty to a "driving too fast for conditions" charge—was not shown by the evidence to be causally connected to the accident (which arose not because he was driving too fast, but because he allegedly ran a red light). Accordingly, the Court held there was no evidence that Mastec should have been aware that its driver had a "pattern or policy of dangerous driving."

Because the evidence did not support an award of punitive damages against Mastec as a matter of law, the plaintiff's underlying negligent hiring/retention claim against Mastec also failed. Specifically, Mastec's admission of course and scope, in the absence of a viable punitive damages theory, rendered the negligent hiring/retention allegations "duplicative of the negligence claims against the employee."

MOTOR CARRIER REGULATIONS: *Am. Trucking Ass'ns, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243 (D.C. Cir. 2013), *cert. denied*, 134 S.Ct. 914, 187 L.Ed.2d 781 (2014).

The U.S. Supreme Court denied certiorari in a contentious case from the D.C. Circuit arising out of multiple Petitions for Review of a Final Rule issued by the Federal Motor

Carrier Safety Administration (FMCSA) dealing with hours-of-service regulations. The underlying appellate decision almost entirely rejected challenges to the FMCSA's 2011 Final Rule (the "2011 Rule"), which is the set of regulations that went into effect on July 1, 2013. The petitioners seeking to challenge the law included two individual truck drivers, Dana Logan and Mildred Ball, as well as a "safety-oriented public interest group" known as Public Citizen. The petitioners were attempting to roll back the hours of service to shorter time windows. Meanwhile, American Trucking Associations, Inc., an industry lobbying group, filed a separate petition seeking a different set of changes. The U.S. Department of Justice, supported by the U.S. Department of Transportation, argued in support of the 2011 Rule as written.

The history of this set of regulations is very complicated. As of 2003, the hours of service laws included: (1) a daily driving limit of 11 hours; (2) a daily on-duty limit of 14 hours; (3) a daily off-duty requirement of 10 hours; and (4) a "34-hour restart" rule that allowed a driver to reset the "clock" for a week's driving limit (70 hours in 7 days) by taking off 34 hours. These rules were widely criticized when released and have since been subject to prolonged litigation, culminating in the 2011 Rule issued by the FMCSA. The 2011 Rule continued the earlier rules as set forth above, but added a "30 minute off duty break," which bars drivers from driving more than eight consecutive hours unless they have an off-duty break of at least 30 minutes. The 2011 Rule also added a stopgap to prevent abuse of the 34-hour restart rule, only allowing drivers to invoke the provision once every 168 hours (7 days). Finally, the 34-hour restart, if invoked, must have included *two* nights of the time period between 1:00 a.m. and 5:00 a.m.. This provision ostensibly ensures that drivers have two nights rest before "resetting" their work week.

In the underlying appellate case, the D.C. Circuit first analyzed questions of standing. In sum, it ruled that the trucking industry group had standing to challenge the 2011 Rule under an "associational" theory, while the public interest group lacked standing altogether. The individual drivers also had standing to challenge the 2011 Rule, but their comments in support of the 34-hour reset rule limited their alleged injuries to the 11-hour daily driving limit, which they sought to roll back to only 10 hours.

Ultimately, having eliminated several of the petitions on standing grounds, the D.C. Circuit analyzed the 34-hour restart rule's once-a-week rule and two-night requirement, upholding both. It also upheld the 11-hour daily driving limit (rejecting the truck driver petitioners' claims that this should be reduced to 10 hours per day). Therefore, almost all of the 2011 Rule, which itself was merely an enlargement of the regulations first enacted in 2003, was upheld.

However, the court did criticize the FMCSA's application of the 30-minute break rule because, as written, it was applied equally to both long-haul and short-haul drivers. As a result, the court "vacated" the "offending requirement" as to short-haul drivers (who typically stop and start many times in the course of their job duties).

On February 28, 2014, the FMCSA issued a "revision" bulletin, in which it acknowledges that, effective August 2, 2013 (the date of the D.C. Circuit's ruling), the 30-minute break rule is vacated as to short-haul drivers. The remaining provisions of the 2011 Rule appear to have survived the test of the courts. ❖

GDLA Files Amicus Brief in Expert Affidavit Case

The GDLA Amicus Curiae Committee, co-chaired by Jeff Ward of Drew Eckl & Farnham in Brunswick and Rusty Gunn of Martin Snow in Macon, in consultation with the Executive Committee, accepted a request to file an amicus brief to protect the requirement that, in a professional malpractice case governed by O.C.G.A. § 9-11-9.1, a plaintiff must contemporaneously file with the complaint an affidavit of a competent expert. *See* O.C.G.A. § 9-11-9.1(a).

In *Gala v. Fisher*, Docket No. S14G0919, the Georgia Supreme Court granted certiorari, noting that it was particularly concerned with the following and that briefs should be submitted only on the following question:

> In a professional malpractice action, when the plaintiff files his complaint with an affidavit by a person not competent to testify as an expert in the action, does O.C.G.A. § 9-11-9.1(e) permit the plaintiff to cure this defect by filing an amended complaint with an affidavit by a competent expert? *See, e.g., Piscitelli v. Hosp. Auth. of Valdosta*, 302 Ga. App. 746 (691 SE2d 746) (2010).

In *Gala v. Fisher*, shortly before the expiration of the two year statute of limitations, the plaintiff filed a complaint alleging that the defendant neurosurgeons committed medical malpractice. The complaint was filed with the affidavit of a family physician. The neurosurgeons and their practice moved to dismiss on the ground that the complaint was not filed with the affidavit of a competent expert. In response to the motion to dismiss, rather than attempting to establish that the family practitioner affiant was qualified to opine regarding the standard of care applicable to the neurosurgeons, the plaintiff filed a new affidavit from a new, substitute expert, a board-certified neurosurgeon.

The trial court granted the defendants' motion to dismiss, ruling that plaintiff Fisher failed to show that the original affiant-physician was competent to testify and, therefore, that the affidavit was defective. The trial court also held that Georgia law does not authorize a plaintiff to cure such a defect by filing an amended complaint with the affidavit of a *different* expert.

The Court of Appeals reversed, relying in part on its earlier opinion in *Piscitelli v. Hosp. Auth. of Valdosta,* for the proposition that substitution of the expert is a valid amendment under Georgia law. *Fisher v. Gala*, 383 Ga. App. 800 (2014). As noted above, the Supreme Court granted certiorari to address this issue.

