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Social Media As Evidence: *A Georgia Overview*

By Nick Hinson
The Hinson Firm, Athens

The ever-increasing reach of the Internet in recent decades has had numerous effects on the dynamics of litigation; among other things, the widespread use of social media has created a virtual treasure trove of information for parties involved in lawsuits. Federal courts across the nation seem to have reached a general consensus that social media is discoverable evidence so long as it is the subject of a request that is reasonably calculated to lead to the discovery of information bearing on the claim at issue, under Federal Rule of Civil Procedure 34. *See, e.g., Davenport v. State Farm Mut. Auto. Ins. Co.*, No. 3:11-CV-632-J-JBT, 2012 WL 555759, at *1 (M.D. Fla. Feb. 21, 2012); *Mailhoit v. Home Depot U.S.A., Inc.*, 285 F.R.D. 566, 570 (C.D. Cal. 2012); *Tompkins v. Detroit Metropolitan Airport*, 2012 WL 179320, at *2 (E.D. Mich. Jan.18, 2012). Nonetheless, there is much variation in how courts permit the discovery of social media content to be conducted.

As an initial matter, courts have consistently held that, by sharing social media content with others – even if only with a limited, select group of contacts, a litigant has no objectively reasonable expectation of privacy with respect to that content. Consequently, discoverability of social media is governed by the standard analysis and is not subject to any "social media" or "privacy" privilege.

Social media data is subject to the same duty to preserve as other types of electronically-stored information. Generally, all evidence in a party's "possession, custody, or control" is subject to the duty to preserve and the duty to preserve is triggered when a party reasonably foresees that the evidence may be relevant to issues in litigation. Evidence generally is considered to be within a party's "control" when the party has the legal authority or practical ability to access it. Many social media platforms make preservation of information simple; for instance, Facebook offers

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Inside This Issue

GDLA Honors Atlanta Judges at 12th Annual Reception

The GDLA hosted its 12th Annual Judicial Reception on February 5, 2015, at the State Bar of Georgia. More than 150 members and judges enjoyed the evening.

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

See pages 40-41 for more scenes from the reception.

Photo courtesy of John Disney, *Daily Report*

Pictured at the event are Georgia State Senator Bill Cowsert (left) of Cowsert & Avery in Athens and Judge Steve C. Jones of the U.S. District Court for the Northern District of Georgia.

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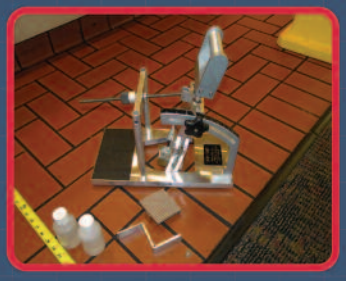


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President's Message

How time flies! It is hard to believe that I will soon enter the coveted group of those who call themselves Past Presidents. Thank you for allowing me the opportunity to be a part of this wonderful organization of talented lawyers who are dedicated to sharpening the tools of the civil defense bar to preserve justice in the legal system.

The organization is healthy and strong. It is growing in numbers, but we are missing many of our brethren.

This year, we embarked on a strategic planning process to examine and evaluate how we can improve, and how we can make the GDLA valuable to every member of the civil defense bar. The survey of the membership was one part of this. Additionally, a Strategic Planning Committee was formed and has met to discuss the future of the GDLA.

> "This year, we embarked on a strategic planning process to examine and evaluate how we can improve, and how we can make the GDLA valuable to every member."

In the years ahead, the GDLA will consider whether a name change is needed to prevent the on-going misconception that we are criminal defense attorneys. We will also consider ways to dispel the notion that we are solely insurance defense focused; indeed we are the voice for anyone on the literal and proverbial *right* side of the "v."

We will also be considering new and different ways of delivering services to you, of using technology to better assist our efforts, of providing more opportunities for involvement, and of making the Annual Meeting a must-attend event for every civil defense lawyer in Georgia.

As with any change, some of the efforts will be successful, and others will need to be discarded or modified. Please keep an open mind as we try new things in an effort to make the GDLA even better.

The GDLA intends to maintain its camaraderie, its keeping abreast of the new legal decisions and their impact, and its tools for practical application of lessons learned.

We will continue to foster communication with the members in a candid environment, and in substantive law sections that benefit your practice areas. We will provide opportunities for involvement that fit in with the demands of a busy practice and family life.

My legal practice has been enriched through the GDLA. I have benefitted from the words of wisdom from other members and from the friendships that have been developed. My clients have benefitted from the assistance of other members, and the trust and respect that we show each other, even when not aligned in our interests. As we move forward, let us remember that we are always stronger together.

On to bigger and better success!

For the defense,

Kirby Mason

Kirby G. Mason
HunterMaclean
Savannah

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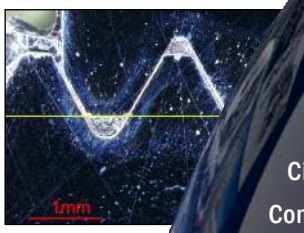




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Member News

Swift Currie McGhee & Hiers in Atlanta announced that **Ashley W. Broach** and **Pamela N. Lee** have been named to the firm's partnership. Ms. Broach practices primarily in the areas of product liability, premises liability and mass tort defense. Ms. Lee focuses on general litigation, insurance coverage and bad faith. She is a member of the GDLA Board of Directors and chairs the Young Lawyers Committee; she is also a member of both the Education and Strategic Planning Committees.

Hicks Casey & Morton announced the firm's new name following the elevation of **Erica L. Morton** to be a named partner. Ms. Morton, who has been a partner at the Marietta firm for four years, also serves as Chair of the GDLA Education Committee. The firm continues to focus its practice on insurance defense, including personal injury, premises liability, negligent security, product liability and construction defects. The firm's website and all e-mail addresses remain the same using hickscasey.com.

Hall Booth Smith announced that **James B. (Jim) Durham** joined the firm as a partner in the Brunswick office. A fellow of the American College of Trial Lawyers, he has more than 30 years of trial experience in multiple areas of civil litigation, including commercial litigation, product liability, medical malpractice defense, personal injury, and insurance coverage disputes. Mr. Durham is a Past President of the State Bar of Georgia and served on the Judicial Qualifications Commission from 2004-2013. In addition, the firm announced **Duane Cochenour** was elected as a partner in the Atlanta office. He specializes in the representation of medical professionals and is the leader of the firm's Insurance Coverage Practice Group. Prior to becoming a lawyer, Mr. Cochenour worked almost 20 years as an insurance claims professional. He is also a certified mediator and is licensed to practice in Florida.

Freeman Mathis & Gary announced that **Brian Dempsey** has been named a partner in the Atlanta office. His practice focuses on representing local government and commercial entities in civil litigation and appeals. In addition, **E. Andrew (Andy) Treese**, formerly with *Allen McCain & O'Mahony* in Atlanta, has joined the firm as an associate concentrating on personal injury defense and government law. He vice-chairs the GDLA Education Committee and is a member of the Strategic Planning Committee.

Ann Baird Bishop announced the launch of *Sponsler Bishop Koren & Hammer* defending workers' compensation, liability, and Longshore and Harbor Workers' Act cases through the representation of employers, insurers and third party administrators. The firm has offices in Atlanta, Tampa, Palm Beach Gardens and Chicago.

Michael J. (Mike) Athans has moved his practice to form *Gilson Athans* with **Jonathan R. Granade** and other new colleagues in the same office where *Casey Gilson* was located in north Atlanta. Mr. Athans was formerly with *Fields Howell*.

Owen Gleaton Egan Jones & Sweeney in Atlanta welcomed **Theodore E.G. (Ted) Pound** to the firm as a partner and **Kathleen W. (Kathy) Simcoe** as an associate. Their practice focuses on civil litigation specializing in the defense of medical malpractice claims against healthcare professionals, facilities and organizations.

Bryan Cave announced that **Adwoa Ghartey-Tagoe Seymour** was elected to partnership in its Atlanta office. She practices in the Commercial Litigation and Product Liability Client Service Groups. She was also sworn in as President of the *Georgia Association of Black Women Attorneys* (GABWA) in January.

Drew Eckl & Farnham announced that **Eric R. Mull** and **Matthew A. Nanninga** have been selected to join the firm's partnership. Mr. Mull practices insurance defense litigation with a focus on construction defects, professional malpractice, and first party property insurance matters. Mr. Nanninga focuses on general liability defense and workers' compensation matters. Both are resident in the firm's Atlanta office. In addition, **Garret W. Meader** joined the firm as a partner in the Brunswick office. He was previously a partner with *Brown Readdick Bumgartner Carter Strickland & Watkins*, also in Brunswick, and practices mainly in the area of insurance defense litigation.

Richard C. (Richie) Foster, **Elizabeth L. Bentley** and **Marc A. Hood**, formerly with *Hicks Casey & Foster* in Marietta, have moved their practice to *Carlock Copeland & Stair* in Atlanta. They will continue to focus on motor carrier liability, general liability and commercial insurance coverage. **M. Elizabeth Googe**, formerly with *Leitner Williams Dooley & Napolitan*, has also joined the firm's Atlanta office. She concentrates her practice on general insurance defense, premises liability, automobile liability, insurance coverage, and trucking and transportation litigation.

W. Taylor McNeill, formerly with *Chilivis Cochran Larkins & Bever*, has joined *Polsinelli* as an associate in the firm's Atlanta office. As a member of the firm's

White Collar Defense & Government Investigations Practice Group, he is focused on healthcare-related matters. He vice-chairs the GDLA Government Defense Enforcement Substantive Law Committee.

Jonathan J. Kandel, formerly with *Freeman Mathis & Gary* in Atlanta, has joined *McMickle Kurey & Branch* in Alpharetta. His practice includes insurance coverage and bad faith, business litigation, and appellate matters.

Sarah B. (Sally) Akins, a GDLA Vice President and partner with *Ellis Painter Ratterree & Adams* in Savannah, was appointed by the Supreme Court of Georgia to the *Board of Bar Examiners*. She is also serving her third term as Editor-in-Chief of this publication.

Daniel J. Huff, a partner at *Huff Powell Bailey* in Atlanta, is President of the *Georgia Chapter of the American Board of Trial Advocates* (ABOTA). GDLA Board of Directors member **Robert R. (Rusty) Gunn II**, a partner at *Martin Snow* in Macon, serves as Secretary. ABOTA is a national association of experienced trial lawyers – both defense and plaintiff's – and judges dedicated to the preservation and promotion of the civil jury trial right.

Sun S. Choy, a partner at *Freeman Mathis Gary* in Atlanta, is President of the *Korean American Bar Association of Georgia* (KABA-GA), which was founded in 2012. **Moses Kim**, a partner at *Insley & Race* in Atlanta, is a KABA-GA Board member.

The U.S. Air Force has promoted Air National Guard Brigadier General **Robert L. Shannon, Jr.** to Major General. Following his promotion, Major General Shannon – a partner at *Hall Booth Smith* in Atlanta – was assigned to the Pentagon in a dual-hatted capacity as Special Assistant to the Director of the Air National Guard and as Advisor to the Deputy Chief of Staff for Intelligence, Surveillance and Reconnaissance. Previously, he was dual-hatted as Vice Commander of the Georgia Air National Guard and advisor to the Commander for 25th Air Force, formerly the Air Force Intelligence, Surveillance and Reconnaissance Agency. In 2010, he was the first African-American to be promoted to Brigadier General in the Georgia Air National Guard. His most recent promotion makes him the second highest-ranking African-American in the Air National Guard nationwide.

Miller & Martin in Atlanta announced **Curtis J. Martin II** has been selected as one of *Savoy Magazine's* 2015 Most Influential African-American Lawyers. The list is comprised of the top 100 African-American lawyers nationally who are either partners at leading law firms or corporate counsel at Fortune 1000 corporations.

Eliyahu E. (Elie) Wolfe, an associate in *Nelson Mullins Riley & Scarborough's* Atlanta office, was appointed by the *Georgia Asylum and Immigration Network* to its Board of Directors. The network provides pro bono legal representation to asylum seekers and immigrant victims of human trafficking, domestic violence, sexual assault, and other crimes through direct representation and pro bono referrals.

Case Wins

Freeman Mathis & Gary partner and GDLA Board of Directors member **Wayne S. Melnick**, along with his law partners, GDLA Immediate Past President **Theodore (Ted) Freeman** and **Brian R. Dempsey**, successfully obtained summary judgment for a Hall County sheriff's deputy who was sued in a jail suicide case in Fulton Superior Court.

Plaintiff, the surviving minor daughter of the decedent, alleged that various defendants were responsible for allowing her father to commit suicide while he was awaiting trial on various criminal charges, after the trial court had ordered he be placed on suicide watch due to stated suicidal ideation. Although plaintiff's decedent was a Fulton County Jail inmate, he was being housed at Hall County Jail due to overcrowding at Fulton County. Hall County had placed the inmate on suicide watch when it received the suicide watch order. The Fulton County Jail, however, failed to properly mark its internal records when it received its copy of the order.

On the date in question, the inmate was due in court, and Fulton County Jail requested Hall County Jail return the inmate to Fulton County for the day so that he could appear. The Hall County deputy obtained the necessary paperwork, which indicated that the inmate was on suicide watch, and along with other transferring inmates, transported the inmate to Fulton County Jail. Upon arrival, custody of the inmate was given to the receiving officer. Because Fulton County Jail had failed to properly mark its internal records, the receiving officer had no idea that the inmate was suicidal.

Although there was a dispute regarding whether the Hall County deputy told the receiving officer about the suicide watch order, the Hall County deputy did tell the receiving officer to keep the inmate "separate" from the other inmates. The Hall County deputy provided the transfer paperwork, not to the officer to whom she transferred custody of the inmate, but to Central Control at the Fulton County Jail. The receiving officer placed the inmate in an attorney-visitation booth to keep him separate from the other inmates. While unsupervised in the booth, the inmate made a ligature out of his pants and hanged himself from the doorknob of the booth.

In granting summary judgment to the Hall County deputy, the trial court found that the duties identified by the plaintiff were not

applicable and, therefore, were not owed by the deputy to the inmate. The court went on to determine that even if the duties identified were applicable, the transfer of the inmate was a discretionary duty entitling the deputy to official immunity under Georgia law; or alternatively, if the duties owed were ministerial (and not discretionary) there was no disputed issue of material fact that the deputy had not breached any duty owed. Finally, the court determined that even if there were a breach of a ministerial duty, the breach was too far removed to be a proximate cause of the death of plaintiff's decedent.

Partners **Robert L. Berry** and **Stephen B. Moseley** of *Brinson Askew Berry Seigler Richardson & Davis* in Rome successfully defended a hospital and three of its nurses in a medical malpractice trial in the Superior Court of Catoosa County.

Plaintiff contended the hospital's nurses failed to appropriately care for a 50-year-old female patient who developed a sacral pressure ulcer after being admitted to the hospital in a life-threatening condition due to a suspected overdose of multiple prescription medications. The patient's condition was made worse by the fact she had not taken dialysis for at least two months, despite having end-stage renal disease. The patient spent the first 13 days of her 16-day hospitalization in the intensive care unit, seven of which were spent on a ventilator.

The defense presented evidence to show the nurses and attending physician took steps to prevent skin breakdown, including placing the patient on a pressure-relieving mattress and turning and repositioning the patient at least every two hours. Even with these preventive measures in place, the patient developed a pressure ulcer on her sacrum.

The defense contended the development of the pressure ulcer was unavoidable due to the patient's overall critical condition during much of the hospitalization. After the pressure ulcer was promptly recognized, the attending physician and the hospital's nurses began treating it appropriately and continued the preventive measures to avoid any further skin breakdown.

After seven days of trial, the jury returned a defense verdict in favor of the hospital, its nurses, and the attending physician.

Kim M. Jackson, a partner at *Bovis Kyle Burch & Medlin* in Atlanta, and **Bryan Grantham**, a partner at *Hawkins Parnell Thackston & Young* in Atlanta,

obtained summary judgment at the Court of Appeals of Georgia. The plaintiff had sought damages for fraud and breach of fiduciary duty against his former attorney.

The client asked the attorney to take his misclassification case on a contingency fee basis. When the attorney refused, they then agreed to an hourly fee agreement to evaluate the claim and try to settle it. They also agreed the attorney would consider handling the case on contingency or hybrid-contingency fee if it turned out to be strong case. The case turned out to be weak, and the employer refused to negotiate. The client owed the attorney money and could not get another attorney to take the case on contingency. The client then sued the attorney for fraud and breach of fiduciary duty.

The client claimed that the fraud was based primarily on the allegation that the attorney fraudulently induced the client into the attorney-client relationship by exaggerating the value of the case and by promising to reconsider a contingency fee agreement. The law firm counter-claimed for its unpaid attorney fees.

