

*Certiorari in the Georgia
Supreme Court: By the Numbers*

*Juries' Consideration of Amounts
Paid to Medical Providers:
A Theory for O.C.G.A. § 51-12-1(b)*

*Court of Appeals Reverses
Verdict After Failure to Charge
on Assumption of the Risk*

General Assembly in Review

54th GDLA Annual Meeting

GEORGIA DEFENSE LAWYER

A Magazine for the Civil Defense Trial Bar

Volume XVII, Issue I
Summer 2021



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President's Message

What a difference a year can make. It was great to see everyone again in-person at the Annual Meeting at Amelia Island in June. We were able to renew old friendships and meet new members at a well-attended meeting in a safe environment. It is nice to know at the beginning of my tenure as President that things are returning to "normal."

A great note of thanks is owed to our last two Presidents, Dave Nelson and Jeff Ward, for guiding us through the challenging times in 2020 and 2021. Our Executive Director Jennifer Ward also went above and beyond in keeping things moving. We were also greatly supported by our loyal sponsors throughout these difficult days.

As things return to normal, we will hopefully get back on our usual schedule. The Board plans to meet in person this Fall and we'll hold our Trial & Mediation Academy then, too.

Our Political Action Committee will also be gearing up for the next legislative session. Our Amicus

Committee continues to crank out high quality briefs on many important topics. Reach out if you need amicus assistance in one of your cases.



George Hall

If anyone has any ideas they would like to present to the Board, please let me know. I can be contacted at ghall@hullbarrett.com.

Also, please let me know if you or anyone in your firm is interested in becoming more involved in GDLA. Jennifer and I will keep you updated with blasts about initiatives for the coming year.

Stay healthy.

For the Defense,

George R. Hall

Hull Barrett, Augusta

GDLA Verdicts Database: Enter Yours!



Please enter your verdicts, regardless of outcome, so this becomes a robust resource for the civil defense community. Log into the members only area and select Verdicts Database in the right navigation. It's searchable in a variety of ways, including by venue, judge, expert, plaintiff's and defense lawyers, etc.

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Member News & Case Wins

MEMBER NEWS

Elissa B. Haynes, a partner at **Drew Eckl & Farnham** in Atlanta, was sworn-in as President of the State Bar of Georgia's Young Lawyers Division (YLD) at the State Bar Annual Meeting in June. She chairs GDLA's Amicus Committee. Ms. Haynes follows **Bert Hummel**, a partner in **Lewis Brisbois'** Atlanta office, who just completed his term as YLD President. **Brittanie Browning**, an associate in **Hall Booth Smith's** Atlanta office was installed as YLD Treasurer.

Payton D. Bramlett has joined **Boyd & Jenerette** as a partner in the firm's Savannah office. He focuses his practice in the areas of insurance defense, general liability, and personal injury litigation including automobile, trucking, and premises liability. Mr. Bramlett also handles property damage cases including construction defect claims.

Williams Mullen announced the addition of **Richard H. "Dick" Willis** as a partner in its Litigation Section based in the firm's Columbia, S.C. office. He has over 40 years of experience representing product manufacturers and business clients in product liability litigation, mass torts, environmental litigation, and various types of commercial litigation. Mr. Willis is a Fellow of the American College of Trial Lawyers and is the current President of the South Carolina Chapter of the American Board of Trial Advocates. He is also a longtime faculty member of GDLA's Trial & Mediation Academy.

Wicker Smith O'Hara McCoy & Ford announced the opening of its newest office in Atlanta to expand the firm's services in its practice areas of civil litigation including premises liability, transportation,

negligent security, motor vehicle accidents, and professional liability. **Wicker Smith** is a full-service trial firm with 14 southeast locations including two others in Georgia—Atlanta and Brunswick. **Joe Menello** is managing partner of the Atlanta office and **Jon Silverman** has joined him as an associate.

Weinberg Wheeler Hudgins Gunn & Dial announced the elevation of **Anna Idelevich** to partner in its Atlanta office. She focuses her practice on catastrophic injury, mass tort, environmental law and toxic tort, transportation, product liability, premises liability, nursing home and long-term care litigation.

Groth & Makarenko announced the change of its firm name to **Groth Makarenko Kaiser & Eidex** in recognition of the significant contribution of partners **Joseph Kaiser** and **Jay Eidex** to the firm's continued success. Mr. Kaiser serves as the firm's managing partner and focuses his practice on civil litigation, both at the trial and appellate levels. Mr. Eidex concentrates on automobile liability, commercial general liability, insurance coverage, and directors & officers/ homeowners association disputes. The address/phone remain unchanged, but all emails are now @gmke.law.

Copeland Stair Kingma & Lovell announced the elevation of **Clinton F. Fletcher** to partner in the Atlanta office. He has extensive experience in the areas of products and premises liability, trucking, aerospace, construction equipment, and material handling equipment. He was previously the Georgia State Membership Chair for the Defense Research Institute (DRI) and is former chair of DRI's Recreational Products Specialized Litigation Group.

Alycen A. Moss was voted Vice-Chair, Office Managing Partner for the Atlanta office of **Cozen O'Connor**. Ms. Moss is also chairing GDLA's Women Litigators Section, having previously served as Vice-Chair since the group's inception in 2019.

Carmen R. Toledo, a partner with **King & Spalding** in Atlanta, was elected to the Board of Directors of the National Foundation for Judicial Excellence (NFJE) at the DRI Board of Directors Meeting earlier this year. She is also currently serving as a National Director of DRI.

Freeman Mathis & Gary announced the addition of **Bob Marcovitch** as a partner in its Atlanta office. He focuses his practice on appellate advocacy.

Evelyn Fletcher Davis, a partner in the Atlanta office of **Hawkins Parnell & Young**, was elected President-Elect of the Association of Defense Trial Attorneys (ADTA). ADTA is a select group of diverse and experienced civil defense trial attorneys whose mission is to improve their practices through collegial relationships, educational programs, and business referral opportunities, while maintaining the highest standards of professionalism and ethics.

David V. Hayes, formerly with **Owen Gleaton** in Atlanta, has joined **Bendin Sumrall & Ladner** in Atlanta as a partner. His litigation practice includes professional malpractice, products liability, premises liability, general liability, toxic torts, and commercial disputes. He also advises business entities on a number of issues, focusing especially on healthcare, insurance, and international business law. Mr. Hayes is also licensed in Alabama.

Continued on next page

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Donavan Eason of **Lewis Brisbois** in Savannah was appointed to a two-year term on Formal Advisory Opinion Board (FAOB) of the State Bar of Georgia. The FAOB is composed of 18 lawyers appointed by the State Bar President to assist in drafting ethics opinions. The Board drafts proposed advisory opinions concerning a proper interpretation of the Georgia Rules of Professional Conduct or any of the grounds for disciplinary action as applied to a given state of facts.

Drew Eckl & Farnham announced the opening of an office in Augusta and that **James V. Painter** has joined the firm as a partner there. He focuses on representing hospitals, physicians, nursing homes and other health care providers throughout Georgia and South Carolina. Mr. Painter also handles comprehensive general insurance defense, including suits involving allegations of premises liability, product liability, defamation, breach of contract, worker's compensation, and automobile and trucking liability.

CASE WINS

The Atlanta office of **Rutherford & Christie** in Atlanta has enjoyed a couple successes this year. In the first case, partner **Carrie Christie** and senior associate **Ann Potente** of obtained a defense verdict for Southern Mutual Church Insurance Company in the first post-COVID jury trial held in the U.S. District Court for the Southern District of Georgia. Judge Lisa Godbey Wood presided over the trial that concluded on Friday, April 23, after the jury deliberated two hours. The plaintiff church, represented by Douglas Adams of Brunswick, alleged substantial roof and interior water damage resulting from a category-2 hurricane that swept through Brunswick in 2016. The defense successfully struck the plaintiff's causation and damages experts and obtained

summary judgment on bad faith and attorney's fees, based on briefs written by partner **Courtney Norton**, prior to trial. With the assistance of a forensic engineering expert, the defense argued at trial that the extensive interior water damage was caused by construction defects and the damage was therefore excluded under the policy.

In another case, **Ms. Christie and Ms. Norton** were joined by associate **Stephen A. Swanson** in the successful defense against an appeal to the Georgia Court of Appeals on behalf of the firm's client, Timothy Lutheran Church of Woodstock, Inc. The State Court of Cherokee County previously granted the defendant's Motion for Summary Judgment, and on May 13, 2021 the Court of Appeals of Georgia affirmed the trial court's ruling *in toto*.

The premises liability case stemmed from an incident at the defendant's church food pantry. The plaintiff, who volunteered at the food pantry twice weekly for the prior five-to-six years, had just finished putting away canned goods and was traversing back through the food pantry aisle, of which she had traveled at least three-to-four times previously that day, when she "just fell." The plaintiff could not recall the mechanism or any other circumstances of her fall, but nevertheless pointed her finger at the defendant as the source of an allegedly protruding floor vent that caused her fall. With no witnesses to the fall, and her own deposition admission that she knew the floor vent was there, the defense moved for summary judgment arguing that the plaintiff failed to prove the existence of a hazard, the alleged hazard posed by the floor vent was open and obvious, the plaintiff had equal knowledge of the alleged hazard, the plaintiff could not prove causation, and the plaintiff failed to exercise ordinary care for her own safety.

The trial court and Court of Appeals unanimously agreed with

the defendant in that the alleged hazard was open and obvious to the plaintiff and could have been avoided by the exercise of ordinary care for her own safety. Moreover, the plaintiff's speculation that she tripped over the floor vent was insufficient in carrying her burden of proof as to causation. Even if construed as a potential hazard, the courts found, the plaintiff's prior knowledge of and traversal across the floor vent gave her at least equal knowledge of the purported hazard, thus making her claim fail on yet another basis.

Based on these circumstances, the defendant successfully negated at least one or more of the essential elements of the plaintiff's case, thereby garnering summary judgment in the defendant's favor. The case is *Reva Abramson v. Timothy Lutheran Church of Woodstock, Inc.*, Case No. A21-A-0080.

Henry D. Fellows, Jr. and **Michael Gretchen** of the Atlanta law firm of **Fellows LaBriola** obtained a dismissal of all the claims against their client, Blake Goodman, in the federal case styled as *Wade Park Land Holdings, LLC et al. v. Jonathan Kalikow et al.*, 2021 WL 728185, ___ F.Supp.3d ___ (N.D. Ga. 2021). The plaintiffs alleged in their First Amended Complaint that the defendants engaged in (1) federal RICO violations; (2) federal RICO conspiracy; (3) Georgia RICO violations; (4) Georgia RICO conspiracy; (5) breach of fiduciary duty; (6) conspiracy to breach fiduciary duties; (7) misappropriation of trade secrets under the Georgia Trade Secrets Act ("GTSA"); (8) punitive damages; and (9) attorneys' fees.

Defendant Blake Goodman filed a Motion to Dismiss as to all counts of the First Amended Complaint. The remaining defendants, Jonathan Kalikow, WP Development Partners, LLC, Gamma Lending Omega, LLC, Gamma Real Estate Capital, LLC, and GRE WP, LLC ("Kalikow Defendants"), were

represented by other counsel. They filed a Motion to Dismiss and a Motion to Transfer the case to the U.S. District Court for the Southern District of New York pursuant to a forum-selection clause in a certain Limited Liability Company Agreement entered into between plaintiffs and the Kalikow defendants.

U.S. District Judge Timothy C. Batten granted the Motion to Dismiss of defendant Blake Goodman. Judge Batten also granted the Kalikow Defendants' Motion to Transfer the case to the U.S. District Court for the Southern District of New York pursuant to the agreed-upon forum-selection clause in the Limited Liability Company Agreement, but declined to address their Motion to Dismiss.

As to Goodman's Motion to Dismiss, the court held that the plaintiffs failed to plausibly allege a federal RICO violation against Goodman. The court stated that the plaintiffs failed to show that Goodman "... (1) operated or managed (2) an enterprise (3) through a pattern (4) of racketeering activity that included at least two predicate acts of racketeering, which (5) caused (6) injury to the business or property of the plaintiff," citing *Cisneros v. Petland, Inc.*, 972 F.3d 1204, 1211 (11th Cir. 2020). Mr. Fellows and Mr. Gretchen also represented Petland, Inc., in that purported RICO case.

The court also held that the plaintiffs failed to plausibly allege a federal RICO conspiracy or a Georgia RICO violation or conspiracy. The Court noted that although Georgia RICO is generally broader in scope than federal RICO, in this case, the plaintiffs failed to plausibly allege that Goodman engaged in a pattern of racketeering activity or shared trade secrets with the remaining defendants. As to the remaining claims against Goodman, the court held that the plaintiffs failed to plausibly allege that Goodman misappropriated trade secrets under the Georgia Trade Secrets Act, O.C.G.A. §

10-1-760 et seq. The court also held that the plaintiffs failed to plausibly allege that Goodman owed them fiduciary duties or that he breached such duties.

Duke Groover and Chris Conley of **James Bates Brannan and Groover** in Macon represented Southern Flavor Real Estate in two nuisance lawsuits filed in the Superior Court of Peach County. There were two actions, both of which involve substantively identical claims. Southern Flavor is a commercial greenhouse operation that uses state-of-the-art technology to carefully control its internal greenhouse environment for the mass production of food products. Part of this technology is the controlled use of light. As a byproduct of Southern Flavor's operation, it emits light through the roof of the greenhouse at night. Consequently, neighbors of the greenhouse sued claiming that the lights are a nuisance and seeking injunctive relief. The neighbors sought a preliminary injunction, and the court held a combined hearing in which both sets of plaintiffs presented arguments seeking to have the lights shut off for the duration of the pending lawsuits. Southern Flavor introduced expert testimony from Dr. Erik Runkle, a commercial greenhouse expert from Michigan State University, showing that operation of the lights is imperative to the successful functioning of Southern Flavor's business. Additionally, Dr. Runkle testified that Southern Flavor's use of lights is ordinary and necessary to any commercial greenhouse operation. Weighing the equities, the court found that the harm to Southern Flavor would be far outweighed by the harm to the plaintiffs if a preliminary injunction were granted, and Southern Flavor successfully defended against an injunction at the hearing. Following the preliminary injunction hearing and the completion of discovery in the first action of the two, Southern Flavor moved for summary judgment

citing *Effingham Cty. Bd. of Comm'rs v. Shuler Bros.*, 265 Ga. App. 754, 755 (2004), for the proposition that legal business operations conducting affairs in an ordinary and necessary manner cannot be a nuisance as a matter of Georgia law. The court agreed and granted summary judgment in favor of Southern Flavor disposing of the case. The plaintiff, Thomas Kempton, has appealed. The results of the appeal will have significant consequences affecting all Georgia businesses subject to nuisance lawsuits and whether a legal business operating in an ordinary and necessary manner can be subject to such claims as a matter of law.

Freeman Mathis & Gary partner and former GDLA Board Member **Wayne S. Melnick**, along with counsel **Andy Treese**, won summary judgment for a principal and teacher in a federal case where a student alleged a different teacher molested her while in study hall. The student brought Section 1983 claims against the principal and teacher based on both the Substantive Due Process and Equal Protection clauses of the Fourteenth Amendment. The student alleged violations based on the principal's knowledge of prior allegations of molestation against other students and the teacher's failure to report a claim of inappropriate touching by the other teacher prior to the student-plaintiff's report being made. Although the facts of record were enough to find questions of fact for her Title IX claims against the district (not represented by Mr. Melnick or Mr. Treese), the court found qualified immunity protected the principal because that same evidence was insufficient to show a history of widespread abuse, a custom or policy of deliberate indifference, or that the principal's knowledge of the prior abuse rose to the level of sexual harassment being obvious, flagrant, and rampant. Regarding the teacher, the court found that although her failure to report was troubling, it did not rise to a

“conscience-shocking” level. Plaintiff’s counsel already stated plaintiff will not be appealing the judgment.

Partner **Robert A. Luskin** and associate **Robert. E Noble III** of **Goodman McGuffey’s** Atlanta office won summary judgement for Noodle Life, a closely-held family corporation, in a restaurant liability matter involving soup spilled into the plaintiff’s lap. This case turned more complex when allegations of Alter Ego, Agency, Joint Venture and attempts to pierce the corporate veil were injected into the litigation.

In another case, partner **James T. Hankins III** and associate **Samantha M. Mullis** won summary judgment in a case where a work employee took a vehicle without permission. It happened on a job

site in Dahlonega, Ga., when Steve Moss took a Local Mechanical vehicle without permission causing a multivehicle collision. It was believed that at the time of the incident, Mr. Moss was undergoing some sort of psychotic episode and may have been attempting to commit suicide by vehicle. Along with criminal charges against Mr. Moss, several civil lawsuits arose out of the collision against both Mr. Moss and Local Mechanical Networking, Inc.

In *Karen Bright v. Local Mechanical Networking, Inc. and Steve Moss*, Ms. Bright alleged that Local Mechanical had negligently entrusted the vehicle to Mr. Moss and was vicariously liable for his conduct. Ms. Bright also alleged that Local Mechanical was negligent for hiring Mr. Moss, a veteran with a history

of DUI and PTSD, and negligently supervising and training Mr. Moss on the day of the collision. Ms. Bright also alleged that Local Mechanical should be held liable for attorney’s fees under O.C.G.A. 13-6-11 and punitive damages.

The defense duo moved for summary on all claims, arguing Mr. Moss was not in the course and scope of his employment at the time of the collision and that he was not entrusted with the vehicle. Defense counsel further argued there was no evidence of similar behavior from Mr. Moss that would have made them aware he was likely to steal a work van and cause an accident. Mr. Hankins argued the case before Judge Carl Bowers in Cobb County State Court, who granted summary judgment in its entirety. ♦

GDLA Law School Award Recipients Honored

Alex Mooring (left photo) was presented GDLA Rusty Gunn Award during the Mercer Law School Student Dinner on May 8, 2021. 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.

Mandi Goodman

(right photo) 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 and Past Presidents. She is now a judicial law clerk for Judge William M. Ray, II, at the U.S. District Court for the Northern District of Georgia. ♦

GDLA Wins Back-to-Back Newsletter Awards

GDLA was honored with back-to-back Best Newsletter Awards from the State Bar of Georgia in the category of local and voluntary bars with more than 500 members.

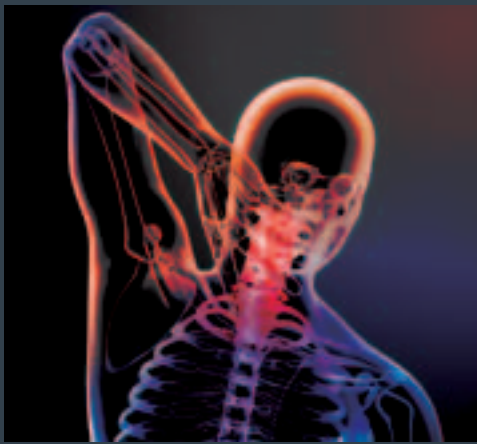
Since last year’s conference was held virtually due to COVID, the awards for 2019-2020 and 2020-2021 were both presented on June 11, 2021 during the State Bar Annual Meeting held at Wild Dunes Resort.

Winners are showcased in the State Bar’s Annual Meeting brochure and the *Georgia Bar Journal*. We continue to see the benefits of this pub-



licity 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 countless contributing authors, which include GDLA members and sponsors, but especially to the Editor-in-Chief Erica L. Morton of Swift Currie in Atlanta, who served during both winning years. Executive Director Jennifer Ward is also to be commended for coordinating the layout/design, as well as writing, editing and photography for each issue. ♦



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Welcome, New GDLA Members!

