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O.C.G.A. 51-12-33 Means What it Says: Thou Shalt Apportion

Photo courtesy of *The Daily Report*

By Myles Levelle
Drew Eckl & Farnham, Atlanta

On November 20, 2015, the Court of Appeals of Georgia united in reversing a $35 million verdict against Six Flags Over Georgia. Plaintiff Joshua Martin alleged a premises liability claim, following a physical attack outside the theme park's gates. This important decision will have a significant impact on apportionment in Georgia and should, therefore, be understood by defense lawyers regardless of practice area.

In *Six Flags Over Georgia II, LP v. Martin,* the Court of Appeals issued several holdings concerning premises liability under O.C.G.A. § 51-3-1, and a separate and distinct holding concerning Georgia's apportionment statute – O.C.G.A. § 51-12-33 – which ultimately led to a reversal of the jury verdict. While questions abound concerning what many see as the Court's expansion of premises liability under Georgia law, this article focuses exclusively on the apportionment aspects of the ruling, which emphatically clarify Georgia trial courts' obligations with regard to apportionment of fault to nonparty criminal actors and the use of jury verdict forms.

Six Flags can be briefly summarized as follows. Six Flags timely sought apportionment against multiple nonparties, including several John Does, Brandon Forbes, Ander Cowart, Jonathan McCoy, Brian Gay, Nicholas Gay, David Miller, Kentavious Stevens, and Mark Davis.[1]

At trial, Six Flags presented *some evidence* that Mr. Cowart,

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Inside This Issue

Taking Advantage of Jurors' Decision-Making Shortcuts

By Alayna Jehle, Ph.D., and
Rick R. Fuentes, Ph.D.
R&D Strategic Solutions

Have you ever had a case where the plaintiff seemed to be at least somewhat to blame for the incident or where there were other third parties that caused the harm? However, you were concerned jurors may look down on you if you "blamed the victim" or spoke about the other parties.

This is a common issue facing defense lawyers that can result in one of two approaches that inhibit persuasion: 1) Going too far in criticizing the plaintiff, which can result in loss of credibility with the jurors; or 2) Deciding not to discuss the plaintiff's fault at all and jurors

are left with no other causal explanation except the defendant.

The best course of action for defense lawyers falls in the middle of those two paths. The key to successfully shifting responsibility onto the plaintiff or other party is to activate the *availability bias* in jurors by discussing the plaintiff's conduct first and foremost.

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President's Message

As we listen to the presidential candidates criticize and argue about the current and past leadership of our country, I am proud that our GDLA past presidents have led our organization in the right direction.

There certainly is no debate about their collective record: over 850 GDLA members and growing, the best Trial & Mediation Academy in the country, a debt-free operation with a fiscally prudent budget, and a professional Board of Directors always committed to the diversity of ideas and people.

So, join me in thanking the GDLA past presidents shown on page 52. The collective efforts of these accomplished lawyers and leaders have been advancing the civil defense bar in Georgia and making GDLA the best for almost 50 years.

I committed last June to working diligently with our officers and board members to build on the foundation of this strong leadership, for the benefit of all of us in GDLA, and we are doing that now.

Committed to Batting 1,000!

GDLA is considered one of DRI's State & Local Defense Organizations (SLDOs), and yet we find that some Georgia defense lawyers belong to DRI, but are not yet members of GDLA. As I mentioned in my last column, DRI members who have not been a GDLA member within the past five years are now eligible for a complimentary year of GDLA membership.

Additionally, we intend to have a joint networking event with DRI. In fact, the Young Lawyers Committees from both of our groups have already had one mixer.

Our message is clear: We want all DRI members in our state organization. We are stronger when we present a united front, advancing the civil defense bar collectively.

Committed to Professionalism!

We are reaching across the aisle to forge and enhance our professional relationships. Last September, we came together with GTLA and also Georgia's Chapter of the American Board of Trial Advocates (ABOTA). As the photos on pages 46 and 47 show, a great time was had by all, and our three groups expect to make the GDLA-GTLA-ABOTA Rivalry Happy Hour, including our appellate bench, an annual gathering.

Also, and with thanks to Secretary Hall McKinley, who recently rotated off of the American Bar Association's Tort Trial & Insurance Practice Section (TIPS) Board, we'll be combining forces again with GTLA to produce a seminar segment during the TIPS Section Conference, May 11-15, 2016, at the Intercontinental Buckhead in Atlanta. Look for more information coming to your inbox.

Committed to Raising our Profile!

From the *Daily Report* to the *Atlanta Business Chronicle* (Who's Who in Law & Accounting), the GDLA is in the news prominently and frequently. Our Amicus Committee continues to file important briefs in both of our Georgia appellate courts, as well as most recently in the Eleventh Circuit Court of Appeals (see pages 13 and 14). We appear regularly before the Judicial Nominating Commission (JNC) so our voice is heard in that critical vetting process. Our newsletter is mailed to judges, in addition to members, and continues to win annual awards from the State Bar, garnering the fifth consecutive one in 2015. Each year, our Atlanta Judicial Reception attendance exponentially increases; be sure you calendar to attend every February.

As an additional means of raising our profile and expanding our voice, we have reinvigorated a long-dormant Legislative Committee. In fact, many Board members were surprised to learn, from old meeting

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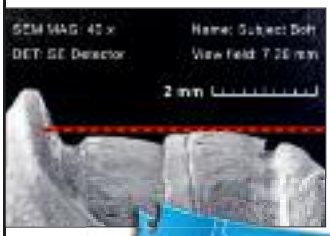

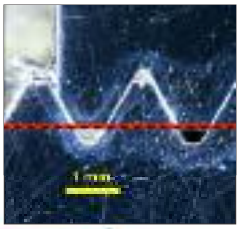

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Member News & Case Wins

Member News

With the passing of longtime GDLA Board of Directors member **Robert R. (Rusty) Gunn, II**, of *Martin Snow* in Macon, the Board of Directors appointed current Board member **Jason C. Logan** of *Constangy Brooks Smith & Prophete* in Macon to fill his unexpired term ending in 2018. They also appointed **C. Jason Willcox** of *Moore Clarke DuVall & Rodgers* in Albany to fill Mr. Logan's term expiring in June of 2016. (See the memorial tribute to Rusty Gunn on page 8.)

Swift Currie McGhee & Hiers announced the retirement of partner **Lynn M. Roberson** on August 31, 2015. She leaves the firm after 31 years to serve as a mediator with Miles Mediation in Atlanta. Ms. Roberson is a GDLA Past President.

During the State Bar of Georgia's Fall Board of Governors Meeting in Savannah, in an historic event, **Patrick T. O'Connor** of *Oliver Maner* in Savannah was elected to serve a dual role as President-elect and Treasurer.

Waldon Adelman Castilla Hiestand & Prout in Atlanta announced that **John Alday** has been named a partner in the firm. He practices in the areas of automobile negligence, premises liability, and insurance coverage.

On August 21, 2015, in Chicago, **Grant B. Smith of** *Dennis Corey Porter & Smith* in Atlanta was appointed by the *American College of Transportation Attorneys* to serve as Treasurer. He is a GDLA Past President.

Gray Rust St. Amand Moffett & Brieske in Atlanta announced that **Nicole C. Leet** was elevated to partner effective December 1, 2015. She specializes in civil tort litigation. Ms. Leet is also Treasurer of the State Bar of Georgia Young Lawyers Division and serves on the GDLA Newsletter Editorial Board.

Three GDLA members were appointed to serve on the State Bar of Georgia's Electronically Stored Information Task Force: **K. Alex Khoury** of *Balch & Bingham* in Atlanta; **Richard Tisinger, Jr.** of *Tisinger Vance* in Carrollton; and GDLA Vice President **Jeffrey S. Ward** of *Drew Eckl & Farnham* in Brunswick. They join GDLA members **Henry D. (Hank) Fellows, Jr.** of *Fellows LaBriola* in Atlanta and **Edward H. Lindsey, Jr.** of *Goodman McGuffey Lindsey & Johnson* in Atlanta, already serving.

GDLA Board member **Martin A. (Marty) Levinson** of *Hawkins Parnell Thackston & Young* in Atlanta and **J. Anderson (Andy) Davis** of *Brinson Askew Berry Seigler Richardson & Davis* in Rome were appointed to serve on the State Bar of Georgia's Advisory Committee on Legislation.

Taylor Odachowski Schmidt & Crossland announced that **Edward R. (Ed) Stabell, III** has joined the firm. He will be serving clients out of the firm's offices in Savannah, St. Simons Island, and Atlanta. His practice focuses on insurance defense and coverage, general and premises liability, product liability, commercial and residential property, construction, transportation, professional negligence, local government, and business and bankruptcy litigation. Mr. Stabell chairs the GDLA Insurance Coverage Law Section.

Kimberly Sheridan, formerly with *Jeyaram & Associates*, has joined the civil litigation defense practice group at *Fain Major & Brennan* in Atlanta. Ms. Sheridan's practice will include product liability, premises liability, motor vehicle litigation, trucking litigation, insurance coverage disputes, wrongful death and professional liability defense.

Hawkins Parnell Thackston & Young announced that **Todd C. Alley, Debra E. LeVorse** and **Eric T. Hawkins** were elected to partner in the Atlanta office. Mr. Alley's practice focuses primarily on toxic tort and environmental, as well as business litigation. Ms. LeVorse actively represents defendants in civil litigation matters. Mr. Hawkins focuses his practice on product liability, toxic tort, environmental litigation and related specialties.

Lewis Brisbois Bisgaard & Smith welcomed **Franklin P. (Frank) Brannen, Jr.** to the Atlanta office as a partner in the firm's products liability practice. Mr. Brannen, previously with *King & Spalding*, has defended manufacturers in complex product liability lawsuits for almost two decades.

Owen Gleaton Egan Jones & Sweeney announced several of its lawyers were named 2016 Best Lawyers®: **H. Andrew (Andy) Owen** and **Frederick N. (Fred) Gleaton** for medical malpractice defense; and **Philippa V. Ellis** for product liability. The sister publication, *Best Law Firms®*, also recognized the firm again as a "Tier One" law firm for medical malpractice defense.

HunterMaclean in Savannah announced that senior partner **John M. Tatum** received the Savannah Bar Association's Judge Frank Cheatham Professionalism Award. The award is presented to an attorney within the legal community who best exemplifies professionalism in how he or she engages clients and members of the community as a whole.

Case Wins

GDLA Board Member **Wayne S. Melnick** along with his partner **Brian R. Dempsey** and their associate **A. Ali Sabzevari** at *Freeman Mathis & Gary* in Atlanta, won summary judgment in a first-of-its-kind case in the Northern District of Georgia. This is the first ruling in the Eleventh Circuit regarding whether a SWAT officer's use of a noise-flash diversionary device ("flash bang") is protected by qualified immunity.

Plaintiff was severely burned by a flash bang during the execution of

a no-knock search warrant for narcotics. Plaintiff alleged that she was asleep in bed with her boyfriend (the target of the warrant), when they were each awakened in the early morning by an explosion and the sound of breaking glass. When she saw the bedroom window had been broken out (via a "break-and-rake" technique performed by a SWAT officer), she then saw a round object land on the blanket covering her on the bed. The object exploded with a blinding flash and loud boom. Plaintiff alleged that she felt searing pain at that point and ran from the room into the bathroom across the hall where she was discovered and handcuffed by the officers searching for her boyfriend.

Plaintiff brought a Section 1983 claim and related state law claims, alleging the officers knew the bedroom was occupied and the officer deploying the flash bang did so despite the known danger to the room's occupants.

Earlier in the case, the district court denied a motion for judgment on the pleadings. In accepting Plaintiff's allegations as true, the court accepted Plaintiff's allegation that the officer intentionally tossed the flash bang onto a sleeping person, and that this was sufficient to demonstrate constitutional rules so clear that case law need not establish the unlawfulness of such conduct. The court likewise found the allegations of an intentional, malicious act sufficient to deny official immunity on the state law claims.

However, at summary judgment, the court no longer had to accept Plaintiff's mere allegations as true. Although Plaintiff alleged (and testified) that the officer deployed the flash bang through the window, this was specifically disputed by the officer who stated he certainly did not know she was in the bedroom and he had actually made an aerial deployment of the flash bang outside the apartment.

Even accepting that the flash bang was deployed within the apartment as Plaintiff testified, the court still found qualified immunity applied. The court first found that no constitutional violation occurred because the use of the flash bang was reasonable based on the known facts (and not merely Plaintiff's unsupported allegations) of how Plaintiff's drug-dealer boyfriend operated and the fact that he was armed. The court also noted there was no evidence to support the officer's intended use for the flash bang was for anything other than diversionary purposes.

Not only did the court find no constitutional violation was committed, but also it found the claimed constitutional right was not clearly established. Noting no precedent in the Eleventh Circuit regarding flash bang usage, the court was unwilling to find the "obvious clarity" exception to qualified immunity applied. Importantly, the court noted other courts around the nation have held that deploying a flash bang into a residence, even without surveying the room first, did not preclude qualified immunity.

In the end, although Plaintiff alleged the officer intentionally deployed the flash bang into the room to hurt her, the defense was able to demonstrate those allegations were not supported by any evidence. Without that element, Plaintiff's Section 1983 and state law claims failed as a matter of law.

Richard (Richie) Foster and **Elizabeth (Beth) Bentley** of *Carlock Copeland & Stair* in Atlanta recently achieved a dismissal for their corporate trucking client in federal court based on the expiration of the statute of limitations, as well as sanctions against the plaintiff's attorneys who refused to dismiss the claim.

The driver of the truck received a citation during the collision and the plaintiff argued O.C.G.A. § 9-3-99, which allows for the statute of limitations to be tolled for civil actions that "aris[e] out of the facts and circumstances related to the commission of a crime," tolled the statute of limitations for the driver's employer as well as the driver.

According to the plaintiff, the prior Court of Appeals decisions – holding O.C.G.A. § 9-3-99 applied only to the person charged with the crime (and not to any joint tortfeasors or employers) – were distinguishable because none of the prior opinions involved claims of vicarious liability. However, the federal district court held Georgia law was "abundantly clear" that the plaintiff's claims against the trucking company were time-barred.

As for the Rule 11 motion for sanctions that was filed, the court agreed sanctions were appropriate, ordered plaintiff's counsel to pay the company's legal fees incurred since the date when plaintiff was first notified by defense counsel that the claims were time-barred, and publicly censured the attorneys.

Kim M. Jackson and **Jared W. Heald** of *Bovis Kyle Burch & Medlin* in Atlanta successfully defended claims against their clients, which included the co-administrator of an estate and her attorneys, for attorneys' fees and expenses of litigation arising out of contentious estate dispute between co-administrators.

The two co-administrators had litigated disputes over the proper recipient of certain high value assets and the handlings and funding of a testamentary trust. The parties eventually settled their disputes before the Probate Court, but as part of the settlement they left open certain issues including claims for attorneys' fees, to be decided by a senior judge. The opposing co-administrator filed claims for abusive litigation (O.C.G.A. § 9-15-14) and breach of fiduciary duty (O.C.G.A. § 53-7-54(a)(1)) seeking over $426,000 in fees and litigation expenses.

Mr. Jackson and Mr. Heald defended against the motions in the one day bench trial held before the senior judge. The judge issued his order finding in favor of their clients and denying the motions in full.

Troy Lance Greene of *McNatt Greene & Peterson* in Vidalia recently obtained a defense verdict in a fire loss case in Hart County, Ga.

The plaintiffs lost their structure in a fire in a rural part of the county, and contended the defendant-utility had allowed kudzu to grow on a service line to a meter base pole. It was the plaintiffs' contention that the weight of the kudzu on the line caused the line to stretch and caused a short in the plaintiffs' structure when it was removed. The structure was a total loss and the claimed damages in the original action were over a $100,000.

The defense was able to prevent the plaintiffs' claim for attorneys' fees and punitive damages from being submitted to the jury. The defendant also filed a Daubert motion challenging the plaintiff's expert, which was denied. However, the court granted the defendant's motion to bifurcate the trial between liability and damages. The jury ultimately never reached the question of damages.

The plaintiffs' expert was forced to admit on the stand the data supplied to him was flawed, and he conceded this affected his opinion as to fault. It was the defendant's position the kudzu could not have caused the short as alleged by the plaintiffs in their complaint. Moreover, the plaintiffs had destroyed the fire scene by the time the defendant's expert was able to inspect it, and the defendant's expert was unable to opine as to what actually caused the fire. However, he was able to opine the plaintiffs' theory was not credible.

Employees of the defendant-utility also testified that when they arrived on the scene to cut the kudzu per the plaintiffs' request, they found no evidence of any type of electrical problem that needed to be corrected. The plaintiffs contended the kudzu's weight had pulled a house knob away from the pole. However, the defendants showed this was more likely caused by external forces and not the kudzu's weight.

The plaintiffs also contended the defendant ignored their request to cut the kudzu on other occasions. The defendant denied this and contended they only had one notice of request for cutting and that was done immediately after the request. The fire resulted a few days after the actual cutting. The plaintiffs' contended this showed ipso facto the cutting was the proximate cause of the fire. This was disputed by the defendant's employees and the defendant's expert who is an electrical engineer.

The case was tried over three and one-half days, and the jury returned a verdict for the defendant late in the evening of the last day of trial. ❖

Robert R. (Rusty) Gunn, II: A Remembrance

His life was gentle, and the elements so mix'd in him that Nature might stand up and say to all the world, 'This was a man." –William Shakespeare, *Julius Caesar*, Act V, Scene V

By Jerry A. Buchanan
GDLA Past President
Buchanan & Land, Columbus

How doomed to failure must be any attempt to set down in a single writing an adequate remembrance of the person that was and is Rusty Gunn. It is a subject at once simple and complex, easy and hard, funny and sad.

Rusty Gunn departed this life on August 10, 2015, and his passing silenced the voice of a great man, husband, father, grandfather, brother, lawyer, friend, mentor, teacher, and GDLA member and director. He was 109 days shy of his 64th birthday, and far too young to leave us.

Rusty loved life, and he lived the one he was given in full measure. He loved spending time with his family, his friends, and his law partners. He loved trying lawsuits, and was exceptionally good at it. He was likewise a great mediator, and through South Georgia ADR, brought to resolution hundreds of disputes and claims without the expense and time of trial, allowing the litigants to get on with their lives. He took his work in the defense of cases seriously, but not so much so that he thought he should win every case. His goal was to get to the truth, and to obtain a good and just result for his clients consistent with the truth. He pursued that goal vigorously.

Rusty was an expert on insurance law and a specialist in the defense of claims of bad faith made by plaintiffs against their insurance companies for failure to pay time-limited policy limits demands. He believed in his clients, and that belief apparently rubbed off on judges and juries. He very seldom had a bad result.

Rusty loved to tell stories. To be a great trial lawyer, one must be a great story teller, and Rusty was one of the best. And he was a superb teacher of trial technique. For more than 20 years, he served on the faculty of the GDLA Trial & Mediation Academy, and was its Chair for several years. He was always glad to teach young lawyers how to be better lawyers, and better trial lawyers in particular.

Rusty always had time to talk to me – or at least he generously gave me that time. He was a regular mentor of mine. I would often call him just to shoot the breeze, or discuss a problem case I was handling, and I always felt better after those calls. The problem always seemed more manageable and less daunting than it had been before we talked. I miss dialing that number and talking to my friend.