> *"At oral argument, the justices' questions, and the time required of Fisher's counsel to address them, showed they had read our amicus brief."*

Plaintiffs contend that substitution of the affiant is not inconsistent with the overarching legislative intent of the statute, to reduce the number of frivolous malpractice suits, because an affidavit of a competent expert is eventually obtained.

The defendant neurosurgeons and the GDLA argue that when the terms and intent of this statute, and those of the other statutes with which it must be applied, are examined more specifically, the construction allowing substitution of the affiant is inconsistent with the intent of the legislature and cannot be allowed.

The GDLA's amicus curiae brief supports the arguments made by the defendant-physicians and provides an analysis of the problems created by the Court of Appeals' interpretation of Section 9-11-9.1 which equates substitution with amendment, particularly in light of the statute of limitations and the contemporaneous filing requirement repeatedly expressed by the legislature in 9-11-9.1. The GDLA's brief argued:

(1) O.C.G.A. § 9-11-9.1(a) requires that an affidavit of a competent expert be filed contemporaneously with the complaint;

(2) The Court of Appeals' interpretation that O.C.G.A. § 9-11-9.1(e) allows *substitution* of the *affiant* rather than *amendment* by the original affiant of his or her affidavit, is inconsistent with the legislative intent and the language of the relevant statutory provisions. If allowed to stand, this decision will lead to results unintended by the legislature, noting that:

- O.C.G.A. § 9-11-9.1(b) expressly reiterates the contemporaneous filing requirement of O.C.G.A. § 9-11-9.1(a) and provides the only legislated exception to that requirement;
- If allowed to stand, plaintiffs have now been provided a judicially-created option with which to avoid the statute of limitations, to avoid 9-11-9.1(a)'s requirement that an affidavit of a *competent* expert be contemporaneously filed with the complaint, and to avoid using the legislated option of § 9-11-9.1(b)— by filing the affidavit of an obviously incompetent and unqualified "expert" with the complaint and then using the additional time provided by the motion to dismiss process to obtain and file the affidavit of a competent substitute expert after the expiration of the statute of limitations);
- In ordinary use, "amendment" does mean "substitution" (using the same dictionaries used by the Supreme Court in *Abdel-Samed v. Dailey*, 294 Ga. 758(2014) to illustrate this

Continued on page 50

GDLA Continues Diversity Focus

Gate City/GABWA Judicial Reception

In order to continue the GDLA's efforts to promote diversity among its membership, we again were pleased to sponsor the annual judicial reception held by the Gate City Bar Association and the Georgia Association of Black Women Attorneys (GABWA). The event was held on August 19, 2014, at King & Spalding. **Photo 1**: The GDLA is especially pleased to have as its members the current President and Immediate Past President of Gate City, Meka B. Ward (left) and Lynnette D. Espy-Williams (right), respectively. They are pictured with GDLA Past President and Diversity Chair Lynn M. Roberson. **Photo 2:** (l-r) Moses Kim with Court of Appeals Judge Carla Wong McMillian and Fulton State Court Judge Susan E. Edlein. **Photo 3:** DeKalb Superior Court Judge Asha F. Jackson with Edward T. McAfee.


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MBLC Kirschenbaum Award Reception

On September 9, 2014, the Multi-Bar Leadership Council (MBLC) presented the Seth D. Kirschenbaum Diversity Award and honored the recipient at a reception held at Hall Booth Smith in Atlanta.

The GDLA is a proud member of the MBLC and supports its mission of fostering meaningful and positive interaction among diverse members of the Bar by its leadership in programs and efforts that support diversity and inclusion.

The Kirschenbaum Award recognizes any member in good standing with the State Bar of Georgia, a law firm, corporate law department or law-related organization that embodies the MBLC mission. This year's recipient, Avarita L. Hanson, Executive Director of the Chief Justice's Commission on Professionalism, was lauded for her commitment to promoting diversity in the legal profession.

Photo 4: (l-r) MBLC Co-Secretary/Treasurer Adriana Solo Capifali, MBLC Vice Co-Chair/Co-Chair-Elect Shatorree Bates, MBLC Co-Chair Yenniffer S. Delgado, MBLC Co-Chair Shiriki L. Cavitt, Avarita L. Hanson and MBLC Vice Co-Chair/Co-Chair-Elect Todd Ashley.


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MBLC Happy Hour

On November 12, 2014, MBLC member bars gathered for a Non-Partisan Post-Election Happy Hour at Colbeh Persian Kitchen & Bar in Decatur. Those present enjoyed delicious, complimentary hors d'oeuvres and drink specials. Attendees either brought a canned food or monetary donation for the Atlanta Community Food Bank.

Pictured in **photo 5** enjoying the evening are MBLC Co-Chairs Yenniffer S. Delgado (left) and Shiriki L. Cavitt (right) with Gary S. Freed.

GDLA Holds 5th Annual Pre-Trial Discovery & Deposition Boot Camp

The GDLA held its 5th Annual Pre-Trial Discovery & Deposition Boot Camp on October 2-3, 2014, at State Bar Headquarters. C. Jason Willcox of Moore Clarke DuVall & Rodgers in Albany again chaired the program; Andy Treese of Allen McCain & O'Mahony in Atlanta served as vice-chair.

The workshop combines lectures and demonstrations from an expert faculty with practical exercises during breakout sessions to help students learn and apply critical skills. Presentations included planning discovery and deposition basics; preparing deposition outlines; questioning the deponent—plaintiff and witness; defending the deposition; ethical considerations in depositions; preparing for motion for summary judgment through depositions; preparing your witness to be deposed; and knowing the deponent through social media. New this year, the program included a session on the discoverability of surveillance evidence; that presentation was expanded into an article for this newsletter (see cover story).

On Thursday, we were honored to have DeKalb State Court Judge Alvin T. Wong as our luncheon keynote speaker, offering his insights on professionalism at trial. The first day concluded with a networking reception, giving students time to get acquainted and to ask the faculty questions on an informal basis. On Friday, State Bar Past President S. Lester Tate, III of Akin & Tate in Cartersville reprised his role offering "The Plaintiff's Perspective: How the Other Side Sees Us." The seminar again concluded with the viewing of a videotaped deposition of Donald Trump by Ben F. Easterlin of King & Spalding, in which Trump—and his lawyer unwittingly demonstrated how *not* to act when being deposed.