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

Marsha Ambroise
Gray Rust St. Amand
Moffett & Brieske, Atlanta

Raina Azarkhail
Groth Makarenko
Kaiser & Eidex, Suwanee

Geoffrey Felix Calderaro
Quintairos Prieto
Wood & Boyer, Atlanta

Christopher D. Carter
Scrudder Bass Quillian Horlock
Taylor & Lazarus, Atlanta

Anelise Roina Codrington
Drew Eckl & Farnham, Atlanta

Jacob Donald Davis
McLain & Merritt, Atlanta

Christina Essex
FisherBroyles, Atlanta

Sarah Lanier Flanders
Downey & Cleveland, Marietta

Matthew D. Friedlander
Holland & Knight, Atlanta

Carley Fulp
Chambless Higdon Richardson
Katz & Griggs, Macon

Scott Greene
Young Thagard Hoffman, Valdosta

Jackson Alexander Griner
Downey & Cleveland, Marietta

Pamela S. Hallford
Carr Allison, Brunswick

Kathryn Dunnam Harden
Hall Booth Smith, Albany

Karolynn Lynn Harris
Worsham Corsi
Dobur & Berss, Marietta

Kyle Joyce
Gray Rust St. Amand
Moffett & Brieske, Atlanta

Michelle LeGault
Vernis & Bowling, Atlanta

Andrew Michael Loewenstein
Holland & Knight,
West Palm Beach, FL

Zachary John McCormack
Scrudder Bass Quillian Horlock
Taylor & Lazarus, Atlanta

Joseph Menello
Wicker Smith O'Hara
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Cruser Mitchell Novitz Sanchez
Gaston & Zimet, Norcross

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Ashante Rosier-Robinson
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Aaron Cochran Smith
Law Office of
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Lance Stephens
Young Thagard Hoffman, Valdosta

Kristen Van der Linde
Boyd & Jenerette, Savannah

Latrice Vann
Savell & Williams, Atlanta

Trevor Jordan Vanzant
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Byron D. Watson
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Tiffany J. Williams
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Chambless Higdon Richardson
Katz & Griggs, Macon

Sarah Williamson
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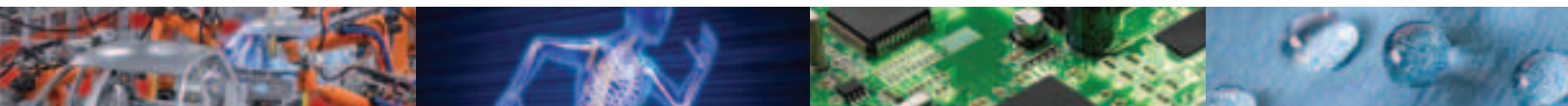
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In Memoriam: Richie Foster

Richie Foster, Atlanta-based partner at Swift Currie McGhee & Hiers and a beloved colleague, passed away on April 6, 2021, at the age of 55. He was a leader known for his wisdom, creativity and knack for forming real relationships with everyone he met. He was a true trial lawyer with strong feelings about how to practice law, try a case and relate to those on a jury. He willingly shared his knowledge and was a great mentor to many.

“Beyond being an excellent attorney and litigator, Richie was an amazing person and friend who will be deeply missed,” said Terry Brantley, managing partner of Swift Currie. “I am grateful for the opportunity to work with Richie as my partner. He had never-ending energy and commitment to everything he touched. He cared about his clients and everyone he worked with deeply and got to know each personally. I will miss him deeply, and extend my deepest sympathies to his wife, sons and entire family.”

Attorney Beth Bentley, who worked with Foster both at and prior to joining Swift Currie, recalls Richie as one of the most knowledgeable and well-versed attorneys she ever encountered—one who was always open to making time for others, no matter how busy he may have been.

“Whether it was talking about life or practicing law, he could always relate to people, and he was always willing to spend time having a conversation so he could connect with others,” said Ms. Bentley. “Then he could walk right into the courtroom, connect with the folks



Richard “Richie” Foster
Swift Currie McGhee
& Hiers, Atlanta

serving on the jury and tell them why they should have the same opinion about a case as he does.”

Richie graduated from Georgia College in 1988 before attending the Walter F. Georgie School of Law at Mercer University, where he earned his law degree in 1995. After more than 16 years with his first firm, Hicks Casey & Foster, he joined (what was then) Carlock Copeland & Stair as a partner. When he joined Swift Currie along with former colleagues at the renamed Hicks Casey & Morton, the *Daily Report* listed the news among its most significant lateral moves for Atlanta firms in 2018.

Richie is a Georgia native who has earned a national reputation as a leader in motor carrier liability, commercial insurance coverage and general commercial insurance defense throughout a law career spanning more than 25 years. He is survived by his wife of 23 years, Jodee Gentry Foster; sons, Benjamin Crawford Foster and Matthew Crawford Foster; his mother and father, Kay and Wendell Barker; his brothers Christopher Phillips, Jason Barker (Joyce) and Jonathan Barker; his sisters Rebecca Foster Tong, Hillary Foster Pennington, and Alex Foster Howell (Glenn); his aunts Dianne Williams, Betsy Foster and Kathryn Foster White; and several nieces and nephews.

Richie was a committed advocate for his clients, which included some of the nation’s largest trucking companies and their insurance carriers, as well as leading local and regional businesses in the transportation and insurance sec-



tors. He dedicated his legal practice to motor carrier liability, commercial insurance coverage and general commercial insurance defense, acting as lead counsel in more than 100 jury trials throughout his career. An innovator in his practice, Richie created a 24-hour emergency response team to make sure he was there for his clients when they needed him. He was highly active with many professional organizations, including serving on the Trucking Law Committee for the Defense Research Institute and as a member of the Georgia Defense Lawyers Association, Southeast Wood Producers Association, State Bar of Georgia, Transportation Law Association and the Trucking Industry Defense Association. He was also a member of the exclusive Federation of Defense & Corporate Counsel.

A devoted father, husband, brother, son and friend, Richie was loved and admired by all who knew him. He was a true outdoorsman, who enjoyed hunting, fly-fishing, kayaking, camping and running marathons, and could often be found offshore fishing in Destin, Florida, or walking his favorite golden retriever, Stella. Richie also loved coaching baseball and cheering on the Atlanta Braves and UGA football. ♦



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In Memoriam: Hugh McNatt

Hugh Brown McNatt died Tuesday, June 1, 2021. He was a trial lawyer extraordinaire for more than 50 years, an effective advocate who could express intricate matters in a way all could understand. As he so aptly put it: "I'll get the corn down to where the cows can eat it." He left an indelible mark on Georgia's legal community, Georgia politics, his many friends, and his dear family.



Hugh Brown McNatt
Balch & Bingham,
Atlanta

Hugh was born on June 23, 1946 in Uvalda, Georgia to the late Lillian Sanders and Hugh Brown McNatt who imparted many life lessons, including the importance of hard work, humility, and a dedication to helping others. Hugh grew up in Uvalda and attended Montgomery County public schools where he excelled in the classroom and on the football field as an offensive lineman. His father passed away suddenly while Hugh was in high school. Hugh's rambunctious personality eventually exceeded the confines of Montgomery County. Following his father's death, he went to Atlanta where he attended Druid Hills High School. He again excelled as a student and as an athlete. Hugh attended Mercer University and Mercer University School of Law. He flourished in law school, excelling in academics and was an Editor of the Mercer Law Review. Upon graduation from law school, Hugh began practicing law in Lyons, Georgia with his mentor and cousin, the late T. Malone Sharpe.

Hugh immediately began trying cases in South Georgia where he honed his trial skills razor sharp. After becoming the go-to lawyer south of the "gnat line" he was soon trying cases all over Georgia and throughout the southeast. Hugh

developed a national reputation as a trial lawyer. His proudest moments were representing the electric utility industry across Georgia.

In 1979 Hugh married the love of his life, Lynn Morris McNatt of Vidalia. Hugh and Lynn became an inseparable team who welcomed clients and friends into their homes. They created and developed relationships which enriched their lives. Hugh worked with clients during the day; he and Lynn entertained them at night. Hugh cherished his relationships with his clients, many of whom became his best friends.

Hugh was an old-time trial lawyer with a throw-back style. However, underneath his rustic personality was a highly sophisticated lawyer and a formidable mind. In court Hugh used the force of his strong personality to subtly direct the course of a trial to achieve the best results for his client. He was a tireless worker keenly focused and driven by a sense of purpose. As he said: "Anything worth doing is worth overdoing." He was a consummate professional to anyone who worked with or against him. He was well known and respected by the federal and state judiciary throughout Georgia. He was truly an artisan in the practice of law.

Hugh was a voracious reader and an avid student of history. He had an encyclopedic recollection of the events and the people who made history. He never stopped learning.

He was a member of the Uvalda Methodist Church and also a member of the Clayton First Methodist Church in Clayton, Georgia. He regularly taught Sunday school at

both churches. Hugh started Kids' Chance, Inc. a charity which provides scholarships to children whose parents were killed or catastrophically injured in a workers compensation accident. Each year Hugh hosted the "Bird Supper" at the Trolley Barn on Edgewood Avenue in Atlanta where he served fried quail, grits and gumbo to raise money for Kids' Chance. He usually attended in his bird hunting attire and always recognized that year's scholarship recipients. The Bird Supper became and remains a major event in the legal and political community.

Hugh prided himself on knowing someone in every corner of Georgia. Whether in the back-woods of Toombs County or in downtown Atlanta, Hugh was equally at home. However, he never strayed far from his Uvalda roots. He always maintained an office and a home in Vidalia though he also spent time in Atlanta and at his mountain home in Clayton, Georgia.

Hugh was a connector and nurturer of people. He willingly shared his largesse with everyone, especially junior lawyers. He loved to pass down lessons in life and law to junior lawyers. Under his tutelage, these lawyers developed their practices as a reflection of Hugh and his legacy. Hugh was instrumental in building the Georgia offices of Balch & Bingham LLP, where he was a partner at the time of his death.

Hugh was an avid wing shooter and loved the outdoors. He especially enjoyed quail hunting and spent a great deal of time studying the quail—its life cycle and habitat. Hugh connected with the land and took a special interest in molding the earth to protect this great bird. Hugh was in his element driving the buggy, watching pointer bird dogs and flushing cockers work the

elusive quail. At night after the hunt, Hugh and Lynn entertained hunter friends and guests on a grand scale.

As a lawyer, he won many awards. He was proudest of The Tradition of Excellence Award (2003) and the Thomas O. Marshall Professionalism Award (2016) he received from the State Bar of Georgia. When he received the former from the Bar's General Practice & Trial Section (for the defense side), the late U.S. Southern District Court Judge Tony Alaimo introduced Hugh. Part of the judge's remarks spoke to Hugh's character; the judge said:

Hugh has tried some seven or eight cases before me, receiving favorable verdicts in each one of them, and he's the only one that has done that in my 30 years on the bench. And I must say that obviously that the catastrophe of success has not corrupted him, to his credit. And I find him to be a



Judge Tony Alaimo and Hugh McNatt in 2003 at the Tradition of Excellence Award presentation.

person of impeccable integrity, which in my book is the lodestar of any professional because we must continually remind ourselves that at the end of the race, there is a fragile prize and that prize is called reputation.

Hugh was a member of many organizations including: the American College of Trial Lawyers of which he served as

President, the American Board of Trial Advocates, and the International Society of Barristers. He was a longtime member of GDLA, too.

Hugh was a fine husband and father, a supreme lawyer, a great friend, and the best mentor. He leaves a large wake, a multitude of friends, law partners and a wonderful family. Hugh is survived by his wife, Lynn Morris McNatt of Vidalia, his daughter Heather McNatt Hennessey, her husband Michael and their son Brian of Winchester, Virginia; his daughter Holly McNatt Kirklighter, her husband Taff and children Hayden McNatt, Victoria "Lauren" Kirklighter, and Taff Kirklighter, Jr. of Albany, Georgia; son Joe Glen Gay and wife Beverly of Waynesboro, Georgia; granddaughter Jessica Harrison and husband Michael of Omega, Georgia; daughter Terri M. Gay of Vidalia, grandson Burt A. "Tony" Swancey, Jr. and wife Libby who reside in Metter, Georgia as well as several great grandchildren. ♦

In Memoriam: Mike Stevenson, ESi

Michael E. "Mike" Stevenson, Ph.D., P.E., Chairman and Chief Executive Officer of longstanding GDLA Platinum Sponsor ESi, passed away suddenly and unexpectedly on March 28 at age 44.

Mike joined ESi in 2007 as Vice President and Director of Georgia Operations. In 2009, he was appointed President, and in 2010, CEO. He was appointed Board Chairman in 2018. He was often called upon by GDLA members to serve as an expert.

Mike was an amazing father, husband, son, brother, uncle and friend. As CEO of ESi, Mike was an exemplary leader and mentor to many. Mike received his bach-



Mike Stevenson with his wife, Julie, and children, McKale and Marisol.

elors, Masters and Ph.D. in metallurgical engineering from the University of Alabama. He was the fastest individual on record in Alabama history to complete all three degrees.

His favorite things to do included watching his kids play the sports they loved—baseball and volleyball. He loved to travel with his family and they never went long without a trip to Disney World.

He was preceded in death by his father, Michael Stevenson and is survived by his wife, Julie S. Stevenson; children, McKale and Marisol Stevenson; mother, Marilyn Stevenson; father-in-law and mother-in-law, Bob and Jo Simon; sister-in-law and brother-in-law, L. Simon and Dave Price; and nieces, Addison and Delaney Price. ♦

Supreme Court Sides with GDLA Amicus on Duties of Employer for Criminal Conduct of Employees

On May 3, 2021, the Supreme Court of Georgia issued a decision in which GDLA had filed an amicus brief on questions of foreseeability of injuries and “color of employment” in tort cases.

The case arose when Byron Perry, a car washer at a car rental company, snuck onto the lot after it had closed and stole a vehicle intending to sell it. Hours later, while fleeing from police in the same vehicle at a high rate of speed, Perry struck a wall and critically injured the two plaintiffs. In separate trials against the company, juries awarded \$47 million and \$7 million in damages which were apportioned among several parties. The trial court’s denial of a motion for judgment notwithstanding the verdict was reversed by the Court of Appeals after which the plaintiffs sought review by the Supreme Court.

In affirming the Court of Appeals’ decision, the Supreme Court ruled that judgment should have been granted as a matter of law because “the subsequent accident caused by Perry’s criminal conduct was not a probable or foreseeable consequence that could have

been reasonably foreseen by the defendants.” Separately, the Supreme Court found the defendants could not be liable under a “color of employment” theory because Perry’s theft and subsequent accident “were not connected to his employment duties and were not accomplished by virtue of his employment.”

In so concluding, the court agreed with GDLA’s positions that judges need to decide, in the first instance, whether an injury is too remote from a party’s conduct for a claim to proceed a jury and that Perry’s conduct was not under “color of employment.”

GDLA thanks the authors, Philip W. Savrin and Alexia R. Roney of Freeman Mathis & Gary in Atlanta, for their work on this. The reported decision can be found at *Johnson v. Avis Rent a Car System, LLC*, 2021 Ga. LEXIS 199 (Ga. May 3, 2021).

This and all prior amicus briefs can be found under Amicus Policy & Briefs in the members’ only area of our website. ♦



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Supreme Court of Georgia Drastically Alters Apportionment Scheme

On August 10, 2021, the Supreme Court of Georgia issued its decision in *Alston & Bird LLP v. Hatcher Management Holdings, LLC*, No. S20C1419 (Ga. Sup. Ct. July, 2 2020), in which it held that a reduction of damages in accordance with nonparty fault is unavailable in single-defendant cases under Georgia's apportionment scheme.

The case involves a malpractice claim against Alston & Bird LLP arising out of the creation and operation of a holding company. Ultimately, a jury found Alston & Bird liable but apportioned 60 percent of fault to a nonparty, and the trial judge (after reducing the verdict for the plaintiff's own percentage of fault) reduced the judgment accordingly. A Court of Appeals panel reversed and determined that the trial court should not have reduced the judgment per the nonparty's fault because Alston & Bird was the only defendant. According to the panel, O.C.G.A. § 51-12-33(b) provides for reduction of damages consistent with nonparty fault only in multiple-defendant cases. Relying in part on pre-tort-reform case law, the panel reasoned that the distinction between the terms "fault" and "damages" supported this interpretation.

GDLA submitted an amicus brief authored by Amicus Vice-Chair Philip Thompson of Ellis Painter in Savannah in support of Alston & Bird. In the brief, GDLA argued that the panel's decision conflicted with the language and legislative history of the apportionment statute and with Georgia court's understanding of the statutory scheme. The legislation that would become O.C.G.A. § 51-12-33 was substituted specifically to permit consideration of nonparty fault in the apportionment of damages, and this intent is reflected in the text of the apportionment statute. GDLA pointed out that the Georgia Supreme Court has accordingly recognized that the apportionment statute provides a comprehensive scheme for the apportionment of damages consistent with the assigned fault of parties and nonparties in all cases to which it applies. GDLA's brief explained how the panel's decision deviated from these principles and would lead to untenable and absurd results.

Rejecting the arguments of Alston & Bird and amici, the Georgia Supreme affirmed in part and reversed in part the decision below. Employing strict textualism in a decision written by Justice Nels Peterson, the Court

determined that the statute unambiguously limited apportionment among the persons who are liable according to the percentages of fault of each person's only to cases "[w]here an action is brought against more than one person." Justice Peterson wrote that the apportionment statute only contains three provisions regarding reduction of damages: subsections (a), (b), and (g). Reasoning that (a) and (g) were not relevant to its analysis, the Court stated that "[t]he issue here is whether the sole remaining provision regarding reduction of damages, subsection (b), applies to this case." The opinion views subsection (c) as merely "tell[ing] the trier of fact how to assess 'percentages of fault' that are to be used under other subsections of the statute, but it does not itself au-

thorize any apportionment of damages." Thus eliminating (c) and (d) from its consideration (because (d) is merely the notification procedure required to invoke (c)), the Court determined that subsection (b) did not apply in this case because it was only filed against one defendant, meaning that Alston & Bird was not entitled to a reduction in damages in accordance with the fault of nonparties.

The Court also looked to statutes in other jurisdictions and noted that they are more broadly worded than Georgia's statute. The Court did not explicitly analyze the statute's legislative history or

the purpose of the statute, instead referring to the text of (b) as the best indicator of the General Assembly's intent. The Court did, however, conclude that expenses-of-litigation awards under O.C.G.A. 13-6-11 are subject to apportionment.

The decision's strict focus on (b), marginalization of subsection (c), and rejection of the stated purposes of the apportionment statute create seismic issues for the defense bar moving forward. The outcome likely entails an increase in the number of suits filed, proliferation in third-party practice and joinder, and a reevaluation of effective practices in arguing damages to juries. Legislative action will be needed to fix these issues and the fundamental unfairness the new apportionment scheme was intended to address moving forward.

GDLA thanks Mr. Thompson for his work on our most amicus brief, as well as Laurie Webb Daniel of Holland & Knight in Atlanta for authoring our first amicus brief in this pivotal case. At this stage, we expect to work with our lobbyist to address this in the next session of the General Assembly. ♦

“
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moving forward.*
”

Georgia Supreme Court sides with GDLA Amicus Arguments Under the Georgia Street Gang Terrorism and Prevention Act (GSGTPA)

On June 21, 2021, the Georgia Supreme Court issued an order siding with GDLA's amicus arguments under the Georgia Street Gang Terrorism and Prevention Act (GSGTPA).

On November 30, 2020, GDLA filed an amicus brief in support of the defendants (the owner and manager of an apartment complex) in a negligent security case in which the plaintiff brought a claim for nuisance under the GSGTPA. *Star Residential, LLC and Terraces at Brookhaven, LLC v. Manuel Hernandez*, No. S20G1214 (Ga. Sup. Ct. docketed Nov. 2, 2020).

The case is a standard negligent security case. The plaintiff alleges that on May 29, 2017, he was shot from behind by two unknown males as he was attempting to enter his apartment at Terraces at Brookhaven. Alleging a failure to provide adequate security at the apartment complex, the plaintiff asserted claims for negligent security under O.C.G.A. § 51-3-1, nuisance under the GSGTPA, negligence per se based on a violation of the City of Brookhaven's nuisance ordinance, and negligence per se based on a violation of DeKalb County's nuisance ordinance. The defendants filed a motion to dismiss with respect to the nuisance and negligence per se claims, which Judge Dax Lopez of the State Court of DeKalb County denied. Judge Lopez issued a certificate of immediate review, and the Court of Appeals granted the defendants' application for interlocutory review. The Court of Appeals affirmed the denial of the defendants' motion. Interestingly, however, the Court of Appeals did



not even attempt to interpret the statute, either by reference to its plain language and meaning or by applying the rules of statutory interpretation. Instead, it held that the issue of who can be sued under the GSGTPA must be decided by a jury since the statute requires it to determine whether the action is consistent with the legislature's codified statement of purpose. As Judge Todd Markle noted in a special concurrence, such statutory interpretation has always been considered to be a function for the courts, not juries. Further, Judge Markle noted that interpreting this requirement in such an absolute manner "essentially eviscerate[s] the summary judgment statute."

The Supreme Court granted the defendants' petition for a writ of certiorari on November 2, 2020. GDLA again argued that the GSGTPA should be interpreted to provide a civil cause of action only against criminal street gangs and their members and not against owners and occupiers of property who did not participate in the criminal gang activity at issue. This interpretation is supported by the plain language and meaning of the specific statute, as well as the overall context of the entire act, and the

legislature's codified statement of purpose. Additionally, the Georgia RICO Act contains an almost identical provision creating a civil cause of action, and that provision has been interpreted as applying only to the persons who committed the alleged crimes.

Beyond these arguments of statutory interpretation, GDLA argued that the Court of Appeals erred by abdicating its role as interpreter of statutes. Again, as Judge Markle noted in his special concurrence, allowing juries to engage in statutory interpretation may cause various unintended consequences. Because statutory interpretation is a matter for the courts, the Court of Appeals should have ruled on the issue of who can be sued under the GSGTPA. The requirement of the jury determining whether the action is consistent with the legislature's codified statement of purpose does not require it to determine who can be sued. These are separate issues, and GDLA contended that the Court of Appeals erred by conflating them.

