



## Georgia's New Evidence Code: Changes in Civil Trials

By Prof. Paul S. Milich

Starting January 1, 2013, Georgia trial lawyers and judges will begin using the new Georgia Evidence Code. Although the new code is predominately based on the Federal Rules of Evidence, there are some departures from the Federal Rules. This article briefly summarizes 14 significant changes that civil litigators will encounter. This article also identifies some provisions that will not change.

The new rules completely replace current Title 24. In addition, many stray evidence provisions from other titles of the Georgia Code have been moved into the new Title 24, and others have been stricken. As a result, one of the new Code's primary benefits is accessibility: nearly all pertinent

evidence rules are now contained in the new Title 24. The numbering of the new rules is based on the Federal Rules. The new citation will first identify the Georgia Evidence Title (24). The citation's second number will correspond to the pertinent article of the Federal Rules of Evidence (*e.g.*, 8 for Hearsay), and the third number will correspond to the rule number of the Georgia provision's federal counterpart. For example, the citation to Georgia's new business record exception is 24-8-803(6).

### SUBSTANTIVE CHANGES TO GEORGIA EVIDENCE LAW

**(1) Hearsay No Longer "Illegal" Evidence.** Georgia is the last state in America to consider hearsay to have no probative value even if no one objects to its

admission at trial. The new rule abandons that view: "Hearsay shall not be admissible except as provided by this article; provided, however, that if a party does not properly object to hearsay, the objection shall be deemed waived, and the hearsay evidence shall be legal evidence and admissible." New O.C.G.A. § 24-8-802.

**(2) Agent Admission Rule Relaxed.** Currently, the statements of a party's agent or employee are inadmissible against the party over a hearsay objection unless the party authorized the agent or employee to speak for it. New O.C.G.A. § 24-8-801(d)(2)(D) defines an agent admission as:

A statement by the party's agent or employee, but not including any agent of the state in a crimi-

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## RecruitOne Membership Drive Recruit Members and You Could Win an iPad2

On December 1, 2011, the GDLA launched a membership drive called RecruitOne.

Membership Committee chair Chris Parker of Miller & Martin and vice-chair Dart Meadows of Balch & Bingham developed the recruitment campaign with inspiration from the *Atlanta Business Chronicle's* successful challenge to metro businesses to "Hire One" new employee. The Board approved the RecruitOne proposal at its recent Fall Meeting.

Every GDLA member is encouraged to recruit (at least) one new member. For every one new member recruited, GDLA members will receive one entry into a grand prize drawing for an iPad2 (\$499 value).

So, recruit 10 new members and you'll have 10 chances at an iPad2. Plus, each new recruit's name will go into a grand prize drawing for a GDLA Annual Meeting registration (\$495 value; registration covers a GDLA member plus one spouse/guest).

In addition, the recruiting GDLA member's name, firm and city will be printed in the newsletter along with his or her recruit's name, firm and city.

Visit the Membership page at [www.glda.org](http://www.glda.org) for a sample e-mail to send prospective recruits. The e-mail includes a link to a GDLA membership benefits page and a membership application.

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Editor: Evelyn Fletcher Davis

Georgia Defense Lawyer, the official publication of the Georgia Defense Lawyers Association, is published three times annually. For editorial information, please contact the editor at edavis@hpty-law.com. The editor acknowledges the invaluable assistance of her associate, Jason Groch, in the editing process.

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The Georgia Defense Lawyers Association was founded 44 years ago by a group of prominent defense lawyers who frankly enjoyed each other's company. Although its initial focus was social camaraderie and sharing war stories, the GDLA has evolved today to offer formal avenues of networking, communication and training.

In fact, one component of the GDLA mission statement is: "To provide for the exchange among the members of this Association of such information, ideas, techniques of procedure and court rulings relating to the handling of litigation as are calculated to enhance the knowledge and improve the skills of defense lawyers."

To realize that part of our purpose, the GDLA Education Committee has really stepped up to the plate over the last year, coordinating more CLE seminars than ever. Under the leadership of chair Wayne Melnick of Gray Rust St. Amand Moffett & Brieske and vice-chair Brett Miller of Mabry & McClelland, the GDLA Education Committee's goal is to offer one educational seminar each month—whether live or via webinar.

Trial Academy, held annually in January, has been a hallmark training program for decades, and we recently added Deposition Boot Camp as another program geared toward educating the next generation of great litigators.

Trial Academy program chair Matt Moffett of Gray Rust St. Amand Moffett & Brieske and vice-chair Sally Akins of Ellis Painter Ratteree & Adams, expanded the 2012 edition to include mediation strategies with the help of Platinum sponsors BAY Mediation and Miles Mediation, as well as

Courtroom Visuals, who will provide trial graphics.

Deposition Boot Camp is being revamped to include pre-trial discovery and will be offered in August 2012. Program chair Jason Willcox, Moore Clarke Duvall & Rodgers, is working diligently to incorporate the Trial Academy "problem," so there is continuity

between the two seminars, to enhance the combined learning experience of Trial Academy and Depo Boot Camp.

The GDLA also recently reinvigorated the popular Skits & Suds program, created 10 years ago by GDLA Past President George Duncan, Duncan & Adair, and Jo Jagor, Hall Booth Smith & Slover. It combines happy hour with lessons on avoiding professionalism and ethics pitfalls, and will be offered again in

**The hope is  
defense lawyers  
will begin to look  
to the GDLA for  
their educational  
needs rather  
than other CLE  
providers.**

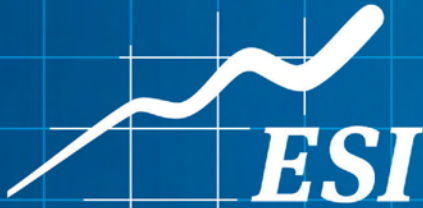
June 2012.

Last April, our Education Committee developed the "360 degrees" CLE concept, and debuted it with a premises liability case. The idea takes a lawsuit that went to trial and brings together all the defense attorneys, plaintiff's counsel and the trial court judge to offer a perspective from all sides—360 degrees.

Our Platinum sponsors also have the opportunity to conduct a CLE as part of their benefits, so the Education Committee is coordinating those with each one.

No doubt you have seen the e-mail blasts announcing our seminars; we encourage you to make an effort to attend and invite GDLA non-members to join you. For any of our seminars, GDLA non-members who apply for membership concurrent with their CLE registration can pay the members' registration rate.

*Continued on page 5*



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## Member News

**Albert H. Parnell** of *Hawkins Parnell Thackston & Young* was named by Best Lawyers® as Atlanta Lawyer of the Year for Mass Tort Litigation. Only a single lawyer in each practice area and designated metropolitan area is honored as the "Lawyer of the Year." He is a Past President of the GDLA.

*Owen Gleaton Egan Jones & Sweeney* was chosen by Martindale-Hubbell and *Fortune* magazine for inclusion in *Fortune's* list of "Top Ranked Law Firms" in America (December 2011). The firm also announces that **Andy Owen**, **Fred Gleaton**, **Philippa Ellis** and **Rolfe Martin** were selected as 2011 Georgia Super Lawyers. **Gretchen Wagner**, **Rick Baker**, **Mark Meliski** and **Derrick Bingham** were selected as 2011 Rising Stars. **Andy Owen** (medical malpractice), **Fred Gleaton** (medical malpractice) and **Philippa Ellis** (product liability litigation) have been selected for inclusion in the 2012 edition of *Best Lawyers*.®

**Todd Bechtel** has joined *Miles Mediation & Arbitration Services* as a mediator. He remains a partner at *Crim & Bassler* in Atlanta where his practice focus is in the areas of insurance and tort defense, personal injury and general civil litigation.

## President's Message

Continued from page 3

The hope is defense lawyers will begin to look to the GDLA for their educational needs before resorting to other CLE providers. You can always check the GDLA calendar page (click on the calendar tab at [www.gdla.org](http://www.gdla.org)) to see the upcoming offerings.

Please join me in thanking Wayne and Brett and the rest of their committee for their efforts. They would appreciate your help

**Todd E. Schwartz** recently joined *Lewis Brisbois Bisgaard & Smith* as a partner in the Atlanta office. He will continue to focus his practice on mass toxic tort litigation and products liability defense. He was formerly a partner with *Hawkins Parnell Thackston & Young*.

**F. Michael Taylor** of *Hull Barrett* in Augusta was selected to serve on Leadership North Augusta (LNA) for 2011-12. LNS is designed to identify, cultivate and develop area leaders through knowledge of history, community, government, education, health care, recreation and social awareness.

*Chambless Higdon Richardson Katz & Griggs* announces the relocation of its Macon office. The new address is Highridge Centre, 3920 Arkwright Road, Suite 405, Macon, Georgia 31210.

## Cases of Note

**Matt Stone** and **Shawn Kalfus** of *Freeman Mathis & Gary* in Atlanta recently won a motion awarding all of their attorney's fees and expenses against a plaintiff's attorney who failed to investigate the (lack of) merit of his client's claim before filing suit. Counsel filed suit against a non-emergency transportation company, alleging that his client's mother was injured and died as a result of an incident

that occurred while being transported. Defense counsel immediately notified opposing counsel that the defendant had not transported the plaintiff's mother until after the date of her injuries. Plaintiff's counsel, however, refused to dismiss the defendant until after the 30-day deadline in the abusive litigation notice. After entry of a dismissal, the defendant filed a 9-15-14 motion. The court granted the motion, rejecting an argument by plaintiff's counsel that he had a right to conduct discovery to determine whether he had sued the proper party; the court found that plaintiff's counsel could have discovered that the claim was groundless if he had exercised minimal diligence.

**N. Daniel Lovein** and a colleague at Hall Booth Smith & Slover in Brunswick obtained a defense verdict on behalf of a local hospital in a discrimination claim brought under the Americans with Disabilities Act. The trial was held in September and lasted one week. In this case, the plaintiffs claimed the defendant hospital discriminated against them by failing to provide plaintiffs with effective communication for their disability, and additionally by treating them differently due to their disability. ❖

with generating ideas, so feel free to reach out to any of them with any hot topics or a "360 degrees" case. You are also welcome to join the committee if you have an interest.

In addition to the chair and vice-chair, the committee members are: Jason Darneille of *Crim & Bassler*; Pamela Lee of *Swift Currie McGhee & Hiers*; Jason Logan of *Constangy Brooks & Smith*; Erica

Morton of *Hicks Casey & Foster*; Molly O'Connor of *Mabry & McClelland*; Sarah Smith and Andy Treese of *Drew Eckl & Farnham*.

For the defense,



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

# Welcome New GDLA Members

*Approved by the GDLA Board of Directors at its 2011 Fall Meeting.*

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Atlanta

**David W. Willis**  
*Vernis & Bowling*  
Atlanta



## RecruitOne Membership Drive

Continued from page 1

The Board of Directors recently voted to waive the \$100 application fee for those admitted to their first bar after July 2, 2006.

Prospective members who submit their applications before the next Board meeting, February 10, will owe a half year's dues (\$100 or \$62.50, depending on first bar admission year, plus \$100 application fee, if applicable).

The next Board meeting is April 14, and applicants considered then will owe

one-quarter year's dues (\$50 or \$31.25, depending on first bar admission year plus \$100 application fee, if applicable).

To ensure you are entered into the iPad2 drawing, ask your recruit to list your name on the application where it says, "Who (if anyone) referred you to the GDLA?"

To see if someone is already a member, go to our website and click on Find a Defense Lawyer. There you can search by last name, firm and/or city.

RecruitOne will run through May 1, 2012. So, reach out to your colleagues in the civil defense bar today, and encourage them to join our ranks to take advantage of the many ways the GDLA can help them and their practice. ❖



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# How Jurors Judge Attorneys

By Robert F. Bettler, Jr., Ph.D.  
*DecisionQuest*

“Ladies and gentlemen of the jury...” From the first words you speak to the jurors—from the first minute their eyes fall upon you—jurors are evaluating you. This is not, of course, something unique to the courtroom; it is hard-wired into the human brain.

The human brain is a social computer, and one of its chief functions is to evaluate other humans in our social environments: Would this person make a good mate or a trustworthy ally? Is this person warm and friendly or cold and hostile? Assertive and dominant or tentative and submissive?

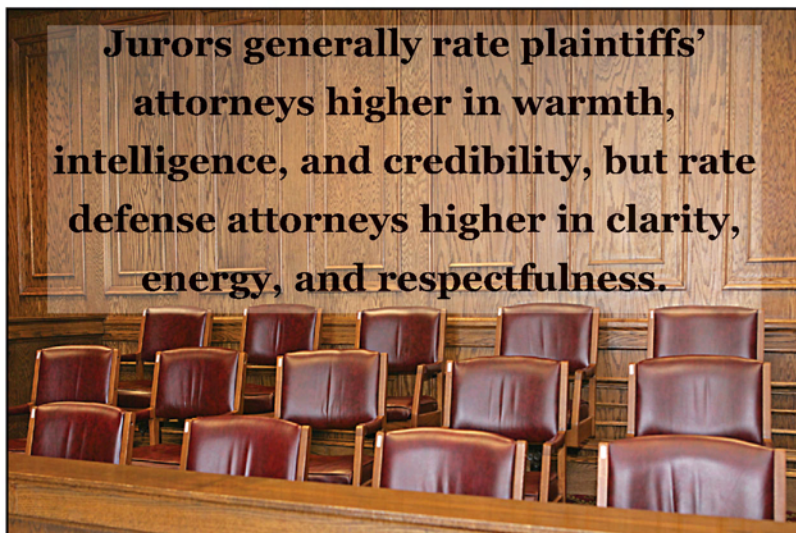
These impressions arise automatically in the mind and often unconsciously. As an attorney, you need to know how the jurors’ impressions of you interact with their acceptance or rejection of your case. If you establish rapport with the jurors, will they be more receptive to your case? If they see you as arrogant or if you fail to make eye contact, will they tend to reject your case?

To address these and other questions, since 2005 DecisionQuest has been gathering data on how jurors evaluate attorneys. For this purpose, DecisionQuest uses an attorney evaluation survey containing 58 questions derived from two sources.

Seventeen questions were drawn from the “person perception” literature. This venerable field of social psychology, tracing its roots back more than 60 years, studies the dimensions by which humans judge one another’s personalities, social skills, and competence. The other 41 questions, which were derived from the literature on legal advocacy and public speaking, serve to assess an attorney’s ability to present complex

technical or legal matters in a clear and engaging manner. Together, these 58 items or evaluative categories assess jurors’ reactions to attorneys in four broad domains:

1. Rapport: How friendly, warm, and courteous does the attorney seem?
2. Competence: How credible, organized, and intelligent does the attorney seem?



3. Public speaking skills: For example, how clearly does the attorney explain complex matters?
4. Annoying qualities: Is the attorney fidgety or nervous? Does he exhibit distracting tics or mannerisms?