Additional faculty members included: Thomas Peter (Pete) Allen III of Martin Snow in Macon; Curtis Martin, II of Miller & Martin in Atlanta; Wayne S. Melnick of Freeman Mathis & Gary in Atlanta; Education Committee Chair Erica L. Morton of Hicks Casey & Foster in Marietta; Anandhi S. Rajan of Swift Currie McGhee & Hiers in Atlanta; Ashley Rice of Waldon Adelman Castilla Hiestand & Prout in Atlanta; and Jeffrey S. Ward of Drew Eckl & Farnham in Brunswick. ❖

1. Faculty member Curtis Martin; 2. Program Chair Jason Willcox; 3. Faculty member Erica Morton; 4. Program Vice-chair Andy Treese with Ariel Adams; 5. Christina Jay with faculty member Jeff Ward; 6. Faculty member Ashley Rice; 7. Jason Willcox (center) leads a breakout group; 8. Faculty member Pete Allen; 9. Faculty member Anandhi Rajan; 10. Keynote speaker Judge Al Wong; 11. Kyle Perry and Amir Nowroozzadeh; 12. Abby Vineyard; 13. Special guest Lester Tate; 14. Fran Parker, Alyssa Rogers and Collier McKenzie; and 15. Faculty member Wayne Melnick.

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CLE: Reptile Theory Draws a Record Crowd

On September 24, 2014, a sold-out crowd made its way to 5 Seasons Brewing in Midtown Atlanta for a late afternoon CLE that concluded with a networking reception.

The largest response yet for a GDLA seminar was no doubt due to the topic, "Debunking and Redefining the Plaintiff's Reptile Theory," and possibly, too, the lure of craft brews.

Education Committee Vice-chair Andy Treese of Allen McCain & O'Mahony in Atlanta worked with Platinum Sponsor Courtroom Sciences, Inc. (CSI) to bring two of their top experts, Vice President of Litigation Psychology Bill Kanasky, Ph.D., and Senior Litigation Consultant Ryan Malphurs, Ph.D., to shed light on this phenomenon that is sweeping the plaintiff's bar across the nation.

They not only addressed the strengths and weaknesses of this plaintiff's litigation tactic, but also explained how best to defend against it.

The seminar was the perfect follow-up to their Spring 2014 article in this newsletter titled "Confronting the Plaintiff's Reptile Revolution: Defusing Reptile Tactics with Advanced Witness Training."

The in-person training allowed them to elaborate on points established in the written version. They divided their presentation into three parts: 1) How the Reptile Theory is scientifically invalid but legally effective; 2) how to defeat Reptile Theory tactics in witness training; and 3) how to defuse Reptile tactics at trial using scientifically-based solutions.

The CSI speakers mentioned an array of other Reptile-focused seminars they conduct, so look for another one next year. ❖

Pictured at the Reptile Theory seminar are (l-r): 1. Ryan Cooper and Jane Taylor; 2. David Marshall and Danny Mills; 3. Adwoa Seymour and Program Chair Andy Treese; 4. Dan Bullard with speaker Dr. Bill Kanasky; 5. Steve Miller and Natalie Beasman; 6. Sherrie Brady, Education Committee Chair Erica Morton and Past President Lynn Roberson; 7. Calvin Yaeger, Michael Denney and Andreea Neculae; and 8. speaker Dr. Ryan Malphurs.

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CLE: Alliance Theater Teaches How to Present with the Power of Story

GDLA members took the stage at the Alliance Theatre seminar. They are identified left to right: 1. Dan Prout and Denise Hoying; 2. Bill Casey, the Alliance's J. Noble and Kevin Patrick; 3. Chris Freeman; 4. Alliance instructor J. Noble and Marcia Stewart; 5. Allison Bloom and Lara Percifield; 6. Ben Avery and Amir Nowroozzadeh; 7. Program Chair Ashley Rice and Education Committee Chair Erica Morton.

On October 9, 2014, things got dramatic at the Alliance Theatre. Under the tutelage of Director and Theatre Communications Manager J. Noble, defense attorneys participated in a unique CLE dedicated to presenting with the power of story. As part of the Theatre's "Alliance @ Work" series, Noble provided attorneys with hands-on training focused on building confidence in public speaking.

The CLE began with a brief reception to introduce participants and foster a relaxed, informal atmosphere. Following instruction on pre-performance breathing and postural exercises, Noble had participants work in small groups to sharpen listening skills and promote the idea of being "present" with an audience. Each attorney—young and old—shared personal anxieties about public speaking as Noble provided tips to confront and move past such common presentation roadblocks. Participants then paired up for "mirror" exercises to practice meaningful eye contact and non-verbal message communication.

After a short break, participants worked with a partner to craft spontaneous short stories, which the partner then repeated back, adding embellishing details. In crafting their stories, participants were encouraged to focus on a few key points to communicate. Their partners were encouraged to retain the key points and repeat them in a more interesting format.

The program concluded with participants working one-on-one and in front of the group to present detailed personal narratives. Noble's direction included guidance on establishing a strong beginning to hook the listener, and a solid, satisfying ending. Participants were then free to fill in additional relevant details for embellishment on the spot.

Response to the program was overwhelmingly positive, with many participants agreeing that the CLE credit hours were the most entertaining they had earned to date. The GDLA Education Committee looks forward to incorporating similar oral advocacy CLEs into its regular schedule. Individuals interested in the Alliance @ Work program can get more information by visiting: http://alliancetheatre.org/education/class/alliancework.

Special thanks goes to Education Committee member Ashley Rice of Waldon Adelman Castilla Hiestand & Prout in Atlanta for planning the seminar. ❖

Speaker Lunch Series Explores the Future of the Profession

On November 13, 2014, the GDLA presented the latest program in its Speaker Lunch Series, featuring Mike Trotter (left) who spoke about the future of the legal profession. As a member of the State Bar of Georgia for more than 50 years, Trotter has been a long-time observer of the legal profession and how it has evolved since the 1960s.

In addition to authoring numerous articles on law firm operations, economics, and fee issues that have been published in the *ABA Journal*, the *National Law Journal*, *Managing Partner Magazine*, and the *Daily Report*, Trotter has authored two books that chronicle the evolution of the legal profession during his professional lifetime. The first, *Profit and the Practice of Law*, traces the growth and transformation of the legal profession between 1960 and 1995, while the second, *Declining Prospects*, picks up where *Profit and the Practice of Law* left off and also looks ahead to the future.