Rusty was very loyal to the GDLA, and those of us who were fortunate enough to serve on the faculty of the Trial & Mediation Academy developed a special bond with him, as we got to spend three days a year with him at Callaway Gardens without major interruptions to conduct business. Here are some of the comments about Rusty from his fellow faculty members at the Academy.

Billy Harrison: *"In the 41 years that I was friends with Rusty, I never heard him say an unkind word about anyone. I never had a conversation with Rusty that he didn't say something funny to make me laugh."*

Douglas Burrell: *"For myself, as one of the younger members of the Trial & Mediation Academy faculty, there was nothing better than watching a true master like Rusty teach young lawyers how to try cases. I am a better trial lawyer and person because I had the opportunity to teach with Rusty and to watch him teach others the fine points of trial practice."*

Bill Casey: *"I am very sorry Rusty is gone. He was a great member of the Trial & Mediation*

Academy faculty. I so enjoyed his awesome Southern accent. He could read a phone book and make it sound interesting."

Past President George Duncan: *"The thought that immediately comes to mind is that Rusty was a first-rate mediator. Mediators attend classes and seminars to learn techniques on establishing rapport, building credibility, solving problems creatively and persevering. Rusty didn't need seminars for any of this – it was simply who he was."*

Dick Willis: *"Rusty cared – about his clients, his cases, his colleagues, his staff, about the young lawyers he mentored and the older lawyers he worked with. He cared about the lawyers on the other side of his cases. He cared about judges and the rule of law and the sacred role of the advocate. He understood that the life of a lawyer is ultimately a life of service to others. Every year at Callaway Gardens, I found myself listening to Rusty and thinking, 'Now that is the kind of lawyer I want to be.'"*

And so we bid our good friend and brother at the bar a fond farewell and goodbye for now. There is no doubt that Rusty lived his life here in such a way that he was well prepared for his first docket call in the life beyond, and that when his case was called, he announced boldly and confidently: "Ready!"

Photo Memories:
1. Rusty and his beloved wife, Brent, at The Breakers for the 2013 GDLA Annual Meeting; 2. Rusty (right) with fellow Academy faculty (l-r) Jerry Buchanan, Dick Willis and Bill Casey; 3. Rusty in his element as trial teacher at Trial & Mediation Academy; 4. Brent and Rusty (at right) enjoyed many Board meetings during his tenure. Here they are with VP Jeff Ward and his wife, Greer; 5. Rusty enjoyed talking with students outside the "classroom" during Trial & Mediation Academy. Here he visits with Reneé Rainey and keynote speaker, Court of Appeals Judge John Ellington. 6. Rusty with Executive Director Jennifer Davis; 7. Secretary Hall McKinley and Western Circuit Superior Court Judge Lawton Stephens with Rusty at the 2013 Annual Meeting; 8. Here is a typical scene at the Trial & Mediation Academy hospitality suite where many laughs – and drinks – were shared: Jerry Buchanan (in the background) has Rusty in stitches. ❖

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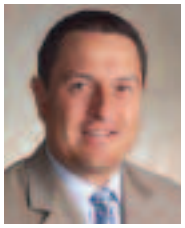
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Welcome New GDLA Members

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

Tyler L. Arnold
Arnall Golden & Gregory, Atlanta

Quinn Bennett
Waldon Adelman Castilla Hiestand & Prout, Atlanta

E. Tyron Brown
Hawkins Parnell Thackston & Young, Atlanta

Joshua Canton
Conroy Simberg, Tallahassee, FL

Lori G. Cohen
Greenberg Traurig, Atlanta

Samuel Crochet
Hall Booth Smith, Atlanta

Joan M. Gutermuth
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Tracy K. (T.K.) Haff
Buckley Christopher & Haff, Atlanta

Jared W. Heald
Bovis Kyle Burch & Medlin, Atlanta

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Law Office of John Calhoun Harris, Jr., Atlanta

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City of Atlanta Department of Law, Atlanta

Dara Mann
Dentons US, Atlanta

Yolvondra Martin-Brown
The Martin Law Group, Atlanta

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David L. Schwartz
McMickle Kurey & Branch, Alpharetta

Paul Scott
Brown Readdick Bumgartner Carter Strickland & Watkins, Brunswick

Emily McLarty Shuman
Drew Eckl & Farnham, Atlanta

Victoria Christine Smith
King & Spalding, Atlanta

Courtney L. Valentine
Hunter Maclean Exley & Dunn, Savannah

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GDLA Files Amicus Brief: Can Plaintiffs Unilaterally Impose Conditions of Acceptance in Policy Limit Time Demands?

In a recent case, the GDLA took an amicus stand where a plaintiff unilaterally sought to impose conditions of acceptance of a policy limit time demand. Garret W. Meader of Drew Eckl & Farnham in Brunswick drafted the amicus curiae brief on behalf of the GDLA in the case of *Grange Mutual Casualty Company v. Boris Woodard, et al*, docket no. 15-13295 before the Eleventh Circuit Court of Appeals.

Grange involves a case of first impression before the Eleventh Circuit addressing policy limit time demands. The plaintiff-appellee in *Grange* was involved in a catastrophic car wreck which caused the death of his daughter, who was a passenger in his vehicle. The driver of the other vehicle had liability insurance with Grange Mutual Casualty Company.

The plaintiff-appellee's attorneys did what is customary and standard for claimant attorneys in such a situation and sent Grange a time demand calling for the payment of policy limits. The time-limited demand prominently stated that it was an offer to settle a tort claim pursuant to O.C.G.A § 9-11-67.1. A paragraph within the demand purportedly conditioned acceptance of the offer on payment being made within 10 days. However, while a check was issued by Grange within 10 days of acceptance, a computer glitch caused the check to be sent to the wrong address.

The plaintiff-appellee subsequently took the position that its policy limit demand had not been accepted because payment was not timely received. The parties filed cross motions for summary judgment and the District Court ruled that Grange failed to accept the demand because: (1) the plaintiff was permitted to condition acceptance upon timely payment; and (2) even though a check was issued, payment was not made because the plaintiff did not receive the settlement proceeds within 10 days.

The GDLA argued that the District Court erred because: (1) the plain language of O.C.G.A. § 9-11-67.1 expressly provides the proper, and exclusive way to make and accept a policy limit time demand; and (2) notwithstanding O.C.G.A. § 9-11-67.1, Grange properly accepted the plaintiff's demand and timely made payment.

In its brief, GDLA noted that O.C.G.A. § 9-11-67.1 was intended to preempt disputes concerning whether a claimant has made a proper offer and whether an offer has been accepted. As such, the statute expressly provides for the essential terms that must be included in a valid offer and it states that an offer must be accepted in writing. While the statute permits a party to require payment within a time certain, this requirement is a condition of performance; not of acceptance.

The GDLA further argued that permitting plaintiffs to unilaterally impose conditions of acceptance defeats the purpose of the statute, which is to remove uncertainty for making and responding to policy limit time demands. Moreover, had the legislature intended for a claimant to be free to impose conditions of acceptance, such a provision would have been included in the statute. At the time of publication, the Eleventh Circuit had not issued a ruling in the case.

The case represents the first time since O.C.G.A. § 9-11-67.1 was amended in 2013 that a court has squarely addressed making and responding to policy limit time demands.

To read the GDLA's amicus brief in this case, as well as any past briefs, visit the Members Only area of our Website and click on "Amicus Policy & Briefs" in the right navigation pane.

The GDLA Amicus Committee is chaired by Martin A. Levinson of Hawkins Parnell Thackston & Young in Atlanta and vice-chaired by Mr. Meader.

See the next page for the second amicus brief filed recently. ❖

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GDLA Files Amicus Brief in Securities Intermediary Conversion Case

In its recent decision, *Amegy Bank, N.A. v. Deutsche Bank Alex.Brown*, No. 14-12568, 2015 WL 4718885 (11th Cir. Aug. 10, 2015), a split-panel of the Eleventh Circuit Court of Appeals affirmed the lower court's denial for motion for judgment as a matter of law, holding that a securities intermediary was not immune from liability under O.C.G.A . § 11-8-115.

On October 20, 2015, the Georgia Defense Lawyers Association filed an amicus curiae brief in support of a Petition for Rehearing *En Banc* in the case. While the Eleventh Circuit ultimately denied the petition for rehearing, this case is notable because it raises important issues relevant to defense lawyers in Georgia and elsewhere.

Underlying Trial and Split Opinion

The case arises out of the sale of stock by a debtor, William Johnson, in violation of a security agreement he signed in connection with a $15 million loan from Amegy Bank. After Johnson defaulted on the loan, Amegy sued the securities intermediary, Alex.Brown, that had executed the stock sale pursuant to instructions it had received from Johnson, who was its client and the owner of the stock. In addition, Amegy sued Deutsche Bank Private Wealth Mortgage Ltd. ("PWM"), which also had an outstanding loan to Johnson. An individual named William Rhodes – a broker at Alex.Brown and an acquaintance of Johnson – facilitated Johnson's dealings with both Alex.Brown and PWM.

At the trial level and on appeal, Alex.Brown claimed immunity under U.C.C. § 8-115 (codified in Georgia as O.C.G.A. § 11-8-115), "which insulates '[a] securities intermediary that has transferred a financial asset' from 'liab[ility] to a person having an adverse claim to the financial asset.'" Amegy, however, argued that this case falls within the "collusion exception" to immunity under § 8-115 (excepting from immunity those securities intermediaries that have "[a]cted in collusion with the wrongdoer in violating the rights of the adverse claimant."). Amegy claimed that Alex.Brown unlawfully converted property by collusion, a contention with which the jury agreed. The jury found compensatory damages in the amount of $16.7 million and further assessed punitive damages in the amount of $201,000.

After the trial, Alex.Brown moved for judgment as a matter of law arguing that the evidence was insufficient to support the jury verdict on both liability and punitive damages. The district court disagreed and found, as did the majority, that there was sufficient evidence to show that as a securities intermediary Alex.Brown acted in collusion with Johnson.

The majority summarized the relevant issue before it as follows: "Alex.Brown can properly be held liable for conversion if there is sufficient evidence that it (1) knew that Johnson's conduct constituted conversion, and (2) gave Johnson substantial assistance or encouragement to commit the conversion." Op. at p. 12 (citing Restatement (Second) of Torts § 876(b)). The majority acknowledges that there was, of course, no direct evidence that Alex.Brown had actual knowledge that sale of the stock was in violation of the security agreement that Johnson had with Amegy. Instead, the majority had to decide whether a reasonable jury could *infer* that Alex.Brown had actual knowledge from the record.

However, as summarized by the dissenting judge, the evidence on this point was scant:

> The evidence presented at trial included the [banks "know your customer"] report, which contained a reference to Amegy's lien on *unnamed* property owned by Johnson, and Rhodes's testimony that he was not aware of Amegy's lien on the ... stock prior to the commencement of this litigation. The parties also presented evidence that the redemption of the ... partnership units and the sale of the resulting stock occurred while Johnson was in default on his Amegy loan; that Rhodes communicated with Johnson and his assistant in the time leading up to the sale of the Host Hotels stock while, at the same time, Johnson was in contact with Amegy; that Rhodes told his assistant that Johnson's account had to be set up fast; that Rhodes sold the stock before the certificate had been delivered; that Rhodes opened Johnson's account with the stated objectives of "Growth" and "Capital Appreciation" but, after the close of the sale, the proceeds immediately were wired to Johnson; that Rhodes had a long-term relationship with Johnson; and that Rhodes profited from the sale through the receipt of a commission.

Op. at 31-32 (Ripple, J., dissenting) (Judge Ripple of the United States Circuit Court for the Seventh Circuit was sitting by designation for this case). The dissenting judge would have reversed the lower court's denial of the motion for judgment as a matter of law.

GDLA's Amicus Curiae Brief

Because this issue is of significant importance to members of the

GDLA (whose clients are frequently accused of any number of creative joint liability theories to avoid the effects of Georgia's abrogation of joint and several liability), the GDLA filed an amicus brief in support of the petition for rehearing in the case.

The GDLA argued to the Eleventh Circuit that, since 1998, the Georgia General Assembly has relieved securities intermediaries from liability to people having adverse claims to a financial asset unless the intermediary "acted in collusion with the wrongdoer in violating the rights of the adverse claimant." O.C.G.A. § 11-8-115(2). As the commentary to the Code explains:

> Faithful performance of this role consists of following the instructions of the customer. It is not the role of the recordkeeper to police whether the transactions recorded are appropriate, so mere awareness that the customer may be acting wrongfully does not itself constitute collusion. That, of course, does not insulate an intermediary or broker from responsibility in egregious cases where its action goes beyond the ordinary standards of the business of implementing and recording transactions, and reaches a level of affirmative misconduct in assisting the customer in the commission of a wrong. O.C.G.A. § 11-8-115, cmt. 5 (emphasis added).

Amegy claimed that Alex.Brown unlawfully converted property by collusion, a contention with which the jury agreed.

The outcome in this case, however, went against the intent of the General Assembly by imposing liability in a circumstance where, at best, the securities broker "should have known" that Johnson was committing a wrong. The majority opinion dilutes the burden and quantum of proof required when an injured party seeks to hold an alleged tortfeasor liable on a collusion theory; in this instance, the court upheld the jury verdict based on tacit collusion supported by negative inferences. This simply is not what the Georgia Assembly intended with the enactment of O.C.G.A. § 11-8-115.

As the case posed an important issue of Georgia Uniform Commercial Code law, the GDLA argued in its amicus brief that the Eleventh Circuit should grant the petition for rehearing and certify the question on Georgia law to the Georgia Supreme Court, rather than have a divided panel of Eleventh Circuit determine the question. The Eleventh Circuit, however, declined to do so. ❖

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Justice Prevails: Supreme Court Upholds Defendants' Right to Seek Apportionment

By Martin A. Levinson
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When the Supreme Court of Georgia issued its opinion in *Zaldivar v. Prickett* this past summer, most people saw it as the long-awaited answer to a key issue regarding nonparty apportionment. At last, we had received a definitive answer from the state's highest court to the question of whether a party could seek apportionment of fault to a nonparty not subject to suit due to some immunity or defense. The Supreme Court had confirmed that O.C.G.A. § 51-12-33 says what it means and means what it says as to parties' right to seek apportionment of fault to "all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit." Finally, parties could rely on judges throughout the state applying the plain language of the statute and following the clear mandate of the General Assembly. Right?

Well, not quite. Still pending in the Supreme Court when it issued its decision in *Zaldivar* was another case dealing with nonparty apportionment, *Walker v. Tensor Machinery, Ltd.*, Docket no. S15Q1222. In that case, filed in the U.S. District Court for the Northern District of Georgia, Jock Walker and his wife sued the companies that manufactured and designed a machine he was using when he was injured at work, alleging negligent failure to warn him of certain safety-related defects in the machine. The defendants, coincidentally represented by GDLA President Matt Moffett and GDLA member Jason Hergenroether, sought to apportion fault to Walker's employer, with whom Walker already had reached a settlement for workers' compensation benefits in relation to the accident. Walker filed a motion *in limine*, seeking to exclude evidence or

argument regarding his employer's alleged fault and arguing that O.C.G.A. § 51-12-33 did not permit a party to seek apportionment of fault to a nonparty employer having statutory immunity to tort liability under O.C.G.A. § 34-9-11, the exclusive remedy provision of the Georgia Workers' Compensation Act.

At the defendants' request, the U.S. District Court certified this question to the Georgia Supreme Court:

> Does O.C.G.A. § 51-12-33(c) allow the jury to assess a percentage of the fault to the nonparty employer of a plaintiff who sues a product manufacturer and seller for negligence in failing to warn about a product danger, even though the nonparty has immunity under O.C.G.A. § 34-9-11?

On April 23, 2015, the Supreme Court accepted the certified question. The parties filed briefs and the Court granted a request for oral argument. On July 6, 2015, just about a week before oral argument was set to take place in *Walker*, the Supreme Court issued its opinion in *Zaldivar*. Though *Zaldivar* dealt specifically with potential apportionment of fault to a plaintiff's employer as a nonparty under a theory of negligent entrustment of a vehicle to the plaintiff, the Supreme Court's holding in that case appeared to be much broader. Indeed, the Court held there that under O.C.G.A. § 51-12-33(c), a jury could apportion fault to "not only the plaintiff himself and defendants with liability to the plaintiff, but also every other tortfeasor whose commission of a tort as against the plaintiff was a proximate cause of his injury, *regardless of whether such tortfeasor would have actual liability in tort to the plaintiff*." *Zaldivar v. Prickett*, 297 Ga. 589, 600 (1) (2015) (emphasis supplied).

The Court then went on to explain that "an affirmative defense or immunity does not eliminate 'fault' or cut off proximate cause, it only bars liability notwithstanding that the 'fault' of the tortfeasor was a proximate cause of the injury in question." *Id.* at 604 (2).

Though *Zaldivar* appeared to answer the certified question in *Walker* as well, Walker argued that *Zaldivar* was distinguishable because that case dealt with tort liability and a purported defense to tort liability as opposed to absolute immunity under the Workers' Compensation Act (WCA). Extending *Zaldivar* to permit apportionment of fault to a plaintiff's employer as a nonparty,

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The Facebook Grenade: Mining Social Media For Maximum Effect

By Zach Matthews
Swift Currie McGhee & Hiers
Atlanta

Imagine this scenario: you're defending a personal injury case against a plaintiff with a pre-existing history of injury and exaggerated claims. You strongly suspect your plaintiff is fibbing, and so you decide to check his Facebook profile and other social media postings. Alas! The plaintiff's lawyer has gotten there first with good advice, and the plaintiff has set all his social media accounts to private. What is your next move? Do you throw in the towel and begin bargaining based solely on plaintiff's sparse medical history? Even if you were successful in recovering damaging social media postings, how would you use them most effectively?

This common situation arises in many – possibly the majority – of personal injury defense cases these days. Properly handled, social media postings by or about the plaintiff can explode like a grenade, sinking a plaintiff's case and resulting in massively decreased settlement demands or a great trial result. Improperly handled, that grenade can explode in your own face, potentially leading to sanctions or even ethical complaints against you, the defense lawyer. The following are best practices to (ethically) get the absolute most out of your social media investigation and then use those gleanings for maximum effect.

First and foremost, you as the defense lawyer need to be aware of the playing field. The major social media websites these days are Facebook (facebook.com); Twitter (twitter.com); Instagram (instagram.com, but primarily available through an app); and LinkedIn (linkedin.com), which is often useful in lost income cases. Depending on the type of case, you may also find yourself trolling some of the darker corners of the web, including Craigslist (craigslist.com), a classifieds website; and Backpage (backpage.com), a classifieds website that spun off of Craigslist a few years ago and is now dedicated exclusively to human sex trafficking and other such offers. (Note: Backpage.com is decidedly not safe for work under ordinary circumstances.) Occasionally you will still encounter a plaintiff with an older social media profile on MySpace (myspace.com); or potentially on new up and coming sites like Reddit (reddit.com); Tindr (Tindr.com), a dating website; or even on fantasy sports pages like DraftKings (draftkings.com).

Identifying the Plaintiff Online

The first issue you are likely to encounter is *locating* the plaintiff's social media profiles. While it may be tempting to simply send an interrogatory request demanding that the plaintiff reveal his or her own account names, this tactic can be counterproductive. The best practice is to hold off on pursuing the social media angle in the first round of discovery while doing your own investigation and preservation of evidence *first*. (That way you'll be in position to know whether a plaintiff is hiding or deleting certain posts in response to your first round of interrogatory requests).

