



## Georgia Supreme Court Issues Major Decision on Apportionment of Liability

By David F. Root  
*Carlock Copeland & Stair, Atlanta*

In an opinion long-anticipated by the state's trial bar, the Georgia Supreme Court addressed the amended apportionment statute in *McReynolds v. Krebs*, Case No. S11G0638, — Ga. —, 2012 WL 1034449 (March 23, 2012). The Court had granted certiorari to consider, *inter alia*, whether the Court of Appeals had correctly construed O.C.G.A. § 51-12-33 to require a trier of fact to apportion an award of damages among multiple defendants when the plaintiff is not at fault. The Court answered this question in the affirmative.

The case arose from a simple car wreck that happened on March 20, 2005, just a month after the

Tort Reform Act of 2005 took effect. Plaintiff Krebs was a passenger in a General Motors sport utility vehicle. Defendant McReynolds collided with the SUV, and Krebs was seriously injured. McReynolds admitted fault; Krebs indisputably was not at fault.

Krebs sued McReynolds and General Motors on December 20, 2005. Krebs later settled with General Motors on November 27, 2006, and McReynolds immediately filed a cross-claim against General Motors seeking setoff and contribution. After a hearing, the trial court concluded that McReynolds could not assert claims for contribution or setoff because the Tort Reform Act had abolished joint and several liability. The court ruled that McReynolds would instead have to seek appor-

tionment of damages against General Motors at trial. The trial court ultimately disallowed apportionment, however, after McReynolds' trial counsel conceded he had no proof of fault by General Motors. The jury returned a verdict of \$1.2 million, and the Court of Appeals affirmed.

In the Supreme Court, McReynolds argued that the trial court and Court of Appeals had erred in ruling that O.C.G.A. § 51-12-33 barred her cross-claims against General Motors for contribution and setoff. McReynolds asserted that apportionment was unavailable because Krebs was not at fault in the accident. McReynolds argued that the amended version of Section 51-12-33 requires apportionment of dam-

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## Juror Confirmation Bias: Powerful. Perilous. Preventable.

By Bill Kanasky, Jr.  
*Courtroom Sciences, Inc.*

In science, you move closer to the truth by seeking evidence contrary to a hypothesis. Scientists follow a general rule of "empirical criticism," which means focusing on seeking data that disconfirm a hypothesis rather than seeking supportive, confirmatory data.

In civil litigation, jurors are instructed to find the truth by impartially evaluating the evidence and coming to an unbiased conclusion. Unfortunately, what actually takes place is a far cry from impartial and unbiased. In general, this is what really happens:

Jurors come up with a hypothesis early in a trial;

- They immediately begin working to prove this hypothesis right instead of working to prove it wrong;
- They give preferential treatment to evidence and testimony supporting their existing belief;
- They tend to better recall evidence and testimony supporting the side they favor;
- They entrench themselves deeply into their stance, before the trial is complete.

At this point, the jurors simply stop working. They stop listening.

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1730-F Mt. Vernon Road - Atlanta, GA 30338  
770-390-0980 - Fax 770-390-0981

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P.O. Box 8558  
Atlanta, Georgia 31106  
Tel: 404.816.9455  
E-mail: jdavis@gdla.org



The GDLA Substantive Law Committees (SLCs) originated in 2005-06 when then-President Johnny Foster, Past President David Whitworth, and then-Board member, now Executive VP, Lynn Roberson teamed up to give members an opportunity to align themselves based on their areas of practice.

Together, the trio reviewed the Defense Research Institute's (DRI) substantive law committees and narrowed down that list of 30 to establish the following 12 SLCs for the GDLA: Appellate, Auto Liability, Business/Commercial Litigation, Construction, Employment, Insurance Coverage, Mass Torts, Premises Liability, Product Liability, Professional Liability, Trucking, and Workers' Compensation.

The SLCs fulfill a key part of the GDLA's mission statement by providing for "the exchange among the members of this Association of such information, ideas, techniques of procedure and court rulings relating to the handling of litigation as are calculated to enhance the knowledge and improve the skills of defense lawyers."

Annually, SLC leaders and members contribute case law updates to this publication, *Georgia Defense Lawyer*, as well as lengthier articles on significant changes in their respective practice areas for the *Law Journal*.

I should note that the *Law Journal* has always been mailed to Georgia's state and federal bench. When the GDLA won the State Bar's Best Newsletter Award last June, Supreme Court Presiding Justice George Carley suggested we add the appellate judges to the newsletter's circulation, which we did. Expanding on his great idea, the GDLA Board of Directors voted in April to add the remaining state and federal judges to the newsletter's mailing list. So the SLC's contributions to both the newsletter and *Law Journal* are seen by the

bench statewide. We believe this is a great member benefit, which also serves to enhance the GDLA's visibility with the bench.

In an effort to aid the SLCs in communicating internally, we established a blast e-mail system in the Members Only area of our website. Once you log in, you will see "Send an E-mail to SLCs" in the left navigation, which will link you to a page where you'll select from a dropdown menu the SLC you want to e-mail.

Finally, many SLCs have expressed the desire to hold in-person meetings. Current SLC Program Chair Johnny Foster and incoming Chair Brian Moore are now working with the SLCs to coordinate these gatherings. In the future, we anticipate the SLCs will meet regularly for CLE seminars, breakfasts, luncheons or happy hours. The goals will be information sharing, networking and social camaraderie.

We are proud of our SLC program, and especially encouraged by the SLC leaders' interest in moving toward in-person meetings. So, be on the lookout for your SLC's meeting announcements. And if you're not already a member of one or more SLCs, be sure to sign up via the annual dues invoice or e-mail our Executive Director, Jennifer Davis, to add you to the committee(s).

As the SLCs become even more active, they offer a great way to get involved in the GDLA, develop new professional contacts, and maybe even make new friends. And the more we connect, the more we'll fortify the strength of the defense bar in Georgia.

For the defense,

W. Melvin Haas, III  
GDLA President  
Constangy Brooks & Smith, Macon

**To aid the SLCs in communicating internally, we established a blast e-mail system in the Members Only area of our website.**



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# Member & Legal News

## Member News

**Lynn M. Roberson** of *Swift Currie McGhee & Hiers* in Atlanta was named a 2012 Georgia Super Lawyer, as well as being selected among the Top 50 Women Lawyers in Georgia. She serves as GDLA Executive Vice President.

*Drew Eckl & Farnham* announces the addition of **Jeffrey S. Ward** as a partner in the firm's Brunswick office. He has experience in many areas of business and tort litigation, including healthcare defense, construction litigation, personal injury defense, contractual disputes, and toxic tort defense. He has been named a Georgia Super Lawyer Rising Star six times, most recently in 2012. He is a member of the GDLA Board of Directors and co-chairs the GDLA Amicus Curiae Committee.

*Freeman Mathis & Gary* in Atlanta announces that **David Cole** has been made a partner of the firm. He is a member of the firm's Labor and Employment Law Practice Group, focusing exclusively on the representation of businesses and local governments. He was selected as a 2012 Georgia Super Lawyer Rising Star, as published by *Law & Politics* and *Atlanta Magazine*. He chairs the GDLA Employment Substantive Law Committee and co-chairs the YLD Labor and Employment Law Section of the State Bar of Georgia. He also was recently named a Board Member of the Federal Bar Association, Atlanta Chapter.

*Miller & Martin*, with offices in Atlanta and Chattanooga, has named GDLA Board of Directors member **Christopher E. Parker** as co-chair of the firm's Labor & Employment Department. He has been selected on repeated occasions as one of *Georgia Trend's* Legal Elite, and has been named a Georgia Super Lawyer for five consecutive years.

At the 2012 American Bar Association Midyear Meeting, GDLA Vice President **Hall F. McKinley, III** of

*Drew Eckl & Farnham* in Atlanta was elected to the Council of the Tort Trial and Insurance Practice Section (TIPS). This is the 15 member leadership board of TIPS, which has over 25,000 members.

**Douglas K. Burrell** of *Drew Eckl & Farnham* in Atlanta is the chair of the Defense Research Institute's (DRI) Diversity Steering Committee and has participated on the planning committee for DRI's Diversity for Success Seminar and Corporate Expo for the last few years. He co-chairs his firm's Diversity Committee. He has served on the faculty of the GDLA Trial Academy for the past two years.

**Catherine Bowman** of *The Bowman Law Office* in Savannah was recently selected as one of *Georgia Trend's* Legal Elite, in the practice area of Employment Law. She was the first chair of the GDLA's Employment Substantive Law Committee.

*Hall Booth Smith & Slover* is proud to announce that **Beth Boone** and **Charles A. Dorminy**, both practicing in the Brunswick office, have been named as partner. Ms. Boone practices in the areas of professional negligence and medical malpractice defense as well as probate, estate planning and administration, trusts, fiduciary law, and general civil litigation. Mr. Dorminy is the leader of the firm's Health Care Practice Group, and practices in a wide variety of areas including medical malpractice defense, health care, local government law and litigation, employment law, and general insurance defense litigation.

*Savell & Williams* in Atlanta announces that **Robert G. Fuller** has joined the firm as an associate in workers' compensation and general liability defense.

**Brian T. Mohs** recently joined *Nall & Miller* as an associate in the Atlanta office. He will continue to focus his practice on product liability, trucking, premises liability and coverage defense.

**Carrie L. Christie** of *Rutherford & Christie* in Atlanta has been named chair of the Employment Practices Committee of the National Retail & Restaurant Defense Association (NRRDA). Additionally, *Rutherford & Christie* was the only law firm named among the Top 100 Women Owned Businesses in Georgia by DiversityBusiness.com, following a survey of 650,000 privately held U.S. businesses.

*Nelson Mullins Riley & Scarborough* announces that associate **Amanda Shelton** was promoted to partner. She is resident in the Atlanta office, practicing in the areas of aviation law, business litigation, class action defense, pharmaceutical and medical device litigation, product liability, and toxic tort.

## Cases of Note

**Walter B. McClelland**, GDLA Past President, of *Mabry & McClelland* in Atlanta recently obtained a defense verdict for a fast food restaurant in a three day trial in Fulton State Court. A 76-year-old female had gotten out of her car, and was walking to the entrance, when she tripped and fell over a concrete car stop. She alleged that she had been distracted by cars in the drive-thru lane, which she was about to cross. The Plaintiff sustained multiple injuries, including a fracture at C-2, which was repaired by open reduction and screw fixation. She spent 11 days in the hospital, and had over \$50,000 in medical expenses.

**Ted Freeman**, GDLA Secretary-Treasurer, of *Freeman Mathis & Gary* in Atlanta recently won a unanimous decision in the United States Supreme Court in a case in which he assisted with the presentation of oral argument. The case resolved a split among the circuits regarding whether witnesses testifying before grand juries are entitled to the same absolute immunity from civil rights damages suits as are witnesses testifying at trial.

In writing for the whole Court, Justice Samuel A. Alito, Jr. held that

the same policies justifying absolute immunity for trial witnesses “apply with equal force to grand jury witnesses.” Rejecting the plaintiff/petitioner’s argument that a different rule should apply where the grand jury witness is a law enforcement officer, the Court noted that just the opposite was true. Because police officers testify with such frequency, any lesser rule than absolute immunity would expose them to convicted defendants’ resentment and allegations of perjury, thereby diverting their energy and attention from “the pressing duty of enforcing the criminal law.”

Mr. Freeman, along with **Sun Choy** and **Jake Daly**, also authored the merits brief in the U.S. Supreme Court. The case is *Rehberg v. Paulk*, No. 10-788, 2012 WL 1069091 (U.S. Apr. 2, 2012).

**Edward R. Stabell, III** and **Britton G. White** of *Brennan Harris & Rominger* in Savannah recently obtained a favorable ruling from the Georgia Court of Appeals for their clients in a premises liability case. On January 12, 2012, the Court of Appeals issued an opinion reversing the trial court’s order denying summary judgment to a premises owner on the grounds that there was no evidence of the owner’s actual or constructive knowledge of the alleged defect. The plaintiff had alleged that an awning on the house was negligently attached, and he was injured while he was working on the roof when the awning collapsed. The appellate court found that the owner’s lack of actual or constructive knowledge precluded recovery by the plaintiff, and it was error for the trial court to deny summary judgment to the defendant.

**Michael Goldman** of *Hawkins Parnell Thackston & Young* in Atlanta received a defense verdict in a product liability case in Rockingham County, New Hampshire. It was a hard fought and expert-intensive case involving a 49-year-old who caught her ankle-length poly-cotton chenille robe on fire. The plaintiff contended the robe was defective for several reasons including fabric selection, garment design, ease of ignition, excessive rate of flame spread, difficulty of extinguishment and extrication and lack of flammability warnings. The injuries

were severe and graphic. The plaintiff, a local schoolteacher, was very sympathetic with a very appealing family story. She sustained both 3rd and 4th degree burns to more than 50 percent of her body, including her face, head, chest, arms, hands and back. Plaintiff was treated by prominent burn surgeons at Massachusetts General Hospital who offered compelling testimony on her behalf. In closing arguments, Plaintiff’s attorney asked the jury to render a \$49 million verdict.

The defense presented expert testimony showing that the robe was designed reasonably. In particular, the defense showed that it ignited and burned in a manner generally consistent with other raised fiber surface garments, and that it met the requirements of the Federal Standard of flammability for general wearing apparel.

Plaintiffs’ experts were highly critical of that Standard and claimed that it was old, outdated, and unrealistic, testing only small strips of fabrics and, therefore, it did not predict the hazards of full cover garments. Plaintiff’s counsel claimed it was unreasonable for a manufacturer of robes of this type to rely on the “outdated” Standard. The defense showed that the clothing flammability Standard was not intended to prevent the possibility of clothing fires, but that it was intended to assure that “dangerously flammable” garments were kept from the market. Thus, the defense showed its compliance with the Standard meant the garment was reasonably safe. Moreover, the defense showed that clothing fire warning tags were not in general use at the time the garment was made in 1995, and that even today they are generally not found in adult apparel because the public already recognizes the need to avoid clothing contact with high heat sources. Therefore, the jury rejected the testimony of the plaintiff’s warnings expert who claimed that the “specific and unique” fire hazards of this robe required a permanent and conspicuous warning label. After seven hours of deliberations, the jury returned a complete defense verdict.

**John E. Hall, Jr.** of *Hall Booth Smith & Slover’s* Atlanta office, along with partners from their Charleston, South Carolina office, obtained a

favorable verdict on behalf of the University of Miami Medical School and five physician defendants in a difficult six-week trial that ended on Friday, January 13, 2012.

The jury returned a defense verdict for four of the defendant physicians and a plaintiff’s verdict as to the University of Miami School of Medicine and one of the physicians. However the overall verdict, as described below, was a win for the defense.

The case involved a little girl who contracted a pneumococcal infection and, because her spleen had been removed shortly after birth, she was unable to fight off the infection, which ultimately resulted in the amputation of parts of all four limbs. There was a comparative negligence claim against the mother.

Four of the physicians – two pediatricians, a neurologist, and a hematologist – were accused of failing to diagnose a protein S deficiency, which allegedly caused the limb amputation. The jury returned a defense verdict for all four of these physicians.

The second aspect of the case involved the pneumococcal infection contracted by plaintiff just short of her third birthday. She had previously been vaccinated against such an infection; however, that vaccination was out of date by five months. The defendants admitted the vaccine had expired five months prior to administration and the court granted summary judgment on that issue.

Plaintiff’s counsel asked the jury to award \$70 million at closing and the lowest pre-verdict demand was in excess of \$20 million. After almost two days of deliberations, the jury found the University and one physician defendant 60 percent responsible for a \$12.6 million verdict and the mother 40 percent negligent for failing to give a penicillin prophylaxis that was prescribed in addition to the vaccination.

Interestingly, the plaintiff submitted evidence of a \$19 million life care plan. The defendants countered with evidence that the future life care plan was between \$2 and \$3.3 million. The jury awarded \$2.7 million on the future life care plan.

Pending post trial motions, including a partial set-off of \$3 million in settlements by other parties, the net verdict to the defendants should be less than \$6 million. ❖

# In Memoriam: Richard A. Rominger

## *GDLA Past President*

By Edward R. Stabell, III  
*Brennan Harris & Rominger*  
*Savannah*

On December 24, 2011, former Georgia Defense Lawyers Association President, Richard A. "Rick" Rominger, passed after a several year struggle with illness.

Rick had a distinguished career as a insurance defense and admiralty lawyer in Savannah, Georgia. He was a graduate of Spring Hill College, Mobile, Alabama, and the Emory University School of Law, where he was a Member of the *Emory Law Review*.

He started the practice of law in Savannah in 1971 and was a founding partner of the Savannah law firm of Brennan Harris & Rominger, and materially assisted in helping the firm grow and flourish and attain the highest rating available from Martindale-Hubbell Law Directory (AV) and being listed in the Martindale-Hubbell Registry of Preeminent Lawyers and the A.M. Best's Directory of Recommended Insurance Attorneys.

Rick was a member of the State Bar of Georgia and its Insurance Law Section; The Florida Bar; the Savannah Bar Association; the Association of Defense Trial Lawyers; the Georgia Defense Lawyers Association, where in addition to serving as President, he also served as Secretary-Treasurer; the Maritime Law Association of the United States; and the Southeastern Admiralty Law Institute, where he served as chairman.

Rick has served as a member of the Board of Governors of the State Bar of Georgia, as well as a member of the State Bar's then-Younger Lawyers Section Executive Council. He also served on the Board of Trustees of the Institute of Continuing Legal Education in Georgia. He was listed in "The



Best Lawyers In America" and was recognized as a Georgia Super Lawyer. Rick was also a member and Past President of the Propeller Club of Savannah.

Rick authored a number of articles, including, "Duty to Settle and Insurance Counsel's Ethical Dilemmas," *Georgia State Bar Journal* (November 1989); "Update on Interpleader and Multiple Claims," *Georgia Defense Lawyers Association Journal* (1992); "1993 Insurance Case Law in Georgia," *Georgia Defense Lawyers Association Journal* (1994) and "Settling Personal Injury Cases: Those Pesky Subrogation Claims," *Georgia Defense Lawyers Association Journal* (1995).

He also presented seminar programs on insurance law updates, the duty to settle, wrongful arrest, admiralty rules, and malicious prosecution, among other topics.

Rick's career spanned over 30 years, and he successfully handled insurance defense cases and trials in state and federal courts throughout Southeast and Middle Georgia. He also has had admiralty, business, commercial and miscellaneous cases and trials in the state and federal courts of Georgia and South Carolina.

He was admitted to practice in the state trial courts of Georgia, the Court of Appeals of Georgia, the Supreme Court of Georgia, the United States District Courts for the Southern District and Middle District of Georgia, the United States Court of Appeals for the Eleventh Circuit, and the Supreme Court of the United States.