Trotter's third book, tentatively titled *The Evolution of the Legal Profession: A Guide to the Future Practice of Law*, is scheduled to be published in early 2015. His presentation to our group offered a glimpse of what this book will examine. The larger law firms in the country are getting larger and more leveraged, the number of equity partners is getting smaller while the number of other billable employees is getting larger, and the average profits per partner is growing at a much faster pace than the rate of inflation. Some have predicted dire consequences for the future of the legal profession, largely due to the influence of technology, but Trotter is not so pessimistic. Although he believes that there will be fundamental changes in the delivery of legal services, he also believes that the complexity of our laws and our legal system will require experienced lawyers to navigate these complexities for clients.

Thus, Trotter predicts the following for the future of the legal profession: larger and increasingly capable law departments; improved access by lawyers, law firms, and law departments to a greater range of legal knowledge; more specialization, standardization, and commoditization; increased disaggregation of legal services into distinct tasks that will be distributed among appropriate service providers; increased utilization by law firms and law departments of less expensive lawyers and billable non-lawyer support personnel; further technological progress; more and better alternative legal service providers for services that law firms provided in the past; and training and licensing of non-lawyers to provide routine legal services.

The GDLA extends a special thank you to Nelson Mullins Riley & Scarborough for again hosting this event. ❖

Pictured at the luncheon are (l-r) 1. Anandhi Rajan and Pamela Lee; 2. Immediate Past President Ted Freeman and Andy Treese; 3. Abby Vineyard and Program Chair Jake Daly. Daly, who is with Freeman Mathis & Gary in Atlanta, spearheads the Speaker Lunch Series programming. Please contact him with any speaker ideas.

Young Lawyers Strike Out at the Alley

GDLA young lawyers (YLs) celebrated Columbus Day, October 13, by bowling for strikes at The Painted Pin in Atlanta. The upscale boutique bar, bowling and entertainment venue was the perfect backdrop for some friendly competition and networking. Special thanks goes to YL Vice-chair Katie Dod, who planned the event. ❖

1. YL Chair Pamela Lee, YL Vice-chair Katie Dod, Sheri Bagheri and Sharon Horne visit before the competition begins. Dod was responsible for planning the fun evening; 2. Leah Fox, Nicole Leet and Sheri Bagheri are ready to play; 3. Matt Shoemaker, Jennifer McNeely, Janine Willis and Jan Sigman comprised a formidable team; 4. Parker Green and Marcia Stewart are ready to roll, literally; 5. James Hankins shows how it's done; 6. Janine Willis and Noelle Abastillas take a break from throwing strikes to chat; 7. Zach Matthews, Richard Bruno and Michael Denney give The Painted Pin a thumbs up.

GDLA and ESI Sponsor 5th Annual Charity Golf Tournament

For the fifth 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 17, 2014, at Chateau Élan, is an annual fundraising event for Camp To Belong Georgia—a non-profit that has reunited brothers and sisters who have been placed in separate foster, adoptive or kinship homes through summer camp programs and year round events since 1995.

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

Pictured above at the tournament are (l-r) 1. Robert Luskin and Josh Stein; 2. Edward McAfee and ESI's Mike Stevenson; 3. ESI's Roy Gottschalk, Jay O'Brien, Adam Hand and Mike St. Amand. ❖

Announcing the Government Enforcement Defense SLC

Join the GDLA's new Substantive Law Committee geared toward your practice.

The Government Enforcement Defense Substantive Law Committee (SLC) is intended for those who defend individuals and entities against government actions, such as: 1) claims under laws administered by state, federal and municipal agencies—e.g., environmental, health care, and securities law claims; 2) False Claims Act claims, including Qui Tam actions; 3) citizen suits; and 4) toxic torts.

If you have any questions about this SLC, please contact its leaders, Chair Richard E. (Rich) Glaze of Balch & Bingham in Atlanta or Vice-chair W. Taylor McNeill of Chilivis Cochran Larkins & Bever in Atlanta.

Log in to the GDLA website and join this or any other SLC by selecting your choice(s) under My Profile.

GDLA Board of Directors Holds Fall Meeting at Barnsley Gardens

The GDLA Board of Directors headed north to Adairsville, Ga. for its Fall Meeting at Barnsley Gardens Resort, October 17-19, 2014.

Those present were *Executive Committee:* President Kirby G. Mason of HunterMaclean, Savannah; President-elect Matthew G. Moffett of Gray Rust St. Amand Moffett & Brieske, Atlanta; Secretary-Treasurer Peter D. Muller of Goodman McGuffey Lindsey & Johnson, Savannah; and Immediate President Theodore (Ted) Freeman of Freeman Mathis & Gary, Atlanta; *Vice Presidents:* Sarah B. (Sally) Akins of Ellis Painter Ratterree & Adams, Savannah; Craig C. Avery of Cowsert & Avery, Athens; and. David N. Nelson of Chambless Higdon Richardson Katz & Griggs, Macon. *Board of Directors:* George R. Hall of Hull Barrett, Augusta; Jason D. Lewis of Chambless Higdon Richardson Katz & Griggs, Macon; Jason C. Logan of Constangy Brooks & Smith, Macon; James D. (Dart) Meadows of Balch & Bingham, Atlanta; Wayne S. Melnick of Freeman Mathis & Gary, Atlanta; Brian T. Moore of Drew Eckl & Farnham, Atlanta; James W. Purcell of Fulcher Hagler, Augusta; Ashley Rice of Waldon Adelman Castilla Hiestand & Prout, Atlanta; 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; Warner S. Fox of Hawkins Parnell Thackston & Young, Atlanta; and Edward M. (Bubba) Hughes of Callaway Braun Riddle & Hughes, Savannah. *Also present* were Judicial Relations Committee Vice-chair Edward T. McAfee of Lewis Brisbois Bisgaard & Smith, Atlanta; and Executive Director Jennifer M. Davis.

The group gathered for a welcome reception in the Red House hospitality cottage, then strolled to The Ruins for a spectacular dinner under the stars. Everyone enjoyed roasting marshmallows to make s'mores, then surprised Dart Meadows with a birthday cake and serenade.

The Board Meeting took place on Saturday morning until noon; then the afternoon was free to take part in a variety of activities, including enjoying lunch and watching college football outdoors at the Bier Garten, hiking, horseback riding and more. That evening, everyone gathered again for a reception in the Red House then adjourned to dinner on their own.