Certain factors are always important in a social media investigation: first, knowing the plaintiff's name and nickname(s), as well as his or her location. If you're lucky, this will be enough information to turn up the plaintiff's profile in a simple Google search or a search within Facebook's contained environment. However, because Facebook's own internal search algorithms leave much to be desired, don't give up if you can't find your plaintiff on the first pass, especially if they have a common name like "Tom Jones" or "Sarah Smith," which may trigger a multitude of Google hits. It is the rare plaintiff indeed who has no social media presence whatsoever these days.

Phone numbers are also valuable search information, which can often lead to the most important marker of a particular plaintiff online: his or her favorite "handle." Facebook accounts are actually linked to individual's phone numbers. In a little-known trick, you can search via the Facebook app on a phone or tablet for a profile using only the plaintiff's phone number. This trick doesn't work on the

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Document Production: Liberal Standards vs. Reasonable Limits

By Timothy J. Buckley III & T.K. Haff
Buckley Christopher & Haff, Atlanta

One issue parties frequently disagree on during litigation is what documents the parties can request – and receive – during discovery. Georgia traditionally has a very liberal standard for document production, requiring parties to turn over all non-privileged documents and information that are relevant to the claims or defenses of any party in the pending action, even if inadmissible, if they "appear reasonably calculated to lead to the discovery of admissible evidence." O.C.G.A. §§ 9-11-34(a)(1) and 9-11-26(b)(1). The Georgia Supreme Court recently reiterated the liberal standard for what documents can be requested during discovery in *Bowden v. The Medical Center, Inc.*, 297 Ga. 285 (2015).

In 2011, after being involved in a car accident, Plaintiff Danielle Bowden was taken by ambulance to The Medical Center, Inc.'s ("TMC") hospital in Columbus, Ga. She remained at the hospital for the next three days to receive medical treatment including surgery for a broken leg. During her stay, Bowden's mother allegedly signed an admission form that said, in relevant part, that in consideration of the services rendered to the patient, she was individually obligated to pay the account in full. Approximately one week later, returning for physical therapy, Bowden also allegedly signed the same form. Bowden, who did not have health insurance, was ultimately billed $21,409.00 for her care, and a hospital lien in that amount was filed against her.

In answering a lawsuit seeking to recover that lien, Bowden filed a cross-claim against TMC, asserting that she was uninsured and indigent at the time, and her bill was grossly excessive. Further, she claimed the emergency nature of her injuries prevented her from making pretreatment cost comparisons as provided by O.C.G.A. § 31-7-11. She also denied signing any payment contract and argued even if the contract had existed, it would be void as unconscionable, and that TMC was unjustly enriched. TMC answered the counterclaim by stating only that the bill was "fair and reasonable" and that the lien was valid and attached to any settlement received by Bowden.

During discovery, Bowden requested documents regarding the amounts TMC charged other patients with similar injuries and financial situations, as well as pricing agreements for the previous three years between TMC and providers such as Medicaid. TMC, in response, provided Bowden with records and bills relating to her injury only. Bowden filed a motion to compel and the trial court granted the request for the documents on the condition that a protective order was included to ensure confidentiality; however, the Court of Appeals reversed, holding that the documents requested were not relevant to Bowden's claim. Bowden appealed to the Georgia Supreme Court.

In considering the Court of Appeals' ruling, the Georgia Supreme Court found three basic flaws in its analysis. First, the Court of Appeals concluded that if Bowden signed a contract to pay for her treatment then she was precluded from challenging the lien. This was problematic because the lien was for "reasonable charges," not for "whatever the patient agreed to pay" by signing the contract for treatment. In general, hospital charges, or any contract price for goods and services does not necessarily equal their reasonable value, and a party entering into a contract retains the right to question the "reasonable value." The Court also noted that the lien, by definition, was not against the patient or guardian, but against the cause of action relating to the patient's injuries. Thus, the lien was subject to being paid by the tortfeasor or the tortfeasor's insurer, neither of which were parties to any contract. Second, while O.C.G.A. § 31-9-2(a)(3) authorizes parents to consent to medical treatment for their adult child, it does not allow for adult children to be bound to payment terms included in the consent contract. Similarly,

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Motions to Exclude Opposing Experts: Be Careful What You Wish For

By William J. Martin
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It has been over two decades since the U.S Supreme Court decided *Daubert*; more than 15 years since *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) was codified by Rule 702 of the Federal Rules of Evidence; and now over a decade since Georgia adopted *Daubert* as its test for the admissibility of expert testimony by enacting O.C.G.A. § 24-9-67.1. When Georgia passed § 24-9-67.1, explicitly adopting the *Daubert* standard for the admission of expert testimony, many of the attorneys newly-admitted to the Georgia Bar this November did not possess a driver's license, much less a license to practice law. For a generation of young Georgia lawyers, *Daubert* has always been the law. And the practice of attempting to exclude opposing expert testimony under the *Daubert* standard has become an ingrained part of civil litigation.

But should moving to strike an opposing expert's opinions be quite so commonplace? More to the point, does challenging the opposing expert, even when successful, always further the ultimate goals of a litigant? From personal experience, the process of deciding whether to file a motion to exclude an opposing expert should go far beyond simply asking whether the motion will be granted. What follows below are a few examples that illustrate this point.

The Evolving Expert: Your Motion to Exclude as a Guide for Improving their Witness

Our client owned a small shopping center that leased space to retail businesses, including a drycleaner. The plaintiffs owned a residential lot next door. When environmental testing revealed that a portion of the plaintiffs' property was contaminated with a common drycleaning chemical, the plaintiffs sued our client, alleging he was responsible for the contamination.

By the end of discovery, there was no evidence in the record with respect to how, or, more importantly, when, the plaintiffs' property had been contaminated. Different drycleaners had operated in the shopping center for nearly 20 years prior to our client's purchase of the property. We moved for summary judgment. As part of their response, plaintiffs submitted the affidavit of an expert geologist and environmental engineer. After deposing plaintiffs' expert, we immediately moved to strike his affidavit under O.C.G.A. § 24-9-67.1. The strategy was simple: Get rid of the expert's causation and damages opinions, and win on summary judgment.

What followed was anything but simple. First, the court denied our summary judgment motion before issuing a ruling on our *Daubert* motion, relying in part on the opinions of plaintiffs' expert in finding there were genuine issues of fact to be tried. The parties then engaged in a sequence of revised and expanded testimony, supplemental motions, expert testing, and hearings. Every time we raised new arguments in favor of striking their expert's testimony, plaintiffs would submit a supplemental affidavit attempting to correct the flaws we had just pointed out. Over the next two and a half years, their expert would execute four separate affidavits. The case would eventually resolve, after more than five years of litigation. The court never did rule on our motion to strike the plaintiffs' expert.

The case is a good reminder to always consider your audience. In this instance, we had a judge who simply did not want to rule on the *Daubert* motion one way or the other. No matter what we did to try and force a decision, there was always another continuance or some other delay that gave plaintiffs the chance to amend and revise their expert's testimony. Worse, the entire process was actually making the plaintiffs' expert a stronger witness. He became more familiar with the factual evidence. He dug up studies and references to support what had been seemingly baseless opinions. He performed tests on his own, rather than simply relying on previous tests performed by others. He consulted with other experts. And with each new affidavit, and each subsequent turn on the witness stand, he learned to deliver his opinions in language that made him less susceptible to

attack. Not only had we failed to knock out the only evidence keeping us from summary judgment, but also over time we had actually "coached up" the opposing expert.

Just Because They Put the Ball on a Tee, Doesn't Mean You Should Take a Swing

Our client was a used car dealer who provided a loaner car to the plaintiff, whose recently purchased vehicle was in the shop for service. Plaintiff got in a wreck, and filed suit alleging the accident had been caused by malfunctioning brakes. Her theory was that our client's service department had negligently maintained the loaner vehicle and damaged the brake caliper during a brake replacement. Plaintiff retained an accident investigator to provide the key causation testimony.

As soon as the expert gave his first deposition, the motion to strike began writing itself. He worked just part-time as an accident investigator, while working 40 hours a week stocking shelves and managing deliveries for a retail store. He was not an engineer or an auto mechanic, and had no experience designing, manufacturing, maintaining, or testing brake systems like the one involved in the accident. During his deposition, he would list all of the facts he was required to consider in evaluating various aspects of the accident, then freely admit that he had no knowledge as to any of those facts. For example, he admitted to not doing a survey of the weather or roadway conditions present at the time of the accident, even though he acknowledged these factors as the most significant with respect to his opinion that the plaintiff's vehicle hydroplaned. When asked why he had not looked at these factors, he volunteered that he did not think he was qualified to do so.

We filed a motion for summary judgment and moved to strike the expert's testimony in its entirety. After response and reply briefs, and a second deposition of the expert, the court set the *Daubert* motion for a hearing. Plaintiff's expert performed just as badly at the hearing as he had during his depositions, and the judge openly questioned his qualifications while he was on the stand.

The court granted our *Daubert* motion, but refrained from awarding us summary judgment. We faced a brand new concern: had we just forced plaintiff's counsel to go out and find a better expert? Plaintiff's first expert had been so inept, and such a poor witness, that he really seemed to actively hurt the plaintiff's case every time he performed a test or opened his mouth. If we had to try the case to a jury, isn't this exactly the "expert" on which we wanted our opponents to rely?

Practical Considerations

These examples illustrate the motion to exclude an opposing expert will sometimes have unforeseen consequences – even when the motion is granted. What can defense lawyers do to reduce the risk that such unintended effects will adversely impact our client's case? Better yet, how can we most effectively position our case to maximize the impact of a well-founded *Daubert* motion? Below are some tips:

1. Know your Judge. Educate your Judge.

It borders on the cliché but, if you anticipate your case will involve significant pre-trial motion practice, you need to know more about the assigned judge than her general pro-plaintiff/pro-defendant leanings or the nature of her practice before joining the bench. For instance, in the drycleaners case, perhaps we could have discovered that our judge had a tendency to delay ruling on motions for long periods of time in order to pressure the parties into settlement. In the brake caliper case, we learned early on that our judge had never presided over a *Daubert* motion in a civil case. That informed our strategy moving forward – from requesting oral argument, to the depth and detail of our briefs, to the early engagement of our own experts to serve as consultants and testifying witnesses in support of our motion to exclude. Develop a network outside the four walls of your firm, and outside your home city, of attorneys who can give you first-hand information about a particular judge. GDLA is a great place to start whether by sending an e-blast or contacting a lawyer directly who works in a particular city.

If you are in front of a judge who has limited experience with a motion to exclude expert opinion testimony, make sure you educate the court on the procedure, as well as the substantive law. In the drycleaners case, we would have benefited greatly from later-decided cases like *An v. Active Pest Control South, Inc.*, 313 Ga. App. 110 (2011) and *Burroughs v. Mitchell County*, 313 Ga. App. 8 (2011), where the Court of Appeals reversed and remanded the trial court's decisions on summary judgment made without rulings on pending *Daubert* motions.

2. Get it in Writing.

Even if your judge doesn't require a scheduling order, they are generally a good idea in cases that will involve experts and pre-trial motions. Commit – and get your opponent to commit – to hard deadlines for expert disclosures and expert discovery. Include dates for a *Daubert* hearing before the court. Even if you're in state court, insist on advance production of all expert reports in compliance with Rule 26. Of course, the judge always has discretion to extend time or shift deadlines, but a clearly-worded consent scheduling order and mandatory Rule 26 report can help limit the surprises and keep your case on course.

3. Keep an Honest Perspective.

What is best for your case at the motion stage may not be the same thing as what is best for your case at trial. While motions to exclude opposing expert testimony frequently accompany dispositive motions, their effects extend right up through the trial of the case and beyond. In the brake caliper case, we filed the motion to strike their expert's testimony because we felt the exclusion of his opinions

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Testing in the Context of Litigation

By Haskell Beckham, Ph.D., and
Eric Guyer, Ph.D., P.E.
Exponent, Inc.

On January 18, 2015, the New England Patriots beat the Indianapolis Colts in the AFC Championship Game. After the game, reports of the use of underinflated footballs by the Patriots appeared in the press. An investigation was launched, including engineering and scientific analysis.

Legal disputes often involve issues in which scientific or engineering analysis can provide useful or even critical insight and support. Scientists and engineers who conduct such analyses generally follow the scientific method or the engineering design process to develop an understanding of the issues in dispute.

The scientific method is, in brief, a process through which observations are made, hypotheses are formulated, tests are developed and conducted to examine the hypotheses, and the hypotheses are accepted, altered, or rejected accordingly until the point that the conclusion most consistent with the available data can be reached.

When a past incident is being examined, this process is meant to help determine the most likely historical reconstruction of events. However, since the circumstances associated with a particular legal dispute can be multifaceted and the physical evidence unique, the testing required to "reveal reality" will be specific and can be quite complex.

In many cases, such testing will not have been performed previously, and, therefore, may not be readily recognized as admissible in some courts.[1] The perception is that since a test is novel, it should be excluded. However, this perception is erroneous.[2]

In *Daubert et al. v Merrell Dow Pharmaceuticals, Inc.*,[3] the Supreme Court of the United States established a nonexclusive list of factors to be used as a guide, as opposed to an explicit list, for trial courts to consider in assessing the admissibility of scientific expert testimony. This list includes: has the technique or theory been tested, what is the rate of error, were controls or standards employed, is it generally accepted within the scientific community, and has it been peer reviewed.[4] The overriding concept is to keep results and opinions based on junk science out of the courtroom and make sure the expert's testimony is relevant and has a reliable foundation.

While standardized test methods exist for a large variety of products, materials, and circumstances for which the answers to these questions are known or are straightforward to determine, in cases requiring novel, nonstandard testing the answers to these questions may not be obvious initially. A customary belief among some is that a standardized test should always be used; indeed, experts are often criticized if they do not employ standard tests in their analyses. However, in cases where a standardized test does not fit the specific details of a matter, it can be appropriate and often necessary to develop a customized test that will more accurately reflect the circumstances of the litigation.

Expanding the testing options through customization can lead to the generation of more relevant data and opinions for the court to consider. To be consistent with the scientific method, a customized test must be carefully designed to address a hypothesis, and the methods must be documented specifically enough so that another qualified party could repeat the test. To explore this further, it is helpful to consider how standardized tests are developed.

Standard test methods are those that have been accepted by a professional community following an established, rigorous, and often prolonged consensus-based process. Examples of such entities are the American Society for Testing and Materials International (ASTM International), Underwriters Laboratories (UL), and the National Fire Protection Association (NFPA).

Figure 1. Photograph of a football being compressed to a 650-pound load in a test that was designed to simulate the effect of an aspect of game use.

These associations are typically composed of professionals from industry, academia, and government laboratories who self-select into various divisions or committees depending on their professional, personal, and business interests. Standard test methods are developed within committees and cannot be accepted until there is a consensus of the committee members. Because of the consensus process through which they are developed, standard tests often meet the criteria set forth in *Daubert* for scientific reliability. They are peer reviewed, they typically prescribe the use of controls and include an assessment of error rate, and they are generally accepted within a scientific community. Thus, appropriately selected standard tests can nearly always be integrated into a scientific or engineering analysis in support of litigation. Still, there may be times when evidence or exemplars may not be

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Avoiding Poindexter: Effective Selection of Experts for Defense of Construction Cases

By Ryan T. Chancey, Ph.D., P.E.
Nelson Forensics

Experts in litigation assist the trier of fact in understanding technical issues and provide professional opinions regarding relevant facets of those issues. In construction cases, the effective selection and use of expert witnesses in the fields of engineering and architecture can make or break your case. The efficacy of an expert witness lies in his/her qualifications, experience, communication skills, and interpersonal appeal.

For the defense, being able to utilize one's own expert to defend one's position and effectively challenge or disqualify the plaintiff's expert witness can eviscerate a case to allow for either early resolution or a defense verdict. To ensure effective utilization of an expert witness to present a solid case and challenge opposing expert witnesses, careful analysis of expert selection must begin early. If you've ever spent much time with engineers or architects, you'll agree that finding one with the aforementioned diverse skill set can try the patience of the placid.

The hiring attorney should hold the prospective expert to a standard set of minimum qualifications. First, the expert engineer or architect must be registered with the appropriate licensing board over his/her profession *in the jurisdiction where the property subject of the litigation is located*. This is not only a responsible practice; many states consider diagnostic and forensic engineering and architecture, including preparation of expert reports and delivery of expert testimony, as professional practice. Holding a license in another jurisdiction is not sufficient, essentially discredits your expert, and could result in disciplinary action by the licensing authority having jurisdiction.

Your expert witness should possess the following: (a) solid command of technical fundamentals relevant to the technical issues peculiar to the project; (b) familiarity and practical experience with the type of project and relevant trades at issue; (c) understanding of the customs and practices of the community of professionals involved with similar projects in similar conditions at the time of construction; and (d) familiarity with different types of design and construction contracts at issue and the contractual obligations such contracts create.

Selection of the proper discipline of your expert is critical – sometimes you don't simply "need an engineer," as callers to the author's office routinely proclaim. Does your problem involve the inability of a building to support loads? Does the building vibrate excessively? Are the heating or air conditioning systems, and thus the ability of the building to "breathe," compromised? Do issues exist with the building's electrical systems or lighting? Does the building leak? Has poor coordination of trades during construction caused chaos and an inferior finished product? For each of these perils, a specific discipline of building science professional is necessary, be it a structural engineer, mechanical engineer, electrical engineer, or an architect. Vet properly, and choose wisely.

The expert's investigation and ultimate opinions on a wide variety of technical issues related to design, construction, codes, standards, practices, and contracts can substantially impact the outcome of a case. The expert must be able to develop valid opinions, based on the facts, supported by qualified and quantified data and accepted industry literature and methods, in conjunction with his or her analysis. Your expert should have experience in the design, analysis, and/or construction administration of the same or similar construction issue which is subject to the case.

For example, a respected, renowned, properly licensed architect who specializes in contract negotiations and specification writing will be an ineffective expert in a

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Understanding the Challenges of Child Car Seat Use, Fit, and Compatibility

By Tara T. Amenson
S-E-A, Ltd.

Considering the myriad of crash modes occurring in the real world, child car seat design engineers are continuously working to improve the safety of children, just as vehicle manufacturers are striving to improve the safety of a variety of occupants, including children. Due to design constraints at both levels, there are times when even the best designs are not optimally compatible with one another. Coupled with this is the risk associated with improper use of the car seats. According to Safe Kids Worldwide, correctly using child car seats can reduce the risk of death by as much as 71 percent.

The National Highway Traffic Safety Administration (NHTSA) reported of the children in the United States 14 years and younger, an average of three were killed and 642 injured every day as a result of motor vehicle crashes during 2012. Child injuries and fatalities from motor vehicle crashes can be mitigated through proper use, fit, and vehicle compatibility of child car seats. For this reason, during an accident investigation, these features must be evaluated and assessed in order to evaluate a car seat's design and performance forensically relative to the specific accident outcome.

