

*The Fear Factor
Feeds the Reptile*

*The Changing Climate
for Defending Medical
Malpractice Cases at Trial*

*Preparing for Daubert
Through the Life of a Case*

GEORGIA DEFENSE LAWYER

A Magazine for the Civil Defense Trial Bar

Volume XV, Issue III
Summer 2019



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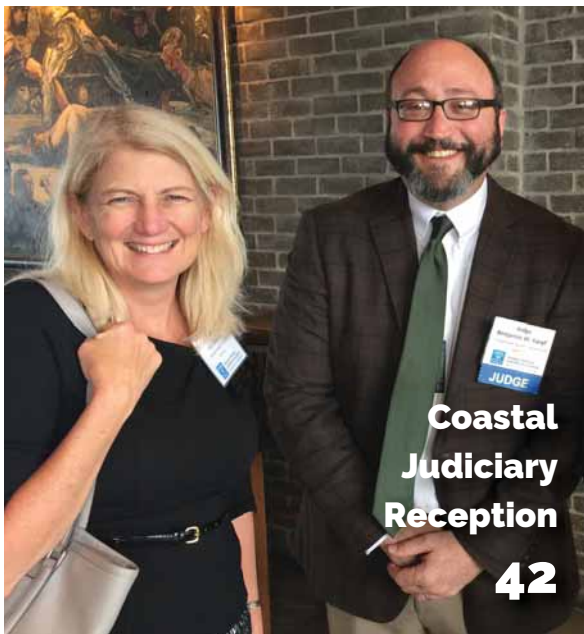


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Erica L. Morton

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Incoming President's Message

As I write this message as the 52nd President of the GDLA, I think of the great leaders I am following who have meant so much to this organization's success and growth, including Warner Fox, Ted Freeman, Matt Moffett, Sally Akins, Hall McKinley and so many others.

My own introduction to GDLA started as a young lawyer when Joe Chambless, my senior partner and a Past President of GDLA, urged me to attend the Trial Academy (now Trial & Mediation Academy). I still remember how much I learned from the panel of great lawyers who volunteered their time and efforts, including Rusty Gunn and Past President George Duncan. The techniques and insight I gained from them were invaluable to me as a young lawyer with little trial experience, and provided a great foundation at the beginning of my career.

I have now had the privilege of being involved with GDLA for over 20 years, first as a young associate and then later as a partner involved in the leadership of GDLA. Over two decades of involvement I have seen GDLA continue to grow and coalesce into the organization it is today, with more than 950 members and increased visibility and leadership within the mandatory State Bar. GDLA of today provides its members from around the state with the resources to share ideas, trial techniques, and information through a variety of platforms and opportunities.

Just as I was encouraged to become involved in GDLA many years ago, today I encourage my

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Dave Nelson

Outgoing President's Message

I have been proud to serve as the 51st President of the Georgia Defense Lawyers Association. While my year as President came to a close at the Annual Meeting in Ponte Vedra in June, I have the opportunity to include one final message and will start by thanking our new President, Dave Nelson, for putting together a great annual CLE program and including U.S District Court Judge Tripp Self as our honored guest.

We had some great successes during 2018-2019. Our GDLA Women Litigators Section took off like a rocket, our magazine won another State Bar Best Newsletter Award, our membership continued to grow, our *GDLA Law Journal*

was very well received by judges across the state, our 16th Annual Judicial Reception in Atlanta was a great evening, and we had three of our own assume important leadership positions beyond our ranks.

Douglas Burrell was elected Second Vice President of DRI, meaning he will become President of DRI, the national defense bar, in 2022. Darrell Sutton was sworn-in as President of the State Bar of Georgia in June. At the same time, Immediate Past President Sally Akins was sworn-in as Secretary of

Continued on page 67



Hall McKinley



A Message from DRI

By Matthew G. Moffett, DRI State Representative
Gray Rust Moffett St. Amand Moffett & Brieske, Atlanta

Greetings from your DRI State Representative and liaison to GDLA. Our two organizations are working together to make each better.

Did you know that DRI has written (and is willing to write) amicus briefs, in support of legal issues important to GDLA? Not too long ago, DRI agreed to weigh in at the Georgia Supreme Court on an apportionment issue of first impression, in one of my cases. Thanks for helping the defense prevail!

Have you checked out Legal-Point, where you can search thousands of documents and filter them by practice area and resource? Today I saw quite a few articles on defending against the reptile, in discovery and trial. Thanks for some new perspectives on defensive strategy I can implement now!

When was the last time you attended a DRI seminar? It's all about making your practice grow into what you want it to be and, along with the seminar substance,

there is great networking all day and at evening social events. Thanks for that referral!

I hope everyone is aware that GDLA's own Douglas Burrell was elected as DRI's Second Vice President. That means he will become DRI President in 2022. Douglas and I have a goal that all GDLA members will be DRI members and all DRI (Georgia) members will be GDLA members. Why? Because our organizations comprise the best of the defense bar. ♦

GDLA Law School Award Recipients Honored



Leesa Guarnotta (above right) was presented the GDLA Rusty Gunn Award during the Mercer Law School

Student Dinner on May 8, 2019. This annual award, established by GDLA, honors the memory of long-time Board of Directors member Robert R. "Rusty" Gunn. It recognizes a student whose professionalism is his/her badge of honor, and who quietly leads with strength, intelligence and good humor. She will join Hall Booth Smith as a first-year associate. She is pictured with Mercer Law School Dean Cathy Cox.



Joseph Sklar (left) was this year's recipient of the Willis J. "Dick" Richardson Jr. Student Award for Outstanding Trial Advocacy at the University of Georgia School of Law. This annual award, sponsored by GDLA, honors the memory of one of our founding members. ♦

GDLA Wins Bar's Best Newsletter Award Again

For the seventh time, GDLA was honored by the State Bar of Georgia with the Best Newsletter Award for voluntary bar associations with 500+ members.

The award is presented each year during the State Bar's Annual Meeting, held most recently at the Ritz-Carlton in Orlando from June 6-9.

Winners are showcased in the State Bar's Annual Meeting brochure and the *Georgia Bar Journal*. We continue to see the benefits of this publicity in heightening GDLA's visibility with both the bench and bar.

Receiving this award repeatedly does not happen without significant time and effort. Kudos to the count-



Then-State Bar President Ken Hodges presented this year's award to GDLA Past President Sally Akins.

less contributing authors, which include GDLA members and spon-

sors, but especially to the Editor-in-Chief Jeffrey S. "Jeff" Ward of Drew Eckl & Farnham, Brunswick, who served for three years.

We also thank the Editorial Board: Christopher L. Foreman of Watson Spence in Albany; Nicole C. Leet of Gray Rust St. Amand Moffett & Brieske in Atlanta; James "Jimmy" Scarbrough of Mabry & McClelland in Atlanta; and R. Matthew "Matt" Shoemaker of Jones Cork in Macon. GDLA Executive Director Jennifer M. Davis is also to be commended for handling the layout/design, as well as writing, editing and photography for each issue. ♦



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Member News & Case Wins



Darrell Sutton of **Sutton Law Group** in Marietta was sworn-in by Chief Justice Harold Melton as the 57th President of the State Bar of Georgia during the Bar's Annual Meeting in Orlando in June (photo courtesy of the Bar). GDLA Past President **Sally Akins** of **Ellis Painter** in Savannah was also sworn-in after being elected Secretary in a contested statewide race. In addition, **Bert Hummel** of **Lewis Brisbois** in Atlanta was installed as Young Lawyers Division (YLD) President-Elect, and **Elissa Haynes** of **Goodman McGuffey** in Atlanta was sworn-in as YLD Treasurer. GDLA is proud of these members serving our mandatory Bar.

Member News

Weathington McGrew in Atlanta announced the promotion of **David Hanson** and **Lindsay Forlines** to partner. Mr. Hanson handles a variety of litigation, including medical malpractice defense, trade secret and restrictive covenant disputes, privacy and data security and other business litigation. Ms. Forlines has defended doctors, nurses, hospitals and other health care providers against professional negligence claims since she started practicing law in 2008.

Huff Powell Bailey in Atlanta announced the election of **Sharonda Boyce Barnes**, **L. Evan Cline**,

David D. Mackenzie, and **David L. Mize** to partnership. Mr. Mize practices in the firm's Columbus office, while the others are in Atlanta. Ms. Boyce defends hospitals, health care institutions, physicians, dentists, psychologists and other ancillary medical care providers in all stages of litigation, including appellate work. Ms. Cline has particular expertise in medical litigation, representing physicians, mid-level providers, nurses and hospitals. Mr. Mackenzie has handled cases involving allegations of medical malpractice, automotive liability, premises liability, and products liability. He also routinely represents physicians in State Medical Board complaints and Medicare/Medic-

aid audit appeals. Mr. Mize's practice is devoted to civil defense and primarily focuses on representing physicians and hospitals in cases involving allegations of medical malpractice. He conducts all aspects of litigation, from the pre-litigation claims stage to appeals. He also represents physicians in State Medical Board actions and appeals.

In other firm news, **Craig A. Brookes**, **Karen Lea Smiley**, and **Denny Brown** have merged their practice group from **Hanks Brookes** with Huff Powell & Bailey as of May 1, 2019.

In August, **Thomas S. "Tom" Carlock** joined Huff Powell & Bailey from **Carlock Copeland & Stair**, the litigation defense firm he co-founded almost 50 years ago. In the same month, Huff Powell opened a Raleigh, N.C. office.

Jerald R. "J.R." Hanks announced the establishment of **Hanks Law Group** in Atlanta. He previously practiced at **Hanks Brookes** and maintains the same office address. **Brandon Day** joined him as a partner. Mr. Hanks continues to defend clients against many different types of claims, including premises liability, construction defects, environmental torts, product liability, motor vehicle accidents, negligent security, mold infestation, false imprisonment, tainted food, and defamation. He is frequently called upon to provide guidance to insurance carriers on a wide range of coverage issues, and represents carriers in declaratory judgment actions. Mr. Day defends companies and individuals in a wide range of matters including premises liability, construction defects, and motor vehicle accidents. He also represents businesses in commercial litigation, including contract disputes and collections.

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Member News

Continued from previous page

Copeland Stair Kingma & Lovell, formerly Carlock Copeland & Stair, in Atlanta announced the elevation of several attorneys to partnership: **Jennifer M. Guerra**, **Abby C. Grozine**, **Claire A. Sumner**, **Stephen J. Cohen**, and **Michael P. DiOrio**. Ms. Guerra focuses her practice on commercial litigation, representing clients in professional liability claims, product liability claims and bad faith/coverage disputes. Ms. Grozine concentrates in the areas of commercial litigation, general liability defense, and trucking and transportation litigation. Ms. Sumner focuses on health care and general liability defense litigation. Prior to practicing law, Mr. Cohen was a police officer and then a claims adjuster at a commercial automobile insurer. Both professions have afforded him invaluable experience and a unique perspective in his trucking and transportation litigation practice. Prior to joining the firm, Mr. DiOrio practiced as a criminal prosecutor in a metro Atlanta area District Attorney's Office. His practice is focused primarily on medical malpractice defense and general liability litigation. He has been first chair in over 50 jury trials.

Joshua Y. Joel, formerly with **Goodman McGuffey**, has joined **Greenberg Traurig**, as an associate in the firm's Atlanta office. He maintains a labor and employment practice, focusing on representing employers on matters related to discrimination, wage and hour, Family Medical Leave Act, OSHA investigations, negligent hiring and retention, and directors and officers liability.

James-Bates-Brannan-Groover announced **Nathaniel "Nate" Edmonds** joined the firm's general litigation practice group as an associate. He focuses his practice on in-

surance defense, liability defense, and general litigation. Prior to joining the firm, he worked as an in-house attorney for a large national insurance company where he gained an extensive amount of experience with complex litigation matters.

Swift Currie McGhee & Hiers in Atlanta announced **Calvin Yaeger** is now a partner of the firm. He represents clients in matters involving automobile and trucking accidents, premises liability, environmental law and construction litigation.

Philippa V. Ellis, formerly a partner at **Owen Gleaton Egan Jones & Sweeney** in Atlanta, has joined **The Home Depot** as Assistant General Counsel - General Liability. Ms. Ellis has been a long-time faculty member of the GDLA Trial & Mediation Academy.

Balch & Bingham announced the election of **Brooke Gram** as a partner in the Atlanta office. She focuses her practice on civil litigation of commercial disputes, acquisition of property rights and property litigation, and defense of personal injury and property damages claims. She also handles the defense of contract and tort claims for financial institutions and other commercial litigation matters.

Eleanor G. Jolley, formerly with **Swift Currie McGhee & Hiers**, has joined the commercial litigation group at **Wilson Elser** in Atlanta. She focuses her practice on general insurance defense, financial services, transportation litigation, construction law, professional liability and insurance coverage.

Case Wins

Nate Edmonds, an associate at **James-Bates-Brannan-Groover** in Macon, recently won a defense verdict in Clayton County. The case dealt with a car accident on I-285, and central issues in the case in-

cluded whether the plaintiff was intoxicated at the time of the accident, and whether the defendant left a disabled vehicle in the roadway. After four days of trial with complex evidentiary issues, the jury found that the defendant was not liable to any extent and returned a verdict for the defense.

The Georgia Court of Appeals issued a unanimous opinion on February 5, 2019 affirming the trial court's grant of summary judgment to a property owner in a negligent security case involving a murder in a convenience store parking lot. The case was defended in both the trial and appellate courts by **Elissa B. Haynes** and **Robert A. Luskin**, partners at **Goodman McGuffey** in Atlanta. This was Ms. Haynes' first oral argument in the Court of Appeals.

Appellant argued that the property owner should have foreseen and taken steps to prevent the shooting because there was evidence of loitering and other violent crimes on and around the property. The property owner, however, testified that he had no knowledge of any prior crime and there was no evidence in the record to suggest otherwise. In its Opinion, the Court reiterated there must be evidence of a property owner's knowledge, actual or constructive, before the property owner can be held liability for a third-party criminal attack. The mere existence of prior crime, by itself, is insufficient to raise a genuine question of material fact as to a property owner's knowledge. Further, under Georgia law, a property owner has no duty to investigate police reports or crime records to determine whether criminal activity has occurred on or around its property.

Appellant's Motion for Reconsideration was denied on February 25, 2019. Appellant filed a petition for *certiorari* in the Georgia Supreme Court, to which GDLA responded with an amicus brief in opposition on August 26, 2019.

Matthew F. Boyer of **Nall & Miller** in Atlanta authored the amicus brief. The Case is *Bolton v. Golden Business, Inc.*, 2019 WL 440949 (Case No. A18A1600).

Bovis Kyle Burch & Medlin in Atlanta logged two recent successes. GDLA Past President **James E. “Jimmy” Singer**, and **Eric A. Ludwig** obtained a defense verdict on March 12, 2019 on behalf of BR Mountain Homes, LLC and its two principals. The verdict followed seven days of trial before Judge William Story in the Gainesville Division of U.S. District Court, Northern District of Georgia. BR Mountain Homes was retained to complete selected stages of the construction of a mountain home in North Georgia. Plaintiff Cribb, a 47-year-old crew member from a different company engaged to complete the log home super structure, suffered numerous broken vertebrae, ribs and sternum and was paralyzed from the chest down when he jumped from the second floor and crashed through the main level decking into the basement. Plaintiff argued the way BR Mountain Homes temporarily decked over the stairwell opening of the main floor, without a warning or other indication that the three-foot by 15-foot area was not supported like the remainder of the floor, constituted a hazard, was essentially a “booby trap,” and all three were ordinarily negligent both in the manner of construction and, additionally, in failing to warn. Plaintiff also contended that the corporation—and/or the individual defendant with the contractor’s license who obtained the building permit—was the general contractor and, since Plaintiff was an invitee, Defendants were additionally and independently liable in premises liability. Plaintiff sought approximately \$2 million in medical specials, an additional amount for lost past and future wages, and asked for up to \$9

million in pain and suffering. After deliberating approximately three hours, the jury returned a verdict in favor of all three Defendants on both Plaintiff’s ordinary negligence claims, as well as the premises liability allegations.

Eric Connelly, the same week along with another partner, obtained a favorable verdict in an auto accident case in Banks County Superior Court in front of Judge Currie Mingledorff. In the J&J Flea Market parking lot, Defendant Griffith backed into Plaintiff Meeler, a pedestrian, who dislocated her elbow, suffered chipped bones in her wrist and elbow, and claimed low back injuries. Plaintiff’s counsel asked the jury for \$282,000. Though the jury found for Plaintiff, it substantially limited the damages awarded, and further allocated 49.9 percent fault to the pedestrian Plaintiff, which reduced her total award to only \$8,399.

James Merritt of **Vernis & Bowling** in Atlanta defended a case in the Superior Court of Glynn County before Judge Stephen Kelley. This trial arose out of a car accident that took place on Sea Island Road at Hamilton Road in July of 2015. Mr. Merritt’s client admitted negligence in causing the accident. Plaintiff claimed two major injuries. First, he claimed a spinal injury required injections and three different surgical procedures to implant a spinal stimulator device to alleviate his pain. Second, he claimed that he had to go on dialysis and now required a kidney transplant because of this accident.

As for the kidney claims, Plaintiff’s medical records showed he had a prior liver transplant in 2007, and his kidney was damaged as part of the liver transplant procedure. The records also indicated that Plaintiff had Stage 4 chronic kidney disease prior to this accident. Plaintiff claimed that after this accident, when his pain man-

agement doctor prescribed him a pain killer medication, he had an allergic reaction which accelerated his kidney disease from Stage 4 to Stage 5, requiring expensive dialysis treatments and an organ transplant. Plaintiff introduced the testimony of numerous treating doctors on both the back and kidney injuries. Mr. Merritt showed a video deposition of his only expert witness, a nephrologist, who testified Plaintiff’s kidney failure was not caused by this accident.

The Saturday prior to trial, the defense offered Plaintiff \$750,000 to settle his claims, which was rejected. After a four-day trial, Plaintiff’s counsel, Bob Killian in Brunswick, asked the jury for a total verdict of more than \$10 million. Defense countered in closing, suggesting a total verdict between \$20,000 and \$30,000. The jury deliberated for about 30 minutes and returned a total verdict of \$2,500. Using a special verdict form, the jury was asked to separately allocate the damages awarded between the kidney-related injuries and all other non-kidney-related injuries. The jury awarded zero for kidney-related injuries and the full \$2,500 for the other injuries.

Vice President **Pamela Lee** of **Swift Currie McGhee & Hiers** in Atlanta obtained a defense verdict in a premises liability case in the State Court of Athens-Clarke County. Plaintiff was a housekeeper who went into Defendant’s attic to retrieve a curtain rod. While in the attic, Plaintiff slipped between the ceiling joists in the attic and fell onto the trunk of a car below. Plaintiff had medical expenses of over \$40,000 and claimed a traumatic brain injury. At trial, Ms. Lee argued there was no defect in the partially-floored attic and Plaintiff caused her injuries when she stepped from the floored portion of the attic onto the exposed sheetrock. Ultimately, the

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Case Wins

Continued from previous page

jury agreed and determined the homeowner was not liable for the housekeeper's fall.

In another case, **Ms. Lee** and **Jennifer Nichols** had a defense verdict upheld at the Georgia Supreme Court. Plaintiff had filed a Motion for New Trial and an appeal following the defense win in a case involving an alleged sexual assault of a patient by a nurse practitioner. The issue on appeal related to the exclusion of a rape kit that was taken following the incident.

GDLA Secretary **James D. "Dart" Meadows** of **Balch & Bingham** in Atlanta obtained summary judgment for the defendant manufacturer in a product liability suit in federal district court in Brooklyn, N.Y. in March. The case involved a New York carpenter who amputated several fingers when his left hand contacted the spinning circular blade of a sliding table saw. The court dismissed Plaintiff's complaint in a 54-page decision, an unusually long order in a product liability case. Plaintiff did not appeal so that case is over. In another one, Mr. Meadows and **Jonathan Deluca** obtained a defense verdict in a medical malpractice case in Cobb County State Court following a four-day jury trial in May. The duo defended the hospitalist caring for the plaintiff who suffered an unexpected heart attack in the hospital two days after admission. The plaintiff's theory was he came into the hospital with shortness of breath, which can be a sign of acute coronary syndrome. The plaintiff argued additional cardiac monitoring would have detected the blockage of his coronary arteries and allowed for cardiac treatment that would have prevented the heart attack. The defense theory was the plaintiff's heart was stable and he suffered an acute myocardial infarction two days later that could

not be predicted or prevented. This was an unusual case because case was tried 13½ years after the death occurred on January 2, 2006. It is on appeal again for the fourth time.

Nicole C. Leet and **Michael Rust**, partners at **Gray Rust St. Amand Moffett & Brieske** in Atlanta, obtained summary judgment in a premises liability lawsuit against QuikTrip over a man who was murdered in a convenience store parking lot. "As a matter of law, a proprietor's duty of ordinary care toward its invitees does not normally include taking measures to protect them against the intervening criminal acts of third parties, as such acts usually are unforeseeable," Senior Judge Clarence Cooper of the U.S. District Court for the Northern District of Georgia said in an order granting QuikTrip's motion to dismiss. "The shooting death of Andrew Spencer was not reasonably foreseeable, as prior crimes in the QuikTrip parking lot were not substantially similar and did not establish foreseeability."

