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Spring 2011

Walkway Traction Testing: Friction or Fiction?

By John Leffler, PE
FORCON International

Introduction

A common type of premises liability case is a pedestrian slip-and-fall, where the property holder has allegedly provided a "slippery" walkway surface. Different traction-testing devices (called "tribometers") each have their advocates, and a certain amount of controversy exists within the field of walkway traction testing – especially because each tribometer design may provide different results on the same surface.

A more thorough discussion of walkway testing issues can be found in this author's article in the June 2009 *Journal of the National Academy of Forensic Engineers;*[1] the present article is intended as an overview to highlight some issues that are not commonly known.

There are three general types of pedestrian slip events:

Heel strike: A heel strike slip is the most common cause of a slip-related fall. During the stride, as the leading heel contacts the walkway, the heel slides forward. The forward momentum of the pedestrian exacerbates the slip, and the leading leg can no longer support its share of the body weight.

Toe-off: A toe-off slip occurs when the trailing foot slips as the toes push off. A toe-off slip rarely results in a fall, since the

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GDLA Honors Atlanta's Judiciary

GDLA honored Atlanta area judges at its eighth annual Judicial Reception on February 3, 2011, at the One Ninety One Club. Pictured above are (l-r) Court of Appeals Judge Chris McFadden, Sally Akins and GDLA President Bubba Hughes. *See page 28 for additional photos from the evening.*

Inside This Issue

Mediation and Arbitration May Expedite Cases Stalled by Court Funding

By Terrence Lee Croft
Georgia Academy of Mediators & Arbitrators

Once again, Georgia is on track to substantially reduce the budget for our entire judicial system, even as new case filings continue to increase, year after year.

Attorneys and clients in civil cases, for example, will be directly affected by the budget cuts and their resulting mandated furloughs and reductions in courthouse staff. Civil cases are already placed at the back of the line on some court dockets, behind criminal matters and family law proceedings. They will now face even longer delays, having to wait years before they can be heard. Such delays do not involve just the low-budget matters; many cases involving millions of dollars will also face delays. Parties will be "on hold," unable to plan or resume normal business operations or personal affairs, while they wait for their day in court.

These delays are not something that many parties, or their counsel, wish to endure. Today's business environment simply does not allow for litigants to wait years for a case to be decided. This is one

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President's Message

As you have hopefully noticed, a number of improvements have resulted from the effort to make GDLA's services of more value to each member's practice.

These improvements have resulted from the efforts of many, including members, sponsors and our Executive Director. The work effort is continuing and the benefits provided can only increase as a result.

Everyone would have to agree that the newsletter has improved significantly over the years and, as the current issue illustrates, it is an excellent source of relevant and timely information of benefit to all of us.

The *Law Journal* has also progressed over the years and with this year's edition currently being organized and edited for distribution, we can expect another excellent publication.

Other examples of improvements include educational opportunities such as the long running and popular Trial Academy, as well as the very recent webinar dealing with Medicare "set asides" — a timely and important topic. GDLA webinars are now available on-demand in the Members Only area. Having these sorts of tools readily accessible when needed is very valuable to all in providing the representation our clients need.

The Annual Meeting is quickly approaching and will be held at Amelia Island Plantation, June 9-12, 2011. Mel Haas has developed an excellent program, and I would encourage all members to attend if at all possible. In addition to receiving CLE credits, those attending will benefit from presentations on legal topics by judges, lawyers and mediators, as well as marketing specialists and leaders in community development and commerce.

For information on GDLA meetings and CLE seminars, visit the calendar page of our website.

Yours for the defense,

Bubba Hughes
GDLA President

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Selected Areas of Expertise

Automotive (Passenger, Commercial, Industrial, Off-Road) A/R
Chemical and Manufacturing Processes
Commercial and Patent Disputes
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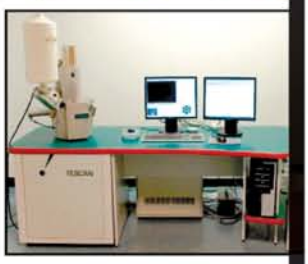

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Member & Legal News

Member News

W. Melvin Haas III of *Constangy Brooks & Smith*'s Macon office was reappointed to a second term as vice chairman of the Labor Relations Committee of the U.S. Chamber of Commerce. He serves as GDLA's Executive Vice President.

Nall & Miller is pleased to announce that **Laura D. Eschleman** has been named partner. She represents clients nationally in the areas of medical malpractice, professional licensing, negligent credentialing, medical board matters and hospital privileging issues. Eschleman is licensed in Georgia and Alabama.

Hicks Casey & Foster is pleased to announce that **Erica L. Morton** has been named partner. She handles cases stemming from trucking fatalities, premises liability, insurance coverage, product liability, construction defects, and automobile liability.

John E. Hall, Jr. of Atlanta's *Hall Booth Smith & Slover* was elected chair of the USLaw Network, an independent organization of 64 member firms with more than 4,000 attorneys in 48 states and Latin America.

Michele Jones, partner at *Carlock Copeland & Stair* in Atlanta, was admitted to practice law in Tennessee.

M. Diane Owens of Atlanta's *Swift Currie McGhee & Hiers* was unanimously elected as the first female to chair Mercer University's Board of Trustees.

Cases of Note

Carlton E. Joyce of *Bouhan Williams & Levy* in Savannah received a defense verdict in a case brought against an infectious disease doctor for failing to monitor a patient after placing him on antibiotics where the lab neglected to send the patient's lab test results to the doctor's office. The jury deliberated for approximately two hours before reaching its verdict.

Erica L. Morton of *Hicks Casey & Foster* successfully defended PetSmart, Inc. in a slip and fall action in Cobb County. The plaintiff claimed multiple soft tissue injuries, neurological injuries and a permanent impairment following the fall, which occurred in one area of the store after she walked through a large puddle resulting from a leaking plant tank in another area of the store. Before falling, the plaintiff notified store management of the puddle and continued to walk through the store. A store employee testified the floor where the plaintiff fell was dry immediately after the fall. The jury deliberated for under an hour before delivering a defense verdict. ❖

In Memoriam F. Gregory Melton

By GDLA Past Presidents George Duncan and Steve Kyle

The Georgia Defense Lawyers Association mourns the death of its 30th President, F. Gregory Melton. Greg succumbed to cancer on January 21, 2011. He was 60.

Greg led the Association during a period of great growth and transition. Under Greg's leadership, the Association abandoned the "shoebox" mentality (simply passing records from President to President in a shoebox) and emerged into a multi-faceted professional association.

During Greg's tenure, GDLA hired its first Executive Director, expanded the sponsorship program, improved communication among the membership, and began its push to attract younger members. Members would frequently comment and compliment Greg favorably on his forward-thinking innovations.

Greg approached his work with GDLA the same way he approached his practice and his entire life — with passion, with great dedication, and with an engaging dry wit.

In 2000, Greg was the Association's Executive Vice President and was charged with planning the program at the annual meeting. He said, "Let's do something different." Rather than having the speakers bring charts and PowerPoints to demonstrate the anatomy of the spine, Greg had the speaker bring a neck from a human cadaver and dissect it during the meeting. Though GDLA has had many memorable seminars and programs over the years, the one planned by Greg Melton stands alone as the most unique.

Greg was a scholar, erudite at times, who had a deep respect for the profession. He graduated from Georgia Tech and from Mercer Law School, and though he had a keen mind and was a student of the law, Greg owed his success in great measure to hard work. Greg would simply not be outworked on a case or on anything else he did. He combined his scholarship and work

Continued on next page

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ethic with a rare ability to present cases and arguments simply and cogently. His word was his bond.

Greg loved the outdoors; he loved sports, especially Georgia Tech sports, and he certainly loved the game of golf. With his unique wit, he often questioned why the things he loved so much, golf and Yellow Jackets football, broke his heart so many times.

While on a trip with other lawyers to California, Greg was taking the famous 17-mile drive in Monterey when he saw a herd of mule deer grazing on the fairway at the Spanish Bay golf course. He made his colleagues stop the car and get a picture, saying, "When I see my two greatest passions in life together in one place, I have to get a picture of it." He continued the drive, stopping only to buy a sweater vest at one of the golf pro shops. (Sweater vests and high ankle golf socks graced his unique wardrobe.)

Greg's true passion, however, was his family. Though he was a tireless worker at the office, he was a full-time husband and father. He was not shy about speaking of his love and admiration for Debbie, his wife of 34 years. While Debbie herself was battling illness, Greg served as her caregiver and medical advocate. He was always available for his children. He coached his son David in sports and was an active participant in the life of his daughter, Dara. He was blessed with a grandson, Cade Gregory Melton.

Very few people outside his immediate family and closest friends knew that Greg had been diagnosed with bone cancer in 2005. Though he received chemotherapy and radiation in Atlanta and Houston, he continued to work up until a few weeks before his death. By keeping his illness to himself, he succeeded in keeping his relationships with his friends normal and unaffected, and he shared his humor and joy of living with those around him until his death.

GDLA, the legal profession, the community of Dalton, and the Melton family have lost a rare and irreplaceable man. ❖

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Admitted at the Winter 2011 Board Meeting

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The Evolution of Visual Communication in the Courtroom

By Dan Codman & Mathew Hepp
Courtroom Visuals

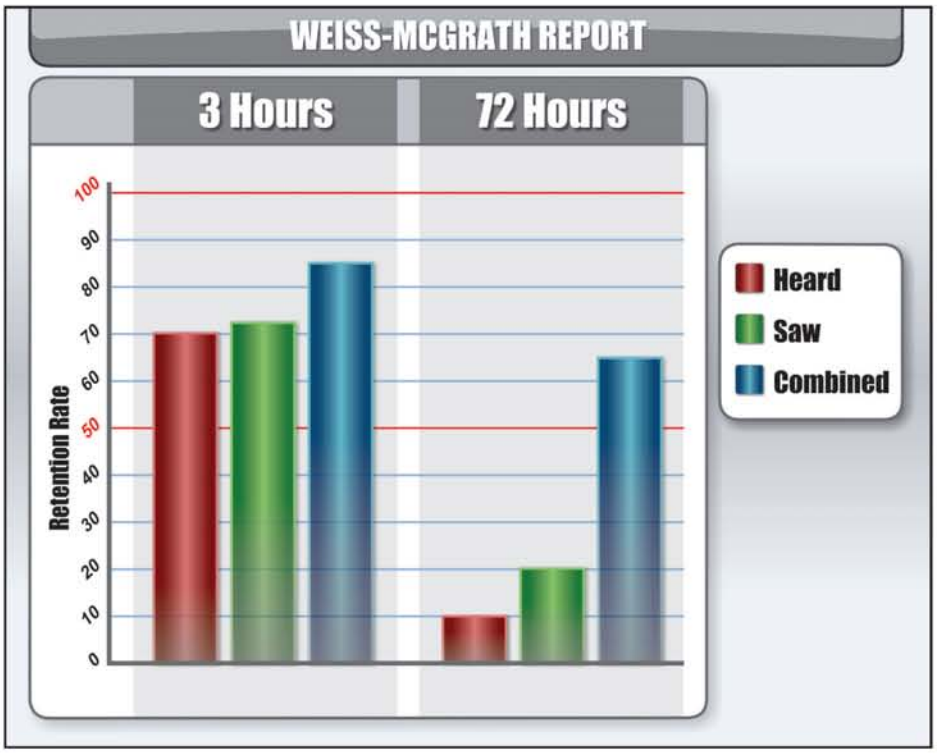
For centuries, trial lawyers have depended on their mastery of language, both verbal and written, in the courtroom. It is with words that we transmit and receive the important information that is essential to the judicial process. As the court system has evolved, so has our understanding of human nature. Trial lawyers now have access to more information and tools than ever before.

