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Georgia Court of Appeals Reaffirms Right to Nonparty Apportionment

Holds that Nonparty Fault is Jury Issue

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

In *Alston & Bird LLP v. Hatcher Management Holdings, LLC*, Docket no. A15A1677 (March 1, 2016), the Court of Appeals dealt with a situation in which a trial court struck a defendant's notice of intention to seek apportionment of fault to various nonparties. Alston & Bird LLP ("A&B") and one of its attorneys represented an individual named Maury Hatcher in connection with creating Hatcher Management Holdings, LLC ("HMH") as "an estate planning mechanism." Thereafter, A&B continued to represent HMH, but also represented Mr. Hatcher individually after he resigned from the company. HMH subsequently sued Mr. Hatcher, alleging he had embezzled funds from the company and breached his fiduciary duty to the company. After obtaining a verdict against Hatcher in that case, HMH filed a separate suit against A&B on theories of legal malpractice and breach of fiduciary duty.

A&B filed a notice of intent to apportion fault to Hatcher and other members of the Hatcher family who were involved in the business of HMH, as well as another law firm that represented the com-

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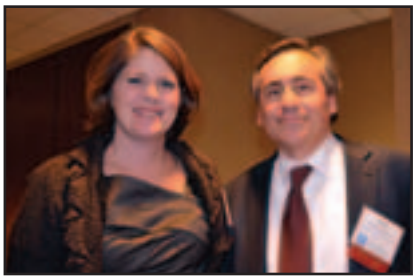
GDLA Honors Atlanta's Judiciary



The GDLA held its 13th Annual Judicial Reception at the State Bar Center on February 4, 2016. Pictured there are Fulton State Court Judge Susan Edlein and GDLA President Matt Moffett.

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

See pages 38-39 for more scenes from the evening.

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Improving Witness (and Attorney) Performance on Direct Examination

By Bill Kanasky Jr., Ph.D.
Courtroom Sciences, Inc.

Introduction

Cross-examination of defendant witnesses often represents the most stressful, vulnerable time of a trial for both witness and defense counsel. For the witness, surviving the emotional and mental chess match of a plaintiff attorney's manipulative pattern of leading questions is often a daunting task. For defense counsel, feelings of helplessness and powerlessness are common, particularly when their witness is getting filleted on the stand. Direct examination, in contrast, is perceived as one of the few non-threatening parts of a trial for both the witness and defense counsel. This is because the witness and the attorney possess total control of the information that is presented to the jury, free of influence from opposing counsel. Control alleviates anxiety and worry, and direct examination provides the witness and the attorney full control of what the jury will see and hear. Unfortunately, this false sense of security can lead to lax witness preparation efforts resulting in ineffective testimony at trial.

After intense preparation for cross-examination, many defense attorneys calmly tell their witness, "Direct examination is when I toss you 'softballs' and you crush them out of the park; you will be great."

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President's Message

Your GDLA leadership is at work for you, and I hope you're pleased with what has been accomplished for our organization over the past year.

We continue to raise our profile as the leading civil defense lawyers in Georgia. From our recent amicus filings, our new judicial candidates forum, and our ever growing judicial reception, Georgia judges know the GDLA.

We continue to recognize and honor our past leadership for the foundation of excellence upon which we are always building. In February, we held the inaugural GDLA Past Presidents Luncheon, and we expect to make this an annual gathering to honor these distinguished leaders for their past and continuing service.

Speaking of great leaders, in August we lost long-time Board of Directors member Rusty Gunn. I hope you read GDLA Past President Jerry Buchanan's memorial tribute in the last issue. To honor Rusty's memory, and the tremendous work he did for this association, we have established the GDLA Rusty Gunn Award to be presented annually to a Mercer law student whose professionalism — like Rusty's — is his or her badge of honor, and who quietly leads with strength, intelligence, and good humor. Special thanks goes to GDLA Treasurer Sally Akins, who coordinated the award's establishment with her alma mater.

We continue to advance professionalism by reaching out to our friends in GTLA for networking and educational events. In September, we hosted the first-ever happy hour with GTLA, and repeated that successful event in April. Also that month, we partnered with GTLA and the *Daily Report* to present the Fulton County Superior Court Candidates Forum. This event, which was free and open to all, including the public, was the brainchild of GDLA Legislative Chair Jake Daly, and he is to be commended for its success.

In addition, thanks to the good idea and hard work of Secretary Hall McKinley, the GDLA partnered with our friends in GTLA, as well as the State Bar of Georgia, Atlanta Bar Association, Georgia Association for Women Lawyers, and Georgia Asian Pacific American Bar Association, to co-host the ABA Tort Trial & Insurance Practice Section (TIPS) Second Annual Conference held in Atlanta in May. As part of the educational programming, we joined with GTLA and GDLA Platinum Sponsors BAY Mediation and Miles Mediation to present "Bridging the Divide: Plaintiff and Defense Counsel, Ethics, Civility & Mediation Summit."

Also, for the first time, we invited all presidents of Multi-Bar Leadership Council (MBLC) bar associations to be our guest at the GDLA's annual judicial reception in February, which is otherwise for members only.

Our new Diversity chair, Candis Jones, took the torch from prior chair and Past President Lynn Roberson, and is representing us at monthly MBLC meetings. She is working with our Young Lawyers Chair, Zach Matthews, who recently picked up the mantle from Pamela Lee. Candis and Zach led our efforts to win second prize at the MBLC Diversity Celebration & Cook-off.

We are committed to fortifying our relationship with DRI–The Voice of the Defense Bar by participating in its State & Local Defense Organization (SLDO) programming at DRI's Annual Meeting, Leadership Meeting, and Regional Meeting. By sharing ideas with our counterparts across the country, we are strengthening the civil defense bar nationally. Locally, our young lawyers again held a joint happy hour with DRI's Young Lawyers Committee in May. There we shared the message that DRI members who have not been a GDLA member previously qualify for a free year of GDLA membership.

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Member News & Case Wins

Member News

Ellis Painter Ratterree & Adams in Savannah announced the addition of GDLA Past President **Edward M. (Bubba) Hughes**, **Dana F. Braun** and **Thomas E. (Tommy) Branch**. All three were previously with *Callaway Braun Riddle & Hughes* in Savannah. **Joshua H. Dorminy** has also joined the firm.

Troy Lance Greene, former GDLA Board of Directors member, announced the formation of his new firm *Troy Lance Greene, P.C.*, in Vidalia, where he was formerly with *McNatt Greene and Peterson*. Having been in practice over 27 years, he will continue to represent insurance carriers and self-insurers in Georgia. Mr. Greene handles insurance, workers' compensation, casualty, premises liability, and electrical contact cases, and has defended utilities for several years. In addition to handling many workers' compensation hearings, he also has tried many jury trials to verdict, including handling four jury trials in the last 18 months.

Weinberg Wheeler Hudgins Gunn & Dial in Atlanta announced its Managing Partner **David A. (Dave) Dial** was named to *Georgia Trend's* Legal Elite in the area of general practice/trial law. Mr. Dial has a broad-based national commercial litigation practice and is widely known for construction litigation and catastrophic injury cases. Selected as Band One in construction law by Chambers USA, he was also recently named Lawyer of the Year in Litigation Construction by Best Lawyers.

Savell & Williams in Atlanta announced that **Edward P. Denker, Matthew D. Schreck, Christian A. Pecone** and **Kasi R. Whitaker** have become partners in the firm. Mr. Denker and Ms. Whitaker specialize in workers' compensation defense. Mr. Schreck and Mr. Pecone specialize in the defense of liability and workers compensation matters.

Stephen Dermer, **Adam L. Appel** and **Kim Ruder** announced the formation of *Dermer Appel Ruder*. Joining them as an associate is **Andreea Neculae Morrison**, who practiced with Mr. Dermer at *Magill Atkinson & Dermer*. Ms. Ruder was previously with *Carlock Copeland & Stair*, where she practiced with Mr. Appel prior to his joining *Cruser & Mitchell*. The new firm will focuses on commercial vehicle claims, premises liability, product liability, construction site accidents, construction defects, medical malpractice, nursing home defense, civil rights, and employment discrimination. Their office is located at 6075 The Corners Parkway, Suite 210, Peachtree Corners, GA 30092.

Swift Currie McGhee & Hiers announced that **David M. Atkinson**, formerly a partner at *Magill Atkinson Dermer*, has joined the firm as a partner in the Atlanta office. Mr. Atkinson's practice includes insurance coverage and bad faith, tort defense, construction, intellectual property, and business litigation. **Calvin Yaeger**, **Ari Shapiro** and **Pilar Whitaker**, all formerly with *Magill Atkinson Dermer*, have also joined the firm's Atlanta office as associates.

Brett A. Tarver, formerly with *Insley & Race*, has joined *Jones Day* in the Atlanta office. Her practice focuses on complex civil litigation in state and federal courts, including the defense of individual and class action product liability lawsuits. She is currently involved in Jones Day's nationwide defense of the Engle progeny smoking and health lawsuits brought against R.J. Reynolds Tobacco Company.

Continued on next page

GDLA's Richardson Award Presented at UGA Law School

Anna V. Fowler (right) was the recipient of the GDLA's 2016 Willis J. (Dick) Richardson, Jr. Student Award for Outstanding Trial Advocacy at the University of Georgia School of Law. This annual award, sponsored by the GDLA, honors the memory of one our founding members. Ms. Fowler is pictured with Dean Bo Rutledge during the 2016 Georgia Law Awards Program on April 8, 2016.

T. Jeffery Lehman, formerly with *Dennis Corry Porter & Smith* in Atlanta, has joined *Fain Major & Brennan*. He focuses on general insurance defense, including motor carrier, automobile negligence, premises liability, and insurance coverage litigation.

Owen Gleaton Egan Jones & Sweeney in Atlanta has named **David Pardue** a partner of the firm. His 21 years of practice in Atlanta have focused on intellectual property and business litigation representing large and small companies. He has been lead counsel in numerous trademark infringement and trade secret cases, as well as cases involving fraud, RICO, noncompetes, insurance coverage, wage and hour claims, and real estate matters. Mr. Pardue has also handled numerous arbitrations. He has been listed in *Georgia Trend's* Legal Elite in 2006, 2010 and 2012-2013 in the area of general practice/trial, and has been named a Georgia Super Lawyer from 2008-10 and 2014-16.

Keith M. Hayasaka, formerly with *Hall Bloch Garland & Meyer*, has joined *Dennis Corry Porter & Smith* in Atlanta. His practice encompasses the areas of transportation defense, general liability, premises liability, wrongful death, property damage, and personal injury defense.

Payton D. Bramlett, formerly with *Vernis & Bowling*, has joined *Drew Eckl & Farnham* in Atlanta. He focuses his practice on appellate law, commercial law, commercial transportation law, general liability, insurance coverage, and professional malpractice and healthcare.

C. Whitfield Caughman, formerly with *Greenberg Traurig,* has joined *Paradies Lagardere* as Senior Corporate Counsel in the company's Atlanta headquarters. In this role, she will handle both corporate and litigation matters for the company.

James-Bates-Brannan-Groover in Macon announced that **William H. Noland**, a former partner at *Childs and Noland*, has joined the firm as Of Counsel. His practice consists of civil, commercial, and insurance litigation, as well as local government liability. Mr. Noland also serves as a registered mediator. The firm also announced that **Lauren N. Schultz**, formerly with *Childs and Noland*, has joined the firm as an associate. Her practice consists primarily of general, commercial, and insurance litigation, as well as local government liability defense.

Sun Choy of *Freeman Mathis & Gary* in Atlanta was installed as president of the Korean Amerian Bar Association of Georgia. **Lilia Kim** of the *Georgia Department of Banking and Finance* in Atlanta and **Sul Kim** of *Constangy Brooks Smith & Prophete* in Macon were appointed board members.

Several GDLA members were elected to leadership positions with the State Bar of Georgia: **Patrick T. O'Connor**, president, *Oliver Maner*, Savannah; **Darrell Lee Sutton**, secretary, *Sutton Law Group*, Marietta; and **Nicole C. Leet**, YLD President, *Gray Rust St. Amand Moffett & Brieske*, Atlanta. All three will serve on the State Bar's Executive Committee, which meets monthly and exercises the power of the Board of Governors when it is not in session. Re-elected to the Board of Governors were: **Sarah B. (Sally) Akins**, Eastern Circuit, Post 1, *Ellis Painter Ratterree & Adams*, Savannah; **J. Anderson (Andy) Davis**, Rome Circuit, Post 2, *Brinson Askew Berry Seigler Richardson & Davis*; **Janice M. Wallace**, Griffin Circuit, Post 1, *Beck Owen & Murray*; and **Jeffrey S. Ward**, Brunswick Circuit, Post 2, *Drew Eckl & Farnham*.

Case Wins

R. Scott Masterson, a partner with *Lewis Brisbois Bisgaard & Smith*'s Atlanta office, obtained a defense verdict in Los Angeles (California) Superior Court when his client Union Carbide Corp. was found not liable in a former mechanic, construction worker and welder's $20 million mesothelioma trial. The trial commenced on January 11, 2016, and the defense verdict was reached on February 8 after one day of deliberation.

Victor Jasniy alleged that he developed mesothelioma from exposure to asbestos in various jobs he held in the 1970s and 1980s. The Jasniys sued several companies with Victor seeking damages for negligence, strict liability and conspiracy, and Diane seeking damages for loss of consortium. Union Carbide was the sole remaining defendant in the trial; previous defendants included 3M Co., Ford Motor Co. and Cessna Aircraft Co.

At trial, the couple's attorney pointed to 1975 invoices for Union Carbide asbestos fibers as evidence that the fibers were in products with which Jasniy worked. Mr. Masterson took aim at inconsistencies in Jasniy's case, including documentation containing dates that differed with Jasniy's memory of when he worked with the products in question. During closing arguments, plaintiff's counsel said that jurors need only find it was more likely than not Jasniy was exposed to Union Carbide's asbestos and the asbestos caused his cancer.

In his closing, Mr. Masterson told jurors the plaintiff had failed to prove he was exposed to Union Carbide's Calidria asbestos, much less that the product caused his cancer. In fact, during cross-examination, when asked whether or not Mr. Jasniy was exposed to Calidria and it was a substantial contributing factor to his cancer, plaintiff's own liability expert could not say.

The case is *Victor Alexander Jasniy et al. v. Certainteed Corp. et*

al., case number BC578783, in the Superior Court of the State of California, County of Los Angeles.

GDLA Trial & Mediation Academy Vice-chair **Carrie L. Christie** and her associate, **Courtney M. Norton**, of *Rutherford & Christie* in Atlanta won summary judgment in the U.S. District Court, Southern District of Georgia, on behalf of American Airlines, Inc.

The plaintiffs, who are Haitian nationals, claimed American Airlines breached its contract with them and violated 42 U.S.C. §§ 1981, 1985 (3) and 2000 (a) when it invalidated Berneide Benjamin's round-trip ticket from Jacksonville, Fla. to Port-au-Prince, Haiti after Miss Benjamin was a no-show for her flight in Jacksonville. When she subsequently attempted to board the plane during its connection in Miami, she learned her seat was sold in Jacksonville and she was charged a change fee and placed on a stand-by list until the next day.

Against the plaintiffs' claims of breach of contract and discrimination, American Airlines argued that the plaintiffs failed to abide by the terms of the Conditions of Carriage and the International General Rules Tariff, and that its policies do not discriminate on account of race or national origin.

Citing to the airline's Conditions of Carriage, which state that failure to comply with a flight itinerary would result in a ticket's becoming invalid, the Court found that the airline was within its right to cancel the ticket and the doctrine of apparent agency did not save the breach of contract claim, despite the plaintiffs' claim that Mr. Benjamin orally advised a telephone representative that his daughter would not board her flight in Jacksonville. The Court again relied on the Conditions of Carriage, which forbids employees from altering, modifying, or waiving provisions of the Conditions of Carriage unless authorized in writing by a corporate officer, and the Benjamins presented no such evidence. The terms of the Conditions of Carriage were also integral to the Court's award of summary judgment on the Benjamins' Section 1981 discrimination claim because it was undisputed that the airline cancelled Berneide Benjamin's flight for a non-discriminatory reason, which was her failure to abide by the terms of the Conditions of Carriage, and the plaintiffs failed to present any evidence that their dealings with airline representatives in Miami went beyond race-neutral enforcement of airline policies.

In noting an absence of discriminatory intent — in contrast to cases from other districts in which the attendant circumstances showed arguable discriminatory animus — the Court found that the airline followed established protocol in finding an available seat for Miss Benjamin and "there is nothing discriminatory in applying both a national origin and race-neutral policy in accommodating the needs of 24 other passengers who were placed on the stand-by list prior to Miss Benjamin." Accordingly, the Benjamins' Section 1981 discrimination claim failed, as did their claims under 42 U.S.C. 1985 (3) and Title II.

GDLA Vice President **Jeffrey S. Ward** of *Drew Eckl & Farnham* in Brunswick served as local counsel and argued the case, which is *Joseph Benjamin, Eunide Benjamin, Berneide J. Benjamin, and Jericho7 Arnaud Projects, Inc. v. American Airlines, Inc.*, Case no. 2:13-cv-00150-LGW-RSB.

Carlton E. Joyce and **Gregory G. Sewell** of *Bouhan Falligant* in Savannah obtained a defense verdict after an eight-day trial on behalf of their clients, a local primary care physician and his practice. **I. Gregory Hodges** of *Oliver Maner* in Savannah, also obtained a defense verdict in the case on behalf of his client, a local gastroenterologist. The plaintiffs claimed that the primary care physician was negligent in prescribing and treating a patient with high blood pressure medication, resulting in the patient's developing drug-induced liver injury, liver failure, and death. The plaintiffs claimed that the gastroenterologist improperly managed the patient's liver injury after she had a reaction to the medication. The plaintiffs asked the jury to award in excess of $7.6 million in damages, and the jury returned a defense verdict after nine hours of deliberation.

On January 21, 2016, a DeKalb County jury returned a defense verdict in a wrongful death case in favor of a pulmonologist/critical care specialist represented by **Rolfe Martin** and **Melissa Reading** of *Owen Gleaton Egan Jones & Sweeney* in Atlanta. The plaintiff's wife died of sepsis from a bowel perforation two days after a laparoscopic procedure to remove her ovary. Plaintiff alleged that the gynecologist, who performed the procedure, and the pulmonologist/critical care doctor, who saw his wife in the emergency room the day after surgery, failed to recognize signs and symptoms of injury to the bowel. They successfully established on appeal in 2014 that a higher burden of proof applied to the care that their doctor provided in the emergency department. The eight-day trial included the defendant-pulmonologist as the first witness, six experts, a treating physician, a co-defendant and several family members and friends. The jury awarded a verdict against the co-defendant gynecologist for $3 million.

