Georgia Defense Lawyer©

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Georgia Supreme Court Revisits *Daubert*

By Richard A. Brown, Jr.
Brown, Readdick, Bumgartner, Carter, Strickland & Watkins

Reversing the Georgia Court of Appeals, the Supreme Court of Georgia recently issued a key decision regarding the scope of a trial court's power to exclude expert testimony which it finds to be insufficient.

As part of the Tort Reform Act of 2005, the Georgia Legislature enacted O.C.G.A. § 24-9-67.1, which incorporated into Georgia law the federal *Daubert* standard for determining the admissibility of expert testimony. The Georgia Supreme Court's first significant examinations of that statute occurred in *Nathans v. Diamond*, 282 Ga. 804 (2007), and *Mason v. Home Depot*, 283 Ga. 271 (2008). In both of those cases, the supreme court upheld the statute against constitutional attacks and generally confirmed that in considering the admissibility of expert testimony, trial courts should consult the U.S. Supreme Court decision in *Daubert* and the subsequent federal decisions applying the *Daubert* standard.

Although the Georgia Supreme Court has, since *Mason*, considered issues such as the timeliness of hearings to determine the admissibility of expert testimony (*e.g., Ford Motor Co. v. Gibson*, 283 Ga. 398, 404 (2008)) and the particular application of O.C.G.A. § 24-9-67.1 to medical malpractice cases (e.g., *Condra v. Atlanta Orthopaedic Group, P.C.*, 285 Ga. 667, 668 (2009)), the supreme court offered no further substantial analysis of how trial courts should apply the *Daubert* standard.

Now, in the recent case of *Plant Improvement Co., Inc. d/b/a Seaboard Construction Company v. Hamilton-King*, No. S09G1224, 2010 Ga. LEXIS 493 (Ga. June 28, 2010) and the companion case of *HNTB Georgia, Inc. v. Hamilton-King* ., the supreme court has reaffirmed the importance of the trial court's role as a "gatekeeper" and directly addressed, for the first time, the admissibility under O.C.G.A. § 24-9-67.1 of expert opinions that are based solely on an expert's experience and personal judgment.

The *Plant Improvement* litigation arose out of a motor vehicle accident in a construction zone on an Interstate 95 bridge that was in the process of being widened. The traffic control plan for the construction had reduced the bridge to

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Inside This Issue

New Officers & Board Elected

GDLA held its 43rd Annual Meeting at the Ponte Vedra Inn & Club, June 10-13, 2010, where members and guests enjoyed beach activities, golf, tennis, CLE, an exhibit hall of practice resources, and more.

During the business meeting, GDLA members unanimously accepted the report of the Nominating Committee, chaired by Past President Salty Forbes, thereby electing the 2010-11 officers and Board of Directors, including President Edward M. "Bubba" Hughes of Callaway, Braun, Riddle & Hughes in Savannah. See pages 22-25 for highlights.

GDLA's new President Bubba Hughes (right) welcomes CLE seminar speaker Judge William T. Moore, Jr. of the U.S. District Court for the Southern District of Georgia.

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- Heavy construction machinery
- Indoor Air Quality
- Low Speed Vehicle Accidents
- Manufacturing Machinery
- Motorcycles
- Marine Structures
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1730-H Mt. Vernon Road - Atlanta, GA 30338
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President's Message

GDLA is continuing to progress as an association in many ways. This progress is due to the stewardship of my predecessors and a very qualified group of officers and directors, who are willing to dedicate their time and efforts to improving all aspects of the association and its relevance to practicing defense work in these interesting times.

We are also just over a year into having Jennifer M. Davis as our Executive Director and her impact has already been incredible. I look forward to the months ahead knowing that with all this working for the association, it will be a good year; and, with the participation of our members, it can only get better.

These are challenging times for those of us in defense work. The impact of the recession has seemed to coincide with a movement for alternative methods of billing and other changes that either have or will significantly impact most, if not all, of us to some degree. While, in one sense, we compete with each other, there are still many benefits from associating with those who perform the same type of work.

I think the recent Annual Meeting illustrated that principle, as do the improvements in the association's services available to members. This includes the improved website, judicial receptions, sponsor provided educational seminars, our newsletter, *Law Journal*, and so on.

We are continuing to work to improve all of these services, but their value is apparent and increasingly important. The exchange of important developments, ideas, and methodologies is always a professional benefit from which anyone can learn. GDLA's website is a great source for those ideas and the Board is continuing to work to improve it constantly. The Substantive Law Committees are becoming more valuable and tort reform cases are reaching the appellate courts. The Amicus Committee has been very active, and I think we can expect that to continue under the circumstances. Help from the membership is needed in all of these areas.

The exchange of important developments, ideas, and methodologies is always a professional benefit from which anyone can learn.

I know all of you are busy and have little time to devote to non-income related activities, but the professional experience of participation has many rewards. One of my goals is to make the benefits of that experience known so there will be more participation that will, in turn, benefit the association and all of its members. I truly feel that the more one puts into something, the more beneficial the experience and the ultimate reward.

Some of these benefits can be achieved fairly easily, such as simply circulating news of critical issues. The membership's use of the blast e-mail system in this regard has greatly improved, and we are working to expand the database on tort reform similarly.

Membership participation can only improve the product and benefit us all. I encourage everyone to reach out to those you know who are involved in significant issues and encourage communication. This is also a good source for increasing membership as the benefits become apparent and self-fulfilling.

Yours for the defense,

Bubba Hughes
GDLA President

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Member & Legal News

Member News

Lynn M. Roberson of *Swift, Currie, McGhee & Hiers* was elected Secretary of the Atlanta Bar Association for 2010-2011.

Sarah B. "Sally" Akins of *Ellis, Painter, Ratterree & Adams* was elected to the State Bar of Georgia Board of Governors for the Eastern Circuit, Post 1.

Rita A. Sheffey of *Hunton & Williams* received a Distinguished Service Award from the Atlanta Bar Association at its 2010 Annual Meeting. She was also elected Second Vice President of the Atlanta Bar for 2010-2011. In addition, she received the Atlanta Victim Assistance Inc. Rachel Champagne Leadership Award, as well as the Emory School of Law EPIC Award for Unsung Devotion to Those Most in Need. Finally, she accepted the State Bar of Georgia's William B. Spann, Jr. (pro bono) Award on behalf of the Atlanta Bar, having chaired its Pro Bono Committee for the past two years.

Owen, Gleaton, Egan, Jones & Sweeney attorneys selected as 2010 Georgia Super Lawyers include six time honoree **H. Andrew Owen**, four time honoree **Frederick N. Gleaton** and second time honoree **Rolfe M. Martin**. Selected as Rising Stars were **Amy J. Kolczak, Mark Meliski** and **Richard J. Baker**.

Amy J. Kolczak of *Owen, Gleaton, Egan, Jones & Sweeney* was among the recipients of the 11th Annual Justice Robert Benham Awards for Community Service, which honor lawyers and judges who have made significant contributions to their communities beyond their legal or official work. She was also awarded the Spotlight Award by the Georgia Association for Women Lawyers at their annual dinner.

Philippa V. Ellis of *Owen, Gleaton, Egan, Jones & Sweeney* served on the faculty of the American Conference Institute's Automotive Product Liability Litigation CLE Seminar addressing the topic "Preparing and Defending Daubert/Frye Challenges and Finding Qualified and Reliable Biomechanical and Accident Reconstruction Witnesses." She also spoke at the 2010 DRI Products Liability Conference on the topic "Federal Preemption in the Wake of Wyeth v. Levine."

Frederick N. Gleaton of *Owen, Gleaton, Egan, Jones & Sweeney* was part of a panel discussion addressing recent legal and insurance market developments affecting medical practice groups during the Georgia Medical Group Managers Association Annual Meeting.

GDLA Executive Director **Jennifer M. Davis** has been appointed by State Bar President Lester Tate to serve a three-year term as a laymember on the Chief Justice's Commission on Professionalism.

Cases of Note

Ted Freeman and **Jake Daly** of *Freeman, Mathis & Gary* prevailed on behalf of a company that had installed the smoke detection and fire alarm system at a motel where a fire claimed the lives of five people and seriously injured another. Plaintiffs had alleged that the company and five other defendants were liable in damages because the fire alarm system, which had been installed 11 years earlier, did not function properly. Facing the prospect of what promised to be years of expensive discovery, Freeman and Daly filed an early motion to dismiss on the grounds that plaintiffs' claims were barred by the eight-year statute of repose for claims involving improvements to real property. The trial court agreed and granted the motion.

Matthew G. Moffett of *Gray, Rust, St. Amand, Moffett & Brieske* recently tried to defense verdict two MVA cases. One case involved a contended wrongful death where the defendant driver turned left and in front of plaintiff's oncoming vehicle; policy limits were offered but rejected. The other case involved a serious neck injury and resulting surgery where the defendant driver pulled into the lane of travel of plaintiff's vehicle; plaintiff's counsel asked the jury to award what amounted to four times the defense settlement offer.