To date, DecisionQuest has employed this attorney evaluation survey in 12 jury-research exercises. In some of these exercises, DecisionQuest was retained for the express purpose of evaluating potential advocates to guide a client’s decision on which firm to hire. In other instances, the attorney evaluation items were included in a study at the attorneys’ request to provide them some feedback on how jurors viewed them.

In all, the attorney evaluation database contains ratings from 764 research jurors of 59 different attorneys. The types of cases in which the attorney evaluations were administered include every-

thing from criminal cases to those involving patents, product liability, or toxic torts. Moreover, the evaluation has been used in states ranging from New Jersey to Florida, Texas, and California.

As explained below, some analyses of these ratings can only be considered tentative or preliminary. Given the rather large sample of jurors, however, other analyses may be considered more reliable.

For example, older and more educated jurors generally tend to give attorneys higher ratings than do younger and less educated ones. Female jurors generally give attorneys more favorable ratings than do men.

On the other hand, there appears to be no difference between male and female jurors in how they rate male and female attorneys.

The research also allows some tentative observations on how jurors tend to evaluate plaintiffs’ attorneys versus those for the defense. Although the attorney evaluation database contains some “true” plaintiffs’ attorneys, often a member of the defense team must play the role of the plaintiff’s attorney because DecisionQuest has been hired by a defendant. With that caveat, jurors generally rate plaintiffs’ attorneys higher in warmth, intelligence, and credibility, but rate defense attorneys higher in clarity, energy, and respectfulness.

Perhaps most importantly, there is no difference in how jurors view plaintiff and defense representatives in their general effectiveness *qua* attorneys.

One of the more intriguing analyses has compared how jurors rate male and female attorneys. In the 58 categories included in the database, female attorneys outscore their male counterparts in 50 of them. Male attorneys rate higher in categories such as intelli-

*Continued on page 10*

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**ANGELA ABEL**

**All of us at DecisionQuest** are saddened by the passing of our friend and esteemed colleague, Angela Abel. Angela was a Senior Vice President and our senior executive in the South, located in Atlanta.

Angela epitomized all we strive for at DecisionQuest. She was foremost dedicated to the success of her clients. Angela faced the toughest challenges as a consultant and consistently created innovative, effective and thoughtful strategies.

Personally, she was a wonderful friend and role model for all of us. She was graceful, engaging, funny and always the life of any DecisionQuest event. We all recognized what a devoted mother she was as well. Angela is survived by the pride of her life, her daughter Ashley. An educational fund has been created for Ashley.

Donations may be sent to:  
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## How Jurors Judge Attorneys

Continued from page 8

gence and organization, but women rate higher in warmth, composure (relaxed versus nervous), and global effectiveness as an attorney.

These generalizations are quite tentative, however, because the sample of attorneys is very limited at this point, even though the sample of research jurors is fairly large. Comparisons like these are more reliable when a specific female attorney is compared to a specific male attorney in a specific case where other variables (*e.g.*, the fact pattern, the opposing counsel) are held constant. In the handful of such specific comparisons DecisionQuest has conducted, the observation holds true: In most instances, the women did outscore the men.

Of course, the more important question is whether jurors' reactions to attorneys exert some influence over verdicts. DecisionQuest's research results—as well as

decades of published research literature—speak clearly to this point.

By looking at juror ratings of attorneys in mock trials ranging from one to five days in length, we can track how the correlations between jurors' impressions of the attorneys and their verdict tendencies vary over time.

Over time, the correlation between various attorney qualities and verdicts diminishes, while the impact of the evidence—or, more precisely, jurors' reaction to the evidence—increases.

This is consistent with decades of social scientific research on jury decision-making: It is the evidence that determines the outcome of a trial, much more than extraneous factors such as the likeability of an advocate.

Still, our research and the published literature show that one attorney characteristic maintains a more stable influence with jurors over time: credibility. Although the

influence of variables related to rapport becomes less important over the course of a trial, the importance of credibility remains relatively constant. Thus, of the few factors over which you have complete control in the chess game of a trial, your credibility is your queen—the most powerful piece on the board. If you lose your queen, the game is over (barring some corresponding sacrifice from the other side). The lesson is clear: Guard your queen! ❖



*Robert F. “Bob” Bettler, Jr., Ph.D. is a trial consultant in the Atlanta office of GDLA Platinum sponsor DecisionQuest. He has*

*a decade of experience in fields spanning the military, engineering, business, education, medicine and neuropsychology.*



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# Success as a Litigator in a Post-Litigation World

By John K. Miles, Jr.  
*Miles Mediation &  
Arbitration Services, LLC*

An insurance defense attorney recently lamented that there was a time when he tried 10 cases a year and mediated two. Now he mediates two cases a week and has not tried a case in months. What caused this trend away from jury trials and toward mediation? And what strategies can insurance defense attorneys employ to thrive in a post-litigation world?

## The Good Old Days

I began my legal career with a seven-member insurance defense firm in 1988. I accepted the firm's offer in 1987, the fall of my third year in law school. When I arrived for my first day of work on July 1, 1988, I discovered that the firm had hired five other first-year associates. The firm had almost doubled in size in six months' time.

A little concerned over this development, I went to the office of a senior associate and asked whether there would be enough work to keep us all busy. He gestured toward a stack of files on the floor of his office and said, "All those files came in this week." Swiveling in his chair, he gestured toward three large file cabinets. "Those are filled with open files. Believe me, there is enough work for everyone." He then returned to dictating, indicating that our conversation was over.

He was right. We had more than enough work to keep us all busy. During my first year of practice, I billed over 2,000 hours. The hours were long and the pay was good; I received raises of 10 percent or more in each of my first three years of practice. Over the next three years, the firm grew to 20 lawyers. Furthermore, my firm was not unique: other insurance defense firms in Atlanta were experiencing similar growth.

In those days, insurance defense firms had little need for a

business plan. Most firms had a small number of partners responsible for producing all the business. These partners had strong personal relationships with the insurance adjusters who had the authority to assign files. These relationships were based on a long history of friendship, respect, and trust. The partners who originated the business assigned files to associates. If the files were successfully handled, the adjuster did not care which attorney in the firm was primarily

As a result of the desire to cut costs and to resolve claims more efficiently, insurance companies have demonstrated a preference for mediation over trial.

responsible for the file.

Bringing a file to a successful conclusion meant achieving a settlement or verdict within an acceptable monetary range. Additionally, success meant achieving the result for a reasonable cost. This system guaranteed a predictable stream of business, and associates were under little pressure to generate business. They advanced based on how successfully they handled the files they were assigned. The only "marketing" requirement for associates was attendance at the annual Atlanta Claims Convention. Stories of what occurred there would make for a more entertaining, but less informative, article.

Between 1988 and 1991, my average billable rate was \$85 per hour. I do not have records from that time, but I estimate that the cases I handled were resolved—whether by settlement or verdict—for an average amount under \$15,000. The final bill submitted to the insurance company was under

\$5,000, and the case was concluded within 18 months. Partners were handling larger matters; however, I believe my averages were typical of most attorneys in the firm.

During this time frame, each lawyer in the firm was billing between 2,000 and 2,200 hours a year. Needless to say, these were profitable days and the future seemed bright. As a friend and fellow insurance defense attorney said at the time, "This is an excuse to print money."

## What Went Wrong?

As Atlanta's population exploded in the 1990s, so did the number of personal injury claims submitted to insurance companies. This meant more work for insurance defense firms, but it also increased the amount insurance companies were paying for legal services. Insurance companies began exploring ways to reduce costs. These cost-cutting measures had a negative effect on the profitability of insurance defense firms. Firms were told to produce the same results for less money. The companies promised that firms successful in doing this would receive more files. I recall my senior partner grumbling, "They are asking us to lose money on each file, but to make it up on volume."

Insurance companies tried to reduce costs in various ways, but the most successful was the creation of in-house firms. When I started practicing in 1988, there were few in-house firms. These firms now dominate the insurance defense industry. They handle many cases that were previously handled by insurance defense firms.

This trend has been documented by CaseMetrix, a database of more than 3,500 cases settled and adjudicated from 2007 forward. CaseMetrix's data shows a steady migration of cases away from insurance defense firms to in-

*Continued on page 14*

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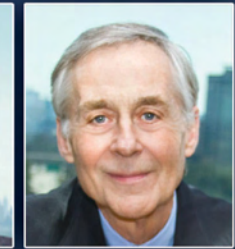
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# Success as a Litigator in a Post-Litigation World

Continued from page 12

house firms. In 2008, 36.45 percent of cases reported to the database were being handled by in-house counsel; by 2010, that number had risen to 42 percent. At this point, while in-house firms represent only 19 percent of insurance defense firms, they account for 42 percent of all litigated motor-vehicle cases. Currently, there are 21 in-house firms in Georgia. Nine of these firms account for 85.2 percent of all in-house cases. These statistics are all the more significant in light of the fact that in-house firms were almost nonexistent 10 years ago.

Insurance companies' cost-cutting has also been reflected in their preference for mediation over litigation and trial. In 2008, 7.12 percent of the case resolutions

reported to CaseMetrix were jury verdicts; by 2010, that percentage had decreased to 5.46 percent. In 2008, only 19.09 percent of reported cases had been mediated; by 2010, that percentage had increased to 23.10 percent.

In addition, the percentage of cases settled pre-suit—and without the use of defense counsel—is increasing. In 2008, 35.9 percent of cases settled pre-suit; that percentage increased to 46.84 percent in 2010.

The legal environment has changed dramatically in the time I have been practicing. As a result of the desire to cut costs and to resolve claims more efficiently, insurance companies have demonstrated a preference for mediation over trial. They have shown a greater willingness to settle claims pre-suit and without retaining defense counsel.

Although the CaseMetrix data for 2011 is incomplete, it shows all the above trends continuing. If the insurance defense attorney is to survive and prosper, he must adapt to these new realities.

## Success in a Post-Litigation World

Recently, I saw a bumper sticker that read "Mediate Don't Litigate." While, as a full-time mediator, I agree wholeheartedly with that sentiment, the thought occurred to me that, in today's world, mediation is not an alternative to litigation but the preferred way to conclude litigation. The mediation session rather than the courtroom has become the place where cases are decided.

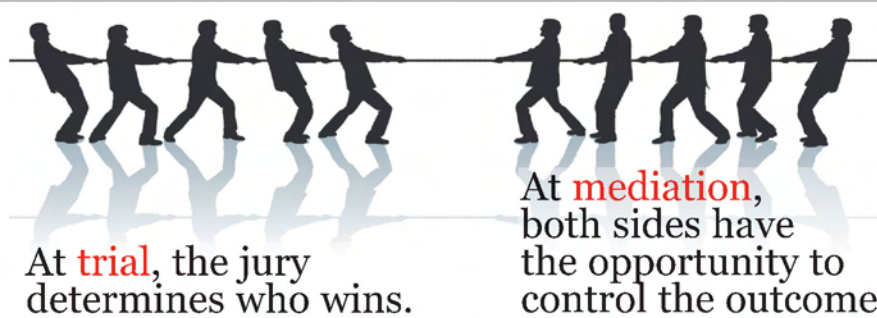
The insurance defense attorney

that by failing to engage her, I was being disrespectful. I was not only saying that what bothered her was not important, but also I was telling her that she was not important. In the same way, the emotional plaintiff needs to be engaged.

Mediations as they are typically conducted do not provide what these plaintiffs need. They do not want to be lectured about the importance of compromise and "win-win" scenarios. They want a confrontation. They demand to

know why the company will not pay the amount claimed. If they are not given an opportunity for this type of hearing, they will demand to be heard by a jury.

Mediations conducted in a manner that addresses these needs have all the benefits of trial and



none of the risks. At trial, the jury determines who wins. At mediation, both sides have the opportunity to control the outcome of their case. The plaintiff motivated by emotion is forced to listen to the defense attorney's arguments and review evidence that undermines his case. It is the rare plaintiff who will not reevaluate his settlement position when he realizes his case is not as strong as he once thought. At mediation, he has the opportunity to settle for a lesser amount without "losing the case."

Insurance defense attorneys should play a vital role in this type of mediation. They have the skills and economic incentives necessary to give these plaintiffs the fight they crave and the opportunity for reflection they need. In the 1980s, insurance defense attorneys proved themselves expert in representing the interests of insurance companies. They consistently brought cases to quick and successful conclusions. Not surprisingly, the CaseMetrix data reveals that in-house attorneys are now taking

neither who markets himself primarily as a trial lawyer is in danger of becoming irrelevant in today's legal environment. He is trying to sell a horse and buggy at an auto show. In addition to being the preferred venue of the insurance industry, mediation is also the better venue for most plaintiffs. In my soon-to-be-released book, *A New Day in Court*, I demonstrate that most plaintiffs are motivated by emotion. For these plaintiffs, process is as important as the amount of the settlement. These plaintiffs have needs that previously could only be adequately met by a jury trial. The plaintiff motivated by strong emotion wants a fight. He believes that he has been wronged and he wants his day in court. He needs a full and fair airing of the issues in his case. In short, he needs the fight that a defense attorney can give them. In my book, I recount how my wife and I have different ways of resolving conflict. She sometimes needs to argue about an issue, and I want to avoid conflict. My wife eventually got me to understand

Continued on page 39

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# The Science of Slipped Discs

By Stacy M. Imler, Ph.D., P.E.,  
Amanda W. Bridges, Ph.D., and  
Torrence D. J. Welch, Ph.D.  
*Exponent, Inc.*

A common injury claim following low-speed rear-end automotive collisions includes pain in the low back (lumbar spine) sometimes radiating into the legs. Claimants may also report a “slipped disc,” a misnomer that actually refers to herniation of an intervertebral disc. A detailed biomechanical analysis can be performed to evaluate whether a mechanism for disc herniation was present during the circumstances of an alleged event.

## Anatomy and Function of the Lumbar Spine

The vertebral column—the “backbone” of the human body—consists of articulating vertebrae (including five in the lumbar spine) and additional fused vertebrae (Figure 1). Each vertebra is composed of a vertebral body and posterior bony structures that protect the spinal cord. Adjacent vertebrae are separated by intervertebral discs (Figure 1) that act as shock absorbers to distribute loads throughout the spinal column, prevent bone-on-bone contact, and allow motion between vertebrae. Additional support for the spine is provided by skeletal musculature and ligaments.

Similar to a jelly-filled donut, the intervertebral disc is composed

of an outer ring of fibrous material (called the annulus fibrosus or annulus) surrounding an inner core of hydrated gel (called the nucleus pulposus or nucleus) (Figure 2).

The annulus fibers are organized in multi-directional layers, allowing the disc to withstand and resist loads in various directions. When the spine experiences increases in load, such as in bending or while picking up objects, pressure in the fluid-filled nucleus increases, causing the walls of the annulus to expand.