Beyond his legal career, to those who were blessed to know him, Rick was an extremely decent, witty and loyal colleague and friend. He will be much missed. ❖

# Welcome New GDLA Members

The following were admitted to membership at the Board of Directors' Winter and Spring Meetings. As part of our RecruitOne membership drive, we are pleased to recognize the GDLA members who were listed as a referring party on a prospective member's application. **New GDLA members' names are in bold**; recruiting *GDLA members' names are in italics*:

**Todd Alley**

Hawkins Parnell  
Thackston & Young, Atlanta  
*Jason L. Groch, Hawkins Parnell  
Thackston & Young, Atlanta*

**Joseph J. Angersola**

Swift Currie McGhee  
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**Jeffrey J. Costolnick**

Drew Eckl & Farnham, Atlanta

**Sean B. Cox**

Goodman McGuffey  
Lindsey & Johnson, Atlanta  
*Robert A. Lusk, Goodman  
McGuffey Lindsey & Johnson,  
Atlanta*

**Christina Cribbs**

Levy & Pruett, Atlanta  
*Susan J. Levy, Levy & Pruett, Atlanta*

**Brigitte Eckerson**

Mozley Finlayson & Loggins, Atlanta  
*John L. McKinley, Jr., Mozley  
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**Elizabeth Edwards**

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Williams, Atlanta  
*Robert P. "Robin" Hein, Robert P.  
Hein, P.C., Atlanta*

**Michael Eshman**

Drew Eckl & Farnham, Atlanta  
*Hall F. McKinley, III, Drew  
Eckl & Farnham, Atlanta*

**Scott A. Farrow**

Troutman Sanders, Atlanta  
*Jerry A. Buchanan, Buchanan &  
Land, Columbus*

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Owen Gleaton Egan Jones &  
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Groover, Macon  
*Duke R. Groover, James Bates  
Brannan Groover, Macon*

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Balch & Bingham, Atlanta  
*James D. "Dart" Meadows,  
Balch & Bingham, Atlanta*

**Edwin Lee Hamilton**

Goodman McGuffey  
Lindsey & Johnson, Savannah  
*Peter D. Muller, Goodman  
McGuffey Lindsey & Johnson,  
Savannah*

**David Hayes**

Owen Gleaton Egan  
Jones & Sweeney, Atlanta  
*Noelle A. Abastillas, Owen Gleaton  
Egan Jones & Sweeney, Atlanta*

**Steven A. Herman**

Dennis Corey Porter  
& Smith, Atlanta  
*Alan F. Herman, Hawkins Parnell  
Thackston & Young, Atlanta*

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# Court of Appeals Rules Insurer Can Create Safe Harbor to Avoid Bad Faith Claim Where Plaintiff Unreasonably Refuses to Satisfy Hospital Liens

By Matthew P. Stone  
*Freeman Mathis & Gary, Atlanta*

In *Southern General Insurance Co. v. Wellstar Health Systems, Inc.*, Case No. A11A2065, — Ga. App. —, 2012 WL 917604 (March 20, 2012), the Georgia Court of Appeals considered the dilemma an insurer faces when a plaintiff makes a time-limited settlement demand to try to set up a bad faith claim while also unreasonably refusing to assure satisfaction of hospital liens as a condition of the settlement. The Court ruled that an insurer can create a “safe harbor” for itself in this situation.

Southern General issued an automobile liability policy with an applicable limit of \$25,000. In September 2007, its insured struck and injured Norman Gray, who was treated at Wellstar Hospital and incurred \$22,000 in medical expenses. In October 2007, Wellstar notified Gray and Southern General of its intent to file liens; a month later, it filed liens for the total charges.

After receiving notice but before Wellstar filed its liens, Southern General wrote to Gray’s attorney, offering to settle for its policy limits and to send a check and general release once Gray confirmed that the liens would be satisfied or that he would indemnify Southern General’s insured. In response, Gray’s attorney sent Southern General a letter demanding payment of its policy limits within five days. The letter also cited *Frickey v. Jones*, 280 Ga. 573 (2006), in which the Supreme Court held that no binding settlement agreement was formed where an insurer’s response to a settlement demand contained an additional term requiring resolution of liens.

Southern General responded the next day, offering to send the

If an insurer makes a timely and reasonable offer or counteroffer of this sort but the plaintiff unreasonably refuses to give the requested assurance, **the insurer will then be under no obligation to tender the policy limits directly to the plaintiff.**

\$25,000 settlement check upon receipt of a signed release that included a representation that no liens existed and an agreement to indemnify. Gray’s attorney responded that Gray would sign a general release without an agreement to indemnify. Southern General then tendered its \$25,000 policy limits to Gray, and Gray provided Southern General a signed release that did not include an indemnity provision.

Thereafter, Wellstar sued Southern General, alleging that it had ignored Wellstar’s liens and paid Gray in violation of Georgia’s hospital lien statutes, O.C.G.A. §§ 44-14-470 *et seq.* Southern General moved for summary judgment, arguing that had to accept Gray’s time-limited demand to avoid the result in *Frickey*. Southern General further argued that it had to accept the settlement demand to avoid a bad faith claim under *Southern General Insurance Co. v. Holt*, 262 Ga. 267 (1992), which holds that an insurer may be found to have acted in bad faith for failing to settle where liability is clear and the claimant’s special damages exceed the policy limits. Southern General contended that *Frickey* and *Holt* are irreconcilable

with the hospital-lien statutes. The trial court denied the motion for summary judgment, and Southern General appealed.

On appeal, Southern General argued that *Frickey* and *Holt*, when coupled with the lien statutes, “impermissibly set up an insurance company ‘to pay in excess of its contractually agreed policy limits because it cannot both unconditionally accept a time limit demand, and satisfy the statutorily enforced hospital lien.’” The Court of Appeals rejected this argument, however, and affirmed the denial of summary judgment. The Court acknowledged that an insurer faced with a time-limited demand must accord its insured “the same faithful consideration it gives its own interest” and may be held liable for a bad faith failure to settle. *Wellstar*, 2012 WL 917604 at \*3. The issue, however, is whether the insurer acted *unreasonably* in rejecting a time-limited settlement demand. Furthermore, an insurer cannot ignore a properly filed hospital lien. Here, Southern General made the wrong choice when it acceded to Gray’s unreasonable demand for an unconditional settlement and paid him the policy limits without taking measures to

ensure satisfaction of the liens.

The Court further ruled, however, that an insurance company can create a "safe harbor" from liability under *Holt* and its progeny when "(1) the insurer promptly acts to settle a case involving clear liability and special damages in excess of the applicable policy limits, and (2) the sole reason for the parties' inability to reach a settlement is the plaintiff's unreasonable refusal to assure the satisfaction of any outstanding hospital liens." *Id.* at \*4.

Southern General could have created a safe harbor by verifying the validity of the liens, making payment directly to Wellstar, and then paying the remainder of its policy limits to Gray. *Id.* at \*6. An insurer can also establish a safe harbor by timely offering to tender its policy limits "subject to a reasonably and narrowly tailored provision assuring that the plaintiff will satisfy any hospital liens from the proceeds of such settlement payment." *Id.* at \*4.

The Court suggested that the insurance company could request that plaintiff's counsel or a third

party hold a portion of the settlement proceeds sufficient to cover the hospital lien in escrow while the plaintiff investigates the lien's validity and negotiates with the hospital. After resolution of the lien, the held-back settlement funds would be disbursed to the plaintiff.

If an insurer makes a timely and reasonable offer or counteroffer of this sort but the plaintiff unreasonably refuses to give the requested assurance, the insurer will then be under no obligation to tender the policy limits directly to the plaintiff. Instead, the insurer will be free "to simply verify the validity of any liens, make payment directly to the hospital, and then disburse any remaining funds to the plaintiff." *Id.* In that situation, an insurer would not be subject to liability for bad faith failure to settle:

[W]hen the failure to settle a *Holt*-scenario claim is based solely on the plaintiff's unreasonable refusal to agree to a reasonably and narrowly tailored provision assuring that any hospital liens will be satis-

fied from the settlement proceeds, that cannot, as a matter of law, constitute a bad faith failure to settle when the insurer is merely attempting to comply with its legal obligations.

*Id.* at \*5 (emphasis in original).

The Court of Appeals warned insurers, however, that making payment directly to a hospital *before* engaging in good faith settlement negotiations with a plaintiff could expose an insurer to liability under *Holt* and its progeny. *Id.* at \*4 n.21.

The Court of Appeals' decision in *Wellstar* is likely not the last word on this issue, as the Georgia Supreme Court has regularly weighed-in on post-*Holt* and *Frickey* cases.



*Matthew P. Stone is a partner at Freeman Mathis & Gary in Atlanta. He is chair of the GDLA's Trucking Substantive Law Committee.*

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# If You Do Nothing Else Right on Appeal, Properly Prepare the Record

By Matthew G. McLaughlin  
and Todd C. Alley  
*Hawkins Parnell Thackston &  
Young, Atlanta*

If you do nothing else right when you appeal a case, promptly and properly prepare the record from the court below. Without that, you are in the proverbial canoe, the Court of Appeals is the approaching rapids, and the lack of a perfected record would be your paddles floating away ahead of you.

John walked down the hallway and into his supervising partner's office. He had been called there to discuss the appeal he had handled following a disastrous plaintiff's verdict in a recent trial. He had *nailed* the appellate brief – detailed the salient facts, marshaled the pertinent legal research, and skillfully crafted the persuasive legal arguments. Finally, he would be getting the much-awaited praise he deserved for the countless hours he had spent toiling on the brief.

Rather than smiles and a hearty “nice job,” Sue gave him a sour look and a curt, “Have a seat, John.” This did not seem good. “We received the opinion from the Court of Appeals. The judgment of the trial court was affirmed because,” she looked down at the paper in her hand, “quote, ‘Appellant failed to properly perfect the record on appeal,’ end quote.”

After an initial moment of shock, a light bulb came on in John's head. “The Court is wrong!” He was winding up to knock this one out of the ballpark. “We made contemporaneous objections at trial, made offers of proof when needed, got all the trial court's rulings on the record, and made excep-

tions to the court's rulings. We did everything right.” Satisfied, John leaned back in the chair.

The sour look on Sue's countenance turned decidedly dour. “The problem isn't that we failed to properly preserve our issues for appeal, the problem is that we failed to properly perfect the *record* on appeal.” She paused to let the difference sink in, but seeing a perplexed look on John's face, continued, “All our great work objecting to the trial court's erroneous rulings, preserving the objections, and making the record – and all your dynamite legal research and writing – is for naught when we don't give the Court of Appeals the record it needs to reverse the trial court's decisions.”

This seems elementary, but it may be easy to forget when you are elbow-deep in legal research, assigning tasks to paralegals and associates, and deftly spinning your law-review quality facts and arguments like so much straw into gold. Among all that other work, you must remember that every motion, objection, ruling, testimony, deposition, or transcript of proceedings that you intend to question on appeal *must* be made a part of the record on appeal. If you are the appellant, you have the duty to have the transcripts of all necessary proceedings prepared and made part of the record on appeal. O.C.G.A. § 5-6-41(c). Omitting transcripts of evidentiary hearings, oral arguments on motions, or even deposition testimony from the record on appeal can be fatal to your cause.

The good news is that the Court of Appeals will not dismiss your appeal outright for failure to perfect the record. O.C.G.A. § 5-6-48(c). The trial court has the authority to grant an extension of time to cure omissions in the record, and the

Court of Appeals may grant a motion to remand for supplementation of the record if an omission is discovered after the record has already been transmitted to it. A trial court can dismiss an appeal, however, where an appellant has unreasonably delayed filing a transcript or other materials necessary for the appeal.

If you do make it past the trial court (and the watchful eye of the appellee) without transmitting a proper record, the Court of Appeals may simply ignore your million-dollar arguments, accept the factual findings and the judgment of the trial court, and (typically) deliver a not-so-subtle open-handed-slap to you for neglecting your duties regarding the record. Recent cases have illustrated this gaping pitfall:

*Farmer v. Branch Banking & Trust Co.*, 312 Ga. App. 519 (2011): Appellants contended that the trial court had the appellee bank's applications to confirm the foreclosure sales of two pieces of real property. They raised various arguments regarding the evidence and testimony presented at the confirmation hearing, yet failed to include a transcript of the confirmation hearing in the record. Consequently, the Court of Appeals affirmed because the appellants had “not met their burden as appellants of demonstrating error by the record.”

*Terry v. Burley*, 312 Ga. App. 860 (2011): Appellant sought reversal of a judgment entered following a bench trial, claiming the trial court erred in admitting improper and prejudicial character evidence. He failed to have the trial transcribed, however, and thus could not meet his burden of demonstrating error. In the absence of a transcript to review for error, the Court of Appeals had to assume that the trial court's rulings were appropriate.

*Ellington v. Gallery Condominium Ass'n*, 313 Ga. App. 424 (2011): In this appeal from a judgment entered in favor of a condominium association in its lawsuit against an owner delinquent in paying her assessments, the appellant challenged, *inter alia*, the calculations underlying certain damages awarded to the association and the reasonableness of the award of attorneys' fees to the association. The Court of Appeals found, however, that it could not review these two issues without the transcript of the summary-judgment hearing, which appellant had failed to include in the appellate record. Therefore, the Court of Appeals had to assume that the trial court's rulings on these two issues were correct.

"So..." John drew out as the impact of his error dawned on him, "we even have to make sure transcripts of oral arguments before the trial court, like summary judgment arguments, and all orders of the trial court make it to the Court of Appeals?"

"Yes," Sue responded, "we are responsible for making sure that the appellate record includes everything that the Court of Appeals needs to review the issues we raise on appeal. The trial court clerk has the responsibility of preparing the record, but, as the appellant, we have the responsibility of making sure that nothing the Court of Appeals needs to consider our arguments has been omitted from the record. This is of particular importance when dealing with large county court clerks' offices, where documents and pieces of evidence can easily get lost in the shuffle even though they are listed on the docket sheet."

The appellant's responsibility to ensure that the record includes

all the materials necessary for review is illustrated by *Rois-Mendez v. Stamps*, 312 Ga. App. 136 (2011): The appellant's notice of appeal designated the entire record to be included in the record on appeal, including the trial transcripts (other than the *voir dire* proceedings) and the exhibits. The exhibits were omitted from the record, however, and so the *appellees* moved the Court of Appeals to remand the case to the trial court for completion of the record. The Court of Appeals granted this motion and remanded



the case on September 2, 2009. Although the specific facts of what occurred next were subsequently disputed, the Court of Appeals found that one overriding material fact was clear even from appellant's account: the appellant did not timely act to have the exhibits included in the record on remand. The *appellees* therefore moved to the trial court to dismiss the appeal, and the court heard this motion on November 12, 2009. Only sometime thereafter did the appellant finally cause the exhibits to be filed. The appellant's effort to cure the problem was too late to satisfy the trial court, however, and it therefore dismissed the appeal pursuant to O.C.G.A. § 5-6-48(c) due to the appellant's unreasonable and inexcusable delay. The Court of Appeals concluded that the trial court had not abused its discretion in ordering the dismissal.

"Well surely there are provisions in Georgia law that allow us to request additional time to perfect the record," John asked, grasping at straws now. "What if a party discovers that a hear-

ing has not been transcribed? Can't he get more time to obtain the transcript and file it?"

"Absolutely, but that request must be made within the initial 30 days allowed for filing transcripts following the notice of appeal. That's what O.C.G.A. § 5-6-39(d) tells us."

The hazards of not timely moving for an extension of time to prepare the record are illustrated by *ACCC Insurance Co. v. Pizza Hut of America, Inc.*, Case No. A111905, — Ga. App. —, 2012 WL 414466 (Feb. 10, 2012): On October 10, 2008, the appellant filed a timely notice of appeal from an order entering summary judgment in favor of the *appellee*. Issuance of the estimated bill of costs for preparation of the record was

delayed, allegedly because the civil appeals clerk had been on maternity leave. After receiving the bill of costs on February 10, 2009, the appellant's lawyer reviewed it and realized that no transcript of the summary-judgment hearing had been filed. Appellant's lawyer then contacted the court reporter to request that she prepare the transcript on an expedited basis, but she was unable to do so because of other pressing work. Appellant filed a motion on February 25, 2009, for an extension of time to April 11, 2009, to file the transcript — which was granted — and subsequently filed the transcript on April 8, 2009. In the meantime, however, the *appellees* moved to dismiss the appeal based on appellant's unreasonable delay in filing the transcript. The trial court granted this motion, and the Court of Appeals affirmed. Although the trial court had initially entered an order granting appellant's motion for extension of time, the Court of Appeals ruled that this order was "nugatory and void" because the motion was untimely. The Court of Appeals also

*Continued on page 54*

# Gauging the Impact of Cobb County's \$40 Million Trucking Verdict

By Matthew P. Stone  
*Freeman Mathis & Gary, Atlanta*

When a Cobb County jury returned a \$40 million verdict in *Foster v. Landstar Ranger, Inc., et al.*, in September 2011, it sent a shockwave through the trucking industry and the legal community. Injury and death cases against trucking companies have been a fertile area for years, and big verdicts against them are nothing new. Nevertheless, the verdict was unusual for Cobb County, which is one of the most conservative venues in the state, if not the country.

This article considers *Foster* alongside some other recent Georgia verdicts in injury and death cases against trucking companies and offers some thoughts on how the *Foster* case may impact similar cases.

## The *Foster* Case

In September 2011, a Cobb County jury returned a \$40 million verdict in favor of Theresa Foster. She was riding in the back seat of her husband's pick-up truck when a tractor-trailer ran a stop sign and struck their vehicle. The crash killed her husband and his front seat passenger. Mrs. Foster sustained fractures to her sternum, ribs, and vertebrae. The tractor-trailer truck driver, who was convicted of vehicular homicide before the civil case went to trial, had no explanation for why he failed to stop despite having good visibility and the presence of advance warning signs and rumble strips. The trucking company admitted liability before trial, which lasted two weeks.

After five hours of deliberation, the jury returned a verdict, awarding \$11.2 million to Mrs. Foster for her own physical injuries, pain, and suffering and the emotional injury of being present and watching as her husband died; that sum included her med-



**Unless it is overturned on appeal, the \$40 million verdict in *Foster* will be the largest-ever net verdict against a trucking company in Georgia.**

ical expenses of \$22,000 and smaller amounts for property damage and funeral and burial expenses. The jury awarded \$28.7 million for the full value of Mr. Foster's life and \$265,000 for his pre-impact fright, shock, and terror.

Mr. Foster was 45 years old at the time of his death. He had been in business for 20 years and had earned an average of \$470,000 per year in the five years before his death. Witnesses for the plaintiff testified that Mr. Foster's income would have increased to \$1.8 million per year based on a new business venture that came to fruition two years after his death. At trial, plaintiff presented future lost income projections of \$15 million to \$42 million.

According to plaintiff's counsel, defendants did not accept a \$10 million offer of judgment made at the outset of the case, and he has filed a motion to recover attorney's fees of \$12 million (his one-third contingency fee). Plaintiff's counsel also reported that defendants did not accept an offer to settle for \$21 million that expired shortly after closing arguments and that plaintiff rejected a subsequent high-low offer with \$21 million as the "high." Defendants' insurance policies have limits totaling \$275 million.

According to defendants' counsel, his clients will appeal the verdict, arguing that Georgia law precludes (as too speculative) evidence of projected future earnings based on a business venture that

did not exist at the time of the crash. Although the economic component (lost income) might seem to be the obvious basis for the eight-figure award, that may be impossible to prove because the jury did not break down the wrongful death verdict.

### **Other Recent Georgia Verdicts**

A review of searchable databases for the period from January 1, 2008, to October 31, 2011, reveals 34 jury verdicts in Georgia for injury and death cases involving large truck crashes — although there are, no doubt, numerous unreported verdicts and hundreds of reported and unreported settlements in these types of cases.

Unless it is overturned on appeal, the \$40 million verdict in *Foster* will be the largest-ever net verdict against a trucking company in Georgia. There is only one Georgia case in which a jury returned a larger verdict against a trucking company: in May 2008, a Fulton County jury returned a \$54.42 million verdict. That award included \$44 million in punitive damages, however, and those damages were subsequently reduced to the statutory maximum of \$250,000, yielding a net verdict of \$10.67 million.

Of the 34 reported verdicts mentioned above, six were defense verdicts; 14 were verdicts below \$1 million; eight were verdicts between \$1 million and \$3 million; two were verdicts between \$5 million and \$8 million; three were verdicts between \$10 million and \$20.2 million; and one — the *Foster* verdict — was \$40 million.