GDLA Board member **James W. (Jim) Purcell** of *Fulcher Hagler* in Augusta secured a defense verdict in a wrongful death action involving the intrauterine fetal demise of a twin at 34 weeks gestation. Plaintiffs alleged the defendant, a high-risk ob/gyn, breached the standard of care in the treatment of Plaintiff and her in-utero twin. Specifically, Plaintiffs alleged a failure to properly monitor the twins following the premature rupture of the twins' membrane. Further, Plaintiffs claimed that the

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physician unreasonably delayed delivery and failed to properly communicate instructions to the nursing staff regarding induction of delivery. Plaintiffs sought damages for the wrongful death of their stillborn twin, as well as emotional damages and a claim for physician abandonment. The defense previously defeated claims for punitive damages and attorneys' fees.The co-defendant hospital settled in the weeks leading up to trial for an undisclosed amount.

Plaintiffs presented expert testimony from an ob/gyn who claimed that Defendant's monitoring, orders, and plan of care were beneath the standard of care. Plaintiffs further argued that the twin succumbed to cord compression that would have been detected and resolved with additional fetal monitoring.

The defense utilized medical evidence showing the cause of the fetal demise was undetermined, including testimony of the autopsy pathologist and records from the physician authored at the time of delivery. Additionally, the defense successfully contradicted Plaintiffs' assertions regarding missed warning signs and illustrated that the physician's plan of care was well within the standard of care. The physician testified extensively during trial, withstanding the barrage of cross-examination from a distinguished plaintiffs' attorney.

After a week-long trial, the jury found that the physician did not violate the standard of care in any respect.

Frederick N. (Fred) Gleaton and David Hayes of *Owen Gleaton Egan Jones & Sweeney* in Atlanta tried a serious dental malpractice case in Bibb County State Court. The case involved the alleged necessity for the replacement or rebuilding of all but one of the plaintiff's teeth due to the use of invisible aligners placed by her orthodontist and improper dental management by her general dentist. The plaintiff's final settlement demand before trial was $1.5 million; the jury returned a verdict for the plaintiff in the amount of $25,000, apportioned among two defendants.

In October 2015, **Brian F. Williams** of *Waldon Adelman Castilla Hiestand & Prout* in Atlanta obtained a defense verdict from a Gwinnett County jury in an admitted fault three-car accident. Although Plaintiff complained of injury at the scene, she did not seek any treatment for more than a week after the accident. Plaintiff claimed injuries to her neck, shoulders, and a lumbar disc bulge, which her treating physicians attributed to the accident. Plaintiff also claimed her injuries significantly reduced her social activities and adversely affected her ability to make a living. After 55 minutes of deliberations, the jury returned a defense verdict. Prior to trial, Plaintiff demanded $28,500 to settle.

In December 2015, in Clayton County, **Alexander (Alex) Salzillo** of *Waldon Adelman Castilla Hiestand & Prout* in Atlanta obtained a double defense verdict in a case involving two plaintiffs claiming soft tissue injuries and over $9,000 each in healthcare bills. Mr. Salzillo's client admitted that he caused the rear-end accident, but disputed causation and damages. Although Plaintiffs attempted to portray the accident as having had a profound effect on their lives, defendant introduced evidence of multiple similar injuries for each plaintiff that had not been disclosed in discovery. In closing, Plaintiffs' attorney asked the jury to award $15,000 each. Ultimately, the jury did not believe that Plaintiffs were injured. Six months prior to trial, Defendant had extended statutory settlement offers in the amount of $3,500 to each plaintiff. The court found those offers to have been made in good faith and has granted Defendant's post-judgment motion for attorney's fees.

In October 2015, **Travis J. Meyer** and **Daniel C. (Dan) Prout, Jr.** of *Waldon Adelman Castilla Hiestand & Prout* in Atlanta obtained a defense verdict from a Cherokee County jury in an admitted fault accident. Defendant rear-ended Plaintiff's vehicle, pushing it into a third vehicle. Extensive damage to Plaintiff's vehicle confirmed a heavy impact. Plaintiff claimed serious knee injuries for which she underwent multiple injections over several years. She further claimed that her knee injuries derailed her career aspirations to be a nurse. Plaintiff's counsel had requested an award between $360,000 and $760,000 in past and future pain and suffering.

Troy Lance Greene of *Troy Lance Greene, P.C.*, in Vidalia recently obtained a significant ruling from the Georgia Court of Appeals in a workers' compensation case when the Court upheld the four-year statute of limitation (contained in O.C.G.A. §34-9-104) on permanent partial disability ("PPD") benefits.

The claimant had undergone surgery in 1992 and returned to work. A few years later, following litigation, he underwent a second surgery and was assigned a significant PPD rating. He sought payment of these benefits and the employer/insurer denied the request. The Court held the four-year statute ran from the last time he received temporary total disability ("TTD") benefits in the 1990s. The Court acknowledged their decision led to a harsh result, but the statute still applied. The Court had accepted the discretionary appeal even though the employer/insurer had prevailed before the State Board of Workers' Compensation and the superior court.

There was fear the Court might reverse the lower decisions and find the statute did not apply, since they accepted the claimant's discretionary appeal. Fortunately, the Court upheld the Board's decision. See *Bell v. Gilder Timber,* Court of Appeals Case Number A16A0300.❖

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Welcome, New GDLA Members

The following have been admitted to membership in the GDLA since the last edition of the newsletter:

Michael Scott Bailey
Huff Powell & Bailey, Atlanta

Myada Baudry
Gray Rust St. Amand Moffett & Brieske, Atlanta

Amy Bogartz
Rutherford & Christie, Atlanta

William Shawn Bingham
Baker Donelson Bearman Caldwell & Berkowitz , Atlanta

Wayne Cartwright
Insley & Race, Atlanta

Timothy Franklin-Johnson Dean
Waldon Adelman Castilla Heistand & Prout, Atlanta

David A. Dial
Weinberg Wheeler Hudgins Gunn & Dial, Atlanta

Ryan Donihue
Hall Booth Smith, Atlanta

Joshua H. Dorminy
Ellis Painter Ratterree & Adams, Savannah

Martin Harrison Drake
Brown & Adams, Columbus

Blake Durham
Blake Durham Law, Evans

Tynetra Evans
Gray Rust St. Amand Moffett & Brieske, Atlanta

John Farrish
Quintairos Prieto Wood & Boyer, Atlanta

Parsa Fattahi
Nall & Miller, Atlanta

Sean L. Gill
Gower Wooten & Darneille, Atlanta

David Williams Gordon
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Marvis Jenkins
Smith Moore Leatherwood, Atlanta

Matthew Johnson
Drew Eckl & Farnham, Atlanta

Laughlin Kane
Hall Booth Smith, Atlanta

Lilia Kim
Georgia Department of Banking & Finance, Atlanta

Erin Lis
Waldon Adelman Castilla Hiestand Castilla & Prout, Atlanta

Collier McKenzie
Jones Cork & Miller, Macon

Molly Moyer
Scrudder Bass Quillian Horlock Taylor & Lazarus, Atlanta

Mark Nash
Nelson Mullins, Atlanta

Allison Ng
Swift Currie McGhee & Hiers, Atlanta

Jennifer E. Parrott
Drew Eckl & Farnham, Atlanta

Wesley J. Padgett
Rahimi Law, Savannah

Warren Marcus Pitts
Brennan Wasden & Painter, Augusta

Joe Matthew Queen
Galloway Johnson Tompkins Burr & Smith, Atlanta

Sarah Richards
Hall Booth Smith, Atlanta

Ari Shapiro
Swift Currie McGhee & Hiers, Atlanta

Elisabeth Shepard
Miller & Martin, Atlanta

Darrell Lee Sutton
Sutton Law Group, Marietta

Maxwell Kent Thelen
Drew Eckl & Farnham, Atlanta

Stephanie B. Vari
Carlock Copeland & Stair, Atlanta

Jade F. Velasquez
Waldon Adelman Castilla Hiestand & Prout, Atlanta

Emily Wang
Rutherford & Christie, Atlanta

Pilar Whitaker
Swift Currie McGhee & Hiers, Atlanta

Jodene White
Waldon Adelman Castilla Hiestand & Prout, Atlanta

John Harold Zwald
The Law Offices of John H. Zwald, Suwanee

GDLA Files Amicus Brief in Six Flags Case on "Approaches" Issue

On April 1, 2016, the GDLA filed an *amicus curiae* brief in the Supreme Court of Georgia on an issue with far-reaching implications in premises liability cases. This case involved the brutal assault of a man at a Cobb County Transit (CCT) bus stop after he had left the Six Flags amusement park in Cobb County. According to evidence presented at trial, the bus stop was roughly 200 feet away from Six Flags property, and the plaintiff and a companion had walked from the amusement park to a nearby hotel first before walking to the bus stop.

Although the Six Flags defendants did not own or operate the bus stop, the plaintiff contended that Six Flags was to blame for the assault because the CCT bus stop was an "approach" to the amusement park. Cobb County State Court Judge Kathryn Tanksley allowed the case to proceed to trial on that theory and the jury returned a verdict of $35 million for the plaintiff, $32.2 million of which was apportioned to the Six Flags defendants (eight percent fault was apportioned to four criminal perpetrators who were named as parties).

On appeal, the Six Flags defendants contended, among other things, that the trial court had erred in allowing the jury to find that the CCT bus stop was an "approach" to the amusement park for premises liability purposes. The Court of Appeals affirmed the trial court's rulings on the "approach" issue and held that the jury was authorized to find that the bus stop was an "approach," although the Court of Appeals ultimately reversed the verdict and remanded the case for a new trial due to the trial judge's inexplicable refusal to permit the jury to apportion fault to certain nonparties who were alleged to have participated in the attack. The Six Flags defendants then petitioned the Supreme Court for *certiorari* on the "approach" issue.

Photo courtesy of the *Daily Report*

The GDLA filed an *amicus curiae* brief in the case to argue against what appears to be a significant departure by the Court of Appeals from prior case law defining what can constitute an "approach" to a defendant's property under O.C.G.A. § 51-3-1. Specifically, the case presents significant questions regarding just how far away from a person's property he can be held liable for a criminal assault perpetrated by a third party, and what actions by a landowner or occupier will constitute sufficient "exercise of dominion" over someone else's property to render it an "approach" to the first owner or occupiers property.

In its brief, the GDLA contended, among other things, that the Court of Appeals failed to follow prior precedent, most notably including the case of *Motel Properties, Inc. v. Miller*, 263 Ga. 484 (1993). In *Motel Properties*, the plaintiff had fallen on a patch of rip-rap along the shoreline while attempting to walk from the defendant's motel to take a late-night walk on the beach. Although the plaintiff reached the rip-rap by taking a sidewalk that started at the motel's exit, he walked some 27 feet beyond the end of the sidewalk — a total of 196 feet from the motel's property — before falling and injuring himself.

The Supreme Court held in *Motel Properties* that the place where the plaintiff fell was not an "approach" to the motel's property. More generally, the Court held that an "approach," as used in O.C.G.A. § 51-3-1, "mean[s] that property directly contiguous, adjacent to, and touching those entryways to premises under the control of an owner or occupier of land" and "that property within the last few steps taken by invitees ... as they enter or exit the premises." *Motel Props.*, 263 Ga. at 486 (2). The Court went on to explain that the area where the plaintiff fell in that case was "at best an approach to an approach." *Id.* at 487 (4).

Particularly disturbing about the Court of Appeals' opinion in this case were statements to the effect that the geographical or financial size of a business may influence the definition of "approach" for premises liability purposes. The GDLA argued in its brief that the rule on what constitutes an "approach" should not vary because the business is large or its owner is presumed to have the ability to pay a large judgment. In any event, the GDLA urged the Supreme Court to grant *certiorari* to clarify when a property owner or proprietor may be held liable for the criminal acts of others on someone else's property.

The GDLA's brief was co-authored by Amicus Committee chair Martin A. (Marty) Levinson of Hawkins Parnell Thackston & Young in Atlanta and vice-chair Garret W. Meader of Drew Eckl & Farnham in Brunswick. The Six Flags defendants are being represented by GDLA member Laurie Webb Daniel of Holland & Knight in Atlanta. The case *is Six Flags Over Georgia II, L.P. and Six Flags Over Georgia LLC v. Joshua Martin*, Supreme Court of Georgia, Case no. S16C0750. ❖

Don't Look at Me, I Just Work Here

Are Retail Store Managers Subject to Individual Liability Under O.C.G.A. 51-3-1?

By Matthew G. Moffett
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Georgia's statutory duty to exercise ordinary care to keep one's premises and approaches safe for invitees is limited — by its express language — to *owners* and *occupiers* of property.[1] Often, whether a particular defendant is an *owner* or *occupier*, and thus, subject to liability under § 51-3-1 is obvious, such as titled owners of the property, or tenants operating a business on the property under a commercial lease. However, whether the statute's definition of *owners* or *occupiers* encompasses store managers may be less obvious as the applicable standard turns on one's level of control over the subject property.[2] Nevertheless, the few Georgia cases that have addressed this issue suggest that store managers are not subject to liability under the statute, as they are neither *owners* nor *occupiers* of the retail stores, which are owned and/or operated by their employer.[3]

On the other hand, federal courts in Georgia have struggled with the issue of individual liability of local store managers named as defendants in premises liability cases.[4] Retail and hospitality defendants, who seek removal of slip or trip and fall personal injury lawsuits to a federal venue on the basis of diversity jurisdiction often find their efforts thwarted by the inclusion or addition of local store managers as defendants, whose presence in the lawsuit destroys complete diversity. Attempts to remove such cases have been largely unsuccessful where defendants oppose remand by arguing the store manager was fraudulently joined to defeat diversity jurisdiction.[5] Citing uncertainties in Georgia law regarding the nature of a store manager's liability in slip and fall cases, federal courts routinely hold that such uncertainties in fraudulent joinder cases involving store managers require remand.[6]

While additional direction from the Georgia Courts may definitively resolve any doubts, the current state of the law does present sufficient support to find that in general, local store managers employed by national or regional retailers lack sufficient control over the property to be subject to liability under § 51-3-1.

I. Liability Under § 51-3-1 Requires Sufficient Control

In *Scheer v. W. L. Claitt*, the Georgia Court of Appeals set forth the applicable standard for determining whether one was subject to liability as an owner or occupier of a premises under § 105-401, the precursor to the current § 51-3-1.[7] There, the plaintiff slipped on a foreign substance and fell on the sidewalk abutting a barber shop. Immediately after the plaintiff's fall, an employee of the barber shop told plaintiff he had found liquid detergent spilled on the sidewalk and had tried to clean it up but left a thin film of soap.[8] Plaintiff sued the defendant Charles Fairbanks d/b/a Tom's Barber Shop alleging *inter alia* that Fairbanks was liable for breach of the statutory duty to exercise ordinary care as an owner or occupier of land.[9] Fairbanks moved for summary judgment and averred in an affidavit that: he never owned, occupied, or operated the subject barber shop nor any of its equipment; that his only interest in the shop was payment of bills and taxes, obtaining a business license, and ensuring that a note he co-signed, which was secured by the barber shop, was paid from the proceeds of the barber shop.[10]

The *Scheer* Court held that whether the plaintiff could recover from Fairbanks as an owner or occupier of the barber shop "depends on whether or not Fairbanks had control of the property, whether or not he has title thereto, and whether or not he has a superior right to possession of property which is in the possession or control of another."[11] The Court further noted the following factors as evidence of control: "Who managed the daily operations of the shop-hiring, wages, hours, etc.? Who had the right to admit or exclude customers? Who maintained and repaired the premises? Who paid the bills, taxes, wages? What were the responsibilities of the parties under the lease?"[12] As the only other evidence in the record was a business license in the name of Charles Fairbanks and Tom's Barber Shop, a certificate of occupancy in the name of Charles Fairbanks, and tax records showing taxes collected in the name of 'Tom's Barber Shop/Charles Fairbanks,' the Court held that it could not determine as a matter of law that Fairbanks was not an owner or occupier and reversed the trial court's grant of summary judgment on this theory.[13]

In *Amear v. Hall*, the Georgia Court of Appeals again used the degree of control to determine a property owner's liability in a case

where a plaintiff, who was employed by an independent contractor to install fiberglass on the owner's property, was injured when a supporting beam collapsed.[14] The *Amear* Court held:

> There is no liability from ownership alone. It must appear that the injury resulted from a breach of some duty owed by the defendant to the injured party. [Cit.] Liability, if any, of the owner is dependent on whether the owner had any duty which might arise from control of the property or title thereto or had a superior right to possession of property which is in the possession or control of another. [Cit.] Before the owner of premises can be held liable for injuries done by reason of a defect therein … it must appear that the owner had control of the premises.[15]

When the *Scheer* test for whether one exercises sufficient control over the property to be deemed an *owner* or *occupier* is applied to the average retail store manager, only in rare circumstances will the store manager be deemed an *owner* or *occupier,* such as a small business retail store owner who as manages his or her own store. However, generally, store managers: do not possess legal title or a superior right to possession of the retail stores they manage, do not set store employee wages, do not have a right to exclude customers, do not perform repairs in the store, do not pay taxes or employee wages, and generally do not assume specific lease obligations for the store. Store managers are employees of the retailer, and any maintenance or inspection responsibilities they have over the store are incidental to their employment, not the property. This result operates to validate the sufficiency of control test, as the liability that arises under § 51-3-1 is an incident to one's possession of property.