Spencer died outside a QuikTrip at 4050 Buford Highway in Chamblee, Ga., in the early morning hours of December 20, 2016. He and a friend had gone inside for about two minutes after leaving a nearby strip club at 3:20 a.m. After a silent encounter near the store's hot dog stand, a gang member mistook Spencer and his friend for rivals, according to Judge Cooper. Testimony and security film showed the gang member walked outside first, went to his vehicle, took out a gun and started pacing near the door waiting for Spencer and his friend to leave, Judge Cooper said. He added the friend took the statement to be a reference to gang affiliation, but neither he nor Spencer were in a gang. The gang member shot anyway, killing Spencer.

Law & Moran argued that QuikTrip was negligent for not having a security officer on duty to observe the confrontation and intervene to de-escalate it. Ms. Leet's successful argument defending QuikTrip

seemed to hang on the day of the week. The company employed a security guard on Friday and Saturday nights—which happened to be when previous violent crimes had taken place—but not on weeknights.

"Plaintiffs allege that, if there had been a security guard outside the QuikTrip store on the Thursday in question, this incident would not have happened," Judge Cooper said. "However, none of the prior incidents involving gun violence would have drawn QuikTrip's attention to the need to have a security guard on the premises on weekday nights or on Thursdays, in particular."

Other incidents of gunshots outside the store had been on weekends. They were also different in other ways, Cooper ruled. "The Court agrees with QuikTrip that there were no prior incidents that were sufficient to put QuikTrip or any of its employees on notice of the allegedly dangerous condition of not having a security guard on weekday nights."

The case is *Yvette Sanders v. QuikTrip*, No. 1:17-CV-2341-CC.

Stephen W. Mooney, **Scott P. Kerew** and a colleague, partners at **Weinberg Wheeler Hudgins Gunn & Dial** in Atlanta, in conjunction with client UnitedHealthcare's legal team recently landed a \$56.2 million consent judgment in its counterclaim against five laboratories. The now defunct labs initiated litigation in the Western District of Texas, by suing the healthcare behemoth, over claims they were not being paid enough for urine toxicology tests. UHC counterclaimed, accusing the companies' CEO, COO and sales chief of orchestrating a "kickback scheme" to "repeatedly defraud commercial insurers, like UHC, out of millions of dollars" by paying kickbacks for testing requests. The case is an example of UnitedHealthcare's commitment to protect its members and clients. It was hard-fought with complicated facts, numerous procedural twists, and involved numerous law firms. ♦

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Everybody Wins



Welcome, New GDLA Members!

The following were admitted to membership in GDLA since the last edition of this magazine.

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Worsham Corsi Scott & Dobur,
Marietta

Austin Atkinson
Hall Booth Smith, Atlanta

Tamara Nikki Baines
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GDLA Files Amicus Brief Regarding Applicability of Assumption of the Risk

GDLA filed an *amicus curiae* brief in the Supreme Court of Georgia in a case involving assumption of the risk and, specifically, the applicability of that defense in the context of a professional negligence claim. The plaintiff in the case was injured when he fell roughly 18 feet to the ground from a deer stand when he decided to go hunting just five days after undergoing coronary bypass surgery. The plaintiff sued his cardiologist and the doctor's practice group, alleging that the doctor negligently prescribed too much medication following the surgery and that caused the plaintiff to faint. The defendants argued at trial that they were not negligent and that, in any event, the plaintiff assumed the risk of his injuries by going hunting and climbing onto an 18-foot-high deer stand just five days after the surgery, despite being told by the cardiologist

not to engage in strenuous or risky activities for the next week. The jury ultimately returned a verdict for the defendants. On appeal, the Court of Appeals reversed, holding that the trial court erred in charging the jury on assumption of the risk.

GDLA agreed to submit an amicus brief on the defendants' petition for *certiorari* filed in the Supreme Court of Georgia. In its brief, GDLA argued that the trial court properly charged the jury on assumption of the risk because a reasonable jury could have found that the plaintiff knew or should have known the risk inherent in going hunting and climbing onto an 18-foot deer stand just five days after surgery, regardless of whether the plaintiff specifically knew he might become dizzy or faint. GDLA also argued that the Court of Appeals erred in ignoring the plaintiff's own conduct, and in-

stead focusing solely on the alleged negligence of the defendant cardiologist, in determining whether the plaintiff could be deemed to have assumed the risk of his injuries. GDLA also contended that the Supreme Court should grant *certiorari* to reaffirm that assumption of the risk is a viable defense in the professional negligence context.

GDLA thanks the author and Amicus Committee Co-Chair Marty Levinson of Hawkins Parnell & Young in Atlanta. The Committee is also led by Co-chair Garret Meader of Drew Eckl & Farnham in Brunswick.

The case is *Dale P. Daly, M.D. and Savannah Cardiology, P.C. v. Shane H. Berryhill and Pamela S. Berryhill*, Supreme Court of Georgia, Case no. S19C0499. The brief, filed January 14, 2019, is posted in the members only area under Amicus Policy & Briefs. ♦

GDLA Files Amicus Brief Regarding Contractual Provisions in a Lease that Affect Personal Injury Statute of Limitations

On April 16, 2019, the Supreme Court of Georgia heard oral argument regarding a residential lease for personal injuries. The case arose out of a poolside chair failing, dropping onto concrete pavers, and causing the plaintiff's brain damage. The plaintiff's sole argument in the Court of Appeals was that the trial court erred in granting summary judgment to the defendant after concluding that her lease shortened the time to bring a personal injury action from two years to one year. *Certiorari* was granted on two questions: Does the limitations provision of the lease contract apply to the plaintiff's premises tort action; and if so, is that provision enforceable. Nine amicus briefs were filed—seven for the

plaintiff and two for the defendant. In the Supreme Court the plaintiff's arguments were: (1) that the limitations provision does not govern the plaintiff's premises liability claim; (2) that the contractual language was ambiguous; (3) the clause is against public policy; and (4) that enforcement would be unconstitutional.

GDLA filed an *amicus curiae* brief in support of the defendant arguing that the limitations provision applies to the plaintiff's tort claim, as a matter of interpretation the plain language in the limitation provision applied, and the provision is enforceable because it does not violate the statute of limitations or public policy. Finally, GDLA asserted that as initial matter the plaintiff did not raise a constitu-

tional issue in the trial court or the Court of Appeals. GDLA further argued that if the Court entertained that non-issue, the plaintiff could not show that she is similarly situated to members of the class who are treated differently that she was treated.

The case is *Langley v. MP Springs Lake, LLC*, Case No. S18G1326. The opinion of the Court of Appeals is at 345 Ga.App. 739 (2018).

Mark Wortham, now General Counsel to the Secretary of State, authored the brief with his former Hall Booth Smith associates, Austin Atkinson and Pearson Cunningham. GDLA appreciates their efforts on the brief, which is available under Amicus Policy & Brief in the members only area of our website. ♦

Georgia Supreme Court Rules in Favor of Insurer in Bad Faith Case

On March 11, 2019, the Georgia Supreme Court issued its opinion in a closely watched case involving a claim for bad faith/negligent failure to settle within policy limits. Agreeing with positions urged by GDLA in several *amicus curiae* briefs, a unanimous Court held that First Acceptance Insurance Company could not be held liable for a \$5.3 million verdict against its insured in a case arising out of a car accident, reversing the Georgia Court of Appeals and finding that First Acceptance did not act negligently or in bad faith when it failed to settle the claim within policy limits.

The case arose out of a 2008 collision involving five vehicles, caused by First Acceptance's policyholder, Ronald Jackson, who was killed. At least five others were injured, in-

GDLA Filed Multiple Amicus Briefs in the Case

cluding Julie An, who suffered a neck injury and permanent scarring on her arm, and her 2-year-old daughter, Jina Hong, who suffered a traumatic brain injury. Jackson's auto policy with First Acceptance had the minimum liability limits of \$25,000 per person and \$50,000 per accident. Recognizing the potential exposure exceeded the available limits, First Acceptance retained counsel to negotiate a settlement with all parties. After First Acceptance's attorney wrote all parties in January 2009 to suggest a global settlement conference, An and Hong's attorney sent two letters on June 2, 2009. In the first, the attorney expressed an interest in attending a

settlement conference, and, in the alternative, offered to settle An and Hong's claims for the available policy limits. In the second, the attorney requested certain information about the policy within 30 days. First Acceptance did not respond within 30 days, and An and Hong filed suit on July 10. Their attorney then wrote First Acceptance and stated that the offer to settle had been withdrawn because it was not accepted within 30 days. An and Hong later obtained a judgment against Jackson's estate for more than \$5.3 million in damages, most of it attributed to Hong's injuries.

The administrator of Jackson's estate, Robert Hughes, subsequently



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sued First Acceptance, asserting that the insurer was liable for the entire judgment because its failure to settle An and Hong’s claims within the policy limits led to the excess judgment. The Superior Court of DeKalb County granted summary judgment to First Acceptance, but a panel of the Georgia Court of Appeals reversed in November 2017.

GDLA filed an *amicus curiae* brief in support of First Acceptance’s petition for certiorari, arguing that the Georgia Supreme Court should hear the case because the Court of Appeals’ decision converted legal issues—interpretation of a settlement offer and whether a legal duty exists—into questions of fact. In its Order granting certiorari, the Supreme Court raised two issues that tracked the issues from GDLA’s brief. In its opinion, the Court’s analysis agreed with many of the arguments raised by GDLA in its amicus briefs.

First, the Court asked the parties to address whether an insurer’s duty to settle arises when it knows or reasonably should know settlement with an injured party within the insured’s policy limits is possible or only when the injured party presents a valid offer to settle within the insured’s policy limits. In its decision, the Court rejected Hughes’ argument that the insurer should attempt to settle a claim to protect the interests of its insured, even in the absence of a demand, and held that an insurer’s duty to settle arises only “when the injured party presents a valid offer to settle within the insured’s policy limits.”

Second, the Court asked the parties to address whether the Court of Appeals correctly held that a jury question was presented as to whether the claimants had made a time-limited offer to settle their claims within the policy limits. In its decision, the Court began its analysis by concluding that the Court of

Appeals erred when it held that a jury must decide whether the claimants had made a settlement offer because the interpretation of an offer is an issue of law for a court. Applying the rules of contract construction, the Court held that although the first June 2 letter did present an offer to settle for policy limits, there was no deadline for acceptance. For that reason, the Court reversed the Court of Appeals and held that First Acceptance was entitled to summary judgment on Hughes’s failure-to-settle claim.

The case is *First Acceptance Insurance Company of Georgia, Inc. v. Hughes*, Supreme Court of Georgia, Case No. S18G0517, decided March 11, 2019.

We appreciate David Atkinson of Swift Currie McGhee & Hiers in Atlanta, and Jonathan Kandel, who was formerly with the firm, for their significant work on this case for which they authored four briefs on behalf of GDLA. ♦

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Under the Gold Dome: The 2019 Session of the General Assembly

By Jacob E. Daly
Freeman Mathis & Gary, Atlanta

This year's session of the General Assembly was extremely active. In the House, 741 bills and 873 resolutions were introduced. In the Senate, 279 bills and 534 resolutions were introduced. At the end of the 40 legislative days, 312 bills were passed by both chambers (226 of which were introduced in the House and 86 of which were introduced in the Senate). Of those 312 bills, Governor Brian P. Kemp signed 297, vetoed 14, and allowed one to become law without his signature by not vetoing it by the deadline. As for resolutions having the force of law, which must be passed by both chambers and signed by the Governor, there were six House resolutions and two Senate resolutions that passed both chambers. Governor Kemp signed seven of these resolutions and vetoed one.

This article summarizes the bills that are likely to be of particular interest to members of the GDLA and their clients. Obviously, this includes bills that were passed by both chambers and signed by Governor Kemp. But, because it is important for members of the GDLA and their clients to be aware of bills that were not passed by both chambers or were vetoed by Governor Kemp, these bills are also included. Unenacted bills are important for several reasons. First, often it is important to know what the law is not and what has been specifically rejected by the General Assembly. Second, even if a bill has not garnered majority support, the fact that it was introduced means there is some support for it. Sometimes the difference between passage and failure is just a few votes, and legislators can change their minds. Finally, the General Assembly works on two-year cycles, and so a bill that is introduced but does



not pass during the first year of a cycle automatically remains eligible for consideration during the second year of the cycle. This year was the first year of a cycle, and so all of the unenacted legislation discussed below still has a chance of being enacted in 2020.

BILLS PASSED AND SIGNED BY THE GOVERNOR

House Bill 481: Heartbeat Bill

One of the most controversial bills considered during the 2019 session of the General Assembly was HB 481, which is officially known as the Living Infants Fairness and Equality (LIFE) Act and unofficially known as the Heartbeat Bill. This bill mostly deals with the circumstances under which abortions may be performed, but it also includes two provisions relating to tort litigation of which GDLA members should be aware. First, any woman upon whom an unlawful abortion is performed may recover all available tort damages in a civil action against the person who engaged in the violation. O.C.G.A. §

16-12-141(g). Second, the parents of an unborn child may recover in tort for the wrongful death of the child. O.C.G.A. § 19-7-1(c)(1). The measure of damages is the full value of the life of the unborn child, and the life of the unborn child is deemed to begin at the point at which there is a detectable human heartbeat. *Id.* A “detectable human heartbeat” is defined as “embryonic or fetal cardiac activity or the steady and repetitive rhythmic contraction of the heart within the gestational sac.” O.C.G.A. § 1-2-1(e)(1).

House Bill 239: Georgia Statewide Business Court

HB 239 creates a new constitutional court known as the Georgia Statewide Business Court, though the creation of this court does not preclude any superior or state court from creating its own business court division or continuing to operate an existing business court division. O.C.G.A. § 15-5A-1. The Court shall commence operations on January 1, 2020, and it may start accept-

Continued on page 60

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The Changing Climate for Defending Medical Malpractice Cases at Trial

By Daniel J. Huff
Huff Powell & Bailey, Atlanta

Medical defendants enjoyed a successful run in trials following the aftermath of the General Assembly's tort reform in 2005. Medical defendants prevailed in more than 90 percent of the cases that were tried between 2005 and 2016. Since 2016, this winning percentage has gone down. At the same time, awards in medical malpractice cases have increased. Higher awards are also being seen in non-medical catastrophic injury trials as well. Combined with this trend is the fact that there are now verdicts in traditionally defense-oriented counties in Georgia. These counties were not known for plaintiffs' verdicts at all, let alone large verdicts against medical providers. These realities have made it more difficult for medical defendants to confidently try their cases in Georgia.

There are some identifiable reasons for this climate change. First, the Georgia jury pools are now based on having a driver's license and not being registered to vote. This has widened the group of citizens who are called for jury service. It is hard not to associate the change in the composition of jury pools with a trend in favor of plaintiffs' verdicts. There is a plethora of anecdotal evidence from experienced lawyers that juries in different counties are not what they used to be.

A second reason is how people receive information. The concept that people have short attention spans has been a hallmark of trial practice for many years. Getting to the point has been a long-standing priority. Now, most people get all of their information electronically. Many of the questions we ask are answered using an electronic device. People are not used to getting the whole story or context



in the information that they receive. We have developed an appetite for the quick answer. Anyone with a phone can answer any question in seconds. This is especially true with respect to medical information. Nowadays, everyone uses Google or WebMD to look up any medical disease, diagnosis or symptom. Naturally, these websites warn users of the most serious symptoms, problems and diagnoses. The availability of this information alone, in this format, places a greater emphasis on bad outcomes than what is practiced by medical providers. More on dealing with this reality later.

Another generalization about jurors today is that they are less trusting of traditional institutions. This includes police departments, district attorneys and the court system. One of the most popular shows in 2017 was Netflix's documentary *Making a Murderer*. Young people

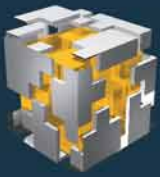
who watched that show were more appalled by the conduct of the police, district attorney and the courts than of the defendant himself. In real life, jurors who heard all the evidence in that case found the defendant guilty. The majority of the people who watched the show believed it was a set up. My perception is that jurors are much more willing to believe that people and institutions with reputations or money will lie and cover up their wrongdoing.

Finally, there is the concept of the "greater good." The greater good is touted as a millennial core value. Millennial jurors want to feel like they are doing things that help the greater good. Plaintiffs' attorneys frequently try to make their case about the greater good by portraying justice in an individual case as part of that millennial value. I personally think this is a big factor with millennial jurors and impacts trials in unexpected ways. We can do better in finding ways to capitalize on this value ourselves.

Whether this is an exhaustive list of why the medical malpractice trial climate has changed or not, it has definitely changed. More cases are being filed and venture capitalists are investing in plaintiffs' cases. It has not helped that medical errors are periodically reported as a top cause of death in the United States.

In light of the current climate, we should consider pivoting our approach to defending medical cases. This is necessary in some individual cases and may be necessary in all cases to some degree. Every traditional trial concept for medical malpractice cases should be rethought in light of today's climate. Here are some

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Court Cases Reveal Secret Litigation Networks for Trucking Accidents

By Aaron Huff, Senior Editor
Commercial Carrier Journal

In September 2017, an office runner from Spine Center Atlanta delivered a box of doughnuts with a letter to the break room of Atlanta-based law firm McMickle Kurey & Branch.

The delivery was made by accident but served an important purpose. The contents of the letter may explain why insurance premiums for motor carriers have been rising drastically over the past few years.

“To Our Valued Attorney Business Associates,” the letter began, making it immediately obvious to law partners Kevin Branch and Mike Johnson that the delivery was intended for someone else.

At the time, Zach Matthews, another partner in the firm, was defending a real estate company in a slip-and-fall injury case. He was in the midst of a heated discovery battle with Spine Center Atlanta and its co-founder Dr. James Chappuis. The plaintiff received medical treatment from the clinic following the incident.

The letter mentioned a cloud-based software the clinic uses to maintain secret communications with plaintiff attorneys and other doctors in the area. Matthews soon discovered that a litigation finance company was involved in the business network. The same network, it turned out, was also steering the litigation of truck accidents.

Matthews subsequently provided legal counsel to trucking fleet insurance companies, who are the big targets with policies that typically have liability coverages of between \$1 million and \$10 million per accident.

It is not unusual for attorneys and doctors to be lien holders in accident claims, since they do not get paid until settlements are



reached, but the involvement of litigation finance companies has been a recent discovery.

“Anytime you add an interested third-party to the mix, injury claims can get more expensive. In the case of medical finance companies, that increase can be significant,” says Nathan Lundquist, vice president of commercial auto claims for Protective Insurance, one of the largest fleet trucking insurance providers. “The more you peel back the covers, the more you understand the pervasiveness of medical finance involvement.”

Bundling Claims

Matthews was able to gain access to the database of Spine Center Atlanta by order of a federal court. He found a log of activity between Dr. Chappuis, plaintiff attorneys and a medical funding company, ProMed Capital.

This and other recent court cases have exposed what legal experts say is an unethical practice. Non lawyers, namely doctors and finance companies, are steering the litigation

for accident claims. In the past, plaintiff attorneys were the only ones behind the wheel and put aside money in a “war chest” to fund the risk of their contingency cases, says Ben Dyches, an attorney in Utah who specializes in defending doctors from malpractice suits.

“Now there’s a whole industry built around third-party case evaluation and actuarial appraisals. If the odds are good, but the war chest is a little short, they bring on an investor and roll the dice together,” he says.

Medical funding companies traditionally have advanced funds to plaintiffs while cases are in litigation to cover medical bills and lost wages, for example. The companies collect on these receivables when the cases are settled.

In the lawsuit with Spine Center Atlanta, Matthews discovered that Dr. Chappuis was billing at 2.5 to 3.5 times more than average market rates for medical procedures. More alarming was the clinic marketing to other doctors in the area and plaintiff lawyers to bundle their claims.

The clinic presented the bundles in packages of 10 to ProMed Capital to finance as accounts receivables. The finance company was advancing payments to the doctors for a discount fee on the receivables. It stands to reason, Matthews says, that the money Dr. Chappuis was receiving up front covered all of his clinic's costs for the medical procedures, including overhead.

The clinic's legal team was vetting the claims as part of this bundling process. Questions on the "intake sheets" for claims asked about the presence or absence of cameras and video event recorders, for example, and insurance policy limits.

The clinic and its legal team was deciding whether or not to work with patients based on the strength of their legal case, he says.

Matthews also found evidence the clinic had bundled 700 cases in the Atlanta area in one year. On average, each claim had a projected settlement of \$100,000, he says, which equated to approximately \$70 million in annual revenue.

The Collateral Source Rule

As a rule of thumb for reward- ing verdicts, Matthews says juries will triple the cost of the medical bills. The doctor takes one third, the plaintiff lawyers takes one third and the plaintiff gets the remainder.

In many states, juries are permitted to only see what the doctor billed, not what a plaintiff's medical insurance paid as part of a negotiated rate. This practice is an application of the Collateral Source Rule, explains Mathews.

"In Georgia, for example, that rule prevents the jury from learning that an individual had medical insurance—or what the insurance rate would have been for a given procedure if they did not happen to have insurance," he says.

Medical finance companies have become a more pervasive influencer

of civil suits because of this rule. As the litigation financiers they have "figured out that they can fund these cases, which will be presented to the jury at an exceptionally inflated 'uninsured' billing rate that is far higher than anyone is ever actually asked to pay," he says. "The difference between the fictitious charges being black-boarded to the jury and the actual, much lower charges the funder is actually being asked to pay creates a huge profit margin."

In the Spine Center Atlanta case, a deposition revealed that Dr. Chappuis was collecting 60 percent of the medical bill, on average, at the settlement of an accident claim. This left ProMed with plenty of margin to extract its fees. Even if the plaintiff attorneys settled with the defense at lower rates than the verdict amounts, the doctors and finance company were making very large profits, he says.