When preparing for a trial today, you can utilize the information we have available about learning and the importance of visuals to ensure that your case is successful. We now know that most people — be it a judge, a jury or an arbitration panel — retain and comprehend information more effectively when they both see and hear the information simultaneously.

The Case for Visual Communication

As trial lawyers, it is easy to forget that many jurors are a blank slate, a Tabula-Rossa, who know nothing about the issues they are being asked to decide. Often jurors are forced to depend on highly-educated lawyers with a propensity to use complicated language to equip them with the information they need to complete their civic duty. Instead of merely presenting the facts of a case, the attorney, expert, and/or the witness can embrace the role of the educator in the courtroom. Good teachers have always known that visuals help learners to understand and remember complex information and abstract concepts.

In the Weiss-McGrath report, it was found that there was "a 100 percent increase in juror retention of visual over oral presentations and a 600 percent increase in juror retention of combined visual and oral presentations alone." The report also showed that subjects who only heard the information had a 70 percent retention rate after three hours and only a 10 percent retention rate after 72 hours. Likewise, for subjects who only saw the information, there was a 72 percent retention rate after three hours and a 20 percent retention rate after 72 hours. However, in subjects who both saw and heard the information, the results were dramatically different. When you compare those results, there was an 85 percent retention rate after three hours and a 65 percent retention rate after 72 hours.



It is through this combination of words and images that we elevate our thinking to the highest levels of understanding. It is safe to say that visuals play an integral part. The amount and type of visuals that trial lawyers have at their fingertips are growing everyday. The evolution of technology has taken us from the days of butcher paper and white boards to fully integrated multimedia presentations incorporating everything from documents and photographs to interactive graphics and 3-D animations.

The Evolution...

Before photographs and other demonstrative evidence, lawyers once relied on purely testimonial and substantive evidence. Indeed, the evolution of presenting in the courtroom has gone through many stages. There was a time when an attorney would pass around a piece of paper for the jury to review. Technology has changed the way visuals are presented in the courtroom.

Transparencies are one of the earliest and most common uses of technology to create courtroom visuals. Attorneys could easily create transparencies to project images onto a screen for the entire jury to see at once. Before 3-D animations became a practical solution, 3-D scale models were a very a popular and affordable visual tool. Three dimensional models are also an extremely effective method of enhancing the juror's visual and kinesthetic learning. They also have the added benefit of staying in front of the jury for an extended period of

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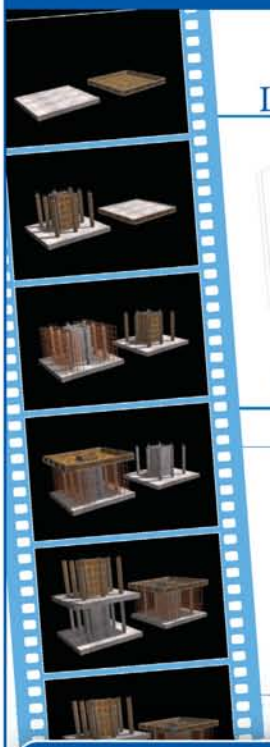
In the courtroom, seeing is believing.



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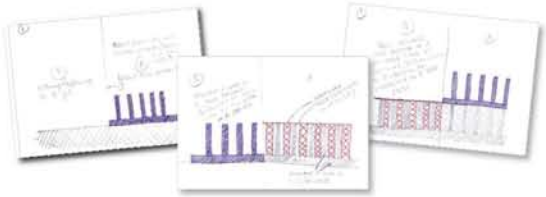

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The Evolution of Visuals in the Courtroom

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time, constantly providing reinforcement. With the advent of the desktop computer and large format printers, enlarging and blowing up exhibits suddenly became the affordable and expected solution. Documents and photographs could easily be blown up to 400 times their original size and mounted on foam core boards.

Today, the personal computer and courtroom technology serve as the control center for visual presentations. At its core, technology is a means for displaying visual evidence simultaneously in front of everyone in the courtroom. For jurors, it can increase the sense of participation in the proceedings and improve their understanding of the facts.

Courtroom technology, when coupled with trial presentation software, can also serve as an effective and efficient way to draw attention to particular points and emphasize certain aspects of the evidence. Suddenly, the ability to display documents, photographs, and video is only a mouse click away. Gone are the days of having to haul in boxes and boxes of documents. High volume scanners and 750 gigabyte hard drives, not much larger than a cell phone, have made it possible to access hundreds of thousands of documents and hours of video testimony with ease.

The case of
Smith v. Garden Hills

In *Smith v. Garden Hills*, John Smith met Rhonda Jones at the local Waffle House. Jones invited Smith to her apartment at the Garden Hills Apartment Complex in Fulton County, Georgia. After a two-hour visit with Jones, Smith departed and was fatally shot outside the Jones apartment and robbed of his jewelry. After the incident, witnesses reported seeing a Jeep Cherokee driving rapidly away from the scene.

In the complaint, the plaintiff charged that Garden Hills did not provide adequate security for its residents and guests. It was also contended that Smith's untimely death was a result of Garden Hills' negligence.

The defense's challenge was to show that Garden Hills had, in fact, provided security measures to ensure the safety of its residents and guests. Such measures included the presence of 19 Georgia Power floodlights and 12 closed-circuit security cameras, which recorded all movement on the property. Ultimately, there was nothing Garden Hills could have done to prevent this targeted act of violence.

To prove the safety measures taken at the Garden Hills Apartment complex, it was vital to the defense's case to show photographs, surveillance video, and witness testimony to the jury in order to bring them to the scene. The obvious solution would have been to blow-up countless images onto foam core boards, which would have resulted in a satisfactory, but cumbersome, presentation of the evidence. Additionally, it was decided that this approach would not have met the jurors' high expectations that they inherently have when they enter the courtroom. Another solution would have been to use an ELMO (document presentation camera) to project the images onto a screen for the jury. This method, although perceived as high tech, would not have enticed and intrigued the audience in a way that would have kept their attention.

Ultimately, the decision was made to create a turn-key, multimedia presentation package. While the presentation was simple enough that it could be operated by defense attorney, Moffett himself, it was sophisticated enough that it engaged the jurors, the fact-finders in the case, and kept them involved in a way that met their expectations and held their attention. The presentation served as the nucleus of Moffett's defense argument, combining audible learning with visual literacy. The visual communication in this case was similar to a good children's book, the words and the pictures were inseparable.

"How do you effectively *show* the jury what you say the evidence *will show*?" asks Matt Moffett of Gray Rust St. Amand Moffett & Brieske. "The flash presentation provided the jury with a visual explanation of our contention in the case. During post verdict interviews with some of the jurors, they were thanking us for making our position so understandable by *showing* it to them."

Conclusion

We are all visual beings, and as such, we depend on our senses and intuitions to guide us in our decision-making process. Today, jurors have a very sophisticated palette, they are technologically and culturally driven and looking for the "WOW" factor. Jurors want to feel an emotional and psychological attraction to what you are presenting.

According to Dr. Lynell Burmark, author of *Visual Literacy: Learn to See, See to Learn*, "If it doesn't relate or connect to something in your own experience, you can't even imagine it." As our audiences' visual literacy evolves, so too must your ability to effectively introduce visual communication.

As lawyers, you must capture the attention of the modern juror, you must look beyond what has worked in the past and look towards what will help them retain and remember now and in the future. You must use this knowledge and experience as a platform to keep pace with and renew your approach in visually communicating with the modern juror. ❖

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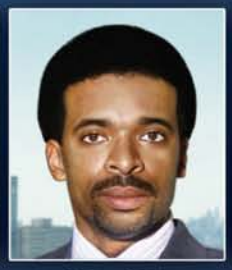
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Settlement and Verdict Trends in Georgia Motor Vehicle Accident Cases

By Alan Pershing
CaseMetrix

The following article will review Georgia settlement and verdict trends for motor vehicle accident (MVA) cases, especially as they relate to the insurance defense community.

CaseMetrix began collecting MVA data in June 2009, and accepted settled or adjudicated cases from 2007 forward; we receive our case data directly from a network of trial attorneys (both plaintiff and defense firms) across Georgia.

We currently have almost 3,000 MVA cases in the database from 125 Georgia counties; the majority (61.3%) of cases are outside metro Atlanta.

With this resource, we can now compile MVA trend data across the last few years. It is probably safe to say that similar analysis is happening at larger insurance companies, utilizing their internal claims databases.

Since most attorneys are not analysts and most analysts doing this work are not attorneys and have no legal perspective, we thought the insurance defense bar would find this analysis interesting and, hopefully, enlightening.

Jury Trials

Trials by jury are in decline, which should come as little surprise. Jury trials are expensive in terms of time needed for thorough preparation and support material. They bring into play both outcome extremes — *i.e.,* either extraordinarily high or zero dollar awards.

Juries are also notoriously fickle and difficult to predict, although our analysis shows some venues are clearly more penal or liberal than others. So a high degree of financial risk is involved in jury trials.

While our data shows an average of 5.86% of MVA cases are jury trials, this number varies over time and is decreasing:

2008 – 7.12% (N=365)
2009 – 5.83% (N=1,081)
2010 – 5.46% (N=1,096)

Litigated Settlements

Litigated settlements are also on the decline as a higher percentage of cases are now being settled pre-suit, primarily between plaintiff attorneys and insurance companies directly.

Mediators have said anecdotally that they are seeing a much higher number of pre-suit mediations where no defense attorneys are present.

Mediators have said anecdotally that they are seeing a much higher number of pre-suit mediations where no defense attorneys are present.