Scott Masterson of *Lewis Brisbois Bisgaard & Smith's* Atlanta office and a colleague successfully defended Union Carbide, a former asbestos supplier, during a six day trial in Louisville, Kentucky. Plaintiff, age 45 with two minor children, was diagnosed with mesothelioma in 2008 and brought suit against several defendants through local Louisville counsel. Plaintiff, who was present at trial, alleged he was exposed to asbestos fibers as a bystander from the clothes of his father who claimed to work with products that contained Union Carbide's asbestos. Plaintiff asked the jury for $40 million at trial. After six days of trial, at which Union Carbide was the single remaining defendant, the jury returned a complete defense verdict in favor of Union Carbide finding that Union Carbide's involvement was not a substantial contributing cause to Plaintiff's mesothelioma and that Union Carbide appropriately warned its customers about the hazards of asbestos.

David C. Marshall and **Chris J. Lang** of *Hawkins Parnell Thackston and Young* successfully defended a premises liability

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wrongful death case in DeKalb State Court before Judge Alvin Wong. The jury deliberated 11 hours before reaching its verdict on August 20. The case arose over the murder of a 26 year old who lived with his family at defendant's property; two criminal defendants were charged and convicted. The decedent lived a month after the shooting. Over objection by plaintiff, the Court permitted the two criminal defendants to be included on the jury verdict form. The jury allocated fault at 95 percent to the criminal defendants and 5 percent to the property management company. On the issue of damages, the jury awarded zero for pain and suffering and only awarded $184,192.16 (the amount of medical bills and funeral expenses) for the value of the life for a net recovery to plaintiff of approximately $9,200. The jury declined to assess punitive damages. At trial, plaintiff called former courtesy officers, the former property manager, and former upper management. Plaintiff introduced prior incidents and testimony that the manager had recommended full time security but management did not approve because of budget issues. The defense called the criminal defendants, one in person and the other, serving a life sentence, by deposition. Neither side called a security expert. Plaintiff was represented by Gilbert Deitch and Andy Rogers.

Henry D. "Hank" Fellows, Jr. of *Fellows LaBriola* obtained summary judgment on behalf of Peachford Hospital after a part-time female nurse alleged her dismissal was age discrimination. Fellows demonstrated the hospital eliminated her position after eight years due to financial reasons. Specifically, the hospital had increased the number of weekend physicians who were able to conduct the initial assessments that the nurse had been handling. The hospital did not hire a replacement for the discharged nurse. In its order, the U.S. District Court for the Northern District of Georgia held: "The record reflects that the employer's intent was to eliminate an unnecessary expense, not to discriminate on the basis of age."

Mike Hostetter and **Amanda Matthews** of *Nall & Miller* prevailed on behalf of a tire recycling facility at which a fire erupted and claimed the life of one of the workers on site. Plaintiffs had alleged that the company and three other defendants were liable in damages because of failed or inadequate training and cleaning procedures, and an improperly installed and/or maintained fire suppression system. Facing what promised to be years of expensive discovery including the retention of numerous industry and safety experts, Hostetter and Matthews filed a Motion for Summary Judgment arguing the tire recycling facility was immune from suit under O.C.G.A. § 34-9-11(c) because the deceased worker was an employee of a temporary help contracting firm as defined in O.C.G.A. § 34-8-46. The trial court agreed and granted the motion, holding the plaintiffs' exclusive remedy was against the deceased worker's employer for workers' compensation benefits.

Welcome New GDLA Members

Leesa A. Bohler
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Expert Witness Performance

By Darren Johnson
DecisionQuest

Expert witness testimony, used effectively, can be a powerful tool to positively influence juror perception of a case. However, expert witness testimony, often more than any other aspect of trial, also has the potential to alienate and confuse jurors. At best, poorly communicated expert testimony may be written off as irrelevant; at worst, it leads to resentment against the presenting attorney and the client's case. When jurors listen to expert testimony, whose case ends up on the cutting edge of the blade?

While most expert witnesses possess a mastery of their subject, they often are naïve and uninformed about trial conduct, are not likely to initiate an assessment of how their testimony ties into the big picture of your case, and are rarely exposed to any substantive evaluation or feedback of their testimony. Often, *"Thanks. Send me your bill,"* are the last and only comments an expert witness gets after testifying.

Before addressing the criteria which jurors use to evaluate expert witness, it is necessary to better understand the expert's fundamental role in relation to the jury. An expert witness serves to act as *investigator*, *educator*, and *evaluator* for the jury. As an investigator, the expert helps identify the facts most important for the jury to learn. As an educator, the expert helps the jury to understand those facts and put them in context of the trial. As an evaluator, the expert helps to guide the jurors' conclusions and arms them with the arguments they need to prevail in deliberations.

The first step in preparing an expert for trial is to review the overall trial context, the expected strategy and tactics of direct and cross examination; the nature of the judge and his/her biases; opposing counsels' history, anticipated strategy, and methods; the make-up, biases, and expectations of the jury; the anticipated length of trial; and the expert's role and positioning in the trial. Welcoming the expert witness as member of the trial team so that the expert can take ownership of his/her testimony requires adequate comprehension of all of these important aspects and nuances of the trial.

Most important, an expert witness must be required to take ownership of his/her testimony and not be led by counsel or coerced into rehearsed testimony. After building the foundation of basic understandings, let the expert "*be*" the expert in preparation sessions and let the expert express his views on the case and the impact that he anticipates his testimony should have on the jury's understanding. Ask the expert what aspects of his testimony does he feels will likely shed great light on the case and what aspects of his testimony are likely to be misunderstood or cause confusion. After allowing the expert control of his testimony, counsel can then come back and suggest what opinions are relevant for the expert to share with the jury, and outline with the expert the main points that the expert would like the jury to remember about the his testimony. Counsel can then begin to hone that testimony into integral components of the overall case story and work with the expert to showcase high points and reinforce weak spots to meet the objectives of the trial.

Also push the expert to assess personal assets and liabilities—the expert's strengths and weaknesses of knowledge, personality, communication skills, and presentation style. Videotaping mock witness testimony is a great aid in this process of evaluating and improving the mechanics of an expert's testimony. Video-taping expert witness preparation sessions often gives the expert the rare opportunity to observe and evaluate his or her testimony. Again, let the expert be the first to critique his own performance and offer suggestions for improving his testimony.

To improve the mechanics of expert witness testimony, it is important to understand the characteristics or criteria that jurors will employ to evaluate the expert. Just as the expert must be versed in the basic foundations of the trial, it is imperative for both the expert and counsel to understand these juror criteria, or they will run the risk of negating the expert's testimony and negatively impacting the jury.

The four main criteria which jurors use when evaluating an expert witness are *credentials, expertise, credibility, and objectivity.*

Credentials

While all four criteria are important, jurors find *credentials* to be the least important. (The rare exceptions regarding the importance of credentials are the existence of clear, direct identification with a widely-recognized "expertise brand" such as a Nobel Peace Prize, the Mayo Clinic, or a Harvard professorship, or celebrity-status fame).

Jurors are often suspicious of, and grow impatient with, lengthy lists of credentials. Keep juror attention focused by initially presenting only the minimum credentials needed to qualify the witness. As the examination proceeds, indirectly incorporate credential information into the direct examination. *("Is that the subject on which your doctoral thesis at Harvard was based on, Dr. Smith?").* Additional impressive credentials outside of the necessary requirements for the immediate proceedings can best be presented at the end of a successful testimony.

Ultimately, however, it is usually in counsel's best interests to hire likeability before credentials. An expert witness who can break down barriers between himself, the facts, and the jury, and who can take jurors aboard an exciting journey of discovery, is far more valuable to the trial than a dull, dry expert with an extensive list of credentials.

Expertise

The first question jurors often ask themselves about an expert witness is, "*Does this witness have information that will help me reach a verdict?*" Nevertheless, jurors consistently rank expertise as the third most important characteristic. The main reason for this is that, although jurors dearly value true expertise, if they cannot understand the expert's testimony, or worse, do not believe the expert's testimony, then the witness' expertise does not matter.

Thus, witness expertise is necessary but not sufficient. In order for the expert witness' expertise to be effective, the expert must first be understood and must convey a sense of interest and passion for the subject. If the expert witness does not appear to care about the subject, how can the jurors be expected to care about the expert's expertise? In response, allow opportunities in direct examination for the witness to both teach (using excellent diction, complimentary word choices, and well-formed sentence structure) and preach with confidence, passion, and authority.

Credibility

The second most important criteria for jurors when evaluating expert witness testimony is *credibility*. Two rules of thumb to keep in mind when addressing credibility are 1) that strong emotional fidelity increases credibility while inconsistency destroys it, and 2) that *simple* is perceived as more truthful than *complex* answers and explanations.