Quarterbacking Litigation

What is happening in Georgia with litigation funding is no less prevalent in other places in the United States, Matthews says.

Litigation funders are often involved in quarterbacking litigation by offering "legal referral services" to plaintiffs and helping them find doctors who will "play ball," he says.

"These so-called 'legal referral services' often have databases of communications flowing back and forth, which [medical finance companies] are very loathe to reveal in discovery. In some prominent cases, the doctors themselves are becoming the nexus of the relationship and are keeping those communications in special fire-walled sections of their medical records software."

Protective Insurance has been working with Matthews. The company has had favorable rulings when it is successful in bringing medical finance companies into the mediation process for accident claims.

"Our goal is to have fair and reasonable settlements. The goal is not to save money on a claimant's injury," Lundquist says. "Protective Insurance does not need to fund a finance company's lifestyle."

Medical finance companies will go to great lengths to conceal their business dealings with doctors and attorneys, he says.

"Some finance companies are very well funded and represented. We expect aggressive opposition during the discovery process. It can be an uphill battle, but we know what we are signing up for when we dig in," Lundquist continues.

A legal defense strategy is to expose the connection between doctors, lawyers and litigation finance companies to show juries that doctors have a bias, intent and motive to perform procedures that the patient may not even need, Matthews says.

For instance, if a truck driver has a rear-end collision the injured party may go to a doctor who is connected to the litigation-funded world to get treatment they do not really need. The result is an inflated claim.

"It happens all the time," Matthews says. But is the world of litigation funding big enough to explain the rising cost of truck insurance?

"Absolutely. There is no question whatsoever," Matthews adds. "It is hard to believe this stuff is really happening." ♦

This article is reprinted with permission from the June 27, 2019 online edition of Commercial Carrier Journal (CCJ). Aaron Huff is CCJ's Senior Editor. His career in the transportation industry began at a family-owned trucking company and expanded to CCJ, where for the past 18 years he has specialized in covering business and technology for online and print readers and speaking at industry events.



The Fear Factor Feeds the Reptile

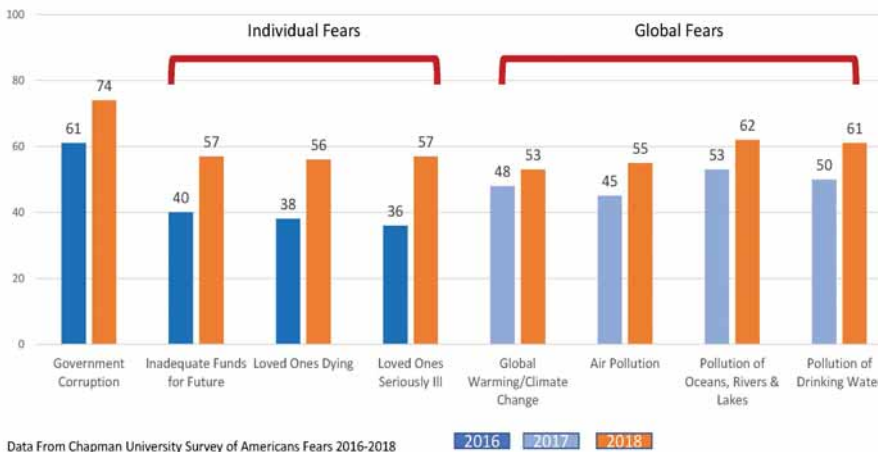
What are jurors afraid of and what percentage of the populous is afraid?

By Maithilee Pathak, Esq., Ph.D.
R&D Strategic Solutions

Generally, Americans' fears can be classified as individual vulnerabilities (e.g., loved ones getting sick or dying) and global concerns (e.g., climate change and pollution). In other words, jurors in 2018 are afraid for themselves and loved ones, *and* for the planet and humankind.¹

Government corruption and running out of money have ranked as top fears among Americans for many years, and the percentage of people expressing these fears and others has grown steadily over time. The percentage of Americans reporting each fear has increased markedly over the last two years (see blue bars below). Whereas government corruption was the *only* fear expressed by the majority of respondents in 2016, the majority of respondents expressed fear of *all of the top 10 categories* (see orange bars below) in 2018.

The Percentage of Americans "Afraid" or "Very Afraid" Has Increased Markedly in Recent Years



Data From Chapman University Survey of Americans Fears 2016-2018

What does rising anxiety mean for corporate litigants?

Rising anxiety provides fertile ground to plaintiffs relying on Ball and Keenan's infamous "reptile strategy" to argue their cases.² The reptile strategy capitalizes on jurors' fears to drive up damage awards.

Lawsuits using the reptile approach are typically framed around the following concepts: (1) the defendant company violated a "safety rule" fundamental to a well-ordered society; (2) the defendant's conduct endangered the plaintiff, and potentially the entire community; (3) the plain-

tiff needs and deserves compensation; and (4) jurors must compensate the plaintiff and deter similar conduct in the future with their verdict.

Staunch plaintiff jurors in deliberations can often use fear plus the common preconception that corporations put profits over safety to justify a multi-million-dollar award to make the defendant company "straighten up and fly right." Examples of exorbitant jury verdicts in recent years include: \$4.6 billion to plaintiffs alleging talcum powder caused ovarian cancer; \$500 million to patient alleging metal hip implant

caused metallosis; \$289 million to patients alleging popular weed killer caused lymphoma; \$50 million to patient alleging pelvic mesh caused severe complications.

Rising anxiety coupled with daily chants of "fake news" makes the courtroom a snake pit.

Seemingly wacky conspiracy theories are flourishing in today's internet environment where the questionable is freely intermingled with the legitimate.³ In this environment, it is tempting to give air time to "both sides" type of arguments.⁴ The trap for corporate defendants in trial is responding in "brick by brick" fashion to each and every plaintiff claim and thereby failing to provide an alternative explanation for the bad outcome.

What can companies do in self-defense?

Corporate litigants can bolster their position in court by: (1) using psychology to craft a persuasive narrative and retain jurors' attention; (2) teaching witnesses active listening and effective communication skills; (3) using demonstratives to illustrate your story, (4) providing jury instructions which to give jurors a roadmap to solve the case; and (5) get to the point quickly and make jurors feel smart.

Use confirmation bias to craft an alternative storyline explaining the bad outcome absent negligence.

Confirmation bias is a psychological tendency to give credence to material consistent with predispositions and prior experiences. Attorneys

Continued on page 70

A close-up photograph of a hand moving a dark wooden chess piece (a king) on a chessboard. Other chess pieces are visible in the background, some in focus and some blurred.

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



Perspectives on Chemicals, Emerging Concerns, and Associated Regulations

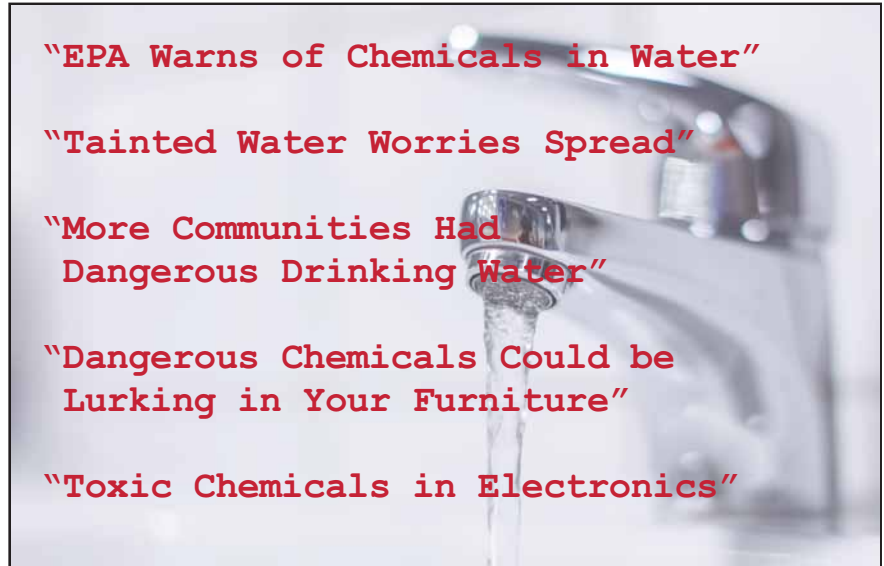
By Laurel A. Royer, Ph.D. (left) and Melanie Edwards, PStat
Exponent, Inc.



Headlines like those at right ignite citizen concerns regarding the safety of their drinking water as well as consumer products encountered daily. Consumer products are at the forefront of many legal and regulatory matters focused on potential environmental and human health impacts from routine use to end-of-life disposal. More specifically, chemicals used to achieve functionality of many products often result in such issues. As research and knowledge develop, the number of chemicals measured and documented in the environment also increases. Many of the “newer” chemicals are referred to as chemicals of emerging concern (CECs)¹ and have yet to be fully regulated.

Advances in laboratory analyses are out-pacing the implementation and enforcement of policy. In recent years, the increased sensitivity of analytical methods has resulted in the detection of chemicals in environmental (water, soils, etc.) and human (blood, urine, sweat, etc.) matrices, which further amplifies public concerns. As a result, a myriad of chemicals of environmental and human health interests are now routinely measured in parts per trillion (ppt) and in some cases even parts per quadrillion (ppq).

However, the public perception of risk is typically fueled by the improper communication of scientific information and the belief that the mere presence of a chemical implies a new and elevated risk while the lack of regulation suggests lagging policy to mitigate any perceived detrimental effects. Policy makers are faced with the challenging task of understanding emerging science for detecting new chemicals and using it to inform decisions that protect the environ-



ment and human health. With the increased analytical sensitivity and lower detection limits now available, understanding where adverse effects (if any) begin is crucial, and simply detecting a chemical does not always mean increased risk. As laboratory methods are able to measure lower levels of more chemicals, understanding of potential adverse effects from exposure must also keep pace.

Conversely, from a human health perspective (i.e., biomonitoring), lower detection limits can be quite useful. More sensitive analytical methods provide quantification of the decreasing levels of legacy chemicals such as dioxins, furans, polychlorinated biphenyls (PCBs), and some persistent pesticides in various populations. These methods can more precisely measure background levels of chemicals in unexposed populations. Moreover, lower uncertainty in the analytical data results in more reliable statistics and thus more robust epidemiological studies.

Consumer products, specifically the chemical inputs, are subject to regulations both in the United States and internationally. According to

U.S. rulemaking under federal purview, agencies such as the U.S. Environmental Protection Agency (EPA), Food & Drug Administration (FDA), and, to some extent, the U.S. Department of Agriculture are tasked to write regulations designed to protect humans, animals, and the environment. Although many states defer to federal guidelines, there are also state regulatory programs that are more protective than those required by the federal agencies. Proposition 65 (Prop. 65; officially called Safe Drinking Water and Toxic Enforcement Act of 1986) administered by the California Office of Environmental Health Hazard Assessment (OEHHA) agency is one such example. Prop. 65 requires that the State publish a “list of chemicals known to cause cancer or birth defects or other reproductive harm.”²

The list of over 800 chemicals was extended most recently (2017-2018) to include a number of chemicals including agricultural chemicals, solvents, pentabromodiphenyl ether mixture (DE-71; PBDE), and two perfluorinated alkyl substances

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Ten Steps to Success at Mediation

By A. Lee Parks, Jr.

Henning Mediation & Arbitration Services

Today, crowded civil dockets often require your clients to wait their turn, sometimes for years, while the financial and emotional costs of litigation spiral out of control. Mediation has become an essential alternative to a clogged judicial system, making effective mediation strategies an important skill set for every successful litigator.

I have represented hundreds of plaintiffs and defendants at mediation and served as a mediator for more than 10 years. I have found that, when direct negotiations fail, mediation gives the parties a way to restart negotiations through the buffer of an empathetic neutral who serves as the emissary to get the parties talking again. The skilled mediator can find just the right pace and cadence for the caucuses to build momentum toward closure by making sure both sides' positions are positively impacting the negotiations. You can settle your case in a day with zero risk of an adverse outcome since resolution requires the mutual assent of all parties. That is why more and more courts are making mediation mandatory with amazing results. Its popularity continues to grow because it offers litigants the opportunity to collaborate on crafting a settlement that meets both parties' needs within the confines of a confidential process.

Mediation works in mysterious ways by tapping into that comfort zone in a litigant's DNA, halfway between the ancient "fight or flight" instinct that worked for cavemen



but spells disaster as a modern means of solving legal disputes. We have evolved into emotional centrists who seek pragmatic private solutions to our problems by talking rather than fighting. Mediation allows the plaintiff to avoid the stress that comes from believing there is no option but to either "fight," by pursuing a lawsuit and taking on the risk of an unknown outcome at some uncertain time far in the future, or take "flight" by accepting a low-ball nuisance value offer. Given those equally unattractive choices, mediation is the quintessential no-brainer due to the insignificant resource allocation required to participate in a one-day meeting that offers a high likelihood of success.

Following are 10 recommended steps to maximize your client's chances for a successful mediation:

1. Focus on the Future:

Mediation vs. Remediation

Mediation focuses on finding a resolution the parties believe is in their future best interests. In stark contrast, litigation focuses only on the past, with the parties pouring re-

sources into a highly structured fault-finding process to determine whether a cognizable legal wrong occurred and, if so, the scope of remediation allowed by law. Like the movie "Groundhog Day," the litigants spend years trying to prove their version of the past events, oblivious to the natural prejudices that will inevitably color their respective recollections.

At trial, they make very different presentations to strangers who decide the case by largely picking the play they liked the best. It is an "all or nothing" shot at remediation, even though the jury likely found ample portions of truth in both sides' positions. Such are the limitations of litigation.

By prioritizing the future, mediation lets the parties skip the angst-producing process of deciding fault and go to work collaborating on building the proverbial bridge to tomorrow by agreeing to a compromise that prioritizes time, our most valuable and ephemeral asset, and regain control of their lives and businesses by letting go of the need to win. They walk over that bridge they built together full of hope for the future. There is no more satisfying moment for a neutral than when the parties come together at the end of a long day that ended in settlement and congratulatory handshakes, hugs and smiles exchanged between parties who could barely stand to be in the same room when the mediation began. Such is the power of mediation.

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Preparing for Daubert Through the Life of a Case

By Amy Dwyer
S-E-A, Ltd.

Expert witnesses perform a critical role in American litigation. Often the mechanism by which complex scientific and technical evidence is presented and proven, expert witnesses conduct the analyses used to convince a judge or a jury of the merits of a defense. In addition to providing testimony used in court throughout the life of a case, expert witnesses can collaborate with attorneys on case strategy and evaluation, and prepare attorneys to conduct targeted, effective discovery. Without an expert witness, a party may be unable to communicate effectively with a trier of fact whose knowledge of the scientific or technical issues is limited. For this reason, a thoughtful strategy for retaining and working with an expert—with an eye at the outset on the challenges that may be raised down the line—is critical.

The penalties for failing to produce an expert whose testimony is reliable from a scientific or technical standpoint can be fatal to a party's defense. Therefore, it is of the utmost importance to select an expert with the appropriate background, assure that the scope of the expert's work is tailored to the expert's area of expertise, and consider that the scrutiny that the court—as the gatekeeper for expert witness evidence—is considered at every stage of the litigation. Meticulous attention to these considerations throughout the lifecycle of a case can prevent a *Daubert* challenge from derailing critical evidence at trial time.



The Standard: *Frye*, *Daubert*, *Kumho* and *Joiner*

The modern history on the use of expert witnesses is a history of focused effort by courts and legislators to eliminate the proliferation of “junk science” in litigation—that is, testimony of “experts” peddling opinions not based on sound scientific principles. In the early twentieth century, these efforts to control the type of testimony being brought to court culminated with the case of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), a case where the defendant, James Frye, was found guilty of murder. On appeal, the defendant argued that the court committed error by failing to allow the introduction of a lie detector test taken of Mr. Frye. The impact of the appellate court's opinion in *Frye* was a shift in standard for the admissibility of expert testimony from a mere evaluation of the expert's credentials.

The “*Frye*” standard, or, “general acceptance” test, as it came to be known, required that a court evaluate whether the scientific technique used was generally accepted as reliable in the relevant scientific community as the basis for evaluating whether expert testimony would be permitted. In the case of Mr. Frye, the court concluded that the test had not yet gained

the required scientific recognition in its field to justify the admission of the test results as expert testimony.

Although the *Frye* standard stood the test of time, it failed to account for circumstances where there was a technique or methodology that could produce reliable results, but was too new, novel, or narrow a field for it to have gained acceptance in a scientific community. Seventy years after *Frye*, those considerations were, at long last, considered by the Supreme Court. In *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), the Supreme Court held that the standard for admissibility of expert witness testimony set forth in *Frye* was superseded by the Federal Rules of Evidence. This ruling addressed the growing concerns that the *Frye* standard was too restrictive in that it failed to distinguish adequately between “junk science” and “new or novel” scientific or technical advances.

Although the current standard for admissibility of expert testimony is set forth in *Daubert*, two subsequent U.S. Supreme Court cases, *General Electric v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), round out the leading authority on the subject. In *Joiner*, the Court expanded on the concepts set forth in *Daubert*, noting that while *Daubert* emphasized the court's role in evaluating the methodology used—rather than on the accuracy of the expert's opinion—and concluded that the expert opinion must also correlate with supporting

Continued on page 76



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Assessing Tile Roofs for Wind-Related Distress

By Todd E. Jorgenson, M.S., P.E.

Nelson Forensics

The Atlantic hurricane season has seen above-average activity from 2016 to 2018, with fifteen named storms in 2018, eight of which were hurricanes. In just 2018, many billions of dollars in damages are estimated to have been reported, a portion of which includes roof damage. Understanding the proper methodology for assessing roof damage can be essential to an investigation to evaluate damage from a storm event.

Concrete and clay roof tiles provide water-shedding capabilities which generally resist moisture intrusion but are not considered to be the weather-resistive barrier (WRB) of the roofing system. For typical tile roofs, the underlayment acts as the WRB of the roofing assembly and should be installed in a manner to direct water away from interior spaces. The roof tiles protect the underlayment from ultra-violet (UV) radiation exposure and weather-related impacts, such as from hail or wind-borne debris. Fractures in roof tiles or displaced roof tiles can expose the underlayment to UV radiation and, over time, this UV exposure can deteriorate the underlayment material and lead to openings in the WRB.

Roof tiles are installed using adhesive methods (foam or mortar-set) or mechanical methods (nail or screw-fastened). This paper uses a case study to illustrate the mechanics involved in upward displacement of mechanically-fastened concrete tile roofing. The evaluation considered Testing Application Standard 106 (TAS-106) from the Florida Building Code.

Storms with elevated wind speeds/ pressures can cause damage to tile roofs. The most common form of wind distress to tile roofs



Figure 1: Displaced/fractured concrete hip tiles with adjacent fractured concrete field tiles



Figure 2: Displaced/fractured clay hip tiles with adjacent fractured clay field tiles



Figure 3: Top surface of a concrete Vanguard Roll roof tile manufactured by Monier Lifetile



Figure 4: Bottom surface of a concrete Vanguard Roll roof tile with imprints of the style name and the Monier Lifetile (box with ML) manufacturer mark

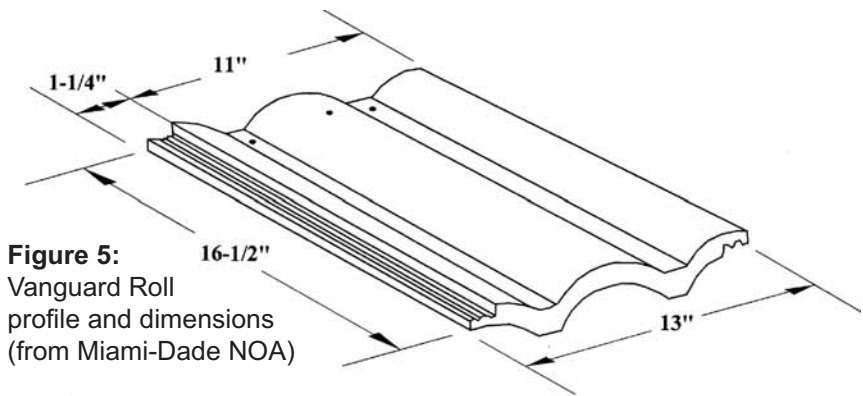


Figure 5: Vanguard Roll profile and dimensions (from Miami-Dade NOA)

includes the displacement of hip and/or ridge tiles, which may tumble down or across a roof plane, impacting and fracturing field tiles in their path (Figure 1 and Figure 2).

CASE STUDY

A single-family residential structure built in 1998 located in Collier County (southwest Florida) experienced hurricane-level wind speeds/pressures during Hurricane

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GDLA Creates Women Litigators Section:

Judges' CLE & Reception, Public Service Day, 2020 S.E. Summit and More—Join Today!



Last Fall, GDLA established a Women Litigators Section whose mission is to support, encourage and advance women litigators in the State of Georgia. The Section is led by Chair Karen Karabinos of Drew Eckl & Farnham, Atlanta, and Vice-Chair Alycen A. Moss of Cozen O'Connor, Atlanta. Ms. Karabinos inspired the group's formation after her involvement with DRI's Women in the Law (WITL) Committee; she used the DRI WITL Toolkit to establish the Georgia group's framework. Section leaders are listed in the last paragraph of this article on the next page.