Our data shows an average of little over half of all settled cases being litigated, but over time, the percentages are decreasing:

2008 – 55.76%
2009 – 49.72%
2010 – 47.69%

Consequently, the percentage of cases settled pre-suit and without the use of defense counsel is increasing:

2008 – 37.12%
2009 – 44.45%
2010 – 46.85%

Mediations

The use of professional mediators to get cases settled is on the rise. This should come as no surprise as mediation is very time and cost-effective and removes extreme outcomes.

Most mediations are successfully concluded in one day and don't require either the costs of support staff being available or expensive trial graphic support.

Our data indicates that 22.31% of *litigated* cases are mediated, although this is rising over time. This includes cases that went to mediation and then to trial, as well as litigated settlements.

It does not include pre-suit settlements; we have some mediated pre-suit claims, but the overwhelming majority of pre-suit claims are not mediated.

The rise in mediation is probably a function of a number of different dynamics: reticence on the part of attorneys to take cases to jury trial and expose themselves and their clients to extreme, untoward outcomes, the ascendance of alternative billing programs (*i.e.*, "flat rating") for independent defense firms which makes both trial and extended case life cycles uneconomical, and the expeditiousness of mediation.

Also, mediation has become a mainstream alternative to jury trials, as evidenced by the number of both professional mediation companies and independent mediators; our data references at least 49 individual mediators.

Percentage of mediated cases, however, varies as a function of both time and geographic location, with a slightly higher incidence of mediation and a more consistent rise happening with cases whose venue is in metro Atlanta counties, as opposed to the balance of Georgia counties.

Overall mediation percentages over time (average 22.31%):

2008 – 19.09% (n=309)
2009 - 22.68% (n=657)
2010 - 23.10% (n=974)

These numbers, however, mask a difference occurring in metro Atlanta cases versus cases occurring outside the metro area. Cases originating outside metro Atlanta stay in

Continued on page 14

Continued from page 12

a fairly consistent range with no discernable pattern.

Mediation percentages outside Metro Atlanta (average 22.56%)

2008 – 23.13% (n=147)
2009 - 24.51% (n=306)
2010 - 21.37% (n=496)

Looking at mediation statistics involving cases inside the metro Atlanta counties, however, shows a consistent rise:

Mediation percentages inside Metro Atlanta (average 22.07%)

2008 - 15.43% (n=162)
2009 - 21.08% (n=351)
2010 - 24.09% (n=478)

Clearly, there appears to be an increasing divergence of opinion between plaintiff and defense attorneys as to the value of cases in metro counties.

Three mediation companies, Miles Mediation, BAY Mediation and Henning Mediation, account for 68.75% of all mediated cases in the MVA database. The balance is distributed among county assigned mediation, smaller mediation companies and independent mediators.

In-House Counsel Caseloads

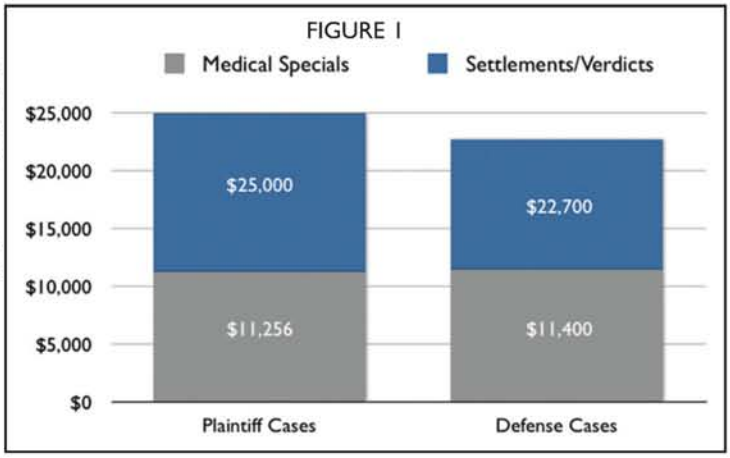
In-house defense counsel caseloads are on the increase. We analyzed our MVA database and looked for cases *reported by plaintiff's attorneys* that named a defense attorney as opposing counsel. This removed all pre-suit claims where no defense attorney was involved and any cases reported to CaseMetrix originally by defense counsel.

Thus, the analysis proceeded from a conservative orientation; no self-reported defense cases are included which might skew the findings, although prior analysis of cases contributed by plaintiff and defense firms showed no significant differences in median medical specials or settlements. See Figure 1.

We removed all cases settled prior to 2008 and all settled or adjudicated in 2011 as their numbers were too small to be reliable. This netted the total to 748 cases, of which 295 (or 39.44%) had in-house attorneys named as counsel.

This number varies over time and increased slightly by 1% between 2008 and 2009; then a 4.33% increase to 41.76% between 2009 and 2010. Parenthetically, the current difference between 2010 and 2011 is a 13% increase to 54.84% although we do not yet have enough 2011 cases to be statistically viable.

FIGURE 1



Percentage of cases handled by in-house defense counsel, over time:

2008: 36.45% (n=167)
2009: 37.43% (n=315)
2010: 41.79% (n=266)
2011: 54.84% – data incomplete/small sample

80/20 Rule

The "80/20" rule is alive and well in reference to in-house defense firms. Our Motor Vehicle Accident database has identified 111 defense firms as opposing counsel. Of that number, 21 (or 19%) are in-house counsel.

As the above table demonstrates, *those 21 firms (19% of total defense firms) account for 41.79% of all litigated MVA cases in 2010* and that number is rising. More telling in terms of concentration, *only 9 of those 21 in-house firms account for 85.2% of all the in-house cases.* The other 12 only share a relative handful of remaining cases and tend to work for smaller or more specialized insurance carriers.

Soft Tissue Injury Cases: In-house vs. Independent Counsel

There is very little difference between in-house and independent defense firms when it relates to soft tissue injury cases. As Figure 2 shows, both medical specials and settlements are very close; however, in non-soft tissue injury cases, in-house counsel tend to handle cases with lower median medical specials but settle their cases for a lower multiple of the specials.

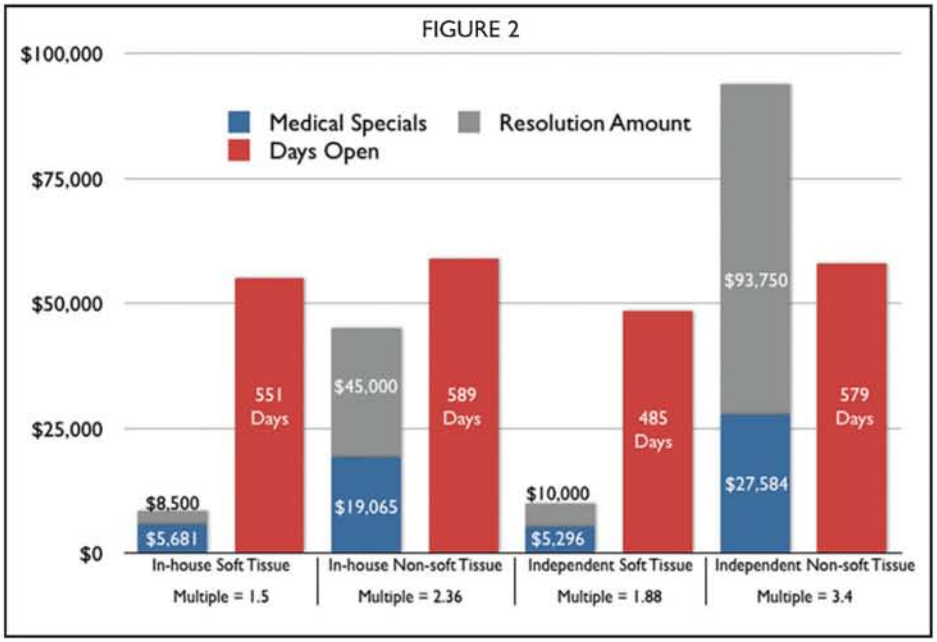
In non-soft tissue cases, independent defense firms handle cases where the median medical specials are approximately 45% higher than the cases handled by in-house counsel; they also handle a disproportionate percentage of cases where surgery is involved (independent defense: 42.19% vs. in-house 23.42% surgical). There is no difference in lost wage claims. While the medical specials are 45% higher, independent defense counsel tend to settle those cases for 108% higher than their in-house counterparts.

Applying the same multiple (2.36) as the in-house firms would yield a median settlement of $65,098, which is a difference of $28,652. Multiplying the number of cases (256) times that difference yields an estimated $7,334,912 in additional money spent by carriers with independent firms over in-house counsel; this is extremely conservative as we don't have 100% of these cases.

Length Cases Open

When plotted over time, the number of days cases are open is moving in opposite directions for in-house and independent defense firms. See Figure 3 (cases where the settlement equaled carrier limits were excluded from analysis.).

In-house counsel are now taking approximately 5.5 months



longer to settle MVA cases than in 2008, while independent defense firms are settling their cases almost two months more quickly. Given the increased percentage of cases going to in-house counsel and the fact that only 9 in-house firms account for 85% of those cases, it would be difficult to see how cases could be closed as quickly as they were two years ago unless in-house firms substantially increased staff.

Conclusion

The legal environment in Georgia is changing along a number of significant dimensions, as evidenced by our data. The number of jury trials is continuing to drop while the number of cases being mediated is accelerating, especially cases involving metro Atlanta counties. Clearly, there is more sharp disagreement as to the relative value of cases in metro Atlanta counties than previously existed.

Like jury trials, the number of litigated cases is dropping while pre-suit settlements directly between plaintiff attorneys and insurance companies are increasing. Anecdotally, according to professional mediators, mediated pre-suit claims are also rising.

Probably the most significant metrics all point to a program of aggressive cost containment by insurance carriers: a rise in settled pre-suit claims and concomitant simultaneous drop in litigated cases, and the migration of litigated cases away from independent defense firms to salaried in-house counsel, even as alternative billing is on the rise. Case migration to in-house counsel has moved from 36.45% in 2008 to almost 42% in 2010. The 2011 numbers are small, but so far moving in a much more aggressive fashion away from independent defense firms. At this point, while in-house firms are only 19% of defense firms, they account for 42% of all litigated motor vehicle cases; and, of that 21, only nine in-house firms account for 85% of those cases. Accordingly, the amount of time each in-house case is now open has increased substantially.