In its unanimous opinion penned by then-Chief Justice Harold Melton, the Supreme Court agreed with GDLA and the defendants in finding the Court of Ap-

peals' interpretation of the civil liability provision of the GSGTPA was incorrect. The Supreme Court first noted that the GSGTPA "provides different causes of action for different remedies with different plaintiffs and defendants." Subsections (a) and (b) of the Act say nothing about civil damages and do not create an ability for any party to pursue an action for damages arising from a public nuisance created by criminal gang activity. As to subsection (c) of 16-15-7 where treble damages are provided, the Court emphasized that section provides that "[a]ny person who is injured by reason of criminal gang activity shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive damages."

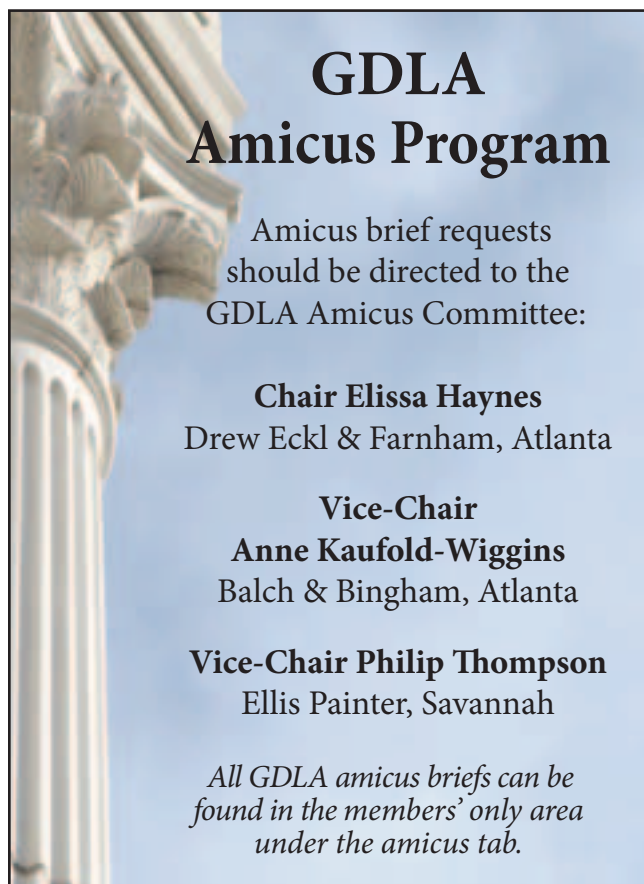
In other words, a cause of action under subsection (c) must result from criminal gang activity. Thus, the Supreme Court held "the plain language of subsection (c) indicates that an injured person may pursue a cause of action for treble and, where appropriate, punitive damages against the actors who proximately caused the plaintiff's injuries by reason of their criminal gang activity." Accordingly, the plaintiff could not maintain a cause of action against the property defendants under subsection (c) "as a matter of law" as there was no allegation the property defendants themselves committed or attempted to commit any of the criminal gang activity

that injured plaintiff. The Supreme Court stated the Court of Appeals improperly grafted the terms of subsections (a) and (b) onto subsection (c) even though these subsections describe entirely separate causes of action.

The Supreme Court further held the Court of Appeals erred in its interpretation of subsection (c) which states, "No judgment shall be awarded unless the finder of fact determines that the action is consistent with the intent of the General Assembly as set forth in Code Section 16-15-2." The Court of Appeals incorrectly found this language meant it is for the factfinder to determine whether a cause of action is consistent with the legislative intent of the Act. Nonetheless, Georgia's "well established rules of statutory interpretation require courts to ascertain the legislature's intent in enacting the law in question." The statute does not say that a factfinder must determine the meaning of subsection (c) in the first instance, "which is a role reserved for the courts."

This unanimous decision represents a big win for the defense bar in limiting these claims of treble damages in premises liability and negligent security cases.

The property defendants are represented by GDLA members Warner Fox, Will Ellis, Jr., and Elliott Ream of Hawkins Parnell & Young. GDLA thanks Jake Daly of Freeman Mathis & Gary in Atlanta who authored the brief. ♦



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The 2021 Session of the Georgia General Assembly in Review

By Jacob "Jake" E. Daly, GDLA Legislative Chair
Freeman Mathis & Gary, Atlanta

This was an important year in GDLA's history—it was the first time the organization formally engaged in lobbying. Thanks to generous contributions from several member firms, GDLA retained Kade Cullefer at Troutman Pepper Strategies in Atlanta to advocate for the interests of GDLA and its members at the Capitol. It was important for GDLA to establish a presence at the Capitol; in years past, the General Assembly had sought input from GTLA on proposed legislation through its own full-time lobbyist. GDLA, meanwhile, did not previously have anyone present for members of the General Assembly to consult about the needs and wants of the organization's members.

Although it is important to have a lobbyist working for GDLA at the Capitol, it is equally important for our members to be engaged in the legislative process. Our members are, after all, constituents of the legislators, and legislators are more likely to be responsive to their constituents. Our lobbying team made several requests of the members during the session, and many GDLA members responded by calling or e-mailing their legislators to express support for or opposition to particular bills. Although some bills that we supported did not pass this year, we know that our members' efforts had an impact. We heard from legislators that our members' calls and e-mails made a difference. So, to everyone who helped: Thank you.



GDLA needs to continue to be involved in the legislative process. If it is not, legislators will hear only GTLA's arguments for and against legislation that affects civil litigation. There are very few civil defense lawyers left in the General Assembly, and they need our help. Thus, we will be calling on our members again next year to help our cause. But before we start focusing on next year, let's take a look back at what happened in the General Assembly this year.

2021 BY THE NUMBERS

The Georgia Constitution requires the General Assembly to meet for 40 legislative days each year, beginning on the second Monday in January. This year, the session began on January 11 and adjourned on March 31. When all

was said and done, 854 bills and 567 resolutions were introduced in the House, and 332 bills and 357 resolutions were introduced in the Senate. Both chambers passed 295 bills (206 House bills and 89 Senate bills) and 13 resolutions (10 House resolutions and 3 Senate resolutions). Governor Kemp signed 294 of the bills, vetoing one, and he signed all 13 of the resolutions. Most of these new laws became effective on July 1, 2021.

LEGISLATION OF INTEREST TO GDLA

Before this year's legislative session started, our lobbying team identified several issues on which to focus our efforts. Two of those issues were phantom damages and the seat belt defense. Much of our efforts went into promoting the bills that addressed these issues, and many of our members answered the call to help our cause by contacting key legislators on those points. Although neither bill passed, they came very close. Either or both could pass during the next legislative session. These two issues remain at the top of our list of priorities.

Another priority was time-limited settlement demands. O.C.G.A. § 9-11-67.1, as enacted in 2013, had some many limitations that it was, at best, only a modest step in the right direction. Amending the statute to make it more effective at limiting "gotcha" time-limited demands was a major emphasis for

GDLA during its inaugural year of lobbying. Some members of GTLA who are opposed to the use of time-limited settlement demands as a trap have been open to working to amend the statute. This year presented an opportunity for the two organizations to work together. Unlike the bills regarding phantom damages and the seat belt defense, the negotiations on this issue were conducted largely behind the scenes, and Kade played a pivotal role in working with GTLA. In the end, his efforts helped GDLA achieve this important success.

Following is a summary of the bills that passed both chambers of the General Assembly and that were signed into law by Governor Kemp, starting with the bill regarding time-limited settlement demands.

HB 714: Time-Limited Settlement Demands, Bad-Faith Penalty, and MARTA Venue

This bill has three key provisions. First, it amended O.C.G.A. § 9-11-67.1 in several important ways:

- As originally enacted, the statute applied only to demands made prior to the filing of the complaint. It now applies to demands made prior to the filing of an answer.
- The claimant/plaintiff must provide all medical and other records in his/her possession relating to the claim and that are sufficient to allow the recipient to evaluate the claim.
- The claimant/plaintiff may include a requirement that the recipient provide a statement under oath affirming that all potentially applicable insurance has been disclosed.

- The only terms that can be included in a demand are those listed in the statute.
- A request for clarification of the terms of the demand must be in writing.
- If the claimant/plaintiff does not provide a release with the demand, the recipient's proposal of a release shall not be deemed a counteroffer.
- A demand must include an address, fax number, or e-mail address to which written acceptance may be sent.
- As originally enacted, this statute allowed a demand to require payment to be made within 10 days of acceptance of the demand, but it now requires a minimum of 40 days after receipt of the demand.

Continued on page 56



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A Theory to Revive O.C.G.A. § 51-12-1(b) to Allow Juries to Consider Amounts Paid to Medical Providers When Determining Reasonable Medical Expense Damages



By Robert Marcovitch (left) and Wayne S. Melnick
Freeman Mathis & Gary, Atlanta

There is pervasive concern within the defense bar that, under existing Georgia law, damages on account of medical expenses for the treatment of injuries at issue in litigation are distorted by operation of Georgia's common law collateral source rule.¹ These damages generally are established by proof of reasonable amounts *charged* by providers of medical services, not the often-discounted amounts *actually paid to and accepted as payment in full* by providers.² In other words, special damages for medical expenses often do not reflect economic reality, but the law withstands this situation based on the rationale that any "windfall" created by it should not be for the benefit of a wrongdoing tortfeasor.³

Because the collateral source rule is a creature of the common law, the Georgia General Assembly is free to alter it within constitutional limits.⁴ And the state legislature did just that when it enacted O.C.G.A. § 51-12-1(b) as part of an early "tort reform" effort. This statutory provision reads, in relevant part:

In any civil action ... for the recovery of damages arising from a tortious injury in which special damages [including medical expenses]⁵ are sought to be recovered ..., *evidence of all compensation, indemnity, insurance (other than life*

insurance), wage loss replacement, income replacement, or disability benefits or payments available to the injured party from any and all governmental or private sources and the cost of providing and the extent of such available benefits or payments *shall be admissible for consideration by the trier of fact.* The trier of fact, in its discretion, *may consider such available benefits or payments* and the cost thereof but shall not be directed to reduce an award of damages accordingly.

(Emphasis added). Thus, insofar as damages for medical treatment are concerned, § 51-12-1(b) was designed (1) to allow defendants to present evidence regarding third-party medical expense payments to or on behalf of an injured plaintiff; but (2) to preclude trial courts from instructing juries to reduce medical expense damages awards by the amounts of such payments.

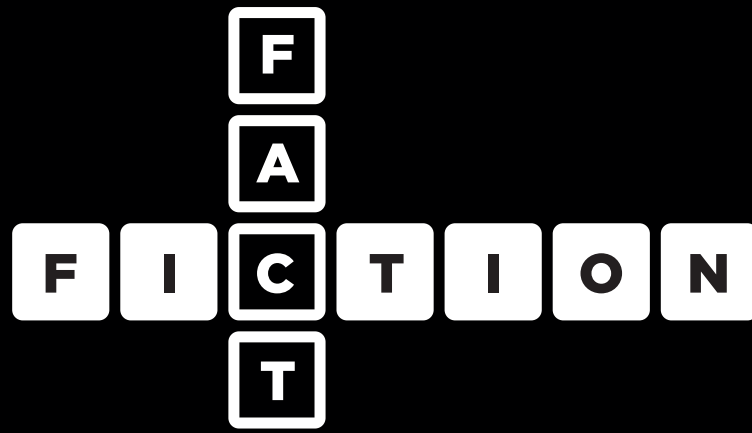
It is not entirely clear whether, notwithstanding its prohibition on *jury instructions* to this effect, O.C.G.A. § 51-12-1(b) permitted defense counsel to *argue* for a reduction in medical expense damages commensurate with third-party payments that offset a plaintiff's expenses for medical services. Nevertheless, at a minimum, § 51-12-1(b) almost certainly allowed a defendant to

contend—and allowed a jury to find—that the calculation of reasonable medical expenses for damages purposes should be keyed to amounts *disbursed and accepted as payment in full* by medical providers for their treatment of a plaintiff, rather than the often fantastical amounts *charged* by these providers for the treatment.⁶

The meaning of O.C.G.A. § 51-12-1(b), however, temporarily became irrelevant in 1991, when the Supreme Court of Georgia declared the statute unconstitutional, in violation of the equal protection clause of the Georgia Constitution.⁷ *Denton v. Con-Way S. Exp., Inc.*, 261 Ga. 41 (1991). The precise nature of the equal protection analysis undertaken by the plurality in *Denton* is difficult to discern, but it seems to relate to the fact that § 51-12-1(b) allowed for the presentation of evidence of a plaintiff's insurance benefits, but not those of a defendant:

The [equal protection clause of the] Georgia Constitution requires statutes to be "impartial and complete." The amended code section that has been challenged, O.C.G.A. § 51-12-1(b), allows a jury to consider inherently prejudicial evidence which could be misused. There can be no equal justice where the

Continued on page 58



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Proceed at Your Own Risk: Court of Appeals Reverses \$4.65M Verdict Due to Failure to Charge on Assumption of the Risk



By Martin A. Levinson (left) and Elliott Ream
Hawkins Parnell & Young, Atlanta

In June, the Georgia Court of Appeals sent a plaintiff home emptyhanded, finding the trial court erred in refusing to allow the jury to consider whether the plaintiff had assumed the risk of his injuries. In *Game Truck Georgia v. Quezada*,¹ the Court of Appeals granted the defendant businessowner's request for a new trial due to the omitted jury charge. In so doing, the appellate court wiped out a jury's post-apportionment award of \$4.65 million to a young plaintiff who was injured during a game of "bubble soccer." As a practical matter, *Quezada* again reinforces the importance of charging a jury properly at trial and the viability of assumption of the risk as a defense to personal injury claims in Georgia.

The evidence at trial in *Quezada* showed the plaintiff, a senior on his high school's soccer team, was participating in a "bubble soccer" match organized by his coach to celebrate the end of the season. Bubble soccer is a recreational activity with the same objectives and general rules of regular soccer—except that each player wears a large, transparent, inflated spherical suit (or bubble) around his or her upper body. At the start of the match, the plaintiff ran quickly toward another student participant and the two collided. The plaintiff suffered a serious head injury, including bone fractures in his forehead and brain damage to his frontal lobe, as a result.



The defendant, Game Truck Georgia ("GTG"), provided the bubble equipment to the student participants. GTG employees assisted students in putting on the bubble suits correctly. GTG employees also conducted a rules briefing with the participants prior to the start of the activities. And prior to the start of each match, the GTG employees reminded participants of important safety rules.

The plaintiff missed the initial safety rules briefing because he arrived at the bubble soccer event late. However, trial testimony showed the plaintiff had played soccer since a young age, he was familiar with its rules, he understood that bubble soccer would be played according to the basic rules of soccer, and he knew the rules of soccer prohibit head-butting or rushing at other players who do not have the ball. There was also evidence a GTG employee specifically instructed the plaintiff not to engage in horseplay or to charge at other players prior to the match. Nonetheless, the plaintiff purposely ran directly toward another student participant at the start of the game.

At trial, the defendant requested the pattern charge on assumption of the risk, but the trial court refused. Under Georgia law, of course, "[t]he affirmative defense of assumption of the risk bars a plaintiff from recovering on a negligence claim if it is established that he, without coercion of circumstances, chooses a course of action with full

knowledge of its danger and while exercising a free choice as to whether to engage in the act or not."² To establish the plaintiff assumed the risk of his injury, a defendant must show the plaintiff "(1) had actual knowledge of the danger; (2) understood and appreciated the risks associated with such danger; and (3) voluntarily exposed himself to those risks."³ Assumption of the risk is a powerful defense since, when successfully proven, it provides a complete defense to a plaintiff's tort action—even where the defendant acted negligently, willfully, or wantonly.⁴

Ultimately, the Court of Appeals held the trial court committed reversible error in failing to charge the jury on assumption of the risk because there was "at least slight evidence that [the plaintiff] had knowledge of the risk he was undertaking by charging at another player during the bubble soccer game."⁵ The plaintiff was familiar with the rules of soccer, he had played soccer for years, he knew better than to try to headbutt other players, and he was specifically instructed prior to the "bubble soccer" match not to charge at other

players. Yet the plaintiff chose to deliberately charge toward another player when the bubble soccer match began. The Court of Appeals understandably held that there was at least “slight” evidence from which a jury could find the plaintiff assumed the risk of his injuries.⁶ Since the trial court failed to give the proper charge, the Court of Appeals was required to reverse the jury’s verdict.

The trial court in *Quezada* did give the pattern charge on the duty to use ordinary care for one’s safety, though, of course, contributory negligence and assumption of the risk are wholly distinct defenses.⁷ As the Court of Appeals explained in *Quezada*, charging the jury on contributory negligence was insufficient as a charge on assumption of the risk since they are different defenses with different elements of proof.⁸

In reaching its decision in *Quezada*, the Court of Appeals directly relied on the Supreme Court’s

2020 decision in *Daly v. Berryhill*.⁹ In that case, of course, the Supreme Court versed a jury’s verdict and the Court of Appeals due to the trial court’s failure to properly charge the jury on assumption of the risk. Like *Daly*, the Court of Appeals’ decision in *Quezada* shows that assumption of the risk remains a viable defense at trial, distinct from comparative fault and contributory negligence. The case underscores the importance of diligence of defense counsel at trial with respect to jury charges—both in requesting all appropriate charges and objecting when the trial court fails to give an appropriate charge. ♦

Martin A. Levinson is a partner at Hawkins Parnell & Young in Atlanta. He is also a GDLA Vice President, Chair Emeritus of the Amicus Committee, and is Editor-in-Chief of this publication. His litigation practice includes appellate matters, premises liability with an emphasis on negligent security and other complex

cases, product liability, trucking and transportation, and bad faith litigation.

Elliott Ream is an associate at Hawkins Parnell & Young in Atlanta. He focuses his practice on high-risk litigation involving catastrophic injury and wrongful death arising from transportation, premises and product liability.

Endnotes

1. 2021 Ga. App. LEXIS 264 (Case no. A21A0439) (June 8, 2021).
2. *Vaughn v. Pleasant*, 266 Ga. 862, 864 (1) (1996) (internal citation and punctuation omitted).
3. *Muldovan v. McEachern*, 271 Ga. 805, 807-08 (2) (1999).
4. *Id.*
5. *Id.*, *6.
6. See *Daly v. Berryhill*, 308 Ga. 831, 834 (2020) (“There need be only slight evidence supporting the theory of the charge [of assumption of the risk] to authorize a requested jury instruction.”).
7. See generally *Bush v. W. Yellow Pine Co.*, 2 Ga. App. 295 (1907); *Deere & Co. v. Brooks*, 250 Ga. 517 (1983).
8. 2021 Ga. App. LEXIS 264, *7-8.
9. *Id.*



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Certiorari in the Georgia Supreme Court: By the Numbers

By Jacob "Jake" E. Daly
Freeman Mathis & Gary, Atlanta

Imagine the following scenario in which all civil defense lawyers in Georgia have probably found themselves at some point during their careers. The Georgia Court of Appeals has just ruled against your client, and now you have to decide whether to file a petition for a writ of certiorari in the Georgia Supreme Court. Your client, or the adjuster for your client's insurer, wants to know the likelihood of the petition being granted and, if it is granted, the likely possible outcomes. You have a vague understanding that most petitions are denied and that the odds of reversal are good when a petition is granted, but you do not know the exact numbers. Well, now you do.