Section Kick-Off Event Attracts Capacity Crowd

The GDLA Women Litigators Section held a kick-off event on January 17, 2019 at Ecco, which was newly-opened in Buckhead. More than 85 women registered for the happy hour event, maxing out the event space capacity. GDLA's then-President Hall McKinley of Drew Eckl & Farnham, Atlanta, was on-hand to congratulate the leadership on the success of its first event. GDLA member and DRI Second Vice President Douglas KBurrell, also with Drew Eckl, was present to bring greetings from the national defense bar.

Judges' CLE Panel and Networking Event

The Section's next event was a continuing legal education seminar, "Women Litigators: A View from the Bench," held on April 23 live at State Bar Headquarters in Atlanta and simulcast to the Savannah State Bar



1. The GDLA Women Litigators Section kick-off happy hour attracted a capacity crowd. 2. Becky Gabelman, Ashley Rice and Marcia Freeman; 3. Evelyn Davis and Leah Parker. 4. Jacque Clark, Section Chair Karen Karabinos and Melody Kiella. 5. Philippa Ellis and Past President Lynn Roberson. 6. Tyler Walker, Stephanie Vari, Chair Karen Karabinos and Beth Boone. 7. Ann Cox Mandel, then-GDLA President Hall McKinley and Natalie Wilkes. 8. Brannon Arnold and Brandi Beale.



office. The Atlanta version was followed by a networking reception. Jennifer Parrott of Drew Eckl moderated the panel, which featured Court of Appeals Presiding Judge Sara Doyle, Fulton Superior Court Judge Shukura Ingram Millender, newly-appointed Gwinnett Superior Court Judge Tadia Whitner (then with Gwinnett Juvenile Court), DeKalb Superior Court Judge Asha Jackson, and Fulton Superior Court Judge Paige Reese Whitaker. The program received terrific feedback as the judges talked candidly about not only the challenges they faced in their own ladder climb, but also what they see in their courtrooms related to gender bias and more.

A Day of Public Service

On August 17, the group planned “A Day of Public Service,” giving all GDLA members and their families the opportunity to join the GDLA Women Litigators Section and their families to give back to their communities.

Beth Boone, Laura Hall Cartner and Jennifer Herzog of Hall Booth Smith in Brunswick, Atlanta and Tifton, respectively, planned the volunteer opportunities in their area of the state. *See the next page for photo highlights from this event.*

**SAVE THE DATE:
Southeastern Women Litigators
Summit—March 26, 2020**

The group’s highlight initiative will be a Southeastern Women Litigators Summit, bringing together the respective groups in Alabama, Florida, Georgia, North Carolina, South Carolina, and Tennessee. The states are teaming up on March 26, 2020 in Atlanta to support, educate and advance women civil defense litigators. While the specific programs have not been finalized, the one-day seminar will combine speakers and panels who will discuss developing leadership and career building skills. Panels will also explore challenges, risks and rewards on the path to having a fulfilling and productive career for women lawyers.

How to Join the Section

Membership in the GDLA Women Litigators Section is free, but female members of GDLA do need to opt in and join by visiting the members’ only area of our website (click Login on the homepage at gdla.org). There you will select My Profile in the right navigation, then scroll down to Areas of Practice, and check the box by the section name.

Section Leadership

The GDLA Women Litigators Section is subdivided into committees with the following leaders: Marketing–Chair Brannon Arnold, Weinberg Wheeler Hudgins Gunn & Dial, Atlanta, and Vice-Chair Aynsley Mull, Centurion, Atlanta; Membership–Chair Allison Escott, Drew Eckl & Farnham, Atlanta, and Vice-Chair: Candis Jones, Lewis Brisbois, Atlanta; Programs–Chair Pamela Lee, Swift Currie McGhee & Hiers, Atlanta, and Vice-Chair: Jennifer Parrott, Drew Eckl & Farnham, Atlanta; Publications–Chair Ashley Rice, Waldon Adelman Castilla Hiestand & Prout, Atlanta, and Vice-Chair Jacque Clark, Hall Booth Smith, Atlanta; Public Service–Chair Beth Boone, Hall Booth Smith, Brunswick, and Vice-Chair Laura Hall Cartner, Hall Booth Smith, Atlanta; and Social Media–Chair Nicole Leet, Gray Rust St. Amand Moffett & Brieske, Atlanta. ♦

GDLA Women Litigators Section Organizes A Day of Public Service



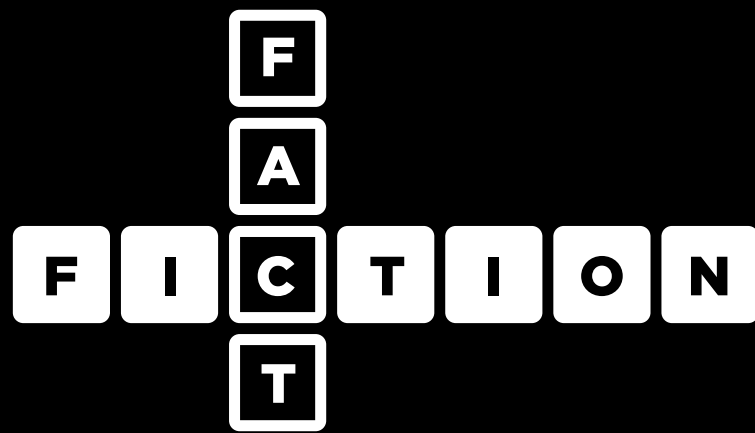
The GDLA Women Litigators Section organized “A Day of Public Service” on Saturday, August 17, for GDLA members and their families to serve in Atlanta, Savannah and Tifton.

In Atlanta, GDLA members gathered at Hall Booth Smith’s office to package items donated by GDLA members, their families and firm staff for the Atlanta Day Shelter for Women and Children. The shelter provides immediate care to meet the basic needs of women and children experiencing homelessness. Donated items ranged from clothing to toiletries to linens to over-the-counter drugs to unperishable food. The volunteers also wrote inspirational notes to offer encouragement to women who seek refuge at the shelter. Hall Booth’s Laura Hall Cartner organized the event and the firm provided lunch. Pictured there in photo 2 are (l-r) Jessica Nwokocho, Calanit Amir, Audrey Berland, Nicole Leet, Barbara Marschalk, Caroline Marschalk and Radha Gordon; and in photo 3 are Section Chair Karen Karabinos and Ms. Cartner.

In Savannah, Hall Booth’s Beth Boone organized GDLA members’ volunteering at the local Court Appointed Special Advocates (CASA) office, as they prepared to move offices and convert paper files to electronic files. CASA supports and promotes court-appointed volunteer advocacy so every abused or neglected child in America can be safe, have a permanent home, and have the opportunity to thrive. Also bene-

fitting CASA, GDLA members were asked via e-blast to donate backpacks to foster children starting a new school year. More than 50 backpacks were contributed. Posing with some of them in photo 3 are (clockwise from right) CASA employee Eric Hornfield and GDLA Board member Tracie Macke’s daughter, Maggie (who also works at CASA) with GDLA Board members Beth Boone and Tracy O’Connell.

In Tifton, GDLA volunteers helped with folding and sorting clothing donations at Called to Care (see photo 1). GDLA members also contributed more than \$500 to purchase frozen meals. The non-profit’s mission is to ease the suffering of vulnerable children domestically and abroad through adoption, foster care and missions. Jennifer Herzog of Hall Booth’s local office spearheaded the effort. Helpers in photo 1 included Jennifer’s husband’s grandmother and mom, as well as Jennifer’s niece and daughter—four generations serving together! ♦



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Skits and Suds Overflow at Ethics and Professionalism CLE

The GDLA Young Lawyers Committee hosted our most popular seminar in Atlanta just in time for members to beat the annual CLE hours deadline on March 14, 2019 at Hudson Grilled in Midtown Atlanta. “Skits & Suds” is a happy hour CLE that features distinguished GDLA members, judges, and ethics gurus reacting to and commenting on everyday ethical and professionalism dilemmas lawyers will likely face. The evening also included a beer and wine reception for networking.

Prior skits have included an auto accident in Springfield with The Simpsons™ characters, a slip and fall at a nightclub involving the “cast” of “The Savannah Shore,” and a fact pattern based on the reality cooking competition, Chopped!, where law firm partner “chefs” were given various ethical and professional “ingredients” during three different rounds to “cook” the best response for handling.

This year’s skit, “The Bachelor,” was a take-off on the hit ABC television show and featured GDLA members acting out different scenes. The actors included Young Lawyers Committee Chair Leah Parker, Payton Bramlett, Elissa Haynes, Chris Perniciaro and Wayne Satterfield.

We were honored to have Fulton State Court Judge Susan Edlein and State Bar General Counsel Paula Frederick on-hand to offer their wisdom as the skit unfolded.

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. ♦





Pictured are (left to right): 1. Leslie Becknell, Jan Sigman and Jennifer Adair. 2. James Hankins, Sally Bright, Bert Noble and Andrea Baker. 3. David Sawyer and Jared Jacobs. 4. Judge Susan Edlein and then-Vice President Dart Meadows; 5. the skits cast: Elissa Haynes, Payton Bramlett, Judge Edlein, Paula Frederick. Leah Parker, Chris Perniciaro and Wayne Satterfield. 6. Paula Frederick and Jamie McDowell. 7. Andy Treese, Brian Williams, Ashley Yagla and Megan Quisao. 8. Zach Matthews, then-President Hall McKinley and Glenn Bass.

GDLA's on Social Media

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www.gdla.org



GDLA Honors Coastal Judges at Reception

On April 4, 2019, GDLA hosted a reception to honor judges in the coastal region in Savannah at The Bohemian Hotel's rooftop lounge. Several Court of Appeals judges were also in town for the annual Savannah Bar Association boat ride. The GDLA Board of Directors convened the next day for its Spring Meeting (see page 44).



Pictured enjoying the reception are (left to right unless otherwise noted): 1. State Bar YLD Past President and GDLA member Nicole Leet, Court of Appeals Judge Elizabeth Gobeil, Court of Appeals Presiding Judge Sara Doyle, Court of Appeals Presiding Judge Anne Elizabeth Barnes, GDLA Executive Director Jennifer Davis and GDLA Vice President Pamela Lee. 2. GDLA Board member Tracie Macke and Eastern Circuit Superior Court Judge Benjamin Karpf. 3. GDLA Past President Sally Akins and Workers' Compensation Judge Jerome Stenger. 4. GDLA Past Presidents Johnny Foster, Warner Fox and Bubba Hughes. 5. State Bar Past President and GDLA member Pat O'Connor with retired Supreme Court Justice Carol Hunstein. 6. Stephanie McDonald, GDLA Board member Garret Meader and Court of Appeals (now Chief) Judge Chris McFadden. 7. Toombs County State Court Judge Tommy Smith and GDLA Board member Beth Boone. 8. GDLA Past President Sally Akins (center) with Jay Doyle and his wife, Court of Appeals Presiding Judge Sara Doyle. 9. Wiley Wasden, Chatham State Court Judge Herman Coolidge and then-GDLA Treasurer Jeff Ward. 10. Court of Appeals Judge Elizabeth Gobeil and GDLA Vice President Bill Casey; 11. GDLA Board member Tracy O'Connell, Past President Kirby Mason and Eastern Circuit Superior Court Judge John Morse, Jr.



GDLA Board of Directors Convenes in Savannah

The GDLA Board of Directors held its Spring Meeting at The Brice in Savannah from April 4-6, 2019. The meeting was held in conjunction with the reception honoring the coastal judiciary on April 4 at the Bohemian Hotel rooftop lounge (see coverage on pages 42-43).

Friday evening featured a cocktail party in the Juliette Salon followed by a group dinner off the lobby terrace. The Board met on Saturday morning during which the group surprised Executive Director Jennifer Davis with a Waterford crystal award recognizing her for 10 years of dedicated services.

Those present were **Executive Committee:** President Hall F. McKinley III, Drew Eckl & Farnham, Atlanta; President-Elect David N. Nelson, Chambless Higdon Richardson Katz & Griggs, Macon; Treasurer Jeffrey S. Ward, Drew Eckl & Farnham, Brunswick; Secretary George R. Hall, Hull Barrett, Augusta; Immediate Past President Sarah B. (Sally) Akins, Ellis Painter, Savannah; Past President Peter D. Muller, Goodman McGuffey, Savannah; Past President Matthew G. Moffett, Gray Rust St. Amand Moffett & Brieske, Atlanta. **Vice Presidents:** William T. “Bill” Casey, Jr., Swift Currie McGhee & Hiers, Atlanta; Pamela N. Lee, Swift Currie McGhee & Hiers, Atlanta; James D. “Dart” Meadows, Balch & Bingham, Atlanta. **Directors:** Beth Boone, Hall Booth Smith, Brunswick; Daniel C. Hoffman, Young Thagard Hoffman Smith & Lawrence, Valdosta; Garret W. Meader, Drew Eckl & Farnham, Brunswick; Erica L. Morton, Swift Currie McGhee & Hiers, Atlanta; Tracy O’Connell, Ellis Painter, Savannah; Jason D. Lewis, Chambless Higdon Richardson Katz & Griggs, Macon; Martin A. “Marty” Levinson, Hawkins Parnell & Young, Atlanta; Tracie G. Macke, Brennan Wasden & Painter, Savannah. **Past**



1



2



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Presidents: N. Staten Bitting, Jr., Fulcher Hagler, Augusta; Morton G. “Salty” Forbes, Forbes Foster & Pool, Savannah; John A. “Johnny” Foster, Forbes Foster & Pool, Savannah; W. Melvin “Mel” Haas III, Constangy Brooks & Prophete, Macon; Edward M. “Bubba” Hughes, Ellis Painter, Savannah; Kirby G. Mason, Hunter Maclean, Savannah. **Other:** Leah Fox Parker, Young Lawyers Committee Chair, Swift Currie McGhee & Hiers, Atlanta; and Jennifer M. Davis, GDLA Executive Director. ♦



Pictured at the GDLA Board of Directors Spring Meeting are: 1. (back row) President Hall McKinley with Past Presidents Peter Muller, Warner Fox, Bubba Hughes, (front row) Salty Forbes, Sally Akins, Mel Haas and Staten Bitting. 2. Past President Salty Forbes (right) and his wife, Lee (left), with Past President Johnny Foster and his wife, Bobbie. 3. Vice President Dart Meadows with Board member Marty Levinson. 4. Board member Tracy O'Connell and Nicole Leet. 5. Vice Presidents Pamela Lee and Bill Casey with Linda Haas and her husband, Past President Mel Haas; 6. Young Lawyers Committee Chair Leah Parker and her husband, Walter. 7. Treasurer Jeff Ward (center) with Past President Staten Bitting and his wife, Cindy. 8. Past Presidents Warner Fox and Sally Akins with President Hall McKinley. 9. Robb Morton and his wife, Board member Erica Morton, with Past President Bubba Hughes and his wife, Debbie.

Collision Specialists Hosts Networking Event at Top Golf

Leading up to Masters week, GDLA had its very own “practice rounds,” on April 11, 2019, the first day of the legendary Augusta tournament. Thanks to GDLA Platinum Sponsor Collision Specialists, Inc. (CSI), members enjoyed libations, hors d’oeuvres, and friendly competition at Top Golf in Midtown Atlanta. Below are highlights from the evening.



Pictured on the links are: 1. Trace Sexton (right) and Marty Levinson. 2. (l-r, front) Ally Escott, GDLA Platinum Sponsor Analiese Stopek of Collision Specialists, Leah Parker, (back row) Trace Sexton, Rachel Reed, Past President Warner Fox and Marty Levinson. 3. Jordan Raymond; 4. President Hall McKinley, State Bar Executive Director Jeff Davis, Quinn Bennett, Jordan Raymond, GDLA Executive Director Jennifer Davis and Jeff Ward. 5. Ally Escott.

GDLA Wins Second Prize at MBLC Diversity Cook-off

The Multi-Bar Leadership Council (MBLC) held its 7th Annual Taste of MBLC Diversity Celebration & Cook-Off competition on Saturday afternoon, April 27, 2019 at Hammond Park in Sandy Springs.

This year's theme is *Honey, I Shrunk the Attorneys*, which meant we had incorporate honey into our dish, plus competitors were judged on table design for an additional award. Our appetizer, air fryer honey goat cheese balls, was prepared by Diversity Chair Candis Jones of Lewis Brisbois in Atlanta. YL Chair Leah Parker of Swift Currie in Atlanta handled decorations for our table to make us look sufficiently shrunk.

Competitor bar associations were judged in three categories—appetizers, entrées and desserts—with first and second prizes being awarded. These real-life judges channeled their inner celebrity food critic to judge the culinary creations: U.S. District Court Judge Eleanor Ross; Court of Appeals Judge Yvette Miller; Fulton Magistrate Judge Lillian Caudle; and Cobb State Court Judges Bridgette Campbell and Maria Golick.

The MBLC was created in 2001 by then-Atlanta Bar Association President Seth Kirschenbaum to foster and improve relationships among local bar association members. Certainly the cook-off fulfilled that mission by adding a competitive spirit to the camaraderie!

Including GDLA, MBLC member organizations are: Atlanta Bar Association, Cobb County Bar Association, DeKalb Bar Association, DeKalb Lawyers Association, Gate City Bar Association, Georgia Asian Pacific American Bar Association, Georgia Association for Women Lawyers, Georgia Association of Black Women Attorneys, Georgia Hispanic Bar Association, Georgia Trial Lawyers Association, Gwinnett County Bar Association, Henry County Bar Association, North Fulton Bar Association, Sandy Springs Bar Association, South Asian Bar Association of Georgia, State Bar of Georgia Diversity Program, State Bar of Georgia Young Lawyers Division, South Asian Bar Association of Georgia, and Stonewall Bar Association. ♦



Pictured at the cook-off are 1. GDLA Board member and Diversity Chair Candis Jones, who served as our prize-winning chef, GDLA Young Lawyers Committee Chair Leah Parker, and Ally Escott; 2. Thanks to all the GDLA volunteers who helped: Andrew Horowitz, Leah Parker, Chuck Hoey, Candis Jones and Will Martin.

GDLA Sponsors National High School Mock Trial Competition

GDLA was proud to be among the sponsors who helped support our state's hosting the National High School Mock Trial Competition. It was held in Athens, Ga. from May 16-18, 2019.

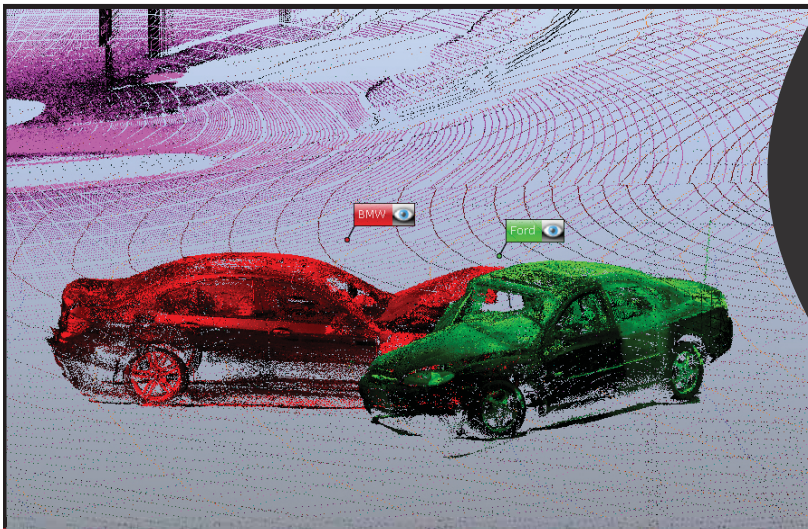
Each year approximately 30,000 students participate in local high school mock trial competitions throughout the United States, Guam, South Korea, and the Northern Mariana Islands. This event highlights the best teams competing for the championship title.

The four preliminary rounds of competition took place in the Athens-Clarke County Courthouse and Classic Center on Friday and Saturday. There were 23 trials happening simultaneously and each trial was overseen by a panel including a presiding judge and three evaluators. The volunteer pool totaled 92 panel

members per round. Then-Chief Judge Stephen Dillard, Court of Appeals of Georgia, presided over the final round, which pitted Nebraska against Tennessee. The winning team was Tennessee's Agathos Classical School.

All in all, lawyers and judges from across the state came together to pull off an extraordinary event that made the Georgia legal community shine, and GDLA was pleased to help in that effort. ♦

Pictured are: 1. Judge Stephen Dillard presided over the final round. 2. State Bar YLD Past President and GDLA member Nicole Leet and GDLA Past President Sally Akins admire the HSMT winner's trophy.



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GDLA and DRI Young Lawyers Hold Joint Happy Hour and Professional Clothing Drive

The Young Lawyers Committees of DRI and GDLA teamed up again for a joint DRI/GDLA Young Lawyers Happy Hour at RiRa Irish Pub in Midtown Atlanta on May 23, 2019. The event was organized by Brett Tarver of Jones Day in Atlanta and sponsored by GDLA Platinum Sponsor Engineering Systems, Inc. (ESI).