Ultimately, however, it is usually in counsel's best interests to hire likeability before credentials.

Strong emotional fidelity can best be increased by reducing differences in the expert's emotion during direct and cross-examination. A common error is to over-prepare the expert for direct testimony at the expense of preparing for cross-examination. This often leads to a lopsided testimony from which two differing portraits of the expert can arise—one that is cool, prepared and calculated, and another that is defensive, angry, and unprepared. Preparation for direct testimony should never eclipse or be given more importance than cross examination preparation.

Plan to increase conflict and emotion during direct testimony. Separating the expert's opinion and knowledge from that of counsel will help to not only establish juror perception of a more independent witness, but will increase conflict to direct testimony, and make the direct testimony more closely match what jurors will hear during cross examination. Conversely, it is important to work to reduce conflict and emotion in cross-examination. The expert should agree pleasantly with factually correct matters presented by opposing counsel, or disagree politely and move on into the same *investigative*, *teaching*, and *evaluating* mode that he conveyed in direct examination.

Anticipating key weaknesses in the case and preemptively addressing them in direct testimony is another useful strategy to boosting credibility. Case weakness can sometimes be diffused or favorably positioned when presented proactively, or even forgiven when the expert is forthright about the weakness at the outset—before the expert and jury are forced to endure repeated emphasis on the matter by opposing counsel. At the very least, the expert's weak card has been shown to the jury of his or her own accord, building trust with and reducing surprises to the jury, and preventing a potential later unreeling of the expert.

Elimination of barriers between expert and jurors also helps increase perception of juror credibility. It is especially important to reach jurors on their level, speak in a language understandable to them and in a manner acceptable to them. Often this means encouraging the expert to climb down from his ivory tower to carefully explain the issues without being condescending or arrogant, emphasizing similarities with the jurors, and providing opportunities for humility and admission of error. Keep the expert's testimony as simple as possible.

Objectivity

The most important characteristic to jurors is *objectivity*. For the

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New Technology Makes Jury Research Possible for Cases of All Sizes

Aref Jabbour, PhD
LookingGlass, LLC

For complex and high profile cases, and cases for which there is a lot at stake, jury research has become an accepted part of the case preparation process. Although jury research remains a powerful tool in evaluating cases and in developing trial strategy, it can require a great deal of time and money to accomplish.

Often the cost puts it out of reach of lawyers in smaller cases and in smaller firms that could benefit from jury research. In addition to the consulting fee, the costs include recruiting and paying jurors, renting space and audiovisual equipment, and food and travel expenses.

Lawyers may also spend a great deal of time and money getting to and from the research site as well as being present at the session. These expenses are often in the tens of thousands of dollars.

Online jury research presents the possibility of a massive reduction in expenses. Even though online jury research has been around for a few years, it remains fairly rudimentary. Often, jurors are presented with written descriptions of the case, there are no juror discussions or deliberations, and data analysis and presentations can be very basic. Consequently, the attorney is left with little data or with data that are not very informative for his/her case.

However, a new breed of online jury research services are now offering more sophisticated and useful options at a reasonable cost for cases of all sizes: for example, the ability for jurors to view video presentations of attorneys' arguments, rate them in real-time, and answer questions. Juror discussions or deliberations are available, and the data reports are comprehensive, informative, and easy to navigate. These new advanced capabilities give attorneys with numerous cases an opportunity to conduct powerful, effective, quick, and cost-efficient jury research.

Online jury research puts jury research in the hands of all attorneys from solo practitioners to members of some of the largest firms. In essence, online jury research is a powerful, sophisticated, quick, and cost-efficient data collection tool. It allows attorneys to get reliable answers to the pressing questions that they have about their cases. More specifically, online jury research is an ideal tool to get a quick "read" on cases, even as soon as they are filed.

Many times, attorneys wish they could get quick insight into what jurors think about their own or their opponents' damages requests, as well as their key arguments or evidence pieces. Online jury research allows attorneys to do all of that, and more.

What is involved in conducting online jury research?

1. Understand the many benefits of online jury research. Online jury research allows you to get many of the benefits of traditional or live jury research, but at a fraction of the cost. With online jury research, you can test your case strengths and weaknesses, figure out which arguments and evidence pieces work and which do not, and find out the characteristics of your best and worst jurors. All of this can be done in the venue for your case, and with a representative sample of jurors. Data from such research can inform your discovery process, and many other trial preparation procedures.

2. Find the right online jury research firm. There are a few online jury research firms out there, but only a select few offer convenient and sophisticated services to meet all of your needs. The right firm should be able to offer a user-friendly process, tailor the research questions to get the answers you need, and provide a data output that is easy to use, exciting and informative.

The validity and reliability of the results are only as good as the sample of jurors from which they come. Therefore, the right online jury research firm must be able to recruit a representative sample of jurors from your venue, or a matched venue in extremely sensitive cases.

Although it may be tempting to conclude that mock jurors with internet access might not be representative of the real jurors, recent

studies show that nearly 80 percent of the U.S. population has internet access at home. The online population is quickly becoming the same as the population. With that in mind, it is critical for an online jury research company to be able to find the right sample of willing participants for jury research

Another critical factor to consider in picking the right online jury research firm is how it goes about presenting the case information to the mock jurors. Most firms have the capability to present only written information. One of the cardinal rules in arguing before a live jury is to keep them engaged in your "story" to make sure that they remember as much as possible of your arguments. The same is true for a sample of jurors online. Reading text about your case and then answering questions will not keep jurors engaged, especially if they are participating from home.

On the other hand, having video presentations of your arguments and those of the opposition will certainly capture and maintain jurors' attention. Video presentations will also allow you to tap into one of the most important and informative features of jury research—real-time ratings of your arguments (if using the right online jury research firm, of course).

As mentioned earlier, one of the greatest benefits of online jury research is the capability to test the strengths and weaknesses of your arguments, and determine which arguments and evidence pieces work and which do not. Sophisticated online jury research firms can have jurors rate the attorneys' arguments as they are watching the video presentations. When the research is completed, the attorneys can review the videos of each side's arguments and see which arguments garnered high and low ratings.

This gives attorneys direct feedback on which arguments and evidence points they need to highlight, as well as which ones they need to respond to when the other side presents them.

3. Determine the key arguments that you and your opponent(s) will make. A crucial step for conducting jury research is to whittle down your mountain of evidence and arguments to a few central themes that you will communicate to the jury. However, you also need to figure out what the other side will say, so as to be able to prepare for and counter their arguments. Investing time and effort early on to produce brief and informative video presentations ensures that the mock jurors are listening to the key arguments and themes that each side will emphasize.

Furthermore, attorneys who have participated in jury research of any type almost always appreciate spending time fine tuning their arguments early on; it makes them that much more prepared when the time comes for trial.

4. Generate the key questions that you want jurors to answer about your case. Online jury research allows you to get answers to standard questions

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PVC and CPVC Pipe Failures

By Dr. Michael Hayes, P.E.
Engineering Systems, Inc. (ESI)

Abstract

The losses and remediation costs associated with a simple pipe failure can be extraordinary, because a failed pipe can cause significant water damage to a high-rise building. Identifying the cause(s) of pipe failure can be challenging for a number of reasons. First, plastic pipes can fail by several mechanisms including high pressure, impact, water freezing events, environmental attack, contamination, and manufacturing defects. Second, pipe variabilities or defects may also contribute to the failures. Furthermore, failures are often the result of a combination of two or more factors, and, in the case of litigation, determining relative fault becomes critical. This paper explores the causes of failure in plastic pipes with particular emphasis on PVC and CPVC pipes. The proper steps to be followed in a forensic investigation are presented, and various pitfalls are discussed.

Background

Polyvinyl chloride (PVC) and chlorinated PVC (CPVC) are used extensively in water service distribution, "drain, waste, and vent", sewer, telephone duct, and fire protection systems. The higher chlorine content in CPVC improves mechanical properties at elevated temperatures and imparts improved flame and smoke characteristics. The corrosion resistance of plastic is touted as a key advantage over steel pipe. Nevertheless, these materials are susceptible to failure, but the damage mechanisms are different. Although damage to plastic pipes often results in slow leaks that cause only minimal damage and hassle, catastrophic failures sometimes occur, causing extensive water damage and, subsequently, litigation. Proper investigation of the pipe installation, service history, environment, and material condition are critical to determining fault. The following sections outline the steps of a complete failure investigation and some of the challenges.

Challenges in Failure Investigations

Proper Scene Inspection

Forensic investigations can be encumbered by a number of factors that are beyond the control of the engineer. For example, the investigating engineer might not be retained until after the initial examination of the pipe by the contractor, building owner, or insurance company. In a rush to return the system to service, they might cut out and replace the failed pipe without any regard for proper preservation of the evidence, which may include adjacent materials (e.g., potential contaminants), water, and the pipe itself. In addition, the location and orientation of the failed pipe (Figure 1), the location of hanger supports and other potential loads or constraints, and general history of the pipe might not be properly documented. It is essential that the investigating engineer be called to the scene as soon as possible to document these details.