The trial court and the Court of Appeals disagreed as a matter of law. The appellate court held that a written claim evaluation was properly couched in conditional language and was not a "statement of fact" that could be the subject of fraud claim. The Court also held that the fee agreement clearly called for an hourly fee agreement and placed no obligations on the attorney to take the case in the future under a different arrangement. The Court of Appeals affirmed the trial court's order granting the law firm summary judgment on its attorneys' fees claim.

In another case, **Kim M. Jackson**, a partner at *Bovis Kyle Burch & Medlin*, and local counsel **J. Anderson (Andy) Davis**, a partner at *Brinson Askew Berry Seigler Richardson & Davis* in Rome, tried an accounting malpractice claim to victory in the Superior Court of Floyd County during the week of March 2, 2015. The jury returned a verdict of only $6,195.00 for the plaintiffs against one of Rome's largest CPA firms.

The claim arose out of an allegation by the plaintiffs that they had overpaid certain taxes in 2004, and had to pay to amend returns in 2005-2007, as a result of an alleged error by the CPA firm. Plaintiffs asserted actual damages of over $70,000. Plaintiffs also presented an O.C.G.A. 13-6-11 claim for attorneys' fees and expenses of litigation of nearly $300,000, which the jury rejected in its entirety. The verdict was limited to the fees necessary to amend the 2005-2007 tax returns, which resulted in a refund without audit.

The jury clearly rejected the professional negligence claims against the accounting firm. This was actually the second trial of this case. The first trial resulted in a jury verdict for the defendant, after which the judge granted a motion for new trial. A motion for fees by the defendant pursuant to O.C.G.A. 9-11-68 is expected.

J. Arthur (Art) Davison and **Sonja R. Tate** of *Fulcher Hagler* in Augusta obtained a defense verdict on February 9, 2015, after a two week trial in U.S. District Court in Columbia, S.C.

The defendant was an international chemical manufacturer who produced a wastewater deodorizer. The plaintiff was an employee of the Town of Lexington (South Carolina) Utilities Department who inhaled a mist of the deodorizer in an industrial accident in April 2010.

He alleged the defendant provided insufficient warnings of hazards associated with the product, and further alleged the defendant was responsible for the accident. Plaintiff, age 40, claimed a permanent respiratory injury totally disabling him from working. His economist blackboarded around $1 million in future lost wages and $1.3 million in future medicals in a life care plan.

The complex trial involved 34 witnesses, 14 of whom were experts in safety, toxicology, pulmonology, industrial hygiene, engineering, economics and vocational rehabilitation. On the eleventh day of trial, while the jury was deliberating plaintiff's counsel dismissed the defendant toller with prejudice. Shortly thereafter, the jury returned a defense verdict for the manufacturer.

Jason D. Darneille of *Crim & Bassler* in Atlanta obtained a defense verdict in Clayton State Court before Judge Linda Cowen.

Mr. Darneille defended a tow truck driver in a disputed liability case after he was involved in accident while trying to reenter the interstate after picking up a stranded motorist. The tow truck driver was cited for the accident and paid the ticket. Plaintiff later sued, claiming approximately $30,000 in specials and a shoulder surgery.

Mr. Darneille was able to impeach the plaintiff on prior medical records. The jury took only 25 minutes to return a defense verdict on liability.

Ashley Rice, a partner at *Waldon Adelman Castilla Hiestand & Prout* in Atlanta and GDLA Board of Directors member, obtained a defense verdict from a Douglas County jury in March.

The defendant admitted that her vehicle rear-ended the plaintiff and pushed it into another vehicle. While the defendant paid a citation for following too closely, she maintained that the plaintiff had already struck the vehicle in front of her before the defendant's impact. The plaintiff complained of injury at the scene, but sought no further treatment for several days. Thereafter, the plaintiff underwent chiropractic treatment, pain management, physical therapy, and an epidural injection. The plaintiff's MRI showed a lumbar herniation, which she related to the accident.

The plaintiff presented approximately $20,000 in healthcare bills, but failed to convince the jury that the subject accident caused her alleged injuries. ❖

Welcome New GDLA Members

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

Kenneth Marc Barre III
Downey & Cleveland, Marietta

Vonetta Benjamin
Womble Carlyle Sandridge & Rice, Atlanta

Matthew Boyer
Nall & Miller, Atlanta

Payton Bramlett
Vernis & Bowling of Atlanta, Atlanta

Samuel Britt
Crim & Bassler, Atlanta

Kirk Andrew Carter
Waldon Adelman Castilla Hiestand & Prout, Atlanta

Wesley Ennis Childs
Chambless Higdon Richardson Katz & Griggs, Macon

Andrew Curtright
Downey & Cleveland, Marietta

Christopher Kelley Gifford
Drew Eckl & Farnham, Atlanta

William Avriett Green
Ken David & Associates, Atlanta

Adam Hand
Levy Thompson Sibley & Hand, Macon

Philip Henderson
Insley & Race, Atlanta

Rachel Erin Hudgins
Goodman McGuffey Lindsey & Johnson, Atlanta

Anna Idelevich
Weinberg Wheeler Hudgins Gunn & Dial, Atlanta

Anam Ismail
Waldon Adelman Castilla Hiestand & Prout, Atlanta

Christopher L. Johnson
Gray Rust St. Amand Moffett & Brieske, Atlanta

Robert W. Johnson
Crim & Bassler, Atlanta

Candis Jones
Gray Rust St. Amand Moffett & Brieske, Atlanta

Melody Kiella
Drew Eckl & Farnham, Atlanta

Crystal Lang
Young Thagard Hoffman Smith Lawrence & Shenton, Valdosta

Gwendolyn Larkin
RLI Transportation, Atlanta

Danielle C. Le Jeune
Rutherford & Christie, Atlanta

Zachary J. Nelson
Goodman McGuffey Lindsey & Johnson, Atlanta

Clay O'Daniel
O'Daniel McDonald, Atlanta

Melissa C. Patton
Webb Zschunke Neary & Dikeman, Atlanta

Kevin Pearson
Georgia Power Company, Atlanta

Theodore E.G. Pound
Owen Gleaton Egan Jones & Sweeney, Atlanta

Bradley W. Pratt
King & Spalding, Atlanta

Tracey Wagner Pruiett
Mabry & McClelland, Atlanta

Rachel Reed
Waldon Adelman Castilla Hiestand & Prout, Atlanta

Darrell Jay Thaw, Jr.
Weathington Smith, Atlanta

Richard G. Tisinger, Jr.
Tisinger Vance, Carrollton

Dana Weinberger
Drew Eckl & Farnham, Atlanta

Members are encouraged to recruit their colleagues to join the GDLA. We have crossed the 800-member mark and continue to expand the voice of the defense bar in Georgia.

Our membership application is now online; prospects can visit the Membership tab at www.gdla.org. Visit Find a Defense Lawyer to see if someone is already a member.

GDLA Files Amicus Briefs in Two Cases

GDLA Files Amicus Brief in Case Questioning Defendant's Right to Apportion Fault to Plaintiff's Employer under Theory of Negligent Entrustment

On December 31, 2014, the GDLA once again jumped into the fray involving apportionment of fault to nonparties under Georgia's apportionment statute, O.C.G.A. § 51-12-33.

Responding to a request from GDLA member Sean L. Hynes of Downey & Cleveland in Marietta, your Amicus Committee, led by Co-chairs Jeffrey S. Ward of Drew Eckl & Farnham in Brunswick and Robert R. (Rusty) Gunn of Martin Snow in Macon and Vice-chair Christopher E. Parker of Miller & Martin in Atlanta, agreed to offer the GDLA's help.

Martin A. (Marty) Levinson and Alex Barfield of Hawkins Parnell Thackston & Young in Atlanta answered the call to draft an *amicus curiae* brief on behalf of the GDLA in the case, which is *Zaldivar v. Prickett*, docket no. S14G1778, before the Supreme Court of Georgia.

Zaldivar involves a case of first impression before the Supreme Court regarding nonparty apportionment. The plaintiff-appellee in *Zaldivar* was driving for his employer when he was involved in an accident with the defendant-appellant, and there is conflicting testimony as to whether the defendant ran a red light or the plaintiff failed to yield. The defendant-appellant filed a notice of intent to seek nonparty apportionment to the plaintiff's employer as a nonparty pursuant to O.C.G.A. § 51-12-33(c) under a theory of negligent entrustment.

The plaintiff's employer apparently had received three relatively serious complaints about bad driving by the plaintiff in the course of his employment for the employer during the roughly 10 years prior to the accident. The plaintiff moved to preclude the defendant from seeking to apportion fault to the plaintiff's employer, and the trial court granted the plaintiff's motion.

The Court of Appeals affirmed, holding that the defendant-appellant could not seek apportionment of fault under these circumstances. In doing so, the Court of Appeals relied on a single case, *Ridgeway v. Whisman*, 210 Ga. App. 169 (1993), which held that a person cannot bring a claim for negligent entrustment against the purported entrustor because the entrustee's own negligence "breaks the causal chain" and eliminates proximate cause. The Court of Appeals reasoned that since the plaintiff in this case could not have brought the claim against his own employer under that rationale, the defendant also was barred from seeking to apportion fault to the plaintiff's employer under O.C.G.A. § 51-12-33(c). The defendant petitioned for *certiorari* to the Supreme Court of Georgia, which was accepted, and the defendant solicited the GDLA's assistance.

In its amicus brief, the GDLA argued that the Court of Appeals erred in deciding whether the defendant could seek apportionment of fault to a nonparty based on whether the *plaintiff* could assert a claim against the nonparty. More fundamentally, the GDLA contended and explained that O.C.G.A. § 51-12-33(c) specifically permits apportionment of fault to ***any*** nonparty who contributed to the plaintiff's claimed injury or damages, *regardless of whether the plaintiff could have sued that person or entity*. Contrary to what the plaintiff and the Georgia Trial Lawyers Association (GTLA) contended in the courts below, the plain statutory language of O.C.G.A. § 51-12-33(c) does not limit nonparty apportionment to situations where the nonparty could not be named for some jurisdictional or similar reason. The GDLA also questioned the validity of the *Ridgeway* case, in particular, as applied to the context of nonparty apportionment.

At oral argument in the Supreme Court, which took place on January 6, 2015, the Justices' questions to counsel focused primarily on whether *Ridgeway* was decided correctly and whether, in fact, there is a proximate cause issue solely due to the fact that the plaintiff in this case is the one alleged to have been negligently entrusted with a vehicle in connection with the accident at issue. Justices Nahmias and Blackwell questioned why the doctrines of comparative fault and/or contributory negligence could not be relied on to determine whether a negligent entrustment claim could be brought.

The case represents only the fourth time since O.C.G.A. § 51-12-33 was amended in 2005 that the Supreme Court has addressed nonparty apportionment. ❖

GDLA Amicus Brief Addresses Pecuniary Loss Rule in Negligence Actions

With approval from the GDLA Amicus Committee, members Laurie Webb Daniel and Leland H. (Lee) Kynes of Holland & Knight in Atlanta filed an amicus brief on behalf of GDLA in the Georgia Supreme Court in support of the defendants/appellants in *Oliver v. McDade*, docket no. S14G1775.

The defendants in this appeal are challenging the trial court's ruling that a plaintiff is permitted to recover under the "pecuniary loss rule" for emotional distress from witnessing the suffering and death of a friend. This ruling conflicts with Georgia's impact rule, which bars a claim for emotional distress under these circumstances. Oral argument took place on January 21, 2015.❖

To read the GDLA's amicus brief in either case, 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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DAILY REPORT

"Learn(ed)-ing" Treatises in Georgia

By Frances M. Parker
Hall Booth Smith, Atlanta

I. Introduction

Traditionally, Georgia has followed a restrictive practice with respect to learned treatises. The current Georgia Rules of Evidence enact this conservative version:

> The following shall not be excluded by the hearsay rule, even though the declarant is available as a witness:
>
> ...
>
> (18) Learned Treatises. To the extent called to the attention of an expert witness upon ***cross-examination***, statements contained in published treatises, periodicals, or pamphlets, whether published electronically or in print, on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice. If admitted, the statements may be used for cross-examination of an expert witness and read into evidence but shall not be received as exhibits. O.C.G.A. § 24-8-803(18) (emphasis added)

By contrast, the corresponding Federal Rules of Evidence permit experts to rely on treatises throughout *direct* examination, as well as on cross-examination, if a proper foundation is laid. FED. R. EVID. 803(18). Once admitted, whether under either the Georgia or Federal Rules, the treatise may be *read* into the record, but it never comes in as an exhibit.

This article will address the use of learned treatises under the current Georgia Rules of Evidence.[1] Specifically, it will summarize when learned treatises can be used during trial, and how to establish a learned treatise as a "reliable authority."

II. Learned Learned Treatises 101: The 5 Ws & 1 H

What *is a Learned Treatise?*

Learned treatises are sufficiently authoritative texts that are admissible in court. In Georgia, statements contained in published treatises, periodicals or pamphlets, whether published electronically or in print, on a subject of history, medicine, or other science or art, may be called to the attention of an expert witness during cross-examination.

Why *Are the Georgia Rules of Evidence Regarding Learned Treatises Important?*

Without O.C.G.A. § 24-8-803(18), learned treatises would be inadmissible hearsay – that is, statements, other than ones made by declarants while testifying at trials or hearings, which are offered into evidence to prove the truth of the matter asserted. O.C.G.A. § 24-8-801(c). Because of the hearsay exception for learned treatises, when specific requirements are met, certain published treatises, periodicals, or pamphlets become admissible at trial and may be read to the jury. Properly admitted treatises are admissible as *substantive* evidence; they are not limited to impeachment use.

How *Can a Learned Treatise Be Established as "Reliable Authority"?*

Before an expert can be cross-examined using a learned treatise, the treatise must be deemed reliable and authoritative in the expert's field.[2] Unless the court elects to take judicial notice of the text's reliability, an expert's own opinion can be used to establish that the treatise is a trustworthy and "reliable authority."[3] By setting this foundation, an expert may then be questioned about contents of the treatise, whether relied upon by the expert or not, and relevant portions may be *read* into evidence.

Who *Can Establish a Learned Treatise as "Reliable Authority" in Georgia?*

The proper foundation must be laid for learned treatises to be admitted into evidence. Georgia allows not only the witness on cross-examination, but also other witnesses, to establish the authoritative status of a learned treatise. In Georgia, a learned treatise may be established as reliable authority by (1) the testimony or admission of the expert witness being cross-examined, (2) the testimony or admission of another expert, (3) or judicial notice.

The evidence rules currently allow an expert to (1) select a treatise, (2) establish that treatise as "reliable authority," and then (3) be cross-examined with respect to that treatise. From an efficiency standpoint, this cuts down on the number of experts needed in a case because an additional expert is not necessary to establish the reliability of a treatise prior to cross-examination – so long as the testifying expert is willing to establish the treatise as "reliable authority." If the expert being cross-examined is not willing to do so, however, another expert witness may be necessary.

***When** Can a Learned Treatise Be Called to the Attention of an Expert Witness?*

Solely on cross-examination – and only once a learned treatise has been established as a reliable authority by the testimony of the witness or judicial notice is taken – may an expert be asked about statements contained in published treatises, periodicals, or pamphlets. It does not matter whether the expert being questioned on cross-examination actually relied upon the treatise, so long as it has been established as authoritative. Further, an expert may testify to an opinion derived from the learned treatise. In addition to being used as substantive evidence, once a treatise, article, or book is accepted as reliable or authoritative in the field, an expert may also be *impeached* by it on cross-examination.

***Where** Does the Learned Treatise Go After It Has Been Established as a "Reliable Authority"?*

After a learned treatise has been accepted as reliable and authoritative in a field, relevant portions properly admitted on cross-examination of an expert may be read or shown to the jury, but they do *not* go out with the jury.

III. Summary

While Georgia adopted most of the Federal Rules of Evidence, it maintained its restrictive practice with respect to the use and admission of learned treatises. Although Georgia has a narrow rule regarding *when* learned treatises may be used (i.e., only on cross-examination), Georgia has expanded its approach regarding *who* may establish a learned treatise as a reliable authority. ❖

Frances M. Parker is an associate in the Atlanta office of Hall Booth Smith, focusing on data protection and risk management, business litigation and employment law.

Endnotes

[1]This article addresses the current evidence law in Georgia under Title 24 of the Official Code of Georgia (O.C.G.A.), which went into effect on January 1, 2013. Laws 2011, Act 52, § 2, eff. Jan. 1, 2013 (Evidence-Revision of Provisions).