This year, GDLA Young Lawyers Committee Chair Leah Fox Parker organized a clothing drive as part of the event. Attendees brought gently-used professional clothing items to donate to Covenant House Georgia (CHGA). CHGA is an Atlanta shelter that works exclusively with youth and young adults suffering homelessness. In addition to providing shelter,

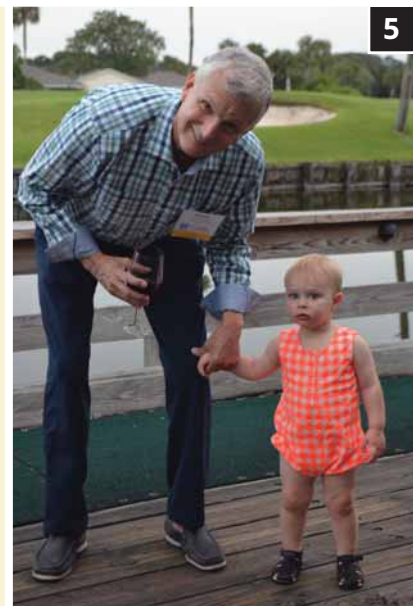
CHGA has numerous programs to help its youth obtain education and employment, including maintaining a “professional clothing closet” where its youth can obtain clothes to wear to job interviews and to work.

We expect to continue this now annual happy hour and keep its new charitable mission. Look for an announcement next spring. ♦



Pictured at the happy hour are: 1. Sara Lui and Elizabeth Brunette. 2. Michael Denney, Shelly Crochet, Donovan Eason and Bert Hummel. 3. Irvin Hernandez, Taryn Harper and Nick Harper. 4. Brett Tarver, Platinum Sponsor ESI’s Heather Slatton and GDLA YL Chair Leah Parker.

GDLA Held its 52nd Annual Meeting at Ponte Vedra Inn & Club in Florida, June 6-9, 2019



Events began on Thursday evening with the Welcome, Y'all Reception sponsored by BAY Mediation & Arbitration. Friday and Saturday mornings were marked by continuing legal education presentations as planned by Program Chair and President-Elect Dave Nelson. Friday evening was the President's Reception, honoring outgoing President Hall McKinley for his service; it was sponsored by Veritext. FORCON sponsored the closing reception and dinner, which Mother Nature drove indoors but spirits were not dampened.

During the Business Meeting on Saturday, GDLA members unanimously accepted the report of the Nominating Committee, chaired by Past President Peter Muller, electing the 2019-2020 officers and Board of Directors (see page 52). David N. "Dave" Nelson of Chambliss Higdon

Richardson Katz & Griggs in Macon took the reins as GDLA President. The other officers are: President-Elect Jeffrey S. "Jeff" Ward of Drew Eckl & Farnham in Brunswick; Treasurer George R. Hall of Hull Barrett in Augusta; and James D. "Dart" Meadows of Balch & Bingham in Atlanta. All of the officers were sworn in by U.S. District Court Judge Tripp Self.

Also on Saturday, Past President Steven J. Kyle of Bovis Kyle Burch & Medlin in Atlanta received the third GDLA Distinguished Service Award. Outgoing President Hall McKinley then presented Karen K. Karabinos of Drew Eckl & Farnham in Atlanta with the President's Award. See page 55 for more details.

The following pages showcase highlights from the conference. Mark your calendar for the 53rd GDLA Annual Meeting set for June 4-7, 2020 at The Breakers in Palm Beach, Fla. ♦

WELCOME, Y'ALL!
OPENING RECEPTION
 PARTICIPATING SPONSOR
BAY Mediation & Arbitration



Pictured at the Welcome Reception (left to right unless otherwise noted): 1. Courtney and Jim Hollis with Vice President Dart Meadows and his wife, Carol. 2. Libby Watkins and her husband, Tom, with Annie and Jim Purcell. 3. President Hall McKinley celebrates the last night of his term with Garret Meader, Judge Tripp Self and Treasurer Jeff Ward. 4. Lawson and Taylor Bittick with Jessica and Erik Haygood. 5. Past President Warner Fox with his first grandchild, Fox Parker. 6. President Hall McKinley (right) with his son, Hall IV, and daughters, Allison and Caroline. 7. BAY Mediation's Michaela and Scott Young (left) with Past President Walter McClelland and his wife, Kathy. 8. Pamela Lee, Erica Morton and Victoria Shaw. 9. Past President Steve Kyle with Lauren and Eric Connelly. 10. Past President Lynn Roberson and her husband, Judge Henry Newkirk. 11. Past President Jerry Buchanan (second from left) with his wife, Carolyn (left), Secretary George Hall and his wife, Margaret. See next page for more photos.

52nd GDLA Annual Meeting: Welcome Reception



Pictured at the Welcome Reception on Thursday evening are: 12. Lauren and Wes Childs with Jason and Annie Lewis; 13. The Gower Wooten & Darneille firm was well represented with Tommy Johnson, Jason Darneille, Anne Gower and Trent Edwards. See previous two pages for more photos from the event. Thanks to BAY Mediation & Arbitration Services for once again sponsoring the evening. It is always a great way to kick off the GDLA Annual Meeting.

2019-2020 OFFICERS AND BOARD OF DIRECTORS

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David N. “Dave” Nelson,
*Chambless Higdon Richardson
Katz & Griggs, Macon*

President-Elect:

Jeffrey S. “Jeff” Ward,
*Drew Eckl & Farnham,
Brunswick*

Treasurer:

George R. Hall,
Hull Barrett, Augusta

Secretary:

James D. “Dart” Meadows,
Balch & Bingham, Atlanta

EXECUTIVE COMMITTEE

(Includes the officers and three most recent past presidents)

Immediate Past President:

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

Past President 2017-2018:

Sarah B. “Sally” Akins,
Ellis Painter, Savannah

Past President 2016-2017:

Peter D. Muller, *Goodman
McGuffey, Savannah*

VICE PRESIDENTS

Pamela Lee, *Swift Currie
McGhee & Hiers, Atlanta*

William T. “Bill” Casey, Jr.,
*Swift Currie McGhee &
Hiers, Atlanta*

James S.V. Weston,
Trotter Jones, Augusta

Ashley Rice,
*Adelman Castilla Hiestand
& Prout, Atlanta*

DIRECTORS

Northern District

Martin A. “Marty” Levinson
(2020), *Hawkins Parnell &
Young, Atlanta*

Candis Jones (2021),
Lewis Brisbois, Atlanta

Erica L. Morton (2021),
*Swift Currie McGhee &
Hiers, Atlanta*

Middle District

Jason D. Lewis (2020),
*Chambless Higdon Richardson
Katz & Griggs, Macon*

Jason C. Logan (2021), *Con-
stangy Brooks Smith &
Prophete, Macon*

C. Jason Willcox (2022),
*Moore Clarke DuVall &
Rodgers, Albany*

Southern District

James W. “Jim” Purcell (2020),
Fulcher Hagler, Augusta

Tracie Grove Macke (2021),
*Brennan Wasden & Painter,
Savannah*

M. Beth Boone (2022),
*Hall Booth Smith,
Brunswick*

State-at-Large (one-year terms)

Daniel C. “Dan” Hoffman,
*Young Thagard Hoffman
Smith & Lawrence, Valdosta*

Zach Matthews
*McMickle Kurey & Branch,
Alpharetta*

Garret W. Meader
*Drew Eckl & Farnham,
Brunswick*

Tracy O’Connell
Ellis Painter, Savannah

Joseph D. “Joe” Stephens
Cowsert Heath, Athens

Anne D. Gower
*Gower Wooten &
Darneille, Atlanta*

52nd GDLA Annual Meeting: Educational Program



Friday and Saturday mornings are reserved for the educational programming, as planned this year by President-Elect Dave Nelson. Meanwhile, GDLA's Gold and Platinum Sponsors showcased their offerings in the exhibit hall. Pictured are: 1. U.S. District Court Judge Tripp Self discussed professionalism. 2. The GDLA Women Litigators Section led by Chair Karen Karabinos (left) organized a panel to explore pathways to partnership for women and diverse lawyers. Panelists included Tracy O'Connell, Douglas Burrell, Alycen Moss, Taylor Poncz and Past President Lynn Roberson. 3. Robert Edmondson of Platinum Sponsor S-E-A, 4. Mitch Garber of Platinum Sponsor ESI, and 5. John Leffler of Platinum Sponsor FORCON explained how to decipher evidence using experts. 6. Will Martin, Zach Matthews and Candis Jones provided an update on medical funding companies and reasonableness of medical fees. 7. Erica Morton, Jason Darneille and Anne Gower presented trial tactics for high exposure cases. 8. Will Martin and Jeff Wasick; and 9. Jason Lewis and Trent Edwards.



52nd GDLA Annual Meeting: President's Reception



**PRESIDENT'S
RECEPTION**
PARTICIPATING SPONSOR
Veritext

Pictured at the President's Reception on Friday evening are: 1. GDLA Platinum Sponsor Veritext's Jon Woody with President Hall McKinley; 2. Jacqueline Kennedy-Dvorak with her husband, Doron, and their children, Helena and Benjamin; 3. Tracie and Joe Macke with Past President Bubba Hughes and his wife, Debbie; 4. Ashley Rice with her husband, Brandon, and their daughters, Marielle and Olivia; 5. Past Presidents Steve Kyle, Walter McClelland and Staten Bitting.

52nd GDLA Annual Meeting: Business Meeting & Awards



Before the CLE commenced on Saturday morning, we held the annual Business Meeting for members. This is a time to reflect on the prior year and to honor those who contributed to the success of the organization. It also marks the changing of the guard with the new Board of Directors and officers being elected after a Nominating Committee report. Pictured are: 1. Past President Steve Kyle, recipient of the third Distinguished Service Award, with Matt Moffett, who introduced the award winner's countless contributions to the Association. 2. Outgoing President Hall McKinley (center) holds his gavel award and mint julep cup alongside incoming President Dave Nelson (left) and U.S. District Court Judge Tripp Self. 3. Hall McKinley presents Karen Karabinos with the President's Award for her visionary leadership in creating and chairing the GDLA Women Litigators Section. 4. Judge Self swears in the new officers—President Dave Nelson, President-Elect Jeff Ward, Treasurer George Hall and Secretary Dart Meadows. 5. Past President and DRI State Rep Matt Moffett (right) presents Hall McKinley with the DRI Exceptional Performance Award.

52nd GDLA Annual Meeting: Fun in the “Sun!”





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Everyone adjourned to the beach on Friday and Saturday afternoons. The Young Lawyers (YL) Committee organized a cornhole tournament. 1. Anne Gower and Jason Logan. 2. Past President Jimmy Singer and his wife, Patti. 3. YL Chair Leah Parker, ESI's Mitch Garber, CSI's Analiese Stopek and Erica Morton. 4. Cornhole! 5. ESI's Doug Locker and Mitch Garber with Past President Matt Moffett. 3. Past President Warner Fox and Robb Morton, and 7. Marty Levinson and Tyler Morton were in the championship round with the father-son duo taking first prize.



7

**HOSPITALITY SUITE
AND CORNHOLE
TOURNAMENT**

PARTICIPATING SPONSORS
**Collision Specialists, Inc.
and ESI**

52nd GDLA Annual Meeting: Closing Reception & Dinner



**CLOSING RECEPTION
AND DINNER**

PARTICIPATING SPONSOR
FORCON International

Saturday's closing reception and dinner was a blast even though Mother Nature forced us inside. 1. Susan and Bill VerEecke (with FORCON), Secretary Dart Meadows and his wife, Carol; 2. Executive Director Jennifer Davis, President-Elect Jeff Ward, Judge Tripp Self and his wife, Amy; 3. Lawson and Taylor Bittick, Jessica and Erik Haygood, and Annie and Jason Lewis.

Join Us at the 53rd GDLA Annual Meeting!

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June 4-7,
2020



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Under the Gold Dome

Continued from page 20

ing cases on August 1, 2020. O.C.G.A. § 15-5A-6(b).

The Court will be headquartered in Atlanta or in Macon-Bibb County, O.C.G.A. § 15-5A-2(b), but it may conduct pre-trial proceedings essentially anywhere in the state since the judge is encouraged to conduct such proceedings “via video, telephone, or other efficient technological means as may be deemed necessary or useful to conserve the resources of the parties or the court.” O.C.G.A. § 15-5A-2(c)(1). Trials are by default non-jury, but any party may request a trial by jury. O.C.G.A. § 15-5A-2(d). Trials must be conducted in the county where venue is provided by law, except that trials also may be conducted in any county agreed upon by all parties. O.C.G.A. § 15-5A-2(e).

The Court has subject-matter jurisdiction over: (1) certain claims arising under the Georgia Trade Secrets Act of 1990, the Georgia Uniform Securities Act of 2008, the Uniform Commercial Code, and the Georgia Business Corporation Code, among many other similar laws; (2) claims that relate to the internal affairs of businesses, including but not limited to claims involving the rights or obligations between or among business participants regarding the liability or indemnity of business participants, officers, directors, managers, trustees, or partners; (3) claims for professional malpractice that arises out of a business dispute; (4) tort claims between or among business entities or individuals as to their business or investment activities relating to contracts, transactions, or relationships between or among such entities or individuals; (5) claims for breach of contract, fraud, or misrepresentation between businesses that arise out of business transactions or relationships; (6) claims arising from e-commerce agreements, technology

licensing agreements, or any other agreement involving the licensing of any intellectual property right; (7) claims involving commercial real property; and (8) many others. O.C.G.A. § 15-5A-3(a)(1)(A).

The Court specifically lacks subject-matter jurisdiction over: (1) claims for physical, mental, or emotional injury; (2) claims involving physical contact of an insulting or provoking nature with the body of another person; (3) claims involving a threat of physical violence to another person; (4) any matter arising under Title 19 of the Code; (5) residential landlord-tenant disputes; (6) foreclosures; (7) individual consumer claims involving goods or services used primarily for personal, family, or household purposes, except that the Court has subject-matter jurisdiction over mass actions or class actions involving such claims; and (8) collections in matters involving a family-owned farm entity or an individual farmer. O.C.G.A. § 15-5A-3(b).

If money damages are requested and the claim involves commercial real property, the amount in controversy must be at least \$1,000,000. O.C.G.A. § 15-5A-3(a)(1)(B)(i). But if money damages are requested and the claim does not involve commercial real property, the minimum amount in controversy must be only \$500,000. O.C.G.A. § 15-5A-3(a)(1)(B)(ii). For claims requesting only equitable relief, there is no amount-in-controversy requirement. O.C.G.A. § 15-5A-3(a)(1)(A).

A case may be commenced in the Court by the filing of a complaint, or a case that was previously filed in a superior or state court may be removed to the Court by the consent of all parties or upon motion by any party. O.C.G.A. § 15-5A-4(a). The filing fee is \$3,000. O.C.G.A. § 15-5A-5(a). In a case commenced by the filing of a complaint, any defendant may file a motion to transfer the case to a supe-

rior or state court where venue is proper. O.C.G.A. § 15-5A-4(a)(1). However, a case involving a contract claim or dispute where all of the parties are business entities will not be transferred from the Court if the contract at issue provides that the claim or dispute shall be litigated in the Court. *Id.* Interestingly, while a lack of subject-matter jurisdiction will keep a case out of the Court, a case that is within the Court’s subject-matter jurisdiction will not necessarily stay in the Court. O.C.G.A. § 15-5A-4(b).

The Court shall consist of only one judge who must have been a resident of Georgia and a citizen of the United States for at least seven years, must have been admitted to practice law in Georgia for at least seven years, and must have at least fifteen years of experience as an attorney or a judge in complex business litigation. O.C.G.A. § 15-5A-6(a), (c). The judge shall be appointed by the Governor, subject to approval by a majority of the House and Senate Judiciary Committees. O.C.G.A. § 15-5A-7(a). The judge shall serve for a term of five years and may be reappointed for any number of consecutive terms as long as he or she satisfies the qualifications for appointment at the time of each appointment. O.C.G.A. § 15-5A-7(b)(3).

When the idea of a statewide business court was put to Georgia voters in November 2018 as a proposed constitutional amendment, the question posed was:

Shall the Constitution of Georgia be amended so as to create a state-wide business court, authorize superior court business court divisions, and allow for the appointment process for state-wide business court judges in order to lower costs, improve the efficiency of all courts, and promote predictability of judicial outcomes in certain complex business disputes for the benefit of all citizens of this state?

Only time will tell whether the Court fulfills these promises.

House Bill 128: Settlement of Medical Malpractice Claims

In Georgia, as in many other states, professional liability insurance policies for physicians typically include a clause that requires the physician's consent before the insurer may offer any payment to settle a medical malpractice claim. This is because any settlement of a medical malpractice claim paid by a physician's insurer must be reported to the Georgia Composite Medical Board, which is the licensing agency for physicians and other healthcare professionals in Georgia, and to the National Practitioner Data Bank, which is a confidential database maintained by the U.S. Department of Health & Human Services that contains information about medical malpractice payments and certain adverse actions related to physicians and others. O.C.G.A. § 33-3-27(b); 42 U.S.C. §§ 11131, 11134; 45 C.F.R. §§ 60.1-60.22.

Upon receipt of a report under O.C.G.A. § 33-3-27(b) that a physician has been the subject of (1) a judgment or a settlement in excess of \$100,000, or (2) two or more judgments or settlements, regardless of the combined amount, the Georgia Composite Medical Board is required to investigate the physician's fitness to practice medicine. O.C.G.A. § 43-34-8(j). In addition, the Board is required to maintain a publicly available profile on every physician in the state, and the profile is required to include, among other things, information about certain settlements of medical malpractice claims, information about certain judgments and awards in medical malpractice lawsuits and arbitrations, and a description of certain disciplinary action imposed by any regulatory board. O.C.G.A. § 43-34A-3.

The reporting requirement and the possibility of public discipline

and/or public disclosure of a settlement or judgment create an incentive for physicians not to consent to the settlement of medical malpractice claims, even when settlement would otherwise be prudent. A high-low agreement could make a settlement more palatable for the physician, but these disincentives still exist.

According to the NPDB Guidebook, the payment of the low amount pursuant to a high-low agreement does not have to be reported to the National Practitioner Data Bank if there is a verdict for the physician at trial. HB 128 mirrors this rule by amending O.C.G.A. § 33-3-27(b) to provide that the payment of the low amount pursuant to a high-low agreement does not have to be reported to the Georgia Composite Medical Board if the jury finds for the physician at trial. HB 128 also amends O.C.G.A. § 43-34-8(j) by excluding the payment of the low amount pursuant to a high-low agreement from payments that must be reported to the Board (again, only if there is a verdict for the physician at trial). Finally, HB 128 amends O.C.G.A. § 43-34A-3 by excluding the payment of the low amount pursuant to a high-low agreement from payments that must be disclosed in the physician's public profile. As with the other changes, this exclusion applies only when there has been a verdict for the physician at trial.

HB 128 seems to be an attempt to encourage settlement of medical malpractice claims by offering physicians an incentive to enter into high-low agreements. When there is a high-low agreement and the jury returns a verdict for the physician, he or she is still required to pay the low amount but is not required to report the payment to the Georgia Composite Medical Board. Because such a payment is not reported to the Board, it is no longer a basis for disciplinary action and is no longer included among the settlements that are included in the physician's public

profile. (Note, however, that HB 128 does not exempt from reporting a verdict for the plaintiff that is less than the low amount in a high-low agreement.) For these reasons, HB 128 should—at least in theory—make settlements of medical malpractice claims more likely, but only time will tell whether this theory becomes reality.

House Bill 135: Worker's Compensation Act

The worker's compensation act distinguishes between catastrophic and non-catastrophic injuries. For catastrophic injuries, there is no limit on the amount of time for which the employee may receive medical benefits. O.C.G.A. § 34-9-200(a)(1). For non-catastrophic injuries, however, the maximum amount of time for which the employee may receive medical benefits is 400 weeks from the date of injury. O.C.G.A. § 34-9-200(a)(2). HB 135 adds an exception to this 400-week maximum for maintenance, repair, revision, replacement, or removal of a prosthetic device, a spinal cord stimulator, an intrathecal pump device, durable medical equipment, orthotics, corrective eyeglasses, and hearing aids, provided that the device or item was originally furnished within 400 weeks of the date of injury. This exception is codified at O.C.G.A. § 34-9-200(a)(3).

HB 135 also increases certain disability and death benefits. It amends O.C.G.A. § 34-9-261 to increase the maximum temporary total disability benefit from \$575 per week to \$675 per week. It amends O.C.G.A. § 34-9-262 to increase the maximum temporary partial disability benefit from \$383 per week to \$450 per week. Finally, it amends O.C.G.A. § 34-9-265 to increase the maximum death benefit for a surviving spouse who was the employee's sole dependent at the time of death, and where there is no other dependent for one year or less after the em-

ployee's death, from \$230,000 to \$270,000.

Senate Bill 29: Immunity of Local Government Entities, Officers, and Employees for Motor Vehicle Claims

The sovereign immunity of local government entities for a loss arising out of the negligent use of a covered motor vehicle is waived for incidents occurring since January 1, 2008, up to the following amounts: (1) \$500,000 for bodily injury or death of one person in a single occurrence, (2) an aggregate of \$700,000 for bodily injury or death of two or more persons in a single occurrence, and (3) \$50,000 for property damage in a single occurrence. O.C.G.A. § 36-92-2(a)(3). In addition, “[a]ny local government officer or employee who commits a tort involving the use of a covered motor vehicle while in the performance of his or her official duties is not subject to lawsuit or liability therefor.” O.C.G.A. § 36-92-3(a). Until SB 29 became law, the term “local government officer or employee” was defined as “an officer, agent, servant, attorney, or employee of a local government entity,” and the term “local government entity” was defined as “any county, municipal corporation, or consolidated city-county government of this state.” O.C.G.A. § 36-92-1(3) and (4).

In *Davis v. Morrison*, 344 Ga. App. 527 (2018), the plaintiff and a Gordon County Deputy Sheriff were involved in a motor vehicle accident. The plaintiff argued that his claim against the deputy was not barred because sheriff's offices are not “local government entities” and deputy sheriffs are not “local government officers or employees.” The Court of Appeals rejected this argument and held that the plaintiff's claim was barred by O.C.G.A. § 36-92-3(a).