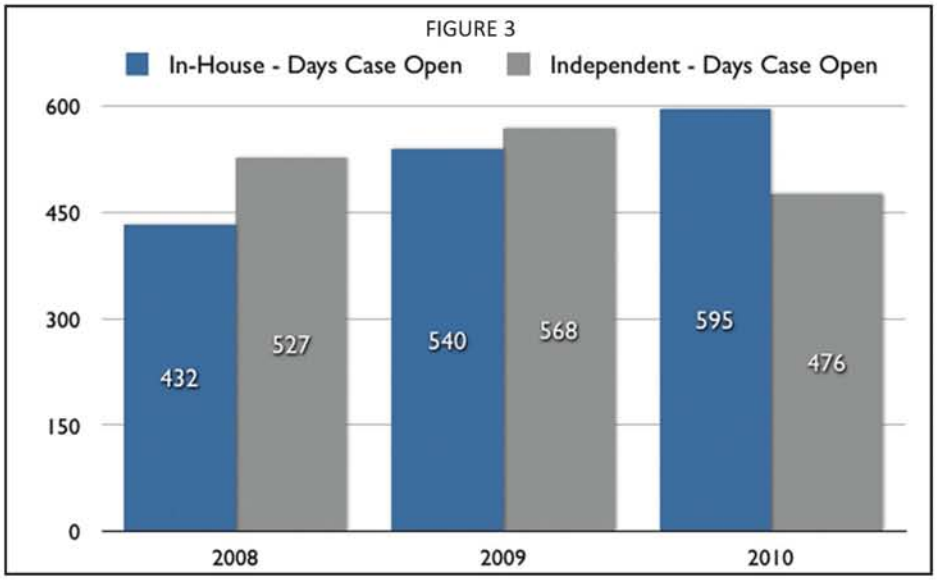
Independent defense firms are getting cases settled more quickly, which could be either the continued permeation of alternative billing that puts a premium on settling cases expeditiously or decreased case loads which allow for more concentrated effort on each case, or a combination of both factors.

More importantly for insurance carriers though, the relative difference in settlement amounts between in-house and independent defense firms on non-soft tissue cases is very disparate. While the medical specials on these cases are approximately 45% higher for independent firms, they are settled 108% higher than in-house counsel. Extrapolating the median difference across the 256 reported cases yields approximately $7.3 million in additional funds being spent. We do not know the true number of non-soft tissue cases closed across Georgia in that time period, but it is probably a substantial multiple of 256 and a consequent amount of additional expenditure.

Given that Georgia is ranked ninth in population with a population four times smaller than California and three times smaller than Texas, you can begin to extrapolate the cost exposure for national insurance carriers.

It is almost certain that the large insurance firms will continue to use similar analysis to squeeze cost savings from the current system. ❖

Alan Pershing is CEO of CaseMetrix LLC, a GDLA Platinum Sponsor. Visit them online at www.case-metrix.com.



Auto Liability Case Law Update

By Edward R. Stabell III, *SLC Chair*, and Sandra V. Foster, *Brennan Harris & Rominger, Savannah*

State Farm Mut. Auto. Ins. Co. v. Adams
2010 Ga. LEXIS 938

The most significant recent case is the supreme court decision in *State Farm Mut. Auto. Ins. Co. v. Adams*, which involves the extension of *Thurman v. State Farm Mut. Auto. Ins. Co.*, 278 Ga. 162 (2004) to the context of hospital liens for purposes of increasing UIM coverage.

The court of appeals in *Adams* had extended *Thurman* in this regard, thus reducing the UIM offset (and increasing UIM exposure) by the amount of any hospital lien, reasoning that such a payment is considered "payment of other claims or otherwise" within the meaning of the UIM statute. The supreme court reversed this decision.

GDLA filed an amicus brief authored by Edward R. Stabell, III and Britton G. White, Brennan Harris & Rominger, Savannah; and Evelyn Fletcher Davis and Jason L. Groch, Hawkins Parnell Thackston & Young, Atlanta. The supreme court accepted the arguments set forth in the amicus brief.

For a comprehensive analysis of the *Adams* case, please see the cover story of the Winter 2011 edition of this publication.

Baker et al v. Wellstar Health Systems, Inc. et al
288 Ga. 336
November 1, 2010

The Supreme Court of Georgia held that a qualified protective order entered by the trial court permitting defense counsel to speak with a plaintiff's medical providers was overly broad and should have been "carefully crafted" to include the "precise parameters within which ex parte interviews may be conducted."

Baker sued Wellstar for medical malpractice. Wellstar filed a motion for a qualified protective order under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), requesting that it be permitted to conduct ex parte interviews of Baker's health care providers. The trial court granted Wellstar's motion, finding, under the authority of *Moreland v. Austin*, 284 Ga. 730 (2008), that HIPAA allows such ex parte interviews as long as specified procedural safeguards are utilized to protect patient privacy — that defense counsel first obtain a valid authorization, or a court order, or otherwise comply with the provisions of HIPAA.

Wellstar sought to "otherwise comply" by obtaining a qualified protective order. The supreme court reversed the lower court indicating that the qualified protective order entered by the trial court was too broad regarding the scope of information that may be disclosed.

The supreme court opined that the protective order should have been limited to matters relevant to the specific medical condition the plaintiff placed at issue in the lawsuit. Without this limitation, the qualified protective order was "deficient."

In issuing a qualified protective order authorizing an ex parte interview, the supreme court held that a trial court should include four items:

1) the name(s) of the health care provider(s) who may be interviewed;
2) the medical condition(s) at issue in the litigation regarding which the health care provider(s) may be interviewed;
3) the fact that the interview is at the request of the defendant, not the patient-plaintiff, and is for the purpose of assisting defense counsel in the litigation; and
4) the fact that the health care provider's participation in the interview is voluntary.

"In addition, when issuing or modifying such orders, trial courts should consider whether the circumstances — including any evidence indicating that ex parte interviews have or are expected to stray beyond their proper bounds — warrant requiring defense counsel to provide the patient-plaintiff with prior notice of, and the opportunity to appear at, scheduled interviews or, alternatively, requiring the transcription of the interview by a court reporter at the patient-plaintiff's request."

McReynolds v. Krebs
2010 Ga. App. LEXIS 1092
November 23, 2010

The court of appeals of Georgia affirmed the grant of a motion to dismiss a cross-claim for contribution because when apportionment is required, defendants have no right of contribution.

Lisa Krebs was riding as a front seat passenger in a Chevy Trailblazer when her vehicle was struck by a car being driven by Carmen McReynolds. The impact caused the Trailblazer to roll over and land in a ditch, injuring Krebs.

Krebs sued McReynolds and General Motors (GM), alleging that the vehicle's lack of crash-worthiness contributed to her injuries. McReynolds answered and filed a cross-claim against GM for, among other things, set-off and contribution.

Before trial, GM settled with Krebs. GM moved to dismiss McReynolds' cross-claim on the basis that O.C.G.A. § 51-12-33 had abolished joint and several liability in Georgia and that, therefore, McReynolds had no right to a cross-claim for contribution. GM also argued that McReynolds had no right to a set-off because, pursuant to § 51-12-33, each party was

only responsible to the plaintiff to the extent of its own percentage of fault.

At trial, McReynolds presented no evidence of GM's potential liability other than the allegations in Krebs' complaint, and the jury awarded $1,246,000.42 against McReynolds. The trial court agreed that McReynolds' cross-claim should be dismissed and that McReynolds was not entitled to a set-off for any amount paid by GM.

The court of appeals affirmed and wrote that GM was not required to be a party to the suit after it settled, and McReynolds had no claim of contribution. The court of appeals also found no basis for a set-off because the statute requires each liable party to pay its own percentage share of fault, and McReynolds presented no evidence at trial regarding GM's alleged fault.

Schwartz v. Brancheau
306 Ga. App. 463
October 14, 2010

The court of appeals affirmed the denial of a motion in limine to exclude a state trooper's testimony regarding alcohol consumption because the testimony was relevant on the issue of proximate cause and damages.

This case arises from a motor vehicle collision in which Defendant Schwartz approached a curve in his pickup truck, was driving too fast given the poor road conditions, lost control of his truck, swerved into the opposite lane of traffic, and struck the plaintiff's vehicle.

At trial, the state trooper who responded to the accident scene testified that he smelled the odor of alcohol on Schwartz's breath and that Schwartz admitted to having consumed alcohol. Schwartz had filed a motion in limine to exclude this testimony, but the trial court denied the motion.

Schwartz appealed, arguing that his consumption of alcohol was an aggravating circumstance relevant to punitive damages, but the plaintiff's punitive damages claim was dismissed.

The court held that although Schwartz admitted negligence, he did not admit proximate cause of the victim's injuries. The fact of his possible intoxication was relevant on the issue of proximate cause and damages.

The court wrote that the issue of "whether a motorist's consumption of alcohol impaired his driving capabilities and entered into the proximate cause of the collision is best left for the jury's resolution.

Thus, a trial court has discretion to admit even minimal evidence of alcohol consumption. While the mere odor of alcohol by itself is weak evidence of intoxication, it does have a logical connection to that issue, and should be considered by the jury in deciding whether a person is intoxicated." ❖

Business Litigation Case Law Update

By Duke R. Groover, *James Bates Pope & Spivey, Macon, SLC Chair* (left); and Matthew B. Stoddard, *Nall & Miller; Atlanta, SLC Vice-chair* (right)

Muscogee County Bd. of Tax Assessors v. Pace Indus., Inc. (A10A1856)
January 5, 2011

Pace is a tax decision where the court of appeals reversed the grant of summary judgment to a manufacturer. The decision interprets, as a matter of first impression, category 3 of Georgia's freeport exemption.

The manufacturer casted BBQ grill bodies in Arkansas, which were shipped to a warehouse in Columbus, Ga. The grill bodies were then sold to an assembler/distributor also located in Columbus. The assembler/distributor incorporated the grill bodies into finished BBQ grills and shipped the grills to other states. The manufacturer relied on the freeport exemption to avoid paying Georgia taxes on the grill bodies. The tax assessor argued that the freeport exemption did not apply.

Under the freeport exemption, a company is not required to pay tax on inventory if the inventory: (i) is a finished good, (ii) stays in Georgia for less than twelve months, and (iii) is destined for shipment to a final destination outside the state of Georgia. O.C.G.A. § 48-5-48.2(b)(3). All parties agreed the grill bodies were finished goods that left Georgia within twelve months. The parties disagreed over whether the grill bodies were "destined for shipment to a final destination outside [of Georgia]."

The freeport exemption defines goods destined for shipment to a final destination outside of Georgia to include "inventory of finished goods which...[are] reasonably anticipated to be shipped to a final destination outside this state." O.C.G.A. § 48-5-48.2 (a)(1). The manufacturer argued that the grill bodies were destined for shipment outside of Georgia because they are sold to the assembler/distributor and then sold to customers in other states. The court of appeals disagreed.