[2]*See Fitzgerald v. State*, 193 Ga. App. 76, 78, 386 S.E.2d 914 (1989) ("An expert witness cannot be cross-examined by the use of a text which has not been shown to be a standard treatise in the area of the witness' expertise."); *Pound v. Medney*, 176 Ga. App. 756, 762, 337 S.E.2d 772 (1985) ("'[A]n expert witness may be cross-examined by reference to a standard treatise in the field of the expert's special knowledge to test his credibility ...[However] an expert cannot be cross-examined upon a treatise which has not been proved to be a standard treatise on the subject.' A party can prove by cross-examination of an opposing party's expert that a treatise is standard on the subject."); *see also* Milich et al., Ga. Rules Of Evidence § 15:7.

[3]Additional hurdles would include expert testimony and expert qualification issues. *See* O.C.G.A. § 24-7-702 (stating expert witness qualifications and advising courts to draw from United States Supreme Court decisions such as *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)).

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Derailing the Reptile Safety Rule Attack

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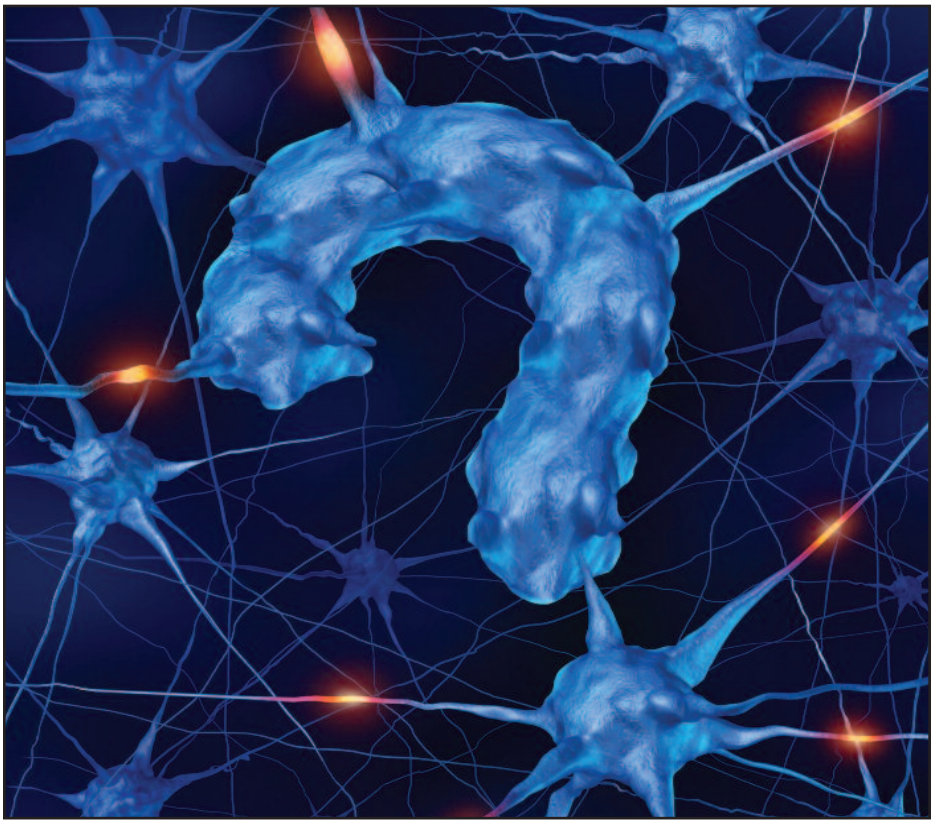


Introduction

"What happened?" your client barks over the phone. As you gather the words to impress upon your client the challenges your witness faced, you also wonder and search for an explanation. "I prepared him like any other witness by explaining he should remain calm, deliver confident answers, listen carefully, and only answer the question asked;" but thinking back on the deposition, you cringe. Your objections went unheard. Your "preparation" sessions were useless. Your "Deposition 101" speech had no impact.

You then realize that plaintiff's counsel used a new, sophisticated approach that is immune to your standard witness preparation efforts – a form of psychological warfare. You realize the case is now over. "We were Reptiled, weren't we?" the client demands.

As your client asks why the key witness in the case just "gave away the farm," with you defending the deposition right next to that witness, you flash back to what happened:

- Plaintiff's counsel presents the defendant witness with a series of general safety and/or danger rule questions;
- The witness instinctually agrees to the safety and/or danger rule questions because it supports their highly-reinforced belief that safety is always paramount and that danger should always be avoided;
- The witness then continues to agree to additional safety and/or danger rule questions that link safety and/or danger to specific conduct, as it aligns with their previous agreement to the general safety and/or danger rules;
- The witness begins unknowingly and inadvertently entrenching themselves deeply into an absolute, inflexible stance that omits circumstances and judgment;
- Plaintiff's counsel then presents case facts to the defendant witness that creates internal discomfort, as these facts do not align with the previous safety and/or danger rule agreements;
- Plaintiff's counsel illuminates that the safety and/or danger rules, which have been repeatedly agreed to under oath, have been violated and that harm has been done as a result;
- The defendant witness regrettably admits to negligence and/or causing harm, as the perception of hypocrisy has been deeply instilled;
- The emotionally-battered defendant witness further admits that if they would have followed the safety and/or danger rules, harm would have certainly been prevented.

Rest assured your witness was not the first, nor will he be the last to fall victim to Reptile manipulation tactics because traditional preparation techniques are not sufficient for the emotional and psychological manipulation witnesses endure during Reptile style questioning. The four devastating psychological weapons that were used against your defendant witness are known as:

- Confirmation Bias
- Anchoring Bias
- Cognitive Dissonance
- The Hypocrisy Paradigm

The combination of these powerful psychological weapons doesn't influence witnesses; rather, it CONTROLS witnesses. These psychological weapons are precisely what the Reptile plaintiff attorney uses to destroy defendant witnesses at deposition.

The well-known "Reptile Revolution" spearheaded by attorney Don Keenan and jury consultant David Ball, Ph.D. is now a

Continued on page 32

Legionellosis Standard of Care on the Horizon

By René I. Basulto, PE MSEM
Robson Forensic

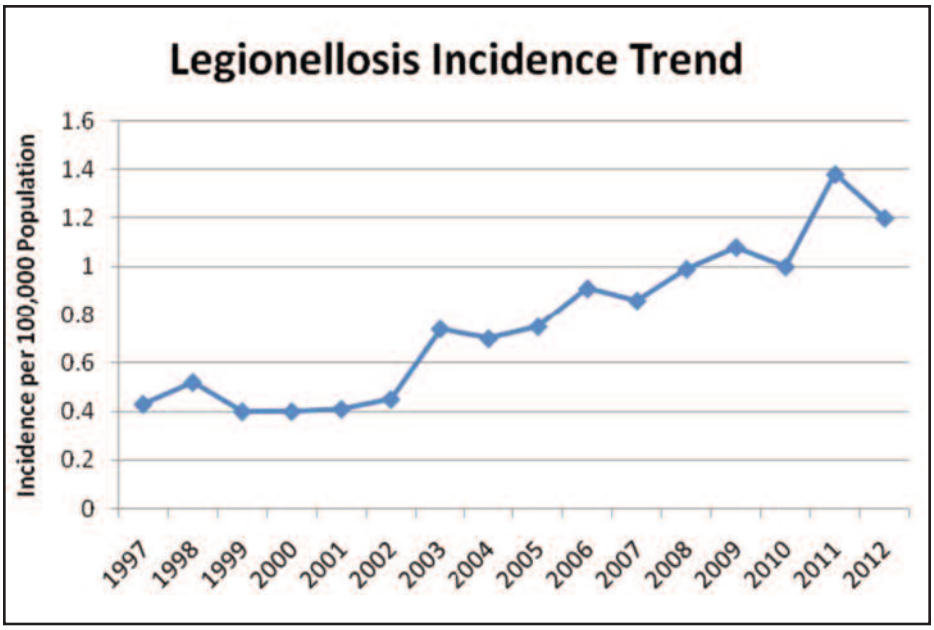
Legionnaires' disease (a grave, sometimes lethal form of pneumonia) and Pontiac fever (a flu-like, self-limited illness) are the two most common forms of Legionellosis. Legionellosis is caused by inhalation of viable Legionella bacteria, of which 70 serogroups have been identified. Legionella are common, aquatic bacteria found in natural and building water systems. The waterborne pathogens are widely dispersed in nature, and are found in moist soils, creeks, ponds and drinking water.

Pontiac fever, as a self-limited disease, usually resolves itself without intervention. However, if untreated, Legionnaires' disease can be fatal. Although prompt treatment with antibiotics usually cures Legionnaires' disease, some people continue to experience problems after treatment.

Several sources indicate 8,000 to 18,000 persons are hospitalized every year in the United States with Legionnaires' disease with a five to 30 percent mortality rate.[1]

Legionnaires' disease was first discovered in 1976 during an outbreak of pneumonia at an American Legion convention held at The Bellevue-Stratford Hotel in Philadelphia, Penn. The outbreak resulted in 34 deaths amongst the 221 attendees who contracted the disease.[2] Almost 40 years after it was first discovered, it continues to gain public attention, remaining very common and with increased incidences over the past few years around the world.

Among the most notable incidences is an outbreak of 302 cases in Portugal, with nine deaths this past year. All cases are linked to an outbreak in Vila France de Xira, a suburban area of Lisbon.[3] The source of the pathogen has not been confirmed, but officials suspect the cooling towers at a local fertilizer plant.



The U.S. is far from immune to Legionellosis outbreaks. In fact, New York City health officials are currently investigating a spike in Legionnaires' disease in the Bronx with 11 cases reported in December of 2014 alone.[4]

Unlike other water-borne pathogens, Legionnaires' disease is transmitted by breathing in mist containing Legionella bacteria. This commonly happens in or near showers, faucets, whirlpools, decorative fountains, swimming pools, or cooling towers in air conditioning systems. The bacteria propagates rapidly in stagnant and warm water, which is why it is so commonly found in untreated potable water systems, air conditioning system components and hot water systems.

Legionnaires' disease can have symptoms like many other forms of pneumonia, making it difficult to diagnose. Signs of Legionnaires' disease include cough, high fever, body aches and shortness of breath. The symptoms normally begin two to 14 days after exposure to the bacteria. These long incubation periods sometimes make it difficult to track down the source of the pathogen, allowing the pathogen to propagate, exposing the risk for extended periods of time, and leading to outbreaks similar to the one in Portugal. Pontiac Fever, on the other hand, has similar symptoms to Legionnaires' disease, but only lasts two to five days, the host does not develop pneumonia, and the symptoms disappear without treatment once the disease runs its course.

Individuals with greater than normal risk of contracting Legionnaires' disease include the young, elderly, people who have underlying diseases and/or are receiving treatment that weaken the immune system, burn patients, bone marrow or organ transplant recipients, and those who are known to be immune-compromised for other reasons.

Due to the potentially lethal consequences, Legionellosis cases are reported to the U.S. Centers for Disease Control and Prevention (CDC) through the National Notifiable Disease Surveillance System (NNDSS) and the Supplemental Legionnaires' Disease Surveillance System (SLDSS), which are designed to manage surveillance data on cases and enhance outbreak detection. The latest SLDSS report from the CDC assessed cases reported to NNDSS from all 50 states and the

Continued on page 54

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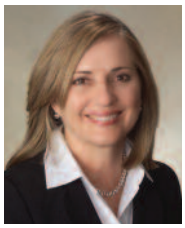
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The Role of Voir Dire in Mediation

By Bruce Barrickman
BAY Mediation & Arbitration Services

I am sure you are wondering what is wrong with the author of this article. After all, what in the world does voir dire have to do with mediation? In fact, it has a lot to do with it.

Is your client or the opposing party a racial minority; a corporation; a female; an attractive female; a motorcyclist; a bicyclist; a truck driver; overweight; an apartment complex owner; a developer or fit into any other category where potential jury bias could come into play at trial? What kind of bias are we talking about? How are we going to address that potential bias in voir dire? To properly evaluate your case for mediation, you will need to objectively evaluate your ability and opportunity to identify and overcome those biases that could significantly affect the outcome of the trial of the case.

You must first determine what potential bias may come into play at trial. Studies reflect that bias comes in multiple forms. There are explicit biases, which are attitudes and stereotypes that are consciously assessable through introspection and endorsed as appropriate. If these biases are generally accepted in the community, a potential juror may freely acknowledge this bias when questioned about it in voir dire. If it is not generally accepted, the potential juror may very well not acknowledge this bias; particularly if just general questions are asked.[1]

Studies reflect that many jurors when asked will say they have no particular bias against corporations, but if presented with this statement, "If a company could benefit financially by lying, it's probable that it would do so," more than 80 percent of the people polled answered *yes*.[2] Studies reflect jurors return larger verdicts against corporations than even wealthy individual defendants. This is not necessarily because of the financial condition of the corporation, but because jurors believe a corporation should be held to a higher standard of care than an individual.[3] How does this sync with most jurors denying they have any particular bias against corporations? When questioned on the telephone, 60 percent of persons polled will admit they do not believe in the tenet that persons charged with a crime should be presumed to be innocent. The majority of those people would not admit this when questioned in voir dire.[4]

It is often difficult to ferret out potential jurors with an explicit bias. Depending upon what the presiding judge allows you to ask or do in voir dire, it may be impossible to identify jurors with an implicit bias that might affect the outcome of the case. Implicit biases are attitudes and stereotypes that are not consciously accessible through introspection; it is a subconscious bias for which the person having it is not even aware. General, and even specific, questions about this type of bias will not illicit a positive response from the person. Even if prospective jurors recognize through questioning he or she may have this bias, they may not acknowledge it because they may feel that it might reflect poorly on them; particularly if they are questioned in front of other potential jurors.[5]

Even though the person is not aware of the bias, studies clearly reflect when placed in a situation where that bias comes into play, the subconscious will affect that person's thought processes and ultimate decisions. Mental activities that are affected include per-

ception, forming of impressions, processing of information, use of information and retrieval of information. All of these play a significant role in how a juror reacts to the evidence presented and his or her deliberations in the jury room.[6]

Studies have indicated that making potential jurors aware of the existence of implicit bias and its effects can help reduce the impact of this type of bias. Implicit Association Tests (IATs) have been developed to help identify these hidden biases. Examples of this testing can be found at https://implicit.harvard.edu/implicit/.

The tests ask questions or have the person respond to certain visual stimuli that are designed to identify implicit biases. The studies have shown the ability to identify implicit bias is significantly better utilizing the tests as opposed to self-reporting. The tests can be administered in as little as 10 minutes.[7]

Over six million IATs have been administered, and the test results consistently show the majority of people prefer whites over blacks (if the test taker is Caucasian, Asian or Hispanic), young over old, light skinned over dark skinned, other people over Arab-Muslims, thin people over obese and straight people over gay people.[8] Social cognition research suggests that over 80 percent of American whites and Asians demonstrate at least unconscious bias in favor of whites compared to blacks.[9] Additionally, mock juror studies reveal that this anti-black bias routinely influences verdicts and sentencing in cases in which a juror's race differs from the defendant's.[10] As litigators, we are not surprised by these results. The key is identifying those people so they can be the subject of either a challenge for cause or a preemptory strike. Unfortunately, the legal basis that must be met for striking someone for cause is not very conducive to successively striking someone with an implicit bias.

There is a push in some areas to educate potential jurors about implicit bias and to administer IATs to potential jurors during their orientation before they are called to a courtroom to participate in voir dire. The primary use of these tests has been to educate the potential juror on what unconscious biases he or she might have, how implicit bias may affect decision-making and to provide additional information to the attorneys to assist in the voir dire process.

Some courts have developed specific jury charges on implicit bias to address the possible effect it can have on decision-making, and the need to try to avoid implicit bias playing a role in the jury's deliberations. It is thought this may assist each member of the jury panel by serving as a check and balance on the potential biases of other jurors.[11]

> *"It is often difficult to ferret out potential jurors with an explicit bias."*

I am not aware of any court system in the Atlanta area that administers these tests or even addresses the existence of implicit bias. Would your presiding judge be open to a motion to have the tests administered? Even if the judge would allow the testing, in all likelihood the cost and logistics of administering the testing would be the responsibility of the moving party. A decision would have to be made on whether the potential value of the case would justify the expense involved. In making this determination, it must be understood the best developed IATs do not always accurately identify the presence of implicit bias.

To try to identify implicit biases without Implicit Association Tests, you must be allowed to ask many more subtle questions that identify beliefs, actions, lifestyles, preferences, etc. The presiding judge would need to allow you to ask questions about club and organization affiliations, what the juror reads, what news they follow, their political party affiliation, what they do with their leisure time, what means of transportation they use, what radio stations they listen to and other similar type questions that might reveal hidden biases. For this to be most effective, each juror would need to be questioned individually, outside the presence of other jurors.