SB 29 made a simple change to O.C.G.A. § 36-92-1(4). It designated the existing definition as subsection

4(A) and added the following language as new subsection 4(B): “A sheriff, deputy sheriff, or other agent, servant, or employee of a sheriff's office.” Although this new language was arguably not necessary because of the holding in *Davis*, the General Assembly stated in the preamble to SB 29 that one of its purposes was “to clarify and conform such waiver of sovereign immunity in response to *Davis*.” Thus, whatever ambiguity survived after *Davis* has now been eliminated. Sheriff's offices and deputy sheriffs now enjoy the same immunities enjoyed by other local government entities, officers, and employees with respect to motor vehicle claims.

Senate Bill 31: Immunity for Rescue of Person or Pet from Locked Vehicle

Following numerous news reports over several years about the danger of small children and pets being left inside vehicles on hot days, the General Assembly amended O.C.G.A. § 35-1-7, which provides that “law enforcement officer[s] shall not be liable at law for any action or actions done while performing any duty at the scene of an emergency except for gross negligence, willful or wanton misconduct, or malfeasance.” This statute now includes a definition of “emergency” to specify that rescuing a person or a pet from a locked vehicle when allowing the person or the pet to remain in the vehicle presents a clear and imminent danger to the person's or the pet's life or health. Thus, a law enforcement officer who breaks into a vehicle to rescue a person or a pet in such a situation will not be liable for the damage to the vehicle unless doing so constitutes gross negligence, willful or wanton misconduct, or malfeasance. Interestingly, a similar bill—SB 32—would have provided similar immunity for “any person,” not just law enforcement officers, but that bill was defeated in the House.

TRY AGAIN NEXT YEAR

House Bill 311: Sovereign Immunity

During the last five years, the Supreme Court decided a trilogy of cases involving the sovereign immunity of the state. In those cases, the Supreme Court held that the state, including its departments and agencies and its officers in their official capacities, is immune from lawsuits seeking injunctive and declaratory relief, including lawsuits challenging the constitutionality of a law. *Lathrop v. Deal*, 301 Ga. 408 (2017); *Olvera v. Univ. Sys. of Ga.'s Bd. of Regents*, 298 Ga. 425 (2016); *Ga. Dep't of Natural Resources v. Ctr. for a Sustainable Coast, Inc.*, 294 Ga. 593 (2014).

At least since 2015, the General Assembly has attempted to legislatively overrule the Supreme Court's decisions on this issue. In 2015, the House passed a bill that would have waived the state's sovereign immunity from claims for injunctive and declaratory relief. The Senate took no action on that bill in 2015, and so it carried over to 2016. Although the Senate and the House eventually passed a substitute bill, Governor Deal vetoed it. A similar bill was introduced in the House in 2018, but that bill died in committee.

HB 311 was the General Assembly's latest effort to waive the state's sovereign immunity from claims for injunctive and declaratory relief. This bill would have created a new article in the Georgia Tort Claims Act that provides for a waiver of sovereign immunity by the state, a state governmental entity, or an officer or employee of the state in his or her official capacity from claims for injunctive and declaratory relief, including claims challenging the constitutionality of a statute under either the federal or state constitution. This bill also would have created a new statutory scheme for the waiver of sovereign immunity from claims

for injunctive and declaratory relief against cities, counties, other “political subdivision governmental entities,” and their officers and employees in their official capacity. Finally, this bill would have added a new paragraph to O.C.G.A. § 5-6-34(a) that would have overruled the Supreme Court’s decision in *Rivera v. Washington*, 298 Ga. 770 (2016), by allowing the denial of any type of immunity to be directly appealable, though such an appeal would have been limited to one per party per case.

HB 311 overwhelmingly passed the House and the Senate, but Governor Kemp vetoed it. In his veto message, Governor Kemp explained his decision as follows: “In considering the possible ramifications of a waiver, it is essential that the provisions be appropriately tailored in conjunction with the executive branch to provide pathways for judi-

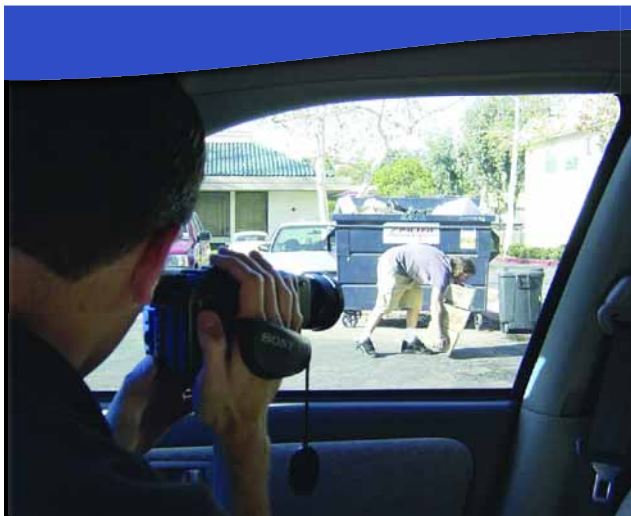
cial intervention without unduly interfering with the daily operations of the state.”

House Resolution 256: Proposed Constitutional Amendment to Allow Limits on Jury Awards

In light of the Supreme Court’s decision in *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, 286 Ga. 731 (2010), which held that a statutory cap on noneconomic damages violated the right to a trial by jury in the Georgia Constitution, it is clear that capping compensatory damages in most cases is not permitted absent a constitutional amendment. HR 256 was an attempt to amend the Georgia Constitution to allow the General Assembly to “provide by law for limitations on the amount of awards allowable by a jury,” but it stalled in the House Judiciary Committee and never received a vote.

House Bill 171: Seat Belt Defense

The seat belt defense is a rule of evidence that allows the defendant to introduce evidence of the plaintiff’s failure to use an available seat belt. The Court of Appeals explicitly recognized this defense in 1987 when it held that “evidence of [the plaintiff’s] use or failure to use seat belts in regard to whether such failure to use them might have contributed to the extent of her injuries was likewise relevant in determining damages.” *Cannon v. Lardner*, 185 Ga. App. 194, 195 (1987) (en banc) (physical precedent). In 1988, however, the General Assembly enacted a statute that abrogated the seat belt defense. Under the current version of that statute, “[t]he failure of an occupant of a motor vehicle to wear a seat safety belt in any seat of a motor vehicle which has a seat safety belt or belts shall not be considered evidence of negligence or causation, shall not otherwise be considered by the finder




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of fact on any question of liability of any person, corporation, or insurer, shall not be any basis for cancellation of coverage or increase in insurance rates, and shall not be evidence used to diminish any recovery for damages arising out of the ownership, maintenance, occupancy, or operation of a motor vehicle.” O.C.G.A. § 40-8-76.1(d).

Although the seat belt defense is unfair to defendants and the arguments against it are no longer valid, *see* Jacob E. Daly, *The Seat-Belt Defense in Georgia*, 65 MERCER L. REV. 19, 20-25, 33-37 (2013), bills introduced in the General Assembly in 2009 and 2013 that would have reinstated it have failed. *Id.* at 31-32. A group of companies and professional organizations tried again this year, but the outcome was the same. Separate bills were introduced in the House (HB 457) and in the Senate (SB 148) and assigned to each chamber’s Judiciary Committee. Both would have amended O.C.G.A. § 40-8-76.1(d) to allow a person’s failure to use an available seat belt to be considered as evidence of failure to mitigate damages, assumption of the risk, negligence, comparative negligence, contributory negligence, apportionment of fault, or causation.

Unfortunately, neither Judiciary Committee approved its bill by crossover day, which is the day by which a bill usually must pass its chamber in order to be eligible to be considered by the other chamber, but the cause was kept alive when the substance of these bills was inserted into HB 171 as an amendment. HB 171 was approved by the Senate Public Safety Committee, but when it came for a floor vote by the entire Senate, one of the Senators from the Senate Judiciary Committee introduced a “poison pill” amendment that would have allowed the defendant’s traffic citation and any judicial determination regarding that citation to be admissi-

ble on the issues of fault, negligence, causation, liability, and damages, but only if the defendant first introduced evidence of the plaintiff’s failure to use an available seat belt. This amendment was adopted, and it caused HB 171 to be voted down by one vote in the Senate.

Senate Bill 155: Phantom Damages

Phantom damages are the difference between the amount charged and the amount paid for medical treatment. For example, if a doctor charges \$1,000 for a procedure but accepts \$500 as full payment, the unpaid \$500 represents phantom damages. Under existing law, the plaintiff in a personal injury case is allowed to present evidence of the \$1,000 charge, but the defendant is not allowed to present evidence of the doctor’s acceptance of \$500 as full payment. As a result, the plaintiff may receive a windfall by recovering more than the actual cost of the treatment. SB 155 attempted to eliminate this inequity by limiting the damages that could be recovered for medical treatment to: (1) the amount actually paid by or on behalf of the plaintiff, and (2) the amount necessary to satisfy unpaid charges still owed to the plaintiff’s healthcare providers. Despite the obvious unfairness of phantom damages, SB 155 died in the Senate Judiciary Committee.

Senate Bill 189: Production of Medical Records by Providers

SB 189 would have made several favorable changes to the rules regarding production of medical records by providers:

- It would have amended O.C.G.A. § 31-33-2(a)(2) to require a medical provider to produce records in response to a request made pursuant to O.C.G.A. § 9-11-34(c) in electronic format, unless the requestor specifically requested production in paper format.

- It would have amended O.C.G.A. § 31-33-2(b) to specify that a request made pursuant to O.C.G.A. § 9-11-34(c) is not required to be accompanied by a HIPAA-compliant authorization or a signed written authorization as prescribed by O.C.G.A. § 31-33-2(d).
- It would have added a new subsection (f) to O.C.G.A. § 31-33-2 to impose monetary penalties on providers that do not timely produce records in response to a request made pursuant to O.C.G.A. § 9-11-34(c).
- It would have amended O.C.G.A. § 31-33-3(a) and (b) to establish the fees that could be charged by providers for production of medical records.
- It would have amended O.C.G.A. § 31-33-8(a) to require providers to create, maintain, transmit, receive, and store medical records in electronic format.

SB 189 stalled in the Senate Health and Human Services Committee and never received a vote.

Senate Bill 203: Civil Procedure

SB 203 would have made several common-sense changes to the rules of civil procedure:

- O.C.G.A. § 9-10-5 would have been amended to require all jury instructions to be provided in writing to the jurors and to require the judge to respond in writing to all written questions posed by juries.
- O.C.G.A. § 9-11-8 would have been amended to require the use of scheduling orders.
- O.C.G.A. § 9-11-12(j) would have been amended to provide that the automatic stay of discovery imposed by the filing of a motion to dismiss would remain in place until the court ruled on the motion.
- O.C.G.A. § 9-11-15(a) would have been amended to be consistent

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with the federal rule governing amended pleadings. That is, a pleading would have been allowed to be amended once as a matter of right within 30 days and thereafter only with leave of court or consent of the other party.

- O.C.G.A. § 9-11-26 would have been amended to define the scope of discovery consistent with the corresponding federal rule. That is, proportionality considerations would have helped to define the scope of discovery instead of “reasonably calculated to lead to the discovery of admissible evidence.” Also, the preparation of a privilege log would have been required if documents were withheld from production on the basis of a privilege, and a procedure would have been imposed for how to deal with the inadvertent production of privileged documents.

- O.C.G.A. § 9-11-34 would have been amended to modernize the language and to make it consistent with the corresponding federal rule. Substantively, the amended rule would have required more specific responses, including a statement of whether anything was withheld on the basis of a privilege.
- A new subsection would have been added to O.C.G.A. § 9-11-37 to provide sanctions for spoliation of electronically stored information.

Although reasonable attorneys could quibble over the details of some of these amendments, these amendments are not particularly controversial as a general matter. Nevertheless, SB 203 was another fatality of the Senate Judiciary Committee.

CONCLUSION

On balance, 2019 was a good year for clients of members of the GDLA. Of the bills that were identified as having a direct impact on clients of members of the GDLA, the ones that became law should have a favorable impact. However, the bills that did not become law would have had a more widespread impact had they become law. Thus, although clients of GDLA members should be happy with the outcome of this year’s session of the General Assembly, they have more to look forward to next year since the unenacted legislation automatically carries over to next year’s session. ♦

Jacob E. “Jake” Daly is of counsel at Freeman Mathis & Gary in Atlanta, practicing in the firm’s Tort and Catastrophic Loss and Governmental Liability section. He primarily represents private companies, government entities, and their employees in personal injury litigation. Mr. Daly chairs GDLA’s Legislative Committee.



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Incoming President

Continued from page 5

firm's young associates to attend Trial & Mediation Academy, judicial receptions, and to take the opportunity to learn from and network with our organization's members, who include leading litigators in Georgia. No other organization provides a similar opportunity to meet, learn from, or form friendships with the leaders of the civil defense bar in Georgia.

As I set out to guide this organization for the next year, I hope to continue to grow GDLA while enhancing its visibility and impact throughout the state. I want to provide our members with more opportunities to meet with the bench and bar. There have also been out-

standing past initiatives focused on advancing the interests of the diverse members of our organization and I look forward to continuing to support those and other efforts.

I also want to acknowledge those who have supported me along my journey to becoming a leader in this organization, and provided their unwavering support to me and GDLA. I owe a great deal to my partners and others at Chambless Higdon Richardson Katz & Griggs who have supported my efforts and volunteered their time when asked. Then, there are those leaders in GDLA who have given me the opportunity to grow with this organization and placed their trust in me. Finally, I couldn't have achieved my success with GDLA without the support of my

wife, Jennifer, and our family. They have supported my efforts for years without complaint.

In conclusion, at a time when membership in voluntary bar organizations is no longer an expectation, GDLA continues to stand out and grow because we provide outstanding value to our members and their clients. I look forward to being a careful steward of this organization and all for which it stands.

For the defense,



David N. Nelson
Chambless Higdon Richardson
Katz & Griggs, Macon

Outgoing President

Continued from page 5

the State Bar, following a contested statewide race. We are proud of these extraordinary leaders who are serving the broader legal community.

I commented during the President's Address at the Annual Meeting that the goal of every President is to leave the Association a little better after their year of service, and I think we accomplished that this year. I thank our great Board of Directors and Executive Director Jennifer Davis for their support during the past year and for their role in the successes we shared.

I leave the Association in the very capable hands of Dave Nelson and wish him all the best for the next year. We have been blessed over the years to have great leadership. I was fortunate to be with many of our Past Presidents at the Annual Meeting and I am very proud to join their ranks. Thank you again for the opportunity to serve.

For the defense,



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How can we help you and your clients?

Medical Malpractice

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of my thoughts about ways to improve how we try medical cases in this new climate.

Reconsider your jury selection questioning of potential jurors. I do not think it is sufficient to simply plant defense seeds in the juror's minds during jury selection. There are people on your jury pool who seem safe, but in today's climate, may or may not be. You will miss some very biased jurors by not asking the most difficult questions about your case. Ask potential jurors about the concerns you have about your case that keep you up at night. For example, "Does anyone think that a doctor should talk to a patient about a C-section if there is *any* sign that the baby is in distress?" In a recent patent trial, a federal judge asked jurors the following two questions: "Who believes there is extraterrestrial life?" and "Who believes that extraterrestrials have come to earth?" Jurors raised their hands to these questions and were identified as individuals who were skeptical of both science and institutions. Only one was struck for cause, but this was valuable information to all parties. Ask questions about concepts you hope jurors do not believe. For example: "Who thinks doctors downplay risks to get patients to agree to have surgery?" and "Does anyone have concerns about the reasons why Doctors prescribe medications?"

With respect to the defendant doctor, traditionally a physician who had military experience was considered someone with impeccable background. Likewise, a physician who had foreign medical training was handicapped at trial. I do not believe either of these dogmas are true anymore. Younger jurors do not revere military service as much as older jurors and younger jurors are much more forgiving of foreign medical education and training. The same is true

for experts. A traditional concept that I think is fraught with peril is the local defense expert. Traditionally, a local defense expert supporting another doctor in the community favored the defense. I no longer think this is the case. Modern jurors are skeptical that local experts are helping out other doctors and hospitals in the community, even if they are competitors. Less charismatic and experienced experts who come from well-known institutions are often perceived as better experts than the local expert, even when the local expert is demonstrably more competent.

Back to the greater good. Certainly, helping a catastrophically injured plaintiff can be seen as doing something for the greater good. This is the justice most plaintiffs' attorneys speak of in trial. Competing against this concept doesn't work. It's an uphill battle to argue that a defense verdict serves the greater good in an individual case. Nevertheless, defendants can embrace the greater good. The greater good is served by having hospitals and doctors available to everyone to provide responsible care and appropriate treatment for all people in the community. In this respect, the greater good is achieved by not over-testing a patient. The greater good is achieved by putting patient care over documentation. The greater good is also achieved by listening to patients and sharing information among the care providers. Developing policies and procedures for patient care furthers the greater good. The list goes on, but there are a number of examples we can use to show that our clients are in service of the greater good as well.

Another aspect of devotion to the greater good is to show that our clients contribute to the medical literature, participate in studies and trials to improve patient care and volunteer time and resources to medical causes. One unexpected outcome of millennials' belief in the greater good is its impact on the plaintiff's

counsel and witnesses. This is subtle. Traditionally, there was an expectation among defense counsel that jurors understood that the plaintiffs' attorneys had the case on a contingency fee, that plaintiffs' experts were paid money to come and testify in court from out of state, and that a plaintiff's life care planner was a ready-made vehicle for litigation. The perception was that these folks were motivated by money. With some millennial jurors, these individuals are seen in service of the greater good. A plaintiff's attorney who takes a case on a contingency basis is serving the greater good along with a plaintiff's expert. The medical expert who testifies the vast majority of their time for the plaintiff can be portrayed as someone who is fighting against the "white coat conspiracy" that protects its own. The expert can be seen by some jurors as one person fighting for what is right against a profession that completely protects its own.

This inaccurate approach can be extended to legitimate medical organizations like ACOG as well. At times, plaintiffs' attorneys and their experts suggest that ACOG was created to protect obstetrical defendants in litigation. It has also been referred to as a "trade association" bent on tort reform. Of course, none of this is true and is easily disproven. Nevertheless, there are some jurors who are very susceptible to these arguments and want to believe them.

The same can be said of life care planners. As defense lawyers, we have a dim view of the life care plan created in litigation. We do everything we can to discredit the life care planning process and its purpose to inflate damages in personal injury lawsuits. We should always consider how well a young jury will receive a life care plan and whether some jurors will consider a life care plan and the people who create them part of the greater good.

Another traditional concept that needs to be reevaluated is how we

deal with textbooks and other medical literature at trial. Simply disagreeing that a textbook or article is authoritative paints a negative picture in today's climate. A defendant who does not consider reputable sources as authoritative is subject to being considered selfish, self-centered and potentially dangerous. The impression is that the defendant considers his own opinion to be superior to the opinion of the community. Context is the key. Textbooks and articles are important and valuable. They are resources for medical information and are generally authoritative about the information they contain. However, no textbook, article or other piece of medical literature is authoritative about how to take care of individual patients. This common sense context will serve our clients better than the traditional "no authority" approach.

A defendant's bias is not a new concept at all, but it deserves more attention in the current climate. It is problematic for the defense if a bias regarding an individual is used to explain a defendant's decision. Jurors believe that all patients should be cared for in an unbiased fashion and not short changed because of a defendant's bias. Bias can also happen in very subtle ways. It can be a bias in favor of someone because they have medical training or someone in their family has medical training. This can be a reason why detailed instructions were not given because the plaintiff knew more than the average patient. Facts like this, must be taken in context and are very individualized to a particular case. Examine your cases closely for any decision making based on any potential bias with the mindset that today's jurors believe patients should all be taken care of the same way, regardless of their individual qualities. ♦

Author's Note: This article is incomplete. It does not talk about documentation, electronic medical records, audit trails, witness preparation, technology at trial, combatting and using reptile techniques or whether and when to attack the plaintiff. All of these topics are subsets of some the information explained above and I welcome discussion by members of GDLA about the climate and our challenges.

Daniel J. Huff is a founding partner of Huff Powell Bailey in Atlanta. For the past 28 years he has specialized in the defense of high damages lawsuits, primarily medical malpractice lawsuits and claims. He has represented defendants in more than 110 jury trials. He has defended and successfully tried cases for every specialty of medicine and numerous hospitals throughout Georgia. In the past five years, he has tried more than 30 medical malpractice cases.

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Fear Factor

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must identify favorable experiences, attitudes, and values that jurors bring to the courtroom, and use these to frame the defense strategy.

The good news is that jurors hold countervailing perceptions about most complex issues which means that *some* jurors are likely to harbor *some* attitudes and predispositions that favor the defense even in seemingly hostile venues. For example, while most people would agree that killing someone is wrong, most would also agree that landing a fatal blow in self-defense may be justified.

For product liability cases, defendants benefit from the almost universal perception that accidents are more likely due to human error rather than defective products. Research shows that jurors apportion fault by weighing the level of knowledge and control each party had over the circumstances precipitating the bad outcome. Therefore, in a tire defect case, amplifying factors that were within the knowledge and control of the driver will be central to convincing jurors the accident was a function of *human error* not a *defective tire*. Detailing the history of the tire (i.e., age, use, and maintenance history), the road conditions at time of blow out (e.g., slick roads, speed), and/or identifying driver distractions (e.g., kids in car, cell phones) will bolster the defense. The key question at trial is “Who was in the best position to prevent the accident? The company that made the tire 10 years earlier, or the people who owned, used and maintained the tire in the interim?”