Of the 34 cases, seven involved fatalities. Not surprisingly, those cases accounted for most of the largest verdicts, ranging from \$1.27 million on the low end to the \$40 million *Foster* verdict on the high end. The other 27 cases, which involved non-fatal injuries of varying severity, had verdicts ranging from \$0 (*i.e.*, defense verdict) to \$11.5 million.

Using the *Foster* case as the high verdict, the average jury ver-

dict for all cases is \$3.36 million. Excluding the *Foster* case and one defense verdict, the average drops to \$2.32 million. When the cases are separated into fatal and non-fatal categories, however, the average verdicts are very different: the average verdict for death cases is \$10.94 million, and the average verdict for non-fatal cases is \$1.40 million. Even throwing out the high and low — as statisticians often do — does not yield significant changes in the averages: \$9.26 million for death cases and \$1.05 million for non-fatal cases.

### **Thoughts on *Foster's* Impact**

Before *Foster*, no Cobb County jury had ever returned a verdict of \$1 million or more against a trucking company. Even if the scope of the research is broadened to include earlier cases and motor vehicle accident cases that do not involve large trucks, Cobb County had never had a prior eight-figure verdict (and the few verdicts in excess of \$2 million involved product liability claims against an automobile manufacturer).

When confronted with *Foster* and other recent verdicts in historically conservative venues, defendants and their insurers should expect plaintiffs' lawyers to use those cases to argue for more lucrative settlements. In evaluating a case for settlement or trial, however, you must look beyond the surface — the raw verdicts — in order to distinguish your case. To that end, *Foster* can and should be viewed as yielding two verdicts: a \$29 million verdict for Mr. Foster's death and an \$11 million verdict for Mrs. Foster's injuries. Then, one has to ask if either would exist without the other.

Looking at the verdict for Mr. Foster's death and using his actual earnings history of \$470,000 per year — instead of the \$1.8 million per year based on a business deal that came to be after his death — the economic component of that claim yielded an eight-figure number that, it seems, could have occurred in almost any jurisdiction, with or without Mrs. Foster's

claim for her own injuries.

The more disquieting portion of the verdict is the \$11 million award for Mrs. Foster's physical injuries — fractures to her sternum, ribs, and vertebrae that resulted in medical expenses of only \$22,000 — and the emotional injury of being in her husband's presence when he died. That verdict, however, would likely not have occurred without the wrongful death claim, even in the most liberal of jurisdictions.

For businesses and litigants that have relied on Cobb County as a conservative jurisdiction, it is not yet time to look elsewhere. While Cobb County's population increased by 13.2 percent between 2000 and 2010 (about 5 percent less than the state as a whole), it has not experienced significant changes from an economic or demographic standpoint.

In fact, the plaintiff's attorney in *Foster* commented that he was glad to have the case in Cobb County because he believed jurors there would understand and appreciate Mr. Foster's development of a successful business and the value of his effort.

### **Conclusion**

As demonstrated above, the \$40 million *Foster* verdict must be viewed in context. When the case-specific factors are taken into account, the verdict can be understood as the atypical result of an atypical case, rather than evidence of a new trend toward higher verdicts in trucking cases in one of the state's most conservative venues. ❖



*Matthew P. Stone is a partner at Freeman Mathis & Gary in Atlanta where he heads the firm's Transportation Practice Group. He chairs the GDLA's Trucking Substantive Law Committee.*

# Improving Mediation Quality

By F. Scott Young

*BAY Mediaton & Arbitration Services*

In 2006, the American Bar Association Section of Dispute Resolution formed a task force to address issues of quality in mediation. The Section of Dispute Resolution had previously considered whether a national mediation credentialing program would be feasible and had determined that it would not. Therefore, the Section of Dispute Resolution instead formed the Task Force on Improving Mediation Quality to identify the factors that define high-quality mediation practice.

Surprisingly, many lawyers — and even mediators — are not aware of this study or its findings. The 48-page final report, which was issued in February of 2008, can be found at [www.american-bar.org](http://www.american-bar.org). (You can also find the report by simply entering “2008 Task Force on Improving Mediation Quality” into any search engine.) This article highlights some of the study’s key findings, with a few of my own comments in brackets.

The study’s methodology included discussions with organized focus groups across the country, written questionnaires, and telephone interviews. The focus groups included outside counsel, in-house counsel, risk managers, human resource managers, and insurance industry managers. (Experienced mediators also participated in later focus group discussions.)

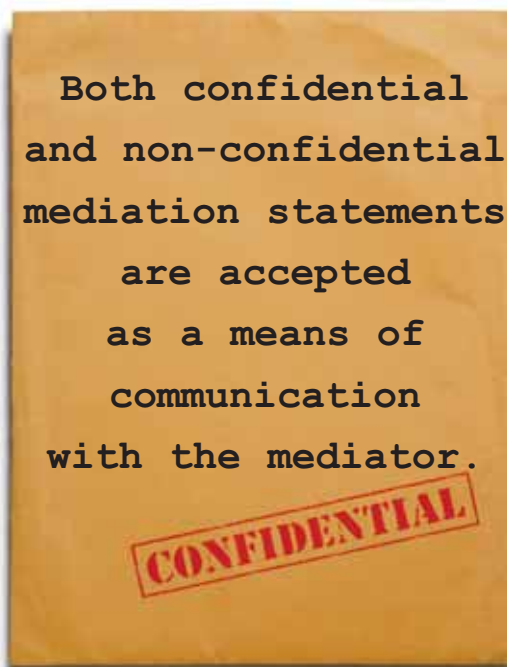
Questionnaire respondents included both mediation users and mediators, and 94 percent of the respondents were lawyers. The telephone interviewees were persons who had been parties at mediations.

Participants in the study consistently identified the following four issues as important to mediation quality:

1. Preparation for mediation by the mediator, parties, and counsel;
2. Case-by-case customization of the mediation process;
3. Analytical assistance from the mediator; and
4. Persistence by the mediator.

## **Preparation by Mediator, Counsel, and Parties**

Participants in the study reported that preparation by the mediator, counsel, and the parties is an important factor in achieving a quality mediation experience.



Many focus-group participants liked pre-mediation discussions with the mediator, as the discussions often prompted the attorneys to prepare themselves and their clients for the mediation process. Although mediator preparation was among the most important factors, there was no consensus on the preferred method. If a mediator is provided information by one or more of the parties, however, study participants expected the mediator to have a good and thorough work-

ing knowledge of that material. Both confidential and non-confidential mediation statements are accepted as means of communication with the mediator. Among the survey respondents, more than 96 percent thought that pre-mediation preparation by the mediator was important, very important, or essential, while less than 4 percent thought it was only somewhat important. Most survey respondents also believed that private calls and conference calls were appropriate means of communication with the mediator.

Participants in the study expected mediators to encourage a constructive approach to mediation and to discuss the procedural aspects of the mediation. [In my experience as a mediator, pre-mediation discussions with the attorneys are almost always positive as they allow me to establish the tone of the mediation; to determine whether or not there are substantial obstacles to mediation; and to help plan the process itself (*e.g.*, to determine whether or not a joint opening statement is appropriate or helpful to the process).]

According to the study participants, lawyers also need to prepare for the mediation and to adequately prepare their clients — whether individual parties or insurance carriers — so that the clients have realistic expectations of the mediation and the mediation process. Finally, participants indicated that the mediator needs to recognize the fact that there are multiple motivating factors for mediation. These include being heard, venting, closure, preserving relationships, and promoting communication. [Quite often litigants, intentionally or unintentionally, use the mediation process as a chance to have their “day in court.” A mediator’s skill in recognizing a party’s need to be heard and allowing that to happen can be the key to a successful mediation.]

*Continued on page 18*

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As stated in the report, moreover, good preparation leads to a better outcome: “In general, parties who are better prepared for mediation will logically settle more favorably than those worse prepared. Parties and counsel thus are generally well advised to prepare to the fullest extent consistent with their perception of the value of the case.” ABA Section of Dispute Resolution, *Final Report of Task Force on Improving Mediation Quality*, p. 11 (2008).

## Case by Case Customization of the Mediation Process

While not all participants agreed on the best time to mediate a case, they generally agreed that the appropriate timing of mediation is case specific. The most popular time to mediate was generally after critical discovery has been completed but before full completion of discovery. Mediators were twice as likely as lawyers to indicate that pre-suit mediation is appropriate.

The respondents had varying opinions as to the usefulness of opening statements. A substantial number of focus-group participants believed that opening statements are a waste of time — or may even be counterproductive if they become inflammatory, as this tends to polarize and entrench parties’ positions. Others believed that opening statements can be helpful because they allow the parties to speak directly to one another and to feel like a part of the process. [Tone and tenor of the opening statement can have serious consequences on the outcome of a mediation. For example, in high-conflict or emotionally charged cases involving angry clients, face-to-face confrontations during opening statements can generate more hostility and can impede the settlement process.]

It is important that lawyers involve the mediator in pre-mediation discussions concerning the

tone of the dispute and that they be open to suggestions regarding the customization of the process for their particular case.]

## Analytical Techniques Used by the Mediator

A substantial majority of the participants believed that analytical input by the mediator is appropriate. Ninety-five percent of survey participants rated making suggestions as an important, very important, or essential characteristic of a good mediator, and 70 percent rated giving opinions as important, very important, or essential. Most participants considered the following analytical techniques to be helpful in half or more of their cases: asking pointed questions that raised issues; giving analysis of the case (strengths and weaknesses); making predictions about likely court results; suggesting possible ways to resolve issues; recommending a specific settlement; and applying some pressure to accept a specific solution. Participants cited various factors that may affect their views on the appropriateness of a mediator providing an assessment of a case’s strengths and weaknesses, including the extent of the mediator’s knowledge and expertise in the area, general confidence in the mediator’s assessment, whether the assessment was requested, and whether the mediator seemed impartial.

## Persistence by the Mediator

The last factor that study participants consistently identified as important to mediation quality is persistence on the part of the mediator. The task force survey revealed that over 98 percent of the users thought persistence to be an important, very important, or essential quality in a mediator, and 93 percent considered patience to be important, very important, or essential. Participants expressed dissatisfaction with mediators who

throw in the towel when a mediation becomes difficult, and preferred mediators who stay consistently engaged in the process and are willing to help the parties resolve their case.

Persistence of the mediator is also an important factor after an unsuccessful mediation. Ninety-three percent of mediation users thought that the mediator should follow up with the parties if a mediation ends at an impasse but with some potential for reaching a settlement. Eighty-two percent of mediation users thought that exerting some pressure was an important, very important, or essential trait of an effective mediator — though mediators must be careful not to cross the line to coercion and intimidation. Pressure encouraged the parties to continue to work hard and be creative in order to achieve the desired outcome.

## Conclusion

I encourage each and every one of you to take the time to read the Final Report of the Task Force on Improving Mediation Quality. It is filled with insightful information that can help you better prepare for your next mediation. The report will also show you the importance of selecting a mediator who insists on preparation, is willing to customize the process to your case, will provide analytical assistance, and will be persistent in helping the parties to resolve their dispute. ❖



*F. Scott Young has been a mediator and arbitrator for 10 years. He is a member of The Georgia Academy of Mediators & Arbitrators (GAMA) and The National Academy of Distinguished Neutrals (NADN). He is a founder of BAY Mediation & Arbitration Services in Atlanta. BAY is a Platinum sponsor of the GDLA.*

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# The Professional Standards and Rules of Forensic Accounting

By Thomas L. Wilson, CPA, CFF, CFE  
*Matson Driscoll & Damico*

Over the past decade, forensic accounting has become the fastest area of growth for accountants. The current economic downturn has continued to increase the demand for forensic accountants and the professional services provided by this new breed of accountant. Accountants who practice in the area of financial forensics have forever changed the image of the bookkeeper with the green eyeshade.

As discussed in this article, forensic accountants are subject to the standards and rules broadly applicable to accountants, but must also follow guidelines specially tailored to their area of practice.

According to West's *Encyclopedia of American Law*, forensic accounting involves the application of accounting concepts and techniques to legal problems. Forensic accounting services differ from traditional auditing and require a combination of special skills, including accounting, auditing, finance, research, and investigation. You might think of forensic accountants as financial detectives.

For the purposes of this article, I will be discussing forensic accountants who are also licensed as Certified Public Accountants (CPA). CPAs are licensed and regulated by states. Because most states have incorporated the professional standards of the American Institute of Certified Public Accountants (AICPA) into their rules and regulations, the content of this article is limited to AICPA standards related to consulting services.

Forensic accountants often provide litigation and investigative services. Litigation services include any engagements in which the CPA provides assistance pertaining to existing or pending litigation.



Typical litigation services include quantifying economic damages, valuations, fraud examinations, bankruptcy, intellectual property, family law, personal injury, etc.

Forensic accountants who are CPAs must make sure they follow the rules, regulations, standards, and principles of the authoritative regulatory bodies. Because they follow these rules, CPAs are consistently recognized as one of the most trusted professions. This is one of the main reasons CPAs are sought after to perform forensic accounting services in the litigation environment.

In addition to the myriad of rules and standards, accounting is also known for its use of acronyms. In fact, the AICPA website has a "Glossary of Terms, Acronyms, and Abbreviations" that includes about 400 items. These terms include GAAP and GAAS, which, despite appearances, are not clothing stores or something for your car. Rather, these terms are acronyms for Generally Accepted Accounting Principles and Generally Accepted Auditing Standards.

The term GAAP is oftentimes misunderstood by those outside our profession. In simple terms, the GAAP principles are accounting standards and guidelines used to prepare and report financial statements. GAAP is a body of guidelines involving the recording of accounting transactions and full disclosure thereon. Although there are differences in calculations and reporting, the federal tax code is somewhat similar to GAAP.

To provide litigation services, CPAs must be knowledgeable of GAAP concepts. Not all GAAP concepts, however, apply in every engagement. As CPAs, we rely upon our knowledge of GAAP issues in analyzing and determining lost profits or providing other litigation services, including economic damage quantifications.

As forensic accountants, our role may not be to prepare or audit the financial statements, but understanding the basis of accounting used to prepare them is relevant to our measurements.

*Continued on page 22*



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# The Professional Standards and Rules of Forensic Accounting

Continued from page 20

The other acronym mentioned above, GAAS, refers to the standards relating to external audits performed by CPAs. As with GAAP, the forensic accountant performing litigation services needs an understanding of the GAAS standards to determine whether they are relevant to the engagement.

All CPAs performing litigation services must observe the rules published by the AICPA in the Statement on Standards for Consulting Services, No. 1 (SSCS). The SSCS requirements are:

- Professional competence to complete engagement
- Exercise due professional care
- Adequate planning and supervision
- Obtain sufficient relevant data to form reasonable basis for conclusions
- Serve the client interest while maintaining integrity and objectivity
- Understanding with client about party responsibilities
- Communication with client about conflicts of interest, reservations, and findings

The AICPA has also published Consulting Services Special Report 03-01 as a guide for litigation service practitioners. Although not authoritative, the AICPA created this report to further assist the growing practice of litigation services provided by CPAs.

CPAs providing litigation services fall into one of the following classifications:

- Expert Witness: designated to render opinion before a trier of fact
- Consultant: provides advice about a matter; does not testify
- Other: any number of roles, including special master, court-appointed expert, arbitrator, mediator, etc.

In addition to SSCS, CPAs providing forensic or litigation serv-

ices must also conform to the AICPA Code of Professional Conduct, any regulations or standards established by state boards of accountancy, and rules of any other designations the professional may carry, such as Certified Fraud Examiner (CFE), Certified Forensic Financial Analyst (CFFA), Certified Valuation Analyst (CVA), Certified Management Accountant (CMA), Accredited in Business Valuation (ABV), Certified in Financial Forensics (CFF), etc.

The AICPA Code of Professional Conduct sections that apply to litigation services include:

- Rule 102, Integrity and Objectivity
- Rule 201, General Standards
- Rule 202, Compliance with Standards
- Rule 301, Confidential Client Information
- Rule 302, Contingent Fees
- Rule 501, Acts Discreditable

In some cases, the following two sections also apply to litigation services:

- Rule 101, Independence
- Rule 203, Accounting Principles (GAAP)

The AICPA also provides practice aids for use in litigation services (including measurement of lost profits). These non-authoritative guidelines discuss the mechanics of such calculations. The practice aids assume, however, that the practitioner has the qualifications and knowledge necessary to complete the engagement.

In 2007, the AICPA also issued the Statement on Standards for Valuation Services (SSVS). Any CPA performing business valuation services must comply with this standard.

Above all else, a CPA performing litigation services must maintain integrity and objectivity. If a CPA cannot uphold these qualities,

he or she will surely lose credibility with a trier of fact.

Due to the complexity of legal matters and the potential for conflicts of interest, the AICPA has also issued Special Report 08-01, Independence and Integrity and Objectivity in Performing Forensic and Valuation Services. CPAs performing these types of services must carefully evaluate the potential engagement to confirm the absence of a conflict of interest.

In summary, a CPA must follow various accounting standards, guidelines, rules, and regulations depending on the nature of the engagement. A CPA auditor must adhere to the AICPA Code of Professional Conduct to evaluate whether financial statements are prepared in accordance with GAAP. A forensic accountant preparing an economic damage calculation must adhere to the AICPA Code of Professional Conduct and SSCS and may need to be knowledgeable of GAAP if pertinent to the engagement.

Finally, all CPAs — regardless of the type of engagement — must adhere to the AICPA Code of Professional Conduct and the rules and regulations of their states of licensure. ❖



*Tom Wilson is a Senior Partner of Matson Driscoll & Damico's office in Orlando, Florida, and is also the firm's CAT Director. Originally a part of the firm's Atlanta office, Tom is licensed in Georgia and Florida. He has conducted various seminars and training sessions on lost profits and business interruption measurement issues for lawyers and the insurance industry. Matson Driscoll & Damico is a Platinum sponsor of the GDLA.*

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# Timely Inspections Can Make All the Difference

By Peter McCawley  
*CED Investigative Technologies, Inc.*

Navy pilots have an old saying about debriefing the practice “dog-fights” they conduct to train for air-to-air combat: “First one to the blackboard wins.” The same is often true with regard to investigating slip-and-fall and trip-and-fall claims: the side whose investigation is closest to the time of the incident often has a decided advantage.

Many inspections are not timely, and the reasons for this are easy to understand. The expenses involved in bringing an engineer on site to investigate a scene, perform slip-resistance testing, and research the applicable codes, are not insignificant. Usually, two or three years elapse between the date of the incident and the time when a claim approaches litigation.

From the plaintiff’s perspective, incurring a fairly significant upfront cost is often hard to justify when the plaintiff’s attorney does not know the twists and turns a case may take or how long it will take to resolve. Risk managers, claims adjusters, and defense attorneys have similar reasons for hesitance. The incident might never result in a claim, let alone a litigated case. In addition, the case may seem cut and dried and just like a hundred before it. The defense attorney may also decide to wait to see whether the plaintiff hires an engineer.

These are all very valid issues and concerns, but there are two very powerful reasons why you may want to consider having an engineer inspect the site earlier rather than later:

1. Accuracy and credibility
2. Knowledge

For example, suppose that you are an adjuster for a retail store where a slip-and-fall incident has

occurred. A claim is brought six months later, and the claimant’s attorney hires an engineer to conduct a slip-resistance test. Eighteen months later, you decide to hire an attorney because the claim is headed toward litigation. After a couple of more months, the two of you decide that hiring an engineer to inspect the site might be a good

The more **credible** engineering report will be the one based on an inspection conducted closer in time to the incident.

idea. Which slip-resistance test is going to appear more reliable: the one conducted by your expert more than two years after the incident or the one performed by the plaintiff’s expert within months of the incident? In the year and a half between inspections, the surface may have changed in ways that impact the findings. These changes could be anything from general wear and tear (as slip-and-fall incidents usually occur in high-traffic areas) to the effects of different cleaners and finishes applied to the surface — or even complete removal or replacement of the surface. Therefore, the more credible engineering report will be the one based on an inspection conducted closer in time to the incident, when the conditions of the site were more like those that existed when the accident occurred.