II. *Wagner* and *Adams*

In *Wagner v. Casey*, the plaintiff, who was injured in a liquor store, sued defendant Fite H. Casey d/b/a Triangle Liquor Store.[16] The defendant moved for summary judgment with an affidavit averring that at no time did he own operate or control the subject property, which was owned and operated by Casey Enterprises, Inc.[17] The *Wagner* Court affirmed summary judgement in defendant's favor and held that defendant's undisputed affidavit established he did not individually owe a statutory duty to exercise ordinary care, as he had no individual operation or control over the liquor store nor a superior right to possession.[18]

Likewise, in *Adams v. Sears, Roebuck & Co.*, the plaintiff, who injured her knee in a slip and fall accident in a retailer's store, sued the retailer and its general man-

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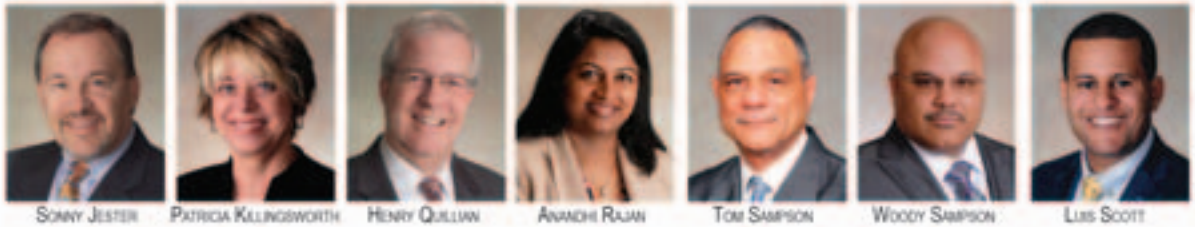
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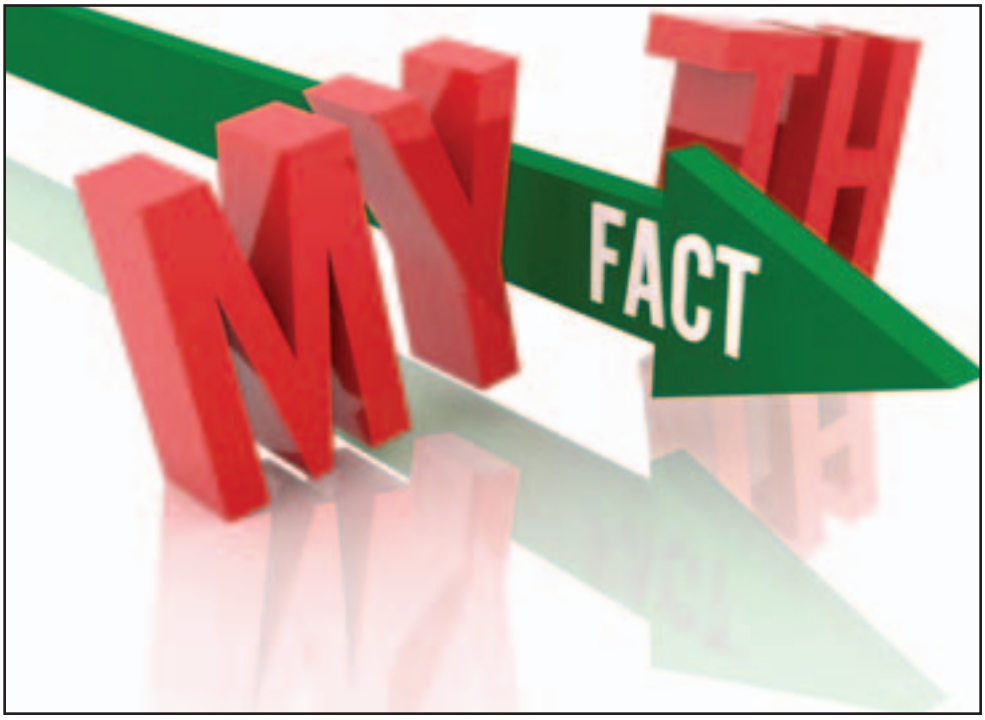
The Apparent Myth About Punitive Damages

By W. Bruce Barrickman
BAY Mediation & Arbitration Services, Atlanta



There is some thought, both in the media and among litigators and insurance claims representatives, that punitive damages are sought and awarded in Georgia in large numbers of cases. In actuality, at least with cases that are tried and reported to verdict research companies, punitive damages are sought in very few cases and awarded in even fewer cases. When punitive damages are awarded, the award for punitive damages is usually less than $100,000, particularly with respect to claims against individuals.

In the Georgia database of VerdictSearch, verdict and settlement research company, there are 3,313 reported motor vehicle accident cases between January 1, 2001 and January 15, 2016. Another such company, CaseMetrix, located 11,310 motor vehicle accident cases in their Georgia database. I combined the cases from both verdict and research companies involving motor vehicle accidents in which punitive damages were sought, in order to eliminate any duplicate cases. Punitive damages were sought in 176 of the reported cases. Some of these cases settled at mediation and I eliminated these. Of the 125 cases that were tried and reported, a verdict was returned in favor of the plaintiff in 120 cases. I will cover later in this article in how many of these cases punitive damages were awarded.

I prepared an Excel spreadsheet for all 125 cases which shows the venue; the type of defendant; the claimed injuries; the claimed medical expenses and lost wages; the factors asserted as the basis for awarding punitive damages; the amount of compensatory damages awarded and the amount of punitive damages, if any, that were awarded. I also prepared Excel spreadsheets for each county in which punitive damages were sought; whether punitive damages were awarded; the number of punitive damage awards in various verdict ranges; and the size of punitive damage awards, if any, with respect to the punitive acts that were asserted. The spreadsheets are available at www.bayatl.com.

Below is a summary of the information I found:

I. Cases Asserting Punitive Damages Against An Individual

Eighty-two cases asserted punitive damages against an individual. No punitive damages were awarded in 40 of those cases. In 19 of the cases, the award of punitive damages was $25,000 or less. In four of those cases, the award of punitive damages was between $51,000 and $100,000. Five of the cases resulted in punitive damage awards of $101,000 to $500,000, and six resulted in punitive damage awards in excess of $500,000. Of the cases in which punitive damages in excess of $100,000 were awarded, the major aggravating issues were road rage and prior and/or subsequent DUIs in which someone was injured.

II. Cases Asserting Punitive Damages Against Individuals and Trucking Companies

Thirteen of the reported cases asserted punitive damage claims against individuals and trucking companies. No punitive damages were awarded in six of these cases. In two of the cases, the award was $25,000 or less. There were awards for punitive damages in four cases in amounts between $101,000 and $500,000. There was one case in which $500,000+ was awarded. Of the cases in which punitive damages in excess of $100,000 were awarded, the major aggravating issues were prior and/or subsequent DUIs in which someone was injured and cases in which the individual had a bad driving or drinking record which

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Water Retention and Detention Ponds: *Hazards in Play*

By Peter McCawley
CED Engineering Technologies

Every day, about 10 people die from unintentional drowning according to the Centers for Disease Control and Prevention (CDC) website. The CDC also reports that drowning ranks fifth among the leading causes of unintentional injury death in the United States. Approximately 20 percent of those victims are children ages 14 or younger. While that statistic is startling, for each fatality there are an additional five children who receive medical attention for nonfatal water-related injuries. The CDC also reports that fatal drowning remains the second leading cause of unintentional injury-related death for children ages 1-14 years, and it is responsible for more deaths among children ages 1-4 than any other cause except congenital birth defects. It should not be surprising that a number of these incidents occur in water retention and detention ponds.

Water retention and detention ponds have been widely used throughout the United States for many years. Retention or detention ponds can be found all over the United States, in even the most arid of climates. Over the last several years there has been a significant increase in the number of water retention ponds dotting the urban landscape. A majority of the ponds have been constructed to satisfy local government regulations for storm water detention in new residential subdivisions to minimize the infusion of contaminates into open water. A properly located and well-constructed retention or detention pond can be an eye- pleasing addition to landscaping as well as a necessary design feature. Good landscaping design techniques take into account the size of the pond, site visibility, relationship to the surrounding environment, and shoreline configuration. A retention pond that can be viewed from a home, business, or road can increase the beauty of the landscape and often increases the property value. A poorly designed, constructed, or maintained retention or detention pond can be a perilous hazard lying in wait.

Retention and detention ponds are both common conventional methods for managing storm water. The difference between a retention pond and a detention pond is simple. The retention pond is designed to always have water in it and a detention pond only detains water during rainy periods. Both retention and detention ponds are designed to help control runoff and limit flooding during high water times. A detention pond will hold the water for a short time and then slowly release it, normally within 72 hours.

If an accident does occur at a retention or detention pond, who is best qualified to investigate the incident and determine what and who may be at fault? The expert needed in these claims and cases is an experienced and licensed civil engineer.

The first, and arguably most important, feature the civil engineer will examine is the slope of the shoreline of the pond. Ideally, pond shorelines should have gradual slopes. A gradual slope minimizes erosion, lessens the chance of involuntary entry into the pond, and allows for easier exiting from the pond. A gradual slope also facilitates proper maintenance by allowing heavy equipment access to the pond for periodic sediment removal and grass mowing.

It is the slope of the land that usually governs whether or not a fence is required. A civil engineer can determine if a fence was required and if so whether the correct barrier was in place. Some jurisdictions also state that if a drowning situation does occur where public safety agencies are needed; these rescue agencies should not be impeded from their rescue procedures by a fence or barrier. Additionally, some barriers may also limit children's ability to self-rescue from the pond. A civil engineer can help navigate these complex and often seemingly conflicting guidelines.

It is not just the slope of the land leading to the water's edge that is important. The slope of the pond underneath the waterline is of equal significance. Gradual slopes above ground leading to drastic slopes hidden under murky waters are perilous hazards for children playing at the

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Project Delay: Analysis Methods

By Michael D. Klein P.E., CHMM, C.F.E.I. *Robson Forensic*

On an ideal construction project, the project follows the scheduled early starts and early finishes, schedule float is not consumed, deadlines are met, the contractor never files claims for time extensions, and the owner never assesses liquidated damages. This is an unlikely event for normal construction projects — events occur that will affect the planned completion of scheduled work. Developing a good knowledge of the techniques for project delay analysis is of paramount importance in understanding the real problematic issues involved in project delays.

Complaints of delay or disruption and additional costs are routinely made during the course of a project. To establish causation for a project delay one must link the acts, events, or conditions which create liability for the damages. The cause and effect burden of proof is the same for a schedule delay claim as with any other claim. The claiming party must first establish that the event or factor causing the delay is a compensable risk event under the contract agreement.

There are several delay analysis methods available for use in a dispute. The method selected is a function of the type of claim and the documentation available for use in the development of the analysis. The methods of analysis vary significantly but all have one common element: the analyses of delay are performed after the fact and are based on historical data, assumptions, and estimates. All of the methods used in analyzing project delay have some theoretical element to them. A discussion of the frequently used approaches in calculating a claim for schedule delay follows.

Total Time Method

This method compares the as-planned versus as-built schedules, which is why it is called "the total time method." In this method the assumption is that one party (contractor) causes no delays and the other party (owner) causes all delays. This method is generally used when the contractor completes the project later than allowed by the contract due to overlapping delays that are not capable of being segregated, and the project records do not allow for the discrete identification of delay periods. The total time method of delay analysis is considered to be acceptable only if the evidence establishes that the claimant experienced an overlapping number of delays and the discrete amounts of delay cannot be successfully apportioned. No attempt is made to demonstrate the relationship between discrete events and actual performance. The justification for this approach is that the only method for establishing delay is by assessing the total impact to the project. By using this method a claimant may recover delay-resulted damages even if separate time extensions for the identified delay events cannot be determined with accuracy. This method is limited by the detail of the project records providing a basis for the delay.

Sequential Delay Approach

Sequential delay analyses assess the impact of individual events. The delay time is computed for each individually identified delay. The various delays are formulated as activities and added to the as-planned network in a chronological order showing the discrete effect of each delay, the sum total of which demonstrates total project delay. The amount of delay equals the difference in completion dates between the schedules before and after the impacts. The technique can be used for analysis of delay during and after project completion. The limitations of this method include the following:

- Utilization of fixed as-planned schedule to analyze delays out of context and time;
- The original project baseline may not be a realistic model on which to base the whole analysis;
- A likelihood of failing to consider the delays of all parties especially that of the claimant (i.e. being one-sided); and
- Potential disputes over the adequacy of the as-planned schedule because it is not economically possible, nor does it make sense, to schedule the entire project in detail at its inception.

Adjusted Baseline Approach

This method of delay analysis uses a Critical Path Method (CPM) network for the schedule impact analysis. The impacts of delays are measured by inserting all contractor delays into the original baseline schedule. These delaying events are depicted as activities and spliced into the project schedule. Actual progress and historical work activity data are ignored in this method. To calculate warranted time extension, non-excusable, non-compensable delays are inserted into the as-planned schedule, resulting in an adjusted planned completion duration. This analysis delay method is performed

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Best Practices: *5 Critical Tasks to Thoroughly Vet Expert Witnesses*

By The Real Law Editorial Team
LexisNexis

Most of the people we now see in movie crowd scenes are not real. They aren't created with digital special effects, either. In fact, a popular alternative to human extras is to use plastic, inflatable mannequins — as many as 30,000 for some films — wearing masks along with an assortment of wigs, hats and other costume props for effect.

How's that for making a point about the value of seeing certain actors for what they truly are?

For many in the legal profession, that skill is important in all kinds of matters. But it's an especially critical requirement when vetting expert witnesses. From criminal cases to patent infringement and medical malpractice suits, they are often essential actors in contemporary court proceedings.

Yet it's not always clear what the best practices are for ensuring that those who provide guidance or testify are the right people for the role - or whether they can perform as effectively as one would hope.

Will they be persuasive in a case, or a liability? To answer that question, attorneys need to ensure that they cover five critical tasks that are essential to thoroughly vetting potential expert witnesses.

Task #1: Access an Expert's Case History and Statements, Personal Background, Authored Articles and More

Attorneys should start by taking a deep look into an expert's testimony and deposition history, as well as his or her employment, education and licensing background. They should also examine court reports filed in previous cases and abstracts of any scientific, technical or medical literature the expert has published.

By doing all that, attorneys can determine if an expert for their case — or an opponent's expert - merits any red flags that would make challenging and/or discrediting the expert possible (for example, testimony was excluded in a previous case, or the individual has been repeatedly barred from testifying as an expert or does not carry required licenses or certifications).

Thorough research is also vital to prevent sanctions, retrials or future lawsuits against an attorney who fails to discover vital problematic information about an expert. To underscore that point, one needs only to watch the news or hear about retrials allowed and hundreds of thousands of dollars in sanctions awarded against attorneys who failed to discover and/or disclose that their experts had misrepresented credentials or had failed to disclose that their certifications were expired.

Task #2: Detect Inconsistencies in an Expert's Prior Testimony

As a follow-up to the initial task, and to avoid the kind of missteps referred to above, attorneys should order testimonial history reports, as well as any relevant depositions and trial transcripts, for further in-depth research into an expert's work on similar cases. The purpose of pulling reports is to find any significant inconsistencies, such as the expert having previously made arguments that counter his or her current assertions. The existence of a substantial inconsistency can provide a solid basis for an attorney — or, again, opposing counsel — to challenge an expert's testimony, which can result in discrediting the expert and strengthening — or weakening — a party's case.

Task #3: Uncover Gaps or Discrepancies in an Expert's Background

Along with examining an expert's prior testimony, attorneys should verify that the information listed on an individual's CV or résumé is correct. Thoroughly vetting an expert's provided information can prevent an attorney from using an expert with a problematic history. It can also reveal gaps or discrepancies that can be used to challenge or discredit an individual.

Continued on next page

Task #4: Find Disciplinary Actions and Challenges Against the Expert

Building on the previous task, attorneys should also review any actions by professional associations or licensing boards and challenges to an expert's testimony in prior cases. Discovery of disciplinary actions often makes challenging and discrediting an expert much easier, particularly if the action is related to the issue currently being litigated.

Likewise, prior challenges to an expert's testimony often result in an expert being limited and/or excluded from testifying if the case at bar is similar to matters in which challenges against the expert were successful.

With the right tool at their disposal, attorneys can search specifically for previous gatekeeping challenges, such as Daubert and Frye hearings to exclude an expert's testimony. If research shows that an expert has repeatedly been challenged, attorneys can further inquire into the specifics of each challenge and potentially find similarities that allow them to raise challenges in their case, or find a new expert to avoid challenges altogether.

Ideally, that tool should also reveal disciplinary actions that are not easily discoverable through general Internet searching. An example is if the expert has been sanctioned in another state. Such results can further assist an attorney in getting an opposing expert's testimony limited and/or excluded.

Task #5: Identify an Expert's Bias Toward Plaintiff or Defense

Finally, attorneys should know if a potential expert has a special interest in a matter or a clear bias that could present a higher risk of the individual being challenged. Such information can also simplify challenging and discrediting an expert for the other side in a case.

Identifying a bias is relevant in any litigation involving expert witnesses, but it is particularly important in product liability suits, such as those related to tobacco or vehicle defects. Experts may have decades-long ties to the industries they are testifying for or against, which can skew their ability to give an unbiased expert opinion. The sooner an attorney has that information, the sooner he or she can act on it appropriately.

Conclusion

Studies indicate that attorneys spend on average 15 hours researching each expert witness involved in a case. To ensure that this time is well spent — meaning that the information obtained is relevant, meaningful, complete and up to date — access to the right tools is necessary.

Those tools are available, and by taking advantage of them while performing five critical tasks, attorneys can do more to thoroughly vet expert witnesses — and improve their odds of winning. ❖

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Appellate Case Law Update

By Mark W. Wortham
Substantive Law Section Chair
Hall Booth Smith, Atlanta

NEGLIGENCE PER SE, PROFESSIONAL NEGLIGENCE, PROXIMATE CAUSE, DIRECTED VERDICT, APPORTIONMENT AND VERDICT FORM

***Goldstein, Garber & Salama, LLC v. J.B.*, __Ga. App.__, 779 S.E.2d 484 (2015).**

In a 4-3 decision, the Court of Appeals affirmed the judgment in favor of the plaintiff/appellee and against the defendant/appellant, a dental practice, whose employee sexually assaulted a patient. Subsequent to the initial opinion, a motion for reconsideration was filed and denied. Thereafter, a change of one judge's vote resulted in a substituted opinion. The opinion is authored by McFadden, J., and joined by Barnes, Ellington, and Phillips, JJ. Defendant petitioned for certiorari, but as of the time of writing no decision has been made.

Plaintiff alleged that the defendant's negligence caused her damages when the defendant's employee, a certified nurse anesthetist, sexually assaulted her while she was under the effects of anesthesia. The trial court denied defendant's motion for a directed verdict and the jury awarded the plaintiff $3.7 million, apportioning 100 percent of liability to the dental practice, and none to the nurse anesthetist who was dismissed from the action prior to trial.

The Court of Appeals held: (1) there was a question of fact for the jury as to whether practice's negligence in failing to adequately supervise patient's sedation was proximate cause of patient's injury; (2) a violation of statute governing qualifications required for a dentist to supervise a certified registered nurse anesthetist could establish negligence per se; (3) the patient's claim against practice was one for professional negligence rather than ordinary negligence; and (4) the practice waived appellate review of

the jury's verdict that did not allocate any fault to the anesthetist who assaulted patient, because there was a reasonable interpretation of that decision, and thus was a form of the verdict question which should have been raised prior to the disbursement of the jury.

The Court began its analysis applying the "any evidence test, absent any material error of law," standard of review. Applying that standard, the Court reviewed the dental practice's enumeration that the trial court erred in denying its motion for directed verdict. The defendant raised as error that the plaintiff did not prove liability by negligence per se or professional negligence, asserting there was no evidence that proved proximate cause. The defendant further argued that J.B.'s negligence per se claim failed because the relevant statute did not intend to prevent the harm the plaintiff suffered, and that the plaintiff's professional negligence claim failed because the wrongful conduct did not involve the exercise of professional judgment and skill. The Court summarized these claims as simply having no merit.