Don't let witnesses give “reptile friendly” sound-bites, especially during deposition. Instead, prepare witnesses using non-traditional witness preparation techniques so they can tell the story effectively at trial.

There is no such thing as being “too slick” in court as jurors have very high expectations of presenters.

Plaintiff’s counsel employing the reptile strategy in deposition can often get concessions from defense witnesses by making very broad assertions that seem incontestable. This may include for example, “*Wouldn't you agree that a design engineer has a responsibility to avoid needlessly endangering the public?*” or “*Wouldn't you agree it is always better to be safe than sorry? Or “Wouldn't you agree a manufacturer should use the safest design option, especially if the cost increase would be nominal?”* An unprepared design engineer might unwittingly agree with these overly broad and seemingly incontrovertible concepts, thereby hamstringing the defense by reinforcing idealistic expectations of the company.

Traditional witness preparation methods often include a list of “do’s” and “don’ts,” but do not teach witnesses the listening and communication skills necessary to “hold their ground” in deposition when faced with questions like “*Wouldn't you agree it is incumbent upon design engineers to avoid needlessly endangering the public?*”

Use demonstratives and multimedia presentations to make the defense story more persuasive and memorable. Jurors today have short attention spans. If jurors can't remember and repeat your arguments, they can't fight for you in deliberations.

There is no such thing as being “too slick” in court as jurors have very high expectations of presenters. Today’s jurors fully expect to see, hear, and sometimes even touch evidence in court. The vast majority of jurors are tech savvy and use the internet every day to gather and assimilate information. Indeed, today’s

younger jurors were surfing the internet, and *doing research* on-line by age 5 (i.e., “Google” is a verb).

Jurors today often grow bored and inattentive when counsel rely solely or primarily on one way of presenting information (e.g., simply talking at jurors). This means counsel must develop a visual strategy to convey important concepts during openings and closings, and expert witness testimony to ensure that jurors will be able to remember and repeat arguments in deliberations. To be clear, “multi-media” does not mandate expensive computer animations, but it should definitely include charts and diagrams that simplify and organize information.

Craft jury instructions carefully because jurors want to “get it right” on the verdict form—right according to the law and facts.

Today’s jurors want to follow the law, whereas jurors in the past were more inclined to follow their conscience. Indeed, two-thirds of mock jurors (68 percent) said they would follow the law over their conscience if there was a conflict between the two. This is in sharp contrast to 25-30 years ago when jurors were more likely to say they would follow their conscience over the law, if the two were in conflict.

What explains jurors’ greater deference to the law today?

One possible explanation for the shift in juror attitudes about instructions is rooted in the increased anxiety jurors bring to the courtroom. Jurors may be yearning for some external authoritative source that can help navigate through the uncertainty and/or emotion driving lawsuits.

Today's Jurors Want to Follow the Law



Source: 2018 data based on 1981 mock jurors who participated in one of 53 R&D studies conducted 2017-2018 across the US: If you were sitting on a jury and had to choose between following the law or following your conscience, which would you do?

Jurors today feel empowered to get the verdict “right,” meaning correct according to the law and the facts. The ubiquity of the internet, DIY programs, and flat-pack furniture have taught jurors they can get the right result by following X, Y, Z instructions. Jurors today find very appealing the idea that there is a common set of rules which provide structure, definition, and emotional security. There is an answer, and they can use instructions to find it.

Jurors today may also be more willing to adhere to jury instructions given the prevalent discussions about the law in everyday society. The current climate of special counsel investigations, allegations of malfeasance among politicians, concerns about illegal immigration, reports of voter fraud and so forth have made the phrase “rule of law” part of the lexicon. Jurors seem to be spending more time in deliberations in civil cases, and that appears to be to the benefit of defendants. In two recent jury trials, jurors spent three full days deliberating.

A third possible explanation for jurors’ adherence to the law may be a growing skepticism of plaintiffs’ claims of physical and emotional injuries. Jurors resent plaintiffs trying to get ahead through the “litigation lottery” and resent plaintiffs’ counsel using sympathy to win a case.

The structure of the law allows jurors to feel good about reaching difficult decisions (e.g., denying recovery to a sympathetic plaintiff) in a time when empathy for those less fortunate is valued. Increased respect for the law means litigants can potentially use jury instructions to help defense-minded jurors advocate difficult positions in the deliberation room (e.g., set aside sympathy when deciding damages, etc.).

Get to the important and powerful evidence quickly and make jurors feel smart and empowered to conclude that yours is the “right side” of the dispute.

Jurors *expect* counsel to provide them the tools and information they need to “solve the case” and to do so in a clear and efficient manner. Jurors want to be: (1) educated about the issues they must decide; (2) engaged by interesting, clear, and efficient presentations; and (3) given room to reach their own conclusions about the evidence.

In addition to being teachers, jurors expect attorneys to make the material interesting and comprehensible. Failure to do either will surely spark juror anger at counsel/company for “wasting their time,” and/or “being patronizing.”

In sum, counsel must develop defense themes that resonate with jurors’ expectations, experiences, and attitudes—don’t advance weak arguments and “swim with the current.” Counsel must also state an affirmative alternate narrative to explain the facts of the case, and equip witnesses to be good story tellers at trial. Finally, counsel must link the evidence to the jury instructions and the verdict questions to provide defense jurors “toe-holds” to shift deliberations in your direction. Without such toe-holds, the defense will likely slip and fall. ♦

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ENDNOTES

¹ Chapman University conducts an annual survey of a random sample of adults in the U.S. (aka prospective jurors) about their level of fear of 94 phenomena across many domains (e.g., crime, government, environment, personal anxieties, etc.). Each year, the Top 10 Fears are rank ordered according to the percentage of people reporting they felt “afraid” or “very afraid” of x, y, or z phenomenon. Government corruption has been the #1 fear for many years. Jurors’ global fears were not among the Top 10 list in 2016, but are among the Top 10 Fears in 2017 and 2018.

² David Ball and Don Keenan, “Reptile: The 2009 Manual of the Plaintiff’s Revolution”

³ For example, roughly one-third of jurors (34%) believe the 1969 moon landing was faked. Based on R&D Strategic Solutions data collected from almost 2000 respondents across the country.

⁴ A candidate for a U.S. ambassadorship recently said she would give equal consideration to “both sides” of the science on global warming. This is one area in which there is scientific consensus with 97% of studies and scientists concluding that the earth’s temperature is warming. J. Cook, et al, “Consensus on consensus: a synthesis of consensus estimates on human-caused global warming,” *Environmental Research Letters* Vol. 11 No. 4, (13 April 2016); DOI:10.1088/1748-9326/11/4/048002—Quotation from page 6: “The number of papers rejecting AGW [Anthropogenic, or human-caused, Global Warming] is a minuscule proportion of the published research, with the percentage slightly decreasing over time. Among papers expressing a position on AGW, an overwhelming percentage (97.2% based on self-ratings, 97.1% based on abstract ratings) endorses the scientific consensus on AGW.”

Perspectives on Chemicals

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(PFAS)—perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS).

California is one of a growing number of states focused on establishing regulatory guidelines for PFOA and PFOS. In 2016, EPA set a lifetime health advisory (HA) of 70 ppt for PFOA and PFOS in drinking water. A comparison of the combined (sum) of PFOA and PFOS to the same HA (70 ppt) is also recommended by EPA when both are detected in drinking water. A number of states have adopted these guidelines; however, several have elected to release more stringent guidelines for the assessment of PFAS. For example, New Jersey adopted a drinking water maximum contaminant level (MCL) of 14 ppt for PFOA and most recently approved a recommendation for a PFOS MCL of 13 ppt. In addition to drinking water assessments, there is growing interest regarding the concentrations of PFOA, PFOS, and other PFAS in many consumer products, including but not limited to cookware, textiles, carpets, firefighter turnout (protective) gear, and floor treatments.

Publicly Available Data

The prevalence of many chemicals including those classified as chemicals of emerging concern are assessed via programs such as the Unregulated Contaminant Monitoring Rule (UCMR) and the National Health and Nutrition Examination Survey (NHANES) biomonitoring programs. The UCMR is the result of a 1986 amendment to the Safe Drinking Water Act that required EPA to establish a program for the monitoring of unregulated contaminants in drinking water, which included a directive to limit monitoring of no more than 30 contaminants at large public water systems (PWS) and a subset of smaller

PWS serving populations of less than 10,000 selected by EPA. The 30 constituents were selected from the contaminant candidate list (CCL), which “is a list of contaminants that are currently not subject to any proposed or promulgated national primary drinking water regulations, but are known or anticipated to occur in public water systems.”³

The NHANES is a program “designed to assess the health and nutritional status of adults and children in the United States.”⁴ Each two-year survey encompasses a robust statistical design of approximately 5,000 persons, with biomonitoring of chemicals conducted on a subset. Chemicals measured in the blood and urine of participants include legacy contaminants, chemicals known to cause health effects, and new chemicals with uncertain exposure levels and possible concerns regarding association with diseases or other health effects.

New chemicals are added to NHANES monitoring through requests from the health, environmental, and regulatory communities. Results of these surveys quantify background levels of chemicals in the general unexposed population of the United States, which serve as a reliable basis for assessing increased exposure. The survey is complex in its design, requiring an understanding of statistical methods to calculate representative summary statistics of the national population. Regarding epidemiological assessments of environmental exposure to chemicals, a critical aspect of the survey is that it includes demographic, socioeconomic, dietary, and health-related details for each participant.

In addition to the UCMR and NHANES programs, the Agency for Toxic Substances and Diseases Registry (ATSDR) compiles “Toxicological Profiles” that include toxicological and other information on substances found at hazardous waste sites. According to ATSDR, “Each peer-reviewed Tox. Profile reflects a

comprehensive and extensive evaluation, summary, and interpretation of available toxicological and epidemiological information on a substance.”⁵ These profiles are not available for emerging chemicals that only recently became detectable and have not yet been subjected to toxicity testing.

Legal Landscape

The growing list of chemicals as assessed by EPA (via CCL and UCMR), state agencies, and the published literature likely increases the potential for litigation, as well as the expansion of potentially responsible parties. Many of the identified chemicals are employed in the fundamental processes that generate the products we use daily. One might think lack of enforceable regulation related to preventing adverse impacts could diminish arguments of contamination to food, drinking water, and the environment and claims against potential responsible parties, but in fact the reverse may be true.

Over the last decade, CECs such as PFAS and PFOA have risen to the attention of the courts and even the U.S. Congress.⁶ The significance of the heightened concern is exemplified by the large judgements and settlement outcomes of litigation matters involving PFAS. For example, in 2017, Chemours and DuPont agreed to pay \$670 million dollars to settle a multi-district litigation regarding PFOA.⁷ This matter involved over 3,550 personal injury claims resulting from PFOA releases from the DuPont Washington Works Plant in West Virginia. DuPont is facing a slew of new suits in North Carolina regarding related chemistries—GenX—in the Cape Fear River.⁸ Earlier in 2018, 3M settled a PFAS environmental lawsuit filed with the State of Minnesota for \$850 million dollars.⁹

As industries work to meet consumer demand, remain competitive, be innovative, and strive to meet sustainability goals, the concern for environmental and human health will

need to be prioritized. Consumers are demanding more transparency about product ingredients, processes including sourcing of raw materials, and the safety of ingredients. Industries are then confronted with developing a fundamental scientific understanding of the entire production network—supply chain through manufacture—to fully understand the contents of their products.

Consumer product industries have to be prepared to respond to scientifically sound queries about the life cycle of the chemicals used in final products. These industries include manufacturers of raw materials (solvents, additives, adjuvants, etc.), secondary producers (personal care products, textile and fibers, electronics, etc.), and end sales industries (clothing, protective gear, carpeting and flooring, etc.).

Closing Thoughts

Improvements in laboratory analytical methods allow detection of chemicals not previously quantified and measurement of legacy chemicals at levels lower than previously reported. With these analytical advancements comes the need to understand potential adverse effects. Although detecting a chemical does not necessarily increase risk, measuring chemicals in the environment or in biomarkers facilitates probing for associations with diseases in populations.

Toxicological understanding and reliable biomonitoring of new chemicals need to keep pace with advances in analytical methods to detect new chemicals as consumers demand more transparency around consumer products. ♦

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	Food <ul style="list-style-type: none"> •Flavorings •Additives •Packaging and Wrapping
	Agricultural Operations <ul style="list-style-type: none"> •Fertilizers •Pesticides and Herbicides •Biosolids
	Electronics <ul style="list-style-type: none"> •Heat Resistance and Water Resistance •Batteries •Optics
	Pharmaceuticals <ul style="list-style-type: none"> •Opioids •Hormones (Natural and Synthetic) •Veterinary (including Aquaculture)
	Personal Care Products <ul style="list-style-type: none"> •Scents •Smoothing Properties •Dyes, Coloring, Whitening
	Plastics and Polymers <ul style="list-style-type: none"> •Additives •Malleability, Flexibility •Heat and Chemical Resistance
	Oil and Gas <ul style="list-style-type: none"> •Drilling and production •Distribution •Heat and Chemical Stability

ment. She has applied this in-depth knowledge to support clients on projects focused on the potential human and wildlife impacts that may have resulted from environmental exposure.

Melanie Edwards is an accredited statistician with Exponent and has testified on the use of statistical methods. She regularly performs and critiques aspects of data analytics of lab chemistry concentrations, toxicity tests, field screening results, and background or reference comparisons. She is called upon frequently to provide understandable descriptions of statistical methods used by testifying experts, and to assist with deposition questioning. Her areas of application are expansive, including chemical forensics, pesticide registration, and injury quantification.

ENDNOTES

- ¹“Contaminants of emerging concern” is a more appropriate terminology when chemicals as well as viruses and/or bacteria are of concern.
- ² <https://oehha.ca.gov/proposition-65/general-info/proposition-65-plain-language>
- ³ <https://www.epa.gov/ccl/basic-information-ccl-and-regulatory-determination>
- ⁴ <https://www.kaggle.com/cdc/national-health-and-nutrition-examination-survey/home>
- ⁵ <https://www.atsdr.cdc.gov/toxprofiledocs/index.html>
- ⁶ <https://www.congress.gov/bill/115th-congress/house-bill/6835/text>
- ⁷ <http://www.dupont.com/corporate-functions/media-center/press-releases/dupont-reaches-global-settlement-of-multi-district-pfoa-litigation.html>
- ⁸ <https://cen.acs.org/articles/96/17/Merged-law-suit-filed-against-DuPont.html>
- ⁹ <https://3msettlement.state.mn.us/>

Ten Steps

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2. Mediate Early

Early mediation gives the parties an excellent chance at settlement before meaningful resources have been devoted to litigation and positions harden. Plaintiffs who decline an early invitation to mediate are usually still in the grip of intense emotions borne of a wrong they blame on the defendant. They can't see past an outcome that punishes the defendant and express their anger by making an exorbitant settlement demand that causes the defendant to conclude that settlement is impossible.

Defendants who balk at early mediation fear any meaningful offer they make will be seen as an admission of wrongdoing and empower a greedy plaintiff to ask for more. Others bypass a chance at early resolution because they believe litigation, at least through discovery, will exhaust an angry plaintiff and force them to settle on their terms. But that approach often ends up costing defendants more in the long run when substantial litigation costs are combined with the final settlement. Never underestimate a mediator's ability to get the parties talking settlement once everyone is in the same room. Like laughing and crying, there is a very thin line between the fight and flight elements of our most primordial instinct. Once a plaintiff has a forum in which to vent, to tell their story to a neutral committed to solving the problem, they often break free of the emotional barriers that were holding settlement hostage and are anxious for resolution. It happens every day.

3. Pick the Right Mediator

The parties are usually best served by hiring an experienced mediator whose expertise in the

substantive area relevant to the claims at issue is respected by counsel. Use the selection process as a first step toward resolution by working collaboratively with opposing counsel. Don't reject a potential mediator just because they were suggested by opposing counsel. Acceptance of a mediator your opponent recommends usually makes settlement more likely. The suspicion that they will "favor" their side is not realistic. Neutrals seldom know who initially suggested them; nor do they care, since settlement depends on meeting the expectations of all participants.

4. Be Well Prepared and "Clear the Air"

Know your case inside and out and be well versed in the mediation techniques that maximize your client's chances for a positive outcome. Have all the critical facts and figures at your fingertips. If you are unsure about your first move, talk to your mediator. It is never too early to begin to strategize on how best to get to "yes."

The tone at mediation should be one of conciliation and collegiality rather than confrontation and combat. If tempers have flared during the litigation, meet with your opposing counsel and "clear the air." The clients will bring more than enough emotion to the mediation without the lawyers adding friction.

5. Make a Reasonable Pre-Mediation Settlement Proposal

Jumpstart the negotiations by exchanging realistic pre-mediation settlement proposals. If the plaintiff is claiming economic damages like back pay, medical bills and attorney fees, calculate the precise amounts and have the supporting documentation available for review. Never condition mediation on the opposing party making some specific qualifying offer as a quid pro quo for agreeing to mediate. You are just short circuiting the mediation and

denying your client a good chance at closure.

6. Educate Your Client

The more your client knows about the mediation process, the better they will react to the highs and lows of the session. Explain how the venue for dispute resolution is changing from an adversarial judicial process to one where the goal is to find closure through compromise. Prepare your client for the likelihood of unrealistically low and high proposals at the outset and have a candid conversation about what a realistic settlement might look like. Make sure your client is not surprised to learn at the mediation that you don't think their case is a "slam dunk."

7. Submit a Mediation Statement and Follow Up

Well-written mediation statements improve your settlement chances by making the mediator more effective. Start off by introducing your client with a brief resume of personal and professional achievements and other relevant background information. Next, summarize the factual and legal disputes that led to litigation, chronicle prior settlement negotiations and provide a range of possible outcomes your client could accept. Focus on the barriers that have frustrated settlement to date, including the emotional hot spots that need to be addressed before a realistic settlement can be forged. Finally, acknowledge your weak points rather than allowing your opponent to point them out over the course of the mediation, and temper the advocacy, as your purpose is to educate rather than persuade.

Schedule a pre-mediation phone conference with the mediator to discuss any headwinds impacting your client's receptivity to settlement and how the mediator can help manage your client's expectations and keep emotions in check. Also, consider

whether your mediation statement needs to remain confidential. Exchanging statements, at least those portions regarding the merits of the claims, can help both parties better value the case.

8. Forego the Opening Statement

Begin with an opening meeting, but pass on making a substantive opening statement, as they tend to be adversarial and get the mediation off to a bad start. The one exception is when the defendant's decision-maker is actively participating in the mediation and wants to hear the plaintiff present his case to get educated about the claims. In that situation, it is critical that plaintiffs counsel deliver an opening statement that does not morph into a closing argument.

Plaintiffs benefit from a sincere presentation that extols the benefits of closure for both parties. Likewise, defendant's counsel can get things off to a powerful start by thanking the plaintiff for attending, sounding hopeful about the success of the mediation and expressing some sympathy for the plaintiff. With just a few well-placed words, defense counsel can deny liability but defuse the plaintiff's demonization of the defendant and lower the emotional temperature of the proceedings.

9. Don't Set a Predetermined "Bottom Line" and Explain Offers

Do not tie your client to a pre-mediation "bottom line" settlement number as it will become an anchor that could drag the mediation into impasse. Negotiate with an open mind about settlement within a broad range of reasonable outcomes. Similarly, arbitrary "authority" limits set by absent adjusters can cause an impasse before the defendant has gotten the very best demand out of the plaintiff, which should be the primary objective of every defendant.

Mediations can break down when the caucuses morph into an auction

and offers devolve into numbers divorced from any rationale. Legitimize your proposals by noting the specific basis for each term. Avoid the tactic of "mirror" offers. Mirroring happens when plaintiffs "pad" their pre-mediation demand so they can repetitively match the defendant's moves and still get to their desired result. This transparent negotiation tactic is unhinged from any analysis of the case and creates extreme negativity in the defendant's room that can be avoided by using more creative negotiation tactics.

10. Avoid Impasse with Brackets, Non-Monetary Benefits or a Mediator's Proposal

The brinksmanship that is often prevalent in direct negotiations has no place in mediation. Ultimatums are toxic to settlement. If you are so far apart that both sides start losing hope, use brackets to narrow a big gap between the parties' positions instead of making a "best and final" offer. Brackets are a way for a party to offer substantial movement in exchange for some corresponding concession by the other side. Listen to your mediator in fashioning your brackets. They have been in the other room and know best what numbers will resonate.

The key to a successful mediation turns on the assumption that both sides are seeking a solution that the other side can accept. If one side exhausts their ability to make further monetary moves, take advantage of the fact you can fashion relief in a mediation that would not be available in court by considering non-monetary benefits. For example, in employment cases the parties can agree to a number of nonmonetary terms as a way to bridge a monetary impasse, such as converting a termination into a resignation, a reference letter from the employer or waiver of a noncompetition agreement.

If negotiations still stall, use your mediator as a resource for alterna-

tive strategies. Trust their judgment about how to keep the parties talking by making a well-timed concession or changing negotiation tactics. If impasse is imminent, consider adjourning to reconsider your respective positions with the mediator continuing the caucus process by telephone or solicit a mediator's proposal. This face-saving strategy is often successful because the settlement terms are recommended by the mediator. If both sides accept the proposal, always enter into an enforceable settlement memorandum setting forth all material terms as a precursor to a final settlement agreement. In drafting the memo, consider how to add value by structuring the settlement in ways that minimize income and payroll taxes.