Considering the potential for both explicit and implicit biases to significantly affect the outcome of the trial when you are representing a client who falls within known biases, you must take this into consideration when preparing for mediation.

Before mediation, ask yourself: What is the most likely composition of the potential jury panel based upon the venue of the case? What role will the efforts of tainting a potential juror about the need for tort reform play in jury deliberations? Is the case in state or federal court? Will the presiding judge conduct most of the voir dire questioning? Will the presiding judge consider having IATs administered and educating potential jurors about the existence and effect of implicit biases? Will the presiding judge allow you to question the potential jurors individually and in detail? Is the case large enough to justify spending the time and expense necessary to weed out the biased jurors, if possible? Will you be able to identify the potential jurors who have a bias that could affect the outcome of the trial and remove them from the jury panel? How do you present your case in a way to best address these known

biases even if you are as successful as you can be in eliminating biased jurors in voir dire?

An honest and objective assessment of these questions is essential in properly evaluating your case. It is also essential that you address these issues with your client before the mediation so the client can have a realistic perspective on the value of the case. Although at first glance, it would appear that the intricacies of voir dire are something to consider only if and when a mediation fails to resolve a dispute, in fact considering bias and the role it may play in your case at trial may very well determine whether a case settles at mediation or not.

It is beyond the scope of this article, but it is recommended you read the blog posting, "Are Jurors Influenced By What They Wish to Believe?"[12] The author addresses how juror's perception of and reaction to evidence, including expert witness testimony, is influenced and shaped by what they wish to believe, and how you should frame your presentation and evidence at trial to account for this. ❖

Bruce Barrickman has been a civil litigator for 37 years and a mediator and arbitrator for 17 years. He is a partner in the law firm of Barrickman Allred & Young and is a founder of BAY Mediation & Arbitration Services in Atlanta. He frequently mediates all types of cases, including those involving bad faith, commercial, construction, insurance coverage, labor and employment, personal injury, premises liability, professional negligence, trucking and wrongful death. BAY Mediation & Arbitration is a Platinum Sponsor of the GDLA.

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Traffic Control Plan: The Route of the Problem

By Peter McCawley
CED Engineering

During a busy morning commute, a truck glances against a road barrier causing it to sideswipe a sedan, which careens into a nearby bicyclist who suffers extensive injuries. Accident reconstructionists are called to the scene. Delta Vs are calculated. The positions, actions and reactions of all the participants are calculated and considered in order to determine who is at fault; but the fault may lie elsewhere.

What about the Traffic Control Plan (TCP)? Was the road barrier – or traffic control device – that the truck hit correctly positioned? Was it even the correct type of traffic control device for that situation? If it was the correct TCP, was it properly serviced? Did it have the requisite amount of water/sand as ballast? Analyzing the Traffic Control Plan could be extremely important in an investigation.

As with most technical topics or specialties, when one digs in, a veritable alphabet soup arises. The following is a list of relevant acronyms:

MUTCD (Manual on Uniform Traffic Control Devices). Issued by the Department of Labor, this is the Occupational Safety & Health Administration (OSHA) document on the subject. It states:

> "During any time the normal function of a roadway is suspended, temporary traffic control planning must provide for continuity of function (movement of traffic, pedestrians, transit operations, and access to property/utilities). The location where the normal function of the roadway is suspended is defined as the work space. The work space is that portion of the roadway closed to traffic and set aside for workers, equipment, and material. Sometimes there may be several work spaces within the project limits. This can be confusing to drivers because the work spaces may be separated by several miles. Each work space should be adequately signed to inform drivers of what to expect."

TTC (Temporary Traffic Control). The primary function of a TTC is to provide for reasonably safe and effective movement of road users through or around TTC zones while protecting road users, workers, responders, emergency personnel and equipment.

ATSSA (American Traffic Safety Services Association). ATSSA is an organization that represents the road safety, traffic safety, and highway safety industry with effective legislative advocacy, traffic control safety training, and a far-reaching member partnership. ATSSA operates a Roadway Safety Training Institute that certifies workers with such courses as Advanced Work Zone Traffic Control Course.

TCD (Traffic Control Devices). TCDs are markers, signs, and signal devices used to inform, guide and control traffic, including pedestrians, motor vehicle drivers, and bicyclists. TCD can include such things as signs, cones, barriers, barrels etc. There are very specific guidelines and criteria as to which devices are used in which situations.

When identifying which experts might be needed to investigate this morning commute accident, an engineer who is an accredited Traffic Control Supervisor should be considered in addition to an accident reconstructionist. This engineer can scrutinize the TCP to determine if it was appropriate for the circumstances and if it was installed correctly. A Traffic Control Supervisor will have the knowledge to check to see if the daily inspections occurred and if the TCP Log Book is current and without deficiencies. The Traffic Control Supervisor will also review all the documentation and determine if the approved TCP was correctly implemented at the time of the incident.

In conclusion, with regard to the hypothetical morning commute accident above, it could be determined that on that busy morning commute the truck driver was doing what he was supposed to, the sedan was where it should be and the bicyclist was without fault. Rather, the barrier could be determined to be inappropriate for the circumstances and the cause of the accident. You need the correct expert to guide you to the answer. ❖

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

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Appellate Case Law Update

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

JURISDICTION: The Supreme Court has exclusive jurisdiction over questions involving the constitutionality of a statute.

WORKERS' COMPENSATION ACT: The Act's denial of death benefits to a non-dependent parent was constitutional.

***Barzey v. City of Cuthbert*, 295 Ga. 641 (2014)**

Appellant Barzey challenged the constitutionality of the provisions in the Workers' Compensation Act that precluded her, as a non-dependent parent, from recovering benefits for the death of her son, Shorter, from his employer, the City of Cuthbert. Barzey argued the limitation on the recovery of non-dependent heirs violated her rights to due process and equal protection.

Shorter was killed in the course and scope of his employment with the City. At the time of his death he was not married and had no dependents. As his mother, Barzey was his only heir at law. Both parties filed motions for summary judgment. The trial court denied Barzey's motion and granted the City's motion. Appellant challenged the Court's jurisdiction, asserting that jurisdiction was in the Court of Appeals. Reciting its exclusive jurisdiction over challenges to the constitutionality of a statute and that the grant of summary judgment was directly appealable as final under O.C.G.A § 9-11-56(h), the Court found it had jurisdiction to review the trial court's order. It further noted that this matter was not one of those cases where, "a law has been held to be constitutional as against the same attack being made, [and] the case requires merely an application of unquestioned and unambiguous constitutional provisions and jurisdiction of the appeal is in the Court of Appeals."

Reviewing the merits of Barzey's claim, the Court first noted that her appeal did not raise any issue under the Georgia Constitution, because she failed to even mention any provision of the Georgia Constitution. Thus, the Court reviewed her claims under the Fourteenth Amendment. As no suspect class or fundamental right was involved, the Court applied the "lenient" rational basis standard. Applying such standard the Court found there was no violation of the Fourteenth Amendment and that the exclusive remedy doctrine, which barred a tort action, was also constitutional.

JURISDICTION: The Court of Appeals has unexclusive jurisdiction over constitutional challenges to administrative regulations.

CONSTRUCTION OF REGULATIONS: The rules of construction presume a regulation is constitutional.

***Georgia Dept. of Community Health v. Northside Hosp. Inc.*, 295 Ga. 446 (2014)**

The consolidated appeals in this case arose from the Georgia Department of Community Health's granting of an application for a Certificate of Need to develop an outpatient ambulatory surgery service in East Cobb County to Kennestone Hospital, Inc. Kennestone's application was approved by the DCH. Northside Hospital, Inc. opposed the CON and sought administrative review of the DCH's initial decision.

The DCH denied Northside's review and Northside filed a petition for judicial review in superior court. The superior court reversed the DCH's decision to grant the CON on the basis that the regulation was unconstitutionally vague. The Court of Appeals upheld the superior court's decision and the Supreme Court granted certiorari to determine whether the Court of Appeals erred.

Continued on next page

The Supreme Court began its opinion by reaffirming the long-standing rule that the Court of Appeals had jurisdiction over constitutional challenges to administrative regulations, as regulations are not laws. The Supreme Court then stated it had jurisdiction to review the Court of Appeals decision by writ of certiorari.

Finding jurisdiction, the Supreme Court explained the various standards applied in reviewing state regulations. In order to resolve the question of whether a regulation is unconstitutionally vague, the regulation cannot be read independently of the statutory framework upon which it is based. "It is within the purview of this Court to consider the validity of an agency [regulation] by determining whether it comports with the legislative enactment which authorizes the [regulation]."

The Supreme Court then looked toward another rule – the rule that, "all presumptions are in favor of the constitutionality of [a statute or regulation]." As such, "every reasonable construction must be resorted to, in order to save a statute [or regulation] from unconstitutionality."

The Supreme Court also employed the fundamental rules of statutory construction that require a court to construe a statute or regulation according to its terms, to give words their plain and ordinary meaning, and to avoid a construction that makes some language mere surplusage. Applying these rules to the state regulations, the Supreme Court found the Court of Appeals erred in finding the regulation unconstitutional.

JURISDICTION: In a mandamus action, where the underlying subject matter is an administrative ruling, a direct appeal (writ of certiorari) will not lie. Rather, the appellants must file a petition for a discretionary appeal.

APPELLATE PRACTICE AND PROCEDURE: The appeal of a decision of an administrative agency is discretionary and a direct appeal will not lie.

***Selke v. Carson*, 295 Ga. 698 (2014).**

After the personnel services' director denied former deputy sheriffs' appeals from their termination from employment, the deputy sheriffs filed a petition for a writ of mandamus against the county, the civil service board, and the director to compel the director to forward their appeals to the board. The superior court granted defendants' motion to dismiss.

Inquiring into its jurisdiction, the Supreme Court noted that generally, under O.C.G.A § 5-6-34(a)(7) judgments or orders granting or refusing to grant mandamus are directly appealable. However, O.C.G.A § 5-6-35(a)(1) requires an appellant to file an application for a discretionary appeal from a decision of a superior court reviewing the decision of a state or local administrative agency. Thus, because the underlying subject matter of the mandamus petition concerned an administrative ruling which was reviewed by a superior court, a direct appeal was the improper vehicle for appellate review.

JURISDICTION: Prior to a final judgment, attorneys do not have the right to directly appeal a trial court's order finding that the attorney violated the rules of professional conduct and placing restrictions on the attorney's representation. Such an appeal requires a certificate of immediate review, or it may be brought up with other orders that are properly appealed.

***Fein v. Chenault*, 330 Ga. App. 222 (2014)**

An attorney and his client filed a direct appeal of the trial court's order finding that the attorney violated the Georgia Rules of Professional Conduct but declining to revoke his pro hac vice status. Instead, the court's remedy restricted the attorney's advocacy by designating local counsel as lead counsel for the defendant and directing the pro hac attorney, Fein, not to prepare or file pleadings, contact the court or its staff, or present argument or evidence at any future court proceeding. The court noted that Fein would be permitted to attend all future proceedings, confer with his client and local counsel, and sit at counsel table during court.

Fein first asked the trial court to issue a certificate of immediate review of its order. It was denied. Fein then filed an application for interlocutory appeal, but the Court of Appeals dismissed the appeal, noting an appellate court generally will not review a trial court's exercise of its discretion to grant or deny a certificate of immediate review. See *Scruggs v. Georgia Dept. of Human Resources*, 261 Ga. 587, 588 (1991); *B & D Fabricators v. D.H. Blair Investment Banking Corp.*, 220 Ga.App. 373, 376 (1996).

The Court of Appeals further held that the case was not one of those extraordinary cases described in *Waldrip v. Head*, 272 Ga. 572, (2000), that qualifies for an exception to the certificate requirement because the trial court's actions would preclude appellate review of a substantive issue. The Court then dismissed the application due to the defendant's failure to comply with the interlocutory procedures under O.C.G.A § 5-6-34(b).

Having had no success with these attempts, Fein also filed a direct appeal of the trial court's order, contending the trial court's order infringed on his client's fundamental right to counsel. Tracing the history of, and inconsistency of, Georgia cases the Court cited federal case law and ultimately dismissed the appeal, finding this was not a disqualification case, as Fein was merely limited in his representation and not disqualified.

It was also noted by the Court of Appeals that if there was a viable appeal on another order in the case, the Court could address the restricting order under O.C.G.A § 5-6-34(d). ❖

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Premises Liability Case Law Update

By Zachary M. Wilson
Hawkins Parnell Thackston & Young, Atlanta

SUMMARY JUDGMENT; LACK OF CAUSATION EVIDENCE IN TRIP AND FALL: Trial court erred in denying defendant's motion for summary judgment, as plaintiff failed to present sufficient evidence as to what actually caused her to trip and fall.

***Canaan Land Props. v. Herrington*, 330 Ga. App. 17, 766 S.E.2d 493 (Nov. 21, 2014)**

Plaintiff had purchased groceries at a Fred's Store and was pushing a shopping cart in the parking lot toward his car. Plaintiff testified as he approached his vehicle, the shopping cart jerked or turned quickly to the left. The cart's rear wheel allegedly caught Plaintiff's foot, causing him to fall, and Plaintiff turned the cart over onto himself, injuring his arm.

After receiving medical treatment, Plaintiff returned to the parking lot and noticed, for the first time, a hole or divot in the pavement close to where his car was parked when he fell. Plaintiff concluded that the hole had caused his cart to turn left and caused him to fall. Plaintiff subsequently filed suit against the owner of the grocery store and the parking lot.

In his deposition, Plaintiff gave somewhat equivocal testimony as to what may have caused his fall, testifying "it had to be the hole" but also saying "[t]hat's the only thing that could have [caused the fall] other than the trash in the parking lot." But, Plaintiff admitted he did not know for certain whether the cart actually hit the hole or whether the cart had turned for some other reason, such as hitting a piece of trash in the parking lot.

The trial court denied the defendants' motion for summary judgment, and the defendants appealed. The Court of Appeals reversed, holding that Plaintiff had not shown more than a "mere possibility" the hole in the pavement caused his fall. The Court of Appeals explained where the plaintiff does not know of the cause or cannot prove the cause of his fall, there can be no recovery;

where there is a possibility of causation, or the probabilities are at best evenly balanced, summary judgment in favor of the defendant is appropriate. Plaintiff was required to introduce evidence affording a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendants was the cause in fact of the accident. Since Plaintiff failed to do so, summary judgment in favor of the defendants was warranted.

DUTY OF INDEPENDENT CONTRACTOR; LACK OF EVIDENCE OF NEGLIGENT CONDUCT: Trial court correctly granted summary judgment to independent contractor tasked with cleaning parking lot after plaintiff slipped and fell due to ice, as plaintiff was not third-party beneficiary to contract between proprietor and independent contractor and there was no evidence of negligence on the part of contractor.

***Davidson v. Meticulously Clean Sweepers, LLC*, 329 Ga. App. 640, 765 S.E.2d 783 (Nov. 14, 2014)**

Plaintiff slipped on a patch of black ice in front of a Dollar Tree store and sued the property management company, the property owner, and other corporate defendants, including Meticulously Clean Sweepers, LLC ("MCS"), which had been hired by the premises owner to sweep the premises and to de-ice the premises when necessary. After Plaintiff resolved her claims against Dollar Tree, the property manager, and the property owner, Plaintiff pursued claims against MCS for negligence and negligent performance of its contract with the property owner.

As a winter storm approached in January 2011, MCS spread a mixture of salt and sand on the store's approaches. The next day, Plaintiff slipped on a patch of "black ice" outside the store. Plaintiff testified the ice could not "be reasonably seen even by somebody who [was] being careful and watching where they [were] going."

At the close of discovery, MCS moved for summary judgment, contending Plaintiff could not recover from MCS because: (1) Plaintiff was not a third-party beneficiary to the contract between MCS and the property owner; and (2) there was no evidence that MCS was negligent in carrying out its duties. The trial court granted MCS's motion for summary judgment, and Plaintiff appealed.

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Dr. Fuentes is a founding partner of R&D Strategic Solutions, LLC. He has specialized in jury behavior and decision-making and the evaluation of complex evidence for more than 25 years.

Trucking Case Law Update

By Allison E. Maloney
Mozley Finlayson & Loggins, Atlanta

RESPONDEAT SUPERIOR: NEGLIGENT HIRING AND PUNITIVE DAMAGES

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

In *Mastec North America, Inc. et al. v. Wilson*, the plaintiff, Gilda Wilson, was injured when her vehicle was struck by a commercial pickup truck whose driver, Gregory Piccione, had run a red light at an intersection. Piccione was in the course of his employment at the time of the accident. Following the accident, Piccione was cited for running a red light, but pled guilty to a lesser charge of driving too fast for conditions. There was no evidence that he was exceeding the speed limit at the time of the accident. Wilson filed suit against Mastec, Piccione's employer, and in addition to her claim for negligence, also made claims for punitive damages and negligent hiring, retention, supervision, training, and entrustment. Mastec filed a motion for partial summary judgment on the latter claims, which was denied. Mastec then took the issue up on interlocutory appeal.