The manufacturer did not merely "send" the grill bodies to the assembler/distributor; the manufacturer sold the grill bodies to the assembler/distributor. The freeport exemption cannot apply, because the grill bodies changed title when the manufacturer sold them to the assembler/distributor. The manufacturer's final destination was in the state of Georgia. As such, the manufacturer was required to pay the ad valorem tax on inventory, *i.e.*, the freeport exemption did not apply. ❖

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Construction Case Law Update

By W. Jason Pettus, SLC Chair
Gray Rust St. Amand Moffett & Brieske, Atlanta

Smith v. Hilltop Pools and Spas, Inc.
306 Ga. App. 881 (2010)

The Georgia Court of Appeals affirmed that the statute of limitations for breach of contract and negligence claims arising from construction defects begins to run from substantial completion.

Smith contracted with Hilltop Pools and Spas, Inc. ("Hilltop") on February 5, 2001, to construct an in-ground swimming pool.

Hilltop installed the pool liner in August 2001, but it was noticeably unlevel. However, the pool was usable at that time, which Smith took advantage of. Smith withheld final payment, and Hilltop did agree to reinstall the pool liner by the end of March 2002. Hilltop never reinstalled the liner, but Smith utilized the pool during the warm months until one pool wall collapsed in September 2004.

Smith filed suit in October 2007, alleging negligent construction, breach of contract, and fraud. Hilltop moved for summary judgment, arguing that the six-year statute of limitations had run. Smith contended that the date the final payment became due and payable was the appropriate date the statute began to run. Smith also contended that the parties extended the contract until February 28, 2002.

The trial court granted summary judgment, holding that the statute of limitations began to run from substantial completion, and the Georgia Court of Appeals affirmed. The court found that substantial completion occurred by August 2001 when the pool was usable, even though the pool liner was not level.

Finally, the court of appeals held that Smith failed to present any evidence of false claims or specific intent to deceive by Hilltop that would toll the statute of limitations.

Lumsden v. Williams
307 Ga. App. 163 (2010)

George Lumsden and Helen Lumsden (collectively referred to as "the Lumsdens") appealed the trial court's grant of summary judgment in favor of Stephen Williams and Elizabeth McGee (collectively referred to as "the sellers") on the Lumsdens' construction defect claims related to their home.

The Sellers began construction on a log cabin-style house in March 2004. On December 1, 2005, George Lumsden contracted to purchase the house from the sellers. Under the "New Construction Purchase and Sell Agreement," which Mr. Lumsden executed with the sellers, the sellers agreed to warrant the property against all defects in labor and materials for a one-year period.

On December 19, 2005, the day of the closing, Mr. Lumsden and the sellers signed a "Walk Through List" of punch items to be completed after closing. The "Walk Through List" stated that "it shall amend the prior Agreement of the parties." Additionally, the document provided that the sellers furnished a one-year guarantee "on basement not leaking." The parties also stipulated that $10,000 would be held in escrow until the "Walk Through List" was completed. Closing was completed, and the Lumsdens took possession of the house on December 20, 2005.

The "Walk Through List" was completed on March 16, 2006, and the parties agreed to split escrow funds, with $9,300 going to the sellers, and $700 to the Lumsdens "due to expenses incurred in accomplishing certain items on walk through list and other expenses." The stipulation was noted and initialed by the Lumsdens and Stephen Williams.

In August 2006, the Lumsdens noticed that a window was leaking. The sellers sent a repairman to caulk the window, but the repair was not successful. The Lumsdens subsequently retained a home inspector, and the inspector issued a report identifying numerous defects in the house. On October 24, 2006, the Lumsdens forwarded the report to the sellers and demanded that the repairs be completed within one month.

On November 24, 2006, the sellers requested additional time to respond. The Lumsdens did not grant additional time; instead, they retained a contractor to make the repairs. On January 19, 2007, the sellers took the position that they were not obligated to make the repairs because the comprehensive one-year warranty was superseded by the warranty against basement leaks. The sellers also contended that the Lumsdens failed to provide notice required under Georgia's Right to Repair Act, O.C.G.A. § 8-2-38, and the parties' Agreement.

The Lumsdens filed suit without giving notice under the Right to Repair Act. The sellers answered and moved to dismiss based on the failure to give notice. Summary judgment was granted in favor of

the sellers. The Georgia Court of Appeals partially reversed the grant of summary judgment.

The Georgia Court of Appeals held that the trial court erred in ruling that the Lumsdens' remedial repairs entitled the sellers to summary judgment under the Right to Repair Act, because nothing in the Right to Repair Act required dismissal where pre-suit notice was not given. Further, the trial court erred in granting summary judgment to the sellers for punch list items noted in the "Walk Through List" under a theory of accord and satisfaction, because it could not be determined as a matter of law whether the parties reached an accord and satisfaction as to all claims regarding the quality of the sellers' repairs.

Additionally, the court of appeals ruled that the trial court erred when it determined that the warranty in the Walk Through List as to basement leaks superseded the general warranty contained in the construction agreement, because an amendment does not automatically result in a novation of a prior contract. Accordingly, a jury issue existed as to whether the parties intended to extinguish the prior warranty with the amendment.

The Georgia Court of Appeals ruled that the trial court erred in granting summary judgment as to the breach of warranty for defects arising during the warranty period, because it incorrectly determined that the warranty only covered claims reported during the one-year period rather than those defects arising during the warranty period. However, the trial court did correctly grant summary judgment to warranty claims arising outside of the one-year warranty period.

Finally, the Georgia Court of Appeals concluded that the trial court correctly granted summary judgment as to Helen Lumsden's claims, because she was not a party to the construction agreement or the "Walk Through List," and she was not an expressly intended beneficiary of either agreement. ❖

Legislature Passes New Evidence Code

On April 14, 2011, the Senate adopted HB 24 creating a new evidence code, and at press time it was awaiting signature by the governor. In essence, it adopts the Federal Rules of Evidence, with some changes. For more information, go to:
http://www.legis.ga.gov/Legislation/en-US/display.aspx?Legislation=31996

Employment Case Law Update

By Christopher E. Parker (left)
and Curtis J. Martin, II (right)
Miller & Martin, Atlanta

U.S. Supreme Court Allows Third Party's Claim of Retaliation: *Thompson v. North American Stainless, LP* 131 S. Ct. 863 (2011)

The U.S. Supreme Court expanded the scope of Title VII retaliation claims and allowed a claim to be filed by an employee who was not a relative of the original claimant and who was not engaging in any protected activity with regard to the original claim. The Court held that the employee had a sufficiently close relationship with the original claimant so as to fall within the "zone of interests" protected by Title VII.

Eric Thompson and his fiancée, Miriam Regalado, were employees of North American Stainless, LP (NAS). Ms. Regalado filed a sex discrimination charge with the EEOC, and three weeks later NAS fired Mr. Thompson.

Mr. Thompson then filed a lawsuit against NAS pursuant to Title VII, claiming that he was fired in retaliation for Ms. Regalado having filed an EEOC charge. The district court granted summary judgment in favor of NAS, concluding that Title VII "does not permit third party retaliation claims." The Sixth Circuit Court of Appeals initially reversed, but later affirmed, reasoning that because Mr. Thompson did not engage in any protected activity, he was not included in the class of persons for whom Congress created a retaliation cause of action.

The U.S. Supreme Court granted certiorari and considered two issues: 1) whether Mr. Thompson's firing constituted unlawful retaliation, and 2) whether Title VII provides a cause of action for Mr. Thompson.

The Supreme Court held that NAS' firing of Mr. Thompson violated Title VII. In relying upon its 2006 opinion in *Burlington Northern & Santa Fe Ry. Co. v. White*, the Supreme Court reiterated that Title VII's anti-retaliation provisions prohibit any employer action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." The Supreme Court applied this standard to Mr. Thompson's case and stated that it was "obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired." Although the Court rejected NAS' "line drawing" argument, it did not define a class of relationships for which this standard would be applicable. Instead, the Court noted that "we expect that firing a close family member will almost always meet the Burlington standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize."

The Supreme Court also held that Mr. Thompson was allowed to bring an action against NAS because he fell within the "zone of interests" protected by Title VII. The Court reasoned that Mr. Thompson was protected by Title VII because he was an employee of NAS, and the purpose of Title VII is to protect employees from their employers' unlawful acts. The Court noted that, if the facts presented by Mr. Thompson were true, then firing Mr. Thompson was an unlawful attempt to punish Ms. Regalado for filing her EEOC charge.

The Supreme Court reversed and remanded the case.

Attorneys Sanctioned in Title VII Action: *Norelus v. Denny's, Inc.* 628 F.3d 1270 (11th Cir. 2010)

The 11th Circuit imposed sanctions against attorneys in a Title VII action filed by a Haitian immigrant. The former employee filed an action against Denny's alleging sex discrimination but failed to present any witnesses or co-workers to support her allegations. Thus, plaintiff's deposition testimony became the sole source of evidentiary support for her claims. Following the plaintiff's deposition, her attorneys submitted an errata sheet of 63 pages making 868 changes to plaintiff's deposition testimony. The changes were substantial and, at times, contradicted the allegations contained in the plaintiff's complaint. The district court exercised its authority under 28 U.S.C. § 1927 to sanction the plaintiff's attorneys. The 11th Circuit held that the district court did not abuse its discretion by concluding that the plaintiff's attorneys acted with objective recklessness that multiplied the proceedings "unreasonably and vexatiously," and upheld the sanctions award totaling close to $400,000.

The court noted that "No one's memory is perfect. People forget things or get confused, and anyone can make an innocent misstatement or two. Or maybe even three or four. But not 868 of them."

Georgia's New Non-Compete Law Now In Effect

On November 2, 2010, Georgia voters approved an Amendment to the Georgia Constitution, which will, among other things, allow Georgia courts to modify ("blue-pencil") restrictive covenants which are construed as overly broad so as to make them enforceable.

Prior to the election, Georgia lawmakers sponsoring the Amendment anticipated that it would have "immediate effect" if approved in the election. Following the election, there was some debate regarding the effective date and constitutionality of the new law.

In light of these concerns, legislators have drafted conforming bills to enact the Amendment.