Consider a converse situation. You represent a retail establishment, and you advise it to adopt a

standard operating procedure of having an engineer conduct a site inspection and issue a report after any incident resulting in EMTs being called. A few months after a slip-and-fall incident, a plaintiff’s attorney brings a claim for the incident against the establishment. The plaintiff’s attorney tries to bring the case to a quick resolution and defers hiring an engineer until the case appears likely to proceed to trial. The plaintiff’s engineer finally inspects the site a year after the incident. In this situation, your engineering report is more credible than the plaintiff’s, as your report was generated shortly after the incident.

As significant as credibility and accuracy are, however, knowledge is the most important reason for having an engineer investigate the incident site as soon as possible. Nobody — whether a risk manager, adjuster, or attorney — likes surprises, which can be particularly costly in litigation. An engineer’s inspection may bring good news or bad, but the inspection does not create that news; it just makes you aware of that news. If a handicapped ramp was not built to code, it was not built to code. Bad news is exponentially worse if it comes as a surprise. You need to know as much information about accident site as possible, including violations that could have contributed to the accident. Having all the facts allows you to take your best course of action, while taking into account the other side’s possible options.

And, as with debriefing dog-fights, the first person with that information usually has the upper hand. ❖



*Peter McCawley has an engineering degree from the U.S. Naval Academy and is a Director at CED Investigative Technologies, Inc., a Platinum sponsor of the GDLA.*

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# Private Investigators Use GPS Tracking for Effective Surveillance

By Steve McElroy  
*Delve Information Resources, Inc.*

Devices that use the Global Positioning System (GPS) to track the movements and location of persons under surveillance are important tools for private investigators. Unfortunately, however, the use of these important tools has come under attack from legislators across the county, including here in Georgia.

Developed in the 1970s by the U.S. military to bring weapons precisely to their targets, GPS now consists of a “constellation” of 30 satellites orbiting the earth at about 11,000 nautical miles. Each satellite broadcasts radio frequencies signals down to a series of ground stations that control and monitor the satellites. GPS is operated by the Air Force’s Space Command Unit, and is provided free of charge to allied nations — in addition to being made available to commercial interests. GPS is now used for everything from date-stamping ATM transactions and the operation of cell phone networks to the maintenance of power grids.

Each GPS satellite also carries an atomic clock measuring time in billionths of a second. A GPS receiver or tracking device searches for the signals from any four satellites and, using a type of triangulation, can determine the location of that device within a one-meter radius. Coupled with the timing capability, trackers can also determine speed, direction, altitude, and, as in the case of aircraft with multiple antenna, attitude as in pitch and yaw.

Like other commercial interests, private investigators have adopted GPS technology to aid in their work. John Roberson of the Georgia Association of Professional Private Investigators (GAPPI) estimates that 60 to 70 percent of the investigators licensed and regulated by the Georgia Board of Private Detectives and Security Guards currently use GPS as a regular investigative resource.

In Georgia, GPS has become one

of the most reliable, efficient, and safe means used by private investigators to conduct the business of private detection, which O.C.G.A. § 43-38-3(3) defines as:

[T]he business of obtaining or furnishing, or accepting employment to obtain or to furnish, information with reference to:

(A) Crimes or wrongs done or threatened against the United States of America or any state or territory thereof;

(B) The background, identity, habits, conduct, business, employment, occupation, assets, honesty, integrity, credibility, knowledge, trustworthiness, efficiency, loyalty, activity, movement, whereabouts, affiliations, associations, transactions, acts, reputation, or character of any person;

(C) The location, disposition, or recovery of lost or stolen property;

(D) The cause or responsibility for fires, libels, losses, accidents, damage, or injury to persons or property;

(E) The securing of evidence in the course of the private detective business to be used before any court, board, officer, or investigating committee; or

(F) The protection of individuals from serious bodily harm or death.

GPS is a substantial asset for Georgia private investigators as they conduct this work. GPS allows an investigator to have remote access to the movements of a subject on land and sea. Before the advent of GPS, surveillance might have included a team of three or more investigators spending numerous hours following the subject in order to develop the information requested by the client. GPS has significantly reduced both the risk of harm to the investigator and the cost of conducting surveillance. Clients are now accustomed to the accuracy and speed at which the same information can be gathered,

stored, and presented.

GPS tracking devices also increase the integrity of the information gathered by reducing its susceptibility to assumptions made on the part of the investigator. With a location accuracy of about one meter, there is less chance of erroneously reporting an address or event. In some cases, the courts have allowed GPS tracking logs to be entered into evidence.

Unfortunately, legislators across the country are attempting to remove GPS tracking from the private investigator’s toolbox. The profession has, however, had success in turning back attempts to deprive it of this important tool. In February 2012, for example, the Virginia General Assembly rejected (for the third time) a bill that would have criminalized the use of GPS tracking devices without consent. In 2009, Michigan carved out an exception to its newly enacted GPS law to allow professional investigators lawfully performing their duties to use GPS for locating fugitives and stolen property and for securing evidence to be brought before a court.

In Georgia, a bill to restrict GPS tracking was introduced during this past legislative session but failed. The proposed Interception and Disclosure of Geolocation Protection of Information Act, HB 674, would have amended O.C.G.A §§16-11-90 *et seq.*, which governs unauthorized access to computer and other electronic communication. This bill would have made it illegal for private investigators to use a GPS device to track the movements and location of any person without his or her consent. The bill did not make it out of committee.

GAPPI remains vigilant, however, against future legislative efforts to restrict private investigators’ use of GPS tracking. This is an effective, safe, and cost-efficient tool that benefits both private investigators and their clients. ❖

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# Contract Attorneys: Everything You Wanted to Know About but Were Afraid to Ask

By Paul Talmadge and Cheryl Oliver  
*The Partners Group*

If you are a litigator at a large law firm in Atlanta or any other major city, chances are you have used contract attorneys for document review projects. If you are a litigator in a small or medium-size firm or you practice outside of a major metropolitan center, you have likely heard about the explosion in use of contract attorneys, but may not have utilized them in your own practice.

In a developing trend, however, smaller litigation practices have begun using contract attorneys as an efficient way to save their clients money and at the same time create a profit center for their practices. Indeed, many companies, on the prowl to cut costs, are now advising defense counsel to use contract attorneys whenever feasible — and many law firms now include the economics of contract attorneys on the front end of pitching and winning client business.

In short, the use of contract attorneys is becoming a routine and ubiquitous part of a litigation practice because it makes for happy clients *and* boosts the law firm's bottom line.

## **The History of the Contract-Attorney Business to Date**

How did the practice of firms using contract attorneys for document review and other substantive projects start? In the mid-1990s, many attorneys in large law firms were approaching partnership and facing tough choices between onerous billable hour and production requirements and a balanced family life. Meanwhile, law firms were increasingly viewing themselves as businesses and were focused on the bottom line. Seeing an opportunity, three attorneys with large-firm backgrounds each started contract-attorney staffing companies in three different areas of the country, and began marketing their colleagues (largely women attorneys who chose family balance over the

2000-hour/year grind) as large-firm quality help for a lower billable hour price.

During the early years of the contract-attorney business, the practice was largely centered in New York, Washington D.C., and Los Angeles. In Atlanta, the first users were large firms handling tobacco litigation. Litigation document review consisted of "hard copy review" — first-year associates, paralegals and contract attorneys reviewed paper documents, often in large, dark warehouses. There was little or no technology involved at the time.

By the early 2000s, the contract-attorney workforce had evolved: it was mixed-gender and as heterogeneous as the more traditional attorney workforce. In increasing numbers, attorneys were becoming professional contract attorneys as a lifestyle choice. At the same time, electronic discovery was on the rise, and technology had entered the market in the form of various software search tools to aid the review process. National and local companies providing contract attorneys began offering document-review space complete with computers, review tools, and even e-discovery services.

Meanwhile, in-house legal departments started contracting directly with attorney staffing agencies to use contract attorneys in their litigation work, with supervision by their outside counsel. Finally, in more recent years, the use of contract attorneys has spread to small and medium-size firms in both major metropolitan areas and smaller cities like Savannah, Macon, and Augusta.

## **Where to Begin if You Want to Use Contract Attorneys**

The first step in the process is to select an experienced contract-attorney company with a track record of brand-name clients and cases as references. An experienced contract-attorney staffing company can help you determine how many contractors you need and for what length of time, which will largely be dictated by the amount of data that

needs to be reviewed and your production deadline. An hourly billing rate for the contract attorneys will then be set, and the company should be able to quote you an approximate cost based on the amount of data.

In addition, a quality staffing company will have vetted the contract attorneys with background checks, bar verifications, reference checks, and personal interviews to determine experience levels. Companies with long histories in a market will also have first-hand knowledge of the contract-attorney pool, and be able to speak to their work on similar projects.

Depending on the experience needed by the firm, the present market rate in Georgia is somewhere in the area of \$50 per hour. For a few additional dollars, some staffing companies can host the entire review, providing the work space, computers, and other equipment.

Just like associates, contract attorneys keep track of their hours using either electronic time-entry software or paper timesheets (if the client prefers). Before the contract attorney's time is submitted for invoicing purposes, you and your firm first approve the hours. The agency pays the contract attorneys weekly and handles all taxes and benefits. Your firm is then billed, and incurs no costs other than the hourly rate.

Under ABA Formal Opinion 88-356, your firm may mark up these services when billing your client, just as you mark up the services of a full-time associate. This creates a win-win situation for the firm and the client: the client's bill will be lower than it would have been if an associate had performed the work, and your firm will enjoy a profitable return without the costs of rent, health insurance, liability insurance, and the other expenses that using permanent employees entails.

Finally, because communication technology allows document review to be performed remotely, contract-attorney companies in cities like Atlanta can provide work space, com-

puters, and attorneys all in one package for law firms scattered throughout the state or country. Recently, for example, our company staffed a project involving patent litigation in Texas federal court for a Nebraska company with a Colorado subsidiary — and the review was supervised by the client’s California-based counsel. The review work was all done in our Atlanta document-review center, with twice weekly conference calls.

There are many predictions about where the contract-attorney business will be 10 years from now. We expect to see as many or more changes in the next decade as in the last. One thing, however, is certain: with the ever-increasing cost of litigation, the era of using contract attorneys is here to stay. ❖

*The Partners Group, a GDLA Gold sponsor, is a Georgia-based attorney recruiting, placement, and staffing firm operated by former practicing attorneys. The Partners Group and its principals pioneered the contract attorney concept in the Southeast and have been staffing attorneys in Georgia since the mid-90s.*

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# Appellate Case Law Update

By Matthew G. McLaughlin  
Chair, Appellate SLC

Hawkins Parnell Thackston & Young, Atlanta



**TIMELINESS OF APPEAL: A party has 30 days to file an immediate appeal from an order granting partial summary judgment against her.**

**CROSS-APPEALS: Cross-appeals of cross-appeals are not authorized.**

***Jones v. White*  
311 Ga. App. 822 (2011)**

Plaintiff Jones brought suit alleging breach of contract, unjust enrichment, promissory estoppel, and fraud claims against defendants Brock, Drury, Khalil, White, Perry Homes Redevelopment, LLC, and The Alisias Holding Company. The trial court granted defendants White and Alisias summary judgment on all claims. The court also granted defendants Brock and Khalil summary judgment on some claims, but denied their motions for summary judgment with respect to other claims.

After Jones appealed the grant of summary judgment to White and Alisias, defendants Brock and Khalil cross-appealed the partial denial of their motions for summary judgment. Jones then filed cross-appeals of the partial grant of summary judgment to Brock and Khalil.

Although the Court of Appeals entertained the Jones' initial appeal and the cross-appeals of Brock and Khalil on the merits, the Court dismissed Jones' cross-appeals as untimely. A party has 30 days to file an immediate appeal from an order granting partial summary judgment against her. Otherwise, she must wait until final judgment to file an appeal challenging the partial summary judgment. In this case, plaintiff Jones did not appeal the order granting partial summary judgment to Brock and Khalil within 30 days, and thus she had to wait until final judgment to challenge these rulings on appeal.

Furthermore, the statute authorizing cross-appeals, O.C.G.A. § 5-6-38, does not contemplate cross-appeals of cross-appeals. Section 5-6-38(a) allows an appellee to file a cross-appeal within 15 days of the appellant's notice of appeal, but does not authorize the appellant

to then file a cross-appeal of her own. Thus, the cross-appeals filed by Brock and Khalil did not give Jones another opportunity to immediately appeal the grant of partial summary judgment to Brock and Khalil.

**APPELLATE JURISDICTION: Where trial court had entered final judgment on jury verdicts in favor of two defendants but had declared mistrial with respect to claims against third defendant, Court of Appeals did not have jurisdiction to consider plaintiff's arguments pertaining to claims against third defendant.**

***Chapman v. Clark*  
313 Ga. App. 820 (2012)**

Clyde Chapman sued Reliford Clark, Joyce Clark, and Larry Clark. At trial, the jury returned verdicts in favor of Joyce and Larry Clark, but was unable to resolve all the claims against Reliford Clark. Pursuant to O.C.G.A. § 9-11-54, however, the trial court entered final judgment on the jury verdicts in favor of Joyce and Larry Clark.

In addition to appealing the final judgment in favor of Joyce and Larry Clark, Chapman attempted to appeal certain trial-court rulings relating to his claims against Reliford Clark. Reliford Clark moved to dismiss the appeal with respect to him due to lack of jurisdiction, and the Court of Appeals granted the motion. Although the Court had jurisdiction over the appeal from the final judgment entered in favor of Joyce and Larry Clark, no final judgment had been entered on the claims against Reliford Clark. Therefore, the Court of Appeals lacked jurisdiction to consider Chapman's arguments concerning the trial court's rulings relating to his claims against Reliford Clark.

**DISMISSAL FOR FAILURE TO PAY COSTS: Failure of two of four appellants to pay appellate costs or demonstrate indigence did not warrant dismissal of entire appeal where other two appellants had attempted to demonstrate indigence.**

***Mapp v. We Care  
Transportation Services***

**Case Nos. A11A1986 and -1987,  
— Ga. App. — (Feb. 6, 2012)**

Plaintiffs Gladys Mapp, Helen Woods, Vera Clark, and Marie Haynes brought a wrongful death lawsuit, alleging that the defendants had negligently injured plaintiffs' mother and caused her death. The trial court granted the defendants summary judgment, and the plaintiffs appealed. The defendants also filed a cross-appeal challenging the trial court's denial of their motion for summary judgment on claims brought by the personal representative of the mother's estate.

The trial court divided the \$10,265 in costs for preparing the appellate record equally between the plaintiffs/appellants and the defendants/cross-appellants. The defendants paid their half of the costs, \$5,132.50, but the plaintiffs did not. Instead, plaintiffs Mapp and Woods filed affidavits of indigence stating that they could not pay their \$5,132.50 share of the costs. Because plaintiffs Clark and Haynes did not file affidavits, however, the trial court dismissed the appeals of all four children without considering the veracity of the Mapp and Woods affidavits.

The Court of Appeals reversed the dismissal with respect to Mapp and Woods. The Court of Appeals ruled that the trial court had properly dismissed the appeal with respect to the interests of Clark and Haynes due to their failure to pay costs or demonstrate indigence. The trial court had erred, however, in dismissing the appeal with respect to the interests of Mapp and Woods without considering their affidavits. The interests of Mapp and Woods were separate from those of Clark and Haynes, and thus the latter two plaintiffs' failure to pay costs or demonstrate indigence did not warrant dismissal of the appeal with respect to the interests of Mapp and Woods. The Court of Appeals therefore remanded the case to the trial court with instructions to consider the veracity of the Mapp and Woods affidavits. ♦



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# Employment Case Law Update

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



## **FMLA CLAIMS FOR INTERFERENCE AND RETALIATION: Employee stated claims for FMLA interference and retaliation based on request for leave made before employee became eligible for leave.**

### ***Pereda v. Brookdale Senior Living Communities, Inc.* 666 F.3d 1269 (11th Cir. 2012)**

In June 2009, Kathryn Pereda informed her employer, Brookdale Senior Living Communities (“Brookdale”), that she was pregnant and would be requesting FMLA leave after the birth of her child in November 2009. Pereda was not entitled to FMLA leave when she made her request because she had not met the FMLA’s minimum time requirements (at least 1,250 hours working for the employer over the preceding 12 months) or experienced a triggering event. She would, however, have been eligible for leave by the time she gave birth in November 2009. According to Pereda, management responded to her planned request for leave by harassing her, placing her on a performance improvement plan with unattainable goals, and writing her up for taking leave to visit her doctor. Pereda was subsequently terminated in September 2009.

Pereda filed suit against Brookdale, alleging claims for FMLA interference and retaliation. The district court dismissed her complaint, ruling that she could not bring either claim under the FMLA because she was not an eligible employee at the time of her termination.

The Eleventh Circuit reversed on appeal. As an issue of first impression, the Eleventh Circuit held that the FMLA protects an employee’s pre-eligibility request for leave that will occur in the future when the employee becomes eligible. Specifically, the Court held

that (1) employees are protected from interference with their FMLA rights based on pre-eligibility requests and prior to the occurrence of a triggering event; and (2) an employee’s pre-eligibility request for post-eligibility maternity leave is “protected activity” under the FMLA. The Court reasoned that to hold otherwise would violate the purposes for which the FMLA was enacted and create a loophole “whereby an employee has total freedom to terminate an employee before she can ever become eligible.”

## **EMPLOYEE PRIVACY: Employer’s access of employee’s personal laptop was authorized by company’s computer usage policy and was not done with the intent of taking, obtaining, or converting employee’s property, as necessary to constitute computer theft under Computer Systems Protection Act.**

### ***Sitton v. Print Direction, Inc.* 312 Ga. App. 365 (2011)**

Print Direction, Inc. (“PDI”), hired Larry Sitton as an exclusive outside sales person. PDI’s Employee Manual provided that employees could not take an outside job with a customer or competitor of PDI. Despite this, Sitton brokered more than \$150,000 in print jobs through a competitor during his employment with PDI.

PDI discovered Sitton’s actions through emails found on his personal laptop. Although PDI provided Sitton a company-issued laptop, Sitton instead used his personal laptop at work, which he connected to PDI’s system network. When his boss “caught wind” that Sitton was competing with PDI, he entered Sitton’s office, moved the computer’s mouse, clicked on an email that appeared on the screen, and printed emails that discussed his competing job. The emails con-

firmed that Sitton was competing with PDI through another business, and he was fired.

Sitton sued PDI, asserting claims for, *inter alia*, computer theft, computer trespass, and computer invasion of privacy under O.C.G.A. § 16-9-93. PDI asserted counterclaims on several grounds, including breach of duty of loyalty. Following a bench trial, the trial court entered judgment against Sitton on his claims and in favor of PDI on its counterclaims.