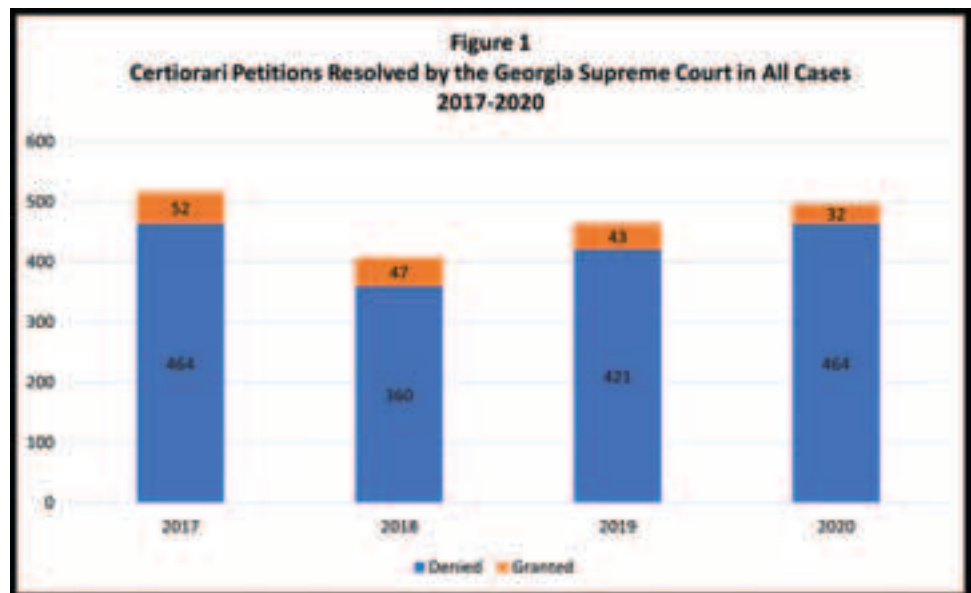
Convincing the Supreme Court to grant a petition is difficult, and for good reason. The Court's rules provide that "[a] petition for the writ will be granted only in cases of great concern, gravity, or importance to the public."¹ This standard is so high because of the role the Supreme Court has played in our appellate system since the General Assembly created the Court of Appeals in 1906, and especially since the Georgia Constitution was amended in 1916 to give the Supreme Court the power of certiorari review. In a two-level appellate system like Georgia's, the purpose of the first appeal is to ensure that the trial court rendered its decision in compliance with the law.²

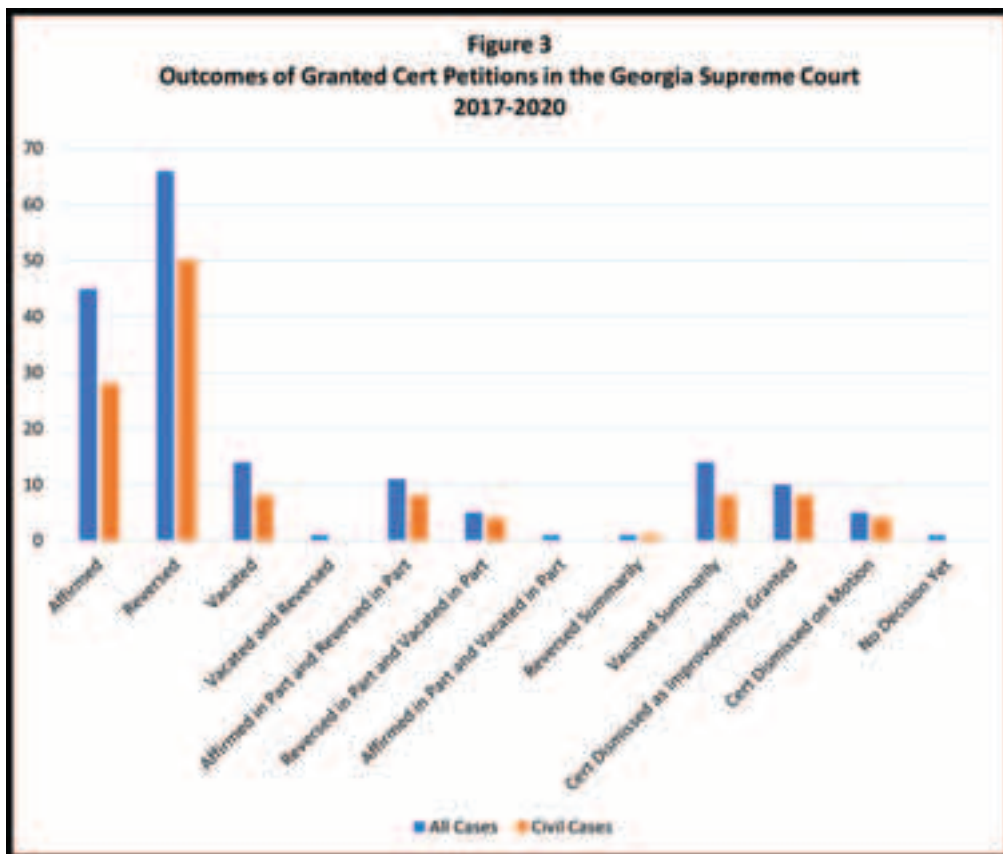
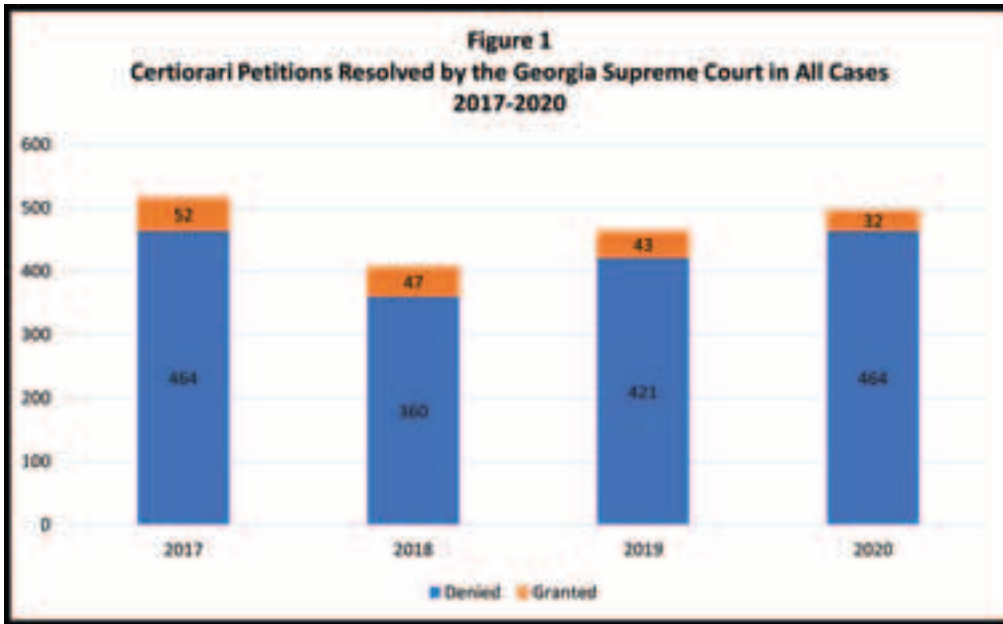
By contrast, the purpose of a second appeal by certiorari review is far different. "Discretionary review in the highest court should be basically for the benefit of the public, to reconcile different holdings of the panel court and to declare the law on matters of gravity and public policy—this is called institutional review which is only incidentally for the benefit of the parties litigant."³ Indeed, "the decisions of [the Court of Appeals] were intended to be final, except in a narrow class of cases; and it was not the purpose of [certiorari review] to make of the Supreme Court a court for hearing appeals from the Court of Appeals generally."⁴ This is why the Supreme Court may deny a petition even when it believes the Court of Appeals decided the case incorrectly.⁵ In fact, the correctness of the decision rendered by the Court of Appeals is not part of the standard set forth in Rule 40, and Rule 40 specifically provides that a petition

ordinarily will not be granted to review the sufficiency of the evidence.

Only a year after the Supreme Court was granted the power of certiorari review in 1916, it discussed the risks of the "careless exercise" of this power.⁶ One such risk was defeating the purpose of the General Assembly in creating the Court of Appeals; another was the "prolongation of litigation."⁷ The Supreme Court recognized that this power was not intended to create a right to two appeals in every case, and so it warned itself to be cautious in exercising this power.⁸

Now, more than 100 years later, the Supreme Court seems to have heeded its own advice. Between 2017 and 2020, the Court considered 1,883 petitions for certiorari, 1,166 of which were filed in civil cases. The Court granted only 174 of all petitions and only 119 in civil cases.⁹ In 2017, the Court granted only 52 of 516 total petitions (35 of





289 in civil cases); in 2018, the Court granted only 47 of 407 total petitions (33 of 251 in civil cases); in 2019, the Court granted only 43 of 464 total petitions (31 of 300 in

civil cases); and in 2020, the Court granted only 32 of 496 total petitions (20 of 326 in civil cases). Thus, the overall odds of a petition being granted were 10.08 percent

in 2017, 11.55 percent in 2018, 9.27 percent in 2019, and just 6.45 percent in 2020. Over that four-year period, the rate of certiorari being granted was 9.24 percent. In civil cases, the odds of a petition being granted were 12.11 percent in 2017, 13.15 percent in 2018, 10.33 percent in 2019, and 6.13 percent in 2020, for a four-year rate of 10.21 percent. Until the numbers for future years are available, it is impossible to know whether the down numbers for 2020 represent a shift in the Supreme Court's (un)willingness to grant petitions or just an anomaly related to COVID-19.¹⁰

Once you tell your client or the adjuster the odds of a petition being granted are only about 10 percent, the next question is likely to be about the expected outcome if your petition is among the lucky few to be granted. In the 174 total cases in which the Supreme Court granted a petition between 2017 and 2020, there were 11 different outcomes. In the 119 civil cases in which the Supreme Court granted a petition between 2017 and 2020, there were 9 different outcomes. Figure 3 summarizes the outcomes of all cases and only civil cases.

From the standpoint of the petitioner, the goal is to change the ruling of the lower court. An outright reversal is the best possible outcome for the peti-

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Remote Inspections: The Art of Not Being There

By Charles A. Fox, Ph.D. (left) and Matthew T. Kenner, P.E.
ESi

Last year, we had to act swiftly and decisively to safeguard our employees, clients, and business operations from the rapidly evolving situation related to COVID-19. Using powerful online collaboration tools, we made key aspects of our investigation workflow available remotely, ensuring that we could continue to serve clients when and where they needed us most. Now, these remote inspection services have become commonplace in our investigation workflow and are being used in ways never before imagined.

In today's world, remote capabilities are no longer just nice to have—they are a business imperative. If your practice involves physical objects that have been damaged, you have probably attended some form of remote inspection. To get the most out of a remote inspection, it's important to understand what's going on behind the scenes, and how you can use these capabilities to your advantage.

BORN IN A PANDEMIC

While our remote inspection services were born during a pandemic, they were also an opportunity for us to extend our existing capabilities in a powerful way. They would allow us to better serve clients, both in the short-term and far into the future. But how could we deliver these services in a way that cemented rather than compromised the value of our inspections in the eyes of our clients? How could we bring the right people to the table “virtually” to guide the inspection activities? And how could we keep key stakeholders engaged with our teams and with others, in real-time?

We reimagined virtually every aspect of a traditional inspection, from the physical gathering of participants to disassembly, examination, testing, documentation/recording, and photography. We also gave special consideration to safety considerations for in-person inspection team members, such as exposure to hazardous chemicals, conditions, or environments (e.g., fall hazards or confined spaces).

While protocols and technology platforms for performing remote inspections continue to evolve, the timing is right to share some lessons learned and help you understand how and when a remote inspection may be a viable—or in some cases, a better alternative—to a traditional inspection.

COLLABORATION PLATFORMS, TOOLS, AND PARTICIPANTS

The benefits of remote inspections are clear. They include:

- **Improved efficiency**—Remote inspections are inherently efficient because they can save travel time and expense for many participants.
- **Increased safety and convenience**—Remote participants can safely “attend” from the comfort of their offices or homes.
- **Better views**—Cameras and other devices (such as drones) can provide unique views of the inspection that could otherwise be difficult or impossible to attain.
- **Enhanced engagement**—The entire process can be recorded for later viewing by participants and those who were unable to attend.

Much of the technology infrastructure was in place to connect

inspection participants to a laboratory or remote location in the field, but we needed to scale these capabilities to make the virtual inspection experience come to life. As part of that effort, we modified our laboratories so we could provide live feeds that clearly captured the activity that happens during an inspection.

Platforms. The global pandemic made remote working capabilities an immediate priority, accelerating the adoption of online collaboration tools. Use of tools like Zoom and Microsoft Teams increased dramatically, with the latter growing from 35 million daily users in March 2020 to 115 million in late October 2020 and 145 million by April 2021.¹ From a timing perspective, this migration helped set the stage for our remote inspection services, because our user base was already embracing these online collaboration tools.

Cameras. A comprehensive live view into the inspection process was a necessity, whether conducted in the laboratory or at a remote site. We also wanted to be able to tailor our use of cameras to fit the needs of the particular inspection and client—whether the inspection warranted a simple FaceTime or Zoom call, a single webcam pointed at a subject artifact, or a laboratory inspection with eight different camera views, tethered instruments, and 25 remote participants interacting in real-time through a complex inspection protocol.

• **Lab Environment**—There are several key considerations when setting up cameras in a lab, in-

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Competence and Complexity in the Changing World of Slip-and-Fall Analysis

By John Leffler, P.E.
FORCON International

Numerous recent advances in the science underlying walkway friction analysis should lead to more defensible methodologies—for those experts (and industries) that use them. There will remain experts (and industries) that don't follow these advances and rely on the methods they have relied on for years—if for no other reason, it is easier and probably cheaper. Justice, and safety, will continue *not* to be served by junk science, of course. That said, what is scientifically defensible at a particular time may eventually become obsolete, though it was considered the methodological “standard of care” at the time.

Tribometers are used by experts, researchers, and manufacturers for measuring the friction of underfoot surfaces. In an article for this publication six years ago, the author discussed that tribometer testing useful for determining whether a surface has sufficient friction for humans must have four characteristics.¹ That has not changed. The characteristics include:

1. Is there a reliable correlation between the tribometer's measurements and actual human slip experiences?
2. Has the tribometer undergone studies to evaluate how repeatable its measurements are—i.e., will it provide consistent measurements test after test?
3. Has the tribometer undergone studies to evaluate how reproducible its measurements are, from user to



- user and machine to machine?
4. Was the tribometer used for a particular analysis operated per a methodology consistent with the human slip correlation and repeatability/reproducibility studies?

Without these four elements, one could argue we have junk science. In the context of *Daubert* and the Federal Rules of Evidence, here's why:

- Tribometers can test friction, but they are machines that are not biofidelic, and they don't slip and fall. Without a reliable correlation to human slips, tribometer measurements are not relevant “to the facts of the case” as required by Federal Rule 702(d) because it surely wasn't a tribometer that slipped and fell.
- Repeatability and (especially) reproducibility statistics for a tribometer are necessary if the expert's testimony is not to be simply *ipse dixit*. A methodology cannot have “widespread acceptance in the technical community” as contemplated by *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579

(1993), if no one else can reasonably duplicate it. Reproducibility statistics allow a person to determine how their tribometer measurements compare to those obtained by others. In the absence of reproducibility stats, an expert's measurements are unique to that expert—they are numbers without context.

- A specific friction target or threshold value in a published standard would typically have been derived using tribometry studies conducted using a limited number of devices and operators. Reproducibility analyzes the measurement variability arising from differences in operator technique and device manufacture. As such, unless an expert participated in the studies leading to the standard's target friction value, they would need reproducibility stats to reliably opine on how their measurements can be compared to the standard's target.
- Repeatability and reproducibility (collectively called *precision*) also are broadly understood types of “error rates” (*Ibid*). Some experts, when asked about error rates for their tribometry, will talk about “accuracy”—but as there isn't a “known” value of friction for most any surface (friction values are method-dependent and empirical), it would be hard to establish how close a measurement is to a “known” value if there isn't one. Other experts testify the error rate of their tribometer is “about 5 percent” or “about 10

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Assessing the Probability of Traumatic Brain Injuries in a Motor Vehicle Collision

By Dr. Fatiesa Sulejmani
Rimkus Consulting Group

Motor vehicle accidents (MVA) have been widely characterized as one of the most common causes of mild traumatic brain injuries (mTBI) in pediatric, adolescent, and adult populations [1, 2]. In 2014 alone, the Centers for Disease Control and Prevention (CDC) estimated as many as 2.5 million traumatic brain injury (TBI)-related emergency department visits, with unintentional falls, unintentional strikes, and motor vehicle accidents accounting for 47.9 percent, 17.1 percent, and 13.2 percent of these visits, respectively [1]. From 2006 to 2014, the CDC also found a 24 percent increase in TBI-related emergency department visits as a result of motor vehicle accidents, but an associated 34 percent and a greater than 40 percent decrease in hospitalization and deaths [1].

While diagnosed TBI cases primarily fall into the category of mTBIs and may resolve on their own, more severe cases can take as long as 7-14 years to resolve or may even result in lifelong symptoms and complications. Historically, biomechanical research on the onset of concussions has focused on severe cases—however, as many as 75 percent of TBIs are mTBIs [1], thought to be as much as 10 times more common than their moderate-severe counterparts [3, 4]. Compared to sports-related concussions (SRC), patients experiencing MVA-related concussions scored lower on cognitive function assessments and took longer to recover, as long as over three months compared to one month for SRCs

[5]. As both mechanisms of injury may result in widely varying impact mechanics, it is therefore crucial to consider the mechanism of injury when evaluating the possibility of a traumatic brain injury and the role of a biomechanics expert in their mechanical investigation.

What is a Concussion? How is it Diagnosed?

According to the CDC, a concussion is defined as “a type of traumatic brain injury—or TBI—caused by a bump, blow, or jolt to the head or by a hit to the body that causes the head and brain to move rapidly back and forth. This sudden movement can cause the brain to bounce around or twist in the skull, creating chemical changes in the brain and sometimes stretching and damaging brain cells.” At its core, the onset of TBIs is a mechanical question, meaning that a biomechanical expert can help shed light on the causation mechanism by analyzing the forces at play.

While most such events that come into an emergency room are classified as mild traumatic brain injuries, and still others go undiagnosed, their effects should not be discounted. The effects of concussions are known to be cumulative [6-8]—the effect of second and subsequent TBIs seems to be greater and may require a longer recovery period than the first. This poses a particular risk for athletes in sports such as football or soccer, where injury may be more common.

A physician’s diagnosis of a TBI or post-concussive syndrome (the symptoms following a concussive event that may linger past an ex-

pected recovery period of perhaps a few weeks or one to two months) is difficult, especially if the patient did not lose consciousness on impact or did not seek medical treatment right away [9]. Guidelines for diagnosis vary depending on TBI etiology (whether the injury is an SRC or MVA), where the evaluation is taking place (e.g. on the sideline at a football game or several days later by a primary care physician or emergency room doctor), as well as the types of symptoms a patient may present, among other factors.

Symptoms also vary widely, and there are no universal diagnostic criteria for evaluating a concussion [8-10]. Medical professionals therefore work carefully and employ a range of diagnostic tools, such as neurological tests, stability tests, computed tomography (CT), and magnetic resonance imaging (MRI), to rule out other illnesses that may present similar symptoms. Imaging, among other benefits, can help to exclude severe injury and evaluate the possibility of fractures. CT is typically preferred over MRI, but may not be used in uncomplicated cases or in pediatric evaluations [9].

Mechanical Onset of TBIs: How Do They Occur?

Because the mechanism of injury is mechanical in nature, the onset of a concussion largely involves the same mechanical principles regardless of whether the etiology is related to a sports injury or motor vehicle accident. The skull is anchored onto the spine and can

Continued on page 67



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The More the Merrier: Mediating a Multiparty Case

By Lee T. Wallace
BAY Mediation & Arbitration Services

The fact pattern for a multiparty mediation reads a lot like a law school exam:

A parking deck collapses. The owner sues the prime contractor. The prime cross-claims against several subcontractors involved in building the deck, who cross-claim against subcontractors involved in grading the property and the engineering company that designed the deck structure. Several subcontractors also counterclaim against the prime contractor for failure to pay. Which parties are liable and what are the measures of damages? Explain your reasoning.

If reading that fact pattern gives you unpleasant law school flashbacks, you know why mediating a complex, multiparty suit can seem like a Herculean task. But if mediating the case is daunting for the parties, imagine how difficult it will be for a jury of laypeople to untangle all the pieces. The parties will spend weeks or months in a complex trial with multiple parties, lawyers, and expert witnesses, incurring very high expenses, and then hand the mess to a jury charged with resolving what the parties and their lawyers could not.

Mediation is nearly always a better solution than trial in a multiparty case. With diligent advance preparation and efficient organization, complex cases can be broken into smaller, logical components so that the parties can successfully resolve them at mediation.

WHAT'S A MULTIPARTY CASE?

Multiparty cases come in all shapes and even sizes. For example, these four, very different fact scenarios all qualify as “multiparty” cases, which simply means cases with more than two parties:

- Nine tenants of a strip mall lose their businesses in a fire negligently caused by another tenant. The nine tenants sue the negligent tenant, and all ten tenants sue the owner of the strip mall for failing to install smoke alarms. Some tenants saw their entire inventories go up in flames, while others were able to sell smoke-damaged merchandise at reduced prices. Some tenants have detailed proof of inventory, while others have handwritten lists based on memory. Some tenants were insured, and their insurance companies paid some of their losses and will be involved in the mediation.
- Hundreds of people join a class action alleging a product was defective. The plaintiffs sued the product manufacturer and its parent company, as well as the manufacturer of the component that allegedly failed.
- In a healthcare qui tam case, the government intervenes in a suit filed by a relator against a hospital, two medical practices, and four doctors.
- A rape victim sues the owner of her apartment building, the apartment management company, and the security company hired to patrol the property.

Diverse as these cases are, when it comes to mediation, they have a

great deal in common: they all are complex and difficult to mediate, yet every party will benefit from a successful mediation.

SETTING UP THE MEDIATION PROCESS FOR A MULTIPARTY SUIT

For a multiparty mediation, preparation before the day of mediation is nearly as important as what happens at the mediation itself. The mediation needs to be organized to allow for efficiency, to promote settlement and to avoid wasting the time of the parties and their attorneys. Here are some ways that parties and their attorneys can set themselves up for a successful mediation.

Zoom Ahead. If every dark cloud has a silver lining, then Zoom was 2020s resplendent edging, at least for the legal community. Among other things, Zoom makes it much easier to mediate multiparty cases.