The Court then turned specifically to the denial of the defendant's motion for a directed verdict on proximate cause. Examining the evidence most favorably to the plaintiff, the Court found that under the law of intervening causation, a defendant does not have to foresee the exact wrongful act, merely that, "as a general matter, the original negligent actor should have anticipated that this general type of harm might result." Citing the rule that questions of reasonable foreseeability of a criminal act are generally for a jury's determination, the Court found that the evidence did not show that the defendant **could not have** reasonably anticipated its patient **might be victimized** if left sedated to a "medically-unjustifiable degree" for a "medically-unjustifiable amount of time" without proper supervision.

On the question of negligence per se, the Court analyzed O.C.G.A § 43-11-21.1, which governs the qualifications required for a dentist to supervise a certified registered nurse anesthetist, and O.C.G.A § 43-11-2(e) ("unlicensed activities are a menace and nuisance dangerous to the public health ...."). Finding that the employee dentists did not have appropriate training,

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the Court found that although O.C.G.A § 43-11-21.1 does not list the harms it intends to guard against, the statute's requirements, "among other things, address a dentist's ability to competently supervise a certified registered nurse anesthetist." Thus, rather than a narrow interpretation of § 43-11-21.1, the Court found this broad language meant that sexual assault by a nurse anesthetist against a patient is one of the unreasonable risks of a dentist not having taken the training required to supervise a nurse anesthetist.

Defendant also raised as error the trial court's determination that an intentional criminal assault could be the basis of a professional negligence cause of action. The appellate Court summarily dismissed this argument as "meritless," holding expert evidence was admitted as to the professional standards that addressed the propriety of the professional decisions made by the practice regarding the treatment and care provided to its sedated patients. The dissent characterized the expert testimony as establishing that gender is not a factor in the standard of care that requires two persons in the room with an anesthetized patient; rather the patient's potential reaction to anesthesia is the reason.

Finally, the Court addressed the defendant's argument on apportionment. Defendant argued that while the jury verdict form contained the name of the employee, the jury did not apportion any fault to the employee. The Court stated that the defendant framed its enumeration as a challenge to the sufficiency of the evidence. The Court disagreed with that characterization, stating that it was a challenge to the verdict and that the defendant waived this challenge by failing to obtain a ruling before the jury was dispersed. Finding that one reasonable interpretation of the verdict was a possible reason for the jury to not find any fault, the Court upheld the verdict. The majority opinion notes, "[i]t is true, of course, as Judge Ray explains [in his dissent], that if the verdict was void — or if the verdict was ambiguous, but void in all its possible interpretations — then additional deliberations would not have been required … [o]ur disagreement with Judge Ray is that we hold at least one of the two possible interpretations of this verdict to be sustainable, while he would hold that both are void."

From the dissenting opinions, two quotes assist in an understanding of the majority's decision. From Judge Dillard's dissent which was joined by Judges Ray and McMillian: "Thus, I disagree that, as a matter of law, sexual assault is a reasonably foreseeable consequence of leaving a patient alone for brief periods of time with a CRNA who has no known history of sexual violence or deviance, in an operating room left open to an area continuously occupied by multiple medical staff members." And that of Judge Ray's separate dissent: "Any verdict allowing this intentional tortfeasor to escape blame for his intentional tort simply cannot stand."

CIVIL PRACTICE: Venue

***Hankook Tire Co. Ltd. v. White*, (A15A2099); __ Ga. App.__ (Jan. 4, 2016).**

Where a co-defendant entered into consent judgment as a part of settlement with the plaintiffs, such judgment is legitimate and does not divest the trial court of jurisdiction and venue over a nonresident corporation.

In an interlocutory appeal, the Court of Appeals affirmed the trial court's denial of Hankook Tire Co. Ltd.'s motion to transfer venue in the plaintiffs' negligence action. Plaintiffs sued a number of defendants, including The Lions Group Inc., a Georgia corporation, and Hankook Tire, a nonresident Korean company. The trial court granted summary judgment in favor of some defendants and the plaintiffs voluntarily dismissed all other defendants, except The Lions Group and Hankook Tire. The plaintiffs then settled with The Lions Group. Included in the terms of the settlement was the entry of consent judgment against The Lions Group.

Upon the facts and procedural moves described above, the Court applied the rule of vanishing venue, stating, "[i]f all defendants who reside in the county in which an action is pending are discharged from liability … a nonresident defendant may require that the case be transferred to a county and court in which venue would otherwise be proper." O.C.G.A. § 9-10-31 (d). The Court found that the entry of a consent judgment is analogous to a finding of liability and did not divest the trial court of personal jurisdiction over the remaining defendant/nonresident joint tortfeasor.

The Court also noted the only exception to the general rule applies when the nonresident defendant can prove collusion. However, Hankook Tire failed to prove collusion. Thus, the consent judgment entered into between the plaintiffs and The Lions Group was a legitimate judgment that imposed real liability on The Lions Group — a settlement over $500,000. The Court further found that while the Plaintiffs entered into a consent judgment with the goal of keeping the case in Clayton County, if that strategy was collusive, then arguably all consent judgments would be collusive.

CONSTITUTIONAL LAW: Sovereign Immunity

***Olvera v. University System of Georgia's Board of Regents*, __ Ga.__, S15G1130, (Feb. 1, 2016).**

In *Olvera*, the Supreme Court affirmed the trial court's dismissal of a declaratory judgment action against the University System and its members in their official capacities. The Court held sovereign immunity barred the students' action, but that actors in their individual capacity might not be protected by sovereign immunity.

Non-citizen immigrant college students, who were in school under the federal government's Deferred Action for Childhood Arrivals pro-

gram, filed suit against the Board of Regents alleging that they were entitled to in-state tuition at institutions in the University System of Georgia. In a relatively short opinion, the Supreme Court of Georgia held that the Board is an agency of the State, and thus was entitled to sovereign immunity. Answering the next question, the Court found the Board did not waive its sovereign immunity. Pursuant to O.C.G.A. § 50-13-10 (a), a waiver under the statute applies only to actions determining the validity of rules adopted by agencies under the rule-making procedures of the Administrative Procedure Act.

Finding that the residency requirement the students challenged was not a rule within the purview of O.C.G.A. § 50-13-10, the Court concluded the trial court was correct in finding that the policy fell outside the waiver of sovereign immunity. But, the Court noted, "'[o]ur decision today does not mean that citizens aggrieved by the unlawful conduct of public officers are without recourse. It means only that they must seek relief against such officers in their individual capacities. In some cases, qualified official immunity may limit the availability of such relief, but sovereign immunity generally will pose no bar.'" (citation and internal citation omitted).

Plaintiffs alleging defamation must also allege a "plus" factor, the deprivation of a "previously recognized property or liberty interest."

CONSTITUTIONAL LAW: Sovereign Immunity and 42 USC §1983

***Hill v. Hale*, ___ F.3d ___ (11th Cir., 2016); No. 15-13592; 2016 WL 556293**

Hill appealed the district court's dismissal of his federal claims brought under 42 U.S.C. § 1983 against Hale and others employed by Jefferson County Sheriff's Department. The Court found no violation of the constitution or the statute.

Hill argued the defendants violated his right to procedural due process when they erroneously identified him as a sex offender, issued warrants against him under Alabama's Sex Offender Registration and Notification Act, and publicized his alleged sex-offender status in a television news segment. The district court dismissed these claims on immunity grounds.

The Eleventh Circuit began its analysis noting that defendants are state officials for sovereign-immunity purposes. "A state official may not be sued in his official capacity unless the state has waived its Eleventh Amendment immunity ... or Congress has abrogated the state's immunity." *Lancaster v. Monroe County, Ala.*, 116 F.3d 1419, 1429 (11th Cir .1997) (internal citations omitted). Finding that neither exception applied in this case, the Court affirmed the district court's dismissal. The Court also stated that, "[a] plaintiff alleging a constitutional violation under § 1983 can only overcome qualified immunity if "(1) the defendant violated a constitutional right, and (2) this right was clearly established at the time of the alleged violation." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir.2004).

The Court determined that even assuming a due process violation existed, the violation alleged was not "clearly established," as reputational injury alone is insufficient to invoke the due process clause. Plaintiffs alleging defamation must also allege a "plus" factor, the deprivation of a "previously recognized property or liberty interest." (citations omitted). Hill argued that erroneously-issued warrants establish such a "plus" factor, but he could not cite any authority for the proposition that the mere issuance of a warrant — absent arrest or prosecution — amounts to a deprivation of property or liberty.

MANDAMUS: Recusal and Mootness

***GeorgiaCarry.Org, Inc. v. James*, __Ga.__ S15A1901 (Feb. 1, 2016), 2016 WL 369369.**

The Supreme Court partially affirmed the grant of summary judgment to Judge James of the Probate Court of Richmond County in GeorgiaCarry.Org, Inc.'s mandamus petition asserting that the judge was wrong in refusing to

issue temporary renewal licenses to gun owners.

Smith applied for a renewal Georgia weapons carry license and requested the issuance of a temporary renewal license at the same time. The court initially refused to issue a temporary renewal license, but did issue a weapons carry license within 30 days of the filing of Smith's application for a license, and before his previously issued license expired. Several weeks later, Smith and GeorgiaCarry.Org filed their mandamus action against Judge James. The plaintiffs also filed a motion for recusal, asserting that a Richmond County Superior Court judge should not preside over a case in which the Richmond County Probate Court judge was named as the defendant. The trial court denied that motion. Both sides moved for summary judgment. Recognizing that, at some point, Judge James had begun issuing temporary renewal licenses to other applicants, the appellants acknowledged they were no longer entitled to the issuance of a writ of mandamus. They asserted, nevertheless, that they were entitled to costs and attorney fees as the "prevailing party" in the lawsuit. The trial court granted Judge James' summary judgment motion and denied the appellants' summary judgment motion.

On appeal, the Supreme Court held that the trial court properly denied the appellants' motion to recuse on the basis of untimeliness. The alleged ground for disqualification that the defendant presided in a court which sat in the same circuit as the superior court hearing the action was known, or should have been known, as soon as the appellants chose the forum. As the plaintiffs waited two months after filing the complaint before seeking to recuse the trial judge, they violated U.S.C.R. 25.3's mandate that motions to recuse must be filed within five days of learning of the alleged grounds for disqualification. The Court then remanded the case to the trial court with direction that it vacate the grant of summary judgment to Judge James and enter an order of dismissal. Smith was the only named appellant in the case holding a weapons license, and he received a new weapons license within 30 days of filing his application well within the time required by law, before the expiration of his previous license and prior to the filing of his mandamus action.

As such, Smith's case was moot from the outset. Regarding GeorgiaCarry.Org, even assuming it was eligible for a weapons carry license, it did not apply for a license and did not file the case as a class action on behalf of any individual who was "an eligible applicant." Accordingly, the Court noted it follows that it lacked standing to recover costs and attorney fees. Because Smith's claim was moot and GeorgiaCarry.Org lacked standing, it was incumbent upon the trial court to dismiss their claims. ❖

Auto Liability Case Law Update

By Richard S. Bruno
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AUTO LIABILITY:
***Metropolitan Atlanta Rapid Transit Authority v. Morris, et. al.*, 334 Ga. App. 565 (November 16, 2015).**

In *MARTA v. Morris*, the Georgia Court of Appeals weighed in on several pertinent issues for auto liability, including: (1) vicarious liability when evidence implicates a vehicle bearing a company's logo, (2) apportionment of fault to a plaintiff, (3) evidence of non-intoxicating levels of alcohol, and (4) attorney's fees. The facts in *Morris* showed that the plaintiff collided on Peachtree Street with a bus marked "MARTA" and "Five Points." Specifically, the plaintiff, as well as several third parties, reported to an officer that the bus veered into the plaintiff's lane, causing her to hit the curb. *Id.* at 565-66.

Vicarious Liability Standard for Logo-Bearing Vehicles

MARTA challenged the trial court's denial of its directed verdict motion, contending that the plaintiff had presented insufficient evidence to establish MARTA's vicarious liability. As the Court of Appeals noted, "[w]hen a servant causes an injury to another, the test to determine if the master is liable is whether or not the servant was at the time of the injury acting within the course and scope of his employment and on the business of the master." *Id.* at 567; *quoting Hicks v. Heard,* 286 Ga. 864, 865 (2010). This issue is particularly pertinent to companies with generally recognizable corporate branding on their vehicles (e.g., FedEx, UPS, or DHL).

Both the plaintiff and third party witnesses testified that the bus responsible for the incident was marked "MARTA" on its side, but as the Court of Appeals correctly stated, "[a] vehicle's insignia, alone is insufficient to show ownership of that vehicle or that it was being operated in the course and scope of employment." *Id.* at 567. The MARTA insignia was not the only evidence linking the bus with MARTA, however. The Court of Appeals also noted that undisputed evidence showed that the bus driver was wearing MARTA's accepted bus driver uniform, that only MARTA bus drivers are permitted to operate buses, and, most importantly, that the bus let passengers on and off at a MARTA bus stop immediately after the incident. *Id.* at 567-68. These facts, taken together, were sufficient to support the jury's verdict that the driver was a MARTA employee acting in the scope of employment. *Id.* at 568.

Evidentiary Threshold to Apportion Fault to Plaintiff

MARTA also appealed the trial court's refusal to charge the jury, pursuant to O.C.G.A § 51-12-33, that it could apportion liability to the plaintiff. MARTA requested that the trial court instruct the jury to determine the percentage of the plaintiff's fault, if any. The trial court denied MARTA's request, however, because it found that there was no evidence contradicting the plaintiff's and eyewitnesses' testimony that the bus had simply veered into the plaintiff's lane. The Court of Appeals began by noting that "[a] charge on a given subject is justified if there is even slight evidence from which a jury could infer a conclusion regarding that subject." *Id.* at 568; *quoting Hendley v. Evans*, 319 Ga. App. 310, 311 (2012).

Nevertheless, without any evidence contradicting the plaintiff and eyewitnesses' description or indicating that the plaintiff was at fault in some way, the Court of Appeals held that the trial court did not err in declining to permit the jury to apportion fault to the plaintiff. *Id.* at 569-70; *see also Beadles v. Bowen*, 106 Ga. App. 34, 36 (1962) (holding it is error to charge a plaintiff's contributory or comparative negligence when there is no evidence of such negligence).

Presence of Alcohol

The plaintiff admitted to having one margarita at dinner prior to the incident. MARTA contended that the plaintiff's ingestion of alcohol prior to the incident constituted evidence of negligence. However, the responding police officer noted in his report that he saw no evidence that the plaintiff was intoxicated and did not administer a field sobriety test. The Court of Appeals held that without that type of evidence, there was nothing in the record showing that the plaintiff was intoxicated or impaired, as the presence of alcohol in a person's body, by itself, does not support an inference that the person was an impaired driver. *Id.* at 570; *citing State v. Frost*, 297 Ga. 296, 305 (2015).

Attorneys' Fees

MARTA challenged the jury's award of attorney's fees, arguing that there was a bona fide controversy as to whether MARTA was vicariously liable for the driver's actions. That argument failed, however, because the existence of a bona fide controversy negates the possibility of a statutory award of attorneys' fees only where bad faith is not an issue. *Id.* at 570-71. In light of the evidence that the bus driver (acting in the scope of employment) hit the plaintiff and fled the scene, the jury could properly conclude that MARTA acted in bad faith and was liable for statutory attorneys' fees. *Id.* at 571.

CONTRADICTORY TESTIMONY*: Whole Foods Market Group, Inc. v. Shepard*, 333 Ga. App. 137 (July 14, 2015).

In *Whole Foods*, a seven judge panel of the Court of Appeals interpreted the *Prophecy* rule. This opinion does not alter the *Prophecy* standard or transform the law, but, in a 4-3 split decision, the majority and detailed dissent's analysis of the evidence are useful in defining "contradictory testimony."

To recap, the *Prophecy* rule states when a party has given contradictory testimony, and when that party relies exclusively on that testimony in opposition to summary judgment, a court must construe the contradictory testimony against him. *Whole Foods*, 333 Ga. App. at 138. This case focuses on the critical issue of whether testimony is contradictory, or "if one part of the testimony asserts or expresses the opposite of another part of the testimony." *Id.*, *citing Bradley v. Winn-Dixie Stores,* 314 Ga.App. 556, 557-558 (2012).

Here, a truck driven by a Whole Foods employee struck another vehicle. Plaintiff filed for summary judgment on its claim that the Whole Foods driver was negligent per se for failing to maintain a lane. *Whole Foods*, 333 Ga. App. at 137. At deposition, the Whole Foods driver adopted an unsworn incident report stating he had just initiated a lane change, felt the impact of the collision, and then came "back in" the lane. *Id.* at 137-38. In an affidavit filed in opposition to summary judgment, the Whole Foods driver testified that he was beginning to change lanes, but he had not left his own lane at the time of the collision. *Id.*

The affidavit also attempted to reconcile the statements by stating the driver was never asked point blank at deposition if his vehicle ever truly left his lane. *Id.* The plaintiff testified that he remained in his lane at all pertinent times. *Id.* at 137.

The Court of Appeals majority affirmed the trial court's decision to disregard the testimony as contradictory, because it believed someone cannot come "back in" to a lane it had never left. *Id.* at 140.

The dissent noted the proper test to determine whether statements are inconsistent for the *Prophecy* rule is "to be determined, not by individual words or phrases alone, but by the whole impression or effect of what has been said." *Id.* at 143; *citing Price v. Thapa,* 323 Ga.App. 638, 640 (2013).

Based on that standard, the dissent looked to multiple sections of deposition testimony that shed doubt on whether the Whole Foods driver ever left his lane. *Id.* at 141-42. In other words, the dissent felt there was sufficient uncertainty present in his deposition testimony about his presence in (or out of) the lane that his subsequent, clarifying affidavit did not amount to a "contradictory" statement sufficient to trigger the *Prophecy* rule. *Id.* 142-43. ❖

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Premises Liability Case Law Update

By Sherrie M. Brady
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SUMMARY JUDGMENT: Building owner and premises manager were not entitled to summary judgment as they could not avoid duty to protect elevator passengers by contracting with a third party.

***Hill v. Cole CC Kennesaw GA, LLC*, 334 Ga. App. 845 (November 20, 2015).**

Plaintiff, Shakira Hill, allegedly sustained injuries when she tripped and fell while entering an elevator that stopped unleveled with the floor. Hill brought suit against the owner of the building where the incident occurred, the entity that managed the premises, and the company that serviced the elevators, alleging that Defendants were negligent because they failed to properly maintain the elevators. *Hill v. Cole CC Kennesaw GA, LLC*, 334 Ga. App. 845, 845 (2015). All Defendants moved for summary judgment which the trial court granted in two separate orders. *Id.* The Court of Appeals likewise handled the appeals separately.