Figure 1. CPVC pipe installation in a fire protection system.

Interpreting Material Evidence

Fortunately, a great deal of information can still be ascertained by examination of the failed pipe and its crack patterns and fracture surfaces (fractography). First, the location and directionality of cracks can help indicate the type of loading that may have contributed to the failure. Second, the microscopic appearance of the crack(s) may indicate the failure mechanism. For instance, a brittle fracture that occurs at a nominal stress level below the yield strength of the plastic will produce a smooth, dull appearance on the fracture surface in the vicinity of the crack origin. In contrast, a smooth, glassy fracture morphology is indicative of slow crack growth and is usually associated with environmental stress cracking (ESC). An example of ESC crack growth is shown in Figure 2 (on next page). A rough texture usually denotes a ductile, high stress failure. Other features such as ridge patterns, crack arrest marks, ratchet marks, and fatigue striations can further elucidate the loading and time scale.

Despite the volume of information that can be gained through fractography, inexperienced investigators may sometimes misinterpret the fractographic features or attribute failure to secondary factors. For instance, in a pipe failure case, one party alleged that the pipe failed due to UV damage as a result of improper storage. The outer surface of the pipe was slightly discolored, and chemical analysis of the damaged surface indicated some degradation, but

only on the outer surface. However, the pipe actually failed by a crack that grew from the *inside* surface *outwards*. The crack also demonstrated the glassy, smooth morphology of ESC.

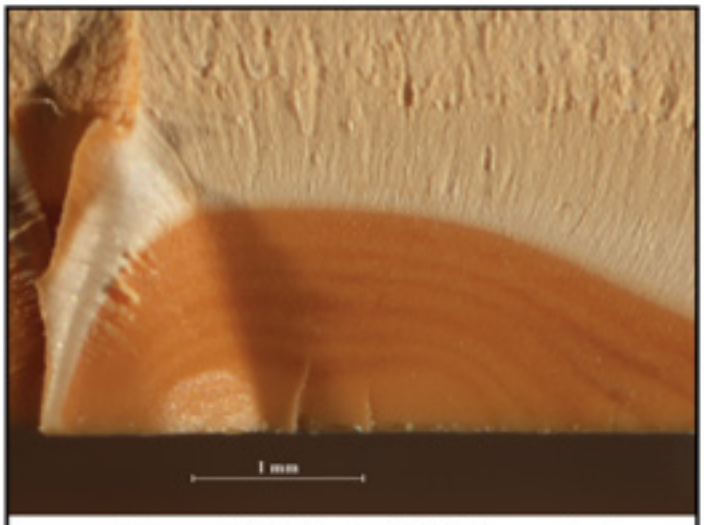

Figure 2. ESC due to polyethylene glycol (anti-freeze) exposure.

Assessing Environmental Factors

Many plastics failures are caused by, or at least facilitated by, exposure to abnormal environmental conditions, including elevated temperature, UV radiation, or chemical contaminants. Plastics are a subclass of polymers, which are long chain molecules having carbon atoms on the primary chain backbone. Thermal damage during processing or high temperature exposure can cause chain fragmentation. The polymer network may also be susceptible to photo-oxidation via ultraviolet (UV) radiation, which results in loss of gloss, discoloration, chalking, cracking, and surface embrittlement. Several spectrographic methods can be used to detect thermal/UV damage, including UV-Vis, Fourier Transform Infrared Spectroscopy (FTIR), and Raman spectroscopy. Damage to key chemical bonds will show up in the characteristic spectra (i.e. "fingerprint") associated with the material.

Environmental Stress Cracking (ESC)

The presence of certain contaminants can also promote failure of plastic pipes. While plastic is susceptible to attack by some chemicals, the most common mode of environmental attack in CPVC pipe is probably environmental stress cracking (ESC). ESC requires tensile stress, which can be well below the design stress of the part, and the localized presence of a contaminant or ESC "agent". ESC agents wet the surface and diffuse into the polymer chain network, acting as a "plasticizer" or softener, consequently increasing the mobility of the polymer chains. ESC is not a chemical attack; no chemical reactions occur.

On a macroscopic scale, ESC cracks often appear as series of interconnected cracks emanating from the contaminated surface at a number of different initiation sites, forming what is often

Continued on page 32

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When Slack Supervision Culminates in Construction Defects

By Stewart M. Verhulst, M.S., P.E.
and Deepak Ahuja, M.S., P.E.
Nelson Architectural Engineers, Inc.

In the construction industry, Structural Engineers are charged with the responsibility of ensuring the public's safety. They do this by directly approving (sealing) not only the design itself, but also any submittals/shop drawings for the structure, its structural members, and the construction materials involved in the project.

If a specialty structural component is used in construction, however, that component's designer/manufacturer is typically required to provide sealed documents, as well. Things can get sticky when the designer/manufacturer extends his expertise into areas in which he may not be licensed. The line where one party's responsibility ends and another's begins is sometimes blurred. Mistakes can be made.

Costly Mistakes: A Case Study

Structural components are commonly used in buildings that have uniform loading conditions. For simple structures with repetitive design elements, the component manufacturers often provide tables and charts for the engineer to use as design aides. Deeper involvement by the manufacturer is rarely necessary.

However, structural component design for more complex structures is...more complex. When the loading conditions for the components are not uniform, the load that each component will bear must be determined and then factored into each component's individual design. The engineering that is involved takes specific expertise, as well as time, and time is a luxury that most high volume, fast-producing component manufacturers do not have.

The Disconnect

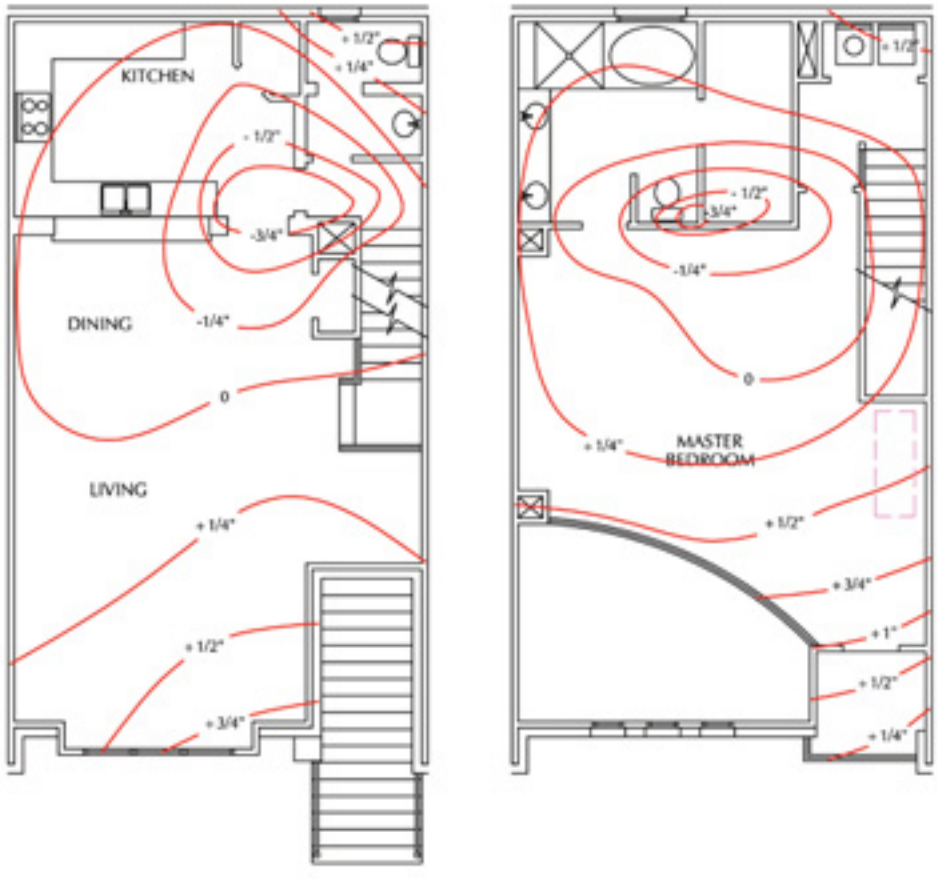
That brings us to our case study, a three-story condominium project built in 2000-2001. The complex featured 17 condominium units and four distinct unit floor plan layouts, which were repeated in each of the three similarly-constructed buildings.

Less than three years after construction was completed, condo owners complained of uneven floors and ceilings, sloping countertops, cracks in finishes, separations in wood flooring, cracks in brick veneer, and sticking and swinging doors. Nelson Architectural Engineers, Inc. (NAE) was retained to investigate the complaints and determine if any structural deficiencies were present in the floor framing.

A floor elevation survey was performed for each unit type to determine the extent and pattern of floor unlevelness for each framing layout.