The Court of Appeals affirmed the verdict in all respects. With regard to Sitton’s claims under O.C.G.A. § 16-9-93, the Court held that proving a claim under this statute requires evidence that the proscribed actions were taken “with knowledge” that the use of the computer or the examination of the other person’s data was “without authority” and that the actions were taken with the intent of: (1) taking or converting property (computer theft); (2) deleting, obstructing, or interfering with a program or data (computer trespass); or (3) examining the owner’s personal data (computer invasion of privacy). The Court of Appeals held that PDI did not access Sitton’s “without authority” because PDI’s computer usage policy was not limited to company-owned equipment. Instead, the policy stated that employees should not regard “electronic mail left on or transmitted over these systems” as “private or confidential,” and provided PDI with a right to access computers that transmitted data through its systems. In addition, the Court held that PDI had not accessed Sitton’s laptop with the intent of taking documents, deleting or obstructing any programs or data, or viewing his personal data. Thus, PDI’s actions did not fall within the scope of O.C.G.A. § 16-9-93.

**EMPLOYEE POLYGRAPH PROTECTION ACT (EPPA): Employer did not violate EPPA by requesting employee to take polygraph test because surveillance-camera images and statements by other employees provided it with “additional evidence” and “reasonable suspicion” sufficient to permit testing under an exception to EPPA.**

**Cummings v. Washington Mutual**

**650 F.3d 1386 (11th Cir. 2011)**

Dave Cummings was a branch manager for Washington Mutual. When a cash audit uncovered a shortage of approximately \$58,000, the bank began an internal investigation. Surveillance-camera images showed what appeared to be Cummings and his employees repeatedly violating the bank’s “dual control policy,” which requires two persons to be present when cash is handled or certain secure areas are accessed. Also,

several employees claimed they saw Cummings repeatedly violate the policy during his tenure as branch manager. Based on this information, the bank asked Cummings to take a polygraph test, but he refused. The bank then terminated Cummings. His supervisor told him he was being fired for violation of the dual-control policy, not for his refusal to take the polygraph.

Cummings filed a complaint alleging, *inter alia*, that Washington Mutual had violated the Employee Polygraph Protection Act (“EPPA”), which generally prohibits private employers from requiring or requesting an employee to take a polygraph test. The employer may request that an employee take a polygraph test, however, if four conditions are satisfied: (1) the test is administered in connection with an ongoing investigation involving economic loss or injury to the employer’s business; (2) the employee had access to the property that is the subject of the

investigation; (3) the employer has a reasonable suspicion that the employee was involved in the incident under investigation; and (4) the employer executes a statement, provided to the employee before the test, that is signed and that describes the alleged misconduct and the basis for the employer’s reasonable suspicion. Cummings argued that Washington Mutual failed to satisfy the “ongoing investigation” and “reasonable suspicion” prongs of the exception.

The district court granted Washington Mutual summary judgment on the EPPA claim, and the Eleventh Circuit affirmed this ruling on appeal. The Eleventh Circuit acknowledged that EPPA’s implementing regulations provide that an “ongoing investigation must be of a specific incident or activity” and that the existence of an inventory shortage, standing alone, is not a sufficient basis for administering a polygraph test. The regulations further provide, how-

*Continued on page 59*

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# Premises Liability Case Law Update

By C. Shane Keith, Chair (left) and  
Martin A. Levinson, Vice-chair, Premises Liability SLC  
Hawkins Parnell Thackston & Young, Atlanta



**DUTY TO WARN INVITEES: Store owner had no duty to warn patron of higher-than-average curb where evidence showed that patron had equal knowledge of the hazard.**

***McLemore v. Genuine Parts Co.***

**313 Ga. App. 641 (2012)**

Plaintiffs Evelyn and Bobbie McLemore sued the owner of an auto parts store after Evelyn fell while attempting to traverse a curb in the parking lot to enter the store. At the time of the incident, the store was hosting a tool show and cookout in the parking lot. Plaintiffs alleged that Evelyn stepped onto the subject curb and then fell backwards, breaking two ribs and a hip.

Evelyn testified that she and her husband had been to the store three or four times prior to the incident. On each prior occasion, they had parked in the handicapped parking space and used the adjacent ramp to enter the store. On the date of the fall, however, they parked in a lot across the street because the store's lot was full of people, and they were unable to use the handicap ramp because their path was blocked by the "luncheon activities." Although Evelyn admitted that she was able to see the curb as she approached, she claimed that it was "a higher step than other curbs," and she believed she would not have fallen "if it had been a regular height curb." Plaintiffs' expert engineer averred that the curb "was defectively created, designed, built, and maintained" and "constituted a trip hazard." He further asserted that the curb exceeded the height prescribed by applicable building codes, and claimed that the defendant had violated the federal Americans with Disabilities Act by failing to maintain accessible features.

The trial court granted the store's motion for summary judgment,

and the Court of Appeals affirmed. The Court of Appeals held that the defendant had no duty to warn Evelyn about the curb, reiterating the principle that a premises owner has no duty to warn of open and obvious hazards. The Court ruled that Evelyn's own testimony showed that she could see the curb — including its height — as she approached and thus had equal knowledge of the hazard. For the same reason, the Court rejected plaintiffs' attempt to rely on the "distraction theory." The Court ruled that this theory was inapplicable because the distraction allegedly created by the tool show did not obstruct Evelyn's view of the curb.

**VOLUNTARY DEPARTURE RULE: Store patron who voluntarily departed from designated route had heightened duty of care for his own safety.**

***Bartlett v. McDonough Bedding Co.***

**313 Ga. App. 657 (2012)**

Plaintiff Lynwood Bartlett was injured when he fell down a stairwell in defendant's bedding and antique shop. The stairwell, which was located between the rear wall of the store and a half-height wall, was illuminated by ceiling fixtures and natural light from windows and had a chain across its top end to prevent its use. Merchandise was displayed on the landing at the top of the stairs.

As Bartlett took a step while looking at merchandise, his left foot went down into the stairwell and he fell backwards. At his deposition, he testified that he was unaware of the stairwell's presence, and claimed that the merchandise on the landing had prevented him from seeing the stairs. He further testified that he "was not looking for a stairway" and so "didn't see one." In contrast, his wife testified that she had no problem seeing the

stairs when went to her husband's aid because she was watching where she was going rather than looking at merchandise.

The trial court granted the store's motion for summary judgment, and the Court of Appeals affirmed. The Court of Appeals agreed that the record, when viewed in the light most favorable to plaintiff, showed that the stairwell was concealed by merchandise tightly arranged on the landing. Nevertheless, the Court faulted plaintiff for continuing to move in that direction despite the obstructed view and for his departure from the designated route.

The Court determined that the plaintiff's "attempt to walk between or over the thick clutter of merchandise, where there was not an aisle or clear area of floor visible, constituted a voluntary departure from the route designated and maintained" by the store for its customers' safety and convenience.

Consequently, the plaintiff had a heightened duty of care for his own safety pursuant to the "voluntary departure" rule. Because the plaintiff did not exercise the requisite care, the trial court properly granted summary judgment to the defendant.

**DUTY TO INSPECT FOR LATENT DEFECTS: Homeowner could not be held liable for injury caused by incorrectly attached awning where she had neither actual knowledge nor notice of the defect.**

***Sipple v. Newman***

**313 Ga. App. 688 (2012)**

The defendants, executors of the estate Elise Furse, appealed from the trial court's denial of their motion for summary judgment in a personal-injury action brought by plaintiff Adam Newman. Before her death, Furse had hired Newman to clean pine straw off the roof of her house. While standing

on a ladder to clean pine straw off a metal awning over the house's back door, Newman rested a foot on the awning for balance. The awning gave way, and Newman fell to the ground.

After he fell, Newman discovered that the awning had been attached to the house with nails, which had rusted. Newman, who was employed as a roofer, testified that he had assumed the awning would be bolted to the house as required by the building code and thus would be able to support the slight weight he applied to it. In fact, the evidence showed that Furse's awning had originally been attached with bolts. At some point, however, a painting contractor removed the awning and reattached it with nails.

At the time of Newman's fall, Furse was 93 years old and bedridden. There was no evidence that she had instructed the painting contractor to reattach the awning with nails or that she knew that the contractor had done so. Newman admitted that Furse could not have seen how the awning was attached when looking at it from the ground. Furthermore, there was no evidence that the awning had ever sagged, buckled, or otherwise revealed that it was not attached securely.

The Court of Appeals ruled that the defendants were entitled to summary judgment. Although a landowner's duty of ordinary care to keep the premises safe requires inspection to discover unknown dangers, the owner is not an insurer of her invitees' safety. The law requires only ordinary diligence, which "may not require an inspection where the owner does not have actual knowledge of the defect and there is nothing in the character of the premises indicating a defect." In this case, there was no evidence that Furse had actual knowledge of the awning's defect or was on notice of the problem. Therefore, the Court of Appeals held that the trial court had erred in denying the defendants' motion for summary judgment.

**DUTY TO LICENSEES: Social guest who fell off balcony could not recover from homeowner where condition of balcony did not constitute dangerous activity, hidden peril, pitfall, or mantrap and homeowner had not willfully or wantonly caused injury.**

***Jordan v. Bennett*  
312 Ga. App. 838 (2011)**

Plaintiff Bennett was attending a party at defendant Jordan's home, which she had visited on three previous occasions. After consuming seven alcoholic beverages, Bennett went onto a balcony to smoke a cigarette and to drink a beer with a friend. About 15 minutes later, Bennett walked to the balcony's edge to toss a cigarette off it. She turned to talk to her friend as she tossed the cigarette, and then fell over the balcony's railing and onto the concrete sidewalk 16 feet below. Bennett did not know what caused her to fall, but "speculated" that she had lost her balance.

Bennett claimed that Jordan was liable for the accident because the balcony railing was just 27.5 inches high and thus not in compli-

ance with the building code. The record showed, however, that both Bennett and her friend could see the height of the railing. In a recorded statement to an insurance adjuster, moreover, Bennett indicated that she had seen how high the balcony was above the ground — even though she later claimed at deposition that she had thought the balcony to be only a ground-level patio.

The trial court denied Jordan's motion for summary judgment, ruling that he had a duty to warn Bennett of the danger associated with the balcony's low railing. The Court of Appeals disagreed, however, and reversed. As a social guest, Bennett had the status of a licensee. A landowner may be held liable for an injury to a licensee only if he willfully or wantonly caused her injury or knowingly exposed her to a dangerous activity, hidden peril, pitfall, or mantrap.

In this case, Jordan had not willfully or wantonly injured Bennett, and the condition of the balcony did not constitute a dangerous activity, hidden peril, pitfall, or mantrap. Therefore, Jordan was entitled to summary judgment. ❖



# Trucking Case Law Update

By John L. McKinley, Jr., Vice-chair, Trucking SLC  
and Allison E. Maloney  
Mozley Finlayson & Loggins, Atlanta



**OFFERS OF SETTLEMENT: Despite defense verdict, trial court did not abuse its discretion in denying defendants' motion for attorneys' fees based on its finding that the offer had not been made in good faith.**

***Great West Casualty Co. v. Bloomfield***  
**313 Ga. App. 180 (2011)**

Plaintiff brought this wrongful death suit against two truck drivers, their employers, and their insurers after a fatal motor vehicle accident that actually consisted of two separate collisions. In the first collision, insurer Great West's driver clipped a vehicle while changing lanes and caused a slow-down in traffic. The decedent was a passenger in a vehicle that came upon the wreck. As her vehicle slowed down, it was struck from behind by the second tractor-trailer, resulting in her death. At trial, the jury found the second tractor-trailer driver 100 percent liable and awarded over \$54 million in compensatory and punitive damages. The jury returned a defense verdict for Great West's driver.

Prior to trial, Great West served a \$25,000 offer of settlement on plaintiff pursuant to O.C.G.A. § 9-11-68. During the course of trial and before the jury returned a verdict, however, Great West made a second offer of its policy limits of \$1 million. After receiving a defense verdict, Great West moved to recover \$69,000 in attorneys fees from plaintiff under Section 9-11-68, based on its initial \$25,000 settlement offer. The trial court denied this request without explanation, but the Court of Appeals vacated and remanded with instructions that the trial court explain the basis of its ruling.

On remand, the trial court again denied Great West's motion for attorneys' fees, ruling that Great West had not made its initial \$25,000 settlement offer in good faith. The court found that \$25,000 "was not a reasonable offer or a realistic assessment of liability in a wrongful death case." The court

also noted that Great West's driver had paid his traffic ticket fine and that Great West had never deposed or even interviewed the first police officer on the scene. In addition, the court found that Great West's later offer to settle the case for its policy limits of \$1 million "showed the bad faith intent of the defendant's initial offer."

The Court of Appeals affirmed on a five-to-two vote, concluding that the trial court had not abused its discretion. The Court ruled that a defense verdict alone is not sufficient to determine whether an offer of settlement under O.C.G.A. § 9-11-68 was made in "good faith." A trial court has broad discretion to determine the reasonableness of a defendant's offer to settle. Furthermore, the reasonableness of settlement offer is "a factual determination, based on the trial court's assessment of the case, the parties, the lawyers, and all of the other factors that go into such a determination, which the trial court has gathered during the progress of the case." The Court of Appeals analogized this reasonableness determination to a trial court's rulings on admissibility of evidence, which the appellate courts review with deference due to the trial court's greater familiarity with the case as a whole.

Judge Adams, joined by Judge Blackwell, dissented from the majority's opinion and urged reversal. The dissent argued that the trial court had abused its discretion in finding that Great West's initial \$25,000 settlement offer had not been made in good faith.

Great West has filed a petition for a writ of certiorari in the Georgia Supreme Court.

**PUNITIVE DAMAGES: *Bennett v. McGriff Transportation, Inc.***

**Case No. 1:08-CV-03573-HTW, — F.Supp.2d —, 2012 WL 220251, 2012 U.S. Dist. Lexis 12733 (N.D. Ga. 2012)**

After plaintiffs' vehicle was struck from behind by a tractor-trailer, they brought suit against the driver's employer. Shortly before the close of discovery, plaintiffs

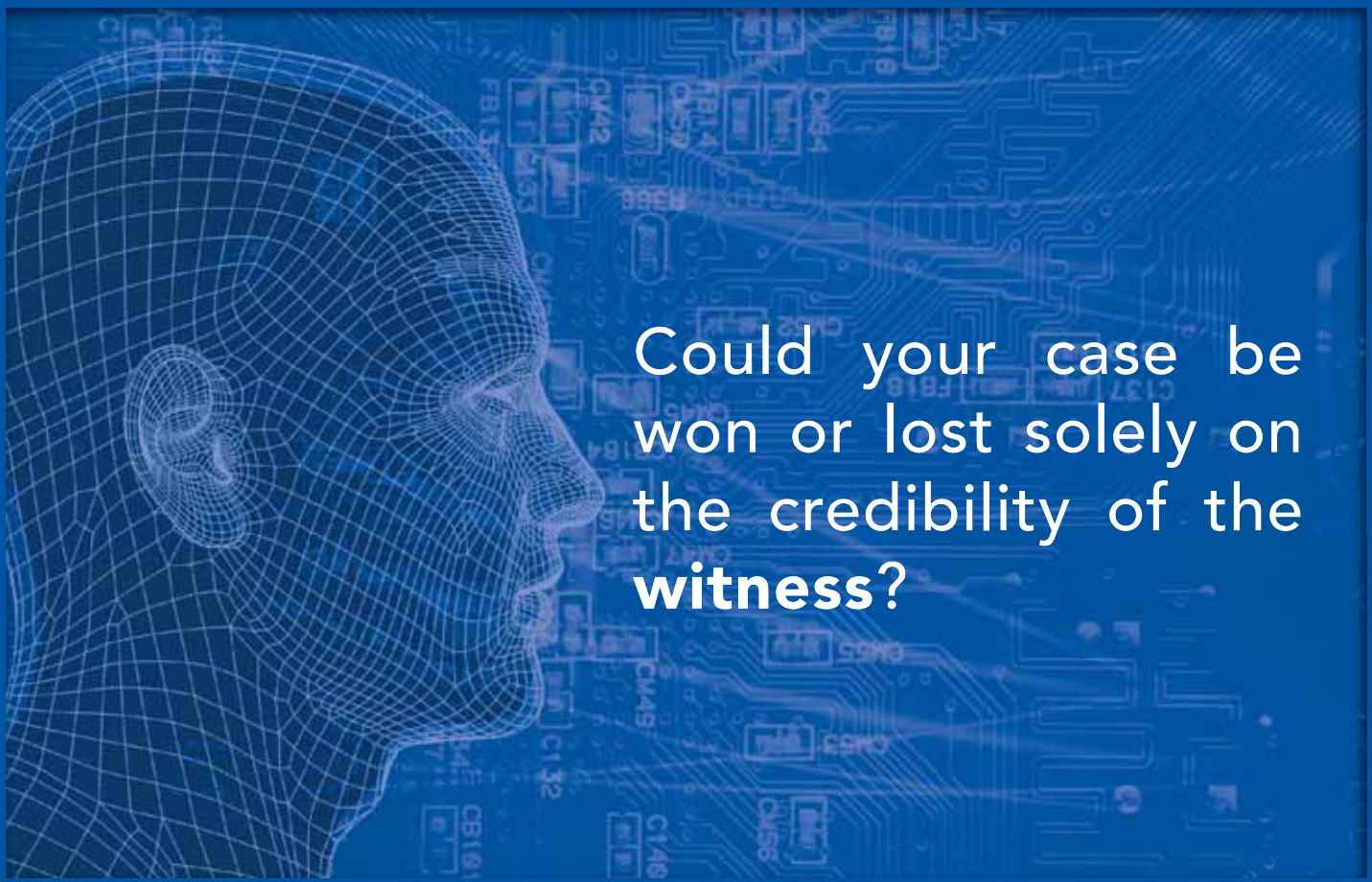
moved to amend their complaint to add a claim for punitive damages based on the driver's alleged violation of the hours-of-service requirements contained in the Federal Motor Carrier Safety Regulations. Plaintiffs contended that punitive damages against the employer were authorized under a negligent supervision or entrustment theory due to the employer's failure to ensure that the driver adhered to the hours-of-service requirements.

The district court denied plaintiffs' motion on the ground that they had not proffered sufficient evidence to support a claim for punitive damages. The court reiterated the well-accepted law governing this issue: "To support an award of punitive damages based on hours of service violations by a commercial motor vehicle driver, those violations must be connected with evidence to driver fatigue and the fatigue must be connected with evidence to the cause of the accident."

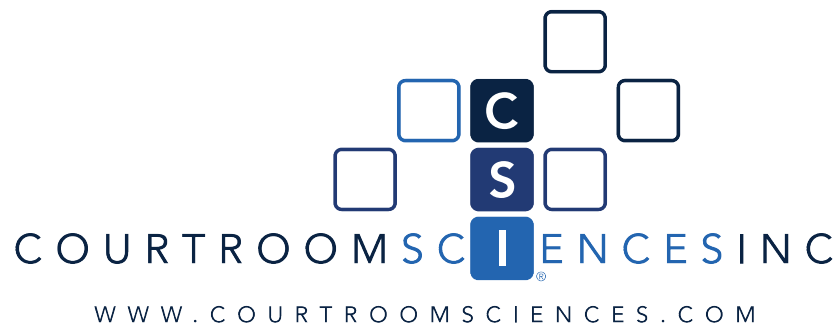
The court found no evidence that the driver had a pattern or policy of dangerous driving or a tendency to drive while fatigued. The only evidence plaintiffs had offered to support their punitive-damages claim was their expert's opinion testimony regarding the driver's alleged hours-of-service violation. That expert had not responded to the accident scene, however, or examined the driver. The court ruled that the expert's opinion was not sufficient to prove that the driver had displayed a pattern or policy of driving while fatigued or that he had knowingly operated his vehicle while impaired by fatigue.

Plaintiffs' claim for punitive damages under a theory of negligent entrustment or supervision also failed. Even if plaintiffs were able to prove that the driver had a tendency to drive while fatigued, they had produced no evidence that the driver's employer knew or should have known of this tendency.

