GDLA NEWSLETTER

Volume 18 Editor: John A. Foster January, 2004

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THE PRESIDENT'S MESSAGE

By: Richard A. Rominger

As I embarked on my year as President of the Georgia Defense Lawyers Association, I knew that we had important things to do to improve and to continue the growth of our organization. Due to the dedicated efforts of the officers and members of the Board and past Presidents of the Association, we are on the road to improving our organization, as well as preserving the elements of our organization that have made it successful.

I believe we have kept our core values as an association of the defense bar, especially through our annual meeting and seminar, our programs and our committees: Amicus Committee (Jimmy Singer, Chairperson); the Workers' Compensation Academy (Staten Bitting and Luanne Clark, Chairpersons); the Trial Academy (Jim Elliott, Chairperson); the Law Journal (Jimmy Singer, Chairperson); Y.L.S. Membership Recruitment (George Duncan and Jo Jagor, Chairpersons); Younger Lawyer Section of GDLA (Greg Ellington, Chairperson); and Sponsorship and Exhibitors (Clay Ratterree, Chairperson).

For many years we have had a part-time Executive Secretary, Alverne W. Shurley. As those of us who have worked with her know, she also has the full-time job of being the legal secretary of our Past President, Joe Chambless. In the last few years, as our organization was growing in numbers, it became clear that a part-time executive secretary was going to become inadequate for our needs. We all thank "Al" for her long and faithful service to the organization. We have also recognized the need for an executive director with experience, who would take on more responsibilities than our executive secretary could and bring about improvement for the services we provide our members.

Through the diligent efforts of Past Presidents Steven Kyle, George Duncan, Walter McClelland and Jerry Buchanan, as well as board members Clay

Ratterree and Mel Haas, we have narrowed our search for an executive director. Our Executive Director is Steve Milano. Since he is brand new to the Georgia Defense Lawyers Association's Executive Director role, more about Mr. Milano will be included in our next newsletter.

The Association is arranging to get together at the Commerce Club with judges on February 5, 2004 from 5:00 to 7:00 p.m. The reception will be for the Georgia Supreme court Justices, the Georgia Court of Appeals Judges, the Fulton County Superior and State Court Judges, the United States District court for the Northern District of Georgia Judges and the Judges of the Eleventh Circuit Court of Appeals. In addition to the judges, the members of the GDLA

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are invited. Due to limited space, attendance will be limited to our invited guests and members only.

As you can see, we have planned a full plate for the Georgia Defense Lawyers Association this year. Come and join us with your active participation in your Georgia Defense Lawyers Association.

By: Richard A. Rominger

BOARD ANNOUNCES 2004 ANNUAL MEETING PLANS

By: Grant B. Smith

The Board is pleased to announce that the 2004 Annual Meeting with take place at the beautiful Hilton Sandestin Beach Golf Resort and Spa, August 5th thru 8th. The room rates will be a very reasonable $209 for Run of the House rooms, $259 for Beach View and $309 for Beach Front or Parlor rooms. Please check out the hotel's website at www.sandestinbeachhilton.com for more details. Please call (800) 367-1271 for reservations. It is not too early to reserve your room.

We are also pleased to announce that nationally renowned trial expert James W. McElhaney will present the program at the 2004 Annual Meeting. Professor McElhaney designed this year's program especially for the Georgia Defense Lawyers Association. Professor McElhaney is both the Baker & Hostetler Distinguished Scholar in Trial Practice at Case Western Reserve University School of Law and the Fred Parks Distinguished Lecturer in Trial Advocacy at South Texas College of Law. Professor McElhaney's widely acclaimed article on trial practice, "McElhaney on Litigation," appears monthly in the ABA Journal. We are also pleased to announce that Scot Pool of Forbes & Bowman will continue the tradition carried on by Johnny Foster in providing a 30 minute summary of developments in Georgia law over the past year.

In addition to a top notch program with the latest trial techniques, the GDLA will once again sponsor the popular scramble golf tournament, round robin tennis tournament and the family oriented sand castle building contest. There will be Cool Aid and Cocktails on Friday evening and following the traditional Saturday evening banquet, the GDLA will sponsor a band party. In the past two years, the band party has become one of the highlights at the annual meeting.