At press time, the Board meeting minutes were not finalized; they will be posted to the GDLA website after Board approval. ❖

1. President Kirby Mason leads the meeting; 2. President-elect Matt Moffett discusses investing; 3. Secretary-Treasurer Peter Muller gives the financial report; 4. Immediate Past President Ted Freeman looks on as Neil Wilcove reports on a proposed new sponsor; 5. Jason Logan and Jason Lewis (center left and right) with their wives, Wendy and Annie, respectively, visit at the welcome reception; 6. Past President Warner Fox and his wife, Pat, enjoy the spectacular weather; 7. Jim and Annie Purcell relax before lunch; 8. Secretary-Treasurer Peter Muller and Brian Moore challenge each other to a game; 9. President-elect Matt Moffett (left) catches up with Vice President Craig Avery and his wife, Resa, at the welcome reception; 10. Wayne and Laura Melnick enjoy sampling craft beers; 11. Dart and Carol Meadows bask in the sun; 12. Enjoying the Bier Garten are (right to left) Past President Bubba Hughes and his wife, Debbie, Past President Staten Bitting, Vice President Sally Akins, Greer and Jeff Ward, Immediate Past President Ted Freeman and his wife, Mary Peironnet; 13. Relaxing around a fire pit are President Kirby Mason, Mary Peironnet with her husband, Immediate Past President Ted Freeman, and Chris Parker.

Continued from page 20

stumbled backward and fell into the railing, breaking it.

Woodruff sued Rogers, relying on the testimony of an "expert in construction" that the railing violated building codes as to minimum height and load capacity. Rogers moved for summary judgment, but the trial court denied her motion, relying on *Hicks v. Walker*, 262 Ga. App. 216 (2003), and finding that an issue of fact remained for trial as to whether Rogers had breached a duty she owed to Woodruff to have the deck inspected when there was evidence that the deck was not built in accordance with applicable building codes.

The Court of Appeals reversed. In *Hicks*, the Court "[r]egrettably … neglected to mention" that for a landowner to be held liable for harm to a licensee by a condition on the property, "the licensee [must] not know or have reason to know of the condition and the risk involved." That case was distinguishable, the Court held, because the property owner's own son had recently built the deck, he had not complied with building codes, and the deck would not have passed an inspection at the time it was built. In this case, by contrast, there was no evidence Rogers had actual knowledge of any problem with the deck railing: although someone testified that the stairway railing was wobbly, there was no evidence that Kelly or Rogers knew of any problem with the deck railing, and even Woodruff testified that there was no visible problem with the deck railing.

Notwithstanding the expert testimony offered by Woodruff, there was no evidence of constructive knowledge by Rogers because the deck was built by a prior owner, was inspected by the county, and there was no evidence the deck failed to meet building codes at the time it was built. In reaching its holding, the Court implicitly rejected the contention that Rogers had a duty to inspect the deck railing for defects before allowing guests on the property.

LATENT DEFECT/HIDDEN HAZARD; TRIP-AND-FALL; DUTY TO EXERCISE ORDINARY CARE; DEVIATION FROM DESIGNATED ROUTE; ACTUAL KNOWLEDGE OF HAZARD: Defendant church not entitled to summary judgment where Plaintiff walked on pine straw and tripped in trench underneath, but only after church's pastor, who knew of hidden trench, had directed Plaintiff to park adjacent to trench and then walked across pine straw in vicinity in view of Plaintiff.

Henderson v. St. Paul Baptist Church, 328 Ga. App. 123 (July 10, 2014).

Georgia Henderson stepped into a small trench and fell, breaking her leg, as she walked through pine straw outside a church. Henderson and her husband were there to attend a revival service at the invitation of the church's pastor. It was already dark when the Hendersons arrived at the church just before the 7:30 p.m. service. The church did not have a designated parking lot, but the Hendersons saw the pastor when they arrived and he motioned them to park behind his car, near the left side of the church, before the pastor and his wife walked across the pine straw and into a side entrance of the church.

After parking, Henderson exited the car and walked between her car and some shrubbery, toward the front of the church. She testified that all of the ground in the area was covered with pine straw and that she assumed it was safe to step on the pine straw because she saw the pastor and his wife walk across part of the pine straw to get to the church. After walking a few steps, however, she stepped into the trench and fell.

The shrubbery was planted about a month earlier, and the trench was dug around the shrubbery to keep it watered. The trench was not marked in any way and was not visible because it was covered with pine straw and leaves. The pastor knew about the trench prior to the incident and knew it was concealed by pine straw but did not mention it to Henderson, who had never parked there. The pastor admitted Henderson could not have known of the trench before falling.

In moving for summary judgment on the Hendersons' claims, the church contended Henderson impermissibly "deviated from the designated route to the front of the church and instead attempted to take a shortcut through a flower bed" to reach the side entrance. The trial court granted the church's motion, and the Hendersons appealed.

The Court of Appeals reversed, holding the Hendersons presented sufficient evidence for a trier of fact to conclude the church had actual or constructive knowledge of the trench, which had shifted the burden to the church to produce evidence that Henderson's injury was caused by her own negligence. The church presented photos showing that the pine straw did not extend much beyond the shrubbery and that a grassy path existed between Henderson's car and the pine straw where Henderson could have walked safely. At that point, the burden again shifted, this time to the Hendersons, to produce evidence sufficient to raise an issue of fact as to Henderson's own negligence or to show that her negligence resulted from the church's actions or conditions under the church's control.

The Court held that despite the photos, there was an issue of fact for trial based on Henderson's testimony that the entire area between her car and the shrubbery was covered with pine straw, leaving her no choice but to walk on the pine straw. Accordingly, the Court rejected the church's argument that it was entitled to summary judgment due to Henderson's choice to walk on the pine straw rather than remain on a safer path in walking to

the church. Similarly, the Court rejected the church's argument that the Hendersons' decision to park next to the church, rather than across the street as in the past, was "a deviation from the known safe path to the entrance to the church," holding that the church "set the stage for this accident" when its pastor told the Hendersons to park next to the hidden hazard.

SLIP-AND-FALL; CONSTRUCTIVE KNOWLEDGE OF HAZARD: Defendant hospital not entitled to summary judgment because there was evidence that its janitorial contractor was in vicinity of alleged hazard shortly before Plaintiff's fall.

Smith v. Tenet HealthSystem Spalding, Inc., 327 Ga. App. 878 (July 7, 2014).

Smith was at defendant's hospital to visit a relative when she slipped, fell, and broke her hip. The evidence showed that a janitorial contractor had cleaned and restocked her cart in the area where Smith slipped approximately 10 minutes earlier. That process included the contractor removing a mop water bucket, replacing pads on "micro mops," refilling liquid disinfectant containers, and wiping down the janitorial cart with a damp rag.