The final bill was passed on the last night of the legislative session and currently (at press time) awaits signature by the Governor. ❖

Professional Liability Case Law Update

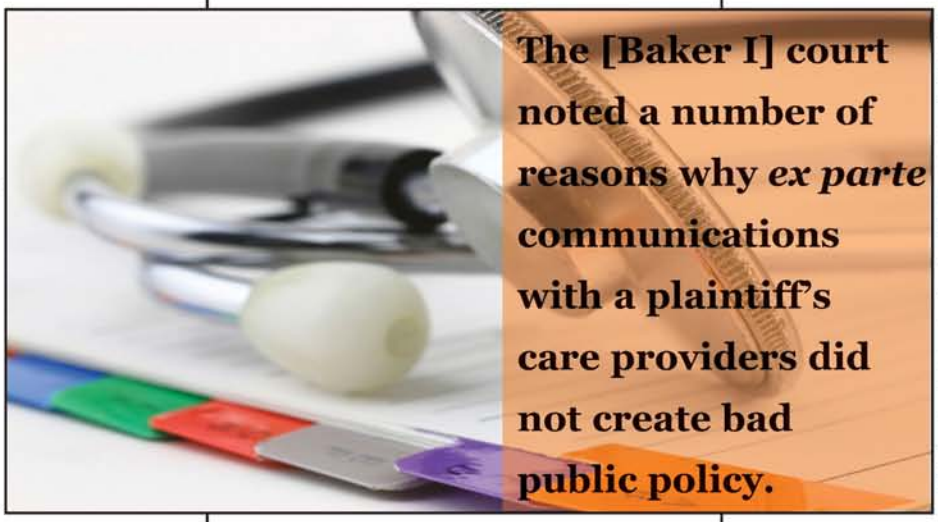
By George T. Major, Jr.
SLC Chair, Oliver Maner, Savannah

An understanding of the differences between the "*Baker I*" and "*Baker II*" opinions is useful in understanding the necessary steps to obtaining a qualified protective order that complies with HIPAA and Georgia law. The *Baker II* substituted opinion controls, but a discussion of *Baker I* and the contrasts between the opinions is helpful given the number of motions for qualified protective order filed after *Baker I* was issued.

***Baker v. Wellstar Health Systems, Inc.*, S10A0994 (Ga. Sup. June 1, 2010) ("*Baker I*")**

In *Baker I*, the Supreme Court of Georgia appeared to delineate the procedural requirements that defendants must meet in order to conduct *ex parte* communications with a plaintiff's treating medical care providers. *Baker I* reiterated the supreme court's previous decision that Georgia law provides that a plaintiff waives her right to privacy with regard to medical records placed in issue in a criminal or civil proceeding, but that HIPAA preempted Georgia law with regard to *ex parte* communications because HIPAA is more restrictive than Georgia law. (quoting *Moreland v. Austin*, 284 Ga. 730, 732 (2008)). However, the court was careful to note that Georgia substantive law survived HIPAA's enactment, and *ex parte* communications with a plaintiff's providers was possible provided that HIPAA's privacy safeguards are met.

HIPAA states that a covered entity (*i.e.*, healthcare provider) may disclose protected health information in response to (1) a court order, (2) a subpoena, (3) a request for discovery, (4) "other lawful process," or (5) written authorization from the patient/plaintiff. *See* 45 C.F.R. § 164.512(c) and (e)(1). *Baker I* determined that a qualified protective order is one manner of complying with HIPAA's mandates. The qualified protective order at issue in *Baker I* set forth that (1) physicians and healthcare providers are not required to consent to *ex parte* meetings, (2) the providers may discuss any of plaintiff's past, present or future treatment with defendant's counsel, (3) use or disclosure of the protected information obtained was forbidden outside of litigation purposes, and (4) the protected information obtained had to be returned to the providers or destroyed at the conclusion of the litigation. The court found that this qualified protective order met HIPAA's procedural safeguards.



The court's analysis did not end with whether HIPAA's procedural safeguard requirements were met. The court went on to explain that a qualified protective order allowing *ex parte* communications with a plaintiff's healthcare providers must also comply with Georgia's substantive privilege concerning medical information. In that regard, a qualified protective order must limit the medical information disclosed in an *ex parte* environment to information that is relevant to the matters placed in issue by the plaintiff. Thus, the qualified protective order which had met HIPAA's procedural safeguards had to be limited to matters relevant to the condition placed at issue.

The court noted a number of reasons why *ex parte* communications with a plaintiff's care providers did not create bad public policy: (1) equalization of access to witnesses; (2) diminished overall costs of litigation by reduced need for depositions; (3) equalization of cost of discovery. The court further noted that it was inconsistent to allow a plaintiff to place a medical condition at issue, but assert HIPAA privacy concerns to prevent the defense from discovery of the conditions and treatment.

***Baker v. Wellstar Health Systems, Inc.*, S10A0994 (Ga. Sup. November 1, 2010) ("*Baker II*")**

Five months after issuing the *Baker I* opinion, the Supreme Court of Georgia vacated *Baker I* through its *Baker II* opinion. The *Baker II* opinion imposed additional requirements upon defendants seeking to conduct *ex parte* communications with a plaintiff's healthcare providers. *Baker II*, at least in part, eliminates the leeway granted to defense counsel by *Baker I*. In exchange, however, *Baker II* sets forth a concise list of elements that a qualified protective

Continued on page 26

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order must meet in order to be acceptable under HIPAA and Georgia substantive law.

Reconsidering HIPAA's impact, the court recited HIPAA's purpose according to its drafters: "'[t]o protect and enhance the rights of consumers by providing them access to their health information and controlling the inappropriate use [thereof].' [Cit.]." Thus, the qualified protective order from *Baker I* was deemed unacceptable when cast in this light, because it contained merely a blanket statement permitting defense counsel to interview *any* of plaintiff's medical care providers. Such a qualified protective order would not permit plaintiff sufficient control over her protected health information as required by HIPAA. Further, the court noted that a qualified protective order may not contain merely a statement that the issues open to discussion are only those placed at issue by plaintiff; instead, the order should be carefully fashioned to limit the areas of discussion to matters that are contained within the order itself.

Concluding its opinion, the court expressly directed trial courts to ensure that its orders authorizing *ex parte* communications should state the following with particularity: "(1) the name(s) of the health care provider(s) who may be interviewed; (2) the medical condition(s) at issue in the litigation regarding which the health care provider(s) may be interviewed; (3) the fact that the interview is at the request of the defendant, not the patient-plaintiff, and is for the purpose of assisting defense counsel in the litigation; and (4) the fact that the health care provider's participation in the interview is voluntary."

The court further directed trial courts to consider whether the circumstances present in the litigation — *i.e.*, whether *ex parte* meetings had or would likely stray beyond the parameters set forth in the order — give rise to an additional requirement that defense counsel notify plaintiff's counsel of the particular time and place of an *ex parte* meeting and give plaintiff's counsel an opportunity to be present. Alternatively, the court recommended that trial courts consider requiring that the *ex parte* meeting be transcribed by a court reporter when requested by the patient-plaintiff. ❖

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GDLA Honors Judiciary at Annual Reception

Through the years, GDLA has hosted receptions honoring the judiciary in Atlanta, Savannah, Macon and Augusta to give lawyers and judges an opportunity to interact outside the courtroom.

Pictured at the most recent Atlanta event are: 1. Fulton Superior Court Judge Wendy Shoob, Kasi Whitaker, Supreme Court Chief Justice Carol Hunstein and Anne Baird Bishop; 2. Fulton Superior Court Judge Shawn LaGrua and Carrie Christie; 3. Court of Appeals Judge Sara Doyle, Fulton Superior Court Judge Kimberly Esmond Adams, Court of Appeals Presiding Judge Herbert Phipps, Court of Appeals Chief Judge John Ellington, and Fulton State Court Judge Susan Edlein; 4. Fulton State Court Judge John Mather, GDLA Past President Grant Smith and Mike Goldman; 5. GDLA Executive VP Mel Haas and Judge Kimberly Esmond Adams; 6. Fulton Superior Court Judge Kelly Amanda Lee, Jason Pettus and Bo Moss; 7. Court of Appeals Judge Sara Doyle and Bill Casey; 8. Cobb Superior Court Judge Reuben Green and Scott Masterson; 9. Bill Major and Fulton Superior Court Judge Jackson Bedford.

More scenes from the judicial reception: 1. GDLA Secretary-Treasurer Lynn Roberson and Fulton State Court Judge Susan Edlein; 2. GDLA Past Presidents Walter McClelland and Salty Forbes; 3. Cobb Superior Court Judge LaTain Kell and GDLA President Bubba Hughes; 4. Edward McAfee and Fulton Superior Court Judge Ural Glanville; 5. Fulton State Court Judge Wesley Tailor with GDLA Past Presidents Steve Kyle and Bob Travis; 6. Jake Daly, Whitfield Caughman, Supreme Court Justice David Nahmias and Ted Freeman; 7. Cobb State Court Judge Eric Brewton and Ryan Mock; 8. Crystal Filiberto, Tim Bendin, DeKalb State Court Judge Dax López, Kristin Hiscutt and Stacey Hydrick.

Trial Academy: Training Tomorrow's Leading Litigators

Lawyers from across the state once again descended on Callaway Gardens to take part in the annual Melburne D. "Mac" McLendon Trial Academy, January 20-22, 2011. This is GDLA's premier seminar to train the next generation of leading litigators.

The students were guided through the two-and-a-half day experience by a distinguished faculty led by Chair Lynn M. Roberson of Swift Currie McGhee &Hiers. The 2011 faculty included: Vice-chair Matthew G. Moffett, Gray Rust St. Amand Moffett & Brieske; Jerry A. Buchanan, Buchanan & Land; Douglas K. Burrell, Drew Eckl & Farnham; William T. Casey, Jr., Hicks Casey & Foster; Robert R. "Rusty" Gunn II, Martin Snow; William D. Harrison, Mozley Finlayson & Loggins; Elizabeth A. McLeod, Fulcher Hagler; James S. "Sandy" Owens, Jr., Nall & Miller; and Richard H. Willis, Bowman and Brooke.

GDLA Past President Albert H. Parnell of Hawkins Parnell Thackston & Young addressed the students during Friday's luncheon concerning career development and professionalism.

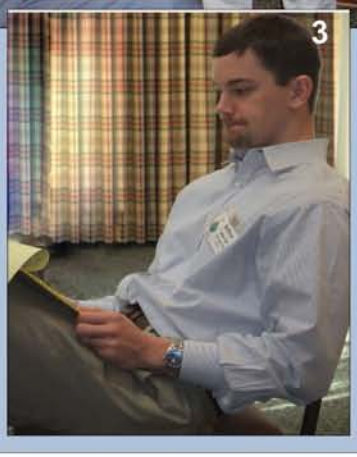
Trial Academy employs a modified mock trial format, covering topics including:

- How to cross-examine fact witnesses and expert witnesses.
- How to conduct a direct examination of your client and expert witnesses.
- How to use rules of evidence at trial.
- Opening statement basics.
- How to conduct proper voir dire.
- Effective use of demonstrative evidence.
- Dynamics of a closing argument for the defense.
- How to handle ethical dilemmas facing defense lawyers

In advance of Trial Academy, the students were divided into defense and plaintiff's teams; each received a case to study to begin preparing aspects of the trial. Following faculty demonstrations, students dispersed into breakout groups to work on their skills.