Please plan to join us for this wonderful family oriented seminar. You can get 6-8 hours of quality CLE, all of which is expected to qualify for trial practice hours.

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FIRM SURVEY

1. Number of Attorneys in Firm: _____ 2. Number of Support Staff: _____
3. Number of Claims/Incidents filed against Firm during the past 5 years:
   Filed: _____ Pending: _____ Total Paid: _____ Total Reserved: _____
4. Firm knowledge of any circumstance(s) or acts(s) which may give rise to a claim: ☐ Yes ☐ No
5. Number of CLE hours averaged by each Attorney during the past 12 months: _____
6. Number of Docket Control Systems: _____ Are they Computerized: ☐ Yes ☐ No
7. Has any Attorney with the Firm ever been disciplined or denied the right to practice: ☐ Yes ☐ No

PRACTICE SURVEY

Indicate the percentage of Firm income derived from each of the following areas of practice. Total must = 100%

____ Abstracting / Title
____ Ad Valorem Tax
____ Admiralty - Plaintiff
____ Admiralty - Defendant
____ Antitrust / Trade Regulation
____ Banking
____ Bankruptcy
____ Bonds
____ Civil Rights
____ Collections
____ Commercial Lit - Plaintiff
____ Commercial Lit. - Defendant
____ Communication (FCC)
____ Copyright / Patent / Trademark
____ Corporate Administrative Law
____ Corporate Formation
____ Corporate Mergers & Acquisitions
____ Corporate General (describe)
_____
____ Criminal
____ Domestic and Family Relations
____ Entertainment
____ Environmental
____ Estate Planning
____ Estate / Probate / Trust
____ ERISA
____ Financial Planning & Investment Counseling
____ Foreclosure / Repossession
____ Health
____ Housing Court
____ Immigration
____ Insurance Co. - Defendant
____ International
____ Juvenile Proceedings
____ Labor - Management
____ Labor - Union
____ Limited Partnerships
____ Mediation / arbitration
____ Municipal *(Do not include Bond Practice Reflect Bonds in Bond category)*
____ Oil and Gas
____ Personal Injury - Plaintiff
____ Personal Injury - Defendant
____ Plaintiff Class Action (Mass Tort/Toxic Tort)
____ Public Utilities
____ Real Estate - Commercial
____ Real Estate - Residential
____ Social Security Admin.
____ Taxation - Individual
____ Taxation - Corporate
____ Water Law
____ Wills and Trusts
____ Workers Comp. - Plaintiff
____ Workers Comp. - Defendant
____ Other _____
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____ Federal SEC
____ Private Placements
____ State SEC
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Current Limits: _____ Desired Limits: _____

ATTORNEY SURVEY

Relation to Firm Codes: (OC) Of Counsel (P) Partner (S) Solo (E) Employed Attorney (IC) Independent Contractor

List of Attorneys By Name *(Attach Separate Sheet if Necessary)*	Year Admitted to Bar	Year Joined Firm	Relation to Firm *(Use above codes)*	% Time Working For Firm *(OC Only)*

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UPDATE ON PREMISES LIABILITY CASES

By Jason Willcox; Moore, Clarke, DuVall & Rodgers, PC; Albany, Georgia (*.)

In ***Thomas v. Executive Committee of the Baptist Convention of the State of Georgia***, 262 Ga. App. 315, 585 S.E.2d 217 (July 14, 2003), plaintiff filed suit against the Baptist Convention for injuries she sustained after stepping in a pothole in the parking lot of the Baptist Convention Center. The State Court of DeKalb County granted summary judgment to the Baptist Convention finding the Baptist Convention had constructive knowledge of the pothole as a static, hazardous condition that had been present over time, and, under the Plain View Doctrine, plaintiff knew or should have known of the condition to the Baptist Convention; however, the Georgia Court of Appeals subsequently reversed finding there was an issue of fact as to whether the Plaintiff exercised ordinary care for her own safety. Further, the Court held that the Plain View Doctrine was inapplicable, restricted previous "common knowledge" holdings under O.C.G.A. §51-3-1, and that there was a factual issue as to whether the view of the pothole was unobstructed.