Research by NHTSA and Safe Kids Worldwide has shown the proper type of seat depends on the child's age, height, weight, and type of vehicle in which they frequently travel. To mitigate child injuries during a crash, the child seat must fit the child correctly, the child seat must be secured properly in the vehicle, and the child must be properly restrained in the child seat. Safe Kids recently reported 73 percent of car seats are not used or installed correctly. If a parent has any questions or concerns about proper use or vehicle compatibility, certified child passenger safety technicians (CPST) are able to help at car seat inspection events hosted by Safe Kids. These events are held throughout the year, across the country, at local police and fire stations, children's hospitals, and Departments of Public Health.

To address the increasing challenges parents are having with child seat use and vehicle compatibility, the NHTSA developed an Ease of Use rating program. The rating program is based on individual assessments of four categories, including the evaluation of label content and clarity, evaluation of the installation instructions for the car seat, ease of use of the features to secure the child correctly in the restraint, and vehicle installation features. The Ease of Use program assigns one to five stars for each category. Five stars correlates to excellent features in a particular category. Consumers who frequently install their child's car seat in multiple vehicles would want a five star rating in the vehicle installation feature category, whereas parents who rarely remove their child's car seat from their vehicle may find a lower rating of one to two stars acceptable.

Unfortunately, the Ease of Use ratings do not address vehicle compatibility, but many child seat retailers will allow consumers to install the seat in their vehicle before purchasing.

Passenger vehicles made on or after September 1, 2002, are equipped with a LATCH (Lower Anchors and Tethers for Children) system that was developed to make it easier to install child car seats. While installing a car seat with seatbelts or LATCH will provide the same level of protection to the child; the most important factor is to be sure the child seat is correctly installed in the vehicle, regardless of the installation method used. It is recommended that only one system be used at a time, LATCH or seat belt, because there is no evidence to suggest the use of both attachment systems provides additional protection. The LATCH system consists of two clips or hooks that attach to lower anchors located in the back seat where the seat back and seat cushions meet. A top tether anchor is commonly located behind the seat and can be used when installing the car seat with the LATCH system or seat belt. When to use the top tether is a common source of confusion for parents. The top tether improves the safety of all forward-facing child car seats whether they are installed using the lower anchors or seat belt.

Child car seat vehicle compatibility, proper use, and fit continue to be obstacles many parents struggle to overcome. There are no clear guidelines describing which car seat designs are best suited for a

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Taking Advantage of Jurors' Decision-Making Shortcuts

Continued from page 1

What is the Availability Bias?

When people are faced with complex or unfamiliar information, they tend to use cognitive heuristics to process the information and make decisions. Cognitive heuristics are mental shortcuts people rely on to simplify decision-making tasks. Availability bias is one of the cognitive shortcuts that people use in everyday life and that jurors use when deciding cases. People are more heavily influenced by information that is more *available* to them, meaning that it can be easily brought to mind and accessed. Availability bias occurs when people are biased toward information that is more available/accessible to them and rely on that information more than other content.

When certain facts are made more available to jurors, this influences how they formulate the story of the case. The first way to make information more available to jurors is by enriching certain facts, perceptions, or evidence. This entails focusing your story more heavily on the facts and evidence that you want the jurors to focus on, while minimizing how much you bring up evidence that you do not want jurors to focus on when deciding the case (e.g., your client's conduct, weak arguments/evidence that expose your client). The other way to take advantage of the availability bias is to properly order the issues by first discussing the facts you want more available first and saving the defense of facts that are unfavorable to your case until much later, if at all.

Essentially, you want to enrich early in the narrative your case information that is unfavorable to the plaintiff as jurors construct their own version of events. In contrast, you want to minimize the availability of unfavorable facts that focus on your client's conduct in order to potentially reduce how much jurors rely on that information in formulating their early "story" of the case.

Why You Should Care about the Availability Bias

Jurors' verdict decisions generally revolve around the notion of determining which parties are responsible for an incident that caused the harm alleged by a plaintiff. This creates a group dynamic in which jurors' discussions are usually dominated by criticisms of the parties to decide who is to blame. Therefore, the more *available* a party is to the jurors, the more *available* it is for jurors to criticize.

You can take advantage of the availability bias by making the plaintiff and other parties more available to jurors' criticisms than your own client. This entails telling jurors a story that is shaped around the plaintiff's (or third parties') role in the incident and establishing the story with specific facts (even minor factoids) that lead the jurors to blame the plaintiff or third party. For example, you can enrich the plaintiff's background by discussing how he was knowledgeable about and had control over the actions that caused the outcome or led to the events that caused the incident. You can discuss third parties' roles and how their conduct may have influenced the outcome. You can point to potential alternate causes that explain the outcome outside of your client's conduct.

The moral is that you want jurors thinking about the plaintiff's role/conduct (e.g., actions leading up to the incident, health background, potential exposure to other sources, due diligence) and roles of other parties rather than your client's role. The order and richness of your case story matters in order to achieve this goal. You want to talk about these issues *first* and *foremost* in opening statements to make them available in jurors' minds. This will allow jurors to think about this information when they hear from the witnesses, and then the jurors can easily access it again during deliberations to argue on your behalf. This way the initial "story of the case" that all jurors formulate during opening statements will be more likely to contain a narrative that places the plaintiff and/or third parties in the best position to have prevented the incident/outcome that is the subject of the lawsuit. The goal is not to have jurors talking about your client during deliberations, and instead, you want them focusing their attention on the opposing side and third parties.

It is important to note that when discussing these issues, you must approach them gingerly and not sound like a full attack on the plaintiff. Instead, you are simply providing jurors with the facts they need to blame the plaintiff on their own accord.

Putting the Availability Bias to the Test: An Experiment

Since lawyers often find this advice counterintuitive, the authors of this article conducted an experiment to test this theory.

We had 80 respondents read either a medical malpractice or a construction contract lawsuit scenario in which they first read a brief neutral summary of the case, followed by a short argumentative plaintiff narrative, and then a short argumentative defense narrative. Within each scenario, the content of the defense's narrative remained the same, but the order varied. Half of the jurors heard the defense narrative begin with discussing the plaintiff's conduct, whereas the other half of the jurors heard the defense narrative start with defending the defendants' conduct.

After reading the scenario, jurors answered questions about their desires to compensate the plaintiff and punish the defendant, and how much fault they would assign the plaintiff and defendant (out of 100 percent).

The results of the experiment confirmed the availability bias works to shift blame onto the plain-

Figure 1: Medical Malpractice Scenario – Fault Apportionment

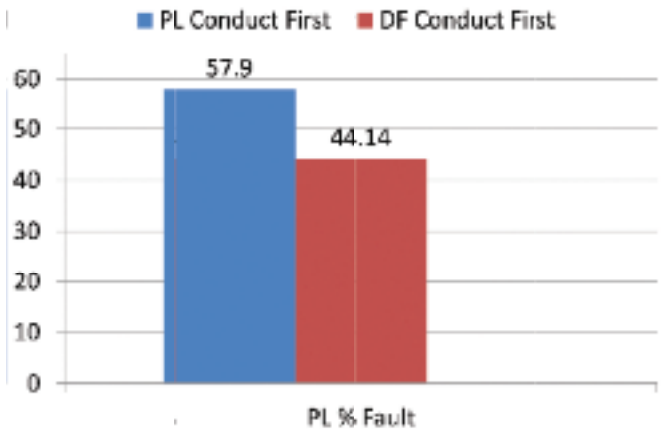


Figure 2: Medical Malpractice Scenario – Desire Measures

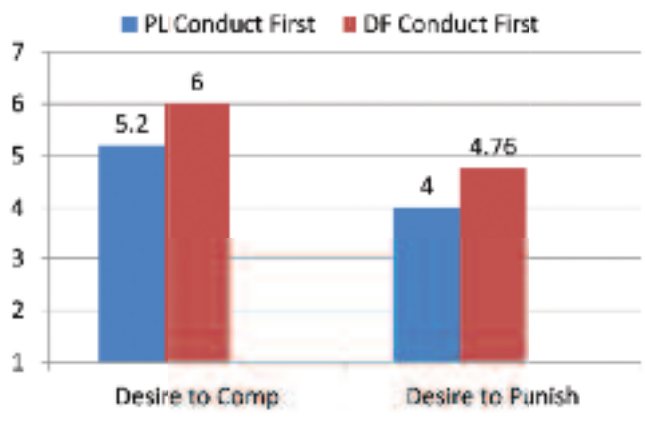


Figure 3: Construction Scenario – Fault Apportionment

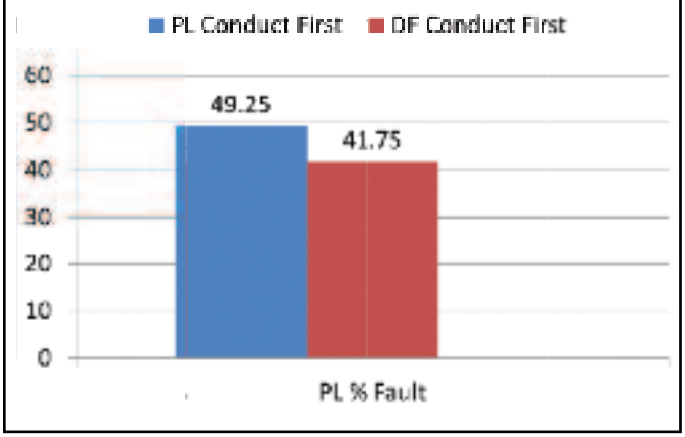
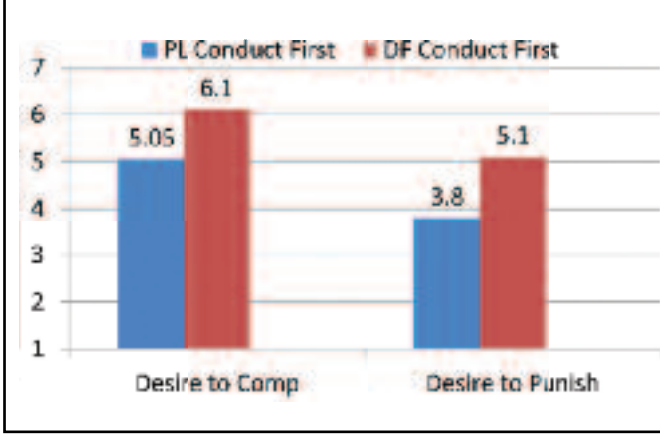


Figure 4: Construction Scenario – Desire Measures



tiff when information regarding the plaintiff's background, knowledge, and control over the incident at issue are made more available. In both scenarios, the defendant fared better when the defense story began with the plaintiff's conduct rather than the defendant's conduct.

For the medical malpractice scenario, jurors heard about a wrongful death lawsuit against a doctor and hospital.

Jurors assigned more than half of the fault (57.9 percent) to the plaintiff when the plaintiff's conduct was discussed first. In contrast, jurors assigned less than half of the fault (44.14 percent) to the plaintiff when the defendants' conduct was discussed first. This demonstrated that the more available the party was to the jurors, the more likely the jurors were to blame that party. (See figure 1.)

When the plaintiff's conduct was discussed first, jurors had a weaker desire to compensate the plaintiff and punish the defendants compared to when the defendants' conduct was discussed first. When the defendants' conduct was first, this approach made criticizing the defendant readily available to jurors resulting in them wanting to punish the doctor and hospital more, as well as increasing the jurors' desire to compensate the plaintiff. (See figure 2.)

These results demonstrate that the defendants were able to successfully reduce their blame, as well as jurors' desires to compensate the plaintiff and punish the defendants, by focusing first on the plaintiff's failure to take care of her health and discussing her unhealthy lifestyle.

For the construction scenario, jurors heard about a contract dispute between a property management company and a construction company.

Jurors assigned nearly half of the fault (49.25 percent) to the plaintiff when the plaintiff's conduct was discussed first. In contrast, jurors assigned only 41.75 percent of the fault to the plaintiff when the defendant's conduct was discussed first. Therefore, jurors increased how much they blamed the plaintiff when the plaintiff was more available to them. (See figure 3.)

When the plaintiff's conduct was discussed first, jurors had a weaker desire to compensate the plaintiff and punish the defendant compared to when the defendant's conduct was discussed first. As with the medical malpractice scenario, discussing the defendant's conduct first made the defendant readily available for jurors to criticize it. This led jurors to have an increased desire to punish the defendant and compensate the plaintiff. (See figure 4.)

These results demonstrate that the construction company defen-

dant was able to successfully reduce its blame, as well as jurors' desires to compensate the property management plaintiff and punish the defendant, by focusing on the plaintiff's knowledge of poor environmental conditions and its choice to use cheaper materials.

These studies demonstrate that defense attorneys can effectively utilize the availability bias in nearly any type of case as it was successfully utilized in both a highly emotional case (medical malpractice involving the death of an individual) and a business case (contract dispute between two companies). While we varied only the order of the narratives in this study because of their brevity, for an hour-long opening statement, both the order and richness matter to take full advantage of the availability bias. ❖

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Rick R. Fuentes is a founding partner of R&D Strategic Solutions. He has specialized in jury behavior and decision- making and the evaluation of complex evidence for over 25 years. Dr. Fuentes has a Master's Degree in Counseling Psychology from the University of Georgia, and a Master's Degree and Ph.D. in Applied Psychology from Texas A&M University. He has worked with trial teams on hundreds of civil and criminal cases involving issues of tort, contracts, anti-trust, intellectual property, product liability, and professional malpractice. Through the use of focus groups, mock trials and surveys, he assists trial attorneys and in-house counsel in the development of persuasive jury messages and themes, witness preparation, jury selection and case valuation.

Be Careful What You Wish For

Continued from page 23

strengthened our motion for summary judgment. When the expert was struck, but the summary judgment denied, we were forced to consider how a new expert, and potentially new plaintiff's counsel, might prosecute the claims against our client based on the same record.

No one wins every dispositive motion. In making decisions with respect to expert discovery and motions to exclude, you have to look beyond the motions stage of the case and consider the possible ramifications of your expert witness strategy if the case proceeds to trial.

4. Be Careful What You Wish For.

Perhaps most importantly, we should think more about whether challenging an opposing expert under *Daubert* will lead to a better result for the client. In certain situations, the expert opinion is so essential to the plaintiff's case that the fight over admissibility versus exclusion practically becomes a dispositive motion on liability in and of itself. If striking the opinion evidence would almost certainly mean a subsequent dismissal or summary judgment, then it makes more sense to aggressively pursue the exclusion.

But if the record is such that a judge could grant the motion to strike and still let the case past summary judgment, then defense counsel should consider whether the benefit of filing the motion outweighs the potential risks. You could wind up opening the door for the plaintiff to replace a poor witness with a more effective expert. Or, your motion could simply serve to educate the opposing expert on how to improve his testimony. Neither outcome makes the case easier to defend at trial.

Conclusion

O.C.G.A. § 24-9-67.1 is a useful tool for litigators encountering opposing experts, and one that can be very effectively coupled with a motion for summary judgment or a motion to dismiss. But whether or not to employ § 24-9-67.1 in seeking to exclude expert opinion testimony is a decision that demands an honest assessment of your case and careful consideration of a number of factors. Even a successful motion to exclude can have an unanticipated – and negative – impact on your defense of a case. Taking proactive measures early in the litigation process (developing specific information on the judge, getting a detailed scheduling order in place, etc.) and maintaining an "all the way through trial" perspective of your case can help you avoid surprises and obtain the best outcome for your client.❖

William J. (Will) Martin is an associate with Hawkins Parnell Thackston & Young in Atlanta. He practices primarily in the areas of product liability, toxic tort, and premises liability. Mr. Martin has defended businesses, individuals, and their insurers in tort and contract litigation since joining the Georgia Bar in 2006.

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Business/Commercial Litigation Case Law Update

By Henry D. Fellows, Jr.
Fellows LaBriola, Atlanta

***Chemence Medical Products, Inc. v. Medline Industries, Inc.* 2015 WL 630400, ___ F.Supp.3d _____ (N.D. Ga. Feb. 12, 2015)**

The U.S. District Court for the Northern District of Georgia held that the purchaser in a supply agreement properly exercised its right to terminate the supply agreement following the supplier's improper imposition of a medical device tax, which the Court had previously held was a price increase not permitted under the supply agreement.

Medline is the largest distributor of healthcare products and supplies in the United States. Chemence Medical Products, Inc., is a manufacturer of surgical medical adhesives. Chemence sought damages in excess of $300 million for alleged breach of contract by Medline. On August 1, 2010, the parties entered into a Supply Agreement ("the Agreement") pursuant to which Chemence would supply a surgical closure adhesive to Medline. The Agreement provided that Chemence would supply "a 2-octyl cyanoacrylate surgical closure adhesive with the exact specifications, or substantially similar specifications" as those set forth in the Agreement. Chemence sold that product to Medline under the trade name Octylseal, but also manufactured the same product under two other names — Derma+Flex QS and Sure+Close II — consistent with the Agreement.

The Agreement's terms required Medline to pay Chemence certain amounts upon FDA approval of the product and upon execution of the Agreement. Medline was required to purchase a minimum annual amount of the product and, as long as Medline met that requirement, Chemence was required to supply the product for a fixed transfer price of $5.50 through December 31, 2012. After that date, Chemence could increase the transfer price annually to reflect changes in raw material, labor

costs, and manufacturing, provided that it gave Medline 30 days' notice. The Agreement then gave Medline the right to reject price increases and terminate the contract upon 30 days' notice.

In late November 2012, Chemence notified Medline that sales of Octylseal could be subject to a 2.3 percent federal excise tax on medical devices under the Affordable Care Act. A month later, Chemence informed Medline that it would add 13 cents per unit to the cost of Octylseal as a charge for the excise tax. Medline responded that it did not believe that the Agreement permitted the excise tax to be passed on to it, and Medline rejected the increase in price as an impermissible increase in cost under the Agreement.

On February 13, 2013, Chemence filed a declaratory judgment action against Medline seeking a declaratory judgment as to whether the tax was a federally-mandated payment or a permissible price increase. On February 19, 2013, Medline notified Chemence that it would terminate the Agreement in 30 days. Chemence responded by amending its civil action to assert a breach of contract claim, seeking in excess of $300 million from Medline.

Medline initially moved for partial summary judgment on the pleadings, which the Court granted, thereby establishing the legal precedent that the medical device excise tax contained in the Affordable Care Act applies only to manufacturers of medical products and not distributors of medical products. *Chemence Medical Products, Inc. v. Medline Industries, Inc.,* 989 F.Supp. 1349 (N.D. Ga. 2013). The Court reasoned that the excise tax did not qualify either as a permissible price increase under the Agreement or a federally-mandated payment.