## Intervertebral Disc Abnormalities

Abnormalities of the intervertebral disc, occurring through degenerative or traumatic changes, can be classified as disc bulge, annular tear, or disc herniation. In a disc bulge, the annulus extends or “bulges” outward beyond the perimeter of adjacent vertebral bodies (compare the normal disc in Figure 2A to the bulged disc in Figure 2B). In an annular tear, the damaged fibers of the annulus are fragmented, creating a pathway for the nucleus to migrate outward (Figure 2C). As the tear worsens, a disc herniation (also called protrusion or extrusion) may occur, in which the nucleus or other disc material extends well beyond the disc periphery (Figure 2D).

Because intervertebral discs support loads within the vertebral column, specific extreme conditions can result in sudden disc rupture through failure of the annulus. Generally, a sudden compressive force while the spine is flexed beyond its normal limits is required to cause such a traumatic rupture. Due to the robust structure of the spine, however, traumatic disc herniation in the absence of other trauma is rare. Under most traumatic loading conditions, vertebral

bodies or spinal ligaments are damaged prior to—or in the absence of—disc damage. In fact, research has shown that disc herniation is a long-term, degenerative process occurring over thousands of cycles through a fatigue process.

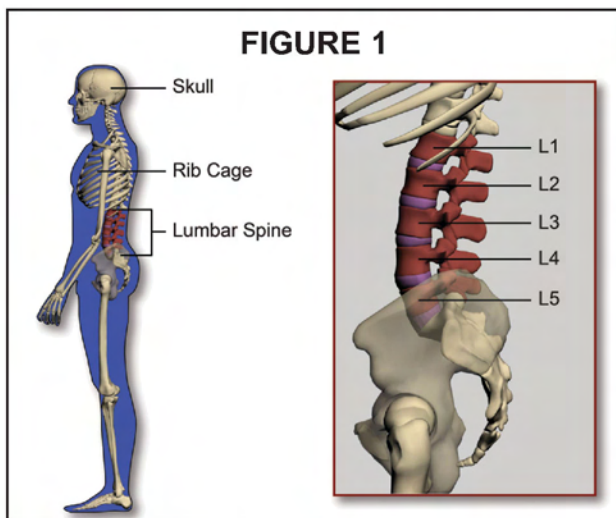
With age and repetitive loading during everyday life, mechanical properties of the intervertebral disc change, and the ability of the disc to support load is reduced. All intervertebral discs show signs of degeneration with advanced aging. For example, Miller and colleagues found that more than 80 percent of male and 65 percent of female lumbar intervertebral discs showed degeneration by age 40.<sup>1</sup>

The proportion of affected individuals and severity of degeneration generally increased with age, and nearly all discs (97 percent) showed some degeneration by age 50.<sup>2</sup> In volunteer studies, Jensen and colleagues found that 64 percent of asymptomatic subjects had at least one lumbar disc abnormality, and 38 percent had an abnormality of more than one disc. Similarly, Boden and colleagues concluded that disc abnormalities are “part of a normal, or at least common, aging process.”<sup>3</sup>

## A Common Claim

Although disc abnormalities can be asymptomatic, in certain cases a bulging or herniated intervertebral disc may cause the adjacent nerve root to become impinged or pinched, leading to symptoms including numbness, muscle weakness, and pain. Manifestation of these symptoms may lead to an allegation of causality between an alleged event and a disc herniation. Indeed, herniated discs in the low back are a commonly claimed “injury” following a low-speed rear-end automotive collision.

To evaluate the likelihood of sustaining a herniated lumbar disc in the alleged event, a biomechanical analysis can be performed to characterize the nature and severity of the collision, to determine the occupant’s motion and the result-



ing loads on the occupant, and to relate that loading to known mechanisms of traumatic disc herniation.

The analysis begins by determining the nature and severity of the collision, using principles of accident reconstruction to correlate vehicle damage to change in speed (referred to as Delta-V or  $\Delta V$ ) and direction of impact force applied to the vehicle (called the "principal direction of force" or PDOF).

During a low-speed rear-end collision, the vehicle is accelerated forward, and the occupant generally moves rearward with respect to the vehicle interior. With the occupant's lumbar spine fully supported by the padded seatback, rearward motion does not provide a mechanism to move the spine beyond its normal range of motion.

Loading on the lumbar spine can be determined by examination of data from crash test dummies (called anthropomorphic test devices or ATDs) measured during vehicle crash tests of comparable severities. Based on injury thresh-

olds reported in the biomechanical literature, the loads on the lumbar spine during such low-speed impacts are typically insufficient to result in damage to the bones, ligaments, or discs of the spine.

Lumbar loads can also be compared to loads during activities of daily living, as reported in the biomechanical literature. This analysis can also be tailored to an occupant's specific activities, including occupational and recreational activities. Such an analysis can be used to demonstrate that the subject collision cannot be specifically implicated as the event causing the herniation; rather, the loads in this event are within the range of, and often lower than, those commonly experienced by the occupant.

In addition, the subject collision can be evaluated in the context of published studies examining human volunteer responses. These studies, involving hundreds of volunteer test exposures, found no evidence that the normal range of lumbar spine motion was exceeded in low-speed rear end impacts, and there were no instances of injuries to the bones, discs, or ligaments of the spine or to the spinal cord.

Further, real-world field accident data from NHTSA's National Automotive Sampling System Crashworthiness Data System (NASS CDS) can be analyzed to expand upon these volunteer study results to an estimate of the entire U.S. population involved in tow-away vehicle crashes. These field accident data can also be queried to investigate specific accident profiles (e.g., accident configuration/severity, occupant stature, injury severity).

### Conclusions

Intervertebral discs are prone to degeneration, which is often present without causing symptoms of back pain. Discs can eventually herniate as a result of

repetitive (fatigue) loading and aging, but are unlikely to fail during a traumatic event without associated bone or ligament damage.

Biomechanical analyses can show that, during a low-speed rear-end collision, loads on the occupant's lumbar spine are below thresholds for damage to spinal structures. Often, these loads are within or lower than the range experienced during common daily activities. ❖

<sup>1</sup>Miller, J.A.A., et al. (1988), "Lumbar Disc Degeneration: Correlation with Age, Sex, and Spine Level in 600 Autopsy Specimens," *Spine* 13(2): 173-178.

<sup>2</sup>Jensen, M.C., et al. (1994), "Magnetic Resonance Imaging of the Lumbar Spine in People Without Back Pain," *N Engl J Med* 331(2): 69-73.

<sup>3</sup>Boden, S.D., et al. (1990), "Abnormal Magnetic-Resonance Scans of the Lumbar Spine in Asymptomatic Subjects: A Prospective Investigation," *J Bone Joint Surg Am* 72-A(3): 403-408.



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Sponsor. She addresses issues related to the biomechanics of human injury, with expertise in the areas of human tolerance, occupant kinematics, and rigid body dynamics.



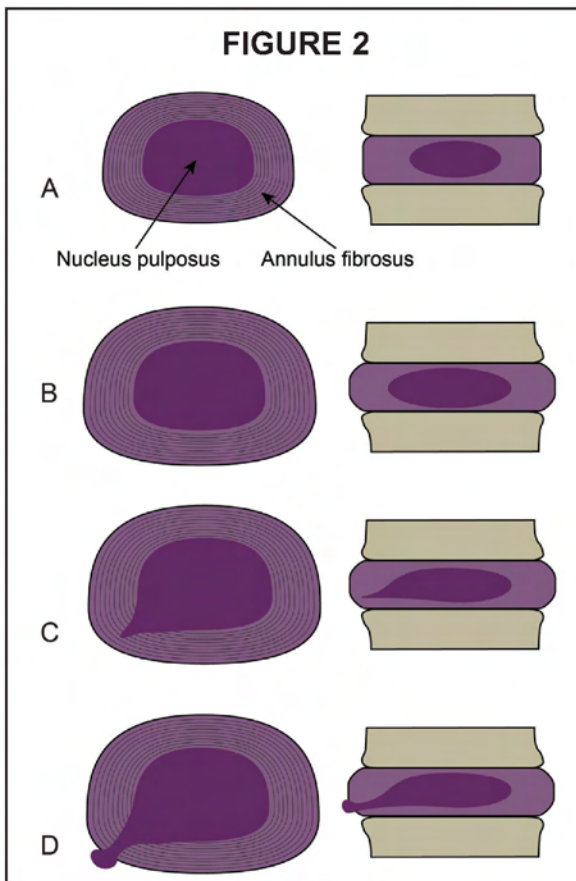
Amanda W. Bridges, Ph.D., of Exponent's Phoenix office, focuses on issues involving biomechanics of human

injury, occupant kinematics, and occupant restraints related to automobile collisions and all-terrain vehicle accidents.



Torrence D. J. Welch, Ph.D., of Exponent's Phoenix office, has expertise in the biomechanics of human

injury, accident reconstruction, occupant kinematics in automobile and UTV collisions, occupant restraints, slip-and-fall events, occupational injury, reactive and postural muscle activity, and postural control and stability.



# Class Dismissed

## ***Katrina Property Owners Tried to Form a Class Action for Canal Breach Damage. Why Didn't Their Suit Certify?***

By Erik L. Nelson, Ph.D., P.E.,  
Marco A. DeLeon, M.E., P.E., and  
Gregory G. Schober, M.S., P.E.  
*Nelson Architectural  
Engineers Inc.*

On August 29, 2005, Hurricane Katrina made landfall between Grand Isle, Louisiana, and the mouth of the Mississippi River. Storm surge associated with Katrina raised the level of Lake Pontchartrain, leaving the majority of New Orleans underwater due to rainfall, levee overtopping, and levee breaches. The chaos that ensued in the aftermath is well-reported. The legal proceedings, less so.

With scores of homeowners sunk because their insurance poli-

cies lacked flood riders, some sought to form a class action to attempt monetary recovery due to the breaches of the levees themselves, arguing that their loss was less "Act of God" and more man-made in nature.

The levees did fail, to be sure. For a lawsuit to gain certification by the court as a class action, however, certain criteria must be met. Among these criteria is a commonality of legal and factual issues across the class, such as a commonality in the nature of the damages.

Nelson Architectural Engineers, Inc. (NAE), was engaged to collect data for evaluating the commonality of damages in the class action *Katrina Canal Breaches Consolidated Litigation*. Stated

simply, the question was whether the New Orleans property owners suffered damages that were so common in nature that they could litigate (and recover) as a group, rather than individually.

### **Forensic Testing Program**

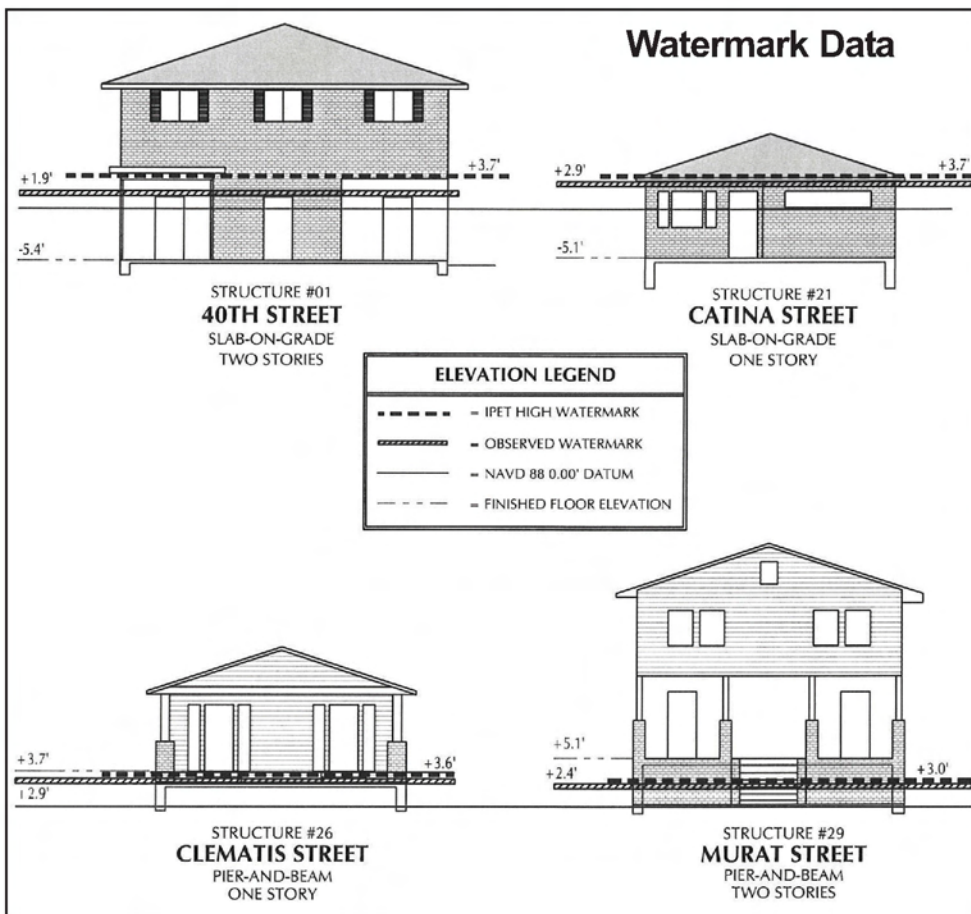
To answer this question, NAE was given a putative class of 36 members to survey. Following the scientific method, NAE developed a testing program for the evaluation of the 36 subject structures. NAE collected detailed data from each structure using several test methods for the purpose of evaluating damages to the structure. NAE documented and photographed observed distress, hurricane-related or otherwise, and existing conditions. Data collection techniques included:

*Descriptive Information:* NAE developed field-measured floor plans and documented structure types—i.e., single-family residential, multi-family residential, commercial, size, number of stories, foundation type, exterior veneer, interior finish, roof type, age, condition of surrounding properties, quality of workmanship, and quality of maintenance—prior to and after Katrina.

*Elevations:* In partnership with a surveying company, NAE established the elevation of each structure relative to the North American Vertical Datum of 1988 using a global positioning device.

*Floor Levelness:* NAE evaluated the levelness of each structure's floor framing by completing a relative elevation survey using an electronic surveying instrument.

*Wall Plumbness:* NAE assessed the plumbness of the exterior or interior walls of the structures and measured the angle of each surface relative to the vertical plane using an electronic plumbness measuring tool. Based on the plumbness measurements, NAE detected no racking or twist resulting from hurricane winds. Rather, the findings are consistent with



long-term foundation movement as evidenced by the significant floor out-of-levelness and aged veneer distress.

*Watermarks:* NAE estimated the maximum flood level within the structures by measuring stains and watermarks left by standing water on interior and exterior finishes, including glass window panes, gypsum board, exterior siding, etc.