The facts presented in the case show the plaintiff had arrived at the Convention Center on Friday, May 28, 1999. Prior to that time, the plaintiff had never been to the Convention Center. On the day she arrived, plaintiff was given her assigned room and went to the worship service held in one of the rooms of the hotel. The next day, plaintiff attended classes at the hotel and walked around a lake to get to the cafeteria to eat. Plaintiff returned to the conference center via the same route. That evening, plaintiff followed someone else to the cafeteria via another route prior to earlier in the day. Following the evening meal, she left the cafeteria and walked, for the first time, across the parking lot to the hotel. At that time, the sun was going down and there were no street lights. The plaintiff also testified there were shadows from the trees and the center building. As she walked across the parking lot, the plaintiff stepped into a pothole in the asphalt and fell, sustaining injuries. She was unable to recall whether the pothole was hidden in the shadows from the trees and/or building.

The Georgia Court of Appeals stated under O.C.G.A. §51-3-1, the Baptist Convention was under a duty to exercise ordinary care to maintain its parking lot, especially for its invitees. The Court addressed the Plain View Doctrine and noted it is a civil concept that embodies the principle that an invitee is under a duty to look where she is walking and to see obvious, **large** objects in plain view which are at a location where they are customarily placed and expected to be. In this case, the pothole in which the plaintiff fell was approximately the size of a human foot and was referred to as a "divot" of asphalt. The Court stated the evidence in the record did not conclude that the divot was so open, obvious and large that the Plain View Doctrine applied and that her view was unobstructed. Therefore, its application was in error.

Secondly, the Court noted, in its opinion, that the prior cases found that development of **small** cracks, holes and uneven spots in pavement was so customary and common that if unobstructed, an owner/occupier was justified in assuming that a visitor would see them and realize the risk. However, the Court stated this law did not embrace the concept that owner/occupiers were permitted to allow a parking lot to become pitted with potholes because an invitee should expect and assume such hazards are common to all pavements. Further, the Court refused to require an invitee to presume the existence of cracks, holes and uneven spots.

Lastly, the Court addresses the condition of the pothole/divot. Due to the light conditions in the parking lot and the fact that the plaintiff had not traversed that section of the lot prior to the fall, the Court ruled the plaintiff's ability to see the pothole/divot was not, as a matter of law, plain, palpable and undisputed.

Therefore, the summary judgment to the Baptist Convention was reversed.

In ***Pylant v. Samuels***, 262 Ga. App. 358, 585 S.E.2d 696 (July 15, 2003), the plaintiff filed suit against the defendant to recover injuries he allegedly sustained when he slipped and fell in a shower stall owned and operated by the defendant. The McDuffie County Superior Court granted summary judgment to the defendant and the plaintiff appealed. In this case, the plaintiff had stopped by the defendant's business to eat dinner with the intention of spending the night in his truck. The defendant had stalls available and provided soap and towels for customers. The plaintiff stated the shower was filthy but was unable to tell if it was dirt, grease or just filth. Prior to entering the shower, the plaintiff saw two white bars of used soap on the shower floor which he removed. The plaintiff reported he had begun to shower and was washing his face and neck when he slipped and fell. He testified after his fall he looked down and saw the remains of another bar of soap which looked like a smear.

The Georgia Court of Appeals noted that the defendant did not have a routine inspection program or a regular cleaning schedule in place. Rather, according to testimony, the facilities were cleaned "as needed" or whenever customers complained. Therefore, a jury under the

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circumstances could decide whether the defendant breached his duty to keep its premises in a reasonably safe condition by failing to conduct or by negligently conducting inspections of its premises.

The Court also considered defendant's assertion that plaintiff failed to exercise ordinary care for his own safety after discerning the condition of the shower. Plaintiff, according to the record, did not assert he slipped on or because of the condition of the floor, rather he fell on a piece or smear of soap which he did not see. The Court reasoned that plaintiff exercised reasonable care by examining the floor and removing the two used bars of soap prior to entering the shower. Therefore, it could not be said that plaintiff failed to exercise reasonable care for his own safety.