The pattern pointed to load transfer deficiencies at the floor framing. For the unit depicted above, the exterior walls were load-bearing, while all of the interior walls, except for the stairway wall, were not. Further, the lowest

Continued on page 16



Elevation surveys at 2nd and 3rd floors of one condominium unit. The lowest elevations occur below a non load-bearing wall at each floor.

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Continued from page 14

points occurred where the truss framing was integrated to walls that were not intended to be load-bearing – walls that were not continuously supported to the foundation or supported by a beam.

Destructive testing was performed at the framing to observe the connections and the possibility of load transfer at the non load-bearing walls. Nearly all of the truss and beam framing was in contact with, and therefore was bearing on, the walls below. This condition essentially made every wall a load-bearing wall.

Truss bearing on a wall not designed as load-bearing.

Lost In Translation

What happened? The structural design for this project was performed by both the Structural Engineer of Record (SER) and the Truss Designer/Manufacturer. The SER was responsible for the overall structural design, including the foundation and lateral load resisting systems. The Truss Designer/Manufacturer was responsible for the design of the metal plate connected wood trusses.

The SER prepared the original structural framing layout schematic. However, the Truss Designer/Manufacturer prepared a different layout scheme for the truss and beam framing at the floors. This revised layout scheme was customized for the design of the trusses and beams and was adopted for construction. Unfortunately, the Truss Placement Plans included both load-bearing and non load-bearing walls, and it was not clearly indicated which walls were and were not load-bearing. The result was that the Truss Placement Plans were confusing both to the framing erector, and even to the Truss Designer/Manufacturer's own Professional Engineer.

Loads and load transfer issues. The SER dictated the loads to be used for the truss design. The Truss Designer/Manufacturer then took those loads and calculated them throughout the structure, taking into account any special loads and all load transfer conditions. These calculations constituted a significant portion of the design of the truss framing...and were being conducted by an unlicensed, non-professionally supervised employee of the manufacturer. The end result was a project rife with miscalculated loads and under-designed structural components.

Signed, Sealed, Under-delivered

Engineering roles. Each state has its own rules for the practice of engineering, although generally, a Professional Engineer is required to directly perform or directly supervise all engineering work which he seals.

In this case, the Component Designer/Manufacturer was required to take the design loads provided by the SER and perform structural engineering to determine the loading for each of his components. The professional engineering rules dictate such work should have been completed either by or with direct supervision of a licensed Professional Engineer.

That is the rule, but what is the reality? While SERs do have a duty to ensure public safety, they are not required to perform work outside their scope of service. SERs are typically required to review shop drawings, such as those prepared by a Component Designer/Manufacturer, but they are not required to retrace all of the design calculations performed by the Component Designer/Manufacturer to determine if the components were designed correctly. The SER is required to review the shop drawings for conformance with his/her design, but this does not constitute a line-by-line verification of the engineering work performed by the Component Designer/Manufacturer.

Retracing Steps

Representatives of the Truss Designer/Manufacturer provided

Continued on page 21

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Young Lawyers Column

Don't Forget About Mama!

By Eric Jenniges and Kathy So
Bovis, Kyle & Burch, Atlanta

We suspect that most of us did not leave law school armed with an abundant, or even adequate, amount of knowledge about the practical aspects of practicing law. In all fairness, professors would offer practical pointers (a.k.a. "war stories"), but those pointers were often preceded by the phrase "this won't be on the exam" which, as few know, is code for "let's see where rivals.com has Georgia football's recruiting class ranked."

A few practical tips did stick with us throughout law school, though. Chief among those was: Don't run to "mama" every time that brother flicks your ear. In other words, do not go to the courthouse clutching a motion whenever you have a disagreement with your opposing counsel. Work it out. Pick up the phone. Go to lunch and resolve things.

That piece of advice has benefitted ua more to this point in our career than knowing the holdings of *Marbury v. Madison* or the name of the railroad that Mrs. Palsgraf sued. It is something that we believe in and something that we tell law clerks or first year associates.

The decision this year by the Georgia Court of Appeals in the case of *McCallister v. Knowles,* 302 Ga. App. 392, 691 S.E.2d 280 (2010), however, requires that this advice be modified a bit, at least for plaintiffs. If you are a plaintiff, you should still call the defense attorney to iron out disagreements. You should still take opposing counsel to lunch to try and resolve disputes. You just better be sure to invite "mama" every once in a while.

Seth Eisenberg, our associate at Bovis, Kyle & Burch, recently wrote an article on this case and its practical implications for both plaintiffs' and defense counsel and has kindly agreed to serve as a guest columnist for this edition of the GDLA newsletter. Seth's article, which originally appeared in one of our in-house publications, *The Labor Market Reporter*, is reprinted below:

Court of Appeals clarifies Five-year dismissal rule

The Georgia Court of Appeals decision in *McCallister v. Knowles,* 302 Ga. App. 392, 691 S.E.2d 280 (2010) specified that the five-year limitation period for automatic dismissal of pending actions pursuant to O.C.G.A. §§ 9-11-41(e) and 9-2-60(b) began to run on the date a complaint was filed with the clerk of court.

Pursuant to O.C.G.A. §§ 9-11-41(e) and 9-2-60(b), any civil action in Georgia shall automatically stand dismissed by operation of law where no written order is taken by the court for a period of five years, and all costs are taxed against party plaintiff. In *McCallister*, the plaintiffs filed

their complaint on November 17, 2003, and the defendants acknowledged service on December 19, 2003 and filed their answer on December 23, 2003. *McCallister*, 302 Ga. App. at 392 The evidence showed that the parties had filed motions, engaged in discovery and even filed proposed pretrial orders with the court! *Id.*at 393. However, the trial court did not enter a written order until five years and one month later, on December 17, 2008, and the case was dismissed by operation of law pursuant to O.C.G.A. §§ 9-11-41(e) and 9-2-60(b). *Id.*at 392.

While the end date for calculating the five year period of limitation in any case will always be the most recent date an order is written, signed by the trial judge, and properly filed with the clerk of court, the Georgia Court of Appeals clarified on appeal that the beginning point for calculating the automatic dismissal five year period was the date the complaint was filed, rather than the date the complaint was served or the date the answer was filed. *McCallister*, 302 Ga. App. at 392. The appellate court reasoned that the case was properly dismissed by operation of law because Georgia law provides that once service is achieve on a party, the commencement date of a lawsuit related back to the date the complaint or petition is filed with the clerk of court. *Id.*at 393.

Defense counsel should always commit to memory the applicable dates for any limitation period.

The practical ramifications of this case must be emphasized to practitioners on both sides of ongoing litigation. It is important to note that the parties in *McCallister* were actually litigating the case and were simply resolving any disputes without court interference. Although parties are always encouraged by courts to resolve matters without court involvement, the failure of the parties in *McCallister* to request an order by the court, even an order of continuance, forced the court to follow the mandatory dismissal rules set forth in O.C.G.A. §§ 9-11-41(e) and 9-2-60(b). Plaintiffs' counsel must be aware that it is ultimately the plaintiff's burden to abide by the automatic dismissal rule due to the harsh result of mandatory dismissal and the taxation of all costs against party plaintiffs. Defense counsel should always commit to memory the applicable dates for any limitation period. Being mindful of this period and the period that has elapsed since the last court order could result in the end of ongoing litigation and mounting fees for your clients.

Please e-mail us with questions or suggestions at emj@boviskyle.com or kcs@boviskyle.com. You may reach Seth at sre@boviskyle.com.

Young Lawyers Host Inaugural Mixer at TAP

GDLA young lawyers gathered at TAP in Midtown Atlanta for happy hour on May 13. Pictured enjoying the evening are: 1. (l-r) Jeff Wasick and Bo Moss of Gray, Rust, St. Amand, Moffett & Brieske; Lara Percifield and Brett Miller of Mabry & McClelland. 2. (l-r) Rick Baker of Owen, Gleaton, Egan, Jones & Sweeney, Moses Kim of Insley & Race, and Willie Ellis of Hawkins Parnell Thackston & Young. 3. Ashley Giblin of Harper, Waldon & Craig and Allison Escott of Mozley, Finlayson & Loggins.

Continued from page 16

insight during deposition into the design process and methods used. The Professional Engineer who sealed the truss drawings, by his own admission, did not have any involvement in the calculation of the loads for the trusses. The employee who designed the project was therefore not directly supervised by the Professional Engineer who sealed the truss drawings. This conduct is a violation of the standards of practice for engineering.

Further, the Professional Engineer who sealed the truss drawings testified that he was not familiar with the architectural floor plans or structural drawings for the project and was not even familiar with the Truss Placement Plans that accompanied the signed and sealed truss drawings. This Professional Engineer also admitted that it was *not* common practice for the engineer sealing the truss drawings to review the structural and architectural drawings.