In the days of in-person mediations, parties had to scramble to find dates that would accommodate every participant to be physically present plus allow for travel time. Each party needed a separate, physical room. For very large mediations, parties with potentially different interests had to share the limited number of conference rooms. When different parties needed to collaborate, everyone had to wait as people disconnected their laptops, gathered their papers and litigator bags, and physically moved to a new room.

But what was virtually impossible is now virtually possible. Before the mediation starts, I set up multiple, virtual mediation rooms. I

Continued on page 70

BAY OPENS NEW OFFICE IN MACON

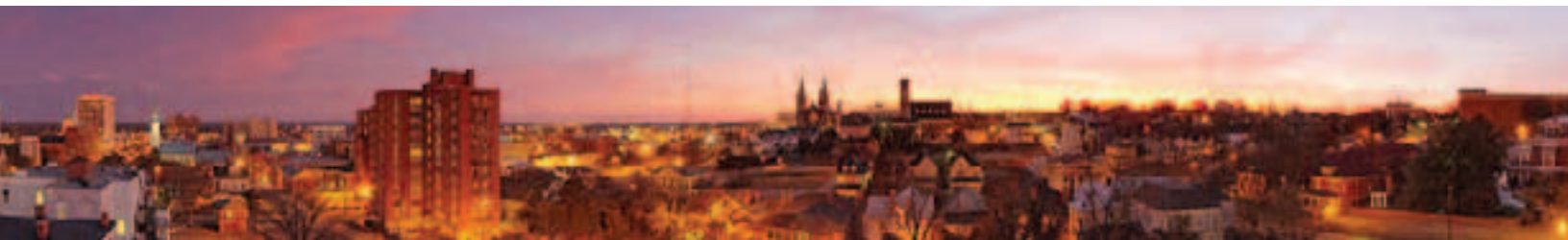
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Number of COVID-19 Business Interruption Lawsuits Spikes, Insurers Racking Up Early Wins

By Chris Frederick
Bennett Thrasher

Over the past year and a half, countless businesses across the country were forced to close their doors as COVID-19 continued to spread. As business owners sought to recover losses suffered due to shelter-in-place orders, many business interruption insurance claims have been denied under the assumption that closed businesses have not experienced a “direct physical loss of or damage to property.” In turn, business owners are taking insurers to court.

There are currently thousands of pending court cases brought by insurance policyholders seeking coverage for COVID-19-related business losses. Some states are even considering bills that would require insurers to provide this coverage for pandemic-related claims. As these first-party property claims play out in jurisdictions across the country, many are tracking rulings and watching closely to see how the definition of “direct physical loss” to property is interpreted. While many recent court decisions appear to favor insurers, a few have favored policyholders and many more cases remain uncertain, raising a multitude of questions yet to be answered.



What’s Covered by Business Interruption Policies?

Traditionally, business income loss coverage provides coverage for any business interruption suffered during a period of restoration. This is typically defined as a required suspension of or delay in operations caused by a direct physical loss of or damage to property directly caused by covered peril. For example, if a hurricane damages a restaurant and causes it to shut down while the building is repaired, this policy would cover lost income until the business reopens.

What qualifies as “loss” varies by jurisdiction, adding a layer of complexity. The courts have often defined direct physical loss as the literal destruction of property that threatens structural integrity or function. In other scenarios, loss may include a contamination so pervasive that it causes the property to become uninhabitable.

Therefore, it remains unclear whether or not COVID-19-related losses meet these conditions.

We are also seeing cases call on civil authority provisions as well as ingress and egress coverage. Civil authority provisions cover loss of income related to restriction of access to insured premises by a government or civil authority as a result of physical

loss of or damage to property not owned by the policyholder. Ingress and egress coverage deals with loss of income when the insured property itself is inaccessible as a result of covered peril or damage to another property. Under both of these provisions, however, the question still arises as to what constitutes a direct physical loss and whether the contamination caused by COVID-19 fits that definition.

How is This Shaking Out in Court?

The first COVID-19 coverage decision of which we are aware was issued in July 2020. In *Gavrilides Management Co. v. Michigan Insurance Co.*, Michigan Circuit Court Judge Joyce Draganchuk granted the insurer’s motion for summary judgment, explaining that coverage is provided for actual loss of business income sustained during a period of suspended operations

Continued on page 72



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Busting the Activity-Check Myth

By Garrett McGinn
DigiStream Investigations

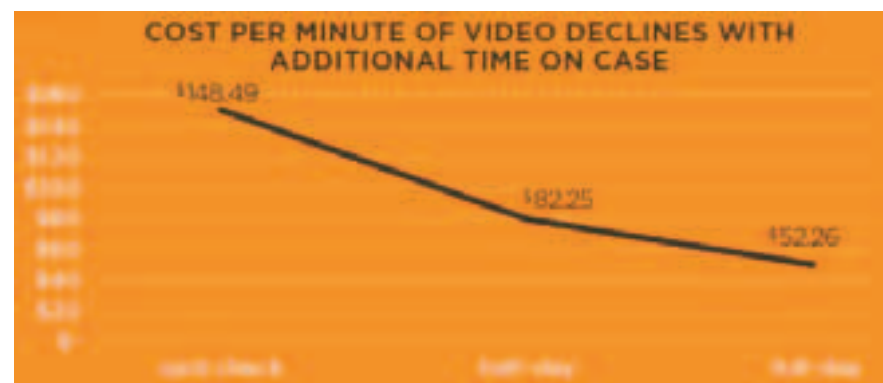
The concept of an activity check has been lurking around the investigative industry for decades. It seems logical enough: At the outset of a case, or anytime thereafter, simply allocate a portion of a day to “check” on the status of a subject in the hope of catching them active. This is generally limited to two hours. Clients who ask to split surveillance orders into half-days are operating under the same logic. The hope is that by splitting two days of surveillance authorization into four half-days, or splitting one day of surveillance into four spot-checks, the client is increasing their chance of obtaining useful video evidence. It is seen as a cost-effective way of going about investigations, something akin to spreading your best on a roulette table in Vegas. The hope is that a few smaller bets will translate into better chances for surveillance results and therefore increased cost savings.

The results point to a different story. Variables are involved in surveillance that reduce the effectiveness of spreading bets. The first variable is the increased risk of compromising the integrity of the case by doubling or quadrupling the number of times a surveillance investigator enters and exits a neighborhood. On a traditional two-day case, a surveillance investigator will enter a neighborhood twice, and depart a neighborhood twice. If that two-day case is split into four halves, the investigator is now entering and exiting a neighborhood a total of eight times. This doubles the risk of a negative case outcome without increasing the

total amount of time spent surveilling a location. Even worse, splitting a full-day of surveillance into activity checks will quadruple that risk with no net gain in surveillance time. Experienced investigators know the surest way to compromise a case is by driving in and out of the area more than necessary. It tends to tip off the subject or their neighbors. In addition, most investigative companies including DigiStream must pass along the cost of the extra driving time to the client, adding an additional cost with no benefit.

a daily jog at 2 p.m. if the client insists the investigator terminate a case at mid-day? Encouraged by the investing rationale of “cutting your losses,” clients are misapplying this logic to a situation with little or no mathematical relationship.

An internal analysis of surveillance efforts, covering 16 out of 18 of the largest metropolitan areas in the United States and totaling 75,433 cases resulting in 888,654 minutes, broke minute totals into three separate categories: 1) activity checks, 2) half-days and 3) full-



Second, in the absence of a full day of surveillance, a subject’s daily pattern of activity cannot be ascertained. As a result, subsequent days of surveillance are not built on a firm foundation. How would an investigator know a subject goes for

days. The results were adjusted to take into account activity checks that resulted in surveillance video and were subsequently upgraded to half or full days of surveillance. The same was done with half days subsequently upgraded to full days due

Continued on page 72

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PRODUCT LIABILITY CASE LAW UPDATE

By James D. "Dart" Meadows
GDLA President-Elect
Balch & Bingham, Atlanta

ASSUMPTION OF THE RISK IN PRODUCT LIABILITY CASES

In Georgia, a manufacturer is strictly liable for an injury caused by its product only if the product "when sold by the manufacturer was not merchantable and reasonably suited to the use intended, and its condition when sold is the proximate cause of the injury sustained."¹ When the statute says, "not merchantable and reasonably suited to the use intended," it means "defective."² Accordingly, if the product is not "defective," there can be no liability. This comports with the policy rationale of strict liability: to hold manufacturers liable if they make a defective product, but not to make them insurers "against all risks of injury associated with [their] product[s]."³ Lack of evidence of a defect likewise demands summary judgment on design defect and negligence claims.⁴

Even if there is evidence of a defect, a plaintiff's claims fail if he assumed the risk of his own injuries when, knowing what he was doing could lead to serious injury. This is true whether the plaintiff's claim sounds in negligence or strict liability.⁵ "The defense of assumption of the risk ... applies when the plaintiff, with a full appreciation of the danger involved and without restriction of his freedom of choice either by the circumstances or by coercion, deliberately chooses an obviously perilous course of conduct."⁶

To successfully assert the defense of assumption of the risk, a defendant must establish that the plaintiff (1) had actual knowledge of the danger, (2) understood and appreciated the risks associated with such danger, and (3) voluntar-



ily exposed himself to those risks.⁷ Each prong of the assumption of risk defense is discussed in detail below.

Actual Knowledge of the Danger

The defense requires proof that the plaintiff had "both actual and subjective knowledge" of the danger.⁸ It is not enough to show a reasonable person would have known something was dangerous; a defendant must show the plaintiff actually knew it was dangerous.⁹ Thus, for example, in a case in which a nine-year-old child was hit by a truck in a driveway, the Court of Appeals held the child did not assume the risk of injury because, despite having general knowledge of the risk of moving vehicles, there was no evidence the child was aware of the specific truck approaching and the presence or absence of moving vehicles was constantly changing.¹⁰ And in another case, the Court of Appeals held that a decedent who was electrocuted after coming into contact with low-hanging electrical wires did not assume the risk of injury because there was no evidence in

the record that he actually knew of the dangers associated with low-hanging electrical wires.¹¹

Understanding and Appreciation of Risks Associated with the Danger

This prong means that the plaintiff knew what he did was dangerous and understood why that action was dangerous.¹² Some product-related risks are so obvious that a plaintiff will be charged with subjective knowledge of the risk even if he denies it.¹³ Furthermore, evidence that the plaintiff was an experienced user of the product is helpful to show the plaintiff understood and appreciated the risks associated with the danger.¹⁴

Voluntarily Exposing Oneself to the Risk of Harm

To satisfy this prong, the defendant must establish that the plaintiff made his own decision to take the action he did. Thus, for example, a plaintiff may try to defeat an assumption of the risk claim by showing that he was simply doing what his employer told him to do.¹⁵

Continued on page 74

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GDLA Held its 54th Annual Meeting at the Omni Amelia Island June 6-9, 2021

The 54th GDLA Annual Meeting was a welcome event after the cancellation of the 2020 conference due to the pandemic. A record crowd gathered at the Omni Amelia Island from June 6-9, 2020. Events began on Thursday evening with the Welcome, Y'all! Reception sponsored by BAY Mediation & Arbitration. Friday and Saturday mornings were marked by CLE presentations as planned by Program Chair and (then) President-Elect George Hall. Friday evening was the President's Reception, honoring outgoing President Jeff Ward for his service; it was sponsored by Veritext. FORCON sponsored the closing reception and dinner. Collision Specialists, Inc. and ESi sponsored the hospitality suite and cornhole tournament. We also held an inaugural pickleball tournament.

During the Business Meeting on Saturday, GDLA members unanimously accepted the report of the Nominating Committee, chaired by Past President Sally Akins, electing the 2021-2022 officers and Board of Directors (see page 46). George R. Hall of Hull Barrett in Augusta took the reins as GDLA President. The other officers are: President-Elect James D. "Dart" Meadows of Balch & Bingham, in Atlanta; Treasurer Pamela Lee of Swift Currie McGhee & Hiers in Atlanta; and Secretary William T. "Bill" Casey, Jr. also with Swift Currie. (Note that Mr. Casey was not present for the cover photo shoot.) The officers were sworn in by Augusta Superior Court Senior Judge Neil Dickert.

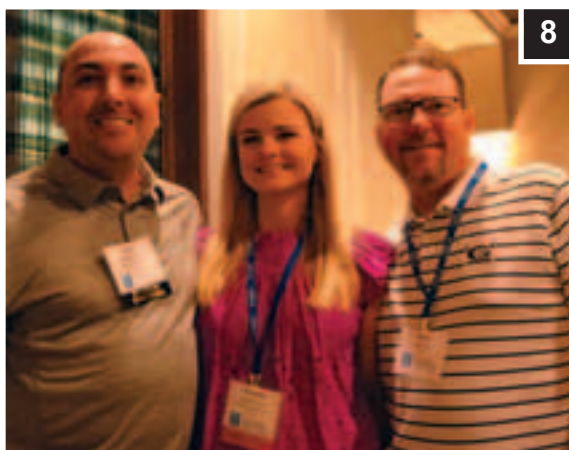
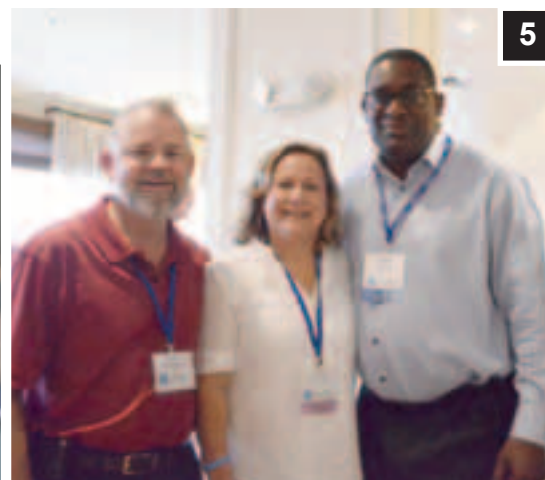
Also on Saturday, Past President Walter B. McClelland of Mabry & McClelland in Atlanta received the GDLA Distinguished Service Award. Outgoing President Jeff Ward then presented N. Staten Bitting, Jr. of Levy Sibley Foreman & Speir in Augusta and his wife, Cindy, with the President's Award, recognizing their combined efforts in helping organize and manage GDLA conference arrangements for the past decade. See page 50 for photos of the deserving honorees.

Mark your calendar for the 55th GDLA Annual Meeting set for June 9-12, 2021 at Hammock Beach Resort in Palm Coast, Fla.

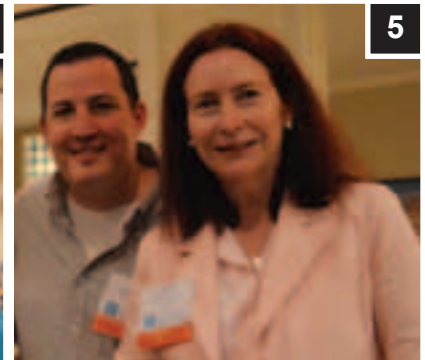
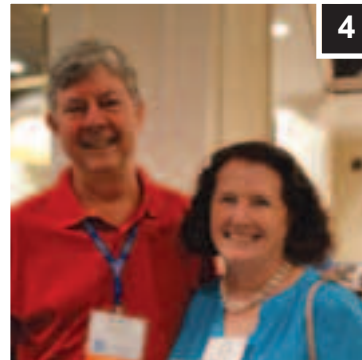
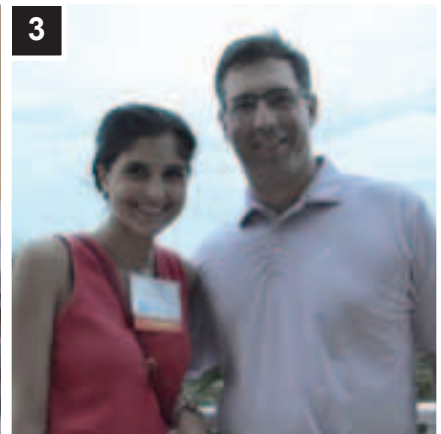
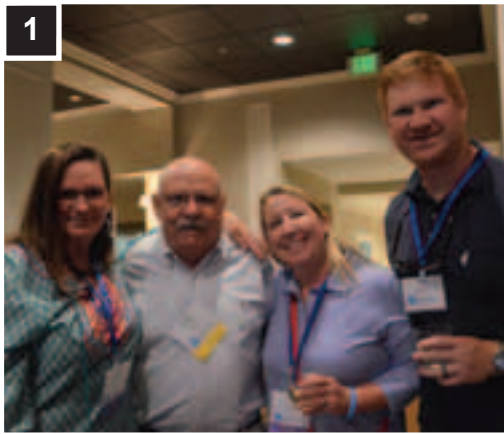
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54th GDLA Annual Meeting: Welcome, Y'all! Reception



Pictured during the opening event at the Welcome, Y'all! Reception are (l-r unless otherwise noted): 1. Past President Jimmy Singer with Bill Allred of BAY Mediation, the event's sponsor; 2. Shane Keith with his wife, Teresa, and kids, Tanner, Wynn, and Landon; 3. Beau Shrable with his wife, Tamara, and son, Brock; 4. Wendy and Jason Logan with Chris and (then) Secretary Pamela Lee; 5. Chris and Karen Karabinos with Douglas Burrell; 6. Chris Perniciaro, Past President Matt Moffett, DRI Regional Director and special guest Alien Estes, and (then) President-Elect George Hall; 7. Brannon Arnold (right) with her husband, Tyler, and children, Townes and Reagan; 8. Jason Lewis with Amanda Morris and her husband, Rusty Trice; 9. Quintesha Williams, Carley Fulp, Bea Hancock, and Katie Harden.



Pictured enjoying the Welcome Reception are: 1. Past President Bubba Hughes (second from left) with South Carolina Defense Trial Attorneys' Association special guests: SCDTAA Executive Director Aimee Hiers (left), SCDTAA President Sarah Butler and her husband, Drew; 2. Jamie Weston and Past President Peter Muller; 3. Samia Taufiq and Robert Luskin; 4. Walter Ballew and Tracy O'Connell; 5. Matt Friedlander and Laurie Daniel.

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EXECUTIVE COMMITTEE

The Executive Committee (EC) is composed of the officers and three most recent past presidents. This year is an exception since Immediate Past President Jeff Ward is mediating full-time, so he will not serve on the EC.

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54th GDLA Annual Meeting: Educational Program



Pictured are the educational program speakers: 1. (Then) President-Elect George Hall introduces the program; 2. Beth Boone and Jacque Clarke discussed nursing home litigation; 3. Lee Gillis reviewed first party insurance claims; 4. Past President Matt Moffett and Chris Perniciaro provided an apportionment update; 5. Legislative Chair Jake Daly reports on the General Assembly's actions; 6. Judge Neil Dickert offered professionalism wisdom; 7. VP Marty Levinson and Elissa Haynes reviewed negligent security litigation; 8. Christine Mast discussed pre-suit time limited demands; 9. GDLA Platinum Sponsor Courtroom Sciences Inc.'s Melissa Loberg explored nuclear verdicts from the jury's perspective; 10. GDLA Platinum Sponsor Collision Specialists Inc.'s Jeff Kidd discussed early morning vehicle crash claims; 11. (Then) Treasurer Dart Meadows delved into assumption of the risk in product liability litigation (see article on page 42).

54th GDLA Annual Meeting: President's Reception



PRESIDENT'S RECEPTION

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***Pictured at the President's Reception** (l-r unless otherwise noted) are: 1. The Macon posse: Jacob Haygood, Carley Fulp, Desmond Reynolds, Wes Childs, Quintesha Williams, Lauren Childs, Bea Hancock, Christy Curreli, AJ Curreli, and Todd Ware; 2. (Then) President Jeff Ward with Hayley Miller (left) and Jennifer Pierson of Veritext, the evening's sponsor 3. Douglas Burrell, Christine and Tim Mast, Warner and Pat Fox, Lee Gillis, Karen and Chris Karabinos; 4. Floride Dickert, (then) President-Elect George Hall, Judge Neil Dickert, and Margaret Hall; 5. Meg and Dana Braun with Walter and Ruth Ballew.*

54th GDLA Annual Meeting: Business Meeting & Awards



Scenes from Saturday morning's Business Meeting: 1. Treasurer Pamela Lee, President-Elect Dart Meadows, and President George Hall were sworn-in by Judge Neil Dickert (Secretary Bill Casey was not present); 2. Outgoing President Jeff Ward with honorary member Craig Avery; 3. Outgoing President Jeff Ward, DRI Regional Director Allen Estes, Past President and DRI State Rep Matt Moffett, and DRI First VP and GDLA member Douglas Burrell; 4. Incoming President George Hall presented outgoing President Jeff Ward with the traditional crystal gavel; 5. Outgoing President Jeff Ward presented the President's Award to Cindy and Staten Bitting; 6. Jeff Ward presented the Distinguished Service Award to Walter McClelland, who was joined for the surprise by his wife, Kathy.