*Distress Mapping:* NAE visually identified and mapped distress



**Structure No. 29:  
Tilted Piers**

observed in each structure by investigating crawl spaces, attics, and roofs. The subject structures exhibited:

- Termite damage: Structural members and veneers impacted by termites.
- Wood deterioration: Structural members and veneers.
- Tilted and/or damaged piers: Cracks and/or mortar joint separations and out-of-plumbness, generally due to long-term foundation movement.
- Window damage: Broken glass panes, broken frames or sashes, or missing or boarded-up windows, some likely related to post-storm vandalism.
- Veneer damage: Cracks and/or mortar joint separations on brick veneers, detached and/or missing siding, and cracks on stucco.
- Mechanical equipment damage: Corrosion at heating, ventilating, and air-conditioning (HVAC) equipment and plumbing fixtures and vandalism or theft of components.
- Electrical systems damage: Dislocated weatherheads, elec-

trical service boxes, and electrical conduit; corrosion at receptacles, switches, junction boxes, and cabling; and some vandalism or theft of components.

- Scouring of soils: Loss of soil and exposure of foundation elements.
- Roof damage: Missing shingles; deteriorated and/or damaged roof shingles; rotted and/or exposed roof sheath-



**Structure No. 12:  
Termite Damage**

ing; missing, detached, or broken ridge tiles; missing, detached, or damaged flashing; and detached and/or punctured flat roofing membranes.

- Suspected mold or fungal growth at gypsum board walls and ceilings.

### **Structural Damage and Resistance**

Hurricane structural damage is a function of the magnitude of the forces (wind and flowing water) exerted on a structure and a structure's resistance to those forces.

A particular structure's resistance to applied forces is determined by its individual and unique characteristics, which include its property topography (its elevation relative to flood levels), age, building design, construction, type and quality of materials, underlying soil properties, pre-existing damage (including termites and wood rot), and maintenance.

NAE found a wide range of variability in the subject structures' resistances, which resulted in a wide range of variability in damages observed. For example, the structures with pre-existing dam-

age (pre-Hurricane Katrina) such as wood rot and/or termite damage were significantly weaker than structures that were not impacted. No two structures featured structural damages of an identical type, degree, and extent.

### **Comparative Study 1: Variability of Structural Damage**

Structural damage varied at each structure, and individual site assessments were necessary to



**Structure No. 6:  
Scour Damage**

ascertain structural damage and the cause thereof at the specific structures.

The photographs above illustrate three different types of damage observed.

At Structure No. 29 (see image above), NAE observed several tilted piers, including what appeared to be remedial piers under the floor structure. As the piers tilted, the floor system deflected, causing the superstructure to move. The tilting of the piers was most likely caused by long-term movement of the subgrade.

Structure No. 12 (see image above) featured significant pre-existing (non-hurricane) structural damage caused by termites and wood rot. Here, large sections of framing members had disintegrated, rendering the dwelling structurally compromised and unsafe for habitation.

Structure No. 6 (see image above) featured damage in the form of scouring and/or undermining of the wooden piles and concrete grade beams, attributed to flood and/or surge.

*Continued on next page*



## Comparative Study 2: Variability of Damage by Foundation Type

Structures with pier-and-beam foundations behave differently from structures with slab-on-grade foundations during hurricane and flooding events.

The open pier-and-beam system allows for fairly unobstructed flow of water during floods, but a dangerous condition is created once the flood level reaches the lightweight, buoyant wood framing of the finished floor. The combina-

tion of water and wind forces can overstress the piers and floor connections and threaten displacement of the structure.

A satellite image obtained from Google Earth (Google Earth, 2005, see image above) shows the condition of Structure No. 1, a slab-on-grade structure that was virtually unaffected by flood, and the adjacent structures post-Katrina. The home located east of Structure No. 1 was detached from its pier-and-beam foundation and displaced from its original position 50' south

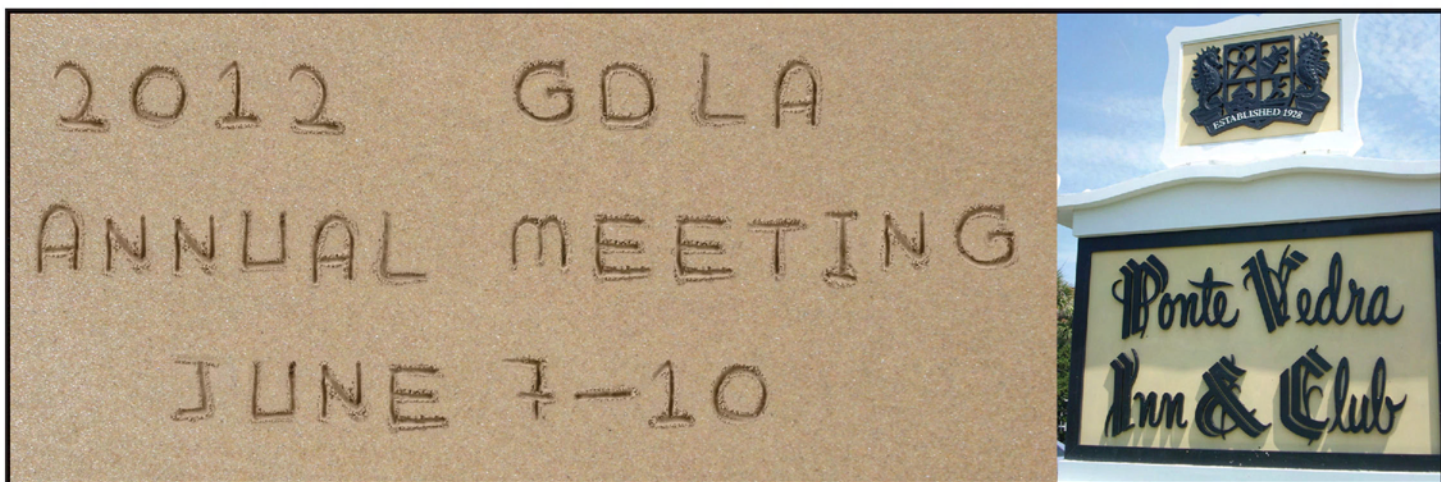
and 8' east. In addition, the structure had rotated approximately 45 degrees. The two structures were similarly constructed and had similar locations, but they had two different structural responses—*i.e.*, no commonality.

## No Class

NAE's study of the 36 putative class-member structures illustrates the varied aftermath resulting from Hurricane Katrina's wind and water forces. Without commonality of type, degree, or extent of damages among the putative class, the ability to create cost estimates fairly and universally is unattainable, and the criteria for certification as a class action are unmet.

Ultimately, the only reliable method of assessing hurricane distress is one that takes into the account the variability of hurricane forces and structure-specific resistance characteristics—*i.e.*, by individual site evaluation. ❖

*Adapted from, "Commonality Test Methodology for Residential Structures in Katrina Canal Breaches Class Action," Erik L. Nelson, Ph.D., P.E., M.ASCE, Marco A. DeLeon, M.E., P.E., M.ASCE, and Gregory G. Schober, M.S., P.E., Proceedings of the ASCE Structures Congress, Las Vegas, NV., April 14-16, 2011. Nelson Architectural Engineers, Inc. is a GDLA Platinum sponsor.*



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# Allocation of Fault to Criminal Tortfeasors: Conflicting Decisions

By Pamela Lee

Georgia courts have been abuzz with litigation debating the meaning and applicability of various provisions of O.C.G.A. § 51-12-33—particularly with regard to allocation of fault—since the enactment of the new version of the statute in 2005.

The newest debate revolves around the question whether the jury can allocate fault to a criminal actor in a negligent-security premises-liability action. In a July 2011 decision regarding this issue, the Court of Appeals ruled that a trial judge had not erred in giving a jury charge on apportionment. The Court of Appeals' ruling on this issue is physical precedent only, however, and two trial courts have taken a different view in more recent decisions.

In *Pacheco v. Regal Cinemas, Inc.*, 311 Ga. App. 224, 715 S.E.2d 728 (July 14, 2011), the Court of Appeals ruled that the trial judge had not erred in charging the jury on allocation in a negligent-security case involving nonparty criminal tortfeasors.

In that case, a man was assaulted and murdered outside a movie theater, and his family sued the theater operator and its security firm. At trial, the court charged the jury on allocation with regard to the criminal tortfeasors. On appeal from a defense verdict, the Court of Appeals found nothing in the statute that precluded such a charge. The plaintiffs relied on court decisions from Florida and Tennessee to support of their argument that allocation was inappropriate, but the Court of Appeals found these authorities unpersuasive.

The court noted that the Florida decision was based on a statute that precluded allocation with regard to intentional conduct. Although the Tennessee decision did involve such a statutory bar, the Court of Appeals nonetheless ruled that the plaintiffs had “failed

to show that the trial court erred by instructing the jury pursuant to our state’s statute, rather than pursuant to Tennessee case law.” *Pacheco*, 311 Ga. App. at 230, 715 S.E.2d at 734.

In the absence of any provision in O.C.G.A. § 51-12-33 barring apportionment to intentional wrongdoers, the Court of Appeals concluded that the trial court had

**The newest debate revolves around the question whether the jury can allocate fault to a criminal actor in a negligent-security premises-liability action.**

not erred in allowing allocation of fault to the criminal tortfeasors. Because one judge on the *Pacheco* panel concurred only in the judgment on this particular issue, however, the Court of Appeals' decision on this issue is physical precedent only, not binding authority.

Two trial courts have subsequently ruled to the contrary of *Pacheco*, finding allocation to criminal tortfeasors inappropriate. Both courts took issue with the possibility of relieving a premises owner from liability for harm resulting from a breach of the owner’s duty to guard against the reasonably foreseeable criminal acts of a third party.

In *Martin v. Six Flags, et. al.*, File No. 09-S-55-4 (Cobb County State Ct., Sept. 12, 2011), Judge Kathryn Tanksley ruled that allocation to a criminal tortfeasor would lead to “an unreasonable or absurd result,” gutting the cause of action for negligent security.

The court determined that a jury would allocate all damages to the criminal actor, thereby relieving the premises owner or security provider from the duty to protect the plaintiff from foreseeable, intentional conduct.

Furthermore, the court found that the statute’s reference to “negligence or fault” evidenced a legislative intent that allocation apply only to negligent, not intentional, conduct.

Eight days later, Judge John Mather of Fulton County reached the same result in *Salinas v. Coro Realty Advisors*, No. 10EVO09982 (Fulton County State Ct., Sept. 20, 2011). The court cited the duty owed by a premises owner, ruling that “a landowner can be liable for third-party criminal attacks if the landowner has *reasonable grounds* to apprehend that such a criminal act would be committed but failed to take steps to guard against the injury.”

The court reasoned that premises liability actions for third-party crimes are similar to vicarious liability actions. The court also determined that injury caused by the reasonably foreseeable conduct of a third-party assailant is the very harm the premises owner has a duty to protect against, and concluded that it would be “incongruous to reduce or relieve the landowner of responsibility by the very harm that was to be deterred.” Notably, the court also expressly rejected the defendant’s reliance on *Pacheco*.

Until the Court of Appeals or the Supreme Court hands down binding precedent on this topic, trial courts will likely continue to issue conflicting opinions. For now, the defense of any case involving negligent-security claims or premises liability actions involving the intentional conduct of a criminal tortfeasor should include an attempt to apportion fault to the criminal tortfeasor. ♦



*Pamela Lee is an associate at Swift Currie McGhee & Hiers in Atlanta, and a member of both the GDLA Premises Liability Substantive Law Committee and Education Committee.*

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# Exculpatory Clauses: Can They Release a Property Owner in a Negligent-Security Case?

By C. Shane Keith and  
Robert P. Hein

For a number of years, apartment owners and management companies have included exculpatory clauses in their leases that purport to excuse or release the rental property owner or manager from any duty to protect the tenant from third-party criminal actions on the property. In fact, such exculpatory provisions have been standard in many Georgia apartment leases, including the Georgia Apartment Association and Atlanta Apartment Association standard leases, since around 2001.

Although provisions of that type have been widely included in Georgia apartment leases, they have not been very effective in defending against lawsuits based on third-party criminal attacks—except for the purpose of showing that the tenant was generally made aware of the possibility of third-party criminal actions on the property and acknowledged a personal duty of self-protection. This simply highlighted the duty to exercise ordinary care that exists in negligence actions. Usually, however, these clauses have not been viewed as the shield that exculpatory clauses in other types of contracts are under Georgia law.

That situation may have changed based on a recent order from the State Court of Fulton County that is currently docketed for appeal with the Georgia Court of Appeals. In *Jusupovic v. HMI Enterprises, Inc., et al.*, Civil Action File No. 2007 EV003078H, State Court of Fulton County (September 6, 2011), Judge Wesley Tailor held that an exculpatory clause in a residential lease agreement barred a tenant's negligent-security premises liability claim under O.C.G.A. § 51-3-1. In that case, the defendants, HMI Enterprises, Inc., and HMI Property Solutions, Inc., owned and operated the Southern Pines apartment complex in Decatur. The plaintiff, Samir Jusupovic, resided

**On September 6, 2011, Fulton County State Court Judge Wesley Tailor held that an exculpatory clause in a residential lease agreement barred a tenant's negligent-security premises liability claim under O.C.G.A. § 51-3-1.**

**POLICE LINE DO NOT CROSS**

at Southern Pines from July 17, 2001, to February 23, 2007, the date of the shooting underlying the lawsuit.

The plaintiff had signed a document entitled "Lease Agreement—Addendum #4 Personal Property/Security Waiver," which contained the following language:

SOUTHERN PINES Apartments encourages all residents to obtain renter's insurance to protect their personal property, and clearly states that no security is provided to protect residents, guests or personal belongings.

I understand fully that no promises have been made or will be made by SOUTHERN PINES Apartment, it's (sic) owners, agents, and/or employee's (sic) concerning furnishing or providing any type of security for myself, my guests or my personal property.

I do hereby release SOUTHERN PINES Apartments, it's (sic) owner's (sic), agents, and/or employee's (sic) of any and all responsibility or liability concerning any and all acts of criminal nature against myself, my guest or my personal property. I am aware of my responsibility for protecting myself as well as my responsi-

bility for obtaining insurance to protect my personal property.

I understand that I must purchase a renter's insurance policy that provides comprehensive property insurance for resident's property that insures against any loss due to theft, vandalism, bursting pipes, fire, windstorm, hail, flooding, rain, lightening (sic), tornadoes, hurricanes, water damage, snow, ice, running water or overflow of water or sewage.

I do hereby acknowledge my understanding of the above by signing this addendum to my lease with SOUTHERN PINES Apartments.