In fact, while looking at the Truss Placement Plans for the project (prepared by his employer) during the deposition, this Professional Engineer incorrectly identified non load-bearing walls as load-bearing. This admission indicated that the Professional Engineer was also unfamiliar with the loading conditions and the load path through the framing.

Assessing Responsibility

The ultimate responsibility resides with the Component Designer/Manufacturer. It is not acceptable for these components to be designed by unlicensed individuals without direct supervision by a licensed Professional Engineer. Granted, component design and manufacturing is often a volume business which involves repetitive designs and quick turnaround times. However, complex projects such as multi-story structures with load transfers require structural engineering work that simply cannot be adequately performed under these conditions. By not taking sufficient time to calculate the component loads, the Professional Engineer was derelict in his duties, per the rules of engineering practice, and failed to ensure the public's safety. Ultimately, if you can't afford to do it right, can you afford to do it over?

Adapted from "Structural Engineering Responsibilities and Structural Components: A Premanufactured Wood Truss Case Study," ASCE 5th Forensics Conference: Forensic Engineering 2009 Pathology of the Built Environment, Proceedings of the Fifth Congress on Forensic Engineering, Washington D.C., November 11-14, 2009. Nelson Architectural Engineers is a GDLA Platinum Sponsor.

Welcome, Y'all Reception

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Scenes from the opening reception: 1. Jamie and Kristen Weston. 2. Nick Laybourn (center), Kirby Mason (second from right) and her husband Frank and daughters Taylor and Alex. 3. (l-r) Cindy and Staten Bitting, Linda Haas, Neil Bitting and Mel Haas. 4. Jerry Buchanan and wife Carolyn. 5. (l-r) Alabama Defense Lawyers President Harold Stephens and Warner Fox. 6. (l-r) Scott Young of BAY Mediation & Arbitration, Clay and Dionne Porter. 7. Jeff and Greer Ward. 8. John and Annie Lewis with sons Henry, John David and Carter. 9. Art Davison (center) with wife Muriam and son Patrick.


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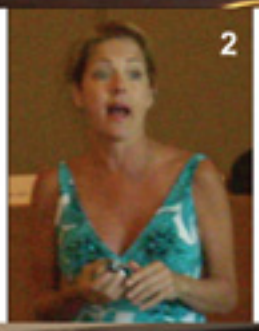
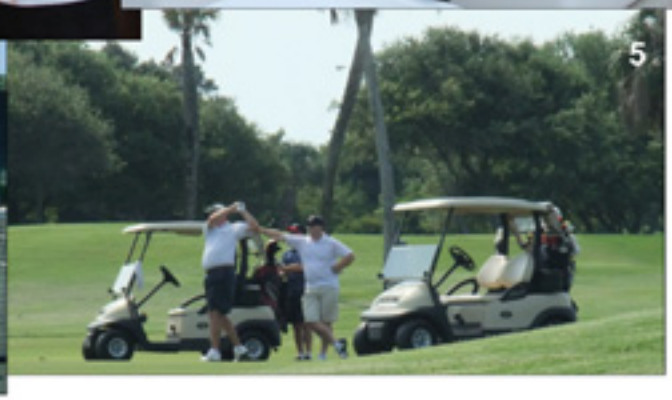
Ponte Vedra Inn & Club, June 10-13

Scenes from the two-day educational program, planned by program chair Bubba Hughes: 1. Judge Stephen Kelley of Brunswick Superior Court addresses the law of voir dire. 2. Sponsor Angela Abel of DecisionQuest expands on jury selection. 3. Nominating Committee Chair Salty Forbes gives their report. 4 Bob Travis moderates the alternative fees panel, featuring (photo 5) Warner Fox, Sandy Owens, Jerry Buchanan, Walter McClelland and Jimmy Singer. 6 (l-r) Todd Markle talks with Steve Kyle. 7. (l-r) Rep. Edward Lindsey and Peter Muller provide a legislative and tort reform update. 8. Matt Moffett discusses turning the strategy of the plaintiff to your advantage. 9. Outgoing President Staten Bitting (left) receives his gavel from new President Bubba Hughes. 10. Paul Painter covers motions at trial. 11. Winn-Dixie Assistant General Counsel Timothy Williams discusses general counsel expectations of retained counsel and reductions in force.



Scenes from Friday's President's Reception, golf sponsored by ESI and tennis sponsored by Esquire Solutions. 1. Lane Young (right) and his wife Kimberly (second from left) hosted the reception at their Ponte Vedra home. They're pictured with Harvey Gray and Beth Taratoot. 2. Bubba and Debbie Hughes. 3. Lynn Roberson and husband Judge Henry Newkirk, Evelyn Fletcher Davis and her mother Penny Dehler. 4. Matt and Diane Moffett. 5. Golfers on the links. 6. (l-r) Esquire rep Jeff Ingram, Peter Muller, Brett Miller, Lisa Muller, Diane Moffett, Patti Singer, Laura and Wayne Melnick, Matt Moffett, and John Leffler.



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Ponte Vedra Inn & Club, June 10-13

CLOSING DINNER
THE OUTPOST

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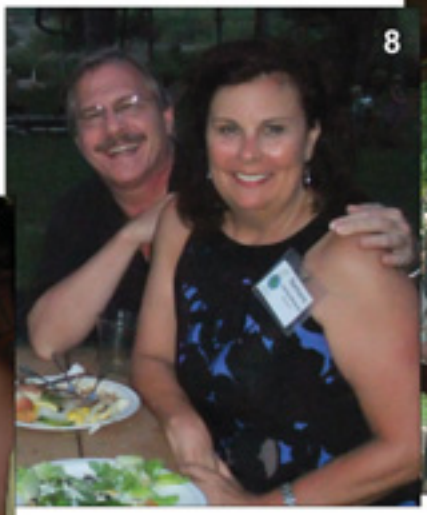
Scenes from Saturday's closing dinner: 1. Everyone enjoyed a low country boil. 2. Bill VerEecke, of FORCON, his wife Susan, and Walter McClelland. 3. John and Lauren Makowski. 4. The Outpost is on the marsh in the Guana River State Preserve. 5. Kids enjoyed volleyball. 6. Chris and Robin Parker. 7. Ted Freeman and Mary Peironnet. 8. David and Barbara Whitworth. 9. Johnny and Bobbie Foster with one of their sons, Andrew.



CLE: New Technologies in Accident Reconstruction

On May 5, 2010, GDLA members, nonmember lawyers and insurance adjusters gathered at Maggiano's Buckhead to learn the latest tools for defending their clients in accident reconstruction cases.

GDLA Platinum Sponsor FORCON presented the informative CLE seminar, where attendees learned from experts Steve Chewning and Jeff Pike. The two addressed differences between simulation and animation in vehicle accident reconstruction, as well as new technologies in crash reconstruction and biomechanical issues in vehicle accidents.

Pictured at the seminar are 1. Dwight Chamberlin and Steve Mooney. 2. Hugh McNatt. 3. Wayne Melnick and Carrie Christie.

The seminar was then repeated on July 29 as GDLA's first webinar, giving members outside metro Atlanta an opportunity to participate.

Expert Witness Testimony

Continued from page 9

jurors, the best expert witnesses will demonstrate the ability to see both sides of the issue; yet will help the jurors prevail in their tough job of rendering a verdict.

All witnesses are believed to have an agenda and a point of view. Witness agendas that are seen as consistent with findings that could favor either side increase perceptions of objectivity. In response, emphasize the expert's broadest possible agenda. The expert might be taking the stand to maintain his or her professional reputation, to help determine the truth about the matter, or to right an injustice.

Witnesses who demonstrate the capability to view the case from either side's point of view greatly increase perceptions of objectivity. Again, allowing the expert to disagree with and correct counsel and conversely to agree when possible with opposing counsel is a strong formula for conveying a sense of objectivity.

Another important trait that impacts juror perceptions of objectivity is *thoroughness*. When a witness is presented as an expert, the jury does not take a kind view of an expert who is inadequately prepared, who has not reviewed all relevant materials, and who cannot recall significant details about the case. In post-trial interviews, jurors often cite faux pas such as missing information that has to be looked up another time, incomplete explanations, or masterful descriptions of information with only negligible relevance to the case as reasons for finding against an expert witness's cause.

Developing expert witness testimony that cuts for, rather than against, a positive trial outcome requires careful effort by the trial team to increase juror perceptions of an expert's objectivity, credibility, and expertise. Only then can the expert witness bear the three-sided shield of *investigator, educator,* and *evaluator* needed to prevail as an effective warrior for your case.

Darren Johnson is a Senior Research Associate in the Minneapolis office of DecisionQuest, a leading national trial consulting firm and GDLA Platinum Sponsor. Johnson's expertise includes strategy and theme development, jury selection, witness evaluation, and post-trial interviews, as well as visual communications. Johnson recently wrote and directed a film for the Tort, Trial & Insurance Practice Section of the American Bar Association entitled The Diversity Factor: Capturing the Competitive Advantage. He can be reached at 952.942.5495 or djohnson@decisionquest.com.