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54th GDLA Annual Meeting: Fun in the Sun

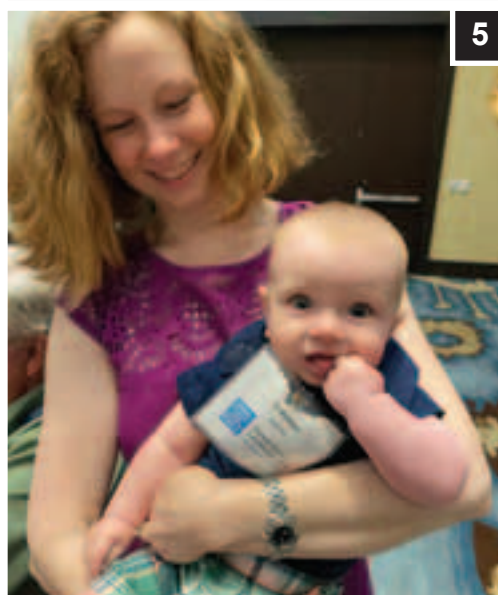
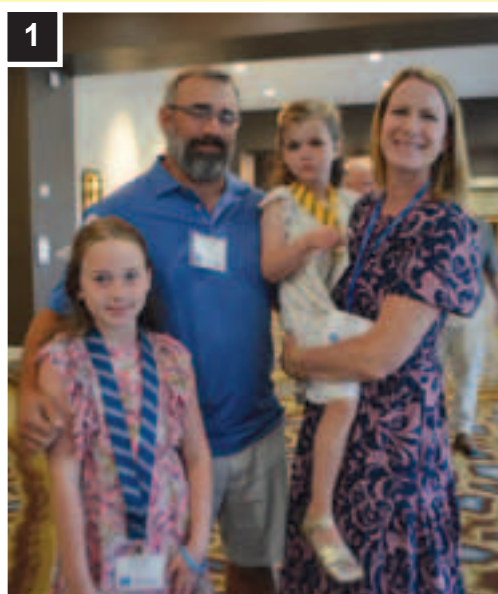


Snapshots from recreational fun: 1. the second annual cornhole tournament attracted a huge crowd of GDLA kids even though rain drove us indoors (but hooray for air conditioning!) 2. Marcia Freeman (right) with her husband, Curtis, and fashionista daughter, Skylar; 3. Past President Warner Fox and his wife, Pat, with their grandchildren, Miller and Fox (whose Mom is a GDLA member—see photo 6); 4. VP Marty Levinson is pictured with GDLA Platinum Sponsor reps Heather Slatton of ESI and Cailan Long of Collision Specialists, Inc., both of whom sponsored the hospitality suite and cornhole tourney; 5. inaugural pickleball tournament players were Past President Peter Muller, Lisa Muller, Past President Jimmy Singer, Holly Smith, Patti Singer, Resa Avery, honorary member and pickleball champ Craig Avery, Past President Grant Smith, DRI Regional Director Allen Estes, and Jason Logan; 6. GDLA Young Lawyer Co-Chair and cornhole tournament director Leah Fox Parker and her daughter, Miller; 7. Arthur Park and his son, Jackson.



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54th GDLA Annual Meeting: Closing Reception & Dinner



7



Pictured at the closing reception and dinner (left to right unless otherwise noted) are: 1. Ashley Rice with her husband, Brandon, and daughters, Marielle and Olivia; 2. Elissa and Charles Haynes; 3. President-Elect Dart Meadows and Quintessa Williams; 3. GDLA Platinum Sponsor FORCON's rep, Kris Andracic, the closing dinner sponsor, with Executive Director Jennifer Ward, Tracy O'Connell, and Past President Staten Bitting 4. Beverly O'Hearn with her daughters, Lauren and Erin; 5. Newly-elected Board member Libby Watkins and her son, T.J.; 6. The Lewis clan: Henry, Carter, Jason, Annie, and JD; 7. Bryant and Katie Harden, Past President Bubba Hughes and his wife, Debbie, Bea Hancock and Josh Ware.

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56TH GDLA ANNUAL MEETING



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General Assembly Review

Continued from page 23

The second key provision of the bill was to amend the provision in O.C.G.A. § 33-7-11 regarding the minimum penalty for a finding of bad faith in a UM case. The penalty was set at 25% of the recovery, but the penalty is now set at 25% of the recovery or \$25,000, whichever is greater.

Finally, this bill amended the Metropolitan Atlanta Rapid Transit Authority Act of 1965 to allow MARTA to be sued in either the State or the Superior Court of Fulton County. Previously, MARTA could be sued only in the Superior Court of Fulton County.

HB 443: Structured Settlements

This bill created the Georgia Structured Settlement Protection

Act, codified at O.C.G.A. §§ 51-12-71, et seq., to regulate the purchase and sale of structured settlement payment rights. Defense lawyers should be aware of the new legislation generally and of certain provisions in particular. For example, a transfer of structured settlement payment rights must be approved by the superior court where the payee resides. The superior court can approve a transfer only if it finds that the transfer is in the best interest of the payee, taking into account the welfare and support of the payee's dependents.

SB 234: Mediation

This bill created the Georgia Uniform Mediation Act, codified at O.C.G.A. §§ 9-17-1, et seq., to provide for uniformity in rules governing mediation. The key provisions in this act include:

- It applies to virtually all mediations, voluntary or court-ordered, and whether the mediator is private or court-appointed. It does not apply to mediations involving collective bargaining relationships or agreements, mediations conducted by the judge presiding over the underlying case, mediations involving students in primary and secondary schools, mediations at a correctional institution for minors where all mediating parties reside at the institution, and certain international commercial mediations.
- Unless otherwise agreed by the parties, certain "mediation communications" are privileged, but this privilege may be waived.
- Mediators are prohibited from disclosing certain information about a mediation to the court.

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- Mediators are required to inquire about and to disclose to the parties, before accepting a mediation, any financial or other conflicts of interest or facts that would likely affect their impartiality.

HB 112: COVID-19 Immunity

This bill amended the Georgia COVID-19 Pandemic Business Safety Act, codified at O.C.G.A. §§ 51-16-1, et seq., to extend its sunset provision by a year. The immunity provided by this act now applies to causes of action accruing by July 14, 2022.

SB 33: Human Trafficking

This bill created a civil cause of action for victims of human trafficking against the perpetrators thereof. Codified at O.C.G.A. § 51-1-56, this bill is important for civil

defendants because it is conceivable that a business could be included in the definition of “perpetrator.” A “perpetrator” is “a person or entity that knowingly benefits, financially or by receiving anything of value, from participating in a venture or scheme which such person or entity knew or should have known involved a violation of Code Section 16-5-46.” The limitations period for a claim under this statute is ten years after the claim accrued or, if the victim was a minor at the time of the trafficking, ten years after the victim’s eighteenth birthday. This new statute also allows the Attorney General to bring a claim against the perpetrator on behalf of the state to obtain “appropriate relief.”

CONCLUSION

GDLA experienced both success and disappointment at the

Capitol this year. Helping to pass HB 714 was a huge success, but the law regarding time-limited settlement demands still needs more work. GDLA’s lobbying team will continue to work on this issue next year, as well as other issues important to our members. Phantom damages and the seat belt defense will still top our list of priorities. Other issues we will consider include proposed regulation of litigation funding companies and enforcing the apportionment statute as written and as intended by the General Assembly. Doing this effectively requires GDLA to have a lobbying presence at the Capitol, which in turn requires financial support from our members and their firms. It also requires our members to be actively engaged in the process. ♦



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Theory to Revive O.C.G.A.

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kind of trial or the damages a man gets depends on the amount of money he has. Because inherently prejudicial evidence is allowed *only to show the plaintiff's sources*, juries will be misled. If for example, both the plaintiff and the defendant are insured, but the jury is only informed of the plaintiff's coverage, it may assume that only the plaintiff has insurance and the plaintiff's insurance should pay for the loss caused by the tortfeasor. * * * [W]e hold that O.C.G.A. § 51-12-1(b) violates that provision of the Georgia Constitution which mandates that the paramount duty of government is the protection of person and property and that the protection shall be impartial and complete. It is, therefore, our duty to declare it void.

Denton, 261 Ga. at 45-46 (emphasis added; citations, brackets, and footnotes omitted).

However, in *Grissom v. Gleason*, 262 Ga. 374 (1992)—an equal protection challenge to the then-extant Georgia direct action statute—the Supreme Court of Georgia abandoned the equal protection analysis that the plurality had just applied the year before in *Denton*:

We disapprove of *Denton v. Con Way* to the extent that it suggests a new equal protection analysis....

[T]he *Denton* decision is an aberration in this court's interpretation of the equal protection provision. A fundamental problem with the *Denton* opinion, ... is its failure to provide a standard for applying the 'impartial and complete' provision [of the equal protection clause]. The opinion does not explain what the provision means, to whom it applies, or how it offers more protection than the explicit guarantee of equal protection immediately following it.

Grissom, 262 Ga. at 376 (1992) (emphasis added). Although the Court in *Grissom* gutted the underlying rationale for *Denton*, it did not expressly overrule the holding in *Denton*. And, indeed, the Supreme Court noted in a later, post-*Grissom* opinion that *Denton* remains good law insofar as it held that O.C.G.A. § 51-12-1(b)—which has never been repealed—is unconstitutional.⁸

Nevertheless, in light of *Grissom*, there is a strong argument that the Supreme Court of Georgia should take the next step and expressly overrule its declaration in *Denton* that O.C.G.A. § 51-12-1(b) is unconstitutional. To lay the groundwork in a case for an eventual argument in the Supreme Court of Georgia that O.C.G.A. § 51-12-1(b) is constitutional, the defendant should advance the argument in the trial court⁹—while acknowledging the full history outlined by *Denton*, *Grissom*, and *Roberts*. This likely would take the form of a motion *in limine* to admit evidence of third party disbursements to medical providers accepted by them as

payment in full.¹⁰ The defendant also should be sure to obtain a definitive ruling from the trial court on this point.¹¹ In any subsequent appeal, the trial court's almost-certain denial of the defendant's effort to breathe life back into O.C.G.A. § 51-12-1(b) should be the subject of an enumeration of error to preserve the issue for later consideration by the Supreme Court of Georgia.

It is worth noting that there is some question as to whether a never-repealed statutory provision, like O.C.G.A. § 51-12-1(b), which is declared to be unconstitutional but later ruled to be constitutional, is "revived" after its constitutionality is affirmed.¹² There being no apparent Georgia case law on this issue, it likely would become an issue in any litigation in which the matter of the revivification of O.C.G.A. § 51-12-1(b) is in question.

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products liability, premises liability, intentional torts, medical malpractice, class actions, real estate matters, business disputes, government enforcement proceedings, and civil and criminal RICO.

Endnotes

1. *Candler Hosp., Inc. v. Dent*, 228 Ga. App. 421, 421 (1997) (“The common law rule in Georgia bars the defendant from presenting any evidence as to payments of medical, hospital, disability income, or other expenses of a tortious injury paid for by a plaintiff, governmental entity, or third-party and taking credit towards the defendant’s liability in damages for such payments, because a tortfeasor is not allowed to benefit by its wrongful conduct or mitigate its liability by collateral sources provided by others.”).
2. See *MCG Health, Inc. v. Kight*, 325 Ga. App. 349, 353 (2013), *aff’d on other grounds*, 296 Ga. 687, 769 S.E.2d 923 (2015) (“Kight’s cause of action against the tortfeasor for injuries and economic damages he sustained in the accident was not limited to seeking economic damages represented by the discounted amounts paid on the Hospital’s billed charges under the contract with Blue Cross. Rather, Kight was entitled to recover medical expenses arising from his injuries, including hospital charges, that were ‘reasonable and necessary.’ Moreover, under the collateral source rule, Kight was entitled to seek full recovery from the tortfeasor of reasonable and necessary hospital charges undiminished by insurance payments or ‘write-offs’ under the Hospital’s contract with Blue Cross.”) (citation omitted).
3. *Hoeflick v. Bradley*, 282 Ga. App. 123, 124 (2006) (“[A] tortfeasor is not allowed to benefit by its wrongful conduct or to mitigate its liability by collateral sources provided by others.”)
4. *Couch v. Red Roof Inns, Inc.*, 291 Ga. 359, 364 (2012) (“Courts like to preserve the law they and their predecessors have made in deciding cases [*i.e.*, the common law]. But as long as legislation does not violate the Constitution, when the Legislature says something clearly—or even just implies it—*statutes trump cases*.”) (emphasis added); see also *Williams v. State*, 159 Ga. 728, 126 S.E. 844, 846 (1925) (“[I]n adopting the Code section we have just cited, Georgia made for itself a rule of evidence which *supplanted the common law*, and in Georgia *this statute and not the common law* must prevail and control.”) (emphasis added).
5. *Zakas v. Jackson*, 352 Ga. App. 597, 600 (2019) (characterizing recoverable medical expenses as “special damages”); *Olariu v. Marrero*, 248 Ga. App. 824, 826 (2001) (same).
6. The Supreme Court of Georgia has acknowledged that amounts charged by hospitals may have no foundational basis. *Bowden v. The Med. Ctr., Inc.*, 297 Ga. 285, 293 (2015) (quoting Mark A. Hall & Carl E. Schneider, *Patients as Consumers: Courts, Contracts, and the New Medical Marketplace*, 106 Mich. L. Rev. 643, 665 (2008) (“Hospital executives confess that ‘the vast majority of charges have no relation to anything, and certainly not to cost’”) (brackets and internal quotation marks omitted).
7. GA. CONST. ART. I, § 1, ¶ II (“Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws.”)
8. *Amalgamated Transit Union Local 1324 v. Roberts*, 263 Ga. 405, 406 n.1 (1993) (“Although *Denton* was subsequently disapproved ‘to the extent that it suggests a new equal protection analysis [.]’ *Grissom v. Gleason*, 262 Ga. 374, 376(2), 418 S.E.2d 27 (1992), it was not disapproved to the extent that it declared O.C.G.A. § 51–12–1(b) to be unconstitutional.”); see also *Cincinnati Ins. Co. v. Reybitz*, 205 Ga. App. 174, 179–80 (1992) (“[W]e conclude that the holding in *Denton* is still the law of this State, even if the analysis suggested therein is not.”)
9. See, e.g., *Burdette v. McDowell*, 321 Ga. App. 507, 508 (2013) (“To preserve an objection upon a specific ground for appeal, the objection on that specific ground must be made at trial, or else it is waived.”)
10. Because this argument is premised on the availability of evidence of third-party payments, it may very well arise (and be preserved for appeal) in the course of a discovery dispute over defendants’ ability to obtain such evidence.
11. See *Holcomb Invs. Ltd. v. Keith Hardware, Inc.*, 354 Ga. App. 270, 274 (2020) (“An error of law has as its basis a specific ruling made by the trial court.”)
12. Compare, e.g., *Jawish v. Morlet*, 86 A.2d 96, 97 (D.C. 1952) (“There are comparatively few cases dealing squarely with the question before us, but they are unanimous in holding that a law once declared unconstitutional and later held to be constitutional does not require re-enactment by the legislature in order to restore its operative force.”); *Christopher v. Mungen*, 61 Fla. 513, 532–33, 55 So. 273, 280 (1911) (“Where a statute is judicially adjudged to be unconstitutional, it will remain inoperative while the decision is maintained; but, if the decision is subsequently reversed, the statute will be held to be valid from the date it first became effective, even though rights acquired under particular adjudications where the statute was held to be invalid will not be affected by the subsequent decision that the statute is constitutional.”); and *Pierce v. Pierce*, 46 Ind. 86, 95–96 (1874) (“This court has no power to repeal or ‘abolish’ statutes. If it shall hold an act of the legislature unconstitutional, while its decision remains, the act must be regarded as invalid. But if it shall afterward come to the conclusion that its former ruling was erroneous, and overrule it, the statute must be regarded for all purposes as having been constitutional and in force from the beginning, and the rights of parties must be determined accordingly.”); with *State v. Hodge*, 2010-Ohio-6320, ¶ 35, 128 Ohio St. 3d 1, 10, 941 N.E.2d 768, 776 (in consideration of once-unconstitutional statutes requiring judicial factfinding in certain criminal sentencing circumstances, subsequently determined to be constitutional: “We are not persuaded by the reasoning of the courts in other jurisdictions that have decided cases involving the potential revival of statutes; those decisions are necessarily based on the factual contexts of the situations before them. None of the cases cited by Hodge, and no cases we have discovered in our own research, have involved a state court of last resort finding in favor of automatic revival in a situation with all the varied attributes that are implicated in this case [including, the practical need to resentence numerous defendants].



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Cert By the Numbers

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tioner, and it is also the most frequent outcome. This is not surprising, since the Supreme Court can “affirm” the lower court’s decision by simply denying the petition. An outright reversal was the outcome in 66 of 173 cases (38.15 percent) in which the Supreme Court granted a petition, including 50 of 119 civil cases (42.02 percent). But an outright reversal is not the only possible favorable outcome for the petitioner. The outcomes listed in Figure 3 that would be at least partially favorable for the petitioner are: reversed, vacated, vacated and reversed, affirmed in part and reversed in part, reversed in part and vacated in part, affirmed in part and vacated in part, reversed summarily, and vacated summarily. Including all of these outcomes together yields a favorable outcome rate for the petitioner of 65.32 percent in all cases in which certiorari was granted (113 of 173 cases decided wholly or partially in favor of the petitioner) and 66.39 percent in civil cases (79 of 119 cases decided wholly or partially in favor of the petitioner).

In contrast, the outcomes that would be completely negative for the petitioner are: affirmed and certiorari dismissed as improvidently granted. Combining these outcomes yields a completely negative outcome rate for the petitioner of 31.79 percent in all cases (55 of 173) and 30.25 percent in civil cases (36 of 119). The only other outcome is when the petition for certiorari is dismissed on motion, which represents only 2.89 percent of all cases (5 of 173) and 3.36 percent of civil cases (4 of 119). This outcome cannot fairly be characterized as favorable or unfavorable for the petitioner because a

petition that is dismissed pursuant to a motion typically means that the case settled. At least theoretically, all parties should consider a settlement to be a favorable outcome for the case, but it is neutral with respect to the disposition of a

“
*If you define success
as nothing less than an
outright reversal, you
have a 42.02 percent
chance of achieving
that goal.*
”

petition because it is the only outcome that results in no resolution of the case by the Supreme Court.