Given plaintiffs' lack of evidence to support their claim for punitive damages, the district court denied their motion to amend as futile. ♦



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# Workers' Compensation Case Law Update

By Ann Baird Bishop  
A. B. Bishop & Associates, Marietta

**O.C.G.A. § 34-9-207 WAIVER OF MEDICAL CONFIDENTIALITY: The State Board may not compel a claimant to authorize his doctor to meet with the employer's lawyer in the absence of the claimant and the claimant's lawyer.**

***McRae v. Arby's Restaurant Group, Inc.*  
313 Ga. App. 313 (2011)**

Claimant McRae suffered chemical burns to her esophagus after accidentally drinking lye at work. Her employer, Arby's Restaurant Group ("ARG"), accepted the claim as compensable and paid income and medical benefits. Three years after the accident, McRae's treating physician prepared a medical narrative report concluding that McRae had reached maximum medical improvement and had a 65 percent permanent body impairment. McRae subsequently requested a hearing on her claim for temporary total disability and permanent partial disability.

After receiving the physician's report, ARG's attorneys tried to schedule an *ex parte* interview with the physician, but she declined to meet with them absent express permission from McRae. ARG moved the administrative law judge ("ALJ") to remove the hearing from the calendar or issue an order authorizing the doctor to talk to its lawyers privately. The ALJ ordered McRae to give ARG's attorneys permission to interview her physician *ex parte*. McRae refused, and the ALJ removed her claim from the hearing calendar until she consented to the interview. The Appellate Division affirmed this decision, as did the Superior Court.

The Court of Appeals reversed on a four-to-three vote. The majority reasoned that the concerns regarding *ex parte* interviews with doctors that the Georgia Supreme Court expressed in the medical malpractice case of *Baker v. Wellstar Health System*, 288 Ga. 366 (2010),

also applies in the workers' compensation context. *Baker* identified various dangers associated with *ex parte* interviews of health care providers in litigation, including the potential for probing into irrelevant and possibly sensitive and prejudicial matters; the potential for disclosure of the doctor's mental impressions not documented in the records and not disclosed to the patient; and "the potential for defense counsel to influence the health care provider's testimony, unwittingly or otherwise, by encouraging solidarity with or arousing sympathy for a defendant health care provider."

In addition, the Court of Appeals disagreed with the Superior Court's ruling that the Privacy Rule of the federal Health Insurance Portability and Accountability Act (HIPAA) is inapplicable to workers' compensation claims. The Court of Appeals ruled that the Privacy Rule applies to workers' compensation proceedings and permits the disclosure of information only "as authorized by and to the extent necessary to comply" with the requirements of workers' compensation laws. The Court further ruled that Georgia's Workers' Compensation Act does not require a claimant to authorize her physician to conduct *ex parte* communications with opposing counsel.

The Court acknowledged that O.C.G.A. § 34-9-207 provides that a workers' compensation claimant waives medical confidentiality to a certain extent, but ruled that this waiver does not require the claimant to consent to *ex parte* meetings between her physician and opposing counsel. This statute provides that a claimant waives her right to privacy regarding claim-related "communications . . . that the employee *has had* with any physician," and directs an authorized treating physician to disclose to the employer "all information and records" related to the claimant's treatment for the injury at issue, as well as any related med-

ical history. The statute also requires a claimant to give authorization for release of her "medical records and information" related to her claim. The Court of Appeals rejected the idea that the statute's reference to "information" requires claimant's consent to *ex parte* interviews of her physician by opposing counsel, and ruled that this term encompasses only tangible documentation. The Court also found that the legislature did not contemplate *ex parte* interviews when it enacted O.C.G.A. § 34-9-207.

Judges Miller, Doyle, and Blackwell dissented from the majority's decision, and Judge Miller and Judge Blackwell each issued a dissenting opinion. Judge Miller expressed concern that the majority's ruling would frustrate the purpose of the Workers' Compensation Act. Judge Blackwell rejected the majority's interpretation of the term "information" to include only tangible things. Noting that words in statutes are to be given their ordinary signification, Judge Blackwell argued that "[t]he word 'information' is generally understood to mean knowledge or data that is communicated to another, regardless of whether the knowledge or data has been memorialized in any tangible medium or exists only in the memory and voice of the person communicating it."

The employer has filed a petition for writ of certiorari in the Georgia Supreme Court, and the GDLA has filed an amicus brief in support of this petition.

**SCOPE OF REVIEW BY APPELLATE DIVISION: Where the Appellate Division holds that the evidence does not support the ALJ's findings, it must substitute its own findings.**

***J & D Trucking v. Martin*  
310 Ga. App. 247 (2011)**

Claimant Martin, the sole pro-  
*Continued on page 61*



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# GDLA Honors Judiciary at Annual Reception

Through the years, the 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.

The 9th annual Atlanta event was held on February 9, 2012, at State Bar Headquarters.

Unless otherwise noted, individuals are named from left to right: 1. GDLA President Mel Haas and DeKalb State Court Judge Stacey Hydrick; 2. Fulton Superior Court Judge Doris Downs and GDLA Past President Salty Forbes; 3. Rita Sheffey and Fulton Superior Court Chief Judge Cynthia Wright; 4. DeKalb Superior Court Judge Cynthia Becker, GDLA Past President Walter McClelland and Fulton State Court Judge John Mather; 5. Wayne Melnick (center) with Fulton State Court Judges Wesley Tailor (left) and Jay Roth; 6. Court of Appeals Judge Chris McFadden and Alan Herman; 7. GDLA Executive VP Lynn Roberson, U.S. District Court Judge Tom Thrash and DeKalb State Court Judge Janis Gordon; 8. GDLA Past President Jerry Buchanan, Peter Muller and Supreme Court Justice Hugh Thompson; 9. Supreme Court Chief Justice Carol Hunstein, Hall McKinley and Brian Moore; (see next page)



**Judicial Reception Photos**  
*Continued*

5. Fulton Superior Court Judge Chris Brasher, Supreme Court Justice David Nahmias and GDLA Past President Steve Kyle; 6. Dart Meadows and DeKalb State Court Judge Eleanor Ross; 7. Erica Morton and Court of Appeals Presiding Judge Herbert Phipps; 8. Fulton Superior Court Judge Todd Markle and GDLA Past President Warner Fox; 9. Jack Williams and Fulton Superior Court Judge Kimberly Esmond Adams; 10. GDLA Secretary-Treasurer Ted Freeman and Cobb Superior Court Judge Tain Kell; 11. Pamela Lee and Court of Appeals Presiding Judge Anne Elizabeth Barnes; 12. Jake Daly and Court of Appeals Judge Keith Blackwell; 13. Scott Masterson, Jim Budd, DeKalb State Court Judge Johnny Panos and Edward McAfee; 14. DeKalb State Court Al Wong, David Marshall and Marty Levinson; 15. Cobb State Court Chief Judge Toby Producers and Cobb Superior Court Judge Reuben Green. ❖



# Trial Academy: Training Tomorrow's Leading Litigators

The annual GDLA Melburne D. "Mac" McLendon Trial Academy once again attracted lawyers from across Georgia to Callaway Gardens from January 19-21, 2012. The seminar kicked off this year with a welcome reception for faculty and students on Wednesday evening.

The students were then guided through the two-and-a-half day experience by a distinguished faculty led by Chair Matthew G. Moffett of Gray Rust St. Amand Moffett & Brieske, Atlanta, and including: Vice-chair Sarah B. "Sally" Akins of Ellis Painter Ratterree & Adams, Savannah; Jerry A. Buchanan of Buchanan & Land, Columbus; Douglas K. Burrell of Drew Eckl & Farnham, Atlanta; William T. Casey, Jr. of Hicks Casey & Foster, Marietta; Robert R. "Rusty" Gunn II of Martin Snow, Macon; William D.

Harrison of Mozley Finlayson & Loggins, Atlanta; James S. "Sandy" Owens, Jr. of Nall & Miller, Atlanta; and Richard H. "Dick" Willis of Bowman and Brooke, Columbia, South Carolina

In recognition of the growing trend toward mediation, this year's program was updated to open with a segment on mediation strategies. This session featured John Miles, of Miles Mediation & Arbitration, who addressed trying your case at mediation. Next, BAY Mediation & Arbitration's Bruce Barrickman discussed effective use of technology at mediation. Both BAY and Miles are GDLA Platinum sponsors.

Court of Appeals Chief Judge John J. Ellington participated on day one as the keynote luncheon speaker, to discuss professionalism considerations at trial.

Trial Academy employs a modified mock trial format. In advance

of the seminar, the students were divided into defense and plaintiff's teams; each received a case to study to begin preparing aspects of the trial. GDLA Platinum Sponsor Courtroom Visuals provided trial graphics. Following faculty demonstrations, students dispersed into breakout groups to work on their skills.

Opening day concluded with a reception and dinner, sponsored by BAY and Miles, giving students and faculty time to network outside the classroom setting. Chief Judge Ellington also attended the event, sharing informal insights from both his years as a lawyer and judge.

Trial Academy continues to be the GDLA's premier seminar, geared toward training the next generation of leading litigators.

See photo highlights on next page. ❖



- MEDICAL MALPRACTICE
- PERSONAL INJURY
- WORKERS' COMP
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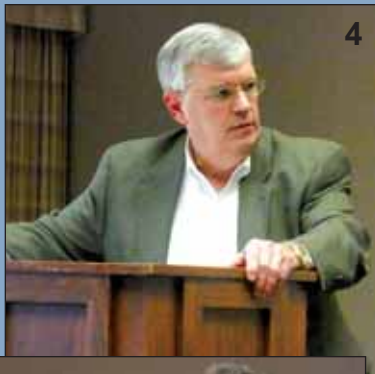
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**Scenes from Trial Academy:**

1. Chief Judge Ellington delivers the keynote address; 2. Program Vice-chair and faculty member Sally Akins role plays as the plaintiff; 3. Program Chair and faculty member Matt Moffett welcomes everyone; 4. Faculty member Jerry Buchanan demonstrates direct examination of an expert; 5. Miles Mediation's John Miles discusses trying your case at mediation; 6. Dick Willis graphs knowledge and control in the trial context; 7. Student Sul Kim takes notes; 8. BAY Mediation's Bruce Barrickman discusses using technology at mediation; 9. Faculty member Billy Harrison leads a breakout; 10. Faculty member Douglas Burrell makes a point as student Lauren Bell looks on; 11. Chief Judge Ellington talks with student Shawn Rhodes; 12. Faculty member Bill Casey demonstrates a closing argument for the defense; 13. Faculty member Sandy Owens (right) makes a point as student Michael Mayo (left) looks on; 14. Rusty Gunn role plays as the engineering expert. ❖



# CLE Explores Apportionment

On March 22, 2012, GDLA members convened on the rooftop patio of Fado Irish Pub in Atlanta for a two-hour CLE seminar, "Apportionment in a Post-Tort Reform World: Putting the Pieces Together."

The seminar was planned by Erica Morton of Hicks Casey & Foster in Marietta; she serves on the GDLA Education Committee.

The program featured speakers Wallace Miller, III of Wallace Miller, III, LLC, Macon; Matthew G. Moffett of Gray Rust St. Amand Moffett & Brieske, Atlanta; and David F. Root of Carlock Copeland & Stair, Atlanta. Mr. Root served as appellate counsel to the defendant in *McReynolds v. Krebs*.

The 2005 Tort Reform Act rewrote O.C.G.A. § 51-12-33, but made only minor changes to § 51-12-31, leaving a puzzling trail of conflicting authority as to the applicability of apportionment. The speakers discussed the revisions to §§ 51-12-31 and 51-12-33, and reviewed a number of current cases which will likely shape the future of negligence cases – particularly those involving negligent security, criminal actors and comparative negligence. They also examined the 2005 Tort Reform Act's impact on apportionment of fault in negligence cases.

The trio further explored topics including whether apportionment is appropriate in cases involving



the intentional acts of a criminal, what is an appropriate comparative negligence jury charge in light of *Clark v. Rush*, and whether the current versions of O.C.G.A. §§ 51-12-31 and 33 are unconstitutionally vague.

Following the presentations, everyone enjoyed some Irish revelry at a reception outdoors on the Fado rooftop on what was a perfect Spring day.

The day after the seminar, the Supreme Court of Georgia issued its decision in *McReynolds v. Krebs*. See Mr. Root's article on the cover of this edition.

## PHOTOS

Scenes from the Apportionment CLE:

1. Speaker Wallace Miller makes a point; 2. David Root (right) reviews *McReynolds v. Krebs* as speaker Matt Moffett (left) looks on; 3. (Rakhi McNeill (left) and Ashley Rice enjoy the reception afterward; 4. Program chair Erica Morton (right) visits with Education Committee member Kevin Patrick (left) and Arthur York at the reception following the CLE. ❖



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# CLE: Prof. Milich Explores the New Evidence Code

As a follow-up to the cover article in the last edition of this newsletter, the GDLA Education Committee scheduled a CLE seminar with Professor Paul S. Milich to explore the impending changes to Georgia's Code of Evidence and its impact on civil cases.

The two hour seminar, planned by Education Committee Vice-chair Brett Miller of Mabry & McClelland in Atlanta was held on April 26, 2012, in Sutherland Asbill & Brennan's Tuttle Courtroom, and was followed by a reception at The Peachtree Club

Professor Milich, Director of the Litigation Skills Program at Georgia State University's College of Law, played an integral role in the drafting and adoption of the new rules of evidence.

He walked through a series of hypotheticals, applying the current rules and new rules to demonstrate, for example, how an objection sustained under today's rules may be overturned under the new code. He also presented attendees with a four-page quick reference

guide entitled "Georgia Evidence Essentials (based on the new 2013 Georgia Evidence Code)."

## PHOTOS

Unless otherwise noted, individuals are identified left to right: 1. Professor Paul Milich reviews hypotheticals. 2. Ben Byrd and Duane Cochenour enjoy the reception; 3. GDLA Past President Grant Smith visits with his firm's associates: Dan Kingsley, Steven Herman and Jan Seanor; 4. Jeff Wasick, David Sawyer, Lara Percifield and Molly O'Connor enjoy The Peachtree Club's rooftop terrace; 5. Firm colleagues Justin Kreindel, Elizabeth Edwards, Mike Williams and Robin Hein network outside the office; 6. Firm colleagues Kimberly Stone Boehm and Catherine Koura enjoy the reception. 7. Networking at the reception are John McKinley, John Austin and Bridgette Eckerson. ❖



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# CLE: Where the Rubber Meets the Road

The GDLA Education Committee and Platinum Sponsor Collision Specialists, Inc. (CSI) presented the luncheon seminar, "Where the Rubber Meets the Road: Causal Factors in Vehicle Collisions," on March 14, 2012, at Maggianos Buckhead.

Education Committee member Andy Treese of Drew Eckl & Farnham in Atlanta planned the CLE event.

CSI's Jeffrey Kidd led the program, which was designed to help attendees understand how to determine the causal factors of a vehicle collision before they have to depose a police officer or an opposing expert.

Mr. Kidd reviewed "black box" technology, including the classification of roadway evidence and vehicle dynamics, which is often misinterpreted.

## PHOTOS

Scenes from the CLE:  
1. Education Committee Chair Wayne Melnick, CLE Program Chair Andy Treese and GDLA Executive VP Lynn Roberson; 2. Speaker Jeffrey Kidd of CSI.; 3. John Harrison (left) of CSI talks with Alan Herman and Steven Herman.



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# Young Lawyers Corner

By Andy Holliday  
Young Lawyers Committee Chair  
*Fulcher Hagler, Augusta*

I was honored when GDLA President Mel Haas called and asked me to serve as Chair of the Young Lawyers Committee (YLC) of the Georgia Defense Lawyers Association. Not only am I happy to still qualify as a “young lawyer” at age 35 – albeit for one more year – but also the GDLA has been a wonderful way to meet other defense lawyers around the state, stay up-to-date on recent developments in the law, receive good advice on various experts, and enjoy camaraderie at meetings and CLEs throughout the year. I am also happy to announce that Pamela Lee of Swift Currie in Atlanta and Jason Logan of Constangy Brooks & Smith, in Macon have graciously agreed to serve as vice-chairs of the YLC. Together, we hope to meet many of our young defense lawyer counterparts around Georgia and help provide you with various opportunities

to network, learn, speak, publish, and enjoy the practice of law.

There are so many developments affecting young lawyers in today’s legal world that make now an important and exciting time to actively participate in the Young Lawyers Committee. For instance, the decline of the civil jury trial is frequently discussed at seminars and in legal publications. It is not uncommon for a young litigator in today’s environment to have never had the opportunity to serve as first, or even second, chair during a jury trial. More likely, younger lawyers are familiar with trying their cases during mediation. How can we, as young lawyers, ensure that we do not grow into a generation of trial lawyers who do not know their way around a courtroom?

Another development young lawyers must address is the saturation of the market with lawyers. In 1963, there were approximately 3,400 lawyers in Georgia or less than 1 percent of Georgia’s population then. By 1985, that number

grew to 14,000 lawyers or 2.3 percent of our state’s population then. Today, the State Bar of Georgia consists of nearly 35,000 active members or 3.5 percent of today’s Georgia population. It is not difficult to imagine how the steady increase in Georgia’s per capita lawyer population will affect the market. There are an unprecedented number of lawyers for each potential client today. The competition is stronger than ever and, with this economy, today’s young lawyers will be competing in a marketplace unlike any that our predecessors experienced.

The ongoing discussion of the billable hour and alternative billing arrangements is another unique issue that lawyers of our generation will need to address. Historically, defense attorneys have been paid an hourly rate, while our counterparts on the plaintiff’s side are frequently paid on a contingency basis. In-house counsel, claims professionals, and other clients continue to seek

*Continued on next page*



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# Young Lawyers Celebrate Dos de Mayo

The newly reinvigorated GDLA Young Lawyers Committee (YLC) kicked off events on May 2, 2012, at Cantina Taqueria & Tequila Bar in Buckhead. The happy hour was billed “Dos de Mayo” as a warm-up to Mexican Independence Day, Cinco de Mayo. As part of the theme, YLs enjoyed margaritas, sangria, quesadillas, chips and guacamole, and more.

Scenes from the happy hour: 1. Executive VP Lynn Roberson (right) welcomed the YLs on behalf

of the GDLA along with YLC Vice-chair Pamela Lee and YLC Chair Andy Holliday; 2. Sarah Smith and Robbie Fuller; 3. Karisa Kopaczewski and Ryan Klee; 4. Stephen Graham and Jeff Costolnick; 5. Brian Williams, Becky Gabelman, Ashley Rice and Benson Ward; 6. YLC Vice-chair Jason Logan, Alyssa Morris and Sul Kim; 7. Mary Claire Jagor, Allison Maloney and Ashley Gowder. ❖



## YL Corner

Continued from previous page

out other ways to pay for our services. At a recent DRI seminar I attended, one in-house counsel commented that she and her colleagues view the billable hour as providing the wrong incentive for her company's outside lawyers, which translates into unpredictable expenses for her department. From her perspective, it was more attractive for outside lawyers to quote her a separate, flat price for different stages of a lawsuit – such as a motion to dismiss, discovery, a motion for summary judgment,

trial, or an appeal. This was not commonly discussed or negotiated by the defense lawyers who preceded us. How do we, as young lawyers, prepare ourselves and address the growing appeal from defense clients for alternative billing arrangements?

There are many other issues that have always faced young lawyers, including how to develop and maintain a healthy work/life balance with a young family at home and a demanding workload; how to get to know the judiciary and develop a strong reputation with Georgia's judges when many of them are of a different generation; how to develop a client base when

you do not have a head full of gray hair or a career full of war stories to share with prospective clients.