In *Hill v. Kone*, 329 Ga. App. 716 (2014) ("*Hill 1*"), the Court reversed the summary judgment ruling as to the company that serviced and maintained the elevators, Kone, Inc. ("Kone"). *Id.* The *Hill 1* appellate panel held that there was an issue of fact regarding whether Kone had complied with O.C.G.A. § 8-2-106, which requires property owners to take certain actions following elevator accidents involving personal injury or death. *Id.* at 846. The Court of Appeals further explained that failure to comply with O.C.G.A. § 8-2-106 would constitute a form of spoliation of evidence, creating a presumption that the evidence would have been harmful to Kone. *Id.* at 847. Moreover, the Court noted that there was evidence that the post-incident inspection, as required by statute, was done on the wrong elevator. *Id.* Thus a question of fact existed as to whether the correct elevator was taken out of service and whether the correct elevator was inspected immediately following the incident. *Id.* These questions, combined with expert testimony in the record as to Kone's failure to properly maintain the elevator at issue, made summary judgment inappropriate. *Id.* at 847-848.

In the more recent appeal, the Court of Appeals reversed summary judgment for the owner of the premises and the management company. *Id.* at 851. Relying on *Gaffney v. EQK Realty Investors*, 213 Ga. App. 653 (1994), the Court noted that "the owner of an office building, equipped with an elevator which is operated for conveying his tenants and their employees and patrons to and from the various floors, has a duty to protect passengers in the elevator." *Id.* at 848. The Court further recognized that this duty requires the exercise of extraordinary diligence on behalf of a defendant owner and his agents to protect the passengers, that the duty cannot be waived or released even by an express contract, that the duty cannot be delegated to a third party, and that the owner is liable for even slight negligence. *Id.* at 848-849. Likewise, the Court of Appeals, quoting *Ramey v. Pritchett*, 90 Ga. App. 745, 751 (1954), stated that "an agent who undertakes the sole and complete control and management of the principal's premises is liable to third persons, to whom a duty is owing on the part of the owner, for injuries resulting from his negligence in failing to make or keep the premises in a safe condition." *Id.* at 849.Because there was evidence that the elevator maintenance company was negligent in failing to properly maintain the elevator that did not stop level with the floor, causing Hill to trip and fall and suffer injury, the Court held that the building owner and property manager could be vicariously liable for that negligence. *Id.*

The Court distinguished *Brady v. Elevator Specialists*, 287 Ga. App. 304 (2007), noting that the plaintiffs in *Brady* "did not show that the inspections or maintenance actually performed were

negligent or that the owner or elevator maintenance provider knew or were put on notice during these procedures that the elevator was defective." *Id.* at. 850. To the contrary, in *Hill*, there was evidence "that Kone had breached industry standards for proper elevator maintenance and inspection and that, absent that breach, the cause of the misleveling would have been identified and Kone would have known what corrections were needed." *Id.*

CONSTRUCTIVE KNOWLEDGE OF ALLEGED DEFECT: Issues of fact remain in slip and fall action as to whether defendants had constructive knowledge of the alleged defect and whether the plaintiff unreasonably exposed himself to danger.

***Gaskins v. Berry's Boat Dock*, 334 Ga. App. 642 (November 18, 2015).**

This case arises from an incident where a boater, Gaskins, was injured in a fall when a pipe and chain railing on a floating ramp gave way. *Gaskins v. Berry's Boat Dock*, 334 Ga. App. 642 (2015). The Court of Appeals described the pertinent facts as follows:

> After unloading a boat and parking his truck, Gaskin walked across the level walkway and turned and stepped onto the ramp that leads to the floating dock. As he stepped onto the ramp, Gaskin grabbed a metal post at the top of the ramp to steady himself as he started down the incline. His right foot then slipped, and as he lost his balance, he either continued to hold onto or re-grabbed one of the posts in an attempt to keep from falling. When he did, the post broke off from the ramp, and Gaskin fell, ended up in the lake, and suffered an injury … Gaskin had used the same ramp to get to his boat many times in the past both when the lake was equally low and when it was higher, and he had traversed the same ramp two weeks earlier when the lake was at the same lower level.

Id. at 642-643. Gaskins alleged, among other things, "that the pipe and chain rail was attached to rotten wood, that the failure occurred when the bolts used to attach the pipe to the wood base 'pulled straight thru the deteriorated wood,' and that the wood had lost its structural integrity." *Id.* at 643. The trial court granted summary judgment to Defendants. The Court of Appeals reversed, holding the trial court erred "by concluding that Gaskins had equal knowledge of the alleged defect in the railing and by concluding as a matter of fact and law that the pipe and chain railing was not a handrail meant for safety purposes." *Id.* at 643-644.

More specifically, the Court of Appeals held that there was "an issue of fact as to whether [Defendants] had constructive knowledge that the pipe posts were attached to rotten and deteriorated wood." *Id.* at 644. In so doing, The Court relied on *Avery v. Cleveland Ave. Motel*, 239 Ga. App. 644 (1999), a case involving the collapse of a handrail where summary judgment was denied because the defendants "failed to sufficiently establish procedures were in place to inspect the stair railings." *Id.* at 645. In *Gaskins*, there was testimony by one of the boat dock owners that "there's nothing documented saying I go out there … every day, once a week or whatnot. It's just I'm out there." *Id.* The Court of Appeals determined that this was insufficient to establish "as a matter of undisputed fact that [Defendants] had a reasonable inspection procedure or that the procedure was carried out at the time of the accident." *Id.* Thus, there was "an issue of fact as to whether the defendants had constructive knowledge of the fact that the pipe posts were attached to rotten wood," and "[f]or the same reason, there [was] an issue of fact as to whether Gaskin reasonably could have known of such a defect even if he did traverse the same ramp on a regular occasion." *Id.* (citing *Paul v. Sharpe*, 181 Ga. App. 443, 446 (1987), which held that a "plaintiff was not negligent in leaning against the deceptively standing-but-loose railing"). *Id.* at 646. The Court closed by noting an additional question of fact as to whether "a reasonable person in Gaskin's position would have assumed that he could steady himself by holding onto one of the posts." *Id.*

CONSTRUCTIVE KNOWLEDGE OF ALLEGED HAZARD: Plaintiff failed to show defendant nursing home had actual or constructive knowledge of a hazard that caused her to slip and fall while visiting a resident.

***Esposito v. Pharr Court Associates, L.P.*, 334 Ga. App. 434 (November 12, 2015).**

Plaintiff Esposito brought suit after suffering a fall while visiting her husband who was a resident of a nursing home operated by Defendant. *Esposito v. Pharr Court Assocs., L.P.*, 334 Ga. App. 434, 434 (2015). The Court of Appeals described the basic facts as follows:

> After entering the facility on the date in question, Esposito walked toward an elevator located across the entrance lobby to the right. The reception desk was situated to Esposito's right as she walked in and across the lobby to the elevator. Just before pushing

> the button for the elevator, Esposito remembered that her husband might be in physical therapy, so she stepped over to the left to look through the doors of the physical therapy room, which was down a hallway to the left of the elevator. As she moved to the left, her feet slid out from under her and up in the air and she came crashing down on her left side and hit her right elbow. After landing on the floor, Esposito realized she had fallen in diarrhea. Esposito testified that there was a large puddle of diarrhea on the floor where she fell and that when she was on the ground she noticed another smaller puddle in front of the elevator on the other side of the hallway leading to the physical therapy room … Esposito did not know how long the diarrhea had been there and she noticed no footprints around it.

Id. at 435. An employee of Defendant working the front desk, Gates, testified that she could see the entire lobby, including the elevator area, from her desk. *Id*. The evidence was undisputed that Gates was at the front desk and actually saw Esposito fall. *Id*. at 435-436. Gates testified that she only realized something was on the floor after the fall. *Id*. at 436. She also testified that she got up about every five minutes because she was always helping residents off the elevator. *Id*. Gates further testified that only a minute or two before Esposito fell, a resident in a wheel chair and wearing a diaper, had come off the elevator and traveled toward the physical therapy hall. *Id*. Finally, Gates testified that her job duties "included making sure the lobby area was clean" and that "i[f] anything was on the floor, she would put up wet floor signs if necessary and either clean it up herself or call a floor tech to do it." *Id*.

Even though the director of nursing for Defendant testified that staff were trained that visitors were customers, the trial court granted summary judgment for Defendant, concluding that Esposito was a licensee when she entered the nursing home and that Defendant did not breach the duty owed to her in that capacity. *Id*. at 434, 436.Relying on *Jones v. Monroe Nursing Home*, 149 Ga. App. 582 (1979), the Court of Appeals held that in the instant case — "where Esposito provided much of the daily care for her husband, which obviously lightened the burden of the nursing home staff, and where [Defendant's] own director of nursing considered visitors to be customers" — an issue of fact did exist as to Esposito's status as a licensee or invitee. *Id*. at 437. However, the Court of Appeals further held that "there was no showing [that Defendant] had knowledge of the substance on the floor, or that it had time to discover the substance even with the frequent lobby inspections conducted by the receptionist." *Id*. at 438. Thus, "regardless of whether Esposito was a licensee or an invitee, the trial court's grant of summary judgment for [Defendant] was proper." *Id*.

SUMMARY JUDGMENT: Summary judgment to hotel was improper because there was evidence from which a jury could find that the hotel had constructive knowledge of the defect.

***Fitzpatrick v. Hyatt Corporation*, 335 Ga. App. 203 (November 4, 2015).**

A hotel patron, Fitzpatrick, brought suit to recover for injuries she sustained when she fell off a two-foot stage at a conference she was attending at a hotel owned and operated by the Defendant. *Fitzpatrick v. Hyatt Corp*., 335 Ga. App. 203, 203 (2015). The pertinent facts of the incident are as follows:

> One of the sessions at the conference featured an entertainer, Don Monopoli, who invited audience members up on the stage. Fitzpatrick volunteered and climbed the stage. She was listening to the entertainer, facing outward toward the audience, when another woman began to leave the stage. Fitzpatrick stepped back to allow the other woman to pass and fell off the stage, injuring her neck and upper back … At the time of Fitzgerald's fall, the stage was configured as a rectangle with a rectangular-shaped area cut out of the back corner. Fitzpatrick was standing directly in front of the cutout section and fell when she stepped backward into the area where there was no stage.

Id. at 204-205. Employees of Defendant had set up the stage, but there was conflicting evidence as to whether the configuration of the stage at the time of Fitzpatrick's fall was the way in which the Defendant employees had set it up. *Id*. at 205. Nevertheless, the Defendant employees agreed that the configuration of the stage at the time Plaintiff fell was unsafe. *Id*.

The Court of Appeals held that the trial court erred in granting summary judgment to Defendant because there was evidence from which a jury could find that Defendant had constructive knowledge of the defect. *Id*. at 205-206. More specifically, "Fitzpatrick presented evidence that [Defendant] employees set up the sound system on the stage and that she fell after the session had begun, after Monopoli had sung several songs, after the volunteers had sung, and after Monopoli had begun telling a story, all while the stage was set up in the hazardous configuration." *Id*. at 206. Therefore, whether Defendant had the opportunity to discover and remedy the hazardous condition and whether Fitzpatrick exercised reasonable care in stepping backwards into the opening were questions for the finder of fact. *Id*. at 206-207. ❖

Trial & Mediation Academy Continues to Train Tomorrow's Leading Litigators

Lawyers from across the state made the annual trek to Callaway Gardens for GDLA's Melburne D. (Mac) McLendon Trial & Mediation Academy from January 21-23, 2016.

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

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

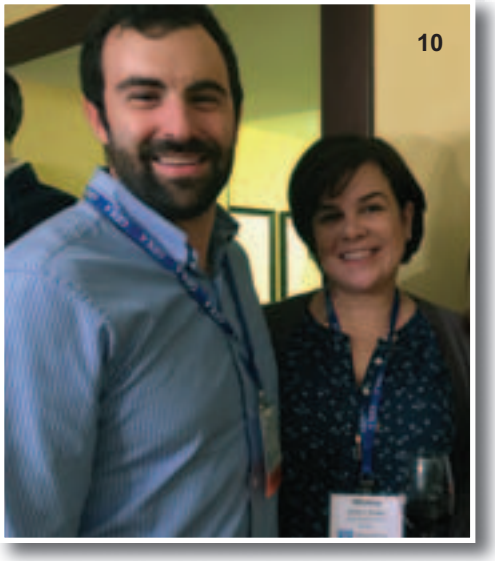
Two of the GDLA's Platinum Sponsors were again on-hand to offer wisdom with respect to the mediation component of the seminar. William S. (Bill) Allred of BAY Mediation & Arbitration Services and John K. Miles of Miles Mediation & Arbitration Services participated in a panel discussion addressing the nuts and bolts of mediations.

This year, Mr. Casey invited GDLA Platinum Sponsor and jury consulting firm, R&D Strategic Solutions, to participate. Maithilee K. Pathak, Ph.D., J.D., not only taught the portion on voir dire, but also offered tips on each aspect of trial as the seminar progressed.

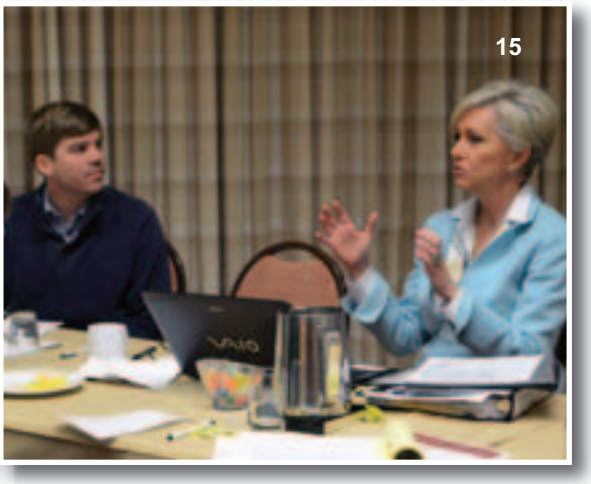
Trial & Mediation Academy employs a modified mock trial format to teach litigation skills. In advance of the seminar, students are given a case to study and begin preparing each aspect of a trial. Following faculty instruction and demonstrations, students disperse into breakout groups to work on their skills from opening statements to cross and direct examinations to closing.

The first day concluded with a reception and dinner, sponsored by BAY and Miles, featuring a keynote address by Fulton State Court Judge Eric A. Richardson, who was back by popular demand to discuss professionalism and the Golden Rule.

Be on the lookout for a save the date for January 2017. Trial & Mediation Academy is an exceptional learning opportunity not only for those early in their careers, but also for experienced attorneys who find themselves needing to brush up on their courtroom skills. Students could repeat the program and learn something new. Even the faculty professes to gaining trial tips and strategies each time — and some have been teaching for over 20 years. ❖



Scenes from Trial & Mediation Academy: *1. faculty member Brad Marsh; 2. Tynetra Evans and Jenn McNeely; 3. faculty member Jerry Buchanan; 4. Academy Chair Bill Casey, Fulton State Court Judge Eric Richardson, and GDLA President and faculty member Matt Moffett; 5. Myada Baudry, Danielle Le Jeune, and Mary Claire Smith; 6. BAY Mediation's Bill Allred; 7. Miles Mediation's John Miles; 8. faculty member Philippa Ellis; 9. Sam Crochet; 10. Zack Lewis and Monica Wingler; 11. Anam Ismail and Sharon Horne; 12. R&D's Maithilee Pathak; 13. faculty members Douglas Burrell and Billy Harrison; 14. (left to right) Wes Childs, Ali Sabzevari, Marc Hood, Steve Wilson, Matt Shoemaker, John Kirbo, Kyle Waddell, and Mark Nash; and 15. Waite Thomas and Academy Vice-chair Carrie Christie.*



GDLA Honors Judiciary at 13th Annual Reception

Enjoying the 13th Annual Judicial Reception on February 4, 2016, at the State Bar Center are *(identified left to right): 1. Jamie Weston, Supreme Court Justice David Nahmias, and VP Craig Avery; 2. Court of Appeals Presiding Judge Herbert Phipps, Kimberly Stevens, and Philippa Ellis; 3. DeKalb Superior Court Judge J.P. Boulee and Secretary Hall McKinley; 4. State Board of Workers' Compensation Chairman Frank McKay and Past President Staten Bitting; 5. President-elect Peter Muller and U.S. District Court Judge Mark Cohen; 6. Past President Bubba Hughes, DRI Director of SLDO Relations Cheryl Palombizio, DRI Executive Director John Kouris, and Frank Bedinger; 7. Cobb Superior Court Judge LaTain Kell and John McKinley; 8. DeKalb State Court Judge Stacey Hydrick and Brian Dempsey; 9. DeKalb State Court Chief Judge Wayne Purdom, Past President Steve Kyle, and Fulton Superior Court Judge Jackson Bedford; 10. Wayne Melnick and Court of Appeals Judge Carla McMillian; 11. Brian Johnson and Fulton Superior Court Judge Amanda Ellerbe; 12. DeKalb State Court Judge Janis Gordon and Treasurer Sally Akins; 13. Hank Fellows, Fulton State Court Judge Jane Morrison, and Marty Levinson; 14. Trevor Hiestand, VP Dave Nelson, and Fulton Superior Court Judge Jane Barwick; 15. Sarah Richards, DeKalb State Court Judge Dax Lopez, Court of Appeals Chief Judge Sara Doyle, Nathan Gaffney, and Laughlin Kane; 16. Will Ellis, DeKalb State Court Judge Shondeana Morris, and E. Tyron Brown; 17. President Matt Moffett and Court of Appeals Judge Lisa Branch; 18. Molly O'Connor with special guest, Georgia Association for Women Lawyers President Laurie Vickery; and 19. Past President Ted Freeman, Cherokee State Court Judge Michelle Homier, and Past President Kirby Mason.*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Board of Directors Holds Winter Meeting


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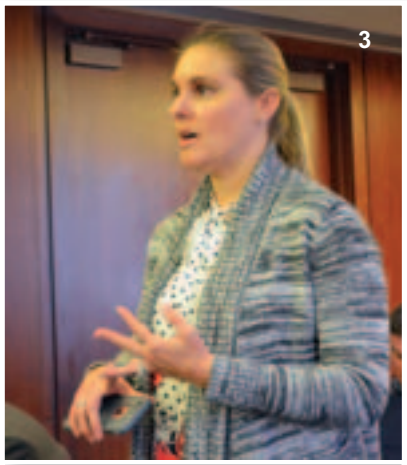
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As is tradition, the GDLA Board of Directors held its Winter Meeting the day after the judicial reception, convening at the Bar Center in Atlanta on February 5, 2016. We were again honored to have DRI Executive Director John Kouris join us for a report on the state of the national defense bar and DRI's efforts in that regard. GDLA is the state affiliate for DRI. For a complete meeting report, please see the Board Meeting Minutes tab in the members only area of our website.