When Mastec hired Piccione in 2008, it ran a motor vehicle report which showed no traffic citations in the previous three years. Mastec, however, was aware that Piccione had previously been convicted for speeding three times, twice in 2002 and once in 2005, while driving his personal vehicle. Piccione had never been in an accident, but he completed a defensive driving course during his employment with Mastec, and he reviewed and signed driver safety guidelines contained in an employee handbook.

The Court of Appeals held that the facts did not rise to the level of clear and convincing evidence showing that Mastec should have known Piccione was a habitually reckless or dangerous driver, or that Mastec acted with the requisite want of care sufficient to raise a presumption of conscious indifference to consequences in hiring, retaining, supervising, or entrusting Piccione with a company vehicle. There was no evidence that the accident was caused by excessive speed, and the Court of Appeals found that the accident was not a result of a pattern or policy of dangerous driving to support an award of punitive damages. Therefore, the plaintiff's claims for negligent hiring, entrustment, supervision, and retention were also improper as Mastec admitted that Piccione was in the course and scope of his employment at the time of the accident, per *Kelley v. Blue Line Carriers*, 300 Ga. App. 577 (2009).

CONTRIBUTORY NEGLIGENCE AND PROXIMATE CAUSE

***Reed, et al. v. Carolina Casualty Insurance Co., et al.*, 327 Ga. App. 130 (2014)**

In *Reed, et al. v. Carolina Casualty Insurance Co., et al.*, the plaintiff's decedent, Thomas Reed, was killed when his vehicle collided with the rear of a tractor-trailer that was parked on the shoulder of I-285 near the entrance ramp from I-75. The driver of the tractor-trailer, Rimantas Labeika, had parked on the shoulder alongside a metal guardrail around 2:00 a.m., and went to sleep in the sleeper berth because he had reached the maximum amount of driving hours allowed by the Federal Motor Carrier Safety Regulations. The weather was rainy and the pavement was wet.

About an hour later, Reed was traveling on the entrance ramp from I-75 to I-285, at a speed that was too fast for the curve and the rainy conditions. He had been drinking alcohol and had a blood alcohol content of .095. He lost control of his vehicle, spun out, collided with the guardrail, flipped over, and collided with the parked tractor-trailer. The collision caused the gas tank of Reed's vehicle to rupture, which resulted in a fire that completely destroyed Reed's vehicle. Reed and his passenger were pronounced dead at the scene, and it was later determined that he died from a combination of blunt force trauma and thermal injuries. Labeika was cited for improper parking in a prohibited area and paid the fine.

Reed's parents brought a wrongful death action, alleging that the fire would not have occurred and their son would still be alive had

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ubiquitous threat to defendants across the nation.[1] Keenan and Ball advertise their tactics as the most powerful approaches available for plaintiff attorneys seeking to attain favorable verdicts and high damage awards in the age of tort reform, and they boast more than $6 billion in jury awards and settlements.[2] Ball and Keenan's tactics have been called "the greatest development in litigation theory in the past 100 years."[3] Although the theory developed within medical malpractice cases, Ball's and Keenan's seminars, held nationwide, now cover specific topics related to products liability and transportation. While the Reptile theory has been shown to be invalid, the specific Reptile tactics have proven deadly, particularly during defendant depositions.[4]

Generating damaging witness deposition testimony creates the foundation for Reptile attorneys. Reptile attorneys accomplish high value settlements by manipulating defendants into providing damaging deposition testimony, specifically by cajoling them into agreement with multiple safety rules. Once these admissions are on the record, and often on videotape, the defense must either settle the case for an amount over its likely value, or go to trial with dangerous impeachment vulnerabilities that can severely damage the defendant's credibility.

Witnesses cannot be faulted for damaging testimony because Reptile tactics employ emotional and psychological tactics to manipulate witnesses into admitting fault. Witnesses' mistakes are caused by inadequate pre-deposition witness preparation that focuses exclusively on substance and ignores the intricacies of the Reptile strategy. In other words, if defendants are not specifically trained to deal with Reptile questions and tactics, the odds of them delivering damaging testimony is high. Preventing Reptile attorneys from gaining leverage through damaging witness deposition testimony is the critical first step in combatting reptile tactics.

Most papers and presentations from defense attorneys and jury consultants about the plaintiff Reptile theory merely describe the theory and provide rudimentary suggestions to defense counsel who may face a Reptile attorney.[5] While these efforts provide basic descriptions of the Reptile theory, they fall woefully short on providing in-depth analysis and scientifically-based solutions. Suggestions such as "better prepare your witnesses" and "tell a better story during opening" do not provide defense attorneys with the neuropsychological weaponry needed to defeat the plaintiff Reptile approach. The Reptile attack during deposition is specifically designed to exploit the defendant witness' cognitive and emotional vulnerabilities. As such, a neurocognitively-based training system and counter-attack strategy is necessary if defendant witnesses are to defeat the Reptile attorney during deposition.

This article will serve to a) expose the step-by-step psychological attack orchestrated by Reptile attorneys, b) identify and analyze the cognitive breakdowns that lead to witness failure, and c) provide neurocognitive interventions to prevent witness failure.[6] Because Keenan and Ball have recently expanded their Reptile tactics past medical malpractice to target transportation and product liability litigation, we offer examples of Reptile questions commonly found within these three areas of litigation.

Understanding Reptile Safety and Danger Rule Questions

The Reptile attorney uses four primary "rule" questions to lure unsuspecting defendant witnesses into their psychological trap. The four questions are classified as:

1. General Safety Rules (Broad Safety Promotion)
2. General Danger Rules (Broad Danger/Risk Avoidance)
3. Specific Safety Rules (Safe Conduct, Decisions and Interpretations)
4. Specific Danger Rules (Dangerous/Risky Conduct, Decisions and Interpretations)

Manipulating defendant witnesses into agreeing with these four types of questions is the linchpin of the Reptile cross-examination methodology, as the agreement creates intense psychological pressure during subsequent questioning of key case issues. Generating and intensifying this psychological pressure over the course of the questioning is essential to the Reptile attorney's success. Absent this psychological pressure, the Reptile attorney's odds of success drop exponentially. Therefore, the Reptile attack requires painstaking effort to both construct and order the questions in a manner which fully capitalizes on the natural biases and flaws of the witness' brain. The attack plan consists of four phases that build off of each other to ultimately force the defendant witness into admitting fault and accepting blame.

Anatomy of the Reptile Cross-Examination Method

Phase One

Confirmation Bias: Forcing Agreement to General Safety Rule Questions

Confirmation biases are errors in witness' information processing and decision-making. The brain is wired to interpret information in a way that "confirms" an existing cognitive schema (i.e., preconceptions or beliefs), rather than disconfirming information.[7] This means that during testimony, most witnesses quickly accept information which confirms their existing attitudes and beliefs rather than considering possible exceptions and alternative explanations.

Essentially, witnesses struggle to say "no" to or disagree with a line of questioning because of emotional and psychological challenges. Reptile attorneys rely on these cognitive challenges to entice defendant witnesses into a dangerous agreement pattern.

Cognitive schemas, the mental organization of knowledge about a particular concept, are powerful because they often relate to our identity as people.[8] The safety movement in many industries (healthcare, trucking, products, etc.) has strongly conditioned witnesses to automatically accept any safety principle as absolute and necessary, while simultaneously rejecting danger and risk.

Specifically, years of repeated safety seminars, safety publications, and continuing education classes provided by employers have created powerful and inflexible cognitive schemas about safety. Therefore, when Reptile attorneys ask witnesses about safety issues during deposition, automatic agreement occurs as a function of the brain working to confirm its cognitive safety schema.

Reptile attorneys have discovered that they can use a witness' confirmation bias tendency to their advantage, because it virtually guarantees agreement to safety and danger questions. Here is how it works:

- The Reptile attorney illuminates the defendant witness' cognitive safety schema regarding safety within their question, relying on the psychological principle of confirmation bias to ensure agreement;
- The defendant witness has no choice but to agree to safety questions, as cognitive schemas are strongly related to an individual's self-value and identity. In other words, disagreement with a cognitive schema is burdensome, if not impossible, as deviating from their internal value system proves uncomfortable for witnesses – no one likes to view themselves or their actions as anything but "safe."
- The Reptile attorney asks additional general safety and/or danger rule questions to the defendant witness, which forces further agreement and momentum.

Examples of General Safety and Danger Rule Questions for Any Case Type:

Safety
- "Safety is your top priority, correct?"
- "You have an obligation to ensure safety, right?"
- "You have a duty to put safety first, correct?"

Danger
- "It would be wrong to needlessly endanger someone, right?"
- "You would agree that exposing someone to an unnecessary risk is dangerous, correct?"
- "You always have a duty to decrease risk, right?"

These repeated agreements lock the defendant witnesses into an inflexible stance, allowing the Reptile attorney to move to Phase Two of the attack – linking safety and/or danger issues to specific conduct, decisions, and interpretations.

<u>Phase Two</u>
Anchoring Bias: Linking Safety and/or Danger to Conduct

Anchoring bias refers to the cognitive tendency to rely too heavily on early information that is offered (the "anchor") when making decisions. Anchoring bias occurs during depositions when witnesses use an initial piece of information to answer subsequent questions. Various studies have shown that anchoring bias is very powerful and difficult to avoid. In fact, even when research subjects are expressly aware of anchoring bias and its effect on decision-making, they are still unable to avoid it.[9]

The Reptile attorney cleverly uses the initial agreement to general safety and/or danger rule questions to form an "anchor" that forces defendant witnesses to continue to agree to subsequent questions that are designed to link safety and/or danger to specific conduct, decisions, or interpretations. This sophisticated psychological approach manipulates the defendant witness by forcing them to repeatedly focus on their cognitive schema alignment, rather than effectively processing the true substance (and motivation) of the question.

Examples of Specific Safety and Danger Questions in a Medical Malpractice Case:

Safety
- "If a patient's status changes, the safest thing to do is call a physician immediately, right?"
- "If a patient is having chest pain and shortness of breath, the safest thing to do is to send them to the ER immediately, correct?"
  "If a patient's oxygen saturation drops to 82 percent, and you are on-call, the safest thing to do to protect the well-being of the patient is to come to the hospital ASAP, right?"

Danger
- "Documentation in the medical chart must be thorough; otherwise a patient could be put in danger, right?"
- "You would agree with me that when a Troponin value is elevated, that the patient is in imminent danger, correct?"
- "Doctor, when you order a test or labs, you'd agree with me that you should review the results immediately, because any delay would put the patient at risk, right?"

Examples of Specific Safety and Danger Questions in a Transportation Case:

Safety
- "To ensure safety, as a commercial truck driver, you must follow the federal rules governing hours of service, correct?"
- "Another safety rule requires daily inspection of the truck and trailer, such as brakes, correct?"
- "And you agree that if someone

violates those safety rules and causes an accident, then they should be held responsible for their actions, correct?"

Danger
- "Commercial drivers must maintain daily log books, to ensure other drivers on the road are not put in danger, right?"
- "You would agree with me that when a commercial driver has exceeded the speed limit, other drivers on the road are put in danger, right?"
- "A commercial driver who places others in danger should be held responsible for the harms and losses caused, right?"

Examples of Specific Safety and Danger Questions in a Product Liability Case:

Safety
- "Product manufacturers must make consumer products that are safe and free from defects, correct?"
- "To ensure consumer safety, authorized dealers must follow the product manufacturer's policies when selling, servicing, or repairing a product, correct?"
- "A product's operating manual ensures consumers know how to safely use a product, correct?"

Danger
- "Product testing should be thorough; otherwise consumers could be put in danger, right?"
- "When a product is mislabeled, you would agree with me that the consumer is in real danger, correct?"
- "Any defect discovered in the manufacturing process should result in an immediate recall of a product, because any delay could put the consumer in danger, right?"

These subsequent agreements to specific safety and/or danger rule questions accomplish two key Reptile attorney goals: a) it forces the defendant witness to become deeply entrenched in an inflexible stance on safety issues and b) it sets the stage to introduce case facts in a powerful manner to create psychological discomfort.

Phase Three
Cognitive Dissonance: Creating Psychological Distress

Cognitive dissonance is the mental discomfort people experience whenever beliefs or attitudes they hold about reality are inconsistent with their conduct, decisions, or interpretations.[10] Cognitive dissonance can occur in many areas of life, but it is particularly evident in situations where an individual's behavior conflicts with beliefs that are integral to his or her self-identity and profession.

The Reptile attorney purposely generates cognitive dissonance by highlighting case facts which show the defendant witness' conduct, decisions or interpretations contradict his or her cognitive schema regarding safety and danger. Repeated contradictions result in the defendant witness experiencing psychological distress. Importantly, the amount of cognitive dissonance produced depends on the importance of the belief: the more personal value, the greater the magnitude of the cognitive dissonance.

Additionally, the pressure to reduce cognitive dissonance is a function of the magnitude of said dissonance. Hence, the Reptile attorney purposely lays out multiple safety and/or danger questions in an effort to increase the magnitude of dissonance between the safety and/or danger admissions and the witness' conduct, decisions, or interpretations in the actual case.

During a deposition, there is a clear transition from general and specific safety and/or danger questions to case specific questions. Once the defendant witness has agreed to the safety and danger rule questions, the Reptile attorney starts to present case facts that do not align with the safety and danger rule answers. Here is how the question sequence works:

- *General Safety Rule Question*
- *General Safety Rule Question*
- *General Danger Rule Question*
- *General Danger Rule Question*
- *Specific Safety Rule Question*
- *Specific Safety Rule Question*
- *Specific Danger Rule Question*
- *Specific Danger Rule Question*
- *Case Fact Question*
- *Case Fact Question*
- *Case Fact Question*

As you can see, the Reptile plaintiff attorney strategically places the case fact questions directly behind several safety and danger rule questions. As the case fact questions are delivered to the defendant witness, his or her brain senses the contradiction between the case facts and their previous testimony, leading to cognitive dissonance. The ordering of the questions is crucial, as presenting case fact questions too early in the sequence will not produce cognitive dissonance. Therefore, the Reptile attorney will purposely delay the delivery of case questions to ensure that the safety and danger rule questions have been agreed to first.

Phase Four
The Hypocrisy Paradigm: Forcing an Admission of Fault

By repeatedly introducing case facts that contradict the defendant witness' previous testimony regarding safety and/or danger, the Reptile attorney intensifies the amount of psychological distress the witness experiences. The final and most powerful Reptile attack is the use of the hypocrisy paradigm.[11] By getting people to advocate positions they support but do not always live up to maximizes the level of cognitive dissonance an individual will experience.

During a Reptile deposition, when the reptile attorney directly accuses the witness of putting someone else in danger and causing harm, the attorney's questioning generates shame and threatens the witness' sense of integrity. Hypocrisy is an intense threat to one's identity and self-esteem, and creates intense psychological discomfort. Therefore, the Reptile

attorney, as a form of manipulation, repeatedly points out that the defendant witness has failed to live up to his or her own professional standards. The hypocrisy fuels further cognitive dissonance, often generating feelings of shame and embarrassment.

Examples of Hypocrisy Paradigm Questions:

Medical Malpractice Case
- "Failing to call a physician at 4 p.m. was a safety rule violation, correct?"
- "It exposed my client to unnecessary risk and harm, right?"
- "And if you would have called a physician, it would have prevented my client's stroke, right?"
- "Nurse Jones, failing to call a physician immediately at 4 p.m. was a deviation of the standard of care, wasn't it?"

Transportation Case
- "Failing to perform a complete vehicle inspection prior to your travel was a safety rule violation, correct?"
- "It endangered my client and other drivers, correct?"
- "If you would have performed a vehicle inspection, it would have prevented my client's injury, right?
- "By failing to perform a vehicle inspection prior to your travel, a violation of the safety rule, and endangering other drivers, including my client, you were negligent weren't you?"

Product Liability Case
- "Failing to perform an immediate recall after learning of a product's defect endangered consumers, right?"
- "Recalling the product immediately would have prevented my client's injury, correct?"
- "By failing to order a recall and allowing your product to harm consumers, you were negligent correct?"

After fostering shame and embarrassment through hypocritical behavior, the Reptile attorney has emotionally battered the defendant witness to a point in which he or she understandably concedes defeat and admits negligence. While some defendant witnesses attempt to fight and defend their conduct, the Reptile attorney often aggressively reminds them of their previous testimony about safety and danger rules, typically forcing the witness into submission.