We hope to help each other with these and many other issues that are relevant to today's young defense lawyers in Georgia. Please sign up for the GDLA's young lawyers e-mail blast database, attend the upcoming events that we are scheduling around the state, attend the GDLA Annual Meeting each year, and encourage other young defense lawyers in your firm to join. We look forward to meeting you and working to create an enjoyable and rewarding environment for Georgia's young civil defense lawyers. ❖

# Board Convenes for Winter Meeting

As is tradition, the GDLA Board of Directors held its Winter Meeting on Friday, February 10, 2012, following the judicial reception the evening before.

Those present included *Officers*: President Mel Haas of Constangy Brooks & Smith, Macon; Executive Vice President Lynn Roberson of Swift Currie McGhee & Hiers, Atlanta; and Secretary-Treasurer Ted Freeman of Freeman Mathis & Gary, Atlanta. *Vice Presidents*: Hall McKinley of Drew Eckl & Farnham, Atlanta; Kirby Mason of Hunter Maclean, Savannah; and Peter Muller of Goodman McGuffey Lindsey & Johnson, Savannah. *Board of Directors*: Sally Akins of Ellis Painter Ratterree & Adams, Savannah; Craig Avery of Cowsert & Avery, Athens; Lance Greene of McNatt Greene & Peterson, Vidalia; Dart Meadows of Balch & Bingham, Atlanta; Brian Moore of Drew Eckl & Farnham, Atlanta; Jeff Ward (then) of Gilbert Harrell Sumerford & Martin (now of Drew Eckl & Farnham), Brunswick; and David Nelson of Chambless Higdon Richardson Katz & Griggs, Macon. *Past Presidents*: Jerry Buchanan of Buchanan & Land, Columbus; Salty Forbes of Forbes Foster & Pool, Savannah; Johnny Foster of Forbes Foster & Pool, Savannah; Warner Fox of Hawkins Parnell Thackston & Young, Atlanta; Steve Kyle of Bovis Kyle & Burch, Atlanta; Walter McClelland of Mabry & McClelland, Atlanta; Jimmy Singer of Bovis Kyle & Burch, Atlanta; Bob Travis of Bryan Cave, Atlanta. Also present were Education Committee Chair Wayne Melnick of Gray Rust St. Amand Moffett & Brieske, Atlanta; Young Lawyers Committee Chair Andy Holliday of Fulcher Hagler, Augusta; and Executive Director Jennifer Davis.

Following are highlights:

- Admissions Chair Warner

Fox advised that the GDLA currently has 590 members. Forty-six individuals were then proposed for membership and unanimously accepted (see page 4).

- President Haas welcomed Andy Holliday, who he appointed as the new Young Lawyers Committee (YLC) chair, and thanked him for his willingness to serve. Mr. Holliday reported that President Haas had also appointed two vice chairs, Jason Logan and Pamela Lee (the latter will serve as a liaison to the Education Committee). The YLC is working with Jennifer Davis to glean from the membership database who is

an eligible member, age 36 or under; they will then set up a list-serve so YLC members can e-blast to each other in the same way that the SLCs now can. The YLC is exploring planning events in Savannah, Macon and Atlanta. Ms. Davis added that the State Bar Young Lawyers Division (YLD) had approached the GDLA to sponsor their Annual Meeting in Savannah, as they celebrate their 65th anniversary. The Board unanimously passed a motion approving the sponsorship. The goal will be to increase the GDLA's visibility among the State Bar YLD as a membership recruitment vehicle;

## Winter Meeting Scenes



*Above: The GDLA Board of Directors convened at the offices of Hawkins Parnell Thackston & Young. Right: (l-r) YL Chair Andy Holliday and President Mel Haas.*



*Left: (l-r) Past Presidents Jerry Buchanan and Jimmy Singer.*

the GDLA's name will appear in the Bar's Annual Meeting brochure .

▪ Membership Committee Vice-chair Dart Meadows reported that one-fourth of the new members had listed a referring GDLA member on their applications, meaning their applications likely resulted from the RecruitOne membership drive.

▪ A question was raised concerning whether in-house counsel are eligible for GDLA membership. The Board was reminded such persons could become Associate members of the GDLA, but they could not be full voting members.

▪ Education Committee Chair Wayne Melnick reported on his group's two goals for the upcoming year: (1) To work with Platinum sponsors to fulfill their right to offer a CLE as part of their annual sponsorship benefits; and (2) to hold one CLE per month. Mr. Melnick described each of the seminars already scheduled and directed the Board to the website calendar for further information.

▪ Substantive Law Committee Chair Johnny Foster

and Vice-chair Brian Moore reported that many SLC committee chairs were uncertain about their expected duties, hence their activity levels fluctuate. The Board then discussed how best to raise the level of involvement of the SLCs in the GDLA. Mr. Moore reported he would arrange a conference call with all of the leaders to give them a sense of Board's vision and to solicit their feedback.

▪ Judicial Relations Chair Bob Travis reviewed the various open judgeships for which he had solicited feedback from the GDLA to provide the Judicial Nominating Commission.

▪ Website Committee Chair Dave Nelson advised that he was trying to solicit orders, motions and briefs from members to be posted the Brief Bank and Tort Reform Database. Jennifer Davis reported that Brett Miller had volunteered to take on the challenge of adding content to the Brief Bank.

▪ In the absence of Editor Evelyn Fletcher Davis, Jennifer Davis reported on the newsletter. It

is now sent to the appellate bench, and the Board discussed expanding the circulation to include all judges statewide. Ms. Davis will investigate costs and report at the Spring Meeting.

▪ Sponsorship Chair Peter Muller reported on the continued success of the program, and announced the addition of three new sponsors: Delve Information Resources returned as a Platinum Sponsor; RGL Forensics joined at Platinum; and Thomson Reuters Expert Witness joined at Gold (as of press time, Thomson Reuters had moved up another level to Platinum).

▪ Amicus Committee Co-chair Jeff Ward reported it had received four requests for amicus briefs, and the Association had accepted two of those: *McRae v. Arby's* and *Couch v. Red Roof Inns, Inc.* All amicus briefs can be found online in the Members Only area.

▪ Secretary-Treasurer Ted Freeman reported that the Association is in its best financial shape ever. ❖

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# If You Do Nothing Else Right on Appeal, Properly Prepare the Record

Continued from page 13

rejected the appellant's argument that its delay in filing the transcript had not delayed the appeal and was thus not unreasonable. Specifically, the appellant argued that its delay in filing the transcript was immaterial in light of the civil appeals clerk's maternity leave and the resulting delay in preparation of the record on appeal, but the Court of Appeals faulted appellant for failing to offer any evidence to support this claim despite being allowed an opportunity to do so by the trial court.

"So all the burden for perfecting the record falls on the appellant? That hardly seems fair," John grumbled.

"Not exactly," Sue replied. "If you are the appellee, you have the responsibility to ensure that the appellant has included all the transcripts and other record items that you believe are required as well. And, appellee has to pay the costs of transcription if the appellee designates the omitted matters be included in the record. Per O.C.G.A. § 5-6-42, this has to be done within 15 days of the appellant's notice of appeal and designation of matters to be omitted from the record. So, it's not all one-sided."

For the sake of prudence, an appellee must check the record to make sure that it includes everything the appellee needs to support his position on appeal. This point is illustrated by *Sprint Transport Group v. China Shipping*, 313 Ga. App. 454 (2011): The trial court entered a default judgment against the appellant because it failed to appear at the hearing on the appellee's motion for summary judgment. On appeal, however, the appellant claimed that it had never received notice of the hearing, and the Court of Appeals vacated the judgment and remanded. Although

the trial court's order granting default stated that the summary judgment hearing had been held "after notice," the Court of Appeals observed that the record contained no evidence showing that notice of the hearing had been served on appellant. Furthermore, the appellee had neither filed an appellate brief nor moved to supplement the record with evidence that notice had been served on appellant. Therefore, the Court of Appeals exercised its discretion to vacate and remand the case for further consideration.

"But what if you discover that you or the trial court clerk has omitted a transcript or some important motion, order, or other part of the record after the 30 days and after the case has gone up to the Court of Appeals? Or even in those cases where you know that a document has been included but you notice as you write your brief that pages are missing from the document or something has been improperly copied? Surely the Court of Appeals would want all the facts and correct copies of documents in the record in order to render its decision?"

"That's true, and it is permissible to supplement the record on appeal," Sue lectured. "The trial court, pursuant to O.C.G.A. § 5-6-41(f), can direct that any omission be corrected and supplemented if a motion is made by either party or if the court itself notices a deficiency in the record. Moreover, the Court of Appeals can, on motion of either party or on its own, supplement the record either before or after oral argument. The key, however, is that a motion to supplement the record *must* be filed *before* the Court of Appeals renders its decision.<sup>1</sup> In other words, you can't ask for a do-over after the Court has decided against you.

All you have to do is file the motion to supplement. You don't even have to include the supplemental materials. If the Court grants your motion, it will get the records from the trial court. I suggest you check Rule 41 of the Court of Appeals Rules . . . actually you should probably go back and re-read all of the Court of Appeals Rules *and* the Georgia Appellate Practice Act."

"The wha...?"

"The Georgia Appellate Practice Act. O.C.G.A. § 5-6-30, et seq. It spells it all out fairly concisely and simply, even for someone like you."

"Well, crap-snacks," John sighed as he slumped in the chair, "I guess I can't count on that performance bonus this year."

"Ah, don't be too hard on yourself, John. Everybody makes mistakes," Sue said as she turned back to her computer, "but I wouldn't be making a down payment on a boat anytime soon if I were you." ❖

<sup>1</sup> See O.C.G.A. § 5-6-48(d); *Damiani v. State of Georgia*, 284 Ga. 372 (2008).



**Matthew G. McLaughlin** is a partner in the Atlanta office of Hawkins Parnell Thackston & Young, representing clients in all phases of litigation from pre-suit evaluation, settlement, trial and appeals. He chairs the GDLA's Appellate Substantive Law Committee.



**Todd C. Alley** is of counsel in the Atlanta office of Hawkins Parnell Thackston & Young, focusing primarily on toxic tort and environmental as well as business litigation.

# Charleston Hosts Spring Board Meeting

The GDLA Board of Directors gathered in Charleston for its Spring Meeting at the Mills House Hotel, April 13-15, 2012.

The weekend commenced with a reception at the hotel, then everyone walked to Magnolias for a dinner of low country favorites. The Board meeting was held on Saturday morning, then the afternoon was free for exploring Charleston before gathering again for a reception. See photos below.

Those present included **Officers:** President Mel Haas of Constangy Brooks & Smith, Macon; Secretary-Treasurer Ted Freeman of Freeman Mathis & Gary, Atlanta. **Immediate Past President** Bubba Hughes of

Callaway Braun Riddle & Hughes, Savannah. **Vice Presidents:** Hall McKinley of Drew Eckl & Farnham, Atlanta; Matt Moffett of Gray Rust St. Amand Moffett & Brieske, Atlanta; and Peter Muller of Goodman McGuffey Lindsey & Johnson, Savannah. **Board of Directors:** Jo Jagor of Hall Booth Smith & Slover, Atlanta; Craig Avery of Cowser & Avery, Athens; Rusty Gunn of Martin Snow, Macon; Chris Parker of Miller & Martin, Atlanta; Jeff Ward of Drew Eckl & Farnham, Brunswick; and Jamie Weston of Trotter Jones, Augusta. **Past Presidents:** Staten Biting of Fulcher Hagler, Augusta; Salty Forbes of Forbes Foster & Pool, Savannah; Bob Travis of

Bryan Cave, Atlanta; Johnny Foster of Forbes Foster & Pool, Savannah; Warner Fox and Bruce Welch of Hawkins Parnell Thackston & Young, Atlanta. Also present were Young Lawyers Committee Chair Andy Holliday of Fulcher Hagler, Augusta; Premises Liability SLC Chair Shane Keith of Hawkins Parnell Thackston & Young, Atlanta; Education Committee Chair Wayne Melnick of Gray Rust St. Amand Moffett & Brieske, Atlanta; and Executive Director Jennifer Davis.

At press time, the minutes had not been approved, but they will be posted with other Board meeting minutes in the Members Only area of our website. ❖

## Spring Meeting Scenes

1. President Mel Haas and his wife Linda (standing right), Past President Warner Fox and his wife Pat (seated right) enjoy dinner with Rusty Gunn and his wife Brent; 2. (l-r) Lisa Muller, Laura Melnick, Peter Muller, Wayne Melnick, Brian and Julie Moore at Magnolia's; 3. Jeff and Greer Ward, Executive Director Jennifer Davis, Debbie and Past President Bubba Hughes visit during dinner; 4. (l-r) Mary Peironnet and Secretary-Treasurer Ted Freeman visit with Robin and Chris Parker at the reception; 5. Shane Keith talks with Past President Bruce Welch at the reception; 6. (l-r) Ann Hopkins and Hall McKinley dine with Resa and Craig Avery.



# Decision on Apportionment of Liability

Continued from page 1

ages only where a plaintiff was partially at fault. The former version of Section 51-12-33 allowed apportionment only where the plaintiff was at fault, and McReynolds construed the amended statute to still require some degree of fault on the part of the plaintiff to trigger apportionment. The amended statute's subsection (a) — which allows apportionment of liability to the plaintiff — still included language limiting its application to cases where “the plaintiff is to some degree responsible for the injury,” and McReynolds argued that this language also applies to the subsection at issue in her case, *i.e.*, subsection (b). McReynolds maintained that joint and several liability still prevails where the plaintiff is without fault, and that contribution and setoff are therefore still available in that situation.

The Supreme Court disagreed. Justice Nahmias wrote that the

amended version of Section 51-12-33 adopted in the Tort Reform Act of 2005 mandates apportionment even where the plaintiff is not at fault. The Court rejected McReynolds' argument that the limitation in subsection (a) of the amended statute (making it applicable where “the plaintiff is to some degree responsible for the injury”) had been imported into subsection (b) of the amended statute. The Court found that “the statute nowhere states that the remaining subsections are dependent on satisfying subsection (a)'s limitation to cases involving plaintiff fault.” The Court determined that subsection (b) is “plainly meant to apply even if there is no plaintiff fault.”

The Supreme Court also rejected McReynolds' argument that she had a continued right to contribution under O.C.G.A. § 51-12-32. The Court found

McReynolds' argument unpersuasive because O.C.G.A. § 51-12-32 begins with the phrase, “[e]xcept as provided in code Section 51-12-33.”

The *McReynolds* opinion is the Supreme Court's first foray into that part of the 2005 tort reform package dealing with apportionment. It is good news for lesser culpable defendants who want to spread the loss to those with more fault. On the other hand, defendants must now be prepared to present evidence at trial to prove apportionment shares against settling defendants and nonparties. ❖



*David F. Root is a partner with Carlock Copeland & Stair in Atlanta, where he focuses on general liability, employment, construction and other areas. He served as appellate counsel to the defendant in McReynolds v. Krebs.*

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They stop thinking. Moreover, they do this *unintentionally and automatically*. They unwittingly treat evidence or testimony in a biased way, without any intention or awareness of doing so.

Importantly, this is not just a “juror thing.” Rather, it is a “human thing,” and we are all guilty of it. No one is immune from it, and it transcends all demographic categories. This phenomenon, called “confirmation bias,” is powerful and perilous — but it is also largely (though not completely) preventable.

## Confirmation Bias Is Powerful

Simply stated, confirmation biases are errors in jurors’ information processing and decision making. Jurors have a tendency to search for, interpret, or remember information in a way that “confirms” their preconceptions, biases, or beliefs. In other words, jurors selectively collect (or omit) new evidence, interpret evidence in a biased way, or selectively recall information from memory. During trial, most jurors *seek* information that confirms their existing attitudes and beliefs rather than genuinely weigh evidence from both the plaintiff and the defendant. Many are reluctant to consider alternative stances and views, and instead set higher standards for arguments that go against their current expectations. Confirmation bias is perhaps more dangerous than other biases because it *actively* keeps jurors from arriving at the truth and allows them to wallow in comforting prejudice and partiality.

Confirmation bias is powerful — so powerful that psychological research shows that many people tend to stick to a position even after the evidence proves it false. Psychology researchers Ross and Anderson (1982) say it best: “[B]eliefs can survive potent logical or empirical challenges. They can

survive and even be bolstered by evidence that most uncommitted observers would agree logically demands some weakening of such beliefs. They can even survive the total destruction of their original evidential bases.”<sup>1</sup> The problem lies in how jurors’ brains instinctively examine and evaluate contrasting positions (*i.e.*, the opposing arguments presented by plaintiff and defendant). The brain is hard-wired or “programmed” to confirm propositions and arguments rather than falsify them. Confirmatory information is easier for the brain to process than data falsifying a position. In other words, a juror can more easily see how evidence supports a position than how evidence refutes the position. Therefore, jurors — and people generally — place excessive value on confirmatory information, *i.e.*, positive or supportive data.

To see confirmation bias at work on a large scale, consider the conspiracy theories offered for the JFK assassination and the 9/11 attacks. These theorists see the evidence in a one-sided way, searching only for data consistent with the theory they hold at the time. They also look for the consequences they would expect if their theory were true, rather than what would happen if it were false. Other common, real-world examples include:

- **Medicine:** A family physician may quickly form a diagnosis in his mind during a brief discussion with a patient, and then convince himself that the other complaints and physical exam fit that initial diagnosis.
- **Politics:** Republicans tend to watch Fox News and Democrats tend to watch MSNBC or CNN, with both sides ignoring and avoiding views that contradict their own.
- **Government policy:** Policymakers may keep the military

engaged in a war or conflict while ignoring countless pieces of evidence that it is a lost cause (*e.g.*, Vietnam).

- **Media:** A reporter who is writing an article on an important issue might only interview experts that support her or his personal views on the issue.
- **Employment:** An employer who believes that a job applicant is highly intelligent may pay attention to only information that is consistent with this belief, and ignore clear flaws.
- **Science:** Scientists may set up experiments or frame their data in a manner that will tend to confirm their hypotheses, and then proceed in ways that avoid dealing with data that would contradict their hypotheses.
- **Health:** A person may read about a particular medical condition on the Internet and then look for those symptoms in his own body, thereby increasing the chances of detecting them regardless of whether he actually has the condition.

As you can see, confirmation bias is a powerful, ubiquitous phenomenon. It can also be perilous to your case.

## Confirmation Bias Is Perilous

Decades of jury decision-making research have repeatedly shown that demographic variables do not accurately predict verdict outcomes or damage awards in civil litigation. This is because demographic factors such as intelligence, education, income, and race do not account for confirmation bias. In situations characterized by interactions among numerous variables and in which the cause-effect relationships are unclear (*e.g.*, evidence in a civil trial), data tend to be open to many

interpretations. In these instances, confirmation bias can have a profound effect, and attorneys should not be surprised to see intelligent, well-intentioned people draw support for diametrically opposed views from the same evidence presented at trial.

Confirmation biases are stronger and more prevalent for issues that are emotionally significant to jurors and for established beliefs that shape a juror's identity. For example, sympathetic cases involving significant injury, suffering, and/or death (especially with infants, children, adolescents, and/or mothers) can further fuel confirmation bias. Additionally, cases that relate to jurors' lives and work roles (*i.e.*, employment matters, divorce, religion, politics, gender, etc.) can also lead to higher levels of confirmation bias in the courtroom. The more emotionally and personally involved jurors are with a belief, the more likely they will ignore whatever facts or arguments undermine that belief.