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two travel lanes without shoulders, which is a common practice in bridge construction. The chain of events leading to the accident began when the plaintiffs' vehicle became disabled at night on the unlit bridge. After the car became disabled, the vehicle's three occupants were standing in one of the travel lanes of the highway when they were struck by a speeding vehicle. Suit was filed against a number of entities, which were ultimately reduced to HNTB, the designer of the traffic control plan, and Plant Improvement, the general contractor.

During the litigation, the plaintiffs successively hired three different experts, eventually deciding to rely upon Jerome Thomas, a retired engineer with the New York Department of Transportation. Thomas eventually settled upon two opinions. First, he contended that the defendants negligently failed to provide shoulders on the bridge during construction. Second, he opined that, in the absence of shoulders, the defendants should have provided lighting on the bridge at night. Notably, he acknowledged that there was nothing in the provisions of the Manual for Uniform Traffic Control Devices (MUTCD)—the industry standard for traffic control plans—that had required either shoulders or lights on the bridge. He was also unable to cite any other governing standard, regulation, or publication that had expressly required shoulders or lights. Instead, he contended that such standards were not a substitute for engineering judgment and that, in his opinion, sound engineering judgment required either shoulders or lights.

Both defendants moved to exclude Thomas' testimony under O.C.G.A. § 24-9-67.1 and the *Daubert* standard that it had incorporated into Georgia law. In making those motions, the defendants challenged both Thomas' qualifications and the reliability of his particular opinions. With respect to Thomas' qualifications, the defendants pointed out that he had never specifically designed or evaluated the construction of a bridge or a traffic control plan for a bridge construction site. So far as his particular opinions were concerned, the defendants contended that, in the absence of any supporting standards or publications requiring shoulders or lights, his opinions about those issues amounted to *ipse dixit* testimony; in other words, he was opining that something was so merely because he said it was so. Though no Georgia appellate courts had

yet confronted the admissibility of *ipse dixit* testimony under the *Daubert* standard, several federal courts had ruled that such testimony is inadmissible.

The trial court brushed aside the defendants' assertion that Thomas' qualifications were insufficient to qualify him to offer any opinions regarding traffic control plans for bridge construction sites; in the words of the trial court, Thomas was at least "marginally qualified" based upon his experience and the self-study he had performed in the case. But when the trial court examined the particular opinions espoused by Thomas, it found those opinions lacking in reliability. Specifically, the trial court noted Thomas' acknowledgment that the traffic control plan was sufficient under the MUTCD and other governing regulations and Thomas' failure to point to anything beyond his personal sense of "engineering judgment" to support his opinions. Due to the unreliability of Thomas' opinions, the trial court, in its gatekeeper role, excluded his testimony. In the absence of Thomas' testimony, the plaintiffs had no evidence to support a claim for engineering negligence, and the trial court entered summary judgment in favor of the defendants.

Due to the unreliability of Thomas' opinions, the trial court, in its gatekeeper role, excluded his testimony.

The plaintiffs appealed to the Georgia Court of Appeals which, in a rather surprising opinion, reversed the trial court on the ground that the trial judge had abused his discretion by too rigidly applying the *Daubert* factors. *Hamilton-King v. HNTB Ga., Inc.*, 296 Ga. App. 864 (2009). In so doing, the court of appeals emphasized Thomas' general experience as an engineer and seized upon language in the MUTCD stating that its standards are not "a substitute for engineering judgment." *Id.* at 868. By recognizing Thomas' personal judgment as a sufficient basis for an expert opinion, the court of appeals essentially held that if an expert is qualified within a field of expertise, then he can render expert opinions regardless of whether he can cite any ascertainable or verifiable basis for those opinions. Thus, the court of appeals largely eviscerated Georgia's adoption of the *Daubert* standard by curtailing the trial court's discretion to exclude expert testimony on the ground that the testimony is unreliable.

Thankfully, the supreme court accepted *certiorari* and reversed.

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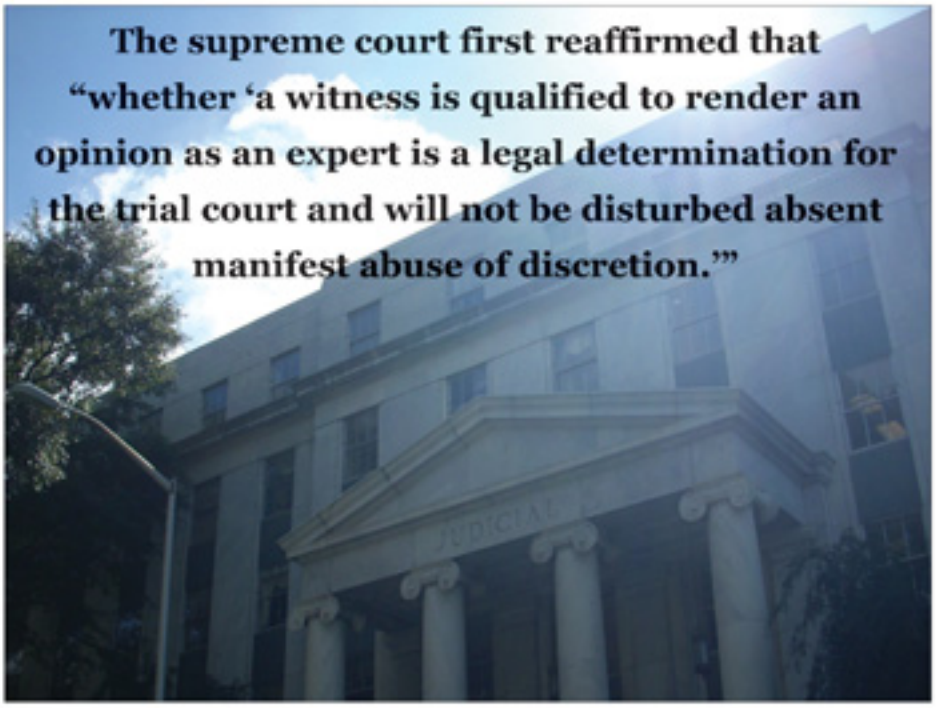

In its opinion, the supreme court first reaffirmed that "whether 'a witness is qualified to render an opinion as an expert is a legal determination for the trial court and will not be disturbed absent manifest abuse of discretion.'" *Plant Improvement*, 2010 Ga. LEXIS at *3 (quoting *Moran v Kia Motors America*, 276 Ga. App. 96, 97 (2005)). The supreme court also reinforced the trial court's role as a gatekeeper both in assessing an expert witness's qualifications and in determining the relevancy and reliability of the proffered testimony. In reviewing how the trial court had performed both of those functions, the supreme court primarily focused upon how the trial court had evaluated the reliability of Thomas' opinions. In this regard, the supreme court approved of the trial court's analysis of Thomas' opinions and noted:

> After a careful review of Thomas' deposition testimony and the documents upon which he relied, the trial court determined that although Thomas was qualified to testify as an engineering expert, [the plaintiffs] failed to provide any indication of the principles and methods employed by Thomas in reaching his conclusions, rendering them unreliable as defined by O.C.G.A. §24-9-67.1 (b)(2) and (3) because they "cannot be validated against accepted standards, tested or reviewed."

Id. at *5 (quoting the trial court order). The supreme court also addressed, for the first time, the specific issue of *ipse dixit* testimony under O.C.G.A. §24-9-67.1 and held that "[n]othing in *Daubert* or § 24-9-67.1 'requires a [trial] court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert.'" *Id.* at *8 (quoting *General Electric Co. v. Joyner*, 522 U.S. 136, 146 (1997)). The court went on to note, "This is not to say that professional experience cannot provide some evidence of reliability, only that *experience, standing alone, does not render reliable all opinions an expert may express.*" *Id.* at *10 (emphasis supplied).

The supreme court also addressed Thomas' general credentials to offer opinions regarding bridge construction projects and was less impressed than either the trial court or the court of appeals. In fact, the supreme court noted that the plaintiffs had "presented no evidence that Thomas [had] any experience that would supply the foundation supporting his methodology and conclusions." *Id.* at *10. It further pointed out that the plaintiffs had failed to make any showing of why a relevant experience base was unavailable in this case.

Finally, the supreme court articulated the crux of its opinion in one of its closing paragraphs:

> After a careful review of Thomas' deposition testimony and the documents upon which he relied, the trial court determined that although Thomas was qualified to testify as an engineering expert, [the plaintiffs] failed to provide any indication of the principles and methods employed by Thomas in reaching his conclusions, rendering them unreliable as defined by O.C.G.A. §24-9-67.1 (b)(2) and (3) because they "cannot be validated against accepted standards, tested or reviewed."