Following substantial document and deposition discovery, both parties moved for summary judgment on Chemence's remaining breach of contract claim. The Court granted Medline's motion for summary judgment and denied Chemence's motion for summary judgment. *Chemence Medical Products, Inc. v. Medline Industries, Inc.,* 2015 WL 630400, ___ F.Supp.3d _____ (N.D. Ga. Feb. 12, 2015). The Court held:

"This Court finds that Medline did not breach the Agreement by giving a notice of termination following Chemence's attempt to impose the excise tax. Where a party simply exercises its rights under a contract, there is no breach of that contract. The plain language of the contract allows Medline to terminate the Agreement following the imposition of a price increase. Here, it is undisputed that the tax would increase the amount paid by Medline to Chemence. Additionally, Chemence gave 30 days' notice before imposing the tax, as required by Section 5.6 of the Agreement — the section governing price increases. Chemence also stated that the tax would have the same effect as a price increase. Chemence cannot have it both ways. It treated the imposition of the tax like a price increase, and Medline responded by exercising its rights under the Agreement in the case of a price increase. Chemence cannot now argue that Medline breached the Agreement when Medline simply responded to Chemence's actions as allowed under that contract … . This Court therefore finds that Medline did not breach the contract by exercising its right to terminate following notice of a price increase." ❖

Mass Torts Case Law Update

By Todd E. Schwartz, SLS Chair
Lewis Brisbois Bisgaard & Smith, Atlanta

***Fletcher v. Water Applications JE-025 Distribution Group, et al.*, Court of Appeals of Georgia, A15A0527 (July 16, 2015)**

In this asbestos exposure case, the Court of Appeals affirmed in part and reversed in part the State Court of Thomas County's grant of summary judgment to Defendants Water Applications Distribution Group, Inc. ("Water Applications") and CertainTeed Corporation ("CertainTeed"). The plaintiff, Ms. Fletcher, alleged that exposure to asbestos from these defendants' products contributed to her contracting mesothelioma.

Ms. Fletcher claimed exposure between 1960 and 1977 while repeatedly laundering dusty work clothes that had come in contact with asbestos-containing cement pipe that her father had worn. Her father was employed by the City of Thomasville Water & Light Department from 1948 until his retirement in 1983. During this time, his primary work duty was handling, cutting, installation and repair of water pipe. A co-worker testified that the father worked with CertainTeed asbestos cement pipe. The pipe was sold to the City of Thomasville Water & Light Department by Davis Meter & Supply Company, the predecessor to Water Applications.

Both CertainTeed and Water Applications filed Motions for Summary Judgment on all causes of action asserted by Plaintiff on the grounds that they did not owe the plaintiff a duty of care because she was neither a user nor a consumer of the product at issue and the Defendants "could not have reasonably foreseen that she would be affected by their product." The trial court granted summary judgment to both Defendants. The plaintiff appealed.

The Court of Appeals considered each Defendant's duties separately.

As to CertainTeed, the manufacturer of the asbestos cement pipe, the Court of Appeals determined that plaintiff's Complaint did not set forth a claim for a manufacturing defect in the pipe because Plaintiff claimed that all of CertainTeed's asbestos cement pipe was defective since it used asbestos as an ingredient in the product. The trial court properly granted summary judgment to CertainTeed on that claim. However, the Court of Appeals concluded the trial court erred in granting summary judgment as to Plaintiff's design defect claim. In reaching this decision, the Court of Appeals decided that the Supreme Court of Georgia's holding in *CSX Transportation, Inc. v. Williams*, 278 Ga. 888 (2005) was not controlling.

The *CSX* Court declined to extend the duty of care of an employer owes for a safe workplace to its employees to non-employee third parties, notwithstanding the fact that the non-employee was a family-member of an employee. The Court of Appeals in *Fletcher* instead chose to apply the risk-utility analysis set forth in *Banks v. ICI Americas, Inc.*, 264 Ga. 732 (1994), finding that said analysis was not limited to the protection of only specified classes of people. As to Ms. Fletcher's warning defect claim, the Court of Appeals concluded the trial court erred in granting CertainTeed summary judgment based on the dispute in CertainTeed's knowledge regarding the potential hazards of asbestos. Finally, the Court of Appeals affirmed the trial court's grant of summary judgment as to Plaintiff's general negligence claims since Plaintiff failed to challenge that part of the trial court's ruling.

As for Water Applications, since it was the distributor of the product and not the manufacturer, the Court of Appeals affirmed the trial court's grant of summary judgment on all of Plaintiff's causes of action. The Court determined that no evidence existed in the record to establish that Water Applications possessed any knowledge of the hazards of asbestos. In fact, Water Applications never took possession of the asbestos cement pipe. Rather, the pipe was shipped directly from CertainTeed to the City of Thomasville. Plaintiff further failed to demonstrate that Water Applications had any knowledge about the lack of warning labels on the pipe. Therefore, the grant of summary judgment as to Plaintiff's negligent failure to warn cause of action was affirmed. ❖

Professional Liability Case Law Update

By James S.V. Weston, SLS Chair
Trotter Jones, Augusta

Emergency Medical Care and Apportionment: *Quinney v. Phoebe Putney Mem. Hosp., Inc.*, Dougherty County Superior Court, SUCV-2010-1785

Jury Instructions and Standard of Care Evidence: *Wong v. Chappell*, 333 Ga. App. 422 (2015)

Federal Tort Claims Act: *McKinley v. United States*, 2015 WL 5842626 (M.D. Ga. Oct. 6, 2015)

The Georgia Supreme Court and Court of Appeals have issued several opinions addressing the constitutionality and application of O.C.G.A. § 51-1-29.5, the "Emergency Medical Care" statute. *See Gliemmo v. Cousineau*, 287 Ga. 7 (2010); *Bonds v. Nesbitt*, 322 Ga. App. 852 (2013). Not until recently, though, had a Georgia jury rendered a verdict in a case where the statute applied. On September 24, 2015, a Dougherty County jury found for the plaintiffs and against an ER physician in *Quinney v. Phoebe Putney Mem. Hosp., Inc.*, Dougherty County Superior Court, SUCV-2010-1785. The Court of Appeals previously reversed the trial court's award of summary judgment to the defendants. *Quinney v. Phoebe Putney Mem. Hosp., Inc.*, 325 Ga. App. 112 (2013). The *Quinney* court rejected the plaintiffs' contention that O.C.G.A. § 51-1-29.5 did not apply, since the record "clearly show[ed] that when the defendants began their care of Mr. Quinney, they were providing emergency medical care as defined by" the statute. *Id.* at 116 (1). The record further established that the defendant ER physician ordered a CT scan of the patient and relied on a radiologist's interpretation of the scan to make his diagnosis. *Id.* at 119 (2). However, the Court of Appeals identified additional facts that precluded summary judgment, namely the ER physician's failure to read records that would have allegedly required him to consult further with a radiologist or neurosurgeon. *Id.* at 120 (2). "Indeed, the Quinneys' expert pointed to these facts as additional clear and convincing evidence that [the ER physician] had deviated from the accepted standards of medical care and was therefore grossly negligent in excluding spinal canal hematoma from his differential diagnosis." *Id.*

Shortly before trial, the plaintiffs dismissed the defendant hospital and two of its nurses. The only defendants at trial were the ER physician and his practice. According to news reports, "In addition to battling over the standard applying to Quinney's claim against the [the ER physician], the parties disputed whether [the ER physician] had to prove gross negligence or ordinary negligence in order for the jury to apportion fault to" the radiologist who read the CT scan. Alyson M. Palmer, Daily Report, "Plaintiff Wins $1.485M from ER Doctor, Clearing Higher Negligence Standard," October 23, 2015, at 2. The trial judge "left that up to the jury on the basis that a question of fact existed over whether [the radiologist's] care of the plaintiff was rendered in the ER or the radiology department. The verdict form does not show how the jury resolved that issue." *Id.* The jury initially awarded $4.5 million against the ER physician and his practice; however, after reviewing the verdict form, the trial judge sent it back to the jury with "additional instructions on apportionment." *Id.* The jury then apportioned 34 percent of fault to the radiologist and 33 percent to the hospital and one nurse, leaving 33 percent of the $4.5 million ($1.485 million) apportioned to the ER physician and his practice. *Id.* at 1 and 2. It is unknown at this time if the defendants will appeal the judgment.

Whether the facts required a jury charge on ordinary negligence was one of the issues in *Wong v. Chappell*, 333 Ga. App. 422 (2015) (physical precedent only). The record showed that the patient died approximately a month after undergoing a cryoablation of her endometrium. At trial the patient's husband requested a jury instruction on ordinary negligence, citing as support several negligent acts by the medical practice's non-physician staff. This alleged negligence included "the front desk staff's failure to ensure that Mrs. Wong took her antibiotic prescription with her after the [cryoablation]," and a medical assistant's failure to note or report Mrs. Wong's complaints of pain after talking with her over the

phone. *Id.* at 424-425 (2). The plaintiff also claimed that the treating physicians failed to properly train the medical assistant "regarding her phone triage duties." *Id.* at 425 (2). The trial court did not charge on ordinary negligence and, instead, instructed the jury that the medical malpractice standard of care covered the plaintiff's claims. *Id.* The jury found in favor of the defendant OB/GYNs and their practice. The Court of Appeals reversed, finding "the trial court erred by concluding that because expert testimony was required to prove causation, all of Wong's allegations asserted claims of professional negligence." *Id.* at 426 (2). The negligence of the front desk staff and medical assistant did "not involve the exercise of professional skill and judgment within the area of an obstetrician-gynecologist." *Id.* Additionally, the physicians' alleged failure to properly train the medical assistant on handling patient calls did "not involve the exercise of professional skill and judgment within their area of expertise." *Id.* Under these facts, the trial court should have charged the jury on ordinary negligence, and the refusal to do so required reversal. *Id.*

The plaintiff in *Wong* also argued that the medical assistant's handling of the phone call with Mrs. Wong supported jury instructions on the unauthorized practice of medicine and negligence per se. *Id.* at 427-428 (3). Reversing the trial court's failure to give these instructions, the Court of Appeals looked at O.C.G.A. § 43-34-44, which clarifies the role of medical assistants, and the relevant administrative rule, Ga. Comp. R. and Regs. r. 360-3-.05. *Id.* "Reading the statute and rule together," the court concluded "that medical assistants may perform certain specified medical tasks as well as tasks that do not require a medical license." *Id.* at 428 (3). The issue at hand was whether the medical assistant's "interaction with Mrs. Wong involved a task that required a license." *Id.* Based on the testimony of the plaintiff's expert, as well as apparent concessions by the defendants, there was a jury question on whether it was appropriate for the medical assistant – as compared to a physician – to handle Mrs. Wong's post-operative complaints of pain or to give treatment advice. *Id.* Therefore, the trial court should have given the plaintiff's requested instructions. The Court of Appeals did uphold the trial court's refusal to give the plaintiff's requested instruction that the "package inserts" included with the cryoablation equipment "established the standard of care." *Id.* at 429 (4). While the package inserts were relevant, they did "not conclusively establish the standard of care." *Id.* "To allow the package inserts alone to establish a physician's standard of care would be inconsistent with O.C.G.A. § 51-1-27 and our case law because it would permit the manufacturer, rather than the medical profession, to establish the standard of care." *Id.* Likewise, the court rejected the plaintiff's contention that the alleged "failure to follow the package inserts was simple negligence that did not require expert testimony." *Id.* at 429-430 (4). Lastly, the trial court properly allowed into evidence a "'resource guide' that was not in effect at the time of Mrs. Wong's procedure." *Id.* at 430 (5). Although "the applicable standard of care is the standard of care at the time of the alleged negligence act," the trial judge "could have found that the later-published resource guide was relevant to the standard of care at the time of Mrs. Wong's procedure, because it demonstrated the manufacturer's revision of its guidelines to reflect the practice in the medical community or information available at that earlier time." *Id.* at 430-431 (5).

> ***"The issue at hand was whether the medical assistant's "interaction with Mrs. Wong involved a task that required a license."***

Lawyers defending malpractice claims brought under the Federal Tort Claims Act should read Judge Lawson's ruling in *McKinley v. United States*, 2015 WL 5842626 (M.D. Ga. Oct. 6, 2015). The plaintiff claimed that her husband died because medical personnel employed by the federal government negligently treated his bladder cancer. The alleged malpractice occurred in Tennessee, but the patient had moved to Georgia when he became aware of it, and he ultimately died in Georgia.

The United States moved to dismiss the plaintiff's FTCA suit, on the grounds that the plaintiff had not complied with various provisions of Tennessee law. The first issue for the court was to decide whether Georgia or Tennessee's substantive law applied. *Id.* at *3. Judge Lawson focused on where the negligence occurred (Tennessee) and where the injury occurred (Tennessee). *Id.* at *5-7. "An examination of the relevant choice of law principles leads the Court to conclude that Tennessee substantive law, to the extent it is not preempted by the FTCA, governs the rights and liabilities of the parties in this case as to all of the Plaintiff's claims against Defendant." *Id.* at *7.

The next step was to determine if the FTCA's time limitations preempted Tennessee's three-year statute of repose for medical malpractice actions. *Id.* at *10-11. The FTCA has a general two-year limitation on "tort claims against the United States," but under certain circumstances the filing of a "reconsideration claim" will toll the limitations period. *Id.* at *11. The plaintiff filed a valid reconsideration claim, and "after exhausting her administrative remedies," timely filed her FTCA action. *Id.* at *11.

Before filing the FTCA action, the Tennessee statute of repose expired on the plaintiff's medical malpractice claims. Nonetheless, Judge Lawson held that under the doctrine of "implied preemption," the FTCA's time limitations preempted "state statutes of repose." *Id.* at *12-13. Since the plaintiff had complied with the FTCA's time limitation provisions, her lawsuit could proceed, even if the Tennessee statute of repose had run. *Id.* at *13. ❖

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DAILY REPORT

Continued from page 1

Forbes, and a John Doe named Mr. Black had some involvement in the attack on Mr. Martin, and asked that these individuals be included on the jury verdict form.[2] Despite including Mr. McCoy and other John Does in its Notice of Nonparty Fault, Six Flags did not ask that Mr. McCoy or any other John Does be placed on the jury verdict form, thereby waiving any appeal rights as to those nonparties.[3]

In response to the Six Flags request to place Mr. Cowart, Mr. Forbes, and Mr. Black on the jury verdict form, the trial court simply responded "no," refused to hear argument or evidence concerning their involvement, and indicated that it would only consider individuals who had a criminal conviction related to the attack.[4]

While the Court was unified in its reversal, the judges' reasoning varied. The majority held that the trial court erred in refusing to allow apportionment against, and place on the jury verdict form, two known (but not convicted) criminal assailants and another unknown criminal assailant referred to as "Mr. Black." The concurrence in the remaining aspects of the apportionment ruling departed from that point. Judges Dillard, Barnes, Ray, Boggs, and Branch (the majority opinion) found that a new trial was necessitated by the error. Judges Miller, McFadden, and McMillian concurred in the reversal on these grounds, but contended that only damages should be re-tried. Finally, Judges Ellington and Phipps concurred in judgment only, agreeing with the reversal, but perhaps not the reasoning. While Judges Doyle and Andrews dissented; their dissent focused on the premises aspects of the case and did not address apportionment, as any issues related to apportionment were mooted by their holding that a directed verdict should have been granted in favor of Six Flags.

The majority decision in *Six Flags* will significantly impact Georgia litigation moving forward, particularly in premises liability cases involving unknown criminal assailants. While on one hand, the Court's decision merely confirmed what we already knew – that apportionment was permitted against at-fault nonparties, including John Doe criminal assailants[5] – on the other hand, the Court went a step further in clarifying what is required on a jury verdict form. Specifically, the Court held that because there was "some evidence" that Mr. Cowart, Mr. Forbes, and "Mr. Black" may have contributed to Mr. Martin's injuries, "Six Flags was entitled to have the requested individuals placed on the verdict form."[6]

The import of this ruling can be broken down into four categories: (1) affirmation of a defendant's right to seek apportionment against John Doe assailants or other alleged criminal actors who were not convicted; (2) clarification of trial courts' obligations with regard to apportionment and the use of jury verdict forms; (3) confirmation of the low evidentiary standard necessary to have a nonparty named on the verdict form; and (4) service as a broad warning of the Draconian effect of excluding at-fault nonparties from the verdict form.

As to the first point, Georgia law had previously addressed the right to seek apportionment against criminal actors, both known and unknown, in several cases. In *Couch v. Red Roof Inns, Inc.*, the Georgia Supreme Court specifically permitted application of O.C.G.A. § 51-12-33 to criminal actors as the term "fault," as used in the statute, encompasses intentional torts.[7] In *GFI Mgmt. Servs., Inc. v. Medina*, the Supreme Court extended the analysis to unknown criminal assailants.[8] Finally, in *Double View Ventures, LLC v. Polite*, the Court of Appeals held that precise identification of a criminal assailant is not required, basing its analysis on the plain language of O.C.G.A. § 51-12-33(d)(1), which merely requires that a defendant provide "the best identification of the nonparty which is possible under the circumstances… ."[9] In light of these rulings, in *Six Flags*, the Court of Appeals found clear error in the trial court's refusal to include non-convicted and unknown criminal actors and noted that the trial court set "the bar far too high for determining who could be considered to have contributed to Martin's injuries."[10]

The second major impact is a clarification of trial courts' obligations with regard to apportionment and jury verdict forms. While we take for granted that a special verdict form is appropriate and should be used where apportionment is at issue, not all courts or judges have agreed with that approach, and the plaintiff's bar has pushed this issue knowing that fact. For example, in *Shirley v. Townview Station Apartments, LLC*, the trial court ruled that a jury charge or instruction was sufficient to task the jury with apportioning fault, and refused to list at-fault nonparties on the verdict form or allow the jury to apportion fault to those nonparties in writing, despite there being some evidence of those nonparties' fault.[11] Left untold is how the jury would assign fault without the special verdict form, or how the parties would understand what percentage of fault was assigned, if any. Nevertheless, the holding in *Six Flags* makes clear that where "some evidence" is presented as to a nonparty's fault, the defendant is "entitled to have the requested individuals placed on the verdict form."[12] As a result of the holding, any argument concerning use of a special verdict form, or attempts to exclude a defendant from actually naming nonparties on the verdict form, should be conclusively put to rest.

The third aspect of the *Six Flags* decision that will impact litigation moving forward is confirmation of the evidentiary standard or defendants' evidentiary burden. The prior seminal apportionment cases

in Georgia have left the evidentiary standard somewhat open-ended. In *McReynolds v. Krebs*, the defendant failed to present any evidence as to General Motors' alleged fault, thereby precluding apportionment.[13] In *Couch*, the Supreme Court noted that the defendant bears the burden of establishing a nonparty's fault, but whether the defendant meets that burden given the evidence at trial should be left to the jury.[14] Neither decision defines the evidentiary burden, although *Couch* demonstrates a preference for including alleged at-fault nonparties on the verdict form where evidence is presented. In *Polite*, the Court of Appeals used phrasing similar to that in *Six Flags*, noting that apportionment was permissible against a Chevron station because *some evidence* of fault existed.[15] The Court's decision in *Six Flags* further confirms this low evidentiary burden of "some evidence," and that the task of assessing the evidence and assigning fault should be left to the jury if at all possible.[16] As a result, defendants should be able to name nonparties on verdict forms so long as they establish some modicum of evidence of the nonparties' alleged fault.