Ironically, trial attorneys are extremely susceptible to confirmation bias as well. For example, defense attorneys are reluctant to strike educated, intelligent people in higher income brackets during jury selection, incorrectly assuming that such people are not as biased as less educated people. They assume that "smart" people are rational and level-headed, will be able to better understand their case arguments, and will therefore be more logical and fair decision makers during deliberations. On the flip side, they assume jurors with less education and lower income status are not smart enough to understand their case, are more sympathetic to plaintiff themes, and tend to award high damages due to a failure to understand economics. As a result, during the *voir dire* and jury selection process, a defense attorney will actively seek out data to satisfy his working hypothesis (related to the above demographics) and ignore or avoid data that goes against it (*e.g.*, a less-educated juror who expresses pro-defense characteris-

tics). This results in the attorney striking or not striking particular jurors for illogical reasons. In the end, this heavy reliance on demographic variables can be costly, as plaintiff-oriented juries that award high damages often include a significant percentage of educated, intelligent individuals in higher income brackets.

### **Confirmation Bias Is (Largely) Preventable**

As demonstrated above, confirmation bias is both powerful and perilous. Fortunately, you can take steps to curtail it.

Confirmation bias among jurors is impossible to completely prevent. It is a natural and powerful cognitive tendency that cannot be totally extinguished. Confirmation bias can, however, be interrupted and weakened. Trial attorneys can use the jury selection process and their opening statement to educate jurors about this inadvertent, automatic cognitive error that results in faulty thinking. The best way to control confirmation bias is by helping jurors to understand cognitive bias and challenging them to consider all the evidence and resist the temptation to confirm their hypotheses. During jury selection and opening statements, you need to pre-program jurors to be aware of confirmation bias and to "feel bad" about becoming biased during the trial. Although this will not completely prevent juror confirmation bias, you may influence at least some of the jurors to evaluate the evidence differently.

Because educating the jurors about confirmation bias and challenging them to overcome it will not completely solve the problem, you must also try to identify those jurors with the strongest biases during jury selection and strike them from the panel. This requires the trial attorney to focus *voir dire* on jurors' attitudes and beliefs, rather than other variables that are poor predictors of verdict and damages. Some of the most frequently asked *voir dire* questions are also some of the worst:

- "Can you be fair in this trial?"
- "Can you follow the judge's instructions?"
- "Can you keep an open mind, and wait until the end of the trial to make judgments?"

These questions elicit answers that are useless in determining true bias, as the vast majority of jurors quickly and obediently respond with a simple "yes."

Instead, trial attorneys need to ask questions that tap into jurors' attitudes and beliefs and reveal how they really tick. This requires both a deep understanding of psychology — specifically, human attitudinal and belief systems — and painstaking levels of work to construct *voir dire* questions that will elicit meaningful and useful information. Since most trial attorneys have little or no training in psychology, they need appropriate training and/or expert consultation to ensure that they construct the most useful and effective *voir dire* questions.

### **Conclusion**

As you can see, confirmation bias is a potentially devastating element of litigation psychology. It can prevent jurors from hearing both sides of a case, as it causes them to selectively perceive and recall evidence presented at trial. Trial attorneys can avoid falling prey to confirmation bias by partnering with litigation psychology experts who will teach them strategies to inhibit juror confirmation bias. ❖

<sup>1</sup> Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 129, 149 (Daniel Kahneman et al. eds., 1982).



*Bill Kanasky Jr., Ph.D., is Director of Litigation Psychology for Courtroom Sciences, Inc., a GDLA Platinum sponsor.*

ever, that polygraph testing in response to a shortage is permitted where “additional evidence is obtained through subsequent investigation of specific items missing through intentional wrongdoing, and a reasonable suspicion [exists] that the employee to be polygraphed was involved in the incident under investigation.” In this case, the surveillance-camera images and employee testimony about Cummings’ repeated violations of the dual-control policy satisfied both the “additional evidence” and “reasonable suspicion” requirements.

**WAGE CREDITS UNDER FLSA FOR EMPLOYEE HOUSING: Employer not entitled to wage credits for the cost of housing it provided to migrant farm workers it hired through H-2A visa program because federal law required the provision of housing.**

**Ramos-Barrientos v. Bland**  
661 F.3d 587 (11th Cir. 2011)

A group of migrant workers brought suit against Bland Farms, LLC, alleging that Bland had paid them below the minimum wage in violation of the Fair Labor Standards Act (FLSA) when it failed to reimburse them for fees and travel costs they incurred during their travel from Mexico to Bland’s farms in Georgia. The district court ruled that Bland was entitled to wage credits for the cost of the meals and housing it provided the workers, which offset any amounts owed for travel expenses. On appeal, the Eleventh Circuit affirmed in part and reversed in part.

Citing Section 203(m) of the FLSA, Bland argued that it was entitled to wage credits for meals and housing it furnished its workers. Section 203(m) provides that a wage paid to an employee includes the reasonable cost to the employer of furnishing such employee with board, lodging, or other facilities, “if such board, lodging, or other

facilities are customarily furnished by such employer to his employees.” 29 U.S.C. § 203(m). Accordingly, an employer lawfully may deduct the reasonable cost of employer-provided housing and meals from an employee’s pay, “even if that deduction results in the employee’s cash pay falling below the statutory minimum.”

The workers and the Secretary of Labor, appearing as amicus curiae, argued that the cost of housing should not be included in wages because provision of housing primarily benefitted Bland. They argued that statutes and regulations governing the H-2A visa program for migrant farm workers required Bland to provide the housing free of charge and that, pursuant to a Department of Labor regulation, any such expenses imposed by law must be viewed as inherently for the primary benefit of the employer.

The Eleventh Circuit deferred to the Secretary’s interpretation of 29 U.S.C. § 203(m) and accepted the pertinent Department of Labor regulations. Therefore, the Court ruled that Bland was not entitled to receive wage credits for the housing it provided to the workers. The Eleventh Circuit did agree with Bland’s argument, however, that it was entitled to wage credits for the meals it provided the workers. The Court ruled that these meals were not required by law and were thus considered primarily for the benefit and convenience of the workers. Therefore, the Eleventh Circuit affirmed the district court’s ruling with respect to the issue of wage credits for meals but reversed its ruling with respect to the issue of wage credits for housing.

**FLSA COVERAGE: Construction worker’s claims for unpaid overtime and back wages under the Fair Labor Standards Act failed because he was not subject to either individual coverage or enterprise coverage under the Act.**

**Josendis v. Wall to Wall Residence Repairs, Inc.**  
662 F.3d 1292 (11th Cir. 2011)

Luis Josendis sued his former employer, Wall to Wall Residence Repairs, Inc., for unpaid overtime and back wages under the federal Fair Labor Standards Act (FLSA). While employed by Wall to Wall, Josendis was assigned to various construction projects in and around southern Florida. His duties included plumbing and tiling; window, door, floor, and kitchen installation; and stucco and granite work. He worked more than forty hours per week and earned approximately \$120 per day. Wall to Wall did not pay Josendis overtime. The district court granted summary judgment to Wall to Wall, however, ruling that Josendis was not covered by the FLSA.

The Eleventh Circuit affirmed on appeal. To be eligible for FLSA overtime, an employee must demonstrate that he is “covered” by the FLSA. For this purpose, the employee may claim “individual coverage” or “enterprise coverage.” “Individual coverage” applies if the employee “directly participat[es] in the actual movement of persons or things in interstate commerce.” “Enterprise coverage” applies if the employee is employed in an enterprise engaged in interstate commerce or in the production of goods for interstate commerce.

Josendis failed to demonstrate individual coverage. The record showed that Josendis never traveled outside Florida for purposes of his employment; that he had no interaction with Wall to Wall’s customers; and that he only performed construction and remodeling work within Florida. Furthermore, Josendis produced no evidence to indicate that he had ever participated in the actual movement of any object in interstate commerce while working for Wall to Wall.

Josendis also failed to establish enterprise coverage. Wall to Wall would be subject to enterprise coverage if it: (1) had at least two

employees engaged in interstate commerce or the production of goods for interstate commerce, or who handle, sell, or otherwise work on goods or materials that had once moved or been produced for in interstate commerce; and (2) had gross sales of at least \$500,000 annually. The evidence showed that Wall to Wall's gross annual sales were less than \$500,000.

Finally, the Eleventh Circuit also rejected Josendis' claim to enterprise coverage based on 29 C.F.R. § 776.23(c), which "purports to bring 'within the scope' of the FLSA all employees engaged in construction work, including maintenance and repair work, that is 'closely or intimately related' to a covered enterprise." Josendis argued that he had coverage under this regulation because he had performed remodeling work for Wall to Wall at the Miami Jewish Home and Hospital for the Aged, which allegedly qualified as an enterprise engaged in interstate commerce.

The Eleventh Circuit, however, rejected the Department of Labor's attempt to expand the FLSA's coverage through 29 C.F.R. § 776.23(c). The Court ruled that the text of the FLSA provision at issue "can only be construed to cover employees actually employed by the covered enterprise" and "cannot stretch so far as to accommodate employees employed by a third party that performs sporadic work for a covered enterprise."

Thus, the Eleventh Circuit held that Josendis was not subject to either individual coverage or enterprise coverage under the FLSA.

**STATE CLASSIFIED EMPLOYEES: RIGHT TO HEARING: State Personnel Board exceeded its authority in adopting regulations authorizing an administrative law judge to resolve termination appeals without an evidentiary hearing.**

***Georgia Dept. of Community Health v. Dillard***  
**313 Ga. App. 782 (2012)**

Elizabeth Dillard, a classified

employee on disability leave, failed to submit paperwork supporting her claim of disability. As a result, the Georgia Department of Community Health ("DCH") terminated her employment, but characterized the termination as a voluntary resignation. Dillard appealed her termination to the State Personnel Board and requested a hearing. The administrative law judge ("ALJ") assigned to the matter informed the parties that the appeal would be decided on the written record, that Dillard had twenty days to file submissions to that record, and that no evidentiary hearing would be conducted. After Dillard submitted written evidence, the ALJ upheld DCH's decision that Dillard had resigned voluntarily.

Dillard appealed to the superior court, which reversed on the ground that O.C.G.A. § 45-20-8 guaranteed her an evidentiary hearing. The Court of Appeals affirmed this ruling.

DCH argued on appeal that O.C.G.A. § 45-20-8 does not require an evidentiary hearing where the employee has voluntarily resigned. In addition, DCH argued that an employee who has voluntarily resigned is not entitled to an evidentiary hearing under the State Personnel Board's regulations — specifically, certain subsections of Rule 478-1-.24. DCH also pointed to subsections of this rule that allow DCH to regard an employee as having voluntarily resigned if she is absent from duty for five consecutive workdays without proper authorization or fails to return to duty at the expiration of a leave of absence.

The Court of Appeals rejected DCH's arguments and invalidated those provisions of the subject regulation that dispensed with the need for an evidentiary hearing in cases involving the voluntary separation of a classified employee. The Court ruled that these provisions were contrary to O.C.G.A. § 45-20-8. ❖

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prietor of the insured, sustained a compensable injury, and the insurer voluntarily paid medical benefits. Despite acknowledging total disability, the insurer did not pay income benefits and did not controvert. The insurer requested a hearing, contending that it owed no disability benefits because the claimant had received no wages.

The evidence showed that the claimant deposited his company's gross income into his only checking account and paid business and personal expenses from that account, though no payments were specifically designated as wages or salary for him. The administrative law judge ("ALJ") found that the evidence showed an average net income of \$1,541.32 per week, and awarded temporary total disability income benefits of \$500.00 per week. The ALJ also found that the insurer had unreasonably failed to comply with O.C.G.A. § 34-9-221, and therefore assessed attorney fees against the insurer. The insurer appealed.

The Appellate Division adopted the ALJ's findings of fact regarding the wage issue and affirmed the award of benefits. The Appellate Division reversed the award of attorney fees, however, ruling that the evidence did not support the ALJ's finding that the insurer lacked reasonable grounds for not complying with O.C.G.A. § 34-9-221. The Superior Court reversed this latter ruling and reinstated the award of attorney fees.

The Court of Appeals vacated the Superior Court's judgment and ordered that the case be remanded to the State Board of Workers' Compensation for reconsideration. The standard of review requires the courts to accept the State Board's factual findings when there is any evidence to support them. In this case, however, the Appellate Division had not substituted its own findings of fact when it rejected those of the ALJ. Therefore, the Superior Court and Court of

Appeals had no basis for determining whether any evidence supported the Appellate Division's conclusion that the ALJ had no discretion to assess attorney fees. Rather than reversing the Appellate Division, the Superior Court should have remanded the case to the Appellate Division for reconsideration.

Judge McFadden dissented, arguing that the Superior Court's reversal of the Appellate Division was warranted based on the undisputed facts.

**TIMELINESS OF SITF CLAIM: A lump-sum advance of future income benefits to prevent extreme hardship does not constitute payment of weekly benefits for the purpose of determining the timeliness of an employer's claim for reimbursement by the Subsequent Injury Trust Fund.**

***Subsequent Injury Trust Fund v. City of Atlanta***  
**310 Ga. App. 581 (2011)**

Ollie Thornton sustained a compensable work injury while employed by the City of Atlanta, and he subsequently began receiving temporary total disability income ("TTD") benefits on September 2, 2001. On May 30, 2002, the State Board of Workers' Compensation ordered a \$12,000 advance to prevent extreme hardship, and the City complied. The order provided that the advance was to be credited against future permanent partial disability ("PPD") benefits. More than 78 weeks after the accident date — and after having made 59 weekly TTD payments — the City filed a notice of claim with the Subsequent Injury Trust Fund ("SITF"). The City settled Thornton's workers' compensation case, and then requested reimbursement from the Fund.

The SITF denied the reimbursement request on the ground that the City's notice of claim was untimely under O.C.G.A. § 34-9-362(a),

which requires an employer or insurer to notify the SITF of any possible claim against the Fund "as soon as practicable, but in no event later than 78 calendar weeks following the injury or the payment of an amount equivalent to 78 weeks of income or death benefits, whichever occurs last." The SITF maintained that the \$12,000 advance represented income benefits for the purpose of O.C.G.A. § 34-9-362(a). The SITF argued that the \$12,000 advance therefore had to be taken into consideration in determining whether the equivalent of more than 78 weeks of benefits had been paid before the City filed its notice of claim. Under SITF's reasoning, the City's \$12,000 advance and 59 pre-notice weeks of TTD payments together exceeded the equivalency threshold. Thus, the SITF contended that the City's notice was untimely.

Following a hearing at the City's request, an administrative law judge (ALJ) agreed with the SITF and ruled that City's reimbursement claim was time-barred. The State Board adopted the ALJ's decision, but the Superior Court reversed.

The Court of Appeals affirmed the Superior Court, holding that the reimbursement claim was not time-barred. The Court ruled that "an advance of future income benefits paid to foreclose extreme hardship, rather than to compensate for present lost wages, as here, is not subject to conversion to the equivalent of weekly income benefits." The Court reasoned that denying reimbursement to employers who made such advances would ill serve the Workers' Compensation Act's humane purpose.

**VALIDITY OF BOARD RULE: Board Rule 205, which provides that treatment or testing related to an on-the-job injury is deemed to be pre-approved if the employer does not timely respond to a WC-205 request for authorization, is not an**

invalid substantive change to statutory law.

***Mulligan v. Selective HR Solutions, Inc.***  
**289 Ga. 753 (2011)**

Claimant Mulligan suffered a compensable back injury at work in September 2005. She underwent surgery and returned to work. Thereafter, she reinjured her back at home. Her authorized treating physician sent a Form WC-205 to the claimant's employer/insurer, Selective HR Solutions ("Selective"), and requested preauthorization of additional surgery. Several weeks later, Selective faxed the physician a note stating that it would not authorize the surgery. A few days later, Selective returned the WC-205 and refused to authorize the surgery without a second opinion. The physician performed the second surgery anyway, and Selective refused to pay for it.

Mulligan sought a finding of change in condition, and requested compensation for the expenses for the surgery as well as additional income benefits. An administrative law judge ("ALJ") denied Mulligan's claim for additional benefits, finding that she had not shown a change in condition regarding her September 2005 injury. The ALJ further found that Mulligan had not shown her December 2007 surgery to be compensable, as she had failed to show that this treatment related to her September 2005 work injury rather than an intervening injury. The Appellate Division affirmed.

The Superior Court affirmed the denial of Mulligan's claim for additional benefits, but reversed the denial of payment for the surgery. The Court ruled that Selective had waived its right to controvert the surgery by failing to timely respond to the WC-205, citing Board Rule 205(3)(a). This rule provides that an authorized doctor may request advance authorization for treatment by sending a WC-205 to the insurer, and further states that the treatment will stand preapproved if the insurer fails to respond within five business days.

The Court of Appeals affirmed the Superior Court's ruling on

Mulligan's claim for additional benefits but reversed its judgment ordering payment for the surgery. The Court of Appeals held that Board Rule 205 is invalid to the extent it precludes an employer from challenging the compensability of treatment. The Court determined that the rule exceeds the State Board's rulemaking powers by substantively shifting the burden of proving work-relatedness from the employee to the employer.

The Georgia Supreme Court affirmed, but disapproved the Court of Appeals' ruling that Board Rule 205 is invalid. The Supreme Court ruled that the Court of Appeals had read the rule too narrowly. Rule 205(b)(4) provides that treatment prescribed by an authorized treating physician is to be paid in accordance with the Workers' Compensation Act *where the treatment is related to an on-the-job injury*.

The rule's provision deeming treatment preapproved where an insurer does not timely respond to a request for treatment does not abrogate this threshold mandate that the treatment be for a compensable injury. Thus, the rule does not require an insurer who fails to timely respond to a request for treatment to pay for the treatment regardless of whether the underlying injury is work-related. Consequently, the rule is not invalid.

In this case, the record supported the ALJ's finding that Mulligan had not sustained a subsequent compensable injury, and this finding warranted the ALJ's denial of compensation for the surgery. Therefore, the Supreme Court affirmed the Court of Appeals' reversal of the Superior Court's judgment ordering compensation for the surgery, albeit for different reasons.

**MALONEY DUTY TO CONDUCT DILIGENT JOB SEARCH: Although a claimant asserting an inability to find suitable work must show that he has conducted a diligent job search, a diligent search does not require personal interviews or visits to prospective employers.**

***R.R. Donnelly v. Ogletree***  
**312 Ga.App. 475 (2011)**

Claimant Ogletree sustained an injury to his neck and arms and received income and medical benefits before returning to light duty work for the same employer under permanent restrictions. Almost five years after returning to work, Ogletree was laid off as a result of a decrease in the company's workload. He looked for work within his restrictions by conducting Internet and newspaper research. He submitted applications to approximately 24 potential employers but did not personally visit any.

Six months after his layoff, Ogletree underwent back surgery and filed a claim for temporary total disability ("TTD") benefits from the date of his layoff and continuing, alleging a fictional new accident date as of the layoff. The administrative law judge ("ALJ") awarded benefits. Although the Appellate Division affirmed the finding of a fictional new accident, it reversed the award of TTD, finding that Ogletree had not conducted a diligent job search as required by *Maloney v. Gordon County Farms*, 265 Ga. 825 (1994). The Superior Court affirmed the finding of a fictional new accident and reversed the denial of TTD benefits, reinstating the ALJ's award of benefits. The Court of Appeals affirmed the Superior Court's judgment on both issues.

Regarding the issue of a diligent job search, the Court of Appeals ruled that the Appellate Division had applied an erroneous legal theory. The Appellate Division found that the job search was not diligent because Ogletree had no interviews and made no personal visits to any prospective employers. The Court of Appeals ruled that the Appellate Division's decision exceeded *Maloney's* diligent-search standard and imposed an additional burden on the claimant regarding matters beyond his control. The Court held that the Appellate Division's decision was therefore erroneous as a matter of law. ❖



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