Witnesses generally attempt to decrease intense cognitive dissonance by either admitting to fault or attempting to change previous testimony, neither of which proves successful when a video camera captures a clear admission, or credibility eroding back-pedaling.

1. *Admitting Fault:* Admitting fault reduces cognitive dissonance and relieves psychological pressure. When the defendant witness realizes that he or she is trapped and has no chance at escape, admitting fault is a fast way to decrease the intense cognitive discomfort that has been created by the Reptile attorney. Admitting fault is a low-road cognitive processing survival response that represents a "flight" (vs. fight) reaction. Specifically, admitting fault is a version of "playing dead" in an effort to decrease exposure to an aggressive negative stimulus (i.e., a Reptile attorney). While this flight response may relieve psychological discomfort within the defendant witness, it obviously increases psychological discomfort within the defense attorney since both strategic and economic leverage in the case have been severely compromised

2. *Attempt to Change Previous Testimony* Some witnesses attempt to "back up" and try to change the conflicting belief so that it is consistent with their behaviors. Specifically, the defendant witness can try to explain to the Reptile attorney that they were mistaken on their previous answers in an effort to escape the safety and/or danger rule trap. However, this is rarely effective as any attempt to reverse previous testimony is characterized as dishonesty by the Reptile attorney, who will remind the defendant witness that he or she was under oath during the previous safety and danger rule questions. Even though the defendant witness may never admit fault in this circumstance, his or her credibility becomes severely damaged.

Regardless of how the defendant witness decides to decrease the psychological distress created from the hypocrisy paradigm questions, they both result in the Reptile attorney gaining extraordinary strategic and economic leverage in the case. Table 1 on the next page illustrates the tactical use of each psychological weapon against the defendant witness and the subsequent result.

Derailing the Reptile Attack at Deposition: Rebuilding Cognitive Schemas

The foundation of the Reptile attack during testimony is to take advantage of the defendant witness' distorted cognitive schema related to safety and danger issues. Again, the witness' flawed cognitive schema results from years of conditioning and reinforcement regarding workplace safety rules, which foster powerful and inflexible preconceptions absent circumstance and judgment. The Reptile attorney preys upon these cognitive flaws.

Table 1 on the next page illustrates how the Reptile attorney heavily relies on the initial agreement to safety and danger rule questions to implement subsequent psychological weapons that will effectively force agreement from the defendant witness. Importantly, without this initial agreement to safety and danger rules, the ensuing questions become impotent and ineffective because confirmation bias and anchoring bias cannot occur. In other words, if a defendant witness can be properly trained to identify safety and danger rule questions and avoid absolute agreement, the powerful effect of cognitive dissonance can be completely neutralized.

Properly training a witness to withstand Reptile attacks requires

Table 1: The Reptile Question Script (Medical Malpractice Case)

Question Type	Question Form	Psychological Weapon	Result
General Safety Question	"Nurse Jones, you'd agree with me that ensuring patient safety is your top clinical priority, right?"	Confirmation Bias of Cognitive Schema	Agreement; Psychological Comfort
General Danger Question	"Because, you wouldn't want to expose your patient an unnecessary danger, correct?"	Confirmation Bias of Cognitive Schema	Agreement; Psychological Comfort
Specific Safety Question	"You'd also agree with me that if a patient becomes unstable, the safest thing to do would be to call the physician immediately, right?"	Anchoring Bias to General Safety Agreement	Agreement; Psychological Comfort
Specific Danger Question	"Because hemodynamic instability can be dangerous, and even lead to death, right?"	Anchoring Bias to General Danger Agreement	Agreement; Psychological Comfort
Case Fact Question	"Nurse Jones, isn't it true that my client's blood pressure was 174/105 at 4 p.m.?"	Cognitive Dissonance	Agreement; Psychological Distress
Case Fact Question	"And you could have picked up the phone to call the physician, but you decided not to, correct?"	Cognitive Dissonance	Agreement; Psychological Distress
Case Fact Question	"At 5:30 p.m., my client suffered a hemorrhagic stroke, correct?"	Cognitive Dissonance	Agreement; Psychological Distress
Hypocrisy Question (Conduct)	"Failing to call a physician at 4 p.m. was a safety rule violation, correct?"	Intensified Cognitive Dissonance/Hypocrisy	Regretful Agreement or Reversal Attempt
Hypocrisy Question (Conduct)	"It exposed my client to unnecessary risk and harm, right?"	Intensified Cognitive Dissonance/Hypocrisy	Regretful Agreement or Reversal Attempt
Hypocrisy Question (Conduct)	"Nurse Jones, failing to call a physician immediately at 4 p.m. was a deviation of the standard of care, wasn't it?"	Intensified Cognitive Dissonance/Hypocrisy	Regretful Agreement or Reversal Attempt
Hypocrisy Question (Prevention)	"And if you would have called a physician, it would have prevented my client's stroke, right?"	Intensified Cognitive Dissonance/Hypocrisy	Regretful Agreement or Reversal Attempt

a sophisticated reconstruction of the original cognitive schema, followed by a rebuilding of a new, adjusted schema built upon an understanding of the role of circumstance and judgment. Once the new cognitive schema is firmly in place with no signs of regression, the defendant witness will be immune from the Reptile attorney's safety and danger rule attacks (see Table 2 on next page).

The cognitive schema reconstruction process is no easy task and requires advanced training in neurocognitive science, communication science, personality theory, learning theory and emotional control. As such, the following steps are only intended to provide general knowledge to defense counsel about how to identify and reconstruct a witness' cognitive schema.

10 Steps to Rebuilding the Cognitive Schema

1. Education: Scientifically define cognitive schemas and how they work.
2. Identification: Identify and discuss the witness' personal safety and risk schemas.
3. Demonstration: Demonstrate cognitive flaws regarding safety and danger (live, video, written).
4. Education: Scientifically define confirmation bias and anchoring bias.
5. Education: Scientifically define cognitive dissonance and hypocrisy paradigm.
6. Simulation: Create cognitive dissonance and force failure (i.e., the witness must fail repeatedly, proving that their current cognitive schema is flawed and ineffective, in order to ingrain successful communication patterns and behavior).
7. Operant Conditioning: Positive reinforcement of correct answers (see Table 2 above).
8. Operant Conditioning: Punishment (criticism) of incorrect agreement.
9. Repeated Simulation: Attempt to force cognitive dissonance and agreement from varying angles.
10. Solidify New Cognitive Schema: Repeat simulation until cognitive regression is minimal to none.

Conclusion

The ultimate goal of the Reptile attorney is simple: create economic leverage. They have no interest in truth, justice, or even prestige in the courtroom. Rather, the Reptile attorney is only interested in fast cash. They strive to force clients to settle a case for far more than the realistic case value by manipulating the defendant witness into delivering damaging testimony. The economic impact of being "Reptiled" is staggering, resulting in millions of dollars of unnecessary payouts to undeserving plaintiffs and their attorneys.

The plaintiff Reptile methodology is pure psychological warfare designed to attain the plaintiff attorney's economic goals. As such, defense counsel and clients need to supplement their traditional witness preparation efforts with

Table 2: Effective Responses to General and Specific Safety and/or Danger Rule Questions

General Safety Questions	Rebuilt Cognitive Schema Responses
"You have an obligation to ensure safety, right?" "Safety is your top priority?"	**Option 1: General Agreement (not absolute)** • Safety is certainly an important goal, yes. • We strive for safety, of course. • In general, yes. **Option 2: Request Specificity** • Safety in what regard? Can you please be more specific? • In what circumstance are you referring? • Safety is a broad term; can you be more precise?
Specific Safety and/or Danger Rule Questions	**Rebuilt Cognitive Schema Responses**
"If you see or experience A, B and C, the safest thing to do would be (Conduct or Decision X), correct?" "(Conduct or Decision X) must be (ADJECTIVE), otherwise someone could be put in danger, right?"	• It depends on the patient's specific circumstances. • It depends on the full picture. • Not necessarily, as every situation is different. • That is not always true. • I would not agree with the way you stated that. • That is not how I was trained. • That is not how (INDUSTRY) works.
General Danger Rule Questions	**Rebuilt Cognitive Schema Responses**
"If you see or experience A, B and C, the safest thing to do would be (Conduct or Decision X), correct?" "(Conduct or Decision X) must be (ADJECTIVE), otherwise someone could be put in danger, right?"	• I don't understand what you mean by "needlessly endanger." • That is a confusing question; can you define "needlessly endanger?" • I don't understand what you mean by "unnecessary risk;" can you please be more specific? • That is a very broad question; to what specific circumstance are you referring?

sophisticated psychological training to specifically derail the perilous Reptile attacks.

Advanced neurocognitive witness training can completely stymie a savvy Reptile attorney from controlling a defendant witness' answers and steering them towards admissions to negligence and causation. The problem is that merely warning a defendant witness about these sophisticated tactics is grossly inadequate. Well-prepared defendant witnesses have repeatedly failed at deposition because the preparation program did not include training to diagnose and repair the neurocognitive vulnerabilities where the Reptile attorney attacks.

Proper training can not only protect the defendant witness from Reptile attorney safety rule attacks at deposition, but it can substantially decrease the economic value of the case. To no surprise, many corporate clients, particularly insurance companies, put great emphasis on decreasing annual legal costs and expenses.

Claims specialists and corporate counsel routinely question whether they can afford the cost of advanced deposition training for their defendant witnesses. However, as Reptile settlements and damages continue to mount into the billions, the real question becomes: Can they afford the cost of NOT training witnesses? ❖

Bill Kanasky, Jr., Ph.D., is the Vice President of Litigation Psychology at GDLA Platinum Sponsor Courtroom Sciences, Inc. He is recognized as a national expert, author and speaker in the areas of witness preparation and jury psychology. Dr. Kanasky specializes in a full range of jury research services, including the design and implementation of mock trials and focus groups, venue attitude research, and post-trial interviewing.

Ryan Malphurs, Ph.D., is a Senior Litigation Consultant with Courtroom Sciences, Inc. His training in persuasion and communication enables him to specialize in preparing challenging witnesses. Author of Rhetoric and Discourse in Supreme Court Oral Arguments, *his expansive research on the cognitive influence of courtroom communication makes him uniquely qualified to advise attorneys at the trial and appellate level.*

Endnotes

[1]For the widespread impact of the Reptile Theory see Ken Broda-Bahm, "Taming the Reptile: A Defendant's Response to the Plaintiff's Revolution," *The Jury Expert* v.25.5, 2013; Ken Broda-Bahm "Defendants: Be the Mongoose," www.persuasivelitigator.com, 12/26/13; Kathy Cochran, "Reptiles in the Courtroom," www.dritoday.org, 1/12/10; Bill Kanasky "Debunking and Redefining the Plaintiff Reptile Theory," *For the Defense*, April 2014; Ryan Malphurs and Bill Kanasky Jr. "Confronting the Plaintiff's Reptile Revolution: Defusing Reptile Tactics with Advanced Witness Training," *Georgia Defense Lawyer*, Spring 2014; David C. Marshall, "Lizards and

Snakes in the Courtroom: What Every Defense Attorney Needs to Know About the Emerging Plaintiff's Reptile Strategy" *For The Defense*, April 2013; David C. Marshall, "Litigating Reptiles," *The Defense Line*, 4/1/13; Minton Mayer, "Make Boots Out of that Lizard: Defense Strategies To Beat the Reptile," *The Voice* v12.38, 2013; Pat Trudell, "Beyond the Reptilian Brain," www.zenlawyerseattle.com, 2010; Stephanie West Allen, Jeffrey Schwartz and Diane Wyzga, "Atticus Finch Would Not Approve: Why a Courtroom Full of Reptiles is a Bad Idea," *The Jury Expert* v.22.3, 2010.

[2] See www.reptilekeenanball.com for promotional material.

[3] Introductory Remarks, Georgia Motor and Trucking Association Annual Meeting, Atlanta GA, September, 23-25, 2014.

[4] See Ryan Malphurs and Bill Kanasky, Jr. "Confronting the Plaintiff's Reptile Revolution: Defusing Reptile Tactics with Advanced Witness Training," *Georgia Defense Lawyer*, Spring 2014, and Bill Kanasky, Jr., "Debunking and Redefining the Plaintiff Reptile Theory," *For the Defense*, April 2014.

[5] See note 1, *supra*, for list of prior articles addressing the Reptile Theory.

[6] Scott Plous, "The Psychology of Judgment and Decision-Making," McGraw-Hill, New York 1993.

[7] Paul DiMaggio, "Culture and Cognition," *Annual Review of Sociology* 23.1.263-287, 1997.

[8] Tim Wilson, Christopher Houston, Kathryn Etling, and Nancy Brekka, "A New Look at Anchoring Effects: Basis Anchoring and its Antecedents." *Journal of Experimental Psychology*, Vol. 125, No.4, 387-402, 1996.

[9] Leon Festinger, A Theory of Cognitive Dissonance, Stanford University Press, 1957.

[10] See Elliot Aaronson, Carrie B. Fried, and Jeff Stone "Overcoming Denial and Increasing the Intention to use Condoms Through the Induction of Hypocrisy," *Am J Public Health*, 81, 1636-16371991; Chris Ann Dickerson, Ruth Thibodeau, Elliot Aaronson, and Duaya Miller (1992), "Using Cognitive Dissonance to Encourage Water Conservation," *Journal of Applied Social Psychology*, 22, 841-854, June 1992; Jeff Stone, Elliot Aaronson, Lauren A. Crain, Mathew P. Winslow and Carrie B. Fried, "Inducing Hypocrisy as a Means of Encouraging Young Adults to Use Condoms," Pers. Soc. Psychol. Bull., Vol. 20 No. 1, 116-128, February 1994.

[11] Eric Stice, "The similarities between cognitive dissonance and guilt: Confession as a relief of dissonance," *Current Psychology*, Vol. 11 Issue 1, 69-77, Spring 1992.

Trucking Case Law Update

Continued from page 30

Labeika not been illegally parked on the shoulder of I-285. Defendants filed a motion for summary judgment arguing that it was plain and palpable that Reed's own negligence was equal to or greater than the negligence of the defendants, and that his recovery was barred by contributory negligence per O.C.G.A. § 51-12-33. The trial court agreed and granted the motion, and the plaintiffs appealed.

The Court of Appeals found that there was an issue of fact as to whether Labeika's improper parking on the shoulder of the highway was a cause in fact of Reed's death. While the record showed the medical cause of Reed's death, it did not show any evidence that he would not have died had the tractor-trailer not been parked alongside the shoulder and guardrail. The Court of Appeals acknowledged that there was evidence of negligence of both Labeika and Reed, and held that there were issues of fact as to the degree to which Reed's and Labeika's negligence caused Reed's death, including whether Reed was 50 percent or more at fault (which would bar recovery by the plaintiffs). It also held that it was reasonably foreseeable to Labeika that a vehicle might lose control on a rainy night and collide with the tractor-trailer parked on the shoulder of the roadway.

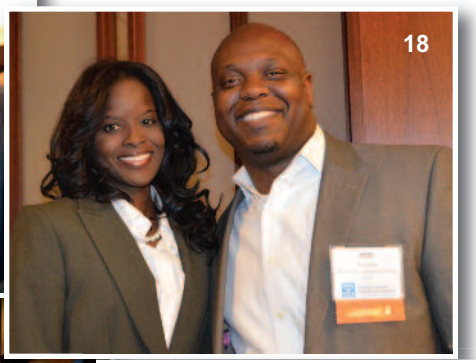
The Court of Appeals, thus, reversed the grant of summary judgment, stating that questions regarding issues of fact that do not have plain and indisputable answers must be resolved by a jury, citing *Storer Communications v. Burns*, 195 Ga. App. 230 (1990). ❖

Board of Directors Holds Winter Meeting

The GDLA Board of Directors, as is tradition, held its Winter Meeting the day after the Judicial Reception, convening at State Bar Headquarters on February 6, 2015. Minutes were not approved by press time, but they will be posted in the Members Only section. Pictured are: 1. Education Chair Erica Morton; 2. Judicial Relations Chair David Marshall and Past President Bob Travis; 3. Vice President Hall McKinley and Secretary-Treasurer Peter Muller; and 4. President-elect Matt Moffett. ❖

GDLA Honors Judiciary at 12th Annual Reception

All those pictured at the reception are identified from left to right. Photos 8, 11, 12, 13, 20, 24, 25 and 26 are courtesy of the Daily Report's *John Disney. 1. Candis Jones, Past President Lynn Roberson and U.S. District Court Judge Steve Jones; 2. Tom Curvin, Tracey Ledbetter and Court of Appeals Judge Carla Wong McMillian; 3. Kimberly Stevens and Court of Appeals Chief Judge Herbert Phipps; 4. State Board of Workers' Compensation Administrative Law Judges Andrea Mitchell and Vicki Snow; 5. Cobb County State Court Judge Eric Brewton and Mark Wortham; 6. Dana Weinberger, Elizabeth Rose, Fulton State Court Judge Wesley Tailor and Christina Jay; 7. DeKalb State Court Judge Stacey Hydrick and Immediate Past President Ted Freeman; 8. Fulton Superior Court Judge Henry Newkirk and Secretary-Treasurer Peter Muller; 9. Jimmy Scarbrough, Fulton State Court Judge Jane Morrison and Board member Wayne Melnick; 10. Hank Fellows, DeKalb State Court Chief Judge Wayne Purdom and Michael Goldman; 11. Court of Appeals Judge Stephen Dillard and Board member Jason Lewis; 12. Christina Hadley, Nathan Gaffney and Laura Hall.*



13. Vice President Sally Akins and Court of Appeals Judge Michael Boggs; 14. Fulton Superior Court Judge Robert McBurney and Michael Rust; 15. Frank Bedinger, Joe Wieseman and Court of Appeals Judge Sara Doyle; 16. Cobb State Court Judge Melodie Clayton and Past President Warner Fox; 17. Fulton State Court Judge Susan Edlein and Neil Wilcove; 18. Dawn Pettigrew and Will Ellis; 19. Sean Cox, Rachel Hudgins and Zachary Nelson; 20. Fulton Superior Court Judge Wendy Shoob and Ann Bishop; 21. Robert Burke and Court of Appeals Judge Chris McFadden; 22. Past Presidents George Duncan and Steve Kyle; 23. Alexa Limeres and Philip Henderson; 24. Sun Choy, Bradley Pratt, U.S. Magistrate Judge Justin Anand and Moses Kim; 25. Cobb Superior Court Judge LaTain Kell and David Sawyer; 26. Court of Appeals Judge Lisa Branch and Edward McAfee.