In conclusion, an analysis of the petitions decided by the Supreme Court between 2017 and 2020 and the outcomes in the cases in which the petition was granted confirms what most attorneys probably assume: There is a very low chance of the Supreme Court granting a petition, but a good chance of the petitioner obtaining at least a partially favorable outcome if certiorari is granted. For civil defense lawyers, the odds of the Supreme Court granting your petition are only about one in ten, but the odds of success greatly increase once your petition has been granted—depending on how you define success. If you define success as nothing less than an outright reversal, you have a 42.02 percent chance of achieving that goal. However, if you define success as any outcome that has some negative impact on the lower court’s decision, then you

have a 66.39 percent chance of success. Now that you are armed with this information, good luck with your petition. ♦

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Endnotes

1. GA. SUP. CT. R. 40; *see also* GA. CONST. art. VI, § 6, ¶ 5 (“The Supreme Court may review by certiorari cases in the Court of Appeals which are of gravity or great public importance.”).
2. *Atlanta Coca-Cola Bottling Co. v. Jones*, 236 Ga. 448, 453 (1976) (Hall, J., dissenting) (“The review of right (three judges) is to determine whether the trial was conducted according to law and applicable procedure—to correct errors of the trial court. It is done primarily for the benefit of the parties to the appeal.”).
3. *Id.*
4. *Adair v. Traco Div.*, 192 Ga. 59, 65 (1941).
5. *Todd v. Dekle*, 240 Ga. 842, 843 (1978).
6. *Central of Ga. Ry. Co. v. Yesbik*, 146 Ga. 620, 621 (1917).
7. *Id.*

8. *Id.*
9. There was one civil case in 2018 and one civil case in 2019 in which a petition was filed and granted with a note indicating that the case would be treated as a direct appeal rather than as a certiorari case. Those two cases are not included in this analysis.
10. Older statistics are difficult to find, but it appears that the Supreme Court was a little more generous in exercising its power of certiorari review in the 1970s, 1980s, and 1990s. The Supreme Court noted in a 1978 opinion that it had granted 20 percent of all petitions decided between September 1976 and August 1977. *Todd*, 240 Ga. at 843 n.2. In 1985 and 1986, the Supreme Court granted 14.78 percent and 11.54 percent of all petitions. ADMINISTRATIVE OFFICE OF THE COURTS, THIRTEENTH ANNUAL REPORT ON THE WORK OF THE GEORGIA COURTS 7 (1987). In 1991 and 1992, the Supreme Court granted 14.44 percent and 9.08 percent of all petitions. ADMINISTRATIVE OFFICE OF THE COURTS, TWENTIETH ANNUAL REPORT

- ON THE WORK OF THE GEORGIA COURTS 10 (1987).
11. In one of those cases, a criminal case, the Supreme Court granted the petition in 2020 but had not issued its decision on the merits by the time this article was submitted for publication on July 15, 2021; that case was assigned to an oral argument calendar during the April 2021 Term, so the Supreme Court is not required to issue its decision until November 18, 2021. Thus, for purposes of this portion of the analysis, there were only 173 total cases in which there was an outcome.
 12. Arguably, the dismissal of a petition as improvidently granted could be treated as a denial since dismissing a petition months after granting it is essentially the same as denying it in the first place. Treating the dismissal of a petition as improvidently granted would have two counter-balancing effects on the numbers described in this article. First, it would slightly decrease the rate of petitions being granted (by increasing the number of denials). Second, it would slightly increase the likelihood of fa-

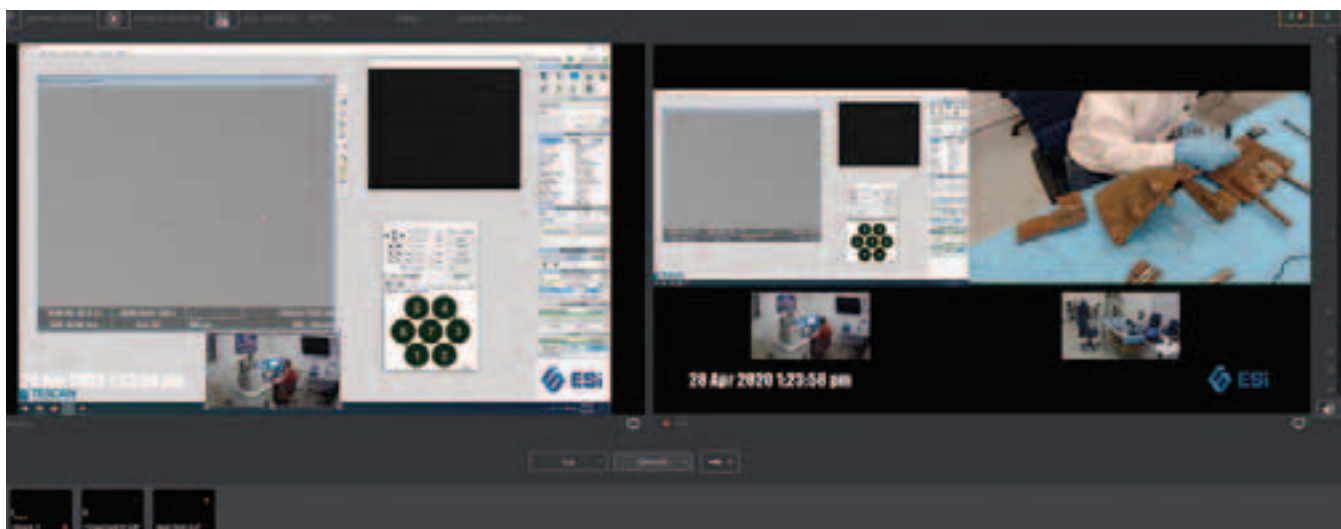
vorable outcomes for the petitioner (by decreasing the number of negative outcomes). This article does not treat the dismissal of a petition as improvidently granted as a denial because there is always the possibility that the lawyers can affect whether the petition is dismissed as improvidently granted by what is said in the briefs or during oral argument, depending on when the dismissal occurs. Indeed, in 9 of the 10 cases between 2017 and 2020 in which the Supreme Court dismissed a petition as improvidently granted, the dismissal occurred after briefing and oral argument. In the tenth case, the dismissal occurred after briefing but just before oral argument. Had these dismissals occurred before briefing, they would more likely reflect a simple reconsideration of the original decision, in which case there would be a stronger argument for treating them as denials of the petitions. But because they occurred after the opportunity for the lawyers to affect the decision, they are treated here as grants followed by negative outcomes.



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Remote Inspections

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cluding portability, fixed view vs. motorized control (i.e., pan, tilt, and zoom), and resolution. In a traditional inspection, participants can move freely around the room, so it is important to be able to switch between different viewpoints. Webcams are often adequate for live-streaming the inspection process, but high-resolution video may also be needed (e.g., to capture a test procedure and instrument read-outs). While remote participants will still see a low-resolution video when viewing it live, the high-resolution recording is captured for later review.

- **Field Inspections and Other Views**—At a site inspection, a drone can provide a bird's eye view of an area, and in some cases, enable views of areas that may be otherwise difficult or dangerous to access. A 360-degree camera can also be used to give remote participants an overview of the lab layout to help create a more immersive and engaging experience for participants.

Still cameras are a critical part of the inspection process. DSLRs are used to capture images of an artifact during an inspection. Because many investigators may be attending remotely, it's important for them to direct the onsite photographer and see the photographs in near real-time to ensure that the views they need are captured.

Remote instrumentation. In a best-case scenario, computer screens tethered to instruments in the lab can be shared directly in a Teams meeting or Zoom call. If the screen cannot be shared via one of our online collaboration tools, pointing a camera at the computer screen during image capture and analysis can also get the job done!

- **Real-time use**—In metallurgical exams, it is not unusual to employ light microscopes, scanning electron microscopes (SEMs), and laser scanners to capture information otherwise unavailable to the naked eye. Many of these instruments are linked to a computer that allows for sample viewing, image enhancement, and tool overlays for measuring and quantifying features. Participants often crowd around the screen that displays the feed from the light microscope or SEM.

They may request new views or measurements while the operator works with the sample and captured images. Because this is fundamentally a screen-based exercise, the use of an online collaboration tools simply makes sense. Rather than crowding around a single screen, participants can view it on their own screens via Zoom or WebEx!

- **Future collaboration** - Other instruments used to collect important data may not be suitable for real-time use. For example, Computed Tomography (CT) scanning can be used to non-destructively view and document a subject artifact such as an aircraft carburetor, complex valve assembly, fitting, or other electronic device. The magic that allows us to see inside these parts does not happen quickly. Many images must be collected and processed to show us the carburetor's internal workings.

The same is true for laser scanners used for scene documentation. Our technologists may collect hundreds of laser scans of an area (e.g., at an intersection where an accident occurred). It takes time to process this data, so it's not readily

available in real-time. However, once processed, the online collaboration can begin!

Whether the collaboration occurs in real-time or after processing, the ability to interact with data can provide a significant advantage, ensuring a common understanding of what happened and enabling good decisions about next steps in the process.

Audio. At an inspection, a clear audio feed is paramount. Microphones that are built into laptop computers generally will not provide an optimal experience for online participants. Lapel microphones also make two-way communication difficult. A good alternative is earbuds—they connect wirelessly to your phone, which can be logged into a Zoom call, enabling two-way communication with participants. A good set of earbuds will have a quality microphone and good audio. Many also have noise cancelling features, which can be helpful when conducting an inspection in a noisy environment.

Decide in advance if a remote inspection will be recorded. Online collaboration platforms provide the ability to record the audio and video from a session. However, that may memorialize discussions that should not be retained. For this reason, many inspections are not recorded.

Online Courtesy. Everyone who has logged into an online collaboration session or webinar knows that there is tweaking required to get the settings right so everyone connected is happy. It's important to allow time for this during a remote inspection. Log into the inspection 30 minutes in advance of the start time, allowing time to troubleshoot problems before the session begins.

The age of online collaboration has created a new set of social norms. Please mute your mic when not speaking! No one wants to listen to



someone crunching their morning cornflakes. Also remember to raise your hand when you have a question or comment and turn off your camera when engaging in something away from the inspection.

Sidebar Conversations. Always plan for sidebar conversations in advance. While most online collaboration platforms allow for private rooms, concerns about “hot mic” incidents are justified. It's best to plan a space and communication mode away from the remote inspection for sidebar discussions. That way, the attending party can leave the inspection and strike up a separate conversation about something that has been discovered and what should happen next.

REAL-TIME ACCESS TO DATA

Hosting real-time conversations during an inspection seems natural. What may be less obvious is how data is collected and shared. For example, there may be times when a consultant wants to take photographs but cannot be physically present. In these cases, the photographs taken by the onsite team can be shared in near real-time via a secured folder. The photos are avail-

able for viewing within 10-20 seconds of the time they are taken, so a remote party can request retakes, changes to the lighting, exposure, or focus, or different angles or perspectives. This helps ensure the photographs taken during the inspection will meet their needs.

AFTER THE INSPECTION

After an inspection, the data collected must be processed, analyzed, and combined with other data. Collaborative analysis sessions with key stakeholders can be important to your client's case (e.g., reviews of CT data or a laser scan of a scene). That could mean viewing the inside of that airplane's carburetor before disassembly. Reviewing this material as a team often reveals important insights that can point to next steps in the investigation.

When laser scans are used to survey an accident scene, the data can often be used to perform a scenario-based analysis in a dimensionally accurate environment which shows lines of sight, the movement of vehicles and pedestrians, and conspicuity. Over time, the data can be refined and used to develop highly

Continued on next page

accurate demonstrative tools for resolving the case. Online collaborative sessions create an ideal forum for key stakeholders to contribute to every step of the process, from initial data review and analysis to the development of an advanced demonstrative.

FUTURE DIRECTIONS

As the rollout of the vaccines continues, travel restrictions and safety concerns are lifting. However, the remote capability infrastructure that allows us to shift smoothly between a physical and virtual delivery mode is here to stay. Online collaboration has transformed the way inspections are performed, and clients are telling us they find these new options convenient, economical, and efficient. The cost and time savings associated with not traveling can be significant. For the cost of an airline ticket and hotel stay, a remote inspection can be hosted for many remote participants.

Remote inspections can also help overcome logistical challenges and scheduling delays. An in-house expert can spend 30 minutes sharing key information about a component in an online session and then continue with his/her regular duties instead of having to catch a flight back home. This allows us to engage a broader community of stakeholders in the investigation process and potentially accelerate the journey to resolution. ♦

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Endnote

1. <https://www.theverge.com/2021/4/27/22406472/microsoft-teams-145-million-daily-active-users-stats>.

Slip & Fall

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percent”, but error rates differ depending upon the surface being tested. Technically sound methodologies evaluate precision on a variety of surfaces.

It is worth discussing published standards that base target friction values on experiential data. Early U.S. guidelines for pedestrian walkway friction (e.g., Sidney James’ work in the 1940s) used limited accident data as the foundation. More recently, nations such as Germany with government-administered accident insurance have the ability (and compelling interest) to analyze and publish accident data; this can be from a “neutral” perspective compared to nations like the U.S. where private insurers will have concerns about both confidentiality and competition. Currently, one important US standard for the friction of a certain type of flooring material has a target friction value based on a survey of German safety practitioners in a PhD dissertation study *not* focused on tribometry. There is no human-derived correlation of that standard’s specified tribometer to its target friction value. Arguably this is a technical deficiency in the standard, but the standards committee, largely composed of flooring manufacturers and installers, considers this value defensible (at least in part) because of feedback these committee members get from their respective customers. The author’s observation (from outside that industry) is that this feedback, likely experiential data, is not typically disclosed.

For the limited, almost “internal” purposes of a specific industry’s standard—perhaps self-regulation—experiential data may be a justifiable foundation. However, if such a methodology starts

to undergo a broadening of its scope (“it works great for this, so let’s use it for that, too”) without a broadening of its technical foundations, then it might be time to challenge the reliance on experiential data. An interesting illustration of potential problems with experiential data can be found in looking at the US Consumer Products Safety Commission’s National Electronic Injury Surveillance System (NEISS)².

In a 2013 article in the *GDLA Law Journal*, Meadows, Norton and Hollis³ found that, among other things, NEISS data (which are product-related hospital injury statistics) can be multi-level hearsay, with a lack of proof of substantial similarity between incidents. It may be that flooring manufacturers all have diligent procedures for determining the adequacy of their products’ friction based on feedback from retail, hospitality, and/or institutional customers. But there can be significant differences in how reliably a particular tribometer model measures different types of otherwise-similar flooring; a “one-size-fits-all” approach becomes problematic if the method’s scope becomes too ambitious. And for uses outside of flooring manufacturing, such as expert work in a *Daubert* environment, undisclosed experiential data isn’t particularly helpful.

This brings us back to the *alternative* to experiential data as the primary foundation for friction thresholds: direct correlation of tribometry to human slip research. This science is evolving—as it should.

- The ASTM F13.10 “Traction” subcommittee (of which the author is the current Chair) first published ASTM F2508 *Standard Practice for Validation and Calibration of Walkway Tribometers Using Reference Surfaces*⁴ in 2011; it provides a

procedure for determining whether a tribometer can rank and statistically differentiate a series of 4 increasingly-slippery reference tiles in the same order found by 80 human test subjects (at the University of Southern California). Since then, new research at USC has been done (2018-2019), this time with 148 human test subjects walking across a new set of 4 painstakingly-chosen reference tiles, and a more rigorous replacement for ASTM F2508 is in the works. In this work, there is a heightened focus on the *homogeneity* of reference surfaces to understand how friction may vary between and within reference tiles.

- The eventual goal of the ASTM F13.10 subcommittee is a friction rating standard that will allow flooring manufacturers to label a material with A, B, C or Grade 1, Grade 2, Grade 3, or similar, to communicate the flooring’s friction relative to human requirements. The need for a reliable friction rating system is clear. Currently, different types of flooring materials have different friction standards, thresholds, and test methods—of disparate quality and relevance to humans. There have been efforts by some organizations to come up with such a system⁵ but none has yet succeeded. The level of technical rigor planned for F13.10’s standard is higher than that of prior efforts. Indeed, the F13.10 friction rating standard will require four subordinate standards to handle the different technical elements.
- The ASTM F15.03 “Safety Standards for Bathtub and Shower Structures” subcommittee (of which the author is the current Chair) originally published ASTM F462 *Stan-*

*dard Consumer Safety Specification for Slip-Resistant Bathing Facilities*⁶ for bathing surface friction back in 1979. In an article for GDLA five years ago,⁷ the author discussed the myriad obsolescence issues with F462, which despite being withdrawn by ASTM in 2016 remains adopted by code to this day. Ramping up over the past eighteen months, the F15.03 subcommittee is now actively working with the Consumer Products Safety Commission and bathing surface manufacturers to develop a defensible standard for bathing surface friction—based on direct correlation of tribometry to bare-foot human slips, with precision and homogeneity being part of the evaluation.

Another issue that comes up in premises liability pedestrian fall litigation is the applicability of non-codified standards. Two standards in particular, ASTM F1637 *Standard Practice for Safe Walking Surfaces*⁸ and ANSI/ASSE A1264.2 *Provision of Slip Resistance on Walking/Working Surfaces*⁹, are often cited by experts as applicable despite the fact that they are not adopted by any code, regulation, or ordinance. These are also frequently described by experts as “industry standards,” but the expert does not state in which they are a standard—perhaps the forensic industry?

Calling such documents “industry standards” implies that they represent a “standard of care” the premises holder would be expected to know and follow when there may be no evidence of that. Regardless, a look at the scopes of these standards reveals their assertions of general applicability; A1264.2 is currently undergoing a comprehensive revision (which the author is leading), and it will be of interest to see what changes that committee approves.

The last point of discussion is somewhat *Daubert*-themed, somewhat open-ended, and based on an ongoing case worked by another expert. It is a hotel bathtub slip case with a porcelain-enamel bathtub. The tub (per the manufacturer) complied with the codified ASTM F462 friction standard, which allows gaps between areas of friction treatment on the bottom of a tub; the patterns one can see in such a tub are comprised of friction features surrounded by “plain,” untextured porcelain. In this ongoing case, the opposing expert used a modern tribometer small enough to measure the friction of the untextured porcelain between friction features—which, unsurprisingly, was slippery. The expert opines that the slipperiness is a deficiency on the part of the hotel.

Though the opposing expert did use “a methodology,” it was not even close to the right one. Under ASTM F462, a standard unchanged from its original publication in 1979, a different tribometer, which happens to be obsolete and unreliable, is the only one to be used by the manufacturer to verify the bathtub friction. There is no requirement for testing once installed. Further, the F462 target friction value is not even relevant to humans as no human slip correlation was ever done—nor are there reproducibility stats. Therefore, in a premises liability setting, since there is no defensible way to friction test this 7-year-old bathtub, one could argue there’s no technical methodology to counter the opposing expert.

Courts may find that as long as an expert has a methodology, they should be able to testify; but what if the methodology in the actual standard of care (ASTM F462) is so flawed as to negate using it? Can an asserted “methodology” successfully be countered by showing that “there is no methodology”? It seems it could take some nuanced arguments to overcome a motion to exclude the expert who knows

there is no defensible methodology to be used here.

The technical validity of walkway friction testing has come a *long* way since the author started doing such work in 2004, and even greater rigor is on the horizon. The more the science advances, the more complicated it is revealed to be. But legitimate friction-related pedestrian slip events remain a concern worthy of addressing.

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Traumatic Brain Injury

Continued from page 34

experience rotational accelerations in addition to linear accelerations; consequently, both their individual and coupled effects should be considered.

Historically, there was little consensus among researchers as to whether linear or rotational acceleration contributed more to TBIs, further complicated by the difficulty of studying such impacts in a controlled experiment and the complex physiologic processes involved [11, 12]. Current studies agree, however, that the brain is more susceptible to injury under a combination of both linear and rotational motion [11-15]. More recently, researchers have begun to associate patients' subjective symptoms in football players' concussive impacts to the mechanics at play and have even attempted to define a risk criterion based on collected data [11, 16].

main at rest unless acted upon by a net outside force. For example, if the front of a vehicle impacts a tree, the vehicle itself may stop moving upon impact, but its occupant will continue to move forward until he/she impacts the steering wheel or the windshield, unless restrained by a seatbelt or airbag. Similarly, in a head impact, we must consider not only the motion of the skull as a result of its direct contact with a foreign object, but also that of the brain. Inertia dictates that the brain will continue to move until it impacts the interior of the skull, which, depending on the severity of the impact, may result in a TBI.

In 1943, an article by A.H.S. Holbourn published in *The Lancet* surmised that in addition to the linear accelerations involved, only rotational motions could account for the tensile and shear strains involved in concussions [17]. Many subsequent studies investigating the role of rotational accelerations in TBIs supported this theory [18-22].

above 4500 radians/second² and a maximum change in resultant angular velocity of 33 radians/second to be predictive of loss of consciousness, as well as 6383 and 28.3 representing a 50 percent risk of concussion and TBI [23, 24].

Research also suggests females are generally more susceptible to TBIs than males, and children and adolescents are generally more susceptible than adults [7-9]. From Newton's Second Law of Motion, we know that the force experienced by an object is directly proportional to its mass and acceleration ($F = ma$). This concept applies both to linear and rotational acceleration. On average, females have a lower head mass than males, and children and adolescents have a lower head mass than adults. The force of the impact is extrinsic; thus, for the same force of impact, females and children would experience a higher head acceleration, making them more susceptible to exceeding injury thresholds. Children, adolescents, and females also tend to have lower neck strength, limiting their ability to resist such contact forces. Moreover, children and adolescents are also more likely to require a longer recovery period, as the myelination process has not yet completed; unmyelinated brain fibers are more susceptible to axonal injury [25, 26].

Evaluating the Probability of Head Injuries Biomechanically

In evaluating the potential for such injuries in events, several relationships have been defined based on investigations in animal models as well as human subject volunteers. Studies have linked intracranial pressure and the severity of brain injury, which then lead to brain contusions or hemorrhaging of the vessels on the surface of the brain [27]. However, the primary modes of biomechanical evaluation

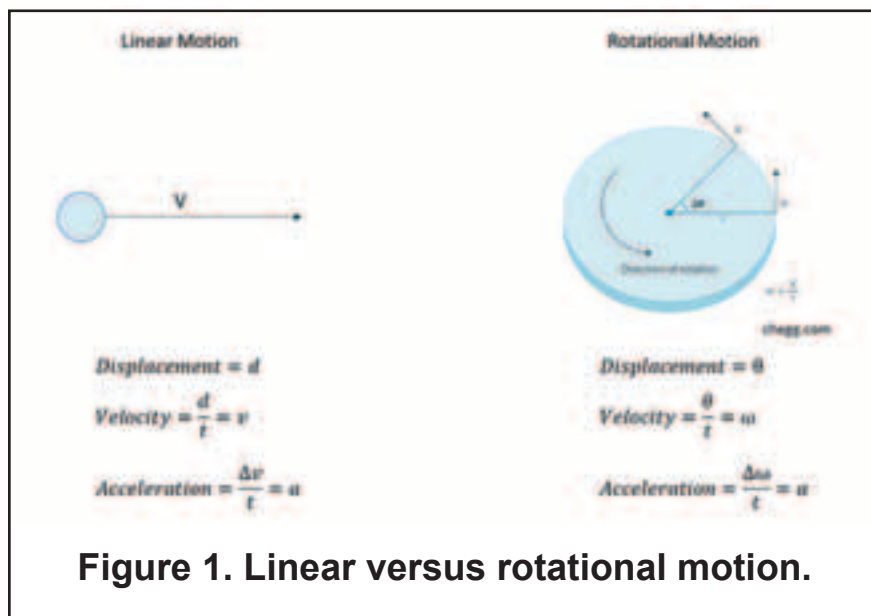


Figure 1. Linear versus rotational motion.