In ***Duvall v. Green***, 262 Ga. App. 669, 586 S.E.2d 269 (August 8, 2003), the plaintiff filed suit against the defendant, who was the homeowner, after she injured herself while walking down stairs in defendant's home. The facts showed the plaintiff worked in the defendant's home as a care giver for his invalid wife. Plaintiff injured herself when her knee buckled when she was walking down the stairs. The plaintiff was not able to explain in her deposition why her knee buckled and specifically stated she did not sustain an injury while helping the defendant's wife in and out of bed. Further, the plaintiff was not able to provide any evidence to support that she fell on a foreign substance on the landing or stair. She also testified that she had walked up and down the basement stairs at least six (6) to eight (8) times prior to her injury. Defendant's steps were designed, constructed and maintained in a safe and reasonable manner and were consistent with the applicable building code. There was no foreign substance or object on the steps at the time of the plaintiff's injury and defendant had never received any notice or complaint that anything was wrong with the steps prior to that time. The only evidence presented by the plaintiff was her contention that the stairs were too steep for regular travel. The Court held that proof of nothing more than the occurrence of the fall is insufficient to establish the homeowner's negligence. There must be proof of fall on the part of the homeowner and ignorance of the danger on the part of the invitee. The Court reasoned since the plaintiff had used these stairs several times prior to her incident she could not show that the homeowner had superior knowledge of the alleged dangerous condition. The Court stated, when a person has successfully negotiated an alleged dangerous condition on a previous occasion, that person is presumed to have knowledge of it and cannot recover for a subsequent injury resulting therefrom. Further, the record was void of any evidence that any act or omission on the part of defendant caused plaintiff injury. Therefore, the Georgia Court of Appeals reversed the Polk Superior Court's denial of summary judgment to the defendant.

In ***Davis v. Bruno's Supermarket, Inc.***, 263 Ga. App. 147, 587 S.E.2d 279 (September 10, 2003), plaintiff filed a personal injury suit against the defendant after she slipped and fell in a puddle of clear liquid the size of a small dinner plate and fell. Bibb Superior Court granted summary judgment to defendants finding that no jury issue existed as to whether the store had constructive knowledge of a hazard because the store had inspected the area shortly before the fall. However, the Georgia Court of Appeals reversed the trial court's decision. First, the Court of Appeals attacked the affidavit of the store manager which was submitted on behalf of defendants' motion for summary judgment. The Court noted the affidavit did not state the basis for the manager's statement, specifically whether they were based on his personal knowledge and observations or based upon the reports of other employees. The affidavit also did not identify the employee who allegedly inspected the aisle prior to the fall and the store did not present an affidavit or deposition testimony of this employee. Further, the store manager's affidavit alleged a security guard was on duty and patrolled the premises that evening but did not identify the guard and the store failed to present an affidavit or deposition of the security guard. The Georgia Court of Appeals found that the store was not entitled to summary judgment based solely on the manger's affidavit because it did not show that he personally observed and conducted the inspection and, therefore, was legally insufficient. The Court also noted that since the store failed to present evidence of reasonable inspection procedures, the plaintiff had the benefit of an inference of the store's constructive knowledge of a hazard. The Georgia Court of Appeals also noted that the length of time of the inspection, which in this case was within 30 to 40 minutes of the time of the plaintiff's reported fall, may not be sufficient. The Court stated that an inspection may be required more frequently than every 30 minutes. Under the circumstances, the reasonableness of the store's inspection procedures was for the jury to determine. The Georgia Court of Appeals rejected the defendant's argument that the spill was open and obvious since the evidence in this case was not plain, palpable and undisputed.

In ***Quarles v. Georgia Service Systems, LLC***, 2003 Ga. App. LEXUS 1260 (October 7, 2003), the Georgia Court of Appeals upheld the grant of summary judgment to the defendant. In this case, the plaintiff filed a complaint against the defendant for negligence, claiming she was injured when she slipped and fell on a mat as she exited the restaurant. The facts show that on the date of