Id. at *12 (citation omitted). Thus, because the plaintiffs failed to satisfy the *Daubert* standard by presenting sufficient criteria by which the trial court could measure the reliability of Thomas' conclusions, the trial court acted within its discretion by excluding his testimony. Accordingly, the opinion of the court of appeals was reversed.

Richard A. "Rick" Brown is a senior partner at Brown, Readdick, Bumgartner, Carter, Strickland & Watkins in Brunswick. His practice is primarily in products liability and transportation litigation.

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referred to as a "mud crack" pattern. As the cracks grow, they can coalesce and form a single long crack that results in gross failure along the length of the pipe. Consequently, a pipe that was designed to leak before bursting may actually fail catastrophically.

Typical ESC agents include aromatic hydrocarbons, halogenated hydrocarbons, ethers, ketones, aldehydes, esters, and nitrogen- and sulfur-containing compounds. Experience has shown that various caulks, sealants, fire barrier products, leak detector compounds, and low molecular weight hydrocarbons such as vegetable oils and lubricants may be deleterious. In addition, glycol-based antifreezes can cause ESC.

ESC failures can prove particularly challenging in failure investigations, because identifying the contaminant can be difficult. This is typically done using FTIR or Gas Chromatography/Mass Spectroscopy (GC-MS). Oftentimes, the identification can be complicated by a number of factors. First, only trace amounts of the contaminant may remain after a pipe failure, due to the initial low concentration of the contaminant or as a result of the contaminant being flushed out during the failure. Second, the spectrographic methods provide only probable matches to standard spectra in library data. Without a reference material for comparison, definitive matches can be difficult to obtain, especially because it may be difficult to distinguish between constituents of the CPVC compound and foreign materials.

Evaluating Material Variabilities

The resistance of a plastic to ESC and other failure modes can be reduced by defects or processing irregularities. Thus, final fracture of a pipe may be influenced by multiple, synergistic factors. Although rare, processing variabilities such as inclusions/contaminants, incomplete fusion, pronounced weld or knit lines, thermal and mechanical degradation, irregular molecular weight distributions, or frozen-in residual stresses may predispose the material to premature failure. One of the biggest challenges facing an investigator in this situation is to assess relative influences of these variabilities, along with the installation details and environment. To this end, a number of test methods are available to detect frozen-in residual stress, to evaluate mechanical properties, and to test ESC resistance.

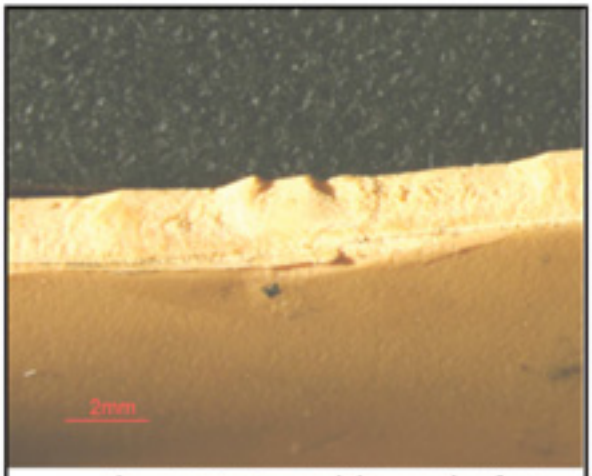

Figure 3. Fracture origin on a pipe that failed in overstress with evidence of impingement on outer surface.

Systems Analysis

It is also constructive to understand the history of the piping system, including installation procedures, pressures, maintenance, and repair. Installation procedures are typically outlined in construction codes, pipe manufacturers' instructions, or standards, such as "NFPA 13: Standard for the Installation of Sprinkler Systems". To understand load history, one must consider the municipal water source, as well as the internal workings of the system. Municipal and private water suppliers use pumps and pumping stations to boost pressures in supply mains, and it is not uncommon for pressure in water supply mains to exceed 200 psi, which may exceed the maximum working pressure of CPVC pipe.

On the domestic side, most plumbing codes require pressure-reducing valves on domestic systems where the water main pressure exceeds 80 psi. However, municipal and private water suppliers often increase supply pressures over time as communities grow and the number of water users increase. Hence, it is not uncommon to find plumbing systems without pressure reducing valve protection operating above 80 psi, because one was "not required" at the time of initial construction.

Regarding maintenance, it is common for building owners to contract with fire protection companies other than the original system designer and installer for follow-on sprinkler system inspections, tests, and maintenance. Thus, a number of parties may contact the system between the time of installation and any failures. Impact damage caused by repair workers or overstress loads caused by hanging lights or other tools from pipes or impinging conduits may introduce cracks that lead to eventual failure (Figure 3).

Conclusions

While plastic pipe offers many advantages over metal pipe, it is susceptible to failure by a number of damage modes. A proper forensic investigation will address the issues of installation, maintenance, system characteristics, environment, and material quality. The engineer has a wide variety of tools at his/her disposal for investigating pipe failures. They include microscopic examination and fractography, mechanical testing, materials analysis, and stress analysis. Utilizing these tools in an efficient and meaningful manner is the key to a successful failure investigation.

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about your case, such as which side do jurors favor after each presentation, and how much damages they would award. However, you can also come up with specific questions that you want jurors to answer. Different online jury research firms have varying capabilities when it comes to the types and number of questions you can ask jurors. Some companies allow a limited number of questions, and others do not allow for any open-ended questions. The right online jury research firm should give you options, in the number of questions you can ask about your case, as well as the ability to ask jurors to tell attorneys what the best arguments were for each side.

Once you have prepared each side's main arguments and generated any questions you want answered, you can then conduct online jury research and see how your arguments resonated with jurors.

5. Decide whether or not you want jurors to discuss the case. Online jury research can have a subset of jurors participate in a discussion/deliberation group. Jurors can view and interact with each other, as well as the moderator, just as they would in a live jury research. The attorney can either listen in anonymously to what jurors are saying, or actively participate and ask them questions about their case.

6. Use the data reports to your advantage. Online jury research is the ultimate data collection tool for any case. The right online jury research firm can show you which of your arguments worked and which did not, show you the characteristics of your best and worst jurors, and get you the information you need about damage figures. You can then use all of these data to impress your clients and show them that you have armed yourself with solid information about their case, all while being cost-conscious.

The time has come for jury research to be available for law firms and cases of all sizes. Online jury research provides a powerful, sophisticated, quick, and cost-efficient tool for attorneys to get the answers they need to the pressing questions they have about their cases. However, the answers attorneys can get are only as good as the online jury research firm they use.

The right online jury research firm should provide you with: 1) a large sample of jurors, making it easier to do juror profiling; 2) the ability to present video presentations to mock jurors to keep them engaged; 3) the choice to ask open and closed-ended questions to get as much information as possible; 4) focus group capability with a subset of jurors, to really get at how jurors understand a case; AND 5) ratings of the attorneys' arguments so they can learn what worked and what did not.

Armed with this information, attorneys, whether in solo practice or in a large firm, will have certainly done their homework when preparing for their clients' cases.

Aref Jabbour, PhD., is president and managing director of LookingGlass, LLC (www.lg-juries.com), which provides online jury research. Jabbour has a doctorate in clinical psychology and is an experienced trial consultant. He has worked on an extensive variety of litigation and jury research for law firms and cases of all sizes nationwide. He can be reached at ajabbour@lg-juries.com. LookingGlass is a GDLA Platinum Sponsor.

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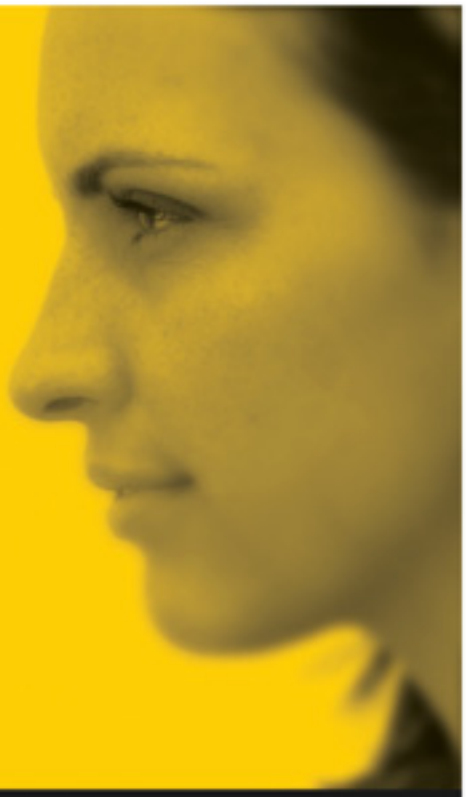

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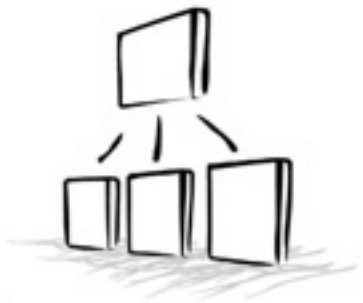

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