Smith filed suit, and the trial court granted summary judgment to the hospital. Smith appealed, and the Court of Appeals reversed, holding there was evidence supporting an inference that Smith's fall was caused by a foreign substance on the floor that the janitorial contractor could have prevented or noticed and removed and that the janitorial contractor's knowledge was imputable to the hospital.

First, the Court held that although Smith did not see any water on the floor where she fell—after falling she was in pain, briefly lost consciousness, and was in no position to examine the area closely—there was other evidence of a hazard. The contractor's activities 10 minutes before Smith's fall could be presumed to have resulted in water being on the floor. Smith testified she heard a nurse say, immediately after Smith fell, "Go get some paper towels ... there's something wet on the floor." Smith's daughter-in-law, who came to help Smith after she fell, said she noticed "something" on the floor that caused her foot to slip when she got close to where Smith was lying. There also was testimony that shortly after Smith's fall, janitorial staff were called to "come get the spill up" and that a worker noticed a wet spot on the wall where Smith fell.

The evidence, when viewed most favorably to Smith, showed the contractor was in the immediate vicinity of the fall and had an opportunity to prevent or to correct the wet floor shortly before Smith fell. The Court held that the hospital was not entitled to summary judgment on Smith's premises liability theory. There was no discussion in the Court's opinion of whether there was an issue with the independent contractor's "knowledge" being imputed to the hospital; it is unclear whether this was raised as an issue in the court below or on appeal. ❖

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expert to examine a failed rope and determine whether the fibers were cut or broke under tension, whether it was abraded or failed due to a chemical exposure. Laboratory testing can determine the type of fiber used in the rope, as well as give an indication of how weathered it is. The same is true of broken pipes and broken welds, collapsed towers and leaking vessels—a study of the failure can tell us what caused it and oftentimes when it occurred. Testing may also indicate if the fractured component was made properly or not. If a steam pipe splits along a seam weld, a study of the fracture can determine whether it failed because it was improperly made, because it was over-pressured, or because it was exposed to a chemical that degraded it. It may also reveal if a defect in the weld should have been detected during the manufacturer's inspection, or if it started out too small to see and grew in the field. Similarly, through appropriate testing, a materials expert may be able to ascertain if a plastic fitting fractured due to a chemical exposure or due to improper installation, whether a stainless steel connector in a fuel system failed due to the use of off-spec steel or exposure to road salt.

In addition to the straightforward analysis of failed parts, materials science also comes in handy when investigating the more unusual cases. Why is the paint on this house peeling while the paint on the neighboring house is fine? Is it because there is a problem with the paint, or because it was washed with the wrong cleaner? Why do we see cracking in this lot of hose connectors when we didn't see it in the last, even though both meet the material specifications? Was it because they were made incorrectly, or were they exposed to something during shipping? Why is this shipment of silver plated picture frames turning purple, when the last one was fine? Is it the lacquer used to seal the plating, or the omission of a rhodium layer on top of the silver? Questions such as these often are not asked, yet can easily be answered by materials experts. And the answers can have significant dollar amounts tied to them.

So how do you know that you need a materials expert in your case? It would be easy (and self-serving) to imply that you always need one if something is broken, bent cracked or degraded (corroded), but there will be times when you may not. If you have a materials expert you trust, it is certainly worth a few minutes of your time to ask them what they can tell you, to discuss how and why it might be important for your case. If not, you can ask yourself a few questions to get pointed in the right direction.

If understanding the why, how, and when of a failure would enable you to validate one theory of the case and invalidate others, then you should call a materials expert. Their expertise could be the key to your case; engaging the materials expert as early as feasible is best to ensure that the evidence is preserved properly and that the right testing is done. If it is already well known that a part was grossly corroded, leaking, and marked for replacement, you may not need a materials expert to tell you why it failed. Alternatively, you may want one to help you determine if the system designer, the system maintainer or another party is liable for the corrosion. If your mechanical engineer tells you that the loads were several times the strength of the material, you probably don't need to know the details, and likely don't need your materials expert to confirm that the fractured part was overloaded.

When should you avoid calling a materials expert? The easy answer is never since everything is made from a material; if a product has failed in any fashion it is usually a materials issue. However, there may be other engineering aspects to the failure that need to be considered. A reliable materials scientist or engineer will direct you to that discipline. Since materials are such a pervasive aspect of our world, and because the materials discipline touches so many of the other engineering disciplines, a good place to start your inquiry is with a materials scientist or engineer. If you have a materials expert whom you trust, you should feel confident that they will direct you elsewhere if they cannot help you. There are cases, however, where you may want to call another expert first. If the system is complex, then the first engineer you talk to should understand the system—if it's a mechanical issue or involves piping, speak with a mechanical or chemical engineer; if it's a building, talk to a structural engineer; if it's an electrical system, talk to an electrical engineer. Of course, there are materials experts who are going to know each of these systems, but not every materials engineer is going to understand every system. Once you hire an expert who understands the system, they will be able to advise if and when it is time to bring in a materials expert. ❖

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potential use is as impeachment evidence?

The Work-Product Privilege

O.C.G.A. § 9-11-26(b)(1) defines the scope of discovery in Georgia state courts.

That statute provides that "[p]arties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action[...]" (emphasis added). More than 40 years ago, the Georgia Supreme Court affirmed a trial court's ruling that surveillance materials fall within the work-product privilege. In *Smith v. Smith*, 223 Ga. 551, 554 (1967), an action for divorce and alimony, the plaintiff-wife sought a copy of a private investigator's report.

Defense counsel had hired the investigator to perform surveillance on the plaintiff after the suit was filed. In reviewing the trial court's denial of the plaintiff's request, the Georgia Supreme Court focused on the fact that the surveillance was performed after suit was filed and after the creation of an attorney-client relationship and ultimately held that what was done by the investigator at the attorney's behest was no different than work done by the attorney himself. Id. at 554-556.

The *Smith* Court's rationale has been cited positively in several subsequent appellate cases in Georgia. *See, e.g., McMillan v. Gen. Motors Corp.*, 122 Ga. App. 855 (1970); *Jones v. Scarborough*, 194 Ga. App. 468 (1990); *Heyde v. Xtraman, Inc.*, 199 Ga. App. 303 (1991); *Stinski v. State*, 286 Ga. 839 (2010).