Opening day concluded with a reception and dinner, giving students and faculty time to network outside the classroom setting. ❖

1. (l-r) Beth McCleod, Dora Hogg and Amanda Shelton visit at the reception; 2. (l-r) Billy Harrison and program vice-chair Matt Moffett lead a breakout; 3. Peter Benion tests his skills; 4. Dick Willis demos an opening statement for the defense; 5. Bill Casey delivers a closing argument for the defense; 6. Douglas Burrell demos closing for the plaintiff; 7. Brooke Williams and Jad Dial enjoy the reception; 8. Rusty Gunn reviews the plaintiff's accident diagram during a breakout session.



More scenes from Trial Academy:
1. Networking at the reception are (l-r) program chair Lynn Roberson, Lori Leonardo, Sandy Owens, GDLA Past President Jerry Buchanan and Bill Buchanan. 2. David Ozburn (right) follows up with GDLA Past President Al Parnell after his presentation on career development. 3. Arthur York prepares to present during a breakout session. 4. (l-r) Allison Escott and Julie Jun unwind at the reception after the first day.

GDLA Board Convenes for Winter Meeting

The GDLA Board of Directors convened at the offices of Hawkins Parnell Thackston & Young for its Winter Meeting on Friday, February 4, 2011.

In attendance were *Officers and Executive Committee*: President Bubba Hughes of Callaway Braun Riddle & Hughes, Savannah; Executive Vice President Mel Haas of Constangy Brooks & Smith, Macon; Secretary-Treasurer Lynn Roberson of Swift Currie McGhee & Hiers, Atlanta; and Past President Bob Travis of Bryan Cave, Atlanta. *Vice Presidents*: Ted Freeman of Freeman Mathis & Gary, Atlanta; Matt Moffett of Gray Rust St. Amand Moffett & Brieske, Atlanta; and Peter Muller of Goodman McGuffey Lindsey & Johnson, Savannah. *Board of Directors members*: Sally Akins of Ellis Painter Ratterree & Adams, Savannah; Craig Avery of Cowsert & Avery, Athens (by telephone); Rusty Gunn of Martin Snow, Macon; Jo Jagor of Hall Booth Smith & Slover, Atlanta; Hall McKinley of Drew Eckl & Farnham, Atlanta; Chris Parker of Miller & Martin, Atlanta; Jeff Ward of Gilbert Harrell Sumerford & Martin, Brunswick; Jason Willcox of Moore Clarke DuVall & Rodgers (by telephone). *Past Presidents*: Joe Chambless of Newnan; Salty Forbes and Johnny Foster of Forbes Foster & Pool, Savannah; Steve Kyle of Bovis Kyle & Burch, Atlanta; Grant Smith of Dennis Corry Porter & Smith; and Bruce Welch of Hawkins Parnell Thackston & Young, Atlanta. Also present was Executive Director Jennifer Davis.

Following are highlights from the meeting:

- The membership report indicated the Association currently has 577 members. Of those who attended the 2010 Trial Academy and received free membership for one year, 50 percent have renewed their membership.
- A list of those members who were deactivated in November after non-payment of their 2010-11 dues was provided to the Board. Board members were encouraged to contact those whom they knew and encourage them to renew their membership.
- The lawyers listed on page 6 were proposed for membership, and unanimously accepted.
- As a follow-up to his report at the Spring Board Meeting in April 2009 regarding dues levels for neighboring states, Membership Committee chair Chris Parker proposed revising GDLA's dues structure. Upon motion duly made and seconded, the Membership Committee's proposal to waive the initiation fee for those in practice

Continued on page 38

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majority of body weight will already have been shifted to the leading leg.

Fore-aft split: The elderly are the most susceptible to a fore-aft split slip event. In these slip events, the lower extremities are not strong enough to keep from spreading apart into an increasingly longer stride, and a fall to the side is typical.

These falls can be caused by a walkway surface that lacks sufficient traction for a particular combination of pedestrian and footwear. Due to the variables of walkway surface roughness, slope, contours, mechanical & molecular bonding, deformation, wear, contaminants, and other factors, every pedestrian step taken (and every tribometer test performed) will result in a unique amount of traction. One cannot objectively quantify traction through "informal" methods — tribometers are necessary.

Tribometer measurements are commonly used in pronouncing a walkway "safe" or "unsafe," or "slippery" or "slip resistant," or similar. However, any measurement is meaningless without an established reference. Such a measurement reference should correlate tribometer measurements to actual pedestrian fall experiences — a reliable tribometer would find "slippery" only those surfaces objectively found "slippery" by humans. Although that statement may seem intuitive, there is still broad use of tribometers for which an objective correlation to human falls has not been established.

Pedestrian Traction Testing Terms

Traction testing encompasses both *coefficient-of-friction* testing and *slip resistance* testing.

Coefficient of friction: Many types of tribometers claim to measure the coefficient of friction, abbreviated COF — see Figure 1. Static coefficient of friction (SCOF) is highest when a stationary object is just about to slide, while dynamic coefficient of friction (DCOF) relates to keeping the moving object in motion. Because COF is between *two surfaces*, testing of wet or contaminated walkway surfaces traditionally is not called coefficient of friction testing, it is *slip resistance* testing.

Slip resistance: The term "slip resistance" is defined in ASTM F1646[2] as

> "The relative force that resists the tendency of the shoe or foot to slide along the walkway surface. Slip resistance is related to a combination of factors including the walkway surface, the footwear bottom, and the presence of foreign materials between them."

Slip resistance is not the same as coefficient of friction, though the terms are frequently used interchangeably.

Overview of Standards and Laws

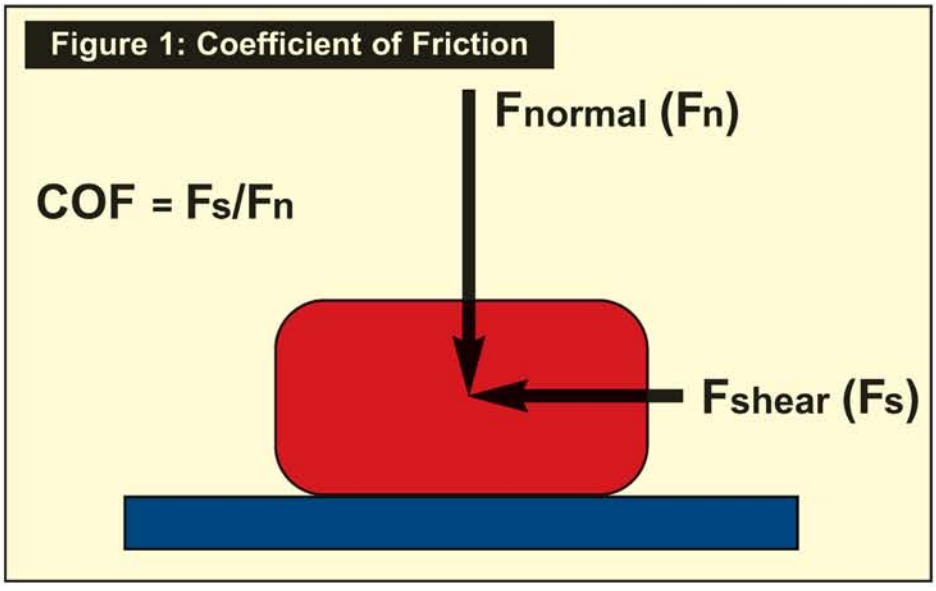
There is a popular understanding that a value of 0.5 is the "threshold" for adequate traction on a walkway — despite the lack of a reliable scientific foundation, and despite constant evolution in test methods and research. However, there currently are no standards or laws that establish 0.5 (or any other value) as the minimum required walkway COF or slip resistance. Codes, laws, and standards from OSHA, ADA, ASSE, ICC, and ASTM entities describe specific values for traction only in non-mandatory sections. Codification of a "required" minimum traction would also require agreements on which tribometers to use for testing and which reference surface(s) to use for baseline values, and there are currently no such agreements.

Common Types of Tribometers in the USA

A tribometer contacts the walkway surface with a "testfoot." Most tribometers use a standardized rubber called Neolite for their testfoot material; some tribometers still use leather, despite leather's inconsistency (being organic) and despite the fact that few shoe heels are leather.

Dragsleds: Dragsleds drag a testfoot across the walkway surface, and in operation the testfoot will be brought to the point of sticking to/slipping on the walk-

Figure 1: Coefficient of Friction



way surface. This stick-slip phenomenon of "adhesion" (or "stiction") affects accuracy of measurement, due to the bonding of the testfoot to the surface while stationary. In wet surface testing, adhesion results in artificially high measurement values — walkways may test as being "safer" then they actually are. Dragsleds include:

- ASM 825 – manual actuation
- Horizontal Dynamometer Pull-Meter – manual actuation
- RSI BOT 3000 - motorized
- Horizontal Pull Slipmeter - motorized

Variable angle articulated strut tribometers: Tribometers of this type apply loads to an angled strut which "kicks out" when a slip occurs. These designs avoid "adhesion" by applying the horizontal and vertical components of the test load to the testfoot simultaneously.

- Brungraber Mark II and Mark III PIAST
- English XL VIT

Tribometer operation is only one part of a robust, defensible walkway analysis, and experts must be able to defend their choice of a particular tribometer and methodology.

Walking Surfaces

The surface of a walkway may be manufactured, fabricated onsite, or natural.

Manufactured surfaces include ceramic tiles, vinyl composite tiles and rolls, concrete paving blocks, bricks, prefinished wood boards, and decking made of molded plastic/sawdust. The traction characteristics of these surfaces are "built in" by the manufacturer.

Fabricated surfaces include sanded wood boards, poured concrete, asphalt, and pourable polymers. The traction characteristics of these surfaces typically vary, with little opportunity for true standardization.

Natural materials include slate, stone, rock, and gravel. The traction characteristics of these are "as is," and naturally-smooth surfaces may provide reduced traction.

Note that significant surface contours may not be capable of being reliably tested, because a tribometer testfoot is typically a thin polymer layer rigidly mounted to a metal backing plate that may not conform to contours in the same manner as would the heels of pedestrian footwear.

Walkway surfaces may be finished with a stain, varnish, oil, paint, sealer, polish, wax, or appliqué. Some finishes fill in the pores and low spots in the surface, potentially reducing traction. Finishes may have lubricating qualities or adherent qualities, or may affect shedding or absorbing of liquid contaminants. Finishes may oxidize, wear away, harden, crack, or break up over time, changing both the local traction and the expectable consistency of measurements across a larger area.

Abrasive additives may be mixed in with some types of coatings. The effectiveness of these abrasives in enhancing traction

Continued on next page

will depend upon the hardness of the abrasive, the abrasive's bond to the coating, and the quantity and distribution of the abrasive on the walkway.