Finally, the ruling serves as a warning concerning the Draconian effect of errors relating to improper exclusion or inclusion of nonparties on a jury verdict form. The holding in *Six Flags* echoes (and perhaps clarifies) the Court of Appeals' holding in *Polite*, specifically, that the failure to include at-fault nonparties on the verdict form for the jury's consideration warrants and requires a new trial, as opposed to allowing another jury to simply hear damages.[17]

Given the low evidentiary burden or threshold and the severity of the consequences for failing to include at-fault nonparties for which "some evidence" of fault is presented, it is likely that parties will more carefully consider challenges to the inclusion and naming of alleged at-fault nonparties on verdict forms in future litigation. ❖

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Endnotes

1 Order, p. 27-28.
2 *Id.* at 28.
3 *Id.*
4 *Id.* at 30-31.
5 *GFI Mgmt. Servs., Inc. v. Medina*, 291 Ga.741, 742-743 (733 S.E. 2d 329)(2012); *see also Double View Ventures, LLC v. Polite*; 326 Ga. App. 555, 560-564 (757 S.E. 2d 172) (2014).
6 Order, p. 34.
7 291 Ga. 359, 365 (729 S.E. 2d 378)(2012).
8 291 Ga. at 742-743 (733 S.E. 2d 329).
9 326 Ga. App. at 560-564 (757 S.E. 2d 172).
10 Order, p. 31.
11 2013-CV-233282, Superior Court of Fulton County.
12 Order, p. 32, 34.
13 290 Ga. 850, 853 (725 S.E. 2d584)(2012).
14 291 Ga. at 366.
15 326 Ga. App. at 561.
16 Order, p. 32.
17 *Order*, p. 33-34, *Polite*, 326, Ga. App. at 564.

Challenges of Child Car Seat Use

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particular vehicle, and positioning multiple child car seats in the rear seat brings additional challenges. Depending on the crash scenario, the middle seating position in the rear seat is considered the safest. However, this seating position is frequently narrow or uneven making it difficult to install a child car seat properly. Additionally, many vehicles do not provide LATCH anchors in the middle seating position. However, parents can use the seat belt as an alternative installation approach if the child seat manufacturer and the vehicle manufacturer manuals give permission to do so.

During a car crash, many factors contribute to an increased risk of injury for children. Proper use, fit, and vehicle compatibility must be considered when analyzing injury outcomes of child occupants post-crash. It is important to note that even after the appropriate child seat is selected for the child's age, height, and weight, it must be properly installed in the vehicle, and the child must be properly restrained in the child car seat for it to mitigate injuries during a crash effectively. Having a trained and certified child seat technician inspect the car seat and teach the caregiver how to install the car seat properly in the vehicle can correct many misuse errors and mistakes. No single child car seat is the best for every vehicle or every child. The optimal child car seat system is one that is used correctly every time, fits the child so he or she is properly restrained, and is compatible with the vehicle in which the child is travelling. Accident reconstructionists need to evaluate all of these factors when analyzing injury outcomes. ❖

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Workers' Compensation Case Law Update

By Ann Baird Bishop
Sponsler Bishop Koren & Hammer, Atlanta

Barnes v. Roseburg Forest Products Company, et al.
Court of Appeals Case
No. A15A0405
Decided July 16, 2015

Issue: Did the Superior Court err in affirming the Appellate Division's decision denying claims (1) for recommencement of indemnity benefits based on the two-year statute of limitation for change in condition claims and (2) for benefits pursuant to a fictional new accident date based on the one-year statute of limitation? In a 3-0 decision, the Court of Appeals ruled that it was error and reversed.

Summary: The claimant sustained a workplace injury in August of 1993, while working for Georgia-Pacific, which resulted in a leg amputation. The claim was accepted as catastrophic, and TTD benefits were paid until the claimant returned to work in January of 1994. He was paid PPD benefits until May of 1998. He did not receive any workers' compensation income benefits thereafter. When the claimant was unable to perform regular work duties, he transferred to a light duty position incorporating duties he was able to perform. He continued working in a light duty position until 2008.

In 2006, Georgia-Pacific sold the facility where the claimant worked to Roseburg Forest Products Company ("Roseburg"). In 2008, Roseburg eliminated several positions, including the claimant's light-duty supervisory position. The claimant continued to work in a more physically demanding position, which caused pain and swelling in his injured limb. The claimant was terminated in a second round of layoffs in 2009.

In August of 2012, the claimant asserted a claim for reinstatement of TTD based on his 1993 injury, claiming that as a catastrophically injured worker he was entitled to receive benefits beginning on the date he no longer had a job. Georgia-Pacific and Roseburg both controverted on the basis that, *inter alia*, the two-year statute of limitation for a change in condition set forth in O.C.G.A. § 34-9-104 had expired.

In November of 2012, the claimant filed a separate notice of claim with Roseburg, asserting an injury date of September 11, 2009 and contending that his termination constituted a fictional new accident. Roseburg controverted this claim on the basis that, *inter alia*, the statute of limitations for an "all-issues" case set forth in O.C.G.A. § 34-9-82 had expired.

The Administrative Law Judge (ALJ) denied both claims as barred by the statutes of limitation set forth in O.C.G.A. §§ 34-9-104 and 34-9-82. The State Board's Appellate Division adopted the ruling and the Superior Court affirmed. Before the Court of Appeals, the claimant argued that the Board erred by finding that the two-year statute of limitation set forth in O.C.G.A. § 34-9-104 barred his claim with respect to the August 1993 injury. The claimant argued that O.C.G.A. § 34-9-261 should be interpreted as authorizing an employee who has sustained a catastrophic injury to assert a claim to reinstate benefits when he experiences a change in condition, even if that change in condition occurs more than two years after the date that the last benefit payment was made.

The Court of Appeals determined that the Board had erred in adopting the ALJ's ruling that the two-year statute of limitation in O.C.G.A. § 34-9-104 barred the claimant's catastrophic injury claim. The Court of Appeals reasoned that this was a situation the Workers' Compensation Act had not contemplated: a situation in which an employee returned to work with significant limitations, despite a catastrophic injury, and then, more than two years after the last benefit payment was made, tried to resume the payment of benefits. The Court of Appeals noted that, pursuant to O.C.G.A. § 34-9-261, the 400-week cap on TTD benefits does not apply to an employee who has suffered a catastrophic injury. The Court of Appeals further held that the legislature intended to allow those who

had more serious injuries to receive benefits indefinitely, so long as they remained catastrophically injured, including in situations where an application for reinstatement of benefits on a change in condition was made more than two years after the last payment of benefits.

The claimant also argued that the Board erred by finding that his claim based on a fictional new accident was barred under the applicable statute of limitation set forth in O.C.G.A. § 34-9-82. The Court of Appeals agreed, concluding that the claim was filed on November 30, 2012, which was within a year of the December 2011 replacement of his prosthetic leg. The Court held that this replacement constituted remedial treatment for the fictional new accident, and a claim filed within one year of the replacement was not barred. The Court rejected Roseburg's arguments that the replacement was part of the 1993 claim and not remedial treatment for a fictional new accident. The Court additionally rejected Roseburg's argument that the replacement could not toll the statute of limitation because it was provided more than one year after the previous treatment.

The Court of Appeals held that because the Administrative Law Judge's decision was based on its finding that the claims were not timely filed, the Administrative Law Judge and, consequently, the Appellate Division and Superior Court, did not fully consider the claimant's arguments. Accordingly, the Superior Court's ruling was reversed and the claims remanded to the Board for further consideration.

Analysis: The decision by the Court of Appeals is wrong for a number of reasons.

First, the claim for reinstatement of benefits for the original, 1993 claim is based on a contention that the claimant experienced a change in condition for the worse when he stopped working in 2009. The employer conceded that the claimant had undergone such a change. However, O.C.G.A. § 34-9-104 provides that a claimant may apply for a decision authorizing the recovery of additional income benefits based on a change in condition, *provided that at the time of the application not more than two years have elapsed since the date of last payment of TTD or TPD was actually made*. The Court of Appeals disregarded the plain language of the statute and found that the legislature intended to create an exception for catastrophic injuries when the legislature had not done so. In so holding, the Court of Appeals referred to O.C.G.A. § 34-9-261, which provides that TTD shall be payable for a maximum of 400 weeks from the date of injury unless an injury is catastrophic, in which case TTD is payable "until such time as the employee undergoes a change in condition for the better." While the Court of Appeals is correct that this shows the legislature intended to treat catastrophic claims differently from other claims, it also shows that the legislature is capable of stating exceptions for catastrophic claims when it intends them. Rather than acknowledge that an exception was clearly omitted by the legislature, the Court created an exception where there was none. O.C.G.A. § 1-3-1(b) provides that "[i]n all interpretations of statutes, the ordinary signification shall be applied to all words, except words of art or words connected with a particular trade or subject matter, which shall have the signification attached to them by experts in such trade or with reference to such subject matter." The two-year statute of limitation clearly states that an application for additional benefits for a change in condition can be made only when "not more than two years have elapsed" since the date the last payment of TTD or TPD was made. Had the legislature intended an exception for catastrophic injuries, it could have and would have stated one, as it did in other parts of the Act.

> ***"The decision by the Court of Appeals is wrong for a number of reasons."***

Second, the claim for benefits based on a fictional new injury in 2009 is barred if no claim was filed within one year after the injury or within one year after the date of the last remedial treatment furnished by the employer. The Court of Appeals held that the December 2011 replacement of the claimant's prosthesis constituted remedial treatment for the 2009 claim so that the claim filed in November was within one year. However, the Court did not point to any factual finding or evidence that the prosthesis replacement constituted treatment for a 2009 injury as opposed to the 1993 injury that resulted in the amputation. Without such evidence, the statute of limitation in O.C.G.A. § 34-9-82 bars the claim.

Third, Roseburg asserted that remedial treatment for a fictional 2009 claim had not been commenced within a year of the alleged injury date. The Court of Appeals did not recite any factual findings on the issue, but given Roseburg's argument, it appears that there was no remedial treatment for a year after the claimant's last day of work. Accordingly, even if the prosthesis replacement was found to be treatment for a 2009 fictional claim, the statute of limitations on a 2009 claim had already run (since no claim had been filed within a year) and an employer's voluntary payment of medical expenses cannot revive a claim once the statute of limitations has run.

A petition for certiorari has been filed with the Supreme Court of Georgia. The GDLA Amicus and Executive Committees have approved our filing an amicus brief in this case. Once filed, it will be posted in the Members Only area of our website under "Amicus Policy & Briefs" in the right navigation pane. ❖

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In our ongoing effort to promote diversity within the GDLA and the bar generally, the GDLA was pleased again to co-sponsor the Annual Judicial Reception of the Gate City Bar Association and Georgia Association of Black Women Attorneys (GABWA) on August 18, 2015, at King & Spalding. The GDLA is especially proud to have member Adwoa Ghartey-Tagoe Seymour serving as GABWA President.

Pictured at the reception are: *1. GDLA Diversity Chair and Gate City Bar Executive Committee Member-at-Large Candis Jones and former Fulton Juvenile Court Judge Glenda Hatchett with Gate City and GDLA member Chris Johnson; 2. U.S. District Court Judges Mark Cohen and Leigh May with DeKalb State Court Judge Dax López and Fulton State Court Judge Wes Tailor; 3. DeKalb Superior Court Judge Asha Jackson, GABWA President-elect Janet Scott, GABWA Past President and GDLA member Jamala McFadden, and Fulton Magistrate Court Judge Melynee Leftridge; 4. Fulton Superior Court Judge Gail Tusan and U.S. District Court Judge Steve Jones with Gate City and GDLA member Jatrean Sanders; 5. GDLA member Kevin Patrick and Georgia Hispanic Bar Association Past President Ana María Martinez; 6. Gate City Bar Past President and GDLA member Curtis Martin with DeKalb State Court Judge Stacey Hydrick; 7. Atlanta Municipal Court Judge Chris Ward with Gate City Bar Immediate Past President and GDLA member Meka Ward; 8. Fulton Superior Court Judge Constance Russell, Court of Appeals Presiding Judge Herbert Phipps, and Fulton Superior Court Judge Kimberly Esmond Adams with GABWA President and GDLA member Adwoa Ghartey-Tagoe Seymour; 9. DeKalb State Court Judge Mike Jacobs with GDLA members Lara Percifield and Tracey Pruiett; 10. Fulton Superior Court Judge Henry Newkirk, GDLA Past President Lynn Roberson, Gate City and GDLA member Ray Persons, and Clayton Magistrate Court Judge Tammi Hayward; 11. Gate City Bar Past President and GDLA member Lynne Espy-Williams with Judge Shondeana Crews Morris, DeKalb State Court, Traffic Division.* ❖

Rivalry Happy Hour with GDLA, GTLA & ABOTA

For the first time, GDLA joined with its counterpart on the plaintiff's side, the Georgia Trial Lawyers Association (GTLA), as well as the Georgia Chapter of the American Board of Trial Advocates (ABOTA), for a Rivalry Happy Hour on September 3, 2015, at Stats Sports Bar in Midtown Atlanta. Also invited to the inaugural event was the appellate bench.

More than 125 lawyers and judges enjoyed an evening of networking and celebrating the kick-off of college football season. The event was one of GDLA President Matt Moffett's goals and, given its success, will no doubt be an annual gathering.

Thanks goes to these GDLA Platinum Sponsors who contributed to making the evening possible: BAY Mediation & Arbitration Services, Collision Specialists, Inc., Courtroom Visuals, Esquire Deposition Solutions, and Miles Mediation & Arbitration Services.

Pictured are: 1. GTLA Past President Lester Tate, ABOTA President and GDLA member Dan Huff, and GDLA President Matt Moffett. The trio worked together to bring the event to fruition; 2. Tracey Pruiett and Erica Morton; 3. GTLA member Kevin Leipow with Lara Percifield and Clay O'Daniel; 4. David Mackenzie and Sharonda Barnes; 5. Jennifer Guerra and Anandhi Rajan; 6. Joe Wieseman, Court of Appeals Judge Chris McFadden, Treasurer Sally Akins and Sam Crochet; 7. GTLA Executive Director Emily Wring, Court of Appeals Judge John Ellington and GDLA Executive Director Jennifer Davis; 8. Jatrean Sanders and Katie Dod; 9. Marty Levinson, Chris Johnson and Rishi Pattni; 10. GDLA President Matt Moffett and Court of Appeals Judge Billy Ray; 11. Supreme Court Justice David Nahmias and Mark Wortham; 12. Kevin Patrick and GTLA member Ryals Stone; 13. Taylor Tribble and GTLA member Matthew Wilson. ❖


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Facebook internet site; only on the phone/tablet app. Plaintiffs will often reveal phone numbers without a second thought in their initial round of discovery responses, but they may balk at revealing their Facebook pages. Meanwhile, during your initial investigation you really do not want them to be thinking about social media at all.

"Handles" go back to the early days of CB radio, but they live on in the form of Facebook, Twitter, and other social media account names. These days very few individuals are able to secure their own legal name as an account name, although some early adopters (including myself) will have moved quickly and grabbed those accounts. Facebook uses the account name in the form of a directory identifier, which you can use, via your web browser's URL bar, to locate a plaintiff's profile page. For example, my account name on Facebook is "ZachMatthews" so type "www.facebook.com/ZachMatthews" in a web browser's URL bar and simply push enter to pull up my personal Facebook profile. Here's the thing about handles: people tend to re-use them. It is extremely common for a person to have the same handle across a multitude of social media platforms.

Thus, your search might play out as follows: after an initially fruitless attempt to locate "Sally Smith" via a Google search, which turns up thousands of results, you decide to serve interrogatory requests asking the plaintiff to identify, among other things, her cell phone number. Upon receipt of her responses, you plug the number into the Facebook app on your phone, thereby identifying her personal Facebook profile. Now that you know which "Sally Smith" Facebook account is hers, you can pick it out of the multitude of Google hits, and pull up her profile in a web browser so that you can look at the URL at the top of your browser page. For this example, turns out Plaintiff Smith is a rabid Tennessee Volunteers fan, and thus has chosen "SallyVol4Evr" as her Facebook profile login; that means the corresponding URL is "facebook.com/SallyVol4Evr". You return to Google, and enter "SallyVol4Evr" in the search block (in quotes to limit the hits to only that particular sequence of letters and numbers), thus revealing that Sally has also chosen the same handle on Pinterest (a social media sharing site that is typically of limited use from an investigation standpoint) and also, much more interestingly, on Instagram. Sally's love for the Tennessee Volunteers turns out to be the keys to her online kingdom, and now you can begin your investigation in earnest.

Mining the Resource

Facebook is like catnip for many plaintiffs (and indeed non-plaintiffs): they cannot resist the urge to share their innermost thoughts and activities with the world. Facebook also has questionable privacy settings, an overly intricate web interface, and a well-published corporate philosophy to "move fast and break things" in the words of founder Mark Zuckerberg. Simply put, it is not in Facebook's best business interests to make privacy a priority, and thus the default mode of operation is usually one of public sharing. As a result, privacy settings are rarely as straightforward or robust as a privacy-conscious individual might wish.

One important caveat which needs to be addressed: there is a growing body of law nationwide in which courts and ethical boards have ruled that "friending" a person on Facebook is a form of impermissible contact with a represented party. *See, e.g.,* Opinion 2009-02, Philadelphia Bar Association Professional Guidance Committee (March 2009). As defense lawyers, our priority should *always* be to lie in the weeds during social media investigations. Remember, for example, that LinkedIn allows its users to see the most recent visitors to their pages – if you click a plaintiff's LinkedIn page while you yourself are logged on, the plaintiff will be able to tell you have viewed his profile, and will be reminded to watch his actions. (To view a LinkedIn profile safely, enter the browser's 'Incognito' mode, which will disable tracking of your computer, *before* navigating to a plaintiff's page).

You will often find that plaintiffs, acting on the advice of their attorneys, will already have set, for example, their most recent Facebook posts to "Only Friends" (thus preventing you from seeing the newer posts, even if you can view the profile page). However, frequently a subject will have increased his or her privacy settings only on the browser version of Facebook, and not on items posted from the Facebook phone/tablet app. Oftentimes they thus inadvertently continue sharing a trickle of their postings with the outside world. Of course, in many situations a plaintiff will stop posting altogether ... once they hire a lawyer. Even where a plaintiff has locked down all new content, he or she may forget to secure the *old* postings. A plaintiff's social media posts made in the interim period between an incident and their retention of counsel can be very useful indeed.

The cardinal rule of mining a plaintiff's Facebook page is to save everything. The best practice is to print a full-color copy of everything you can see on the profile as soon as you first access it. Save the highest resolution copies of Plaintiff's photos that you can. You never know when a plaintiff will decide to make his or her postings unavailable – and you may not win a discovery battle to force them to disgorge materials you only vaguely recollect seeing. For this reason, social media review should also be one of your first steps in investigating any new claim referred to your desk. In addition to printing a paper copy, you can also use the screen capture feature of any computer to save screen-

shots from a plaintiff's profile page with helpful comments and time-stamps. These screen clippings can be very useful when it becomes time to prove up a plaintiff's inconsistent statements on the stand. Jurors are familiar with a Facebook interface and will know the photos were both authentic and secured from Facebook, which only the plaintiff could have posted. Be sure to save and/or stamp any retained materials with the date and time you yourself accessed them, as this may also become important later.

This advice also goes for video, which, of course, cannot be printed. Although Facebook is coded to prevent outright capture of posted videos to save locally, there is a workaround: once you locate the video you wish to save in a web browser, enter the mobile version of Facebook by changing the "www" to "m" (for mobile). Thus, instead of "www.facebook.com/...", your URL would become "m.facebook.com/..." (with the ellipses representing the remaining gibberish identifying the particular video's page). Change *only* the "www" to "m" then push enter. Now in mobile mode, albeit accessed through a regular web browser, you can push play to start the video, then pause to stop it. A paused Facebook video accessed in mobile mode can be saved: simply right-click the video and choose "Save as ..." to retain the full video file locally.

It is rarely possible to cherry pick only the relevant information in a first pass of social media investigation – you typically haven't deposed the plaintiff yet and may not yet know what he or she will claim to be unable to do. Thus, blanket retention is the rule of the day. Be sure to convey this in the clearest possible terms to any associate or staffer you charge with retaining the evidence.