O.C.G.A. § 9-11-26(b)(3) addresses materials prepared in anticipation of litigation or for trial and provides that a party may obtain discovery of such documents and things only upon a showing that the party seeking discovery has *substantial need* of the materials and that he is unable without *undue hardship* to obtain the substantial equivalent of the materials by other means. See, e.g., *Lowe's of Ga. v. Webb*, 180 Ga. App. 755, 757 (1986). Thus, in order to compel production of work-product protected video footage, the plaintiff must demonstrate both prongs of the requirement.

In an effort to meet the "substantial need" and "undue hardship" requirements, plaintiffs typically argue that they have an interest in reviewing the surveillance material in order to ensure that the material has not been altered and is not misleading. Plaintiffs also point to the fact that they cannot obtain the substantial equivalent of the tape because the material is not reproducible, does

not exist elsewhere, and is in the sole custody of the defendant. In response, defendants typically argue that the plaintiff knows exactly what activities will be depicted on the surveillance because it is the plaintiff who performed them. As such, the plaintiff's direct, personal knowledge amounts to the "substantial equivalent" of the video surveillance.

Georgia Trial Courts

As noted above, this issue has not been addressed by the Georgia appellate courts, and the trial courts addressing the issue have come to different conclusions. In a May 2011 Order, the Superior Court of Whitfield County determined that surveillance was protected by the work-product privilege and that the plaintiff did not meet their burden of establishing substantial need and undue hardship. See *Michael Doran, et al. v. John C.B. Wall, D.C., et al.*, No. 10-CI-415-B (Superior Court of Whitfield County, May 2011).

In so doing, the Order noted that the plaintiff had direct personal knowledge of what was recorded on the tapes, which was the "substantial equivalent" of the tapes themselves. *Id.* Nevertheless, the court determined that if the defendants intended to use the surveillance at trial, it must be turned over to the plaintiff no later than the date of the pretrial conference (which defendant had previously agreed to do). *Id.*

In a July 2014 Order, the State Court of Liberty County likewise determined that if the defendant intended to use surveillance video at trial (for any reason), the materials must be produced. See *Allyson Rorro, et al. v. Wal-Mart Stores East, LP*, No. 11SV243 (State Court of Liberty County, July 2014).

In a December 2013 Order, the Superior Court of Ware County held that surveillance video was protected by the work-product doctrine and the plaintiff had not met their burden of showing substantial need and undue hardship. See *Robert J. Lee, et al. v. Allgood Services, Inc., et al.*, No. 11-V-0123 (Superior Court of Ware County, Dec. 2013). However, the court also held that the defendant was only required to produce the video if it intended to use the video as *substantive evidence* (rather than for impeachment) at trial. *Id.*

Taking a variation on the previous two approaches, in a December 2012 Order the State Court of DeKalb County held that the defendant was required to identify the persons who conducted surveillance and that those persons should be treated as any other "fact" witness, making discovery of any facts observed by the investigator—either through deposition or on cross-examination at trial—permissible. See *Veronica Leftridge v. Swift Transp. Co. of AZ, LLC, et al.*, No. 12A40860-7 (State Court of DeKalb County, Dec. 2012). However, similar to the Ware County Superior Court, the DeKalb County State Court held that the actual surveillance tapes and written reports constituted work product and that plaintiff had not established that she had substantial need for them or that she was unable to obtain the substantial equivalent of the materials without undue hardship. *Id.*

Taken as a whole, there are similarities running across all of these orders. First, the courts that determined surveillance was discoverable only ordered the production of the materials if the defendant intended to use it at trial, and even then only after the plaintiff's deposition. Second, each judge came to the conclusion that surveillance video was work product, thus affording it the statutory protections given to such privileged information.

Persuasive Authority and Policy Rationales

All of the Georgia trial courts that have addressed the issue of production of surveillance rely, at least in part, on persuasive authority from other state and federal jurisdictions. An examination of this authority reveals that, generally, there are two primary schools of thought: (1) surveillance is not discoverable at all, and (2) surveillance is discoverable—after pre-production discovery.

Courts holding that the surveillance is not discoverable have focused on the importance of ensuring the honesty of plaintiffs. These courts have also determined that the general trend in favor of access to all relevant material and the possibility that the surveillance materials may be misleading were not sufficient to warrant pre-trial disclosure of work-product privileged materials. See, e.g., *Fletcher v. Union Pac. R.R.*, 194 F.R.D. 666, 670 (S.D. Cal. 2000); *Ward v. CSX Transp., Inc.*, 161 F.R.D. 38, 40 (E.D.N.C. 1995); *Hikel v. Abousy*, 41 F.R.D. 152 (D. Md. 1966); *St. Louis Public Service Co. v. McMillan*, 351 S.W.2d 22 (Mo. 1961); *Ranft v. Lyons*, 163 Wis. 2d 282 (Wis. Ct. App. 1991).

Other jurisdictions have adopted a more middle-of-the-road approach, determining that surveillance is work product, but that other considerations can warrant its production. Courts taking this position typically focus on the fact that the plaintiff's previous activities can no longer be filmed so the plaintiff cannot obtain the substantial equivalent of the surveillance video.

Additionally, they emphasize the uniquely persuasive and potentially prejudicial nature of video, and the importance of allowing the plaintiff an opportunity to ensure the video is not misleading and has not been altered. These courts also indicate that production increases the likelihood of pre-trial settlement, because it ensures that both parties are aware of all of the evidence relevant to the case.

It should be noted, however, that all of these courts allowed for "pre-production" discovery, such as depositions and interrogatories. In so doing, these courts reasoned that the defendant's ability to obtain sworn testimony from the plaintiff before disclosing the contents of the surveillance would blunt the plaintiff's ability to "tailor" her testimony around the activities revealed therein. *See,*

e.g., Roa v. Tetrick, No. 1:13-CV-379, 2014 U.S. Dist. LEXIS 24619, 2014 WL 695961 (S.D. Ohio Feb. 24, 2014); *Martin v. Long Island R.R. Co.*, 63 F.R.D. 53 (E.D.N.Y. 1974); *Cabral v. Arruda*, 556 A.2d 47 (R.I. 1989); *Pioneer Lumber v. Bartels*, 673 N.E.2d 12, 18 (Ind. Ct. App. 1996).

Impeachment Evidence

Another argument against the disclosure of surveillance is that its sole potential use at trial is as impeachment evidence, which is outside the scope of discovery under Georgia law. In *Ballard v. Meyers,* 275 Ga. 819 (2002), the Supreme Court of Georgia held that there was no requirement to disclose documents in a pre-trial order which may be used at trial to attack the credibility of the other side's witnesses. *Id.* at 820.