Those present were **Executive Committee:** President Matthew G. Moffett, Gray Rust St. Amand Moffett & Brieske, Atlanta; President-elect Peter D. Muller, Goodman McGuffey Lindsey & Johnson, Savannah; Past President Kirby G. Mason, HunterMacLean, Savannah; Secretary Hall F. McKinley, III, Drew Eckl & Farnham, Atlanta; Treasurer Sarah B. (Sally) Akins, Ellis Painter Ratterree & Adams, Savannah; Past President Lynn M. Roberson, Miles Mediation, Atlanta; Past President, Theodore (Ted) Freeman, Freeman Mathis & Gary, Atlanta; **Vice Presidents**: Craig C. Avery, Cowsert & Avery, Athens; David N. Nelson, Chambless Higdon Richardson Katz & Griggs, Macon; Jeffrey S. Ward, Drew Eckl & Farnham, Brunswick; **Directors:** James S. V. Weston, Trotter Jones, Augusta; Pamela Lee, Swift Currie McGhee & Hiers, Atlanta; William T. (Bill) Casey, Jr., Hicks Casey & Morton, Marietta; Wayne S. Melnick, Freeman Mathis & Gary, Atlanta; Martin A. (Marty) Levinson, Hawkins Parnell Thackston & Young, Atlanta; C. Jason Willcox, Moore Clarke DuVall & Rodgers, Albany; Ashley Rice, Waldon Adelman Castilla Hiestand & Prout, Atlanta; Brian T. Moore, Drew Eckl & Farnham, Atlanta; Jason D. Lewis, Chambless Higdon Richardson, Katz & Griggs, Macon; **Past Presidents:** N. Staten Bitting, Jr., Fulcher Hagler, Augusta; Edward M. (Bubba) Hughes, Ellis Painter Ratterree & Adams, Savannah; Grant B. Smith, Dennis Corry Porter & Smith, Atlanta; Steven J. Kyle, Bovis Kyle Burch & Medlin, Atlanta; Walter B. McClelland, Mabry & McClelland, Atlanta; George E. Duncan, Jr., Dennis Corry Porter & Smith, Atlanta; **Committee Leaders:** Zach Matthews, Young Lawyers Chair, Swift Currie McGhee & Hiers, Atlanta; Candis Jones, Diversity Chair, Gray Rust St. Amand Moffett & Brieske, Atlanta; David C. Marshall, Judicial Relations Chair, Hawkins Parnell Thackston & Young, Atlanta; Erica L. Morton, Education Chair, Hicks Casey & Morton, Marietta; Jacob E. (Jake) Daly, Legislative Chair, Freeman Mathis & Gary, Atlanta; **DRI:** John R. Kouris, Executive Director; Douglas K. Burrell, National Director, Drew Eckl & Farnham, Atlanta; Cheryl L. Palombizio, Director of State & Local Defense Organization Relations; **GDLA**: Jennifer M. Davis, Executive Director. ❖

Winter Meeting Scenes: *1. (see opposite page) Treasurer Sally Akins; 2. DRI State Rep and Past President Ted Freeman with VP Craig Avery; 3. Education Committee Chair Erica Morton; 4. Board member Brian Moore, Past President Steve Kyle, and Past President Lynn Roberson; 5. DRI Executive Director John Kouris; 6. Board member and Amicus Committee Chair Marty Levinson; 7. DRI National Director and GDLA member Douglas Burrell (left) with President Matt Moffett; 8. Diversity Chair Candis Jones; 9. Legislative Chair Jake Daly (left) and VP Dave Nelson; and 10. Judicial Relations Committee Chair David Marshall.*

GDLA Honors its Past Presidents

GDLA Past Presidents were honored at an inaugural luncheon held on February 5, 2016, at the Capital City Club downtown.

President Matt Moffett welcomed everyone (photo 2), after which several former leaders shared memories from their terms in office. Those included Jimmy Singer (photo 3) and Bob Travis (photo 4 right), who had Steve Kyle (photo 4 left) and the rest of the room laughing.

Those present are in photo 1;. On the *front row* (l-r) are GDLA Past Presidents Edward M. (Bubba) Hughes, 2010-11, Ellis Painter Ratterree & Adams, Savannah; Lynn M. Roberson, 2012-13, Miles Mediation, Atlanta; R. Clay Porter, 1995-96, Dennis Corry Porter & Smith, Atlanta; J. Bruce Welch, 1992-93, Hawkins Parnell Thackston & Young, Atlanta; Steven J. Kyle, 1998-99, Bovis Kyle Burch & Medlin, Atlanta; Kirby G. Mason, 2014-15, HunterMaclean, Savannah; and Walter B. McClelland, 2001-02, Mabry & McClelland, Atlanta. *Back row* (l-r) is President Matthew G. Moffett, Gray Rust St. Amand Moffett & Brieske, Atlanta, with Past Presidents: N. Staten Bitting, Jr., 2009-10, Fulcher Hagler, Augusta; David T. Whitworth, 1994-95, Whitworth & McLelland, Brunswick; Warner S. Fox, 2006-07, Hawkins Parnell Thackston & Young, Atlanta; James E. (Jimmy) Singer, 2008-09, Bovis Kyle Burch & Medlin, Atlanta; Theodore (Ted) Freeman, 2013-14, Freeman Mathis & Gary, Atlanta; Grant B. Smith, 2004-05, Dennis Corry Porter & Smith, Atlanta; Robert M. (Bob) Travis, 2007-08, Bryan Cave, Atlanta; and George E. Duncan, Jr., 1999-00, Dennis Corry Porter & Smith, Atlanta.

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However, we'll be glad to send someone with expertise in case anyone has questions.

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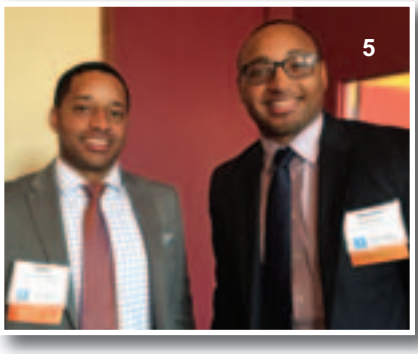
Pictured at the seminar are: *1. Glenn Bass, Jonathan Adelman and Past President Grant Smith; 2. Anne Gower and Erica Morton; 3. Gwendolyn Larkin and Margaret Louttit; 4. Fulton Superior Court Judge Shawn LaGrua, The Choice "winner" Amir Nowroozzadeh, Lara Percifield and Andy Treese; 5. Chris Johnson and Donovan Potter; 6. DeKalb State Court Judge Mike Jacobs (center) takes a selfie with his "team" members, Marty Levinson and Tracey Pruiett.*



Our most popular CLE seminar, Skits & Suds, returned again this year and featured GDLA members reacting to and commenting on everyday ethical and professionalism dilemmas that lawyers may likely face. Held March 23, 2016, at Five Seasons Brewery on Atlanta's Westside, the evening also included a beer and wine reception for networking. There was a good turn out with over 50 people in attendance.

Just like on a well-known television show, which shall go unnamed, this year's skit, The Choice, featured real judges as coaches: Fulton Superior Court Judge Shawn E. LaGrua of and DeKalb State Court Judge Mike Jacobs. After hearing a series of short hypothetical questions answered by GDLA member-contestants, who they could not see, the judge-coaches then selected their own teams. The two teams then battled it out with help from our judges to answer more involved hypotheticals on discovery and social media issues. The judges then each chose a team member to compete in the final round, after which one contestant was determined the winner of the GDLA's The Choice Atlanta 2016! Congratulations to Amir A. Nowroozzadeh of Hicks Casey & Morton!

The other GDLA member-contestants were: Christopher L. Johnson of Gray Rust St. Amand Moffett & Brieske, Atlanta; Martin A. (Marty) Levinson of Hawkins Parnell Thackston & Young, Atlanta; Margaret Dasher Louttit of Tisinger Vance, Carrollton; Jacob E. (Jake) Daly of Freeman Mathis & Gary, Atlanta; Tracey W. Pruiett of Mabry & McClelland, Atlanta; and Ashley Rice of Waldon Adelman Castilla Hiestand & Prout, Atlanta. We also had a special guest appearance by a former defense attorney and GDLA Education Committee member turned plaintiff's counsel, Brett A. Miller.

Thanks goes to GDLA Education Committee member and program chair Lara Percifield of Mabry & McClelland, Atlanta, and committee vice-chair Andy Treese of Freeman Mathis & Gary, Atlanta, who developed the program and moderated it. The Education Committee is chaired by Erica L. Morton of Hicks Casey & Morton, Marietta.

The Skits & Suds fact pattern changes each year — as will the different dilemmas faced (i.e., discovery debacles, deposition nightmares, summary judgment crises, etc.) — making this an enlightening and entertaining way to earn CLE annually.

Also look for Skits & Suds on the road, coming to Savannah this fall. ❖

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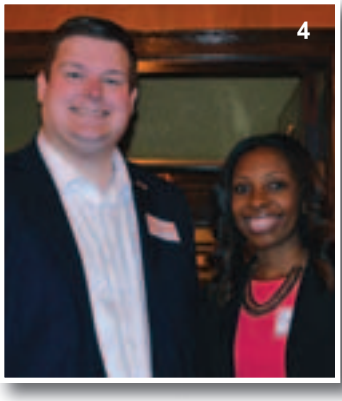
GDLA Holds Second Mixer with GTLA

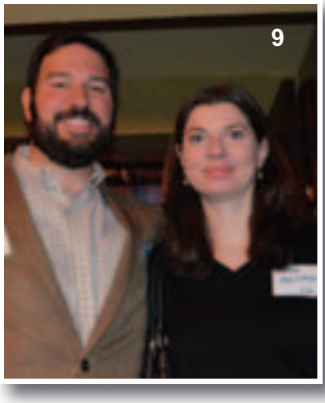
A key initiative of Matt Moffett's year as GDLA president was to bring the two sides — plaintiff's and defense lawyers — together outside the courtroom.

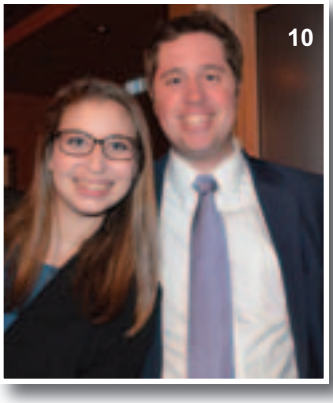
Our first-ever mixer with the Georgia Trial Lawyers Association (GTLA) was held in the fall to kick-off college football season, and also included inviting the appellate judges. The latest networking event with GTLA and the appellate bench was held at RiRa Irish Pub in Midtown Atlanta on April 8, 2016.

Thanks goes to these GDLA Platinum Sponsors for their support of this event: ESI, Elizabeth Gallo Court Reporting, and Miles Mediation & Arbitration Services. ❖

Happy hour scenes: *1. GTLA Past President Lester Tate, Court of Appeals Judge Stephen Dillard, and GDLA Past President Steve Kyle; 2. Allison Escott with GTLA members Michael Ruppersburg (left) and Aaron Strimban; 3. Doug Wilde and John Austin; 4. GTLA member Ron Daniels and Candis Jones; 5. Jake Daly and Zach Nelson; 6. Court of Appeals Presiding Judge Anne Elizabeth Barnes and Andy Treese; 7. GTLA member Parag Shah (left) and Amir Nowroozzadeh; 8. GTLA member (left) Matthew Wilson and Eddie Tarver; 9. GTLA member Michael Geoffroy and Lara Percifield; 10. Danielle Le Jeune and Bo Burke.*







GDLA Teams with GTLA and *Daily Report* for Fulton Superior Candidates Forum

The GDLA teamed up with GTLA and the *Daily Report* to present the Fulton County Superior Court Candidates Forum on April 13, 2016, at the State Bar Center. The event was moderated by GDLA President Matthew G. Moffett (photo 1 center, taking audience questions) and GTLA President Darren W. Penn (photo 5).

The forum was the brainchild of GDLA Legislative Chair Jake Daly (at the podium in photo 2). He assembled all eight candidates running for three open seats, including (left to right in photo 2): Gabe Banks and Thomas A. Cox, Jr., candidates to succeed Judge T. Jackson Bedford, Jr.; Gary Alembik, Eric Dunaway, and Andrew Margolis, candidates to succeed Judge Wendy L. Shoob; and Sterling Eaves, Belinda Edwards, and Angelia McMillan to succeed Judge Bensonetta Tipton Lane.

The forum was free and to the public, and even attracted sitting judges, including (photo 3) Court of Appeals Judge Chris McFadden and Fulton Superior Court Judge Constance Russell. Among those GDLA members in attendance were (photo 4, left to right) Carrie Christie, Past President Lynn Roberson, and Brittany Fleming. ❖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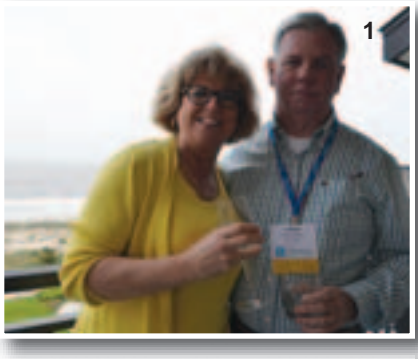
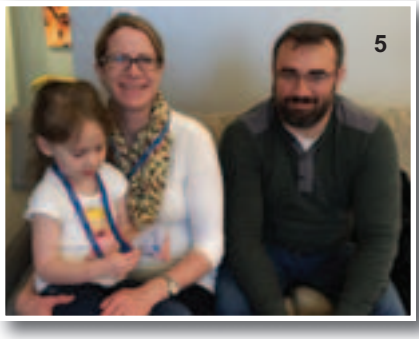
GDLA Board Holds Spring Meeting on Jekyll Island

The GDLA Board of Directors headed to the Westin Jekyll Island for its Spring Meeting from April 15-17, 2016. The weekend commenced with a reception in the hospitality suite. Mother Nature had other plans for the group dinner outdoors, but everyone still enjoyed a delicious surf and turf buffet inside. The Board met on Saturday morning, then the group adjourned to enjoy the island — from exploring the historic district, to having lunch on the water, to biking, and more. That evening was another cocktail reception, then the group dispersed for dinner on their own.

Minutes were not approved at press time, but they will be posted with prior Board minutes in the members only area of our website.

Those present were **Executive Committee:** President Matthew G. Moffett, Gray Rust St. Amand Moffett & Brieske, Atlanta; President-elect Peter D. Muller, Goodman McGuffey Lindsey & Johnson, Savannah; Past President Kirby G. Mason, HunterMacLean, Savannah; Secretary Hall F. McKinley, III, Drew Eckl & Farnham, Atlanta; Past President Lynn M. Roberson, Miles Mediation, Atlanta; **Vice Presidents**: Craig C. Avery, Cowsert & Avery, Athens; David N. Nelson, Chambless Higdon Richardson Katz & Griggs, Macon; Jeffrey S. Ward, Drew Eckl & Farnham, Brunswick; James D. (Dart) Meadows, Balch & Bingham, Atlanta; **Directors:** William T. (Bill) Casey, Jr., Hicks, Casey & Morton, Marietta; George R. Hall, Hull Barrett, Augusta; Martin A. (Marty) Levinson, Hawkins Parnell Thackston & Young, Atlanta; Jason D. Lewis, Chambless Higdon Richardson Katz & Griggs, Macon; Jason C. Logan, Constangy Brooks Smith & Prophete, Macon; Wayne S. Melnick, Freeman Mathis & Gary, Atlanta; James W. Purcell, Fulcher Hagler, Augusta; Ashley Rice, Waldon Adelman Castilla Hiestand & Prout, Atlanta; James S. V. Weston, Trotter Jones, Augusta; and C. Jason Willcox, Moore Clark DuVall & Rodgers, Albany; **Past Presidents:** N. Staten Bitting, Jr., Fulcher Hagler, Augusta; W. Melvin Haas, III, Constangy Brooks Smith & Prophete, Macon; and Walter B. McClelland, Mabry & McClelland, Atlanta; **GDLA:** Jennifer M. Davis, Executive Director. ❖





Spring Meeting Scenes: *1. Past President Staten Bitting and his wife, Cindy; 2. Board members Marty Levinson and Jason Logan; 3. Board member George Hall and his wife, Margaret; 4. Board member Bill Casey and President Matt Moffett; 5. Board member Ashley Rice with her daughter, Marielle, and husband, Brandon; 6. President Matt Moffett and President-elect Peter Muller; 7. Board member Jason Lewis; 8. Annie Purcell with her husband, Board member Jim Purcell, Past President Kirby Mason and her husband, Frank Mason; 9. (on opposite page) VP Craig Avery and his wife, Resa, VP Dart Meadows and his wife, Carol, Ann Hopkins and Secretary Hall McKinley; 10. The golfers: Past President Walter McClelland, VP Jeff Ward, Past President Mel Haas, and VP Craig Avery.*

Continued from page 1

pany. HMH moved to strike the notice, arguing that O.C.G.A. § 51-12-33(b) did not permit apportionment of fault to nonparties because there was only one defendant named in the case and also that there was no evidence on which to apportion damages. The trial court granted HMH's motion and struck the notice of intention to apportion fault, and the Court of Appeals granted A&B's request for interlocutory appeal.

On appeal, the Court of Appeals reversed, relying on the Supreme Court's recent decision in *Zaldivar v. Pritchett*, 297 Ga. 589 (2015). In *Zaldivar*, of course, the Supreme Court held that

O.C.G.A. § 51-12-33(c) "requires the trier of fact in cases to which the statute applies to consider the fault of all persons or entities who contributed to the alleged injury or damages, meaning all persons or entities who have breached a legal duty in tort that is owed with respect to the plaintiff, the breach of which is a proximate cause of the injury sustained by the plaintiff." 297 Ga. at 600 (1) (internal quotation omitted). The Court of Appeals held in this case that *Zaldivar*, which was a single-defendant case, was controlling and required that a defendant be permitted to apportion fault to responsible non-parties even in a case involving only one defendant.

The Court of Appeals also rejected HMH's argument that A&B's notice of intent to apportion fault to nonparties was properly stricken because A&B did not establish sufficient evidence of the various nonparties' alleged fault to create a jury issue. Again relying on *Zaldivar*, the Court held that "to the extent that [A&B] can prove that the nonparties identified in the apportionment notice breached a legal duty in tort that [they] owed [HMH], the breach of which is a proximate cause of the injury that [HMH] sustained, the trier of fact in this case may be permitted under O.C.G.A. § 51-12-33(c) to assign 'fault' to the nonparty."