Additionally, the plaintiff had signed an Apartment Rental Agreement/Lease that contained the following exculpatory clause:

Property Loss and Insurance. Management shall not be liable for loss or damage, theft, vandalism, or other loss of any kind to residents or his occupant's personal property, unless such is due to management's negligence or intentional misconduct. Management shall not be liable for loss due to criminal acts of

other parties. Resident must purchase a renter's insurance policy that provides comprehensive property insurance for resident's property that insures against any loss due to theft, vandalism, bursting or leaking pipes, fire, windstorm, hail, flooding, rain, lightening (sic), tornadoes, hurricanes, water leakage, snow, ice, running water, or overflow of water or sewage. Management shall not be liable for any injury or damage caused by such occurrences, a resident agrees to look solely to his insurance policy to provide liability coverage for resident's negligence which causes injury or damages to management, the owner, the apartment, the apartment community and any other persons and their property. Management does not offer or provide security or law enforcement services for resident's protection or protection of resident's personal property. Resident agrees to look solely to public law enforcement,

emergency services, or fire services for security services or protection. Resident acknowledges that he has an obligation to exercise due care for his own safety and welfare and that management is not liable for the criminal acts of other persons.

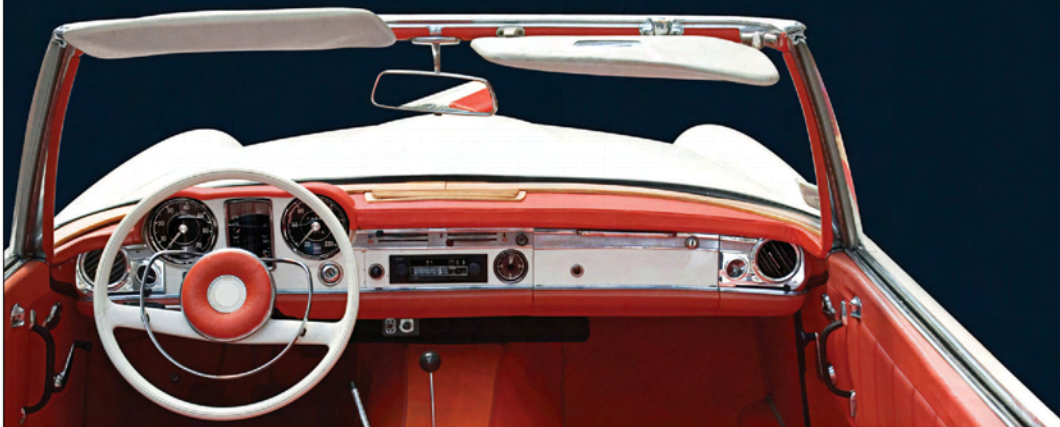
On February 23, 2007, at approximately 9:00 p.m., the plaintiff and two guests were leaving the apartment community to go to a restaurant. While driving out of the parking lot, the plaintiff heard one of his neighbors yelling for help from the balcony of her apartment. The plaintiff believed that something bad was happening and went to his neighbor's apartment building. When he was in the hallway inside the apartment building, the plaintiff saw a man coming from his neighbor's apartment carrying a silver gun. The plaintiff did not intervene, resist against, fight, struggle with, or even block the path of the man with the gun. Nonetheless, that man fired the gun at the plaintiff three times, hitting him once.

The assailant pled guilty to the shooting and was incarcerated at the time he was deposed in the civil suit. Although he largely refused to testify regarding the incident, he did state that, had he seen any security guards, he would not have confronted anybody, attempted to break into anyone's apartment, or robbed anyone. The assailant also testified that security guards would have kept him away from the property. Security guards were not on duty at the time of the incident, although security was provided at the apartment complex at various other times of the day or week.

The plaintiff's lawsuit alleged that the defendants failed to exercise ordinary care to keep the premises safe. This kind of premises liability lawsuit is usually referred to as a "negligent security" claim. The defendants moved for summary judgment, arguing that the lease and the Security Waiver Addendum excluded the defendants from liability for the criminal acts of the assailant. The plaintiff countered that the exculpatory

*Continued on page 43*

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# Mass Torts Case Law Update

Todd E. Schwartz  
Mass Torts SLC Co-chair  
Lewis Brisbois Bisgaard & Smith, Atlanta



## **CAUSATION: Plaintiffs claiming injuries as a result of carbon monoxide exposure must present expert testimony to establish causation.**

### ***Seymour Elec. & Air Conditioning Serv. v. Statom* 309 Ga. App. 677 (2011)**

Plaintiffs alleged that they had suffered various injuries—including headaches, nausea, burning throats, burning eyes, stomach pain, fatigue, and memory loss—as a result of exposure to carbon monoxide leaking from an improperly installed and repaired home furnace. On interlocutory appeal from the denial of the defendant's motion for summary judgment, the Court of Appeals ruled that the plaintiffs had failed to present sufficient evidence to prove a causal link between their injuries and the defendant's negligence.

Although the evidence was sufficient to prove that the defendant had negligently installed and repaired the furnace, the Court of Appeals ruled that the plaintiffs had not presented sufficient evidence to prove that their health problems resulted from carbon monoxide exposure. Even though the plaintiffs had sought medical treatment for their health problems, they presented no evidence that a physician had ever diagnosed the cause of these problems as carbon monoxide poisoning. Furthermore, the plaintiffs had not presented any expert medical testimony linking their health problems to carbon monoxide poisoning.

The Court of Appeals rejected the plaintiffs' argument that the jury could infer causation simply based on the well-known dangers of carbon monoxide inhalation, without the benefit of expert medical evidence. Although the Court of Appeals acknowledged that expert witness testimony is not necessary in many negligence cases, the court ruled that some cases raise causation issues that "can be resolved by a jury only with

the assistance of experts with specialized medical knowledge." The court concluded that cases involving carbon monoxide poisoning are among those requiring expert witness testimony on the issue of causation, especially where there is evidence of other possible causes. Because the plaintiffs had presented no expert evidence to prove causation, the Court of Appeals ruled that the trial court should have granted the defendant's motion for summary judgment.

## **CAUSATION: Plaintiff claiming injury as a result of exposure to allegedly toxic substance must prove both general causation and specific causation.**

### **STATUTE OF REPOSE: Statute of repose bars asbestos claim against construction contractor arising from removal and installation of pipe insulation.**

### ***Toole v. Georgia-Pacific, LLC*, Appeal No. A10A2179 2011 Ga. App. Lexis 810 (Jan. 19, 2011)**

In this unreported decision, the Court of Appeals upheld a jury verdict in favor of two defendants and orders granting judgment as a matter of law to three others. In upholding the trial court's order granting a directed verdict in favor of defendant Western Auto, the Court of Appeals reiterated that a plaintiff asserting a toxic-tort claim must offer proof of both general causation and specific causation. To establish general causation, the plaintiff must prove that exposure to the substance at issue is capable of causing the particular injury alleged. To establish specific causation, the plaintiff must prove that exposure to that substance under the circumstances of the case caused his particular injury. The Court of Appeals reviewed the evidence regarding the plaintiff's exposures to asbestos from

Western Auto products and concluded that the plaintiff had failed to offer sufficient evidence to prove that these exposures contributed to his injury.

In affirming the trial court's order granting summary judgment to defendant National Services Industries, the Court of Appeals ruled that the plaintiff's claims against this defendant were barred by the statute of repose for improvements to real property. The plaintiff alleged that he had been exposed to asbestos in 1967 and 1968 while working around the defendant's employees as they removed old pipe insulation and installed new insulation at a paper mill. The Court of Appeals determined that this activity qualified as an improvement to real property for purposes of the statute of repose. The court further ruled that the statute of repose barred claims based on exposure to the dust and debris associated with insulation removal and installation, as the dust and debris are a normal part of the construction process.

## **EXPERT TESTIMONY: "Every exposure" causation opinion of plaintiff's expert witness rejected under *Daubert* standard in asbestos lawsuit.**

### ***Butler v. Union Carbide Corp.* 310 Ga. App. 21, cert. denied (Oct. 15, 2011)**

In *Butler*, the Georgia Court of Appeals adopted and affirmed a trial court's opinion that the *Daubert*<sup>1</sup> standard required exclusion of plaintiff's proffered expert testimony that every asbestos exposure—no matter how small—was a contributing factor in the development of decedent's mesothelioma. In an order that the Court of Appeals praised as "extensively researched" and attached to its appellate opinion, the trial court rejected pathologist Dr. John Maddox's "every exposure" opinion.

*Continued on page 42*



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# Products Liability Case Law Update

By James Dartlin Meadows  
Products Liability SLC Co-chair  
Balch & Bingham, Atlanta



**DUTY TO WARN:** Under Georgia law, a manufacturer who learns of a defect in a product already on the market has a continuing duty to warn past purchasers of the product, not just future purchasers.

***In re Mentor Corp. ObTape Transobturator Sling Products Liability Litigation***  
Case No. 4:08-MD-2004, 2010 WL 2196629 (M.D. Ga. May 28, 2010)

This multidistrict litigation in the U.S. District Court for the Middle District of Georgia concerns product liability actions against Mentor Worldwide LLC for injuries allegedly caused by Mentor's ObTape Transobturator Tape, a suburethral sling product implanted to treat patients for urinary incontinence.

In a ruling issued on May 28, 2010, the district court concluded that Georgia law imposes a "continuing duty to warn" that requires a manufacturer who becomes aware of a danger associated with a product already on the market to warn not only future purchasers of the product but past purchasers as well.

After initially ruling that a manufacturer has a duty to warn future purchasers of a product about a newly discovered defect but not past purchasers, the court reconsidered and determined that it had misconstrued Georgia law. The court based its initial ruling on *Ford Motor Co. v. Reese*, 300 Ga. App. 82 (2009), which held that a manufacturer does not have a duty under Georgia law to recall a product already on the market when it discovers a defect in the product. In its later ruling, however, the district court decided that it had read *Reese* too broadly, and concluded that *Reese's* rejection of a duty to recall did not necessarily imply that a manufacturer has no continuing duty to warn prior purchasers.

The court further determined

that *Chrysler Corp. v. Batten*, 264 Ga. 723 (1994), recognized a continuing duty to warn of defects discovered in products after they reach the market, and found that nothing in *Batten* limited the duty to new purchasers only. In addition, the court cited O.C.G.A. § 51-1-11(c), which provides that the statute of repose for products shall not "relieve a manufacturer from the duty to warn of a danger arising from use of a product once that danger becomes known to the manufacturer."

Based on these authorities, the district court held that Georgia law imposes a continuing duty to warn both future purchasers of a product and previous purchasers when the manufacturer discovers a defect.

**STATUTE OF REPOSE:**  
**Georgia's 10-year statute of repose begins to run when the finished product containing the defective component is sold as new to the intended consumer who is to receive the product.**

***Campbell v. Altec Industries, Inc.***  
**635 F.3d 1212 (11th Cir. 2011)**  
**and 288 Ga. 535 (2011)**

In an appeal from a district court order granting summary judgment to the manufacturers of a bucket truck and a defective boom lift cylinder incorporated into the truck during its manufacture, the U.S. Court of Appeals for the Eleventh Circuit certified to the Georgia Supreme Court a question regarding the date on which Georgia's 10-year statute of repose for products, O.C.G.A. § 51-1-11(b)(2), begins to run. The Georgia Supreme Court ruled that the statute of repose "begins to run when a finished product is sold as new to the intended consumer who is to receive the product."

Plaintiffs brought their action on February 4, 2008, to recover for injuries that plaintiff Ronald J. Campbell, an employee of Georgia Power Company, suffered on June

30, 2006, when a bucket truck's lower boom lift cylinder failed. The bucket truck's manufacturer, Altec Industries, Inc. ("Altec"), had delivered the truck to Georgia Power in April 1998. The defective lift cylinder had been developed jointly by Altec and Texas Hydraulics, Inc. ("THI"), for use in the bucket truck, and had been manufactured by THI. The lift cylinder was first tested on January 14, 1998, and was installed on the bucket truck in March 1998.

The district court granted Altec and THI summary judgment based on O.C.G.A. § 51-1-11(b)(2), which provides that a claim must be brought within "ten years from the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury." The court ruled that the repose period began to run when the lift cylinder was first tested on January 14, 1998.

On appeal, the Eleventh Circuit found a lack of controlling precedent to determine when Georgia's statute of repose began to run in this case. The Eleventh Circuit therefore certified a question to the Georgia Supreme Court, asking whether the statute of repose begins running (1) when the component part causing the injury is assembled or tested, (2) when the finished product including the component part is assembled, or (3) when the finished product including the component part is delivered to its initial purchaser.

In answer to the certified question, the Georgia Supreme Court ruled that "the statute of repose found in O.C.G.A. § 51-1-11(b)(2) begins to run when a finished product is sold as new to the intended consumer who is to receive the product, in this case, Georgia Power Company." In light of this answer, the Eleventh Circuit determined that the 10-year statute of repose did not begin to run on the plaintiffs' claim until April 1998, when the bucket truck was delivered to Georgia Power. Therefore,

the Eleventh Circuit held that the lawsuit was timely filed, and vacated the district court's order granting summary judgment to Altec and THI.

**DEFECTIVE DESIGN: Where a manufacturer's container was designed for multiple purposes and accommodated multiple dispensing methods, the manufacturer was not liable for inappropriate use of a spigot, which it did not supply, to dispense hazardous liquid.**

**Kelley v. Hedwin Corp.**  
**308 Ga. App. 509 (2011)**

Plaintiffs Ernie and Donna Kelley alleged that Ernie, a clinical engineer at a hospital, had suffered respiratory injuries while cleaning up a formaldehyde spill. The spill occurred when a nurse attempted to dispense the formaldehyde from its container through a gravity-fed spigot that had not been sufficiently tightened. The plaintiffs sued Hedwin Corporation, the manufacturer of the container, for

negligent failure to warn and negligent design, even though Hedwin had neither filled the container with formaldehyde nor supplied the spigot. The trial court granted summary judgment to Hedwin, and the plaintiffs appealed.

The Court of Appeals affirmed. After quickly disposing of the failure-to-warn claim on the ground that the danger of a poorly capped container spilling was obvious, the Court of Appeals turned to the design claim and applied the risk-utility analysis to determine whether the container as designed by Hedwin was defective. The plaintiffs' expert attested that the design was defective because containers used for toxic liquids should be designed for manual dispensing with a hand pump to prevent spills.

The Court of Appeals determined, however, that the expert's opinion did not address certain key facts about the container: namely, that the container had been designed to be useful for multiple purposes; that Hedwin had not

filled the container with formaldehyde or supplied the spigot; that Hedwin was not responsible for the labels on the cardboard packaging used for shipping the container of formaldehyde; and, most importantly, that the container accommodated a variety of dispensing methods—including the hand pump method recommended by the expert. The Court of Appeals also pointed to evidence showing the obviousness of the danger of using a gravity-fed spigot when dispensing toxic liquid from containers of this design. In addition, the court pointed to evidence of the utility of the container's design.