The Court reasoned that defense counsel is entitled to presume a plaintiff will testify truthfully up until he or she actually fails to do so. However, the Court noted that the presumption of veracity is only a reasonable, not an irrebuttable, one and a good trial lawyer should be prepared to rebut contrary testimony or evidence that is false. *Id.* at 821-22. Although the *Ballard* decision specifically applied to the disclosure of impeachment evidence in the pre-trial order, arguably the same rationale applies to the disclosure of surveillance as well.

Similarly, the rulings in a pair of Georgia Court of Appeals cases suggest that evidence not initially disclosed can be properly admitted for the sole purpose of impeaching a witness's testimony and credibility. In *Morris v. State Farm Mut. Ins. Co.*, 203 Ga. App. 839 (1992), the plaintiff sued his automobile insurer based on the processing of a claim under his policy. *Id.* at 839. At trial, the court admitted evidence of a complaint and other documents filed in an earlier accident, solely for impeachment purposes.

The Georgia Court of Appeals affirmed the ruling, holding that "a party may show anything which may, in the slightest degree, affect the credibility of an opposing witness." *Id.* The Court further stated that a "witness may be impeached by disproving the facts testified to by him." *Id.* Likewise, in *Rosandich v. State*, 289 Ga. App. 170 (2008), the Georgia Court of Appeals affirmed the admittance of evidence purely for impeachment purposes, even where that same evidence would otherwise be inadmissible. *Id.* at 171.

Other jurisdictions addressing this same issue have taken identical approaches to those addressing work-product objections to the production of surveillance. Courts that allow a defendant to reveal surveillance materials for the first time at trial focus on the need to protect the impeachment value of the materials and the fact that the plaintiff already knows about his or her own condition.

On the other hand, courts requiring pre-trial disclosure of surveillance have found that the factors unique to a video, such as its highly persuasive nature and inability to be duplicated, as well as concerns that the materials presented may be misleading or incomplete, tip the balance in favor of disclosure. However, even under this approach, the defendant is entitled to depose the plaintiff prior to production and the defendant must only produce the surveillance if defendant intends to use it trial (either as substantive or impeachment evidence).

These courts also note that post-deposition production facilitates effective settlement discussions because it allows the parties the opportunity to evaluate all possible evidence. *See, e.g., Gibson v. Nat'l R.R. Passenger Corp.*, 170 F.R.D. 408, 410 (E.D. Pa. 1997); *Bogatay v. Montour R.R.*, 177 F. Supp. 269 (W.D. Pa. 1959); *Snead v. Am. Export-Isbrandtsen Lines, Inc.*, 59 F.R.D. 148 (E.D. Pa. 1973); *Smith v. AMTRAK*, 22 Va. Cir. 348 (1991).

Another Approach?

As Georgia law currently stands, it is difficult to predict whether surveillance must be produced prior to trial, as the determination is left to the discretion of trial court judges and there are sound policy rationales favoring both production and non-production. These competing policy concerns also lend themselves to an alternative approach to the two discussed above.

Under this approach, a defendant will not be required to produce surveillance until after the plaintiff testifies on direct examination at trial (at which point the defendant will know whether the impeachment evidence is relevant). Once the surveillance is produced, the plaintiff will have the opportunity to review the surveillance, ensure its authenticity, and verify that it has not been altered. This approach better protects the value of the surveillance as impeachment evidence, because the plaintiff has less of an opportunity to shade or alter her testimony to "fit" what is shown on the surveillance. Post-direct examination production of surveillance also comports with the *Ballard* court's reasoning that the defendant is entitled to believe that the plaintiff will testify truthfully up until the time she actually fails to do so (at trial) and, thus, impeachment evidence does not become relevant until that time.

Although this approach does not appear to have been utilized by other state or federal jurisdictions, inasmuch as Georgia courts currently have discretion to apply the approach that they deem most appropriate, it is certainly worth suggesting when arguing against a motion to compel production.

Obviously, the potential pitfall with this approach is that a judge would have to suspend the trial between the direct and cross examinations in order to allow the plaintiff adequate opportunity to review the surveillance video. As such, whether this approach is truly feasible depends on the facts and circumstances of the case.

Practical Considerations

When faced with the issue of whether to produce surveillance, there are key practical considerations to address. The first (and most obvious) step is to object to production on the ground that the materials sought were prepared in anticipation of litigation and are protected by the work-product privilege—even if surveillance has not yet been obtained. From there, the issue is one of risk tolerance. A defense attorney must evaluate how important the surveillance is to defending the case and whether the possibility of exclusion at trial for failure to identify and produce the evidence is outweighed by the benefit of ensuring that the plaintiff has the smallest window in which to tailor his or her testimony to fit the surveillance contents.

Worth noting is that these considerations also apply in the context of a relatively recent source for impeachment evidence—social media. Obviously, the policy rationales against disclosure in the surveillance context are only heightened in the context of a plaintiff's social media page.

After all, it is the *plaintiff's* page—the plaintiff obviously knows of its existence and contents because it is the plaintiff who created and maintains it. However, a plaintiff would almost certainly raise the same concerns regarding completeness and authenticity noted by various courts addressing the production of surveillance. Given that the issue is unsettled in Georgia, it is difficult to predict with any accuracy how a court would rule. Thus, ultimately, it seems the best approach is to identify any evidence (including surveillance and social media evidence) which you *intend to use at trial* either in discovery (if asked) or in the pre-trial order.

Although this approach may lessen the sting of impeachment to a certain degree, it ensures that crucial evidence does not get excluded. ❖

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point);

- In the context in which the term amendment is used within§ 9-11-9.1, amendment does not mean substitution of the affiant; and
- The construction that "amendment" includes substitution of the affiant is inconsistent with the language and intent of the statutes with which § 9-11-9.1 must be applied;

(3) Substitution does not cure the defect that the original affiant, the author of the contemporaneously filed affidavit, is not qualified; and

(4) Later substitution of an affidavit by a competent and qualified expert does not satisfy the contemporaneous filing requirement of O.C.G.A. § 9-11-9.1(a).

At oral argument on September 8, 2014, the justices' questions, and the time required of Fisher's counsel to address them, showed they had read our amicus brief. A decision is expected by the end of the Court's September term, December 16, 2014, or, if carried over to the January term, by March 30, 2015.

GDLA members Steven P. Bristol and Mark W. Wortham of Hall Booth Smith authored the brief. To read this GDLA amicus brief, as well as any past briefs, visit the Members Only area of our website and click on "Amicus Policy & Briefs" in the right navigation pane. ❖

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