Perhaps most significantly, the Court of Appeals went on to hold that A&B was entitled to seek apportionment of fault to the nonparties based on "the **assertions** ... alleged by [A&B] regarding the nonparties' actions" (emphasis supplied). And by footnote, the Court quoted from its own recent holding in *Six Flags Over Georgia II, L.P. v. Martin*, 335 Ga. App. 350 (2015): "it is a defendant's burden to establish a rational basis for **apportioning fault to a nonparty; but whether the defendant meets that burden given the evidence at trial is an issue that should be left to the jury**." *Id.* at 364-65 (3). The Court did not discuss or imply that any particular type or quantum of **evidence** might be required for A&B to ask the jury to apportion fault to the nonparties.

This is significant, because although the phrase "rational basis" was used in earlier appellate decisions regarding apportionment, it had not previously been defined. Taking the decision in this case along with the language cited from the Court of Appeals' decision in the *Six Flags* case, it appears that a defendant need not present evidence of a nonparty's alleged fault to have a jury decide the issue. All that is required, it appears, is an **assertion** of some "rational basis" for apportioning fault to a nonparty to get the question to a jury.

Of course, some evidence of the nonparty's fault would be required before the jury would be authorized to assign fault to the nonparty. But it appears that the days of plaintiffs moving to strike notices of nonparty fault due to a claimed lack of evidence of the nonparty's fault are — or at least should be — over. ❖

Martin A. Levinson is partner in the Atlanta office of Hawkins Parnell Thackston & Young. He is a member of the GDLA Board of Directors and chairs the Amicus Committee.

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UPCOMING DATES:

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DAILY REPORT

What many defense attorneys do not understand is that their witnesses are highly vulnerable even during direct examination. Witnesses can make dangerous cognitive, emotional and communication mistakes that can severely hurt their credibility with the jury. Furthermore, defense attorneys are also highly susceptible to cognitive and strategic errors during direct examination that can inadvertently set up their witnesses for disaster. In reality, neither witness nor attorney is safe during direct examination. This article is designed to (a) educate defense attorneys about three common errors that can damage witness credibility during direct testimony, and (b) provide defense attorneys with a plan to prepare for and conduct direct examination more effectively.

Error #1: Juror Cognitive Saturation

Both defense witnesses and attorneys vastly overestimate how much information jurors can process during testimony. Thanks to the persistent growth of portable technological gadgets (PDAs, tablets, etc.) that provide people with constant and near instantaneous information, juror attention span has declined from poor to atrocious. Specifically, the human brain has become so reliant on technology to provide multiple sources of information that sustained attention and concentration to a single source of information has become difficult for most people.

Attentively listening to a witness testify and effectively processing that information now creates a unique neuropsychological challenge for jurors that was absent before the tech age. Therefore, both defense attorneys and witnesses need to understand jurors' neurocognitive limitations and ensure that information is being presented to them in the correct fashion. Otherwise, valuable information may be missed, lost or forgotten.

Jurors struggle to maintain focus during witness testimony, particularly during long, complex answers. Therefore, the goal of direct examination should be to promote juror cognitive digestion and prevent cognitive saturation. Cognitive "digestion" refers to the maximum amount of information that a juror can process without becoming overwhelmed, while cognitive "saturation" refers to information that exceeds the brain's processing limits and is ultimately lost. To avoid cognitive saturation, defense attorneys must ensure that their witnesses are delivering information in a way that doesn't exceed jurors' cognitive capacity limitations.

Specifically, when information is delivered to a jury, it can either be "chunked" or "streamed." The human brain is designed to effectively process smaller "chunks" of information, rather than long, continuous streams of information. The best examples of chunking include phone numbers, social security numbers, and combination locks. All of them have numbers with dashes between them, resulting in numbers being "chunked" together in groups, rather than one long stream of numbers. This results in enhanced memory capacity as the dash allows the brain to digest before processing the next chunk of information.

This pause, even if only for a second, allows the brain to digest the information and prepare for subsequent information. In contrast, serial numbers and product identification numbers are good examples of information streaming, as these numbers are presented as long, continuous strings of data with no dashes or spaces. Trying to memorize such numbers is nearly impossible, as the continuous stream of information causes short term memory (STM) to become quickly saturated.

In testimony, answers can be delivered in digestible chunks if the length of answers persistently stays under five seconds ("the five-second rule"). Answers that exceed five seconds are considered a form of information streaming, and therefore overwhelm short-term memory (cognitive saturation), resulting in information being lost rather than being appropriately processed and transferred into long term memory (LTM) (see Figure 1).

When information is streamed, short-term memory becomes saturated, or "full," preventing subsequent information from being processed and stored. Instead, the overflow information is lost and cannot be recovered. Consider the following examples of information chunking and streaming.

Case Example: Medical Malpractice

"Streaming" Information (ineffective)

Question: Doctor, please explain to the jury what Heparin is?

Answer: Heparin is an anticoagulant that prevents the formation of blood clots. It is used to treat and prevent blood clots in the veins, arteries, or lung. Heparin is also used before surgery to reduce the risk of blood clots. You should not use this medication if you are allergic to heparin, or if you have uncontrolled bleeding or a severe lack of platelets in your blood. Heparin may not be appropriate if you have high blood pressure, hemophilia or other bleeding disorder, a stomach or intestinal disorder, or liver disease.

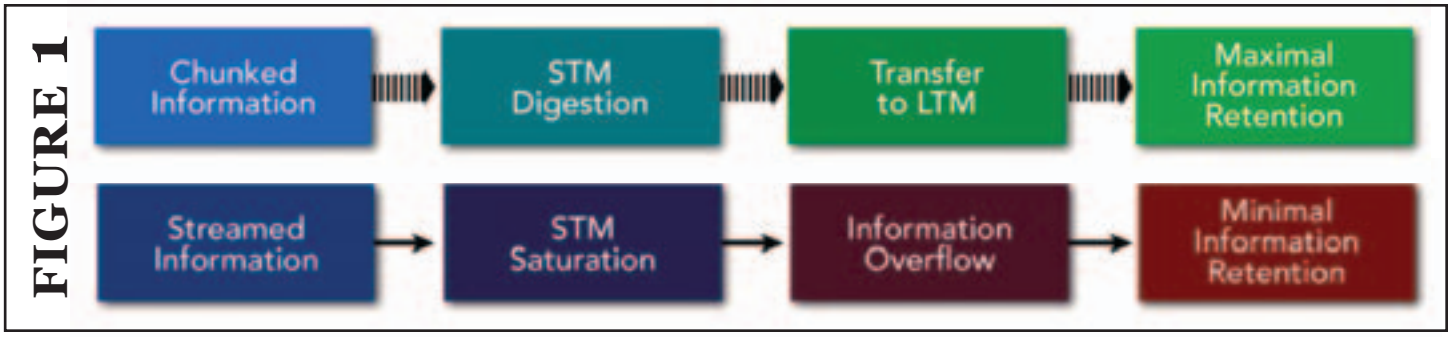
"Chunking" Information (effective)

Question 1: Doctor, please explain to the jury what Heparin is?

Answer: It is a medication used to thin a patient's blood.

Question 2: How exactly do physicians use Heparin?

Answer: We use it to treat and prevent blood clots in the veins,



arteries, or lung, particularly before surgery to reduce the risk of blood clots.

Question 3: Is Heparin safe for all patients?

Answer: No. If a patient has uncontrolled bleeding or a severe lack of platelets in their blood, Heparin can be dangerous.

Question 4: Are there other instances in which the use of Heparin may be inappropriate?

Answer: Yes, Heparin may not be appropriate if a patient has high blood pressure, hemophilia or other bleeding disorder, a stomach or intestinal disorder, or liver disease.

Long, complex answers by witnesses may be authentic, truthful and important, but they can be highly ineffective at the jury level. This may result in critical information being lost or forgotten, which can have dramatic effects in the deliberation room. However, jurors usually process more concise answers (under five seconds) very effectively, resulting in maximum information retention. This is particularly important in courtrooms that allow and encourage note-taking, as this activity can further distract jurors from effectively processing information during direct examination.

If witnesses persistently adhere to the five-second rule, it allows jurors to listen and take notes simultaneously without becoming overwhelmed. Therefore, it is critical for both the witness and defense attorney to undergo juror cognitive training to gain a better understanding of the capabilities and limitations of the juror brain, and how to properly formulate questions and answers to enhance juror comprehension.

Error #2: Emotional Volunteering of Information

A savvy attorney should have his/her questions strategically ordered, providing both the witness and the jury with a road map, or blueprint, to the case. The ability to stick to that plan and present jurors with the proper order of information helps jurors effectively understand the defense story. However, witnesses often develop the burning desire to jump ahead of the attorney and bring up important information that has not been asked for yet. This problem is emotionally-based, as many witnesses are highly motivated to win the case during their testimony.

When a witness jumps ahead of the questioner, it has three detrimental effects on the jury. First, it appears that the witness is over-advocating the defense position, thus potentially damaging credibility. Second, the witness-attorney team appears disorganized, as the witness is not directly answering the actual question the attorney asked. Finally, it can confuse jurors and inhibit proper comprehension of key case information. This ultimately results in frequent interruptions from the attorney to get the witness back on track, which can damage jurors' perceptions of the entire defense team.

An example of how a witness can jump ahead of the questioner and bring in information that the questioner intended to come out later in the questioning is as follows:

Question: Doctor, please explain to the jury what Heparin is?

Answer: It is a medication used to thin a patient's blood, but sometimes, like with this matter involving Mr. Jones, Lovenox is more appropriate as it can prevent a special type of blood clot called a deep vein thrombosis (DVT).

In this example, while the information about Lovenox and DVTs is indeed very important to the case, the witness has delivered it to the jury at the wrong time. This not only can confuse jurors, but also can create the appearance of disorganization within the attorney-witness team. The attorney's plan was to first educate the jury about Heparin, then educate them about Lovenox, and then go into the dangers of DVTs later on in the questioning. However, the witness deviated from the plan and introduced this information immediately. This is an emotional error on behalf of the witness, as high levels of witness motivation can result in decreased patience and poise.

Some witnesses, particularly named defendants, think they must win the case themselves, and therefore tend to try too hard. To prevent this damaging error at trial, witnesses require emotional-control training from a qualified litigation consultant to ensure they stay on course throughout their examination. Witnesses need to understand that the attorney must be in the driver's seat and guide them down the correct path, as cases are typically won through the attorney's carefully developed strategy, not simply through the witness' testimony.

Additionally, witnesses must also understand jurors' cognitive needs, and develop the motivation to improve juror comprehension rather than focus on fulfilling their own emotional needs during testimony.

Error #3: Failure to use the Primacy Effect

The first three minutes of a witness' testimony are more valuable to jurors than testimony that is delivered towards the middle and end of the examination. This important neuropsychological timing effect is precisely why attorneys should not start their direct examination by covering the witness' education and work history, as that information is better placed in the middle or end of the testimony. Rather, the most effective way to examine a witness during direct examination is to start with questions that go right to the heart of the case, as jurors will value that information more than subsequent information. This is known as the primacy effect, meaning jurors perceive information presented early in an examination as more valuable and meaningful than information presented in the middle or at the end. This is a very powerful neurocognitive tool that few defense attorneys utilize because they erroneously assume that primacy and recency effects are similar. While recent information tends to be better remembered by jurors, it is certainly not valued similarly as the juror brain places great significance on early information (vs. later information). In other words, the recency effect only impacts juror memory recall, while the primacy effect improves both memory and meaningfulness of the information.

For example, in medical malpractice cases, defense attorneys usually ask the following question at the end of the direct examination: "Doctor, did you in any way deviate from the standard of care when you were treating Mr. Smith?" Of course, the physician delivers a firm, confident "no" to the jury. Most defense attorneys do this because they want to end on a high note, assuming that placing this important information at the end will have a powerful influence on jury decision-making. However, this is not the best strategic approach, as this question is THE pivotal question in the case. Instead — to the extent permitted in the jurisdiction where the case is pending — this question should be the very first question out of the gate, with a few follow up questions allowing the witness to explain why the care provided to Mr. Smith was reasonable and within the standard of care. That is what the jury wants and needs immediately, rather than later in the examination. Defense attorneys often state "I want the jurors to get to know my witness, so I start with the biographical questions; I want to 'wow them' with my client's impressive education and training."

In reality, jurors don't care where the physician went to medical school or where he or she did his or her residency. Jurors don't care if the physician is board certified and has privileges at four city hospitals. Jurors' first and foremost concern is about the defendant's conduct and decision-making, and asking those key questions immediately in direct examination takes full advantage of the primacy effect.

The primacy effect is particularly important if plaintiff's counsel has called the defendant witness to the stand as an adverse witness. That type of questioning, characterized by leading, closed-ended questions (yes/no, true/false, agree/disagree), allows for very little explanation, if any, from the witness. In that circumstance, jurors are starving for explanations regarding the defendant's conduct and decisions once the defense attorney approaches the podium to begin rehabilitation efforts. By giving jurors what they desire immediately, the defense team can considerably increase the meaningfulness and influence of the defendant's most important testimony.

Conclusion

From the juror's perspective, direct examination from a defendant witness is arguably the most important part of a trial, as the party being accused of negligence or causing harm has the opportunity to explain conduct and decisions. However, the three errors of juror cognitive saturation, emotional volunteering of information, and failure to use the primacy effect can significantly impair juror comprehension of key case issues, as well as negatively impact jurors' perceptions of the defense team. To prevent these problems, and to enhance the quality of direct examination, it is imperative that defense attorneys take a step back and reevaluate their trial preparation plans.

In the short term, it is wise to retain a qualified litigation consultant to evaluate witness responses to promote juror cognitive digestion, as well as to assess the attorney's order of questioning to ensure proper use of the primacy effect. A qualified consultant should have advanced training in the areas of cognition, memory, attention and concentration, communication science, and emotion.

In the long term, attorneys should receive training in these areas by attending CLEs that include presentations from litigation consultants who have expertise in the neurocognition behind jury decision-making. ❖

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ager.[19] The retailer and general manager moved for summary judgment arguing *inter alia* the general manager was not liable for the plaintiff's injuries.[20] The defendants relied on the general manager's affidavit, wherein he averred that although he was the general manager assigned to the store where plaintiff was injured, he did not have an ownership interest in the store.[21] The *Adams* Court held:

> [Plaintiff's] contention that [ ] the store manager, is personally liable for her injuries is without merit. Regardless of whether [the retailer] might be liable in this case, because [the general manager] was neither an "owner nor occupier" of the [retail] store, he cannot be held liable under O.C.G.A. § 51-3-1, as a matter of law, and [Plaintiff] has asserted no other basis for imposing personal liability upon him.[22]

While the majority opinion in *Adams* drew a sharp dissent regarding each parties' respective burden on summary judgment, neither the special concurrences nor dissenting opinion disagreed with the majority's holding regarding the store manager's exclusion from liability under § 51-3-1, as he was neither an owner nor occupier of his employer's retail store.[23] *Adams* and *Wagner* appear to clearly and directly address a store manager's liability under § 51-3-1 in the negative, however, the federal courts have been less convinced.

III. Federal Courts' Application of § 51-3-1 in Fraudulent Joinder Cases

Against the backdrop of *Scheer* and *Amear*, which required an exercise of sufficient control over property in order to impose liability as either an *owner* or *occupier* of land under § 51-3-1, and *Wagner* and *Adams*, which held as a matter of law that individual store managers employed by retailers lacked sufficient control over the retail store to be subject to liability as an *owner* or *occupier* under § 51-3-1, the federal district courts in Georgia began addressing the liability of store managers in the context of fraudulent joinder arguments in 2007.[24]

Generally, a party seeking removal to federal court bears the burden of establishing federal jurisdiction with uncertainties resolved in favor of remanding the action to state court.[25] An exception to the rules favoring remand arises where the plaintiff joins a non-diverse defendant having no real connection with the controversy — fraudulent joinder.[26] Fraudulent joinder exists where: 1) there is *no possibility* the plaintiff can prove a cause of action against the non-diverse defendant; 2) there is outright fraud in plaintiff's pleading of jurisdiction facts; and 3) where a diverse defendant is joined with a non-diverse defendant with whom there is no joint, several, or alternative liability.[27] Such a claim of fraudulent joinder requires the claiming party to carry a heavy burden with clear and convincing evidence.[28]

In *Poll v. Deli Mgmt., Inc.,* plaintiff sued a restaurant company that owned and operated the restaurant where Plaintiff slipped and fell along with the restaurant's manager alleging that both the company and its manager breached the statutory to exercise ordinary in keeping the restaurant premises safe.[29] The company removed the case to the Northern District of Georgia on the basis of diversity of citizenship arguing that plaintiff fraudulently joined the manager to avoid removal, and thereafter, the manager moved for dismissal of plaintiff's claims asserted against him individually.[30]

The *Poll* Court cited to *Scheer*'s test for sufficient control to determine whether one was an owner or occupier; however, it drew a distinction between the *legal* control through ownership or other possessory interest in *Adams* and an alternative form individual liability based on "supervisory control" of the premises.[31] In support of its alternative "supervisory control" theory, the *Poll* Court cited to *Lee v. Myers,*[32] *Gregory v. Trupp,*[33] and *FPI Atlanta, LP v. Seaton*[34] as examples where the exercise of supervisory control without title or superior right to possession was sufficient to impose liability under § 51-3-1.[35]

However, *Lee* never addressed the issue of whether the store manager in that case exercised sufficient control to be an owner or occupier. Rather the manager in *Lee* merely argued the trial court erred in denying his summary judgment motion because the plaintiff was a licensee; and secondly, he did not breach any duty owed to plaintiff, as she had equal or superior knowledge of the contended hazard.[36] Likewise, *Seaton* addressed the duties of a security services contractor arising out of affirmative contract obligations, not statutory duties imposed by § 51-3-1.[37] In *Trupp*, the defendant was a partner in a partnership that owned and operated an apartment complex adjacent to a vacant lot, where the plaintiff was injured when she stepped into a hole.[38] The *Trupp* Court found sufficient evidence of "overt action" by the defendant to raise a fact question as to whether the defendant was an *occupier* of the vacant lot; where the defendant had an oral agreement with the owner of the vacant lot to periodically mow the grass on the lot, defendant's maintenance employees picked up trash, trimmed bushes, and maintained shrubs, and defendant's manager ordered children off the vacant lot and even once called the police to remove a boy from the lot.[39] However, the defendant in *Trupp* employed individuals who performed overt acts on the vacant lot for the benefit of the defendant's

business; *Trupp* did not hold that any of the defendant's employees, who exercised "supervisory control," were themselves occupiers of the vacant lot.[40]

Additionally, the *Poll* Court defined an owner or occupier as: "a person who maintains a place of business to sell goods or services"[41] or "an owner or person in charge of the premises"[42] or "an individual responsible for 'ensuring compliance with laws, ordinances, and regulations, and inspecting, maintaining, and repairing the premises' on behalf of the owner.[43] However, none of the cases quoted by *Poll* in its alternative definition of owner or occupier addressed the individual liability of a store manager under § 51-3-1.[44]