Accordingly, the Court of Appeals affirmed the trial court's order granting Hedwin summary judgment.

**STATUTE OF REPOSE: Plaintiff injured in rollover of sports-utility vehicle failed to establish that the SUV manufacturer's conduct was willful, reckless, or wanton within the**

*Continued on page 44*

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# Workers' Compensation Case Law Update

By C. Wade McGuffey, Jr.  
Goodman McGuffey Lindsey & Johnson, Atlanta



**SCOPE OF REVIEW:** The appellate division may reweigh the evidence and substitute its findings of fact for those of the administrative law judge. The superior court may not review the evidence, however, and must affirm the appellate division's findings if they are supported by any evidence.

## ***Georgia Mountain Excavation, Inc. v. Dobbins*** **309 Ga. App. 155 (2011)**

In February 2007, Dobbins injured his back while removing a toolbox from a truck. He missed one month of work and received income and medical benefits. Three months later, he claimed another injury, which was "medical only." Finally, Dobbins claimed that he reinjured his back on November 25, 2008, while he and a coworker were attempting to pick up a piece of equipment.

Dobbins did not report the new injury that day, but he later alleged that he reported the injury to his supervisor the next day, November 26, 2008. The supervisor denied this allegation, however, and claimed that he had not learned of the alleged injury until nearly two weeks later. In addition, time records showed that Dobbins did not work on November 26, 2008.

At the hearing on Dobbins' claim for benefits based on the alleged injury of November 25, 2008, neither the coworker assisting Dobbins at the time of the injury nor a coworker who supposedly witnessed the injury testified. Dobbins' supervisor testified that he conducted an investigation when he first learned about the alleged injury but could find no one to confirm Dobbins' story. According to medical records, Dobbins told a doctor on December 18, 2008, that he had slipped and hurt his back "a couple of weeks ago" while getting off a truck at work.

The administrative law judge (ALJ) awarded temporary total disability benefits, but the appellate division of the State Board of Workers' Compensation reversed. After considering the conflicting testimony as to whether Dobbins reported the injury and Dobbins' inconsistent accounts of how the injury occurred, the appellate division concluded that Dobbins had failed to prove his alleged work-related injury of November 25, 2008. Therefore, the appellate division denied his claim for benefits.

The superior court reinstated the award of benefits, finding that the evidence did not support the appellate division's decision. The Court of Appeals reversed, however, ruling that the appellate division had authority to reweigh evidence but the superior court did not. Under Georgia law, the appellate division may reject an ALJ's factual findings and substitute its own if it concludes that the ALJ's findings are not supported by a preponderance of competent and credible evidence. The appellate division may assess witness credibility, weigh conflicting evidence, and draw its own conclusions from the evidence.

On judicial review, however, the courts must consider the evidence in the light most favorable to the appellate division's decision, and must uphold the decision provided that the record includes "some evidence" to support it. The courts are not authorized to reweigh the evidence.

The Court of Appeals determined that the superior court had "simply weighed the evidence itself." Because Court of Appeals found "some evidence" to support the appellate division's decision to deny Dobbins' claim, it reversed the superior court's decision.

**REVIEW OF AWARD BY APPELLATE DIVISION: The appellate division of the State Board is authorized to make**

**its own findings of fact, but cannot base its decision on an erroneous finding of fact.**

## ***McEwen v. Bremen Bowdon Inv. Co.***

**309 Ga. App. 170 (2011)**

Brandi McEwen, an employee of Bremen Bowdon Investment Company, developed back problems that she attributed to her work duties. She reported her back problems to her supervisor, and the supervisor told her to seek medical treatment, which she did.

McEwen continued to suffer back pain and missed several days of work. After Bremen terminated McEwen for excessive absenteeism, she filed a claim for medical benefits, continuing temporary total disability benefits, and attorneys' fees.

Following a hearing, the ALJ found that McEwen's back injury was compensable and awarded benefits. In reaching this decision, the ALJ cited McEwen's testimony that she had not had any prior back problems and that she had not suffered any back injury outside work.

Bremen appealed to the appellate division, which reversed the ALJ's decision and denied McEwen's claim for benefits. In reaching its decision, the Board relied on, *inter alia*, McEwen's purported testimony that she had not alleged a job injury while employed at Bremen. The superior court affirmed this decision.

The Court of Appeals vacated the decision, however, and remanded the case to the appellate division for further consideration. Although the appellate division may make its own factual findings if it finds those of the ALJ to be unsupported by a preponderance of the evidence, the appellate division cannot base its decision on an erroneous finding of fact. The Court of Appeals determined that the appellate division erred in basing its decision on McEwen's purported testimony that she had not reported a work injury to Bremen.

The record contained no such testimony; on the contrary, McEwen testified that she had told her supervisor she injured herself at work.

The supervisor acknowledged that McEwen had reported her back problems, but denied that McEwen had specifically related the problems to her work duties. The appellate division did not base its decision on a finding that the supervisor was more credible, however, but instead relied on a purported admission that appeared nowhere in the record.

The Court of Appeals therefore vacated the appellate division's decision and remanded with directions that the appellate division "reconsider the case in light of all relevant testimony."

**ENFORCEMENT AND MODIFICATION OF AWARD: City's motion to set aside judgment enforcing second workers' compensation settlement with police officer was not procedurally barred where superior court was responsible for default leading to judgment, and superior court abused its discretion in denying City's motion in light of un rebutted evidence showing that State Board's approval of second settlement was the result of a mistake.**

**City of Atlanta v. Holder  
309 Ga. App. 811 (2011)**

Police officer Richard Holder filed 15 separate workers' compensation claims against the City of Atlanta for various injuries suffered during his 24 years of service, including a claim for an alleged injury of January 16, 1993.

The parties entered into a seven-page stipulation and agreement covering 15 specified dates of injury. The list of injury dates appeared on the first page of the stipulation and agreement, and was repeated four times in the pages that followed. The list did not include January 16, 1993, but did include an injury date of January 6, 1993. The stipulation and agreement also contained a provision in which Holder agreed that there had been no accidents other than those listed. The State Board approved the settlement on January 23, 2007, and the City paid Holder and his attorney.

As the result of a bureaucratic snafu, another version of the stipulation and agreement was issued with an approval date of January 25, 2007. The second stipulation and agreement was identical in every respect to the January 23, 2007, version, with one major exception: on the first page, the 15 typewritten dates of injury had been replaced with one handwritten date, January 16, 1993. Although he had received payment

pursuant to the first stipulation and agreement, Holder also insisted on payment under the second stipulation and agreement, contending that it represented the City's decision to pay him for an injury not included in the first agreement.

The City appealed the January 25, 2007, award, contending that the approval was the result of mistake or fraud. The superior court tried to remand the matter to the State Board for resolution of the factual dispute over which agreement governed, but failed to enter the order of remand within the time required by law. As a result, the remand was ineffective and the award was affirmed by operation of law. The Court of Appeals granted the City's application for discretionary review, but the appeal was later dismissed due to the City's failure to file a brief.

Holder then filed a demand for judgment in superior court, requesting that the court enter judgment on the January 25, 2007, award. The superior court denied this demand, citing its earlier order remanding the matter to the State Board. The Court of Appeals reversed this denial, however, ruling that the superior court lost jurisdiction to remand the case when the award was affirmed by operation of law. Following this reversal, the superior court granted Holder's demand and ordered the City to pay the second award plus interest and costs.

The City then moved to set aside the judgment pursuant to O.C.G.A. § 9-11-60(d), arguing that the second stipulation and agreement approved by the State Board was the result of an internal mistake at the Board. In support of this motion, the City submitted an affidavit signed by the former director of the State Board's Settlement Division, who explained the events that had led to the Board's approval of the second stipulation and agreement. This affidavit showed that the second stipulation and agreement was indeed the result of a mistake, and Holder submitted no evidence to rebut it. Instead, Holder moved to enforce the judgment.

*Continued on page 46*



# Fall Board Meeting: Grove Park Inn



The GDLA Board of Directors enjoyed a spectacular setting for its Fall Meeting at the Grove Park Inn in Asheville, North Carolina, October 21-23, 2011.

In attendance were *Officers and Executive Committee*: President Mel Haas of Constangy Brooks & Smith, Macon; Executive Vice President Lynn Roberson of Swift Currie McGhee & Hiers, Atlanta; Secretary-Treasurer Ted Freeman of Freeman Mathis & Gary, Atlanta; Immediate Past President Bubba Hughes of Callaway Braun Riddle & Hughes, Savannah; and Past President Staten Bitting of Fulcher Hagler, Augusta. *Vice Presidents*: Hall McKinley of Drew Eckl & Farnham, Atlanta; Kirby Mason of Hunter Maclean, Savannah; and Peter Muller of Goodman McGuffey Lindsey & Johnson, Savannah. *Board of Directors members*: Sally Akins of Ellis Painter Ratterree & Adams, Savannah; Craig Avery of Cowsert & Avery, Athens; Lance Greene of McNatt Greene & Peterson, Vidalia; Rusty Gunn of Martin Snow, Macon; Dart Meadows of Balch & Bingham, Atlanta; Brian Moore of Drew Eckl & Farnham, Atlanta; Jeff Ward of Gilbert Harrell Sumerford & Martin, Brunswick; and Jamie Weston of Trotter Jones, Augusta. *Past Presidents*: Salty Forbes of Forbes Foster & Pool, Savannah; and Bob Travis of Bryan Cave, Atlanta. Also present were Education Committee chair Wayne Melnick and Executive Director Jennifer Davis.

The group gathered in President Mel Haas's suite on

Friday evening for a welcome reception, then adjourned to the Grove Park Inn Dining Room for its famous seafood buffet.

The Board of Directors held its business meeting on Saturday morning, and then the afternoon was free to enjoy the area's many amenities. That evening, Board members and

spouses/guests again convened for happy hour before dinner on their own.

Following are highlights from the Board meeting:

- The GDLA currently has 598 members. The individuals listed on page 6 were proposed for membership and unanimously accepted.

- Membership Recruitment Committee vice-chair Dart Meadows presented his group's proposal for a membership drive, RecruitOne, which he and chair Chris Parker developed with inspiration from the *Atlanta Business Chronicle's* successful Hire One initiative. See article on page 1 for more details.

- Education Committee chair Wayne Melnick delivered his committee's report on past and present CLE seminars. As Mel Haas reports in his President's Page on page 3, the Education Committee has been very busy delivering high quality, defense focused educational seminars for GDLA members. The Board commended Wayne and his committee for their outstanding efforts.

- Substantive Law Committee (SLC) vice-chair Brian Moore reviewed the list of SLC leaders and the number of members per SLC.

- The Board discussed being more proactive in getting young lawyers (YL) involved and discussed the Alabama Defense Lawyers Association's active YL section, which has its own officers much like the State Bar's Young Lawyers Division. The Board voted to create a YL Committee, with a

chair being appointed by the GDLA President; the chair shall serve as an ex officio member of the Board with voting power. The YL committee shall have two vice-chairs, one of whom shall serve as a liaison to the Education Committee to help with YL-focused seminars. A younger lawyer shall be defined as 36 years old or younger.

- Meetings chair and Past President Staten Bitting reviewed the upcoming meetings schedule, which can be found on the Calendar page at [www.gdla.org](http://www.gdla.org).

- Website Committee vice-chair Lance Greene presented a report on behalf of chair Dave Nelson that hopes to enhance the content in the members' only area of the GDLA website by soliciting help from SLC leaders. The Board reviewed a draft letter that will seek contributions from the SLCs for the Tort Reform Database and Brief Bank. The Board also reviewed a synopsis of the current content available online in both areas.

- Sponsorship Committee chair Peter Muller announced the addition of Matson Driscoll & Damico financial accountants as a new Platinum sponsor for the remainder of 2011. The Board then reviewed the current benefits and pricing structure for the three sponsorship levels; they voted to increase the rates for each level, while grandfathering the current sponsors for one more year.

- Education Committee chair Wayne Melnick and Executive Director Jennifer Davis presented the Trial Academy report on behalf of program chair Matt Moffett. The 2012 Trial Academy agenda was updated to include a mediation component, featuring GDLA Platinum sponsors BAY Mediation & Arbitration and Miles Mediation & Arbitration. It is hoped the lower turnout experienced in 2011 was an anomaly; after this year's Trial Academy concludes, the Board will review whether to maintain its annual schedule.

- DRI State Representative

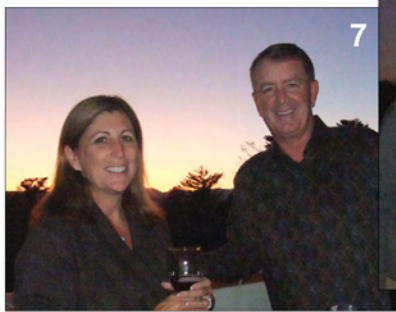
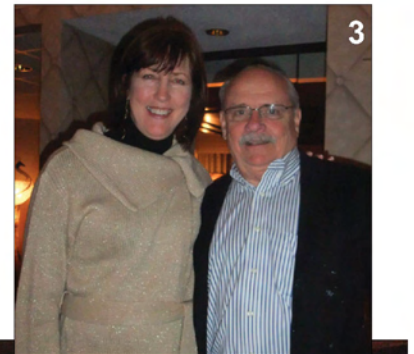
Lynn Roberson reported that Past President Bubba Hughes will take over her role when her term ends in October 2011. Jennifer Davis reported that DRI asked for a judicial liaison from each state, and Dart Meadows volunteered.

- Secretary-Treasurer Ted Freeman reported that we have opened a business savings account to earn a higher yield on our monthly balance.

- Wayne Melnick proposed creating a membership category for paralegals. The Board voted to table discussion until February, and asked various Board members to poll their paralegals for interest.

**Photo highlights:**

- Secretary-Treasurer Ted Freeman delivers his report.
- Education Committee chair Wayne Melnick discusses recent CLE seminars.
- Immediate Past President Bubba Hughes and his wife, Debbie, at the opening reception.
- Judge Henry Newkirk and his wife, Executive VP Lynn Roberson, catch up with Past President Staten Bitting and his wife, Cindy, at the reception.
- Past President Salty Forbes and his wife, Lee, visit with Jeff and Greer Ward at the reception.
- Peter Muller with Hall McKinley and Ann Hopkins at the reception.
- Dart and Carol Meadows enjoy the sunset.
- Craig and Resa Avery with Laura and Wayne Melnick at the reception.
- President Mel Haas and his wife, Linda, enjoy their Great Gatsby themed suite at the Grove Park Inn.
- Lance Greene gives the Website Committee report.
- Past President Bob Travis (right) with his son, Julian.
- Jamie Weston (right) makes a point at the meeting; President Mel Haas is at left.