What if a smart plaintiff has set her social media page to be entirely private? Don't give up. I once was involved in a trial in which the plaintiff lied on the stand about a certain disfiguring injury preventing him from ever wearing short sleeves again. Luckily, I had devoted the hours to mining not only his *own* Facebook profile, but also to identifying that particular plaintiff's closest friends' Facebook profiles as well as the plaintiff's favorite hang-out, a local restaurant, which also had a Facebook page. In meticulously reviewing those companion pages I identified photos of our plaintiff not only wearing short sleeves outdoors at a parade, but also actually giving a toast at a wedding, holding his "disfigured" arm up for all to see, in specific contradiction to his sworn testimony. His friends had not tagged him in these publicly-available images, and thus he did not know they were out there. At trial, this evidence was used during his

... there are additional legal tactics that act as the priming trigger on the Facebook grenade.

cross-examination for impeachment purposes (discussed in detail below), and the jury wound up awarding the plaintiff the exact figure, to the cent, which we had offered at mediation. The moral of this story is to keep banging away: use the plaintiff's friends list; use the friends list of known family members. Identify places the plaintiff likes to hang out and determine if that restaurant or CrossFit Box or roller rink has a website or Facebook profile. If you put in the time, in my experience, in roughly three cases out of five you will find something extremely valuable.

While Facebook will remain the main event for the foreseeable future, don't neglect Twitter, Instagram, or the open web. A privacy-conscious plaintiff may well forget just how many social media accounts he or she has made, and neglect to protect one. In back-to-back negligent security sexual assault cases, I was fortunate to locate the plaintiff's online profiles demonstrating that they were not, as they each claimed, regular college students. Instead, they were the kinds of individuals who would advertise on Backpage.com (the sex trafficking website). While their aliases were meaningless and changed by the day, in those cases their phone numbers could not change for business reasons. A phone number search thus revealed their postings. At the first mediation, plaintiff's counsel took one look through our manila envelope of printouts and we quickly reached a go-away value settlement. In the second mediation, plaintiff's counsel saw the same envelope, and simply said, "Here we go again." Once again his case collapsed.

Baiting the Trap

Just knowing about the plaintiff's (in some cases illicit) activities can be very helpful, but there are additional legal tactics that act as the priming trigger on the Facebook grenade. First and foremost, you want the plaintiff to exaggerate. Exaggeration is the key to impeachment, because even a "white lie" will allow you to prove up the inconsistency on the stand.

Start with your first round of Interrogatories. Ask detailed and probing questions about the kinds of things a plaintiff enjoyed doing before the accident, but can no longer enjoy as a result of it. Be careful about timeframes: don't give the plaintiff wiggle room by setting unnecessarily narrow parameters with your interrogatory or deposition questions, such as asking what the plaintiff can't do "today" or "in the immediate aftermath" of an incident. Make the questions broad enough for a plaintiff to get the gist without boxing yourself in; most are more than happy to tell you all about

their suffering as a way of trumping up their case.

Chances are you will discover useful material via social media that a plaintiff posted in the aftermath of the incident, which may be inconsistent with a plaintiff's sworn statements (for example if the plaintiff with the "debilitating neck injury" nevertheless was able to attend a season's worth of high school football games). However, if the plaintiff *later* had a surgery, which the plaintiff could claim had a bad outcome, that might give the plaintiff a plausible explanation for the increased level of activity after the accident (but before the surgery). You want the plaintiff to blame *all* of his or her suffering on the incident, and not on specifics such as a subsequent round of botched treatment, in order for the impact on the plaintiff's credibility to be as strong as possible. Word your requests carefully with this in mind. At the end of the day, whether or not the plaintiff really could do this or that is unimportant: whether the plaintiff is trustworthy is what matters. If the jurors believe a plaintiff is lying to them, they will penalize him or her heavily, every single time.

Sanctionable Conduct

Once you have the plaintiff's sworn responses to your Interrogatories regarding what he or she can no longer do as a result of the accident (being sure to also demand a Verification), and once you have used that information to secure her social media postings to your satisfaction, in the right case you may want to consider a second round of discovery requests now explicitly targeted at social media accounts and their content. This is where the chess match typically begins. In a best case scenario, upon receipt of your "follow-up" social media discovery requests, the plaintiff – in a panic – will begin deleting (rather than privatizing) harmful social media postings which you will already have retained, then will try to provide you with surreptitiously redacted materials. (Although foolish in the extreme, this is a surprisingly common occurrence).

Redacted social media postings received in response to your discovery requests can be cross-referenced against your saved materials, which will typically give you everything you need to prove up the intentional destruction of evidence. This of course is sanctionable conduct which can lead to, in a best case scenario, an outright dismissal of the plaintiff's entire case. *Chapman v. Auto Owners Ins. Co.*, 220 Ga. App. 539, 542, 469 S.E.2d 783, 785-86 (1996) (Dismissal appropriate where a party has maliciously destroyed relevant evidence with the sole purpose of precluding an adversary from examining that relevant evidence).

Alternatively, if you receive redacted responses, you might want to lay low and refrain from filing a motion for sanctions, instead saving the information you have retained for use at trial as impeachment material, and thus blindsiding the plaintiff with the posts the plaintiff thought he or she had safely hidden. If you are extremely lucky, the judge might even let you get away with questioning the plaintiff on his or her attempted destruction of evidence after the plaintiff's statements have been impeached on the stand, even though this is debatably relevant. Judges tend to take a dim view of perjury, and may rule that a perjurious plaintiff has opened the door to otherwise ancillary or dubiously relevant lines of questioning.

Discovery Battles

You are likely to draw objections to your first round of social media discovery requests, whenever you choose to send them. The law of social media discovery is not yet well-documented and thus plaintiff's lawyers often respond with knee-jerk objections, even to carefully crafted questions. Remember that statements the plaintiff makes about his or her physical condition (whether online or otherwise), as well as photographs depicting the plaintiff (again whether posted online or even taken by a private investigator), are relevant to the plaintiff's contentions of injury, and thus your social media requests will be reasonably calculated to lead to the discovery of admissible evidence. *Lindsey v. Turner*, 279 Ga. App. 595, 597, 631 S.E.2d 789, 791 (2006) ("evidence concerning a plaintiff's 'other' injuries may be admissible to show that the injuries currently at issue are not the result of the defendant's alleged negligence"); *Darwin v. Metro. Atlanta Rapid Transit Auth.*, 158 Ga. App. 635, 636, 281 S.E.2d 361, 363 (1981) (photographs and testimony of private investigator admissible for impeachment even where both the evidence and the investigator's existence was not disclosed in the pretrial order).

Recent Georgia federal cases have begun making it clear that the door is open to discovery of social media postings, which is already well established in other federal courts. "Generally, social networking site content is neither privileged nor protected by any right of privacy." *Jewell v. Aaron's, Inc.*, No. 1:12-CV-0563-AT, 2013 WL 3770837, at *3 (N.D. Ga. July 19, 2013); quoting *Davenport v. State Farm Mut. Auto. Ins. Co.*, No. 3:11-CV-632-J-JBT, 2012 WL 555759, at *1 (M.D. Fla. Feb. 21, 2012) ("Plaintiff will be ordered to produce [] all photographs added to any social networking site since the date of the subject accident that depict Plaintiff"). It is likely to be only a matter of time before similar decisions are reached in our Georgia state courts, making it clear that any social media posting by a plaintiff is fair game for discovery purposes.

Impeachment

The process of impeaching a witness with his or her prior inconsistent statements is well-understood. Most frequently, the defense lawyer will use the witness's deposition testimony after he or she takes a new position on the stand. "Turn with me in your deposition transcript," sometimes becomes a litany as a plaintiff's story crumbles around her. Of course, these are some of the most dramatic moments in any trial.

Social media impeachment is no different, but there are nuances for maximizing the impact with the plaintiff on the stand. Crucially, impeachment is the last bastion of so-called "trial by ambush," which is

otherwise highly disfavored. Defense attorneys are allowed to list "impeachment evidence" as an item in a pre-trial order without actually describing what the evidence will be. The rationale is of course that the plaintiff is expected to tell the truth on the stand; if they do not, on their own head be it. The Georgia Supreme Court has been abundantly clear on this issue: "It is impossible," the Justices held, "for counsel to know whether impeaching documents will even be relevant and admissible until the witnesses for the opposing party testify at trial, so there is no possible justification for requiring disclosure of such evidence in the pretrial order." *Ballard v. Meyers*, 275 Ga. 819, 820, 572 S.E.2d 572, 575 (2002). Thus, "the failure to list [an impeachment] document [is] not an intentional act of ambush, but an instance of adherence to applicable legal and professional concepts." *Id.*

Notably, this longstanding and clearly-articulated rule is in apparent conflict with the newest version of USCR 5.5(1)(b), which just went into effect on June 4, 2015: "Information withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material, the party shall: [] b. Describe the nature of the documents … ." This inartfully drafted language, which does not mention impeachment evidence but which is nevertheless in apparent conflict with decades of case law, may require a legal challenge (and revision) to solidify the retention of impeachment evidence in the near future. For the time being you as the defense lawyer should simply be aware of the new language so you can craft a response if plaintiff's counsel points to it when the evidence is deployed.

Typically, unless social media evidence has previously been disclosed (for example at mediation, discussed below), a plaintiff will never know what hit him until it is too late. The playbook for getting into social media evidence on the stand is straightforward.

First, during the plaintiff's cross-examination, rehash verbatim the plaintiff's earlier deposition testimony regarding their accident-related disabilities or alleged long-term injuries. A plaintiff might, for example, claim at deposition and then repeat on the stand that he or she can no longer enjoy spending time with children, or is not capable of strenuous physical activity.

Once the statement is made, courtroom technology like the Elmo projector can be used to display the contradictory social media posting (the plaintiff's post about riding a roller coaster, or video of he or she performing lawn work, etc.) directly to the jury. Invariably, the plaintiff's attorney will object, usually claiming hacking and citing the pretrial order, and the defense lawyer will need to be prepared to explain that all social media evidence was derived from *public* postings (not from inappropriate contact with a represented party), and was offered exclusively for impeachment purposes as allowed under explicit Georgia case law. *See, e.g., Ballard*, 275 Ga. at 822; *Minnick v. Lee*, 174 Ga. App. 182, 184, 329 S.E.2d 548, 550 (1985) (excluding impeachment evidence because it was not revealed beforehand "would be to elevate a pre-trial order to an almost unassailable position of conclusive sanctity even in the face of the statutory mandate that the object of all legal investigation is the discovery of truth").

This is where screenshots showing the pictures or materials came from the plaintiff's own postings are most helpful. A mere photo of the plaintiff may not provide the immediate context for both the jurors *and the court* to understand that the social media evidence is, most typically, the plaintiff's own admission against interest.

Social Mediation

Alternative dispute resolution or mediation is now the endgame for more than half of civil cases. Mediation also poses the greatest conundrum when it comes to use of social media gleanings. Imagine that you find yourself at mediation in possession of certain online postings – say a picture depicting the plaintiff chain-sawing a tree, despite his alleged back injuries – and you are not sure whether to use the evidence or not. The best advice is to avoid giving up the element of surprise unless the social media evidence is so overwhelming (as the Backpage.com evidence was in the negligent security sexual assault cases related above) that the evidence alone will absolutely shut down the case. If you find yourself closing in on five o'clock and still $100,000 apart, the temptation to show all your cards may become overwhelming. But if you reveal them, and the case does not settle, there is little doubt that the plaintiff will find a way to explain away the apparent inconsistency prior to trial.

Frequently, social media postings are only relevant to prove an inconsistency in the plaintiff's testimony. If the plaintiff is aware the harmful materials are out there, she may amend her testimony with nuanced affidavit testimony which meets the substance of her answers at deposition, but explains further, thereby eliminating the inconsistency altogether, and thus preventing introduction of the impeaching evidence on the stand. Harmful social media content is one of the defense lawyer's sharpest swords and should only be deployed when it has maximum potential impact.

Best Practices

Social media best practices can be summed up as follows: document everything, reveal as little as possible, and give the plaintiff enough rope to hang herself by asking careful questions about what she can (allegedly) no longer do. Properly deployed, the Facebook grenade has the power to change the outcome of cases, showing the jury the *real* truth of a plaintiff's situation, but only if the defense lawyer takes this aspect of investigation seriously and implements the playbook to perfection. ❖

Zach Matthews is a trial lawyer with Swift Currie McGhee & Hiers in Atlanta. He chairs GDLA's Young Lawyers Section and vice-chairs the Trucking Substantive Law Section.

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**denotes deceased*

President's Message

Continued from page 3

minutes, that such a group existed. The belief that, as a 501(c)(6), the GDLA was unable to lobby or otherwise engage in legislative activities has been proven to be a myth.

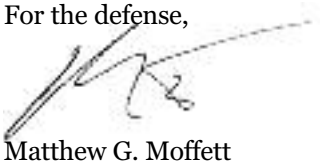
That's not to say that we'll be down at the Capitol every day; it just means that we've appointed Jake Daly to serve as our Legislative Chair and, thereby, our eyes and ears at the General Assembly. Jake will keep us updated on legislative issues that could impact our practices. For now, it will be an information-sharing venture and not a lobbying effort; we realize the Chamber and our clients have that latter piece covered.

With regard to the former, if you hear any political rumblings that deserve our attention, then please contact Jake or me so we can spread the word.

I remain committed to and proud of the work this organization is accomplishing. I thank the effective leaders before me and look forward to honoring those listed above at our inaugural past presidents luncheon in February.

Together, I truly believe we are advancing the civil defense bar in Georgia! ❖

For the defense,



Matthew G. Moffett
Gray Rust St. Amand Moffett & Brieske, Atlanta

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Walker argued, would upset the delicate balance between the rights of employers and employees under the "no fault" workers' compensation scheme. Walker also contended that such a holding somehow would impinge on the employer's immunity from suit under the WCA, thus running afoul of the statement in O.C.G.A. § 51-12-33(e) that nothing contained in the apportionment statute "shall eliminate or diminish any defenses or immunities which currently exist, except as expressly stated in this Code section."

The defendants, on the other hand, argued that *Zaldivar* was controlling and that, in any event, permitting apportionment of fault to Walker's employer would be the fair and equitable result intended by the General Assembly in enacting the current version of O.C.G.A. § 51-12-33.

In a 14-page opinion issued on November 16, 2015, a five-Justice majority of the Supreme Court disagreed with *Walker* and held that the defendants were entitled to seek apportionment of fault to Walker's employer as a nonparty. The Court wasted little time in citing to its own recent opinion in *Zaldivar* and narrowing the certified question to a much simpler one with an equally simple answer:

> "Unless there is a compelling reason to treat nonparty employers with immunity under the Workers' Compensation Act differently than nonparties with other defenses or immunities against liability, Zaldivar requires an affirmative answer to the certified question. We see no such compelling reason, and so, we adhere to Zaldivar and respond to the District Court in the affirmative." *Walker*, 2015 Ga. LEXIS 878, *2 (Nov. 16, 2015)

The Court also borrowed significantly from an opinion in which the Mississippi Supreme Court, faced with a similar issue, held that "the more equitable result is to permit allocation of fault to the exempt employer" in such circumstances. *Id.* at *8, quoting *Mack Trucks v. Tackett*, 841 So. 2d 1107, 1115 (III)(a) (Miss. 2003). "[T]o immunize employers from fault allocation in third-party tort suits would go against the spirit of the bargain between employers and employees that underlies workers' compensation; instead, the [tort defendant] would pay the employer's cost of compensation, and the employee would have the possibility of recovering in tort for his employer's fault, since that would then be allocated to the [tort defendant]." *Id.* Although such an arrangement "certainly would benefit employers, and to some extent plaintiffs," the Court explained that "third parties should not be assessed to supplement our system of workers' compensation." *Id.*

The Court rejected Walker's curious contention that "the assignment of fault to a nonparty employer [would] eviscerate the role that subrogation plays in the workers' compensation system." *Walker* at *9. The mere possibility that allocation of fault to a plaintiff's employer could reduce the plaintiff's recovery in the tort case, thereby reducing the employer's potential to recover in subrogation, would not be so inequitable as to lead to the conclusion that O.C.G.A. § 51-12-33 could not reasonably be read as permitting such an outcome. Furthermore, the Court reasoned that an employer without fault would not be likely to suffer any impairment of its right of subrogation and, in any event, would have the ability to avoid the risk of a jury apportioning fault to the employer as a nonparty, thereby reducing the employer's potential right of subrogation, by exercising its right to intervene in the employee's tort action under O.C.G.A. § 34-9-11.1(b).

And the Court rejected the argument that permitting allocation of fault to a nonparty employer under O.C.G.A. § 51-12-33 "would expose employers to new and substantial litigation costs." The exclusive remedy provisions of the Workers' Compensation Act remained unchanged by the 2005 rewriting of Georgia's apportionment statute. Moreover, employers already were subject to discovery in the workers' compensation proceeding as well as nonparty discovery on numerous potential subjects in any tort action relating to an on-the-job incident. "The allocation of fault to nonparty employers," the Court explained, "simply adds one additional subject about which employers may be subject to nonparty discovery." *Walker* at *15-16.

Put simply, the Supreme Court found "no reason to limit [its] interpretation of O.C.G.A. § 51-12-33 (c) in *Zaldivar* and [to] prohibit a trier of fact from assigning fault to a nonparty employer that has immunity under the exclusive remedy provisions of the Workers' Compensation Act." *Id.* at *16. The Court's rationale in *Zaldivar,* having not decreased in wisdom in the intervening four months and there being no discernible reason for a plaintiff's employer to be treated differently than any other immune tortfeasor under the apportionment statute, resulted in the certified question being answered in the affirmative.

There still remain unanswered questions about nonparty apportionment in Georgia. But with the Supreme Court's opinion in *Walker*, following so closely on the heels of *Zaldivar* and echoing its conclusions so completely, we are one large leap closer to understanding the full import of the statute and to realizing the prospect of greater fairness to all parties that was the intended result of the overhaul of O.C.G.A. § 51-12-33 nearly 11 years ago.

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

GDLA Sponsors Charity Golf Tourney with ESI

GDLA teamed up again with longtime Platinum Sponsor ESI to sponsor the 9th Annual Swing for Siblings Charity Golf Tournament held on October 16, 2015, at Chateau Elan.

The tournament is an annual fundraising event for Camp To Belong Georgia. An international non-profit, Camp To Belong 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, Camp To Belong is a partner of Camp Twin Lakes.

The tournament concluded with an awards luncheon and silent auction. The event is held annually in October.

Pictured above at the tournament are ESI's David Ahearn and GDLA member Jason Darneille. ❖

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Continued from page 25

available in sufficient quantities to enable testing according to a standard method.

Additionally, although standard tests, and the results obtained from them, may pass the reliability assessment, they may not always pass another important test for admissibility as scientific evidence: relevancy. Expert testimony is intended to be helpful and assist the trier of fact. If testing is carried out using an irrelevant or only partially relevant standard method that is not appropriately linked to the details of the case, then despite the fact that the test may be reliable, the results and conclusions drawn from those results may be irrelevant with respect to the issues in dispute. For example, a standard method may not exist that addresses important aspects of the end-use environment for a given material or product.