Finding sufficient conflict between *Adams* and other Georgia cases, the *Poll* Court held that the uncertainty in Georgia law regarding clear inclusion or exclusion of managers from individual liability as owner or occupiers under § 51-3-1 precluded the restaurant company from being able to show there was no reasonably arguable basis for Plaintiff's claim against the restaurant's manager to meet the standard for fraudulent joinder.[45]

In *Ott v. Wal-Mart Stores, Inc.*, the Middle District of Georgia addressed a similar fraudulent joinder argument where the plaintiff asserted two alternative theories of liability against the store manager; the first theory was active negligence for the manager's misfeasance, and the second was breach of the statutory duty under § 51-3-1.[46] While the *Ott* Court relied on the *Poll* Court's supervisory control and alternative definition of owner or occupier to find a possibility that the store manager could be subject to liability under the statute, it also found sufficient support in the alternative theory based on the manager's misfeasance to determine the Plaintiff could state a claim against the store manager, and as such, the store manager was not fraudulently joined.[47] Applying similar reasoning, several additional district court cases found insufficient clarity, or at least uncertainty, in Georgia law to determine that a plaintiff's joinder of the store manager was fraudulent.[48]

IV. Conclusion

Without clarification from the Georgia Court of Appeals or Supreme Court, the arduous standard for defendants to prove fraudulent joinder in federal court is fraught with peril. However, the framework set forth in *Scheer* and *Amear* based on control of the property in addition to the holding in *Adams*, provides slip and fall defendants an avenue into federal court by first securing summary judgment in favor of a defendant store manager in state court thereby opening the door for removal to federal court. However, the requirement for removal within one year of commencement of the lawsuit requires prompt action in seeking summary judgment in favor of the store manager.[49] ❖

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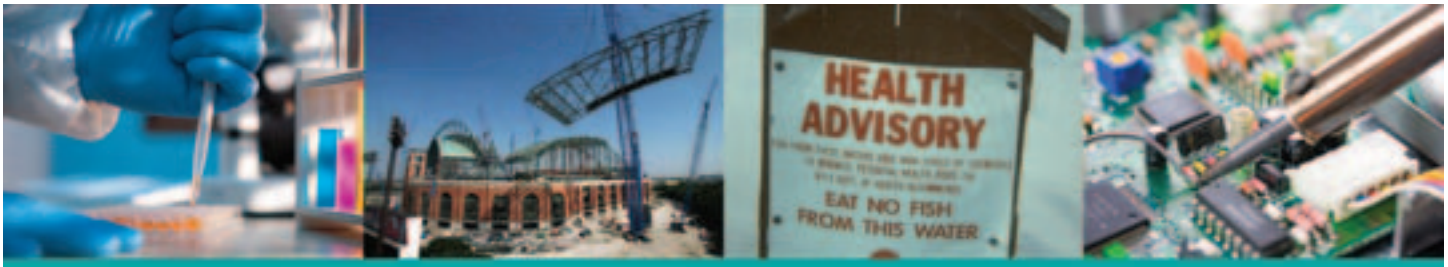
Endnotes

1 O.C.G.A. § 51-3-1; *Parker v. Goshen Realty Corp.*, Case No. 5:11-CV-136-MTT, 2011 WL 3236095, at *2 (M.D. Ga. July 28, 2011).
2 *See Scheer v. Cliatt,* 133 Ga. App. 702, 704, 212 S.E.2d 29, 30 (1975) ("[T]here remains the question of whether or not [defendant] was the 'owner or occupier' of the barber shop[, and] [t]hat question, in turn, depends on whether or not [defendant] had control of the property ... .").
3 *Adams v. Sears, Roebuck & Co.*, 227 Ga. App. 695, 697, 490 S.E.2d 150, 153 (1997) (holding that regardless of his employer's liability, a store manager was neither an owner nor occupier, and thus, as a matter of law, not liable under O.C.G.A. § 51-3-1).
4 *See Parker*, 2011 WL at *3 ("[A]s this Court and others have pointed out, some uncertainty exists as to whether a store manager may be held liable as either an *owner* or *occupier* under O.C.G.A. § 51—3—1, or as an agent of an *owner* or *occupier* under traditional agency principles.") (internal citations and punctuation omitted, emphasis added); *see also*, *Poll v. Deli Mgmt., Inc.*, Case No. 1:07-CV-0959-RWS, 2007 WL 2460769, at *7 (N.D. Ga. Aug. 24, 2007).
5 *See, e.g., Parker,* supra (Middle District); *Poll*, supra (Northern District); *Ishmael v. Gen. Growth Properties, Inc.*, Case No. CV 114-175, 2014 WL 7392516, at *4 (S.D. Ga. Dec. 29, 2014); *Hambrick v. Wal-Mart Stores E., LP*, Case No. 4:14-CV-66-CDL, 2014 WL 1921341, at *4 (M.D. Ga. May 14, 2014).
6 *Parker* supra; *Poll* supra; *Ishmael* supra; *Hambrick* supra.
7 133 Ga. App. at 704, 212 S.E.2d at 30.
8 *Id.* at 702, 212 S.E.2d at 30.
9 *Id.* at 703, 212 S.E.2d at 30.
10 *Id.*
11 *Id.* at 704, 212 S.E.2d at 30.
12 *Id.*, 212 S.E.2d at 31.
13 *Id.*
14 164 Ga. App. 163, 163-64, 296 S.E.2d 611, 612-13 (1982).
15 *Id.* at 166-67, 296 S.E.2d at 614-15.
16 169 Ga. App. 500, 500, 313 S.E.2d 756, 757 (1984).
17 *Id.*, 313 S.E.2d at 757.
18 *Id.* at 501, 313 S.E.2d at 757.
19 227 Ga. App. 695, 696, 490 S.E.2d 150, 152 (1997).
20 *Id.*
21 *Id.*
22 *Id.* at 697, 490 S.E.2d at 153.
23 *See id.* at 701, 490 S.E.2d at 156 (Eldridge, J. dissenting).
24 *Poll* supra, 2007 WL at *4-7.
25 *Id.* at *1.
26 *Id.* at *3.
27 *Id.* citing *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287 (11th Cir. 1998).
28 *Id.*
29 *Id.*
30 *Id.*
31 *Id.* at *4.
32 183 Ga. App. 87, 87, 374 S.E.2d 797, 797 (1988),
33 171 Ga. App. 299, 299, 319 S.E.2d 122,122 (1984),
34 240 Ga. App. 880, 880, 524 S.E.2d 524, 524 (1999),
35 *Poll* supra, 2007 WL at *4.
36 *See* 183 Ga. App. at 88-89, 374 S.E.2d at 798-799.
37 *See* 240 Ga. App. at 887-88, 524 S.E.2d at 531-32.
38 171 Ga. App. at 300, 319 S.E.2d at 124.
39 *Id.*
40 *See id.*
41 *Poll* supra, 2007 WL at *5 (quoting *Rhodes v. K-Mart Corp.*, 522 S.E.2d 563, 565 (Ga.Ct.App.1999)).
42 *Id.* (quoting *Coffer v. Bradshaw*, 167 S .E. 119, 122 (Ga.Ct.App.1932)).
43 *Id.* (quoting *Norman v. Jones Lang Lasalle Americas, Inc.*,627 S.E.2d 382, 384-86 & n. 2. (Ga.Ct.App.2006)).
44 *Poll* supra.
45 *Poll* supra, 2007 WL at *7.
46 *Ott v. Wal-Mart Stores, Inc.*, Case No. 5:09-CV-00215-HL, 2010 WL 582576, at *2 (M.D. Ga. Feb. 16, 2010).
47 *Id.* at *3.
48 *See, e.g., Parker* supra, 2011 WL at *3; *Ishmael* supra, 2014 WL at *4; *Hambrick* supra, 2014 WL at *4.
49 28 U.S.C. § 1446(c)(1)



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was ignored by the employer.

III. Cases Asserting Punitive Damages Against Individuals and Non-Trucking Companies

There were 13 reported cases in which punitive damages claims were asserted against an individual and a non-trucking company. In eight of those cases, there was no award of punitive damages. The remaining five cases had punitive damages awards in excess of $200,000. Significant injuries and bad prior driving records, resulting in significant reckless retention claims, were the primary factors supporting the larger awards.

IV. Cases Asserting Punitive Damages Against Companies Only

Thirteen punitive damages claims were asserted against companies only. In six of these cases, no punitive damages were awarded. In the remaining cases, the verdicts were in excess of $500,000. These cases primarily involved horrific injuries and known product defects.

V. Summary of Influencing Factors

A. No or Relatively Small Punitive Damage Awards

The factors that were present in cases where no or relatively small punitive damages were awarded included situations in which it was the defendant's first DUI (even when the defendant left the scene of the accident); there was alleged reckless driving and this was the sole aggravating factor; there were allegations of failure to properly maintain a vehicle and this was the sole aggravating factor; and where the defendant was able to exhibit to the jury he or she was truly remorseful, had received a strong sentence in the criminal DUI charges and/or he or she had truly reformed. The type and extent of the injuries and the way plaintiff and/or the defendant presented themselves and their case to the jury appeared to play a significant role. There were some cases where punitive damages were not awarded, and it appeared the compensatory damages were increased as a result of the alleged punitive acts, but this did not appear to occur in a large number of cases.

B. Large or Relatively Large Punitive Damage Awards

The factors that were present in cases where large or relatively large amounts of punitive damages were awarded were in cases where there were multiple DUIs, particularly where someone was injured from a previous or subsequent DUI. Cases in which there were subsequent DUIs, even if no injury resulted from the subsequent DUI, often resulted in larger awards. It would seem those cases were ripe for the argument about doing something that is going to stop this person from drinking and driving. Road rage cases seemed to result in large punitive damages awards. Huge punitive damages awards were given against manufacturers that had known defective products that injured people, and the manufacturer did nothing about it; particularly when it was clear the defect has been brought to the attention of the manufacturer and nothing was done to fix the problem or recall the product. Also, in cases against employers that retained employees with long standing bad driving records and placed them in positions which required significant driving, the jury was not hesitant to award significant punitive damages. Even though there was not always a direct correlation, it seemed clear after examining the cases that significant physical injuries and special damages typically needed to be present for there to be a large award of punitive damages.

VI. Premises Liability Cases

Due to limitations in the length of this article, I cannot address premises liability cases. With the help of the verdict research companies, I have obtained the same information in premises liability cases. I have prepared similar Excel spreadsheets regarding the premises liability claims and those spreadsheets are also available at www.bayatl.com.

VII. Conclusion

Certainly the risk of an award of punitive damages must be assessed in every case in which those claims are asserted. From my research, it appears the award of significant punitive damages is not the norm, but in the right case, the awards can be quite substantial. It also appears that in many cases, the way the case is approached by both counsel for plaintiff and defendant and how the parties come across to the jury can significantly influence the outcome. It is a myth that punitive damages are sought and awarded in large numbers of cases, but it is not a myth that if the injuries and facts of the case align a certain way, punitive damages can become a significant portion of an award in favor of the plaintiff. ❖

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Water Retention and Detention Ponds

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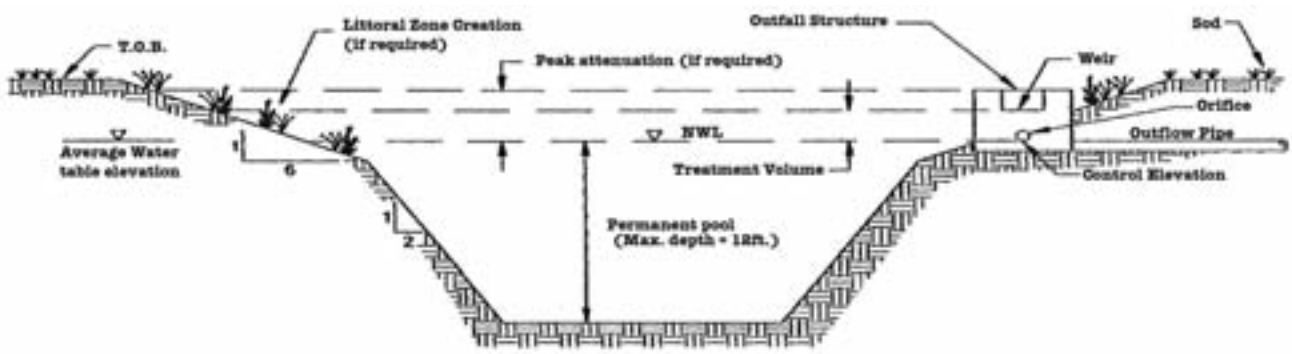

water's edge. Retention and detention pond slopes, both under and above the waterline, must be designed so they are both effective as to storm water drainage and safe for the public.

The vegetation in and around these ponds is important as well. Correct vegetation can act as an effective barrier. However, the vegetation should not be planted in such a way as to disguise the water's edge. The vegetation should help impede erosion but should not obscure sight lines that could compromise public safety.

Retention and detention ponds have control structures that contain inlet and outlet/overflow pipes to regulate the flow to and from the ponds. These pipes are often unprotected and serve as both an attraction and hazard to children. The length and diameter of these pipes and whether they are sufficiently guarded or screened should be examined by an engineering expert.

The appropriate upkeep and maintenance of retention and detention ponds is equally as important as correct design and construction. The party responsible for maintenance varies greatly depending on the type and function of the pond and the municipality involved. Often the property owner is responsible; it could also be the permitting agency such as water management district or the local municipality. A civil engineer, familiar with the applicable regulations and guidelines can identify responsible parties and assist in determining whether correct maintenance procedures were followed. ❖

Peter McCawley has an engineering degree from the U.S. Naval Academy and is a director at CED Engineering, a GDLA Platinum Sponsor. He is based out of CED's Jacksonville office, which is well positioned to support cases in South Georgia. In addition, CED recently announced the opening of an Atlanta office.

President's Message

Continued from page 3

We are fortunate to have had Bill Casey take his turn as chair of this year's Trial & Mediation Academy, following former chair Douglas Burrell. Bill will serve a second year as chair in 2017, and then vice-chair Carrie Christie will take over this critically important training program. (See article about this year's program on page 36.)

We continue to innovate to bring even more relevance and value to the membership. To that end, thanks to the efforts of GDLA Website Committee chair and Vice President Dave Nelson, we have expanded our membership benefits by developing a Verdicts Database and replacing the Tort Reform Database and Brief Bank with a Current Legal Trends Database — each being housed within the Members Only area. Please help us make both new databases a robust resource for GDLA members by entering your own recent verdicts, regardless of outcome, for the former and sending contributions for the latter.

Marty Levinson recently took over chairing the Amicus Committee from Jeff Ward, who is editing this great publication. Marty and vice-chair Garret Meader are working hard as requests for amicus support continue to rise.

I'm proud of what we have accomplished together during my tenure as your president. I'm honored to serve you and grateful to all of you who have made this association grow and thrive. As we gear up to celebrate our 50th anniversary in 2017, I have no doubt our combined efforts will continue advancing the civil defense bar in Georgia. ❖

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retrospectively; the adjusted planned completion duration is then subtracted from the as-built completion duration. The theory is that the contractor is taking responsibility for their delays, and the difference between the adjusted completion and as-built completion is not their fault.

The limitations of this method of delay analysis are that it ignores the actual construction progress and utilizes a theoretical schedule. The delay analysis is based on the premise that the baseline schedule developed by the owner or contractor was reasonable, and was generally followed. The pitfall in using this method of delay analysis is that the original project plan may have been unworkable, unrealistic, and may not have been followed during the performance of the project. This approach to delay analysis does not consider the actual project conditions or take into account the actual dates of activity completion. Furthermore, delays may have changed the critical path of the project on an incremental basis.

Without representation of the changes in the project schedule, relying on a very outdated project schedule is useless when looking back to determine if the project was late at some prior moment in time. The analysis fails to compare to the as-planned project dates which have been adjusted to account for previously addressed impacts to the project.

Adjusted As-Built Approach

This delay analysis technique focuses on the use of the as-built project schedule as the source document from which to measure the effects of all impacts to the project. The as-built schedule delay analysis approach utilizes the "but-for" technique. In this schedule delay analysis the owner and excusable delays are removed from the as-built schedule, "collapsing" the schedule, and demonstrating "but-for" the owner and excusable delays, the project would have been completed in a timely fashion. The technique is performed in the following multiple steps:

1. Once the project is complete, develop an as-built CPM schedule.
2. Remove excusable, compensable delays from the project as-built CPM schedule.
3. The remaining duration represents what it would have been but-for the owner's delays.
4. Subtract the "but-for the owner's delays" duration from the as-built duration; the resulting days are solely the fault of the owner, warranting "X" amount of days of delay damages and time extension.
5. Remove the excusable, non-compensable delays from the schedule. The resulting schedule is what would have been had it not been for owner and excusable delays. The difference between this and the previous schedule is all attributed to the excusable delay — justification for "Y" amount of day's time extension.

Summary

Delay claims are a source of conflict in the construction industry and also one of the most difficult to resolve. Each project starts with a plan to execute the work scope — the what, how, where, and in what order — of the matter in which work will be completed. The plan is then given greater detail — the who and the when — that develops the project baseline schedule, or the contractor's original understanding and plan of action for the project work scope.

To ensure more reliable delay analysis results, it is important to use resource-loaded and leveled baseline schedules, as such schedules provide for reliable task duration, network logic, and realistic float values (the time by which an activity can delay without delaying the early start of its successor activity in non-critical activities). Without taking such scheduling requirements into account in the analysis, the baseline schedule will not adequately reflect the plan of work as dictated by the true intent of resource usage in practice, thereby leading to results that are not accurate and trustworthy.

Once the project commences, schedule updates and revisions — whether at scheduled intervals or as result of a change — create new schedules of record that meet the owner's approval. Eventually, the final schedule of record will be the as-built schedule — a final documentation of actual starts and finishes of activities, any delays, change orders, extra work, weather, and other factors that affected project completion.

Events that influence a project completion are of various type, including delays, disruptions, change, suspension, and termination. One of three parties is responsible for these sources of schedule impact: the owner, the contractor, or a "third party." When classifying delays, those caused by a third party, such as unusually severe weather, are "excusable delays" and warrant time extensions to the contractor. Owner responsible delays are "compensable" delays, and in addition to rewarding the contractor time extension, may involve delay damages. On the other hand, when the contractor is responsible for a delay, it is a "non-excusable delay," and not only is the contractor declined a time extension, but they may also be held accountable for liquidated damages. ❖

Michael Klein is a civil engineer at Robson Forensic, a GDLA Platinum Sponsor. He has more than 25 years' experience in the design, planning, and delivery of high-value projects for both the government and private sector. His project experience includes technical studies, system design, software development, and capital construction. His project management expertise lies in the areas of project planning, communication, critical path method (CPM) scheduling, productivity evaluation using earned value management, technical document development, claim preparation and evaluation, dispute resolution, contract administration, and cost analysis.

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