# CLE: Economic Damage Quantification

The GDLA's newest Platinum sponsor and forensic accounting firm, Matson Driscoll & Damico (MDD), hosted a CLE seminar on November 11, 2011 (a.k.a. 11/11/11—certainly an appropriate date for “number crunchers”).

The seminar was held in Athens, Georgia, on the Friday before the Georgia-Auburn football matchup to give GDLA gridiron fans an opportunity to earn CLE credits and network with their colleagues, as part of college game day festivities.

The seminar opened with a coffee and dessert bar at 1 p.m., followed by a two-hour presentation, and then a happy hour reception.

MDD's Dayne Grey reviewed the forensic accountant's role in discovery, depositions and as an expert witness. He also explained the difference between first party and third party damage terms, and reviewed other business damages concepts.

MDD's John Otting provided an overview of various tax entities—sole proprietorships, C corporations, S corporations, etc.—and their impact on determining profits.

Finally, they walked through real life case examples showing how they had successfully tackled aggressive damages claims by plaintiffs. At the conclusion, attendees were given a document request matrix for various practice areas and a “playbook” for using a financial expert from discovery through trial.

This CLE was coordinated by GDLA Education Committee member Erica Morton of Hicks Casey & Foster, Marietta.

Photo highlights: 1. (Standing l-r) Dayne Grey and John Otting of MDD conduct the seminar; 2. (l-r) Eric Jenniges, Jamie Weston, George Lilly and Robyn Roth enjoy the reception; 3. GDLA Past President Steve Kyle, Erica Morton and Bill Casey during a seminar break; 4. Craig Avery and Matt Moseley at the CLE. 5. Steve Kyle (standing) makes a point during the CLE while Robyn Roth and Eric



Jenniges look on; 6. George Lilly and George Talley at the seminar; 7. MDD's John Otting talks with Michael Broun; 8. Susan Elder visits with MDD's Dayne Grey at the reception. ❖





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# CLE: Latest Accident Reconstruction Tools

On December 7, 2011, GDLA members gathered at Maggiano's Buckhead for a CLE seminar hosted by long-time Platinum sponsor SEA, Ltd.

James M. "Jim" Peters, P.E., (on right in photo 3) discussed emerging technologies that can help you successfully defend your next commercial or passenger vehicle accident case. Examples of new reconstruction tools include 3-D laser scanners, which were featured in the last edition of this newsletter.

Mr. Peters also reviewed aerial photography and photomodellers. For each tool, he showed actual case examples with photos and/or video footage. He then reviewed crash data recorders and electronic control modules.

In summary, Mr. Peters noted that every accident is unique and the technology for documenting it depends on its specific details, with

some accidents requiring a combination of technological tools.



This CLE was coordinated by GDLA Education Committee Vice-chair Brett Miller of Mabry & McClelland, Atlanta.

Photo highlights: 1. Michael Melonakos, Kevin Patrick and Philip Lorenz, Josh Stein, and Brett Miller. 2. Education Committee chair Wayne Melnick,

Executive VP Lynn Roberson, Kevin Patrick, and Philip Lorenz. 3. GDLA Past President Grant Smith talks with the speaker, Jim Peters. ❖

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# GDLA & ESI Sponsor Charity Golf Tourney

The GDLA teamed up once again with long-time Platinum Sponsor Engineering Systems, Inc., (ESI) to sponsor the Swing for Siblings Charity Golf Tournament, October 14, 2011, at the Trophy Club of Atlanta.

The Swing for Siblings Charity Golf Tournament is an annual fundraising event for Camp To Belong Georgia (CTB).

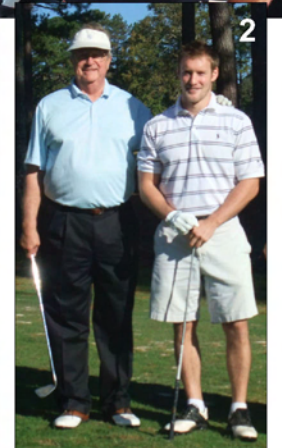
An international non-profit 501(c)(3), CTB has been actively reuniting brothers and sisters placed in separate foster, adoptive or kinship homes through summer camp programs and year round events since 1995. In Georgia, CTB is a partner of Camp Twin Lakes.

ESI covered the greens fees and provided lunch to the first 40 golfers to register. The tournament concluded with an awards banquet and silent auction, featuring sports memorabilia.

This was the second year that the GDLA has participated as a sponsor in this event with ESI.

Pictured at the tournament are

1. Edward McAfee and Mike Stevenson of ESI.
2. Arthur Mozley and ESI's Will Pinkston.
3. Adam Joffe.
4. James Hankins, Josh Stein, and Robert Luskin. ❖



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# Success as a Litigator in a Post-Litigation World

Continued from page 14

5.5 months longer to settle cases than in 2008, while outside insurance defense attorneys are settling their cases almost two months more quickly.

In-house attorneys do an excellent job representing their clients. As the above data shows, however, they are overwhelmed. An in-house attorney recently told me that she feels like she is being asked to paint a house with a nail-polish brush.

The insurance defense model was threatened when, from the insurance companies' perspective, the cost of defending a case through trial became prohibitive. In short, files were staying open too long, and, when cases were tried, the trials took too long. Most of the factors that determine the length of time needed to get a case to trial and how long the trial lasts are outside the defense attorney's control. In contrast, the scheduling of a mediation can be done quickly. Additionally, the mediation session is shorter and far less expensive than trial.

Trying a case at mediation allows insurance defense attorneys to go "back to the future." They will once again be able to successfully resolve cases for their clients in an efficient and economic manner. If the last few years have taught us anything, it is that insurance companies are very number conscious. As they track the results of mediations conducted by insurance defense attorneys, they will quickly conclude that there is great value in having their interests protected by these attorneys. Insurance defense firms would be wise to market themselves to insurance companies as firms that know how to "try cases" at mediation. The growth of mediation shows no signs of slowing. Additionally, almost half the cases that are currently being settled by insurance companies are being resolved without the assistance of insurance defense attorneys. Clearly, there is a significant market waiting to be developed.

Occasionally, I still encounter

attorneys who lament the current state of insurance defense practice. They have no time for mediation, and believe the insurance industry will soon "come to its senses" and let them back into the courtroom. They are akin to dinosaurs lamenting the arrival of mammals.

Insurance companies have demonstrated a preference for mediation. The process is evolving, however, and there are great opportunities for the insurance defense attorney willing to "try his case" at mediation. ❖



*John K. Miles, Jr. is the founder of Miles Mediation & Arbitration Services, a Platinum sponsor of the GDLA.*

*He has mediated over 2,000 cases in the areas of personal injury, premises liability, insurance, construction, estates, fiduciary, contracts, commercial, business, employment, and subrogation.*

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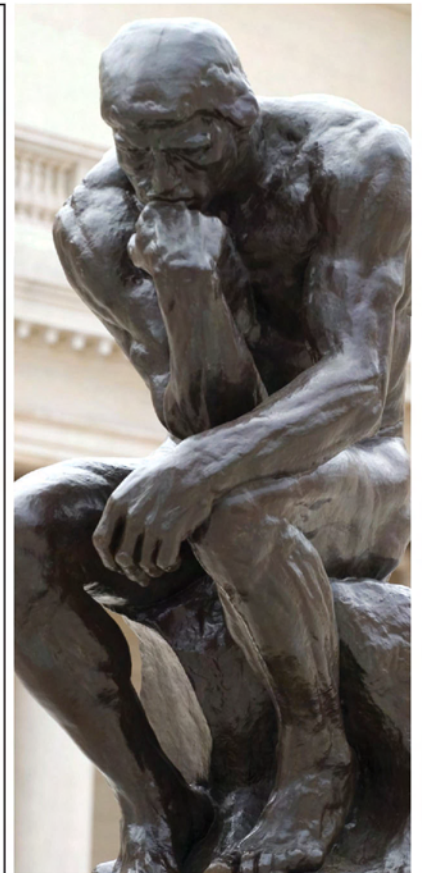
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nal proceeding, concerning a matter within the scope of the agency or employment, made during the existence of the relationship.

The new rule sets forth two simple requirements for an agency or employee admission: (1) the statement was made during the agency or employment relationship; and (2) the subject matter of the statement concerns a matter the agent or employee would know about by virtue of his agent or employee duties.

The new rule does not purport to redefine substantive law regarding when a principal is legally bound by the actions or words of his agent but only defines an agency admission for purposes of clearing a hearsay objection. Thus, even though an employee may not have been authorized to make the statement in question, the court may admit it over a hearsay objection if it meets the requirements of this subsection.

**(3) Business Record Exception Will Admit Opinions.** Currently, Georgia is one of very few states that do not allow any opinions in a business record. The new rules follow Federal Rule 803(6) and admit properly qualified opinions and diagnoses. The new rules also allow a party to use an affidavit, in lieu of live testimony, to lay the foundation for a business record, provided that the proponent gives opposing parties pretrial notice of the intent to do so. New O.C.G.A. § 24-8-803(6).

**(4) Hearsay Exception for Public Records Liberalized.** Currently, most public records must qualify for admission under Georgia's business record exception, which does not admit opinions in the record. Moreover, narrative portions of police reports are inadmissible. The new rules have a special exception for public records. "Matters observed" by public officials, including police officers, in the course of their duties are admissible in civil cases, as are "factual findings resulting

from an investigation made pursuant to authority granted by law." New O.C.G.A. § 24-8-803(8)

**(5) Res Gestae Retired.** As Professor Morgan wrote nearly a hundred years ago, "The marvelous capacity of a Latin phrase to serve as a substitute for reasoning, and the confusion of thought inevitably accompanying the use of inaccurate terminology, are nowhere better illustrated than in the decisions dealing with the admissibility of evidence as *'res gestae.'*" Edmund M. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 Yale L.J. 229, 229 (1922). The *res gestae* rule is replaced by three specific, easy-to-apply hearsay exceptions: (1) statements of present sense impressions, (2) excited utterances; and (3) statements of then existing mental, emotional, or physical conditions. New O.C.G.A. § 24-8-803(1), (2), (3).

**(6) Refreshing Recollection Rule Rationalized.** Current Georgia case law suggests that, although an opposing party has a right in a criminal case to examine what counsel shows a witness to refresh that witness's recollection, there is no such right in civil trials. Why there should be such a difference is never explained. The new rules allow opposing counsel in both civil and criminal cases to examine anything used to refresh a witness at trial, to question the witness about it, and to offer it into evidence. The new rule also gives the trial court discretion when "necessary in the interests of justice" to order production to opposing counsel of anything used to refresh a witness before the witness took the stand. New O.C.G.A. § 24-6-612.

**(7) Settlement Discussions More Fully Protected.** Current Georgia cases sometimes make arduous distinctions between "offers to settle," which are admissible, and "offers to compromise," which are not. The new rules provide broader and more definitive protection for any discussions of settlement of a claim disputed as to liability or damages. As long as the

parties are engaged in compromise negotiations or mediation, all their statements and conduct—as well as the statements of nonparties who participate in the discussions—are protected from disclosure. New O.C.G.A. § 24-4-408.

**(8) Payment of Medical and Similar Expenses.** Under current Georgia case law, an offer to pay medical or similar expenses should not be allowed into evidence as an admission of liability if the trial judge determines that the offer was made on an impulse of benevolence or sympathy. The new rule ends any uncertainties or caveats in this area: "Evidence of furnishing, offering, or promising to pay medical, hospital, or similar expenses occasioned by an injury shall not be admissible to prove liability for the injury." New O.C.G.A. § 24-4-409.

**(9) Authentication Rules Relaxed.** Authentication of such things as phone calls, notarized documents, or audio recordings can be unnecessarily challenging under current Georgia law. The new rules make it easier to lay a foundation for such evidence. New O.C.G.A. § 24-9-901, 902.

**(10) Best Evidence Rule Modernized.** Georgia's current best evidence rule was written in 1860. As such, it does not apply to photos or video recordings. The new rules apply to any form of recording. The new rules also provide that copies are admissible to the same extent as originals, unless the opposing party raises some specific problem with using a copy in lieu of the original. New O.C.G.A. § 24-10-1001 through 24-10-1006.

**(11) Impeaching the Verdict Exception Applied to Civil Cases.** At common law, the rule that jurors may not impeach their verdict was subject to an exception when extraneous prejudicial information was improperly brought to the jury's attention or any outside influence was brought to bear upon any juror. This exception currently is recognized only in criminal cases in Georgia. For

unexplained reasons, it does not apply in civil cases. The new rule applies the exception to all jury trials, civil or criminal. New O.C.G.A. § 24-6-606(b).

**(12) Prior Consistent Statement Rule Clarified.**

Under the Federal Rules of Evidence, the prior out-of-court statements of a testifying witness are hearsay. Such statements are not hearsay under current Georgia law, however, since the witness is under oath and the parties have the opportunity to cross-examine the witness concerning the prior statement. This makes more sense than the Federal Rule, and the new Georgia rules retain this approach.

To be admissible, however, a testifying witness's prior out-of-court statements still must be relevant for something other than merely repeating the witness's in-court testimony. The new rules provide that a witness's prior consistent statement is admissible if it logically rebuts an attack on the witness's credibility. For example, if the opposing party suggests on cross-examination that the witness

has a poor memory of what happened, counsel on redirect could establish that the witness made a prior consistent statement closer in time to the events in question, when his memory was fresh. Likewise, if cross-examination suggests that the witness has been influenced by recent events to shape his testimony in some respect, redirect could establish that the witness made a prior consistent statement prior to the events that allegedly influenced the witness's trial testimony. New O.C.G.A. § 24-8-801(d)(1)(A).

**(13) The Ultimate Issue Rule Abolished . . . Nominally.**

Current Georgia law embraces a limited form of the "ultimate issue rule" by prohibiting lay or expert opinion that mixes law and fact. For example, there is no problem under current Georgia law (or Federal Rule 704) if an expert testifies in a legal malpractice case that the defendant failed to use the degree of care and skill expected of an ordinary lawyer practicing in Georgia. The standard of care of attorneys is beyond the ken of ordi-

nary jurors, and thus jurors require expert assistance in drawing opinions and inferences from the evidence. Current Georgia law does not, however, allow a witness to testify in legal terms or to state legal conclusions. The new rules adopt Federal Rule 704, which states that evidence "is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."

In practice, however, Federal Rule 704 has a significant caveat. Although the "ultimate issue rule" is abolished by name, federal courts still will not allow witnesses to present opinions in legal terms or to invade the province of the jury by drawing inferences that the jurors are fully capable of drawing on their own. Rather than stating that such opinions violate the ultimate issue rule, courts exclude them on the grounds they are not helpful or will not assist the trier of fact. New O.C.G.A. § 24-7-704.