Trial & Mediation Academy Continues to Train Leading Litigators

Lawyers from across the state made the annual trek to Callaway Gardens for the Melburne D. (Mac) McLendon Trial & Mediation Academy from January 22-24, 2015.

> *"I've never been a better lawyer than I was on Saturday afternoon at 12:30 p.m."*
>
> *–Amir Nowroozzadeh*

The seminar kicked off on Wednesday with a welcome reception so faculty and students could gather informally before training commenced the next morning.

The students were guided through the two-and-a-half day experience by a distinguished faculty led by Chair Douglas K. Burrell of Drew Eckl & Farnham, Atlanta; Vice-chair William T. (Bill) Casey, Jr. of Hicks Casey & Morton, Marietta; Past President Jerry A. Buchanan of Buchanan & Land, Columbus; Carrie L. Christie of Rutherford & Christie, Atlanta; Philippa V. Ellis of Owen Gleaton Egan Jones & Sweeney, Atlanta; William D. (Billy) Harrison of Mozley Finlayson & Loggins, Atlanta; President-elect Matthew G. Moffett of Gray Rust St. Amand Moffett & Brieske, Atlanta; and Richard H. (Dick) Willis of Bowman and Brooke, Columbia, SC.

Special guests Hon. Susan B. Forsling and John K. Miles reprised their roles by participating in a panel discussion led by Mr. Burrell that addressed the nuts and bolts of mediations. The mediation segment of the seminar was expanded this year after feedback from students in 2014. The faculty also participated from the floor, offering insights into their experiences – both good and not so good.

Trial & Mediation Academy employs a modified mock trial format to teach litigation skills. In advance of the seminar, students are given a case to prepare fully for trial before they arrive at the Academy – i.e., opening statements, direct and cross-examinations, and closing statements. In previous years, students were divided into defense and plaintiff's teams and asked to prepare for whichever side they were assigned. This year, all of the students were tasked to be defense lawyers while the faculty assumed the role of plaintiff's counsel during demonstrations.

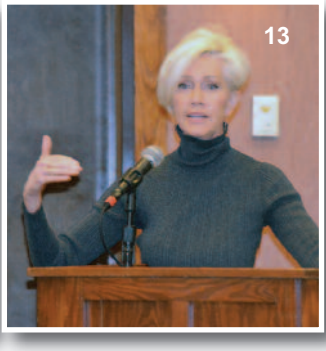
Another change this year was a new case, *Powell v. SuperPulper*, which was used with permission from the National Institute for Trial Advocacy (NITA).

Following faculty instruction and demonstrations, students dispersed into breakout groups to work on their skills.

The first day concluded with a reception and dinner sponsored by two GDLA Platinum Sponsors, BAY Mediation & Arbitration Services and Miles Mediation & Arbitration Services, featuring a keynote address by Fulton State Court Judge Eric A. Richardson. Back by popular demand, he reprised his 2014 presentation on professionalism and the Golden Rule from a new judge's perspective.

Be on the lookout for a save the date for January 2016. Trial & Mediation Academy is an exceptional learning opportunity not only for those early in their careers, but also for experienced attorneys who find themselves needing to brush up on their courtroom skills. Students could repeat the program and undoubtedly learn something new. Even the faculty professes to gain new trial tips and strategies every time, and some have been teaching for over 20 years.

Trial & Mediation Academy continues to be the GDLA's premier seminar, geared toward training leading litigators. As one student, Amir Nowroozzadeh of Hicks Casey & Morton in Marietta, explained: "I've never been a better lawyer than I was on Saturday afternoon at 12:30 p.m. [when the Academy concluded]." ❖



Scenes from Trial & Mediation Academy: *(l-r unless otherwise noted) 1. Megan Quisao and Marcia Stewart visit before Friday's dinner sponsored by BAY Mediation and Miles Mediation; 2. Faculty member Dick Willis (center) poses proudly with his first breakout group: Bridgette Eckerson, Rakhi McNeill, Sam Britt, Mr. Willis, Anna Idelevich, Chris Johnson and Skye Wellesley; 3. Mark Wortham and Amir Nowroozzadeh listen during a breakout session; 4. Collier McKenzie, Robert Johnson, Kyle Perry and Payton Bramlett visit at the reception; 5. Faculty member Jerry Buchanan shares advice on voir dire; 6. Program Chair Douglas Burrell introduces the rest of the faculty; 7. Dick Willis covers direct examinations of experts; 8. Douglas Burrell (center) thanks John Miles and Hon. Susan Forsling for their participation on the mediation panel; 9. Alyssa Rogers and Dana Weinberger get acquainted; 10. Rishi Pattni talks with faculty member Billy Harrison; 11. Faculty member Matt Moffett demonstrates an opening statement for the plaintiff; 12. Fulton State Court Judge Eric Richardson makes a return appearance to cover professionalism; 13. Faculty member Carrie Christie delivers a closing statement for the plaintiff; 14. Program Vice-chair Bill Casey shares tips on closing statements before also demonstrating one for the plaintiff to illustrate different styles; 15. The Academy features multiple breakout sessions for attendees to test their skills; 16. Faculty member Philippa Ellis offers advice on cross-examinations.*

Continued from page 28

On appeal, the Court of Appeals affirmed the trial court's grant of summary judgment to MCS, holding that although a premises owner owes a nondelegable duty of ordinary care to invitees, this duty is inapplicable to an independent contractor. Furthermore, a plaintiff may only recover against an independent contractor as a third-party beneficiary of a contract if it is apparent from the language in the agreement that the contracting parties specifically intended to confer a direct benefit upon the plaintiff. In this case, the contract between MCS and the property owner expressly stated it was not intended to confer third-party beneficiary status to any party. Accordingly, unless Plaintiff could show that MCS somehow owed an independent duty to Plaintiff, which Plaintiff did not do, MCS could not be held liable to Plaintiff.

The Court also held Plaintiff had not presented evidence of actual negligence by MCS in its treatment of the area the day before Plaintiff's fall. The existence of black ice alone was not enough to create a genuine issue of fact as to MCS's negligence, and summary judgment was, therefore, proper on that ground as well.

ASSUMPTION OF THE RISK; RESCUE DOCTRINE; SECURITY GUARDS: Summary judgment in favor of property owners was appropriate where mall security guard, who was shot by criminals, fully appreciated the risks of his job and was aware that confronting criminals was dangerous; "rescue doctrine" did not apply because plaintiff was an on-duty security guard, not a volunteer.

***Swope v. Greenbriar Mall Ltd. P'ship*, 329 Ga. App. 460, 765 S.E.2d 396 (Nov. 3, 2014)**

Plaintiff was shot during an armed robbery while working as a security guard at defendants' shopping mall. The evidence showed while he was on duty, Plaintiff observed several masked men with weapons near a jewelry store and decided to confront them. During the confrontation, Plaintiff was shot as he deliberately attempted to cover another patron's body with his own to protect the patron from being shot. Plaintiff brought a premises liability action against the mall ownership and management. The defendants sought summary judgment based on assumption of the risk, which was granted by the lower court on the basis that the risk encountered by Plaintiff was one inherent in his job as a uniformed public safety officer.

On appeal, the Court of Appeals affirmed. As an employee of an independent security contractor, Plaintiff was hired to provide public safety services, to patrol the property, and to deter criminal activity on the premises. The Court of Appeals held Plaintiff had actual knowledge of the danger, understood and appreciated the risk therefrom, and voluntarily exposed himself to that risk, meeting all the elements of the assumption of the risk defense.

The Court of Appeals also held the rescue doctrine was inapplicable to Plaintiff. Under the rescue doctrine, a defendant may be held liable where its negligent acts or omissions created an imminent peril, and a volunteer or bystander, in the exercise of ordinary care, is injured in an attempt to rescue a party from the peril. In this case, because Plaintiff was a paid security guard who was on duty at the time of the incident, he could not be considered a volunteer or mere bystander. The Court rejected Plaintiff's argument that his action of shielding the patron's body went beyond the scope of his employment, making Plaintiff a volunteer. Because Plaintiff's employment compelled his presence at the scene, any actions taken by him at that time, even those beyond the scope of his employment, could not make him a volunteer so as to invoke the rescue doctrine.

SUMMARY JUDGMENT; LACK OF ACTUAL/CONSTRUCTIVE KNOWLEDGE OF HAZARD: Trial court erred in denying defendant store owner's motion for summary judgment, where there was no evidence owner had actual or constructive knowledge of young boy running through store before he bumped into plaintiff, causing her to fall.

***Ingles Mkts., Inc. v. Carroll*, 329 Ga. App. 365, 765 S.E.2d 45 (Oct. 24, 2014)**

Plaintiff in this case was a customer at Ingles' Supermarket. She was completing her shopping when a young boy, 11 to 13 years old, was carrying a bag of charcoal and "walking fast," bumped into her, causing her to fall and sustain injury. Plaintiff sued the owner of the store on a theory of premises liability.

After discovery was complete, Defendant filed a motion for summary judgment, contending that neither Plaintiff nor any store employee had seen the boy running around the store before the accident, and Defendant did not have knowledge of the alleged hazard posed by the boy superior to that of Plaintiff's.

The trial court denied Defendant's motion for summary judgment, and Defendant appealed. The Court of Appeals reversed, finding no evidence in the record that Defendant had actual or constructive knowledge that the child had been running inside the store prior to the incident. Though Plaintiff argued Defendant's inspection procedures were lacking, the Court of Appeals found that Plaintiff failed to show any additional, reasonable inspection procedures would have prevented her fall, as she could not establish how long the child had been running around the store. Based on the evidence, only a constant patrol could have possibly prevented Plaintiff's injury, and Georgia courts have repeatedly declined to impose such an obligation on proprietors under normal circumstances.

SUMMARY JUDGMENT; PRESUMED KNOWLEDGE OF STATIC CONDITIONS: Summary judgment was not appropriate where Plaintiff tripped and fell on a single-step riser on a sidewalk, as question of fact existed as to whether defendant city had superior knowledge of hazard.

***Strauss v. City of Lilburn*, 329 Ga. App. 361, 765 S.E.2d 49 (Oct. 19, 2014)**

Plaintiff had just exited a restaurant in the City of Lilburn and was walking down a city-owned sidewalk when she failed to see a single step down and fell, injuring herself. Plaintiff sued the City, arguing that the step constituted a hazard. Plaintiff presented testimony from a purported expert who opined that the step was a "camouflaged hazard," the step was not readily apparent, and the City should have taken measures to make the step safer or more noticeable.

The City moved for summary judgment, arguing it did not have superior knowledge of any alleged hazard. Specifically, the City contended it had no specific knowledge the step was a hazard, as it had no record of any previous trips or falls there. The trial court granted summary judgment to the City, and Plaintiff appealed.

The Court of Appeals rejected the City's argument and reversed, finding the step was a "static condition" of which the City was presumed to have knowledge. The City had admitted knowing the step existed, and Plaintiff produced evidence that such an unmarked, single step was a well-known hazard. Accordingly, there was evidence sufficient to create a question of material fact to be decided by a jury. Furthermore, whether Plaintiff exercised ordinary care for her own safety, and whether she had superior knowledge of the hazard, were likewise questions of fact for a jury. ❖

GDLA Participates in Atlanta Bar Association's Fourth Annual Presidents Summit

The GDLA was pleased to participate in the Atlanta Bar Association's fourth annual Presidents Summit, aptly held on President's Day, February 16, 2015, at State Bar Headquarters. The yearly gathering is an opportunity for presidents and other leaders of metro bar associations to exchange information, share ideas and discuss issues relevant to bar management. Vice President Hall F. McKinley III of Drew Eckl & Farnham in Atlanta represented the GDLA at the event.

Executive Director Jennifer M. Davis was invited to present to the group on "Marketing Your Bar Association," given her work with the GDLA, her former role as Director of Communications for the State Bar of Georgia, as well as her background in marketing for Hunton & Williams, Weinberg Wheeler Hudgins Gunn & Dial, and Sutherland Asbill & Brennan. ❖

Pictured at the event are: *front row (l-r) Georgia Association of Black Women Attorneys (GABWA) President Adwoa Ghartey-Tagoe Seymour, North Fulton Bar Association President Michael A. Penn, Atlanta Bar President Jacquelyn H. (Jackie) Saylor, Atlanta Bar Vice President/President-elect Harold E. Franklin, Jr., Georgia Trial Lawyers Association President Linley Jones, Mr. McKinley, Forsyth County Bar Association President Sarah R. Low, and Ms. Davis; back row (l-r) DeKalb Lawyers Association Member-at-Large E. Duane Jones, Atlanta Bar Executive Director Terri Beck, Georgia Hispanic Bar Association President Yenniffer S. Delgado, Gate City Bar Association President Darrick L. McDuffie, and Korean American Bar Association of Georgia (KABA-GA) Sun S. Choy.*

The GDLA is particularly proud to count as members two of the leaders who attended the Summit: GABWA's Adwoa Ghartey-Tagoe Seymour and KABA-GA's Sun Choy.

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

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the ability to download a file containing timeline information, posts, messages, and photos, as well as a history of the ads on which the user has clicked and IP addresses that are logged when the user accesses his or her Facebook account. Twitter offers a similar – albeit less comprehensive – option, allowing users to download all Tweets posted to an account by requesting a copy of the user's Twitter "archive."

Spoliation of social media account information may authorize sanctions. For instance, in *Frank Gatto v. United Air Lines*, No. 10-cv-1090-ES-SCM, 2013 U.S. Dist. LEXIS 41909 (D.N.J. March 25, 2013), after receiving a request to preserve his social media data, the plaintiff deactivated his Facebook account, which was then automatically deleted 14 days later. Defendants ultimately sought and won an adverse inference spoliation sanction against the plaintiff for failing to preserve the account.

There are a variety of ways to handle the fulfillment of a social media discovery request. Some courts have compelled the respondent to provide full account access to the requesting party for a limited time period. *See, e.g., Largent v. Reed,* No. 2009-1823, 2011 WL 5632688 (C.P. Franklin Co. Penn. Nov. 8, 2011). However, turning over the keys to the account appears to be an acceptable solution in only a minority of cases. Several jurisdictions, in fact, have confirmed that requests for an account's log-in and password information are per se unreasonable. *See Trail v. Lesko*, No. GD-10-017249 (Pa. C.C.P. July 3, 2012); *Chauvin v. State Farm Mutual Automobile Insurance Company*, No. 10-11735, 2011 U.S. Dist. LEXIS 121600 (S.D. Mich. Oct. 20, 2011).

Alternatively, many courts have ordered in-camera reviews of the subject social media accounts, and have limited production to only information that is responsive to the discovery request. *See, e.g., Offenback v. Bowman*, No. 1:10-cv-1789, 2011 U.S. Dist. LEXIS 66432 (M.D. Pa. June 22, 2011); *Douglas v. Riverwalk Grill, LLC*, No. 11-15230, 2012 U.S. Dist. LEXIS 120538 (E.D. Mich. Aug. 24, 2012); *Nieves v. 30 Ellwood Realty, LLC*, 39 Misc. 3d 63, 966 N.Y.S.2d 808 (N.Y. App. Div. Apr. 11, 2013). At least one court has tried another solution: appointing a neutral forensic computer expert to access the private portion of the plaintiff's Facebook account and identify relevant materials. *See Perrone v. Lancaster Reg. Med. Center*, No. CI-11-14933 (C.P. Lanc. Co. Penn. May 3, 2013).