Slopes and ramps

Slopes and ramps affect walkway traction. From a physics perspective, all slopes will have a different effective level of traction than if the walkway surfaces were level. Slopes will be susceptible to directional wear, so testing in the direction of pedestrian travel should be considered — most slope falls occur downhill. Some tribometers may not be capable of accurate readings on slopes.

Bathing Surfaces

Traction testing of shower stalls and bathtubs brings a number of unique considerations. For example, bathers do not use full stride steps, do not achieve significant walking velocity, and don't use footwear. These issues arise when using tribometers which are designed for testing "normal" pedestrian walkways.

There are two main types of bathing surfaces: porcelain-coated metal, and plastic/composite. Currently only new porcelain-coated metal tubs have requirements for slip-resistant surfaces; note that these requirements are not based on pedestrian falls.

Contaminants

Softer finishes and tested contaminants that accumulate on the testfoot may provide varied test results depending upon the amount of accumulation.

Solid contaminants such as gravel, oil-dry granules, broken glass, peanut shells, ice-melting compounds, and others may not lend themselves to reliable tribometer testing. The typical "rigid" testfoot design won't have the same compliance around these particles as would typical footwear.

Traction Testing Research

A common criticism of tribometer testing is the fact that different "competent" tribometer designs will typically report somewhat different traction values for the same surface, leading to a question of which device is "correct." Fortunately, recent research has established new methodologies for determining "safe" traction levels using different tribometers, as discussed below.

Because tribometers provide mechanical simplifications of pedestrian falls, appropriate human subject testing is necessary to establish whether the devices can correctly characterize walkway surfaces as reasonably slip resistant — or as unreasonably slippery.

Two studies by Powers et al[3,4] utilized multi-subject human subject testing on selected reference surfaces. The 2010-published study characterized four reference surfaces (ceramic tile, porcelain, vinyl composition tile, and black granite) as increasingly slippery, using a total of 80 test subjects. Different tribometers were then used on the reference surfaces, and the "valid" tribometers were the ones able to correctly rank the surfaces in order of increasing traction.

Given these reference surfaces and new methodology, whether a "valid" tribometer design finds the threshold of traction safety to correlate to a reading of 0.5, or 0.0098, or 341, or something else, does not really matter; the correct ranking (with proper documentation) is the important issue. As such, the opportunity exists to include "reliable" traction thresholds in future standards, and to justify (for validated tribometers) the expectable differences in their measurements of the same surface.

It is also worth recalling that pedestrian fall events involve humans. Traction testing involves consideration of a multitude of *extrinsic* issues. The pedestrian's *intrinsic* issues, including fall kinematics, expected (and unexpected) injuries, medical conditions, and medications, may be more relevant in a particular case.

Conclusions

Traction testing has many complexities that cannot be robustly accommodated by a simplistic slippery/not slippery determination. There are no "recipes" for reliable analyses across all likely scenarios.

The use of a tribometer is only part of a robust analysis. The expert must have an understanding of the limitations of the tribometer, and of the limited ability to test certain surfaces and contaminants. The expert's opinions should be informed by awareness of relevant research, particularly that research that correlates tribometer test measurements to actual human fall experiences. ❖

[1]Leffler, JP. Forensic Engineering Use of Walkway Traction Testing, *Journal of the National Academy of Forensic Engineers*, Volume XXVI, No. 1, June 2009, 121-138.
[2]ASTM F1646-05e1, Standard Terminology Relating to Safety and Traction for Footwear. ASTM International, West Conshohocken PA, 2005.
[3] Powers CM et al. Assessment of Walkway Tribometer Readings in Evaluating Slip Resistance: A Gait-Based Approach. *Journal of Forensic Science*, March 2007, Vol. 52, No. 2, 400-405.
[4] Powers CM et al. Validation of Walkway Tribometers: Establishing a Reference Standard. *Journal of Forensic Sciences*, March 2010, Volume 55, Number 2.

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of the factors behind the already robust growth in the use of arbitration and mediation services in Georgia. Now, due to the judicial budget cuts, these ADR services can play an even greater role in resolving disputes promptly and easing the burden carried by the court system.

As delays grow and litigation costs increase, thoughtful lawyers are raising the options of mediation and arbitration earlier in their conversations with clients. This is not only consistent with the State Bar of Georgia Aspirational Ideals, but knowledgeable counsel realize that the "wait times" and costs involved in seeing a matter through the courts can be reduced through the use of mediation and arbitration. Likewise, many judges are referring matters to mediation or suggesting arbitration or other forms of ADR, as increasingly viable alternatives to watching their civil dockets back up even further.

Thankfully, Georgia is blessed with a number of talented and experienced mediators and arbitrators who are ready to partner with attorneys and the courts to resolve disputes. Many have already spent decades as litigators and understand the pressures counsel face to secure resolutions for their clients.

Others have served long careers on the bench, managing their own dockets and seeing, first-hand, the impact of delay on civil litigants. Whatever his or her background, an experienced mediator or arbitrator is dedicated, first-and-foremost, to resolving disputes fairly, efficiently and in a timely manner.

As lawyers confront the frustration and expense that delays impose on their clients, they need to be aware of the variety of ADR processes that can be utilized to fit the needs of a particular dispute. Mediation and arbitration, of course, are the most familiar. Indeed, many more cases are being brought to mediation even before a lawsuit has been filed, or at least in advance of most of the tedious and expensive discovery procedures.

Other ADR procedures are also available during the course of litigation, some of which are specifically designed to address a complex or time-consuming aspect of a dispute. For example, a discovery referee can expedite the resolution of contentious discovery disputes.

Similarly, courts often appoint special masters to work with the parties to resolve various procedural and substantive matters. The special masters may also prepare findings of fact and conclusions of law. Some insurance policies permit the use of an umpire or referee for disputes over the amount of damages to be paid.

In this era of budget deficits and cuts, it is likely that the Georgia judicial system will be called upon to do more with less, for years to come. The expanded use of mediators and arbitrators can help to alleviate some of the consequences of budget cutbacks, particularly with respect to civil litigation and, as our State Bar President S. Lester Tate III has noted, efficient handling of cases impacts the business and social aspects of all Georgians. ❖

Terrence Lee Croft is a member of the Executive Committee for the Georgia Academy of Mediators & Arbitrators, a GDLA Platinum Sponsor. Visit them online at www.GeorgiaMediators.org. Croft is also a Board Member of the National Academy of Distinguished Neutrals online at www.NADN.org.

Board Convenes for Winter Meeting

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five years or less was passed effective in the next dues cycle. It was felt that this waiver would assist with recruiting younger members.

• The Education Committee, led by chair Wayne Melnick, is planning a Premises Liability seminar at Maggiano's Buckhead on April 27, 2011. Committee vice-chair Brett Miller is working to revive the Skits & Suds program in May. A Medicare Secondary Payer webinar is being planned by committee member Matt Stoddard for mid-March.

• Jason Willcox, who chaired the 2010 Deposition Boot Camp, reported on a very successful event, held in November at Sutherland. Next year, the group expects to use the same problem as that used by the Trial Academy, since it is less factually complex which would allow the students to focus more on technique. The goal is also to dovetail better with Trial Academy by allowing students to become intimately familiar with the facts, much like they would if it were a real case to which they had been assigned to work.

• Jo Jagor suggested that the Board consider developing a formal mentoring program for young lawyers.

• Lynn Roberson, who chaired Trial Academy 2011, reported on the seminar. See article on page 30.

• Substantive Law Committee (SLC) chair Johnny Foster reported that all SLCs now had chairs and vice-chairs, many of whom are new. He has sent them all details regarding their duties, which include submitting case law updates for the newsletter, etc.

• In reporting for the Website Committee chair Dave Nelson, Jennifer Davis suggested that the SLCs should be recruited to update the content in the brief bank and tort reform database as it relates to their respective areas. Enhancing this content would, in turn, be a great marketing tool to recruit new members by showing real value in being a GDLA member.

• Bob Travis reported on the activities of the Judicial Relations Committee, which has been invited by the state's Judicial Nominating Commission in the past to review and comment (by in-person testimony) on applicants for various judgeships throughout Georgia, for recommendation to the Governor for appointment. Travis is seeking to have the same opportunity for input with Governor Deal's current commission, and is in touch with its new leadership, Pete Robinson and Randy Evans.

• Steve Kyle gave a report on future meetings. He has been training his successor, Immediate Past President Staten Bitting, who will take over from Kyle after the next Annual Meeting. The Spring Board Meeting was to be held April 1-3 at the King & Prince Hotel on St. Simon's Island. The 2011 Annual Meeting will be held June 9-12 at Amelia Island Plantation in Florida. The 2011 Fall Board meeting will be held October 21-23 at the Grove Park Inn in Asheville, North Carolina. The 2012 Annual Meeting will be held June 7-9 at the Ponte Vedra Inn & Club. The 2012 Fall Board meeting will be held October 19-22 at Brasstown Valley Resort in Young Harris, Georgia.

• Sally Akins, editor of this year's *Law Journal*, reported on article commitments to date. The *Law Journal* deadline is annually in March, and then it is distributed on CD to members in May along with the dues invoice. The *Law Journal* is also sent to judges statewide.

• Peter Muller continues as editor of the newsletter and was commended for producing consistently outstanding, high quality publications. Members are encouraged to submit not only their professional news, but also legal updates or substantive articles.

• Sponsorships chair Ted Freeman reported that the committee has seen a significant increase in sponsorships this year, thanks in large measure to the efforts of our executive director.

Board members were urged to show appreciation to our sponsors by utilizing their services when possible, and to let the sponsors know that they are using their services because of their support of the organization.

Jennifer Davis noted that we had three brand new sponsors, who joined at the (highest/first tier) Platinum level: Courtroom Sciences Inc., Collision Specialists Inc., and Miles Mediation & Arbitration. Additionally, formerly (second tier) Gold sponsors CaseMetrix and Courtroom Visuals both upgraded to Platinum.

Annual sponsorship levels are Platinum ($3,500), Gold ($2,000), and Silver ($1,000).

• Jeff Ward reported on activities of the Amicus Committee. The committee's most recent effort in the Court of Appeals was successful in getting the trial court overturned. They had planned to submit an amicus to the Supreme Court on that same case, but the matter was settled. Amy Snell of Fulcher Hagler did a great job on the amicus brief in that matter. The most recent newsletter, Winter 2011, included an article about the amicus briefs submitted in the last year.

• Lynn Roberson and Jennifer Davis presented the 2009 year-end balance sheet and profit and loss statement. The financial health of the organization is good.

• A resolution to authorize Staten Bitting, as new Meetings Chair, to execute documents for the Association with related indemnity was unanimously approved.

• The Board recognized the passing of Past President Greg Melton. See tribute on page 5. ❖

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