The first law of Newtonian mechanics is the law of inertia: an object in motion will remain in motion and an object at rest will re-

The classic example of a concussion typically involves a loss of consciousness—studies have shown average rotational accelerations

of TBI follow the Wayne State Tolerance Curve and the Head Injury Criterion (HIC), defined by the National Highway and Traffic Safety Administration (NHTSA).

Established in the 1950s, the Wayne State Tolerance Curve discovered a relationship between the average acceleration experienced and the duration of exposure and defines a threshold for whether that injury may be considered life-threatening. The longer the duration of an experienced acceleration, the lower the acceleration threshold for injury causation.

The main assumption is that the translational acceleration would increase pressure gradients in the brainstem and result in injury induced by shear strains and has been shown in human studies up to a six-millisecond duration, as well as in animals for longer exposure durations. However, this was initially based on linear head accelerations. Criteria based on rotational

accelerations were not defined until later, and were incorporated more slowly into safety standards [28, 29].

In 1972, the NHTSA then defined the HIC, which is currently used to assess head injury potential in crash test dummies in the automotive industry as well as in evaluating athletic equipment, among other applications. The HIC variable is defined as a complex function looking at the exposure time and the magnitude of acceleration experienced, with a maximum of 36 milliseconds [30, 31]. It is used to determine safety ratings by both NHTSA as well as the Insurance Institute for Highway Safety (IIHS).

Typically, an HIC value of over 700-1000 is utilized in vehicle manufacturing as a threshold for injury, with airbag regulations using a maximum allowable HIC of 700. Typical vehicle crash test data will show HIC values of 150-300. However, in athletes, TBIs have been known to occur at HIC values as low as 250 [32, 33]. Within this measurement we may look at both the HIC and the HIC-15, which clarifies that the impact duration was over 15 milliseconds.

An HIC-15 of over 700 estimates a 5 percent risk of severe injury, while an HIC of 1000 estimates an 18 percent chance of severe injury and represents the relative safe limit of human toler-

ance in adults [34, 35]. Lower HIC criteria have been defined for children under 5 years of age [36].

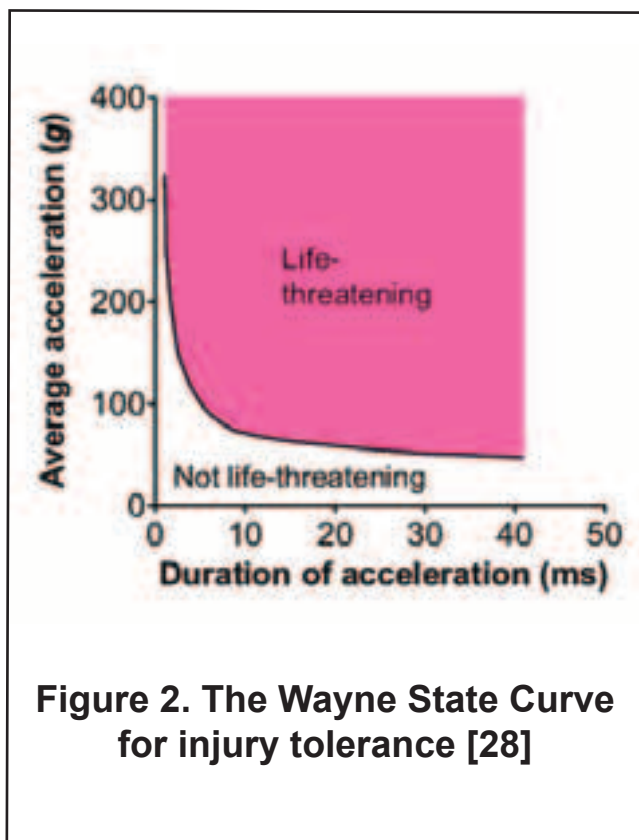
TBIs resulting from MVAs: Important factors to consider

When evaluating the possibility of TBI from a biomechanical perspective, several factors must be considered regarding the occupant of the vehicle, their motions during the collision, and the type of vehicle and the nature of the collision itself.

In addition to considering the occupant's age, the potential for injury is quite different for a male who is over six feet tall than for a female who is five feet tall, especially if driving a smaller vehicle (which presents additional risk for the male's head as it may contact the interior headliner). In addition, relative head mass would be different for the two individuals, and the nature of the impact (i.e. rear-end impact, sideswipe, etc.) must be considered. Additionally, the severity of the impact, defined by the change in speed resulting from the collision, or delta-V, is a major factor, and desktop accident reconstructions, in addition to imaging the vehicle's airbag control module (ACM), can help to shed light on the possibility of injury. To that end, a vehicle-pedestrian impact would present significantly different considerations than a vehicle-vehicle impact, with additional factors to consider.

Finally, we must consider the occupant's motion as well. Were they wearing their seatbelt—both lap and shoulder belt? Which way was the occupant facing? Did the airbag deploy upon impact? Did the occupant brace for impact? Were they ejected from the vehicle? Did they lose consciousness?

As research has shown, the diagnosis and evaluation of a TBI or



concussive injury presents a complex problem for clinicians; the evaluation of the potential for injury is also a complex question for biomechanical experts. Each factor is a piece of the puzzle; collecting as many pieces as possible and taking them into account can help to better understand the subject event and to come to a conclusion regarding injury consistency.

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More the Merrier

Continued from page 36

start with a separate room for every party. As the mediation progresses and parties form coalitions, I shuffle the parties into different rooms that reflect the aligned interests. Subcontractors need to meet to discuss the damages attributable to delays from the owner? Click. Prime contractor wants to talk to the owner about the relative percentage of fault of each sub? Click. I also create extra rooms reserved for attorney-only conversations.

Choose the mediator. With a complex case, the mediator will be integral to whether the case settles. The mediator needs to be experienced, of course, but the mediator also needs to be capable of synthesizing and prioritizing a wide variety of facts and legal issues. The mediator must be willing to invest time up front to learn the case facts and to craft a mediation process that can work with the multiple parties and the range of issues. Finally, the mediator needs to be able to communicate with a wide range of people and personality types.

In extremely large cases, the mediator may need a co-mediator, or an expert witness or reviewer to digest and explain causation or damages materials.

Select the process. The right process will shorten the mediation and increase the chances that the case will settle. For example, the parties may agree to let one party make an opening statement or write a mediation brief on behalf of a group of parties, or they may agree to time limits on their presentations. In very large cases, the parties may need to appoint a steering committee to map out the mediation process.

Educate the mediator. In the pre-mediation conferences, the media-

tor is “going to school” on your case, learning the key issues and players and where the parties’ interests align. Personally, I reach out to every party in advance; if more than a dozen parties are involved, I may use group conference calls.

Use mediation briefs. As the number of parties increases, the chances that all parties have read and understood your positions decreases. You want the other parties to take your positions into account before they set their own expectations for the mediation, and the best way to ensure your positions are taken into account is to set them on paper for the mediator and the other parties to review beforehand.

You are always welcome to submit your mediation brief confidentially, but if the case involves a large number of parties, I strongly recommend that you share three portions with everyone: your statement of facts; your contentions about what role each party played; and your assessment of the damages and any insurance coverage, including how the damages should be apportioned among the parties.

Draft a form settlement agreement. When possible, the parties should draft a form settlement agreement before the mediation gets started. Drafting the form will clarify the issues to be addressed and cut down on disputes after the mediation.

MAKING MEDIATION DAY WORK IN A MULTIPARTY SUIT

With a properly prepared process in place, the parties are ready to hit the ground running at opening conference, and then to move quickly and efficiently through the byzantine network of side negotiations and shifting alliances, hopefully emerging with a solid resolution of the case.

Opening conference. The opening conference will set the tone for the day or days of mediation. Here’s how to make the most of it:

- Don’t skip the opening conference. I am a proponent of opening conferences at mediation in general, but the process is even more important in multiparty suits. In a large case, you cannot hope to have met every adjuster and in-house counsel who attends. The opening conference is your first and perhaps last chance to meet and impress the people who will be making the decisions about settlement.
- Be specific. While a brief “thanks for coming” may suffice for a defendant in a two-party personal injury case, in a multiparty case you almost certainly want to present more detail. Where interests align, one party may offer a consolidated presentation on behalf of a group. But in general, you should assume that many of the decision makers do not understand your contentions.
- Avoid an argumentative tone. Because the mediator’s time will be spread across a large number of parties, in most situations the parties will be asked to buy in to a proposed agreement after relatively few negotiation moves. Thus, even more than in a two-party mediation, it will be critical to strip incendiary language from your opening statement. If you adopt a neutral, fact-based approach, the other parties will have an easier time moving immediately into a reasonable settlement range.

Separate negotiations. Some issues may be pared out of the primary mediation and negotiated separately. For example, in a qui

tam case with multiple relators, we may be able to separate the main dispute from the discussion about the share to apportion to each relator. In a dispute involving insurance coverage issues, the coverage questions may be logically distinct from the underlying lawsuit.

Move quickly to a reasonable range. In a two-party negotiation, the parties can start at extreme positions and still get the case resolved via multiple, small moves. But the “slow march” approach will likely backfire in a multiparty litigation.

When multiple parties are involved, you will be asked to move into what you believe is a reasonable range much more quickly. So before the mediation starts, gather your decision makers to consider what you believe to be a reasonable settlement range, taking into account the range of potential verdicts, the costs of trial preparation and trial, the risks of trial, and the anticipated length of time until final resolution. You may need to amend your range as the negotiations develop. On the other hand, it would not make sense to spend the entire mediation outside of the range you yourself deemed to be a reasonable place to settle.

Mini-negotiations. One of the most effective ways to move the mediation is to divide it into components so that several negotiations can take place at once. For example, the property owners in the strip mall can be discussing the value of what each lost in the fire, while the owner who failed to install smoke alarms negotiates the percentage of responsibility borne by the tenant who caused the fire.

Embrace shifting alliances. As William Clay said about politics, “There are no permanent enemies, and no permanent friends, only permanent interests.” The same could be said about multiparty me-



diations, in which parties’ interest alignments frequently shift. The tenants of the shopping center may be allied against the tenant that caused the fire, but then at odds when it comes to dividing the pot of insurance money. In the qui tam case, the medical defendants may agree on the question of whether the conduct was a violation of the FCA, but if the conduct is deemed to be a violation, they may differ as to the amount of responsibility each bore.

As the mediation proceeds, the shifting alliances will start to produce additional benefits, because parties who stood side by side on one issue are often more willing to listen to one another on the next issue.

Expect to wait. The process of moving numerous parties toward a settlement takes time. The more parties, the longer the mediation is likely to take, and the more time you will spend cooling your heels and waiting for other parties to move. Let your client know what to expect in advance.

Think “big picture.” Be on the lookout for sub-agendas, which offer opportunities for creative negotiating. For example, the prime contractor may want to maintain good working relationships with

his subs for other projects. The owner of the shopping center may want to retain his tenants when the mall is rebuilt.

Memorialize the agreement. When numerous parties are involved in a settlement, the chances for misunderstandings multiply. The parties and the mediator need to document each point as it is resolved. I personally like to use a grid to ensure I memorialize all of the sub-points.

CONCLUSION

Mediating a multiparty case may seem like an overwhelming task, but it is entirely possible and it typically beats the alternative—trying to present a lengthy and complex case to a jury. ♦

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Business Interruption

Continued from page 38

caused by direct physical loss of or damage to property. In this case, “direct physical loss of or damage to the property” was interpreted as requiring “material existence,” and as an event that “alters the physical integrity of property.” The court also upheld the virus exclusion. This set the tone for many similar rulings to follow.

In October 2020, a superior court judge in Durham County, North Carolina handed down what is believed to be the first victory for a policyholder in a COVID-19 business interruption lawsuit. In that case, Judge Orlando F. Hudson, Jr. held that closure orders that restricted the use of a group of 16 restaurants in the Raleigh-Durham area constituted a “direct physical loss” covered by the policy.

This contradicts the interpretation of the law provided in an open letter penned by North Carolina

Insurance Commissioner Mike Causey just four months prior, which stated to business owners that his office was unable to force insurers to pay for damages that are not covered. Citing estimates from the Insurance Information Institute that estimate COVID-19-related business continuity losses could amount to \$383 billion per month, Causey elaborated on how this volume of loss would cripple the insurance industry.

In February 2021, a Chicago federal judge ruled in favor of three policyholders with COVID-19 claims in a consolidated case. In that case, U.S. District Judge Edmond Chang rejected an argument that government orders restricting the use of commercial property could not be considered a direct physical loss covered by the policies. None of the three insurance policies at issue in that case contained a virus exclusion, as most commercial property policies do. This seems to be the common thread among wins for insureds in this context.

However, rulings favoring the insured still represent only a small fraction of cases, as insurers have prevailed nationwide in nearly all of the litigated COVID-19 business interruption lawsuits. As of March 8, 2021, insurers have won 182 motions to dismiss or for summary judgement while policyholders have won 39 of these motions. ♦

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Activity Check Myth

Continued from page 40

to surveillance video obtained. This adjustment avoided the negative bias against activity checks and half days of surveillance.

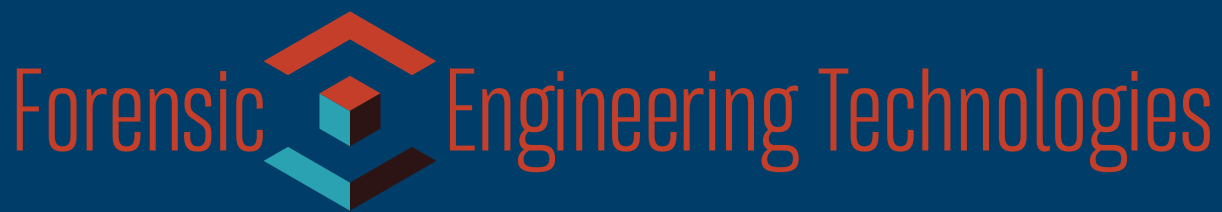
The results are telling. Activity checks resulted in an average of 2.66 minutes per day of surveillance, half days resulted in 8.45 minutes per day of surveillance, and full-days resulted in 20.95 minutes per day of surveillance. When cost is factored into the equation, the return on investment for full-days of surveillance becomes patently obvious as evidenced by the graph on page 40.

Not only are full days of surveillance more effective, but each additional day of surveillance ordered after the first full day increases the expected results with efficiency gains seen up to the fifth day, after which they plateau.

It has been two millennia, but the moral of Aesop’s fable *The Tortoise and the Hare* still holds true: slow and steady is best when it comes to surveillance, an art form that requires patience by nature. An overwhelming amount of data spanning nine years shows that clients are not successfully spreading bets or cutting losses by using activity checks or half-days of surveillance. Rather, they are simply

paying more for less. File this one under “Myth Busted.”

Garrett McGinn has been the Director of DigiStream’s Research & Development Division since 2012. He is a licensed California Private Investigator and holds a Master’s Degree in TransAtlantic Relations from Jagiellonian University in Krakow, Poland and a Bachelor’s Degree in International Relations from the University of California, Davis. Mr. McGinn trained in advanced surveillance tactics in the United Kingdom, achieving a Level III Advanced Award in Foot & Mobile Surveillance. DigiStream is a GDLA Platinum Sponsor.



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Product Liability

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A Minor's Ability to Appreciate Risk

Children as young as seven years old may be deemed to have assumed the risk of injury under appropriate circumstances. Georgia courts have held "there is no legal bar to applying the assumption of risk, as a matter of law, to the conduct of a child between the ages of seven and fourteen when the evidence shows that the danger was obvious, that the child knew of the danger and was able to appreciate the risks associated with it, and the child voluntarily chose to run the risk."¹⁶ In determining whether a child had "the requisite knowledge of danger and appreciation of risks, [courts] apply a subjective standard and look to what the child knew, understood, and appreciated."¹⁷

Moreover, in Georgia, in determining if an assumption of risk defense can properly be applied to a case involving a child, the issues of due care and capacity are dependent on the circumstances of the individual case and the capacity of the specific child involved.¹⁸ Thus, there is no presumption that a child between the ages of seven and fourteen did or did not exercise due care or does or does not have sufficient capacity to recognize danger or to observe due care; instead, this must be determined on a case-by-case basis according to the facts of the case.¹⁹

Question for the Jury or the Court?

Summary judgment based on assumption of the risk is appropriate where "the defense is conclusively established by plain, palpable and undisputed evidence."²⁰ The Court of Appeals has recognized that "[i]t would be a misuse of judicial resources to require that

[such] cases ... be submitted to a jury."²¹ Where a plaintiff subjectively understood the danger and appreciated the associated risks, he will be deemed to have voluntarily exposed himself to the known risks, and there is nothing for a jury to decide.²²

Endnotes

1. O.C.G.A. § 51-1-11(b)(1).
2. *Giordano v. Ford Motor Co.*, 165 Ga. App. 644, 645 (1983).
3. *Id.*
4. *See Kelley v. Hedwin Corp.*, 308 Ga. App. 509, 511 (2011); *see also Courson v. Wright Med. Tech., Inc.*, No. 5:12-CV-173 (CAR), 2013 WL 5595973, at *4 (M.D. Ga. Oct. 11, 2013) ("[Plaintiffs] must produce evidence from an expert who is qualified to conduct the risk-utility analysis and to opine that the risks inherent in [the product's] design outweigh the utility or benefit derived from the product." (second alteration in original)).
5. *See Deere & Co. v. Brooks*, 250 Ga. 517, 518-19 (1983) ("[S]trict liability recovery is barred by evidence establishing assumption of the risk."); *Christian v. Eagles Landing Christian Academy, Inc.*, 303 Ga. App. 113, 115-16 (2010) ("Assumption of the risk is a complete defense to negligence...").
6. *Bodymasters Sports Indus., Inc. v. Wimberley*, 232 Ga. App. 170, 173 (1998).
7. *Vaughn v. Pleasant*, 266 Ga. 862, 864 (1996).
8. *Id.*
9. *See Fuller v. McCormick*, 340 Ga. App. 636, 638 (2017) ("[W]e apply a subjective standard 'geared to the particular plaintiff and his situation, rather than that of a reasonable person of ordinary prudence.'").
10. *Atlanta Affordable Hous. Fund L.P. v. Brown*, 253 Ga. App. 286 (2002).
11. *Williams v. Mitchell County Elec. Mbrshp. Corp.*, 255 Ga. App. 668 (2002).
12. *See Vaughn*, 266 Ga. at 864 ("The knowledge that a plaintiff who assumes a risk must subjectively possess is that of the specific, particular risk of harm associated with the activity or condition that proximately causes injury").
13. *See, e.g., Standard Mgmt. Co. v. Scott*, 229 Ga. App. 36, 38 (1997) ("Every person of ordinary intelligence knows

that falling glass may break and that broken glass may cut."); *Wilson v. Bicycle South, Inc.*, 915 F.2d 1503, 1508 (11th Cir. 1990) ("[I]t seems axiomatic to say that it is unreasonable to use a helmet to protect a portion of the body that the helmet clearly does not cover.").

14. *See, e.g., Lee v. CNH Am., LLC*, 322 Ga. App. 766, 772 (2013) (affirming the trial court's decision to instruct the jury on assumption of the risk where the evidence showed the plaintiff "had owned three or four tractors for over 35 years ..., was mechanically inclined, and 'could fix anything'").
15. *See Stodghill v. Fiat-Allis Construction Machinery, Inc.*, 163 Ga. App. 811, 813 (1982) (noting plaintiff's contention "that because he was acting under orders from his employer, his conduct cannot be characterized as unreasonable as a matter of law").
16. *Kensington Place Owners Ass'n, Inc. v. Thomas*, 318 Ga. App. 609, 611 (2012), citing *O'Neal v. Sikes*, 271 Ga. App. 391, 393 (2005).
17. *Id.* at 612 (holding child knew, understood, and appreciated specific risks of pushing tree over because he made statements indicating he knew tree could fall and cause injury or death). *See also Fowler v. Alpharetta Family Skate Ctr., LLC*, 268 Ga. App. 329 (2004) (holding child's testimony showed he knew of dangers of ice skating, including specific danger of colliding with another skater, and appreciated need for protection for his head in the event of a fall, given his attempt to rent helmet).
18. *See Thomas*, 318 Ga. App. at 612 (finding no evidence 13-year-old child was of insufficient intelligence to appreciate obvious danger of being injured by falling tree).
19. *Taylor v. McGraw*, 327 Ga. App. 654, 657 (2014), citing *Jackson v. Young*, 125 Ga. App. 342, 343-44 (1972).
20. *Bodymasters*, 232 Ga. App. at 174.
21. *Sharpnack v. Hoffinger Indus., Inc.*, 223 Ga. App. 833, 835 (1996).
22. *See, e.g., Thompkins v. Gonzalez-Nunez*, 355 Ga. App. 144 (2020) (reversing trial court's denial of summary judgment on the basis of assumption of the risk); *Desai v. Silver Dollar City, Inc.*, 229 Ga. App. 160, 165 (1997) (affirming trial court's grant of summary judgment on basis of assumption of the risk).



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