Social media evidence has played a pivotal role in recent Georgia trials. *Griffin v. New Prime Inc.*, No. 1:10-CV-1926-WSD

(N.D. Ga.), and companion case *Lewis v. New Prime Inc.*, No. 1:10-CV-1228-WSD (N.D. Ga.) concerned a multiple-fatality accident that occurred after a tractor-trailer was hit by a van transporting prisoners. Defense counsel used a Facebook search to secure evidence impeaching the testimony of one of the plaintiffs, who claimed a head injury from the accident prevented him from being able to taste food or be outside in the sunshine. Defense counsel presented the jury with a photograph of the plaintiff's new beach house, which lacked handicap accessibility, as well as photographs of plaintiff's new boat, shark fishing trips, and a Hawaiian vacation (complete with photos of his meals).

Georgia courts have generally attempted to impose reasonable limits on social media discovery requests, noting that litigants are not entitled to launch "fishing expeditions" with the hopes of turning up relevant social media information. For instance, the United States District Court for the Northern District of Georgia, in *Jewell v. Aaron's, Inc.*, No. 1:12-CV-0563-AT (N.D. Ga. 2013), addressed the defendant's request for "all documents, statements or any activity available that you posted on any internet Web site or Web page, including, but not limited to, Facebook, MySpace, LinkedIn, Twitter, or a blog from 2009 to the present during your work hours at Aaron's store," which was presented to 87 opt-in plaintiff employees who alleged that they were forced to work through meal periods.

Defendant contended, based on the findings from one exemplar plaintiff's Facebook activity, that the social media data was likely to show that the plaintiffs had made social media posts during working hours, thus refuting their claims that the plaintiffs were unable to take breaks during the day because they "had too many work pressures."

Although the court noted that Facebook allows users to download a copy of their Facebook data into a time-stamped document, and thus the request would not require an unreasonably burdensome effort to complete, the court ultimately found that the defendant failed to reach the threshold showing of relevancy for the broad range of electronic data requested.

Georgia courts have generally attempted to impose reasonable limits on social media discovery requests, noting that litigants are not entitled to launch "fishing expeditions" with the hopes of turning up relevant social media information.

The court explained that the available evidence and the defendant's proffered rationales for production did not convince the court "that the broad nature of material [Defendant] seeks is reasonably calculated to lead to the discovery of admissible evidence." *Id.* at 8. Further, the court noted that "whether or not an opt-in plaintiff made a Facebook post during work hours may have no bearing on whether or not the opt-in plaintiff received a bona fide meal period..." *Id.* at 8. Concluding that the burden of the defendant's request outweighed the potential relevance of the information, the court denied the request.

It is instructive to contrast *Jewell*, *supra*, with *Bryant v. Perry*, No. 5:09-CV-060, doc. # 30 (S.D. Ga. Apr. 22, 2010), in which the plaintiff claimed injury resulting in a reduced quality of life, and sought compensation for past and future pain and suffering, past and future medical treatment, and lost wages. Defendant filed a motion to compel, requesting an inspection of all data contained in the plaintiff's Facebook account, on the grounds that the account likely contained information about the plaintiff's life, activities, physical condition and quality of life since the subject accident occurred.

The court noted that the plaintiff's Facebook account privacy settings prevented anyone outside of his 339 friends from viewing his profile, but held that the Facebook page likely contained photographs, wall postings or comments relevant to the claims and defenses of both parties.

The court denied the defendant's request to access the Facebook account directly, but ordered that the plaintiff would accept a Facebook friend request from a 'John Doe' account created by the court, and the court would then perform an in-camera review of the plaintiff's account and provide defendant with responsive information relevant to the plaintiff's contentions (after giving plaintiff's counsel an opportunity to review and object to the production of any portions of the materials).

The law relating to discovery of social media data is still relatively new and developing, but decisions from courts across the country make clear that a litigant's Facebook, Twitter, Pinterest, Instagram and other such accounts may be subject to discovery requests under certain circumstances. It behooves anyone involved with ongoing or potential future litigation to be mindful about the social media that may exist pertaining to the existing or potential claim, and to assess how that information may impact the matter. ❖

Nick Hinson is a graduate of the University of Georgia School of Law. He is an attorney with The Hinson Firm, a litigation boutique in Athens.

Strategic Planning Committee Holds Retreat

Pictured at the retreat are: *(l-r) 1. Facilitator John Trimble and Andy Treese; 2. President-elect Matt Moffett; 3. President Kirby Mason and Past Presidents Bob Travis and Lynn Roberson; 4. Board members Pamela Lee and Ashley Rice, Mr. Trimble, and Secretary-Treasurer/Strategic Planning Committee Chair Peter Muller.*

Recognizing the need for any association to be introspective and actively set long-term goals, then-President Theodore (Ted) Freeman last year created a Strategic Planning Committee. He appointed Secretary-Treasurer Peter D. Muller of Goodman McGuffey Lindsey & Johnson in Savannah as chair and charged him with constituting the group.

Mr. Muller named the following as members: President Kirby G. Mason of HunterMaclean in Savannah; President-elect Matthew G. Moffett of Gray Rust St. Amand Moffett & Brieske in Atlanta; Immediate Past President Ted Freeman of Freeman Mathis & Gary in Atlanta; Past Presidents Lynn M. Roberson of Swift Currie McGhee & Hiers in Atlanta and Robert M. (Bob) Travis of Bryan Cave in Atlanta; Vice President Craig C. Avery of Cowsert & Avery in Athens; Board members Pamela N. Lee of Swift Currie McGhee & Hiers in Atlanta, Wayne S. Melnick of Freeman Mathis & Gary in Atlanta and Ashley Rice of Waldon Adelman Castilla Hiestand & Prout in Atlanta; and Education Committee Vice-chair E. Andrew (Andy) Treese of Freeman Mathis & Gary in Atlanta.

Through DRI's Speakers Bureau, we identified John C. Trimble of Lewis Wagner in Indianapolis to serve as the facilitator for a Strategic Planning Retreat that was held February 19-20, 2015, at Serenbe in Chattahoochee Hills, Ga.

Mr. Trimble has moderated strategic planning sessions for numerous DRI State and Local Defense Organizations (SLDOs). He is a former DRI Board member and has chaired countless DRI initiatives. He is a Past President of the Defense Trial Counsel of Indiana, our counterpart in that state, and current President of the 5,500 member Indianapolis Bar Association. His familiarity with SLDOs and bar associations, in particular, uniquely suited him to assist the GDLA.

The next order of business was developing a survey for the GDLA membership; we appreciate those members who took time to respond. Mr. Trimble assessed the survey responses and distilled them into usable data for the committee's review at the retreat.

He commenced the two-day retreat by showing the TED talk by Simon Sinek, "Start with Why: How Great Leaders/Organizations Inspire Action." The premise is that while most know *what* they do and even *how* they do it, few can articulate *why* they do it. Because of that, leaders/organizations should ask themselves, "What's our purpose, cause, belief? Why do we exist?" The bottom line for associations, in our case, is member prospects don't buy *what* you do, they buy *why* you do it. That is how they determine whether to join or not.

Within that construct, Mr. Trimble posed a series of questions to start the committee's thinking: Why do members join the GDLA and stay? Why do they leave? Who does the public think the GDLA is? Who is the GDLA in reality? And who does the GDLA want to be?

The committee discussed various initiatives under the broad categories of image and branding; membership; membership services, activities and education; committees and sections; governance and long-term finance; and Annual Meeting.

Their recommendations will be covered in the next newsletter following their presentation and potential ratification by the Board at its Spring Meeting in April. ❖

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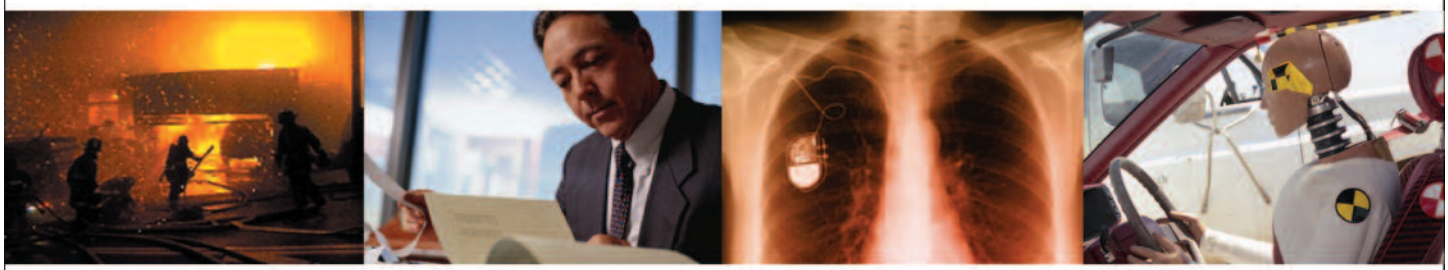

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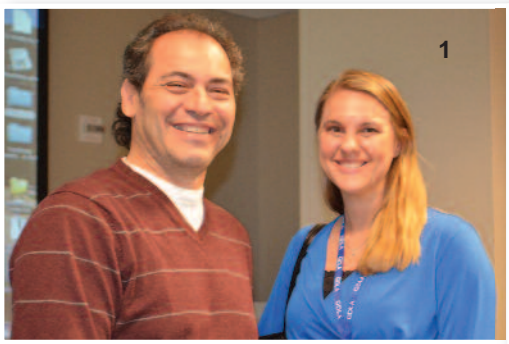

Pictured above at the early morning seminar are: *(l-r) 1. Board member Wayne Melnick and Education Committee Chair Erica Morton; 2. Speaker and State Bar General Counsel Paula Frederick; 3. Peter Munk and Brian Dempsey; 4. Education Committee member Kevin Patrick, who chaired the program, speaker and Associate Dean Jim Elliott of Emory Law School, and Edward Lindsey; 5. Jake Daly, Bridgette Eckerson and John McKinley.*

The GDLA was honored to have Paula J. Frederick, General Counsel of the State Bar of Georgia, and A. James (Jim) Elliott, Associate Dean of Emory University School of Law, headline the Ethics and Professionalism Breakfast on January 13, 2015, at Freeman Mathis & Gary's conference center. These two stalwarts of the legal profession certainly personify the program title.

First, Ms. Frederick provided an update on recent developments in the Georgia Rules of Professional Conduct, such as *pro hac vice* admissions and lawyer trust accounts. She also led an insightful discussion about the parameters of lawyer advertising in light of recent disclosure requirements, as well as the interplay with U.S. Supreme Court precedent involving freedom of speech. She also reported on Georgia lawyer discipline statistics, including a dramatic reduction in the number of grievances filed with the State Bar last year.

Next, Dean Elliott took everyone back to their law school days by posing a number of hypotheticals addressing the tri-parte relationship between the lawyer, insured and insurer. He cited the cautionary verse quoted often by the late Supreme Court Chief Justice Harold G. Clarke, a founder of the professionalism movement in Georgia: No one can serve two masters.

Additionally, Dean Elliott posed interesting hypotheticals involving the importance of communicating with the client under Rule 1.4, and billing guidelines under Rule 1.5. Notably, everyone was still in attendance during the last hypothetical about whether one should claim full CLE credit if a seminar runs short – or if one leaves early.

For each hypothetical, the GDLA used technology to pose the question on-screen, then attendees were able to use their smartphones to log their anonymous yes/no replies for a real-time tally of responses.

The GDLA thanks Education Committee member Kevin C. Patrick of Goodman McGuffey Lindsey & Johnson in Atlanta, who served as program chair, as well as Freeman Mathis & Gary for hosting in their conference center.

If you have CLE topic ideas and/or are interested in speaking at a GDLA seminar, please contact Education Committee Chair Erica L. Morton of Hicks Casey & Morton at Erica.Morton@hickscasey.com.❖

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Legionellosis Standard of Care on the Horizon

Continued from page 16

District of Columbia spanning 2000 through 2009. Based on this data, U.S. Legionellosis cases increased 217 percent, from 1,110 in 2000 to 3,522 in 2009.[5]

Since the reporting program is a passive surveillance system and dependent on healthcare providers and laboratories to report cases, the actual incidence of Legionellosis in the U.S. is most likely higher. Furthermore, in 2012, 3,688 cases were reported to the NNDSS, showing continually rising incidence rates.[6] For additional information on the incidence rate of Legionellosis cases in the U.S. from 1997 to 2012, see the graph above.

Fortunately, Legionellosis is preventable through proper maintenance and treatment of the water systems in which Legionella grow, including drinking water and other building systems. For many years, the American Society of Heating, Refrigerating, & Air Conditioning Engineers (ASHRAE)[7] has provided guidance on minimizing Legionellosis associated with building water systems.

For example, ASHRAE Guideline 12 – *Minimizing the Risk of Legionellosis Associated with Building Water Systems* – provides information and guidance in order to minimize Legionella contamination in building water systems. However, even Guideline 12 falls short of establishing a standard of care for the *prevention* of Legionella contaminations that cause outbreaks of the disease.

Due to the continually increasing incidences of Legionnaires' disease, ASHRAE and the American National Standards Institute (ANSI) Board of Standards Review (BSR)[8] developed BSR/ASHRAE 188P. This proposed standard was created to help building owners establish management strategies to prevent Legionellosis. The first three versions were titled "Prevention of Legionellosis Associated with Building Water Systems" with a declared purpose "to present practices for the prevention of Legionellosis associated with building water systems." The fourth full public review draft presented a new title, "Legionellosis: Risk Management for Building Water Systems," and a revised purpose "to establish minimum Legionellosis risk management requirements for building water systems."

Perhaps in an effort to reduce legal implications and risk, "prevention" was changed to "risk management" in this fourth and final public review draft, which closed for comments in November of 2014 and is expected to drop the "P" and become ASHRAE Standard 188, *Legionellosis: Risk Management for Building Water Systems*, by Summer of 2015, thus actually becoming an ASHRAE/ANSI standard.

Once approved by ANSI, Standard 188 will finally establish the national standard of care for the minimum Legionellosis risk management requirements for building water systems. The standard is intended for use by building owners, managers, and those involved in the design, construction, installation, commissioning, operation, maintenance and service of centralized building water systems and components.[9]

The standard will require facilities to implement a water management program that includes a written document with certain components and Legionella control measures. More specifically, a water management program will be required if a building or site has any cooling towers, evaporative condensers, hot tubs, ornamental fountains, misters, atomizers, air washers, humidifiers, or any other devices that release water droplets into the air.

But most importantly, the standard will establish a baseline for the minimum requirements of building owners, changing the landscape of litigation in Legionnaires' disease cases. ❖

René I. Basulto, PE, MSEM, is the Southeastern Area Manager for Robson Forensic, a GDLA Platinum Sponsor. With 30 years' experience as a mechanical engineer, he provides technical investigations, analysis, reports, and testimony toward the resolution of commercial and personal injury litigation involving all aspects of mechanical systems for buildings, facilities maintenance, construction practices, safety, and construction management. He is also an adjunct professor in the School of Architecture at the University of Miami, teaching graduate and undergraduate level courses in building systems.

Endnotes

[1]Barbara J. Marston, MD et al., *Incidence of Community-Acquired Pneumonia Requiring Hospitalization, Results of a Population-Based Active Surveillance Study in Ohio,* Arch. Intern Med. 157 (15), at 1709-18 (1997).

[2]Lawrence K. Altman, *In Philadelphia 30 Years Ago, an Eruption of Illness and Fear*, N.Y. Times, Aug. 1, 2006.

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[4]Carl Campanile, *NYC Officials Investigating Legionnaires' Disease Outbreak*, N.Y. Post, Jan. 7, 2015.

[5]Centers for Disease Control and Prevention, *Morbidity and Mortality Weekly Report, Legionellosis - United States, 2000-2009*, Aug. 19, 2011.

[6]Centers for Disease Control and Prevention, *Morbidity and Mortality Weekly Report, Summary of Notifiable Diseases - United States, 2012*, Sep. 19, 2014.

[7]ASHRAE is an industry organization that develops and publishes, through its Members (who are practicing engineers), handbooks, guidelines, and standards for heating, ventilating and air conditioning system design.

[8]The ANSI BSR is responsible for the approval and withdrawal of American National Standards.

[9]BSR/ASHRAE Standard 188P, *Legionellosis: Risk Management for Building Water Systems,* Fourth Public Review Draft, ASHRAE, 2014.

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