If nonstandard testing is deemed the best route to obtaining the most relevant scientific information, then care should be taken to develop and conduct the test in a scientifically reliable manner. There is nothing inherently substandard about nonstandard testing; litigation itself is nonstandard, with each case presenting unique facts and circumstances. As long as the test method is developed and the testing is carried out in a thoughtful and thorough manner, the testing and obtained results can be reliable and relevant. Arguably, a custom test properly developed to answer the questions before the court should be preferred over a generic one designed for a different set of facts.

To illustrate the point, what follows are a few examples of nonstandard testing. First, given that football season is upon us, it is certainly fitting to provide an example of thoughtful, thorough, reliable, and relevant nonstandard testing related to the pigskin itself. Next, a discussion of a unique durability test performed on a solar panel that was subjected to walking is presented. Finally, an example of a true torcher test is described wherein a lead-free brass valve is subjected to an exposed flame (i.e., a torch) for 30 seconds in an attempt to elicit a specific failure mode.

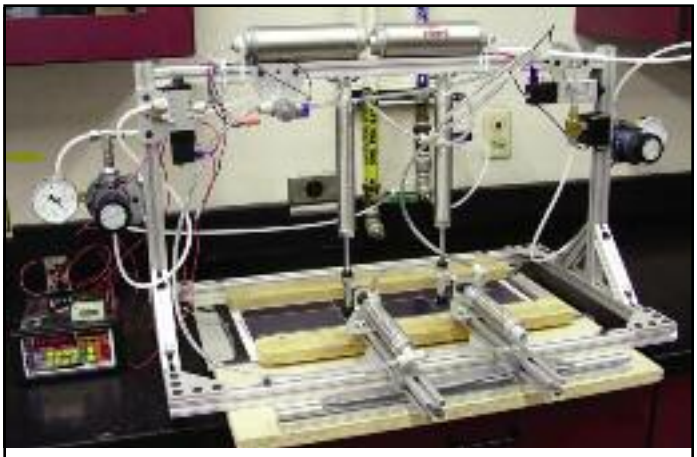

Figure 2. Photograph of a nonstandard test device developed to assess the durability of solar panels to people walking on top of them.

On January 18, 2015, in a quest to advance to the National Football League (NFL) Super Bowl, the New England Patriots defeated the Indianapolis Colts in the AFC Championship Game at Gillette Stadium in Foxborough, Mass. After the game, reports of the use of underinflated footballs by the Patriots appeared in the press. An investigation was launched. As part of the investigation, Exponent was retained to perform an engineering and scientific analysis. Exponent examined and analyzed data collected on football air pressure during the day of the game, the gauges used to measure that air pressure, and the various usage, physical, and environmental factors that could have affected the air pressure on the day of the game. The details of these analyses are described in a publicly available comprehensive report.[5] Of the numerous tests conducted and detailed in that report, two are presented here to demonstrate when and why standard versus nonstandard testing can be employed.

Among other factors, the effect of natural leak rate and game use on football pressure was investigated. Footballs are pressurized by filling them with air, which has a measurable rate of permeation through materials like those used for the bladders inserted in footballs. Thus, footballs have a natural leak rate as air permeates through the bladder materials. Permeation of air and other gasses through materials impacts performance of many other products besides footballs, with tires being a well-known example. Standard tests exist for measuring gas permeation through similar materials; for example, ASTM D1434, Standard Test Method for Determining Gas Permeability Characteristics of Plastic Film and Sheeting. This standard test was conducted on the bladder material used in the footballs. It was found that the natural leak rate of air through the football bladder material was negligible over the time scales of interest for the matter at issue. However, simple material permeability is not the only factor at play when considering the leak rate of air from a football.

During the course of an NFL game, footballs are handled and compressed by very large men. It was of interest to determine whether game use had an effect on the football pressure; a relevant question for which there is no standard test. Thus, a test was designed and conducted to simulate an aspect of heavy game use. Exponent subjected pressurized exemplar footballs to 650 pounds of compression, every 1 second, 1,000 times at room temperature (see Figure 1 on page 25). This test was conducted in accordance with well-documented procedures using instrumentation and equipment that were calibrated and traceable to known standards, so that the tests themselves could be considered reliable and repeat-

able. The football pressure, before and after this test, was found to be unchanged.

Both sets of tests were relevant to examining alternative hypotheses that had been raised. One test used a standard method modified to assess specific materials, and the other used the tools of standard methods to assess the effects of specific use conditions. Together, testing generated results and supported conclusions that are reliable and relevant.

Next, we examine the footstep-load durability of large-area coated solar panels used for large-scale flat roofs. Solar panels used in such applications are coated to provide an easy-to-clean surface, high light transmittance, stain resistance, and long service life. However, we found that near the edges of the silicon solar cells the protective coating was worn, leading to moisture ingress and ultimately cell failure.

The question was whether a change to a slightly thicker coating would mitigate such failures and, therefore, be an appropriate design decision. No standard test exists to elicit the answer to such a question. Therefore, a unique test apparatus (shown in Figure 2) was developed. Although the test was nonstandard, we validated the test by imparting appropriate forces to the coating to simulate walking on the surface, with loads estimated from various gait analyses from peer-reviewed literature for a 200-pound person. Failures, such as openings in the coating, were replicated for the original thin coating numerous times at a particular number of cycles; damage induced was consistent with field failures. Testing was then conducted on the thicker coating and demonstrated failures at a much higher number of cycles, indicating that the thicker coating was an appropriate design decision. Ultimately, replication of the failure coupled with the use of appropriate loads and calibrated instrumentation, and equipment meant that this nonstandard test was scientifically reliable.

Finally, we present a study of fractured brass valves. Brass is a metal alloy consisting principally of copper and zinc, with small amounts of lead (and other elements) added historically to improve machinability. Over the last couple of decades there has been a push to reduce the amount of lead in brass due to various health regulations. With the removal of lead, other chemical elements such as bismuth have been added.

In general, the new alloys have been successfully integrated into commercial products. However, new failure modes for these alloys have appeared which have required nonstandard testing to understand and resolve. For instance, one particular brass alloy exhibited unique signs of fracture when soldering near the valve. Soldering is the term used to describe a process that involves liquefying metal to fill gaps and join metal parts together. Standard testing that included controlled and rapid heating in an oven was unable to replicate the failure. A nonstandard test was developed for rapid heating of samples with a torch, and the unique failure mode of the brass valves was replicated (the aftermath of which is shown in Figure 3).

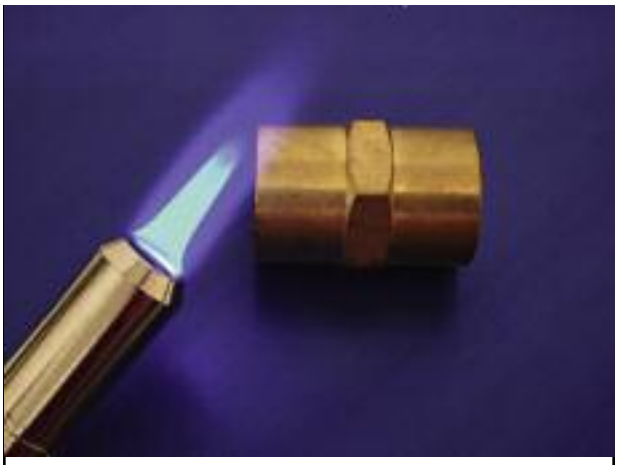

Figure 3. Photograph of broken brass valve that fractured due to the rapid application of heat. Note: a simple piece of brass is shown so as to not reveal the valve manufacturer.

Although this matter is not in litigation, it is another illustration of the unique scenarios and associated testing challenges that engineers and scientists face.

Testing, whether for litigation purposes or otherwise, should be undertaken with care, rigor, and consideration of the best scientific practices. Inherently, such care should address the considerations associated with the *Daubert* ruling. Novel, nonstandard, or customized testing should not be feared or avoided if it will answer the questions or test the hypotheses that are relevant for the matter in dispute and ultimately provide the court with a more thoughtful and relevant analysis. ❖

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Dr. Eric Guyer is a Principal Engineer and the Director of Exponent's Atlanta office. He is a licensed metallurgist and mechanical engineer and commonly investigates failures associated with fracture, fatigue, and corrosion of materials as well as the performance of coating systems. He earned his undergraduate degree in Chemical Engineering at Iowa State University and his Ph.D. in Materials Science and Engineering at Stanford.

Endnotes

1 Margaret A. Berger, *The Admissibility of Expert Testimony*, *Reference Manual on Scientific Evidence* (3rd ed. 2011).
2 Channing R. Robertson, John E. Moalli, and David L. Black, *Reference Guide on Engineering*, *Reference Manual on Scientific Evidence* (3rd ed. 2011).
3 509 U.S. 579 (1993).
4 *Id.* at 579.
5 Exponent (Prepared for Paul, Weiss, Rifkind, Wharton & Garrison, LLP), *The Effect of Various Environmental and Physical Factors on the Measured Internal Pressure of NFL Footballs*, May 6, 2015.

GDLA Board of Directors Holds Fall Meeting at Lake Oconee

The GDLA Board of Directors headed to Lake Oconee, Ga., for its Fall Meeting at the Ritz-Carlton Lodge. The weekend began with a welcome reception at the hospitality cottage, after which everyone strolled to a lakefront dinner. The Board met on Saturday morning, leaving the afternoon free for everyone to enjoy. After another reception that night, the group dispersed for dinner on their own.

Those present were Executive Committee: President Matthew G. Moffett, Gray Rust St. Amand Moffett & Brieske, Atlanta; President-Elect Peter D. Muller, Goodman McGuffey Lindsey & Johnson, Savannah; Immediate Past President Kirby G. Mason, Hunter MacLean Exley & Dunn, Savannah; Secretary Hall F. McKinley III, Drew Eckl & Farnham, Atlanta; Treasurer Sarah B. (Sally) Akins, Ellis Painter Ratterree & Adams, Savannah; and Past President Lynn M. Roberson, Miles Mediation, Atlanta. Vice Presidents: Craig C. Avery, Cowsert & Avery, Athens; David N. Nelson, Chambless Higdon Richardson Katz & Griggs, Macon; and James D. (Dart) Meadows, Balch & Bingham, Atlanta. Directors: William T. (Bill) Casey, Jr., Hicks Casey & Morton, Marietta; George R. Hall, Hull Barrett, Augusta; Pamela Lee, Swift Currie McGhee & Hiers, Atlanta; Martin A. Levinson, Hawkins Parnell Thackston & Young, Atlanta; Jason C. Logan, Constangy Brooks Smith & Prophete, Macon; Wayne S. Melnick, Freeman Mathis & Gary, Atlanta; and James S.V. Weston, Trotter Jones, Augusta. Past Presidents: N. Staten Bitting, Jr., Fulcher Hagler, Augusta; and W. Melvin (Mel) Haas III, Constangy Brooks Smith & Prophete, Macon. Committee and Substantive Law Section (SLS) Leaders: Sherrie M. Brady, Hawkins Parnell Thackston & Young, Atlanta, Premises Liability SLS Chair; Jake Daly, Freeman Mathis & Gary, Atlanta, Legislative Chair; Candis Jones, Gray Rust St. Amand Moffett & Brieske, Atlanta, Diversity Chair; Zach Matthews, Swift Currie McGhee & Hiers, Atlanta, Young Lawyers Chair; Marcia R. Stewart, Waldon Adelman Castilla Hiestand & Prout, Atlanta, Auto Liability SLS Vice-chair; and Mark W. Wortham, Hall Booth Smith, Atlanta, Appellate Chair. Also present was Executive Director Jennifer M. Davis.

At press time, the Board meeting minutes had not been approved, but they will eventually be posted with prior Board meeting minutes in the Members Only area of our website. ❖

Fall Meeting Scenes: *1. President Matt Moffett and First Lady Diane Moffett (at left) with Young Lawyers Chair Zach Matthews and his wife, Tracy; 2. Treasurer Sally Akins with VP Dart Meadows; 3. President Moffett with Marcia Stewart, newly-named to lead our Social Media Committee; 4. Board member George Hall and his wife, Margaret; 5. Immediate Past President Kirby Mason and her husband, Frank; 6. Past President Lynn Roberson and Board member Bill Casey; 7. Past President Staten Bitting and his wife, Cindy, (at left) with VP Craig Avery and his wife, Resa; 8. President Moffett and President-elect Peter Muller; 9. Premises Liability Section Chair Sherrie Brady and Board member Marty Levinson; 10. Diversity Chair Candis Jones; 11. Secretary Hall McKinley; 12. Legislative Chair Jake Daly; 13. President Moffett with Past President Mel Haas; 14. Board member Jason Logan with his wife, Wendy.* ❖

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O.C.G.A. § 31-9-3(b) says that when an emergency exists, consent to medical treatment that is recommended by a physician may be implied by law. The statute is limited to implied consent by the patient and does not address the patient's obligation to pay for such treatment; much less pay whatever amount the hospital decides to charge. Lastly, the Court of Appeals stated in its opinion that Bowden could likely show, through expert testimony or evidence, that TMC's charges were unreasonable. If that is so, then directly applicable documents, such as what TMC charged other patients, would be even more relevant. The Court of Appeals' holding seemed to imply that Bowden is limited to seeking only the most relevant documents in her case; however, the Supreme Court reiterated that O.C.G.A. § 9-11-26(b)(1) states that the availability of one form of proof does not make other forms of proof irrelevant or limit access to those documents.

Pursuant to O.C.G.A. § 9-11-26, the scope of discovery, unless otherwise limited by the court, can contain any material that is not privileged so long as it is relevant to either the claim or defense of the pending action. The information does not have to be admissible at the time of discovery if it reasonably appears to lead to the discovery of admissible evidence. Applying these statutes to Bowden's request, the issue to be examined was whether the documents that she requested were relevant to the subject matter involved. Generally, the courts apply this statute broadly so to include anything that is or may become an issue in litigation. *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, (1978). Applying this standard, the Supreme Court found that the amounts charged to other patients by TMC may not show that Bowden's bill was unreasonable due to numerous variables; however, the amounts in a broad discovery sense, could help to show Bowden's bill was not in line with a normal pricing structure. Further, the prices of goods and services are typically determined by comparing what similar buyers and sellers have contracted to purchase them for. This calculation can be applied to the health care industry and Bowden's counterclaim. The Georgia Supreme Court reasoned that if, in practice, TMC has charged similar patients a much smaller sum, Bowden was entitled to that information and could present such information to a jury. Based on finding that the documents were relevant as possible evidence to Bowden's claim, the Georgia Supreme Court reversed the Court of Appeals' decision, reiterating the broad standard applied to requests for documents and information during discovery. It is important to note that some have suggested this decision may also herald greater openness to admissibility of evidence, bringing the reasonableness of medical charges into question in all cases.

> ***... the issue to be examined was whether the documents that she requested were relevant to the subject matter involved.***

This decision is important because it appears to take away some of the trial court's discretion with regard to requests for discovery. Following the holding above, courts will likely allow many requests for discovery unless they infringe on a specific privilege. This can become problematic when requests for discovery become time consuming or expensive. As these costs begin to rise, there could be even more problems and headaches for the courts to evaluate what documents and information are discoverable. Of course, trial judges retain the discretion to shift the costs of expansive discovery if it is to be allowed. Nonetheless, parties that are at risk for or are often involved in litigation should spend time in keeping identifiable databases and records in anticipation of potential claims and requests for discovery. *Bowden* makes clear that formulaic broad objections may enjoy less favor with Georgia courts. ❖

Timothy J. (Tim) Buckley III, is a founding partner of Buckley Christopher & Haff in Atlanta. Prior to becoming a litigator over 20 years ago, he was a law clerk to Chief Judge Wilbur D. Owens, Jr., U.S. District Court for the Middle District of Georgia. Mr. Buckley has tried dozens of cases to verdict and argued appellate matters before state and federal appellate courts in Georgia and beyond. His areas of practice include municipal liability, transportation, commercial litigation/ arbitration, product liability and workers' compensation.

T.K. Haff is an attorney with Buckley Christopher & Haff. Enhancing her litigation practice, Ms. Haff provides day-to-day advice and counsel to businesses and employers on laws that govern and affect the workplace, with special emphasis on training and litigation avoidance strategies. Her practice includes employment matters, municipal liability, premises liability, product liability, contract disputes, and commercial matters.

Avoiding Poindexter

Continued from page 27

case involving installation deficiencies of window flashing at a high rise condominium.

The expert's knowledge and understanding of the standards for rendering expert opinions (Daubert, Robinson) is essential. An expert must be able to develop or withstand a so-called "Daubert," or legal challenge, to the expert's methods. The qualified expert must be able to: understand accepted testing procedures, analyze and interpret data from the testing, formulate conclusions based on the data, and critique other interpretations.

Essentially, under the Federal Rules of Civil Procedure Rule 702, the following analysis must be performed to determine whether the witness is sufficiently qualified to render expert opinions: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. (See *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).)

An effective expert will have a toolbox of varied non-technical, or "soft," skills. Among these, communication skills and interpersonal appeal are particularly valuable. The expert's ability to communicate highly technical concepts to an audience whose members range in technical ability is of paramount importance. Poindexter, the brilliant theoretical mathematician, may have created a complex multivariate numerical model of the dynamic response of a structure under multiple loading conditions; however, that effort is of little value to a case if he cannot convey the basis for his model, and the results obtained therefrom, to the lay jury in a manner that is easy to understand. The expert should speak clearly, concisely, cohesively, and accurately.

Further, the interpersonal appeal, or "bedside manner," of an expert can heavily influence your negotiating position and the ultimate outcome of litigation. The demeanor and mood of an expert is quite literally contagious in an interpersonal setting, such as deposition, mediation, or trial. The expert should be confident and upbeat to develop a sense of trustworthiness. The most effective expert will have a firm grasp of his/her capabilities and be able to assess him/her self realistically, fostering an interpersonal environment of integrity, candor, and positive discourse. Look for a socially dynamic expert who exhibits the SOFTEN qualities of body language: Smile, Open posture, Forward lean, Touch (ok, maybe not), Eye contact, Nod; all of which convey persuasiveness in concert with sensitivity to one's environment. Avoid the boringly studious and socially inept.

Once you have carefully chosen a technically proficient, emotionally intelligent, and socially skilled expert within the appropriate discipline, and that has actual knowledge and understanding of the particular subject matter at issue, you are well positioned to present and explain the technical merits of your case. You should also consider utilizing your expert to challenge opposing experts, as differences exist between an expert who meets the court's requirements for qualification on paper, and those who truly hold the requisite experience to be a powerful asset. Your qualified expert will be able to sniff out any incompetency of the opposition, test the scientific merits of their analysis, and provide you with valuable ammunition to eliminate the proliferation of junk science through your case. ❖

Ryan T. Chancey, Ph.D., P.E. is the Vice President and Executive Director of Operations for Nelson Forensics, a Platinum Sponsor of the GDLA. He is licensed as a structural/civil engineer in 37 states, and specializes in the evaluation of distress to concrete structures and pavements. Dr. Chancey has performed forensic evaluations of industrial, commercial, residential, agricultural, educational, athletic, and healthcare structures for damage caused by perils including fire, explosion, earthquake, wind, and storm surge; and for defects in design and construction. He has served as a structural engineering and materials science expert in deposition, mediation, arbitration, and trial; has authored numerous publications; and regularly appears as a lecturer.

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