**(14) Hypothetical Questions Not Required.**

The new rules make it quite clear that although a

*Continued on next page*



***A Note from Matt and Tiffany Alley***

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*Best Regards,  
Matt and Tiffany*



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party may ask an expert hypothetical questions, the use of hypothetical question is not required. New O.C.G.A. § 24-7-705.

## SIGNIFICANT GEORGIA DIFFERENCES THAT WILL REMAIN

The new rules continue prior Georgia evidence law on many subjects, including two Georgia rules that vary significantly from federal law.

**(1) Subsequent Remedial Measure Rule Still Inapplicable in Product Cases.** Currently, Georgia does not exclude evidence of subsequent remedial measures in product liability cases. In contrast, Federal Rule of Evidence 407 does bar such evidence. The Legislature decided to retain Georgia policy in this area, and thus the new rules depart from the Federal Rules in this respect. New O.C.G.A. § 24-4-407.

**(2) Prior Inconsistent Statements of Witness Are Substantive Evidence.** Under the Federal Rules, most prior inconsistent statements of a testifying witness are admissible only for their impeachment use, not as substantive evidence. Current Georgia law admits all prior inconsistent statements of a testifying witness for both their impeachment use and as substantive evidence. The new rules depart from the Federal Rules and retain current Georgia law in this respect. New O.C.G.A. § 24-8-801(d)(1)(A).

## OTHER GEORGIA RULES THAT WILL NOT SUBSTANTIALLY CHANGE

In addition, the following rules will not change:

- Evidentiary Privileges
- Expert and Lay Opinion Rules
- Basic Definition of Hearsay
- Personal Admission Rule
- Hearsay Exception for Past Recollections Recorded
- Hearsay Exception for

- Statements for Medical Diagnosis or Treatment
- Hearsay Exception for Medical Narratives
- Hearsay Exception for Reputation Evidence
- Hearsay Exception for Former Testimony
- Hearsay Exception for Dying Declarations
- Hearsay Necessity Exception (though pretrial notice required)
- Inadmissibility of Liability Insurance and Collateral Benefits
- "Apology Statute" in Medical Malpractice Cases
- Character Rule in Civil Cases
- Presumptions in Civil Cases
- Authentication of Public Records
- Wide Open Cross-Examination Rule
- Impeachment by Prior Conviction
- Proving Value
- Routine Practice Rule
- Judicial Notice
- Rule of Completeness
- Continuing Witness Rule

## CONCLUSION

Georgia courts will likely look to federal cases—and those of the Eleventh Circuit in particular—for help in interpreting the rules at the beginning. I am updating my own books, the *Courtroom Handbook on Georgia Evidence* and *Georgia Rules of Evidence*, to include citations and discussion of useful federal cases. These new volumes will be available by early summer of 2012. In addition, the Institute of Continuing Legal Education is planning a day-long training program on the new rules for next summer, with a video recording of the program made available to all members of the Georgia Bar.

As discussed above, the new rules of evidence not only make substantive changes in the law but also improve accessibility. Rules of evidence are only as good as the lawyers and judges who must recall

and apply them quickly and accurately in the heat of trial. Compared with existing Georgia law, the new rules provide a clearer, simpler, more comprehensive approach to evidentiary issues. ❖



Paul S. Milich is a Professor of Law and Director of the Litigation Skills Program at Georgia State University's College of Law. He was Reporter for the State Bar of Georgia's Evidence Study Committee, which successfully urged the adoption of new rules of evidence in Georgia.

## Mass Torts Update

Continued from page 26

On the defendants' motion to strike, the trial court conducted a *Daubert* hearing and concluded that Dr. Maddox's opinions failed to satisfy the requirements of scientific reliability. The trial court applied the four noninclusive *Daubert* criteria and concluded that Dr. Maddox's "every exposure" opinion did not satisfy these criteria. Specifically, the court ruled that Dr. Maddox's opinions failed both the first and third criteria, as his theory of causation was untestable and therefore had no error rate. Without Dr. Maddox's causation testimony, moreover, the plaintiff was unable to rebut the defendant's motion for summary judgment.

This decision will make it more difficult for asbestos plaintiffs to maintain claims against defendants against whom they have minimal exposure evidence. ❖

<sup>1</sup>*Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

clause in the lease and the Security Waiver Addendum were void as a matter of public policy. Judge Taylor agreed that the lease language precluded the plaintiff's claim and granted summary judgment to the defendant property owner and management.

After setting forth the general law covering third-party criminal attack cases, Judge Taylor turned to the lease and found that the exculpatory clause was unambiguous. Because of that, construction of that clause was rendered a pure question of law for the court. The court determined that the lease's exculpatory clause contractually relieved the defendants from liability for loss or damage resulting from criminal acts committed against the plaintiff by third parties.

The court then turned to plaintiff's argument that the exculpatory clause was void as a matter of public policy. Looking to O.C.G.A. § 44-7-2, the court stated that the legislature had specifically limited which rights, duties, or remedies the parties to a lease agreement may waive, assign, transfer, or otherwise avoid. For instance, a landlord may not avoid his duty to keep the premises in repair, O.C.G.A. § 44-7-13, and a landlord is "responsible for damages arising from defective construction or for damages arising from failure to keep the premises in repair," O.C.G.A. § 44-7-14. After examining the law related to the enforcement of exculpatory clauses generally, the court concluded that the exculpatory clause precluded a negligent-security claim brought under O.C.G.A. § 51-3-1. The court reasoned that general negligence causes of action are waiveable and that the plaintiff had waived his claim in this case. Relying on the "paramount public policy of this state," the court held that it would not interfere with the parties' freedom of contract. Thus, the court concluded that the exculpatory clause relieved the defendants of liability for the criminal attack on the plaintiff. The plaintiff is appeal-

ing the trial court's decision to the Georgia Court of Appeals.

Although this ruling is good for property owners and managers, its broader applicability is necessarily limited by the facts of the case—and

**Although this ruling is good for property owners and managers, its broader applicability is necessarily limited by the facts of the case—and it will undoubtedly face stiff opposition from the plaintiff's bar.**

it will undoubtedly face stiff opposition from the plaintiff's bar. Assuming that Judge Taylor's ruling is upheld on appeal, its precedential effect will be limited to cases in which tenants have signed leases with similarly worded exculpatory clauses. The courts are unlikely to extend the ruling to relieve a property owner or occupier of the duty imposed by O.C.G.A. § 51-3-1 where the plaintiff has not freely and voluntarily entered into a lease agreement and freely and voluntarily waived any right to sue under that statute. Additionally, the ruling appears to be limited to claims brought under § 51-3-1. The Georgia landlord/tenant code makes it clear that a party to a lease may not relieve itself of the obligations imposed by O.C.G.A. §§ 44-7-13 and 14. Therefore, certain claims truly arising from defective construction or repair of leased premises are not covered by Judge Taylor's opinion. In fact, the opinion itself notes that the plaintiff had not asserted a claim based on the status of repair of the leased property.

During the appeal of *Jusupovic*, the plaintiff will likely make many of the same public policy arguments

that he raised in the trial court. The plaintiff will likely argue that allowing a landlord to impose such language in a lease is inherently unfair due to the unequal bargaining powers of the parties. That argument, of course, ignores the economic realities of the marketplace, which has been one of the inherent inequities occasioned by O.C.G.A. § 51-3-1 on property owners of low-to-medium income housing. The duty of care imposed by the law ignores the fact that many property owners simply cannot charge enough to insure that their properties are free of crime. Furthermore, the duty imposed is the same regardless of the property's location. Plaintiff's expected arguments regarding unequal bargaining power would likewise serve to maintain this inequity, despite the fact that nothing compels a person to enter into a lease that contains this provision, especially in a market that has a plethora of apartment homes.

The outcome of the *Jusupovic* appeal will be watched by premises liability lawyers on both sides of the aisle. If Judge Taylor's ruling is sustained, landlords may be able to limit liability for certain negligent-security claims through the use of properly worded leases and addenda. ❖



C. Shane Keith is a partner with the Atlanta office of Hawkins Parnell Thackston & Young. He practices primarily in the areas of premises liability, products liability, and professional liability. He chairs the GDLA Premises Liability Substantive Law Committee.



Robert P. "Robin" Hein is Senior Counsel at the Atlanta firm of Fowler Hein Cheatwood & Williams. He authored the 2009 Georgia Apartment Law Book and serves on the Board of Directors of the Atlanta and Georgia Apartment Associations.

## meaning of the statutory exception to Georgia's 10-year statute of repose for negligent design claims.

### *Ivy v. Ford Motor Co.* 646 F.3d 769 (11th Cir. 2011)

On May 22, 2006, plaintiff Melanie Ivy lost control of her mother's 1996 Ford Explorer while steering to avoid a collision with another vehicle. The Explorer rolled and Ivy was ejected from the vehicle, causing injuries that rendered her a paraplegic. On May 20, 2008, Ivy filed suit against Ford, alleging claims for failure to warn and negligent design. Following removal to federal court, the district court granted summary judgment to Ford on all claims, and Ivy appealed to the U.S. Court of Appeals for the Eleventh Circuit.

Ivy waived her failure-to-warn claim on appeal, and thus the Eleventh Circuit addressed only her design claims. Because Ivy's

mother purchased the Explorer in September 1995 and Ivy did not file her lawsuit until 2008, Georgia's 10-year statute of repose for negligent design claims, O.C.G.A. § 51-1-11(b)(2), presented a barrier to Ivy's claims. To avoid this barrier, Ivy attempted to rely on O.C.G.A. § 51-1-11(c), which provides that the statute of repose does not bar claims arising from "conduct which manifests a willful, reckless, or wanton disregard for life or property."

The Eleventh Circuit ruled that Ivy had failed to offer sufficient evidence to prove that Ford's conduct was willful, reckless, or wanton. The evidence showed, *inter alia*, that Ivy's Explorer was a second-generation model that performed safely according to reputable mainstream sources, including the National Highway Traffic Safety Administration (NHTSA) and a consumer product testing organization, at the time it was marketed.

Several years after this model's release, moreover, it performed well in the two tests deemed most appropriate by the NHTSA for assessing susceptibility to rollover. The evidence further showed that Ford had expended considerable effort to ensure that its product was within industry guidelines. In addition, the evidence showed that Ford management requested modifications to improve safety even after Ford's engineers were satisfied with the safety of the vehicle's design and that additional modifications were made to the vehicle as a result.

Based on this evidence, the Eleventh Circuit ruled that Ivy had failed to prove that the "willful, reckless, or wanton" exception to the statute of repose applied. The Eleventh Circuit therefore affirmed the district court's order granting summary judgment to Ford. ❖

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Nine months later, the superior court denied the City's motion without ever holding a hearing on it, and granted Holder's motion to enforce the judgment. The court subsequently entered a final order that directed the City to pay Holder the judgment plus penalties, interest, and attorney's fees.

The Court of Appeals reversed, ruling that the superior court had abused its discretion in denying the City's motion to set aside the judgment. The Court of Appeals determined that the uncontested evidence showed the second award had resulted from a mistake. The superior court was not required to hold a hearing on the City's motion to set aside the judgment, and, in the absence of such a hearing, any party who wanted to raise an evidentiary issue had to do so by submitting affidavits to the court. Because Holder had not submitted any evidence in response to the City's motion and affidavit in support thereof, the only evidence in the record showed that a mistake had occurred and that Holder was not entitled to the second award.

Based on this evidence, the Court of Appeals found that the City's motion demonstrated a basis for relief under O.C.G.A. § 9-11-60(d)(2), which provides that a court may set aside a judgment based on fraud, accident, or mistake. Although this provision allows relief only where the grounds for the motion are "unmixed with the negligence or fault of the movant," the Court of Appeals ruled that the fault leading to the judgment was the superior court's failure to issue a timely order on the City's initial appeal of the erroneous second award, which resulted in the award being affirmed by operation of law.

Holder argued that *res judicata* or law of the case barred the City's motion because the issues raised therein had already been raised and decided on the two earlier occasions that the case had been before the Court of Appeals. The Court of Appeals rejected this argu-

ment, ruling that the earlier appeals had involved only the narrow issue of the second award's affirmance by operation of law due to the superior court's inaction.

Thus, the Court of Appeals concluded that the City's motion to set aside the judgment was legally authorized. Because this motion demonstrated that relief was warranted based on the un rebutted evidence that the second award was "entirely the product of a mistake," the Court of Appeals further concluded that the superior court had abused its discretion in denying the motion. Therefore, the Court of Appeals reversed the superior court's judgment and remanded the case with instructions to grant the City's motion.

**CAUSATION: To obtain an award of continuing temporary partial disability benefits, an employee terminated for reasons unrelated to his workers' compensation injury bears the burden of proving that his injury is the proximate cause of his inability to find work.**

### ***Veolia Envtl. Servs. v. Vick* 309 Ga. App. 658 (2011)**

On April 27, 2007, Jeffrey Vick broke his left ankle in the course of his employment with Veolia Environmental Services. After receiving temporary total disability benefits, Vick returned to light-duty work on June 28, 2007, and continued working with restrictions until March 2008, when he was given a prescription for morphine by his personal doctor.

Pursuant to its drug policy, which requires employees in safety-sensitive positions to report the use of prescription medications that may prevent safe job performance, Veolia removed Vick from work until he provided a clearance letter from his doctor stating that he could safely work while on the medication. After Vick repeatedly failed to provide the requested documentation, Veolia terminated his

employment on May 2, 2008.

Vick requested a hearing, seeking temporary partial disability benefits for the time that he had worked under light-duty restrictions and temporary total disability benefits commencing at the time of his termination. The ALJ granted the request for temporary partial disability benefits but denied the request for temporary total disability benefits, finding that Vick had not made a diligent job search. The ALJ further determined that Vick was entitled to continuing temporary partial disability benefits post-termination because Veolia had not met its burden of proving a change in condition.

The appellate division reversed the award of continuing temporary partial disability benefits, and Vick appealed to the superior court. The superior court remanded the case to the appellate division with the instruction that Veolia be assigned the burden of proving that Vick was not entitled to continuing temporary partial disability benefits post-termination. Veolia appealed, arguing that the superior court had erred in ruling that Veolia had the burden of proof on this issue.

The Court of Appeals agreed and reversed the superior court's judgment. Because Vick had been terminated for a reason unrelated to his injury, the Court of Appeals ruled that he had the burden of proving that his injury was the proximate cause of his inability to find work. Vick had not met this burden. As the ALJ found, Vick's continued unemployment was actually the result of his failure to make a sincere and diligent effort to secure another job. The Court of Appeals therefore held that Vick was not entitled to continuing temporary partial disability benefits post-termination. ❖



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