Mediation provides a non-adversarial forum where the neutral can absorb the parties' emotional reactions to the claims at issue and channel that negative but very powerful energy into motivation to focus on the future rather than obsess over the past. Once the mind-set moves from past to future, emotions abate, and the parties stop talking past each other and truly listen to the "other side" of the case. It is on the broad plane of understanding the opposing viewpoint that the parties will find that island of common ground upon which a fair compromise can take root and grow. ♦

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Preparing for Daubert

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data, such that there is not an excessive analytical gap between the data and the offered opinion. *Joiner* additionally established that abuse of discretion is the standard of review for such evidentiary rulings. The Court in *Kumho* broadened the range of experts that the standards set forth in *Daubert* covered by including technical and other areas of specialized knowledge. These cases, in combination with the Federal Rules of Evidence, are the backbone of any analysis of expert testimony in federal courts.

Federal Rule of Evidence 702 sets the standard for allowing expert evidence referenced in *Daubert*. In addition to the federal courts, many state courts have adopted this standard, although some state courts continue to adhere to the *Frye* standard. Rule 702 provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- b) the testimony is based on sufficient facts or data;
- c) the testimony is the product of reliable principles and methods; and
- d) the expert has reliably applied the principles and methods to the facts of the case.

Based on Rule 702, the first requirement is that the witness be "qualified as an expert by knowledge, skill, experience, training, or education." Once that threshold is met, the witness may provide opinion testimony if his testimony is relevant (will aid the trier of fact) and

is reliable (based on sufficient facts, data, and reliable methods). These rules, in combination with guidance from *Daubert*, establish the basis upon which the court administers its role as the "gatekeeper" — to prevent the admissibility of expert evidence with inadequate methodology or objective evidence.

The Court in *Daubert* also weighed in to provide a non-exhaustive list of factors for a court to consider when evaluating the reliability prong of admissibility. That list included the following factors, which were intended by the Court to be flexible:

- Whether the theory or technique has been scientifically tested;
- Whether the theory or technique has been subject to peer review or publication;
- The expected error rate of the technique used; and
- Acceptance of the theory or technique in the relevant scientific community.

In presenting these factors, the Court clarified that the list was not intended to be exclusive, nor is any one factor dispositive, on the issue of admissibility. Thus, the court's role as gatekeeper is to weigh the factors, along with any other factors that may be relevant, to evaluate the reliability of the methods, and therefore, the admissibility of the expert evidence.

The commentary in the rules notes an additional list of factors identified by other courts in their analysis of the reliability of expert evidence. Those factors include:

- Whether the expert's testimony arises from independent research, or from opinions developed for that litigation;
- Whether the expert has reached his or her conclusion by unjustified extrapolation from an accepted premise to an unfounded conclusion;

- Whether obvious alternative explanations are accounted for;
- Whether the expert is applying the same intellectual rigor as an expert in the relevant field;
- Whether the field of expertise claimed is known to reach reliable results.

In addition to restating some previously listed factors, Texas state courts have further added to the body of factors that a court might consider in evaluating the admissibility of expert evidence. Those factors include:

- Whether the theory has been (or can be) tested;
- Whether the technique relies on subjective interpretation by the expert; and
- Whether the theory has been subject to publication and/or peer review.

It should be noted that the Court in *Daubert* concluded that the focus of the analysis is on principles and methodology, not the conclusions reached. Although the methodology and conclusions are not completely distinct from one another, subsequent case law explains that the court is obligated to evaluate whether the principles and methods have been properly applied to the facts in each case. This does not include, however, an evaluation of whether the opinion is correct.

Preparing to Meet the Challenge

Facing a *Daubert* challenge is high-stakes motions practice. Since the exclusion of an expert from trial can be fatal to a defense, using appropriate expert selection methods and engaging in thorough preparation for the expert based testimony with an eye on the *Daubert* factors may discourage a *Daubert* challenge in the first place, or clear the path for a successful defense to any such challenge. Beating back the issue be-

fore it is raised should be part of every litigation strategy from the earliest point of identifying an expert to testify, all the way through the litigation process.

Despite meticulous planning and preparing, a *Daubert* motion may still be part of an opposing party's litigation strategy. In the event that a motion is filed, it is critical to provide your expert with a copy of the motion, and actively engage your expert in the process of framing a response to the motion. The expert is the individual in the best position to detail the methods and analysis performed for inclusion in an opposition. Additionally, the expert will no doubt be asked to address the methodology, either in a hearing on the motion, or in subsequent cross-examination. Having played an active role in framing the response, the expert will be better able to present a clear, consistent argument defending the reliability of the proposed testimony.

Knowledge, Skill, Experience, Training, and Education

A well-planned strategy for avoiding a *Daubert* challenge begins with the selection of the expert witness. When choosing a witness, first evaluate whether the expert witness has the requisite knowledge, skill, experience, training, and education to opine on the issues you intend to have the witness address. While it is ideal to be able to meet each of these factors, note that Federal Rule 702 states “knowledge, skill, experience, training, or education” (emphasis added). Thus, where a witness may be the appropriate expert for a case, if the expert lacks one of the bases listed, be prepared to articulate how, for example, the expert's training and experience is relevant to their expertise in an area, while a degree (education) is not.

Once assured that the expert has the appropriate background, con-

sider that the expert will be answering questions about his or her knowledge, skill, experience, training, and education in a deposition, and perhaps before a judge at a motions hearing. Prepare a thorough explanation of how the expert obtained his or her knowledge, skill, and experience, and its relevance to the analysis performed. Identify all the experience, training, and education, whether it is degree based, certification based, or single continuing education classes, even if that information is not contained in the expert's CV (such as lifelong hobbies or a family business).

Scope

While the word “scope” does not appear in the language of Rule 702, assuring that a defined, appropriate scope of work and analysis is identified for the proposed expert evidence is critical to the ultimate success of the witness in a *Daubert* challenge. The scope of the analysis sought ought to be tailored not just to the case, but also to the actual knowledge, skill, experience, training, and education of the expert.

Care should be taken that the expert's testimony remains within the scope of his or her expertise. An expert could easily face a *Daubert* challenge triggered by the expression of an opinion outside his or her area of knowledge, despite most of the opinions falling within his or her expertise. A careful review of each opinion expressed before the report is generated, to assure that the opinions do not stray, should be undertaken to avoid the risk that an opinion on a tangential issue, outside the scope of the expert's specialty, is not the trigger for a challenge.

The issue of scope can be particularly problematic in state court proceedings, where the expert disclosure requirements may be less stringent than those under Federal Rule 26. In

those situations, opinions documented by counsel in an expert witness disclosure may not have faced the same scrutiny by the expert as a peer reviewed report. Assuring that the expert witness disclosures have been reviewed by the expert for conformity to the actual expertise the expert has, the opinions held, and the bases therefore, can be essential to avoiding problems with the disclosure down the road. As addressed in more detail below, in federal court, the issue of scope can be a minefield of another sort due to the detailed disclosure requirements of Federal Rule 26.

The Pitfalls of an Inadequate Rule 26 Disclosure

The federal rules, and most state court rules, have stringent requirements regarding the disclosures for expert witness testimony and evidence. Federal Rule 26 requires the disclosure of a substantial amount of information from the parties with respect to expert opinions, including, in most cases, signed, written reports disclosing “a complete statement of all opinions the witness will express and the basis and reasons for them,” and “the facts or data considered by the witness in forming them.” According to Rule 26, the report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
- (v) a list of all other cases in which, during the previous four years, the witness testified as an expert at trial or by deposition; and

Continued on next page

(vi) a statement of the compensation to be paid for the study and testimony in the case.

In preparing to produce an expert report and the required disclosures, care should be taken that the opinions, the bases and reasons for them, and the facts and data considered by the witness in forming them are disclosed, as required by the rule. In so doing, consideration of the reliability foundation that is required by the *Daubert* standard should be included so that the disclosure does not limit the expert from testifying as expected.

The penalties for failing to make the disclosures required by the rule in full, or in part, can be catastrophic. A court may preclude the expert entirely, limit the opinions permitted, or limit the basis for an opinion for failure to disclose properly under Rule 26. Considering the importance of expert testimony in proving a defense, and the expense incurred in developing such testimony, parties need to be meticulous that they are developing opinions and disclosing opinions that can face the scrutiny of the court later. Should a court exclude an opinion or the basis for an opinion due to a shortcoming in the disclosures, it could have the additional consequence of affecting a party's ability to defend the reliability of the methods used and analysis performed in a *Daubert* challenge.

When the time for a *Daubert* challenge arises, having failed to establish the basis for the opinions (that may include principles and methodology) and the facts and data used in reaching those conclusions, the opportunity to disclose them in defense of a *Daubert* challenge may not be permitted.

Planning throughout the life of the case to assure that all key *Daubert* factors are addressed in sufficient detail in the report (or, in the event no report is required, in the disclosures)

assures that the discovery requirements of Rule 26 are met, and the *Daubert* factors can be explained.

**Facing the Gatekeeper:
Reliable Principles and
Methods, Reliably Applied**

While it is essential to assure that the knowledge, skill, experience, training, and education requirement is met; the scope is appropriate; and the Rule 26 disclosures are adequate; that is not always enough to avoid a *Daubert* challenge. When a *Daubert* challenge is made, the court asserts its role as the gatekeeper to evaluate the admissibility of the evidence under Federal Rule 702, using the standards set forth in *Daubert* and its progeny.

In evaluating any *Daubert* challenge, the court will seek to confirm that the expert used reliable principles and methods, and that those principles and methods were reliably applied. This is distinct from a critique of whether the opinions and conclusions reached by the expert are correct or credible (which is the function of a trier of fact), and instead a focus on whether the analytical gap between the data and opinions is too great to provide for the required reliability of the expert's testimony. To that end, in accordance with *Daubert*, the factors the court should consider include the following.

**Has the Theory or Technique
Been Scientifically Tested?**

The disclosures made by counsel and experts should set forth the methodology used, as well as any data or metric that the court may need to evaluate the reliability of the procedures used by the expert, perform its analysis, and reach its opinions. If the methodology is one with a long and deep history in the relevant field, or in mathematics, or science, the methodology is likely to be considered by the court to be reliable.

**Has the Theory or Technique
Been Subject to Peer Review
or Publication?**

A classic hallmark of reliability is whether the technique or methodology used by the expert has been subject to the scrutiny of the scientific community, either by publication in a reputable journal, or otherwise made subject to peer review. While this question is not suitable for all theories, as not all methodologies and techniques have been subjected to peer review and publication, those that have successfully been have faced a time-tested industry standard for reliability are likely to be considered by a court to be reliable.

**What Is the Error Rate for
the Technique Used?**

Technical and scientific communities often identify an error rate for scientific techniques and methodologies. While *Daubert* does not require a specific numerical error rate be assigned to any methodology used, the thrust of this inquiry is to evaluate whether a suitable theory has been applied, suitable methodology used, and whether they have a level of accuracy that makes the methodology appropriate for meeting the reliability standard that the court seeks from the expert testimony. Thus, where appropriate, some effort should be taken to quantify the likelihood that the expert's opinion will be wrong, based on the use of the stated methodology. In the alternative, some courts have considered the related question of whether there is a basis to eliminate other opinions and conclusions that could be reached, akin to the use of a differential diagnosis to reach a conclusion.

This inquiry should not be confused with an evaluation of the correctness of the expert's opinions—but rather whether a suitably reliable methodology was used to reach the conclusions.

Has the Theory or Technique Been Accepted in the Relevant Scientific Community?

The question of whether a theory or technique has been accepted in the relevant scientific community is a throwback to *Daubert's* predecessor, the *Frye* standard. Rather than the nuanced evaluation encouraged by *Daubert*, *Frye* focused wholly on the acceptance in the community of the standard used by the expert. Yet, under *Daubert*, widespread acceptance of a theory remains an important factor for the court to consider when assessing the reliability of the evidence.

Other Factors

The enumerated *Daubert* factors remain the nonexclusive way for a court to establish that expert testimony is reliable. Different industries and fields may require different approaches to the question of reliability,

which a survey of case law post-*Daubert* demonstrates quite clearly. Other courts have found that indicia of reliability may include whether the expert's testimony arises from independent research or from opinions developed for that litigation; whether the expert has reached his or her conclusion by unjustified extrapolation from an accepted premise to an unfounded conclusion; whether obvious alternative explanations are accounted for; whether the expert is applying the same intellectual rigor as an expert in the relevant field; and whether the field of expertise claimed is known to reach reliable results. Additionally, evaluating whether the theory can be tested, and whether the techniques rely on subjective or objective interpretation could be factors used by a court when performing its *Daubert* functions.

Regardless of the technical specialty, considerations of how to establish the

reliability of an expert's analysis and opinion should be a part of each aspect of discovery. Advance thought and preparation to address the factors set out in *Daubert*, or the applicable state court standard, to demonstrate clearly the reliability of the methodology used by the expert throughout the life of a case can avoid serious and expensive consequences. ♦

Prior to joining S-E-A as general counsel, Ami Dwyer worked in private practice for 22 years. Her primary focus was on all aspects of litigation relating to the construction industry, including construction defect and injury, product liability, professional liability, and commercial disputes. She also has extensive experience in mediation, arbitration and appellate practice, as well as with multi-district and class action litigation. S-E-A is a GDLA Platinum Sponsor. This article is reprinted with permission from DRI's The Voice.



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Roof Tile Case Study

Continued from page 34

Irma in September 2017. The roof tiles consisted of mechanically-fastened (two nails per field tile), color through double S-shaped Vanguard Roll-style concrete field tiles (Figure 3, Figure 4 and Figure 5) and mortar-set barrel-shaped hip and ridge tiles manufactured by Monier Lifetile. Boral acquired Monier Lifetile several years ago and discontinued this product line of tiles.

The author as well as another engineering consultant evaluated the subject roof, and differing conclusions were reached. The primary disagreement stemmed from the upward displacement at the leading edges (downslope edge of tile) of field tiles under pressure.

The consultant performed an uplift test that closely resembled the TAS-106, which has been adopted by the current edition of the Florida Building Code (ICC 2017).

TAS-106

The scope of the TAS-106 states “This Application Standard is a product application quality control test” and as such, is appropriate for performing quality control on new roofing applications. The TAS-106 does not differentiate between deficient performance caused by installation, age and wearing, or storm-related forces.

A Roofing and Code Administration representative with the Florida Building Code Staff indicated to this author that the TAS-106 was developed only for use in the High-Velocity Hurricane Zones (HVHZ), which only include Miami-Dade and Broward Counties within the state of Florida. More importantly, the TAS-106 is only applicable to new roofing systems. Therefore, the testing guidelines provided in the TAS-106, or a

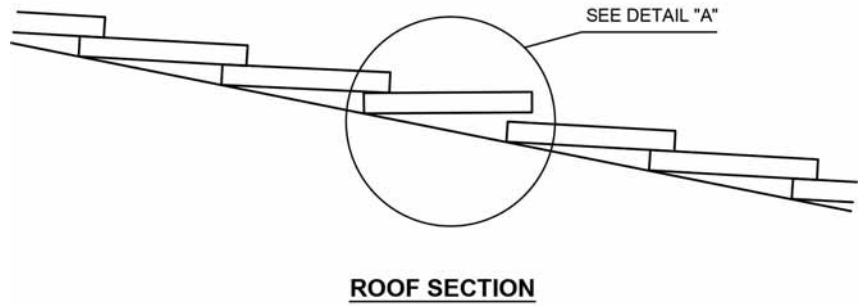


Figure 6: Vertical displacement at the leading edge of a field tile

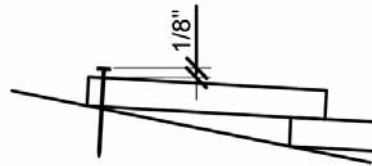


Figure 7: Field tile with no upward pressure applied and clearance space between the nail head and tile

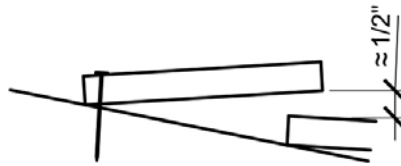


Figure 8: Representative of the relationship between clearance space and displacement at the leading edge of a tile under pressure, observed at multiple tiles at the subject roof

derivative of such, are appropriate for quality testing of *new* tile roofing systems in Florida, limited to Miami-Dade and Broward Counties only.

Upward Displacement Under Light Hand Pressure

The uplift test performed at the subject roof included a displacement failure criteria of 1/2”. According to the TAS-106, section 8.1.4 provides the following with respect to failed roof tiles: “The nose of the tile deflects vertically in excess of 2 inches in mechanically attached systems.” This section indicates that the displacement failure criterion utilized by the consultant was less than that prescribed by the TAS-106.

Nails should not be driven in a manner that will allow for the head of the fastener to contact the tile. Leaving a clearance space between the tile and the nail head allows differential movement of the materials during expansion/contraction of the tiles and the underlying substrate. Lack of clearance can result in damage to the tiles.

A technical representative with Boral Roofing, the company that acquired Monier Lifetile (manufacturer of the subject tiles), indicated to this author that a minimum of 1/16” to 1/8” clearance should be provided between the tile and the fastener head. This space between the fastener head and tile presents a loose condition that allows upward displacement of the tile.



Figure 9 (above):
Upward displacement at the leading edge of field tile under pressure

Figure 10 (right): Table 4 of the NOA, annotated by this author

Table 4: Attachment Resistance Expressed as a Moment - M_f (ft-lbf) for Nail-On Systems				
Tile Profile	Fastener Type	Direct Deck (min 15/32" plywood)	Direct Deck (min. 19/32" plywood)	Battens
Monier Lifetile	2-10d Ring Shank Nails	27.8	37.4	28.8
Vanguard Roll Tile	1-10d Smooth or Screw Shank Nail	8.8	11.8	4.1
	2-10d Smooth or Screw Shank Nails	16.4	21.9	7.1
	1 #8 Screw	25.5	25.8	22.9
	2 #8 Screw	47.1	47.1	49.1
	1-10d Smooth or Screw Shank Nail (Field Clip)	24.3	24.3	24.2
	1-10d Smooth or Screw Shank Nail (Eave Clip)	19.0	19.0	22.1
	2-10d Smooth or Screw Shank Nails (Field Clip)	35.5	35.5	34.8
	2-10d Smooth or Screw Shank Nails (Eave Clip)	31.9	31.9	32.2

Provided that the tile acts as a moment arm (or lever), small variations at the exposure between the fastener head and the tile results in a linear relationship and greater displacement at the leading edge of the tile, as portrayed in Figure 6, Figure 7 and Figure 8.

Force Applied at Leading Edge of Tiles

During the lift test at the subject roof, the testing group applied 35 pounds of vertical force to the mechanically-fastened field tiles. According to section 3.3 of the TAS-106, "A minimum static test

uplift load of not less than 35 lbf per tile shall be applied for mortar or adhesive set tile systems."

However, the TAS-106 loading criteria for mechanically attached tiles is based on the manufacturer's testing data, not a consistent 35 lbf force. For reference purposes,

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Nelson calculated the applicable TAS-106 loading criteria for the specific tile at the subject structure. This calculation was based on information provided by the Miami-Dade County Notice of Acceptance (NOA) for the subject tile and discussions with engineers with the Product Approval Department at Miami-Dade County and the Florida Building Code Staff. The NOA provides manufacturer testing data and as such, was referenced for the example discussed herein.

Table 4 of the Notice of Acceptance (NOA) (Figure 10) provides the “Attachment Resistance Expressed as a Moment” as 37.4 ft-lbf at the applicable fasteners.

The calculation prescribed by the TAS-106 for mechanically-fastened tiles (7.1.2) indicates that 80 percent, plus or minus five percent, of the resistance load shall be applied for five seconds. Considering the example discussed herein, the equivalent range of testing force required by TAS-106 calculated to be approximately 20.4 lbs to 23.1 lbs. The 35 pound force utilized by the consultant at the tested roof tiles calculated to be approximately 152 percent of the manufacturer’s approved moment resistance. Thus, not only did the consultant apply an improper standard, they applied approximately 150 percent of the force that was set forth in the standard, likely damaging the tested roof tiles.

In order to determine whether or not a field tile fastener has been withdrawn, the leading edge of a field tile is lifted and tiles that resist upward force at the point of securement have not experienced withdrawn conditions. This author attempted to lift many tiles beyond the point of securement and no additional displacement was observed.

The subject roof did not exhibit missing or displaced hip or ridge tiles; however, isolated fractured tiles had sharp and/or unweathered fracture surfaces, consistent with a recent occurrence. Based on the limited quantity of recent roofing distress, the lack of withdrawn conditions at the fasteners, and the availability of Vanguard Roll-style tiles at a local “boneyard,” it was this author’s opinion that the tile roofing at the subject structure did not require replacement.

CONCLUSION

Field tiles that exhibit upward displacement at the leading edges under pressure are a typical condition at mechanically-fastened concrete and clay tile roof systems. Roofing fasteners that resist field tile displacement beyond the point of securement are not consistent with withdrawn conditions.

The TAS-106 is a product application quality control test which provides acceptance testing methods for new roof tile installations (limited to Broward and Miami-Dade Counties in Florida). The TAS-106 does not provide guidelines for the testing of existing tile roof systems or for testing of wind damage to mechanical fasteners. Thus, the TAS-106, or a derivative of such, is not an appropriate test to determine wind damages associated with Hurricane Irma. ♦

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