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the accident, the restaurant owner had, at approximately 8:00 a.m., conducted a walk-through inspection of the ground surrounding the restaurant, including the mat in front of the restaurant doors. According to the owner's affidavit, he did not see any wrinkled or crumpled places in the mats. At approximately noon on that date, the plaintiff entered the restaurant for lunch. However, before receiving her food, she realized she had left something in her car and decided to return to her car to get the paperwork. As she exited the restaurant, however, she tripped and fell outside the exit door on a mat described as rumpled and crumpled. Specifically, she stated that she caught her foot on the wrinkle in the mat and was unable to regain her balance because that mat and an adjacent mat were wet as a result of heavy thunderstorms earlier in the day. It was undisputed that the restaurant in this case lacked actual knowledge of the mat and accordingly any liability must be predicated on constructive knowledge. The plaintiff asserted the restaurant lacked a standard or inspection procedures. The evidence in this case show that the restaurant owner had instituted a general inspection procedure of conducting a walk through inspection of the grounds surrounding the restaurant prior to the opening of the business. He testified that he followed the procedures on the day the plaintiff fell and saw no wrinkles in the mats outside the restaurant. The plaintiff also contended the restaurant should be required to inspect the premises more frequently. The Georgia Court of Appeals noted that in prior cases, this Court held that when the nature of business is likely to produce a spill or other hazard, frequent inspections may be necessary. If, however, the slip and fall occurs in an area that the proprietor has no reason to believe is dangerous, the proprietor is under no duty to constantly inspect the area. The restaurant had no knowledge of any other person tripping or falling over the mat and no other patron had reported any problems with the mats on that date. The records also reflected that the restaurant owner had inspected the mat and saw no hazard approximately one hour and 15 minutes before the fall. The Georgia Court of Appeals held that under these circumstances the restaurant's inspection procedures were considered reasonable and the plaintiff failed to demonstrate constructive knowledge.

Therefore, the grant for summary judgment was upheld.

In the ***Pennington v. WJL, LLC***, 2003 Ga. App. LEXUS 1266 (October 9, 2003), case summary judgment was upheld by the Georgia Court of Appeals. Facts in this case showed the plaintiff was injured while he was trying to open the door to the defendant's warehouse and reported feeling a loss of balance. In the injuries, the plaintiff severed his fingers. The plaintiff was not able to recall feeling his feet strike anything but only recalled the feeling of falling. After the accident, the plaintiff found a co-worker to help him wrap his wrist. He also rushed to retrieve his fingers. When the co-worker went inside the warehouse, she saw several hoses in a pile on the floor just inside the door. The plaintiff had no memory of his feet making contact with the hoses and could not recall seeing the hoses. However, the plaintiff alleged that common sense and logic dictated that the hoses caused him to fall because the hoses seemed to be the only explanation. The defendant subsequently moved for summary judgment asserting the plaintiff failed to establish a causal connection between the injury to his hand and any unsafe condition on the premises. The Georgia Court of Appeals stated that causation is always an essential element in slip or trip and fall cases. Where the plaintiff does not know of a cause or cannot prove the cause, there can be no recovery because an essential element of negligence cannot be proven. A mere possibility of causation is not enough and when the matter remains one of pure speculation or conjecture and the probabilities are at best, evenly balanced, it is appropriate for the court to grant summary judgment to the defendant. The plaintiff in this case was not able to state that whether he knew for sure whether he had tripped. The Court stated that such speculation did not support his argument and the Georgia Court of Appeals held the trial court properly viewed all evidence which did not support his argument. The plaintiff attempted to distinguish the ***Williams v. Amroe Marking Company***, 229 Ga. App. 468, 494 S.E.2d 218 (1997) (physical precedent only). In that case, the plaintiff never saw what he slipped on but he knew that he had slipped. The plaintiff never saw any ice but recalls that the area felt slick beneath his feet and a witness who helped him after his fall testified he assisted the plaintiff from the iced area. In that case, the Court of Appeals found there was sufficient circumstantial evidence that the ice he landed on caused his fall. However, in this case, there is no evidence that the plaintiff actually tripped and the only causation evidence was the presence of the hoses at the scene and the plaintiff's speculation after the fact that he must have tripped over the hoses. Therefore, the grant of summary judgment was appropriate in this matter.

Lastly, in ***McCaskill, III v. Carillo***, 2003 Ga. App. LEXUS 1277 (October 14, 2003), the plaintiff sued the defendant who was installing carpet tiles for the plaintiff's employer after the plaintiff was injured as a result of tripping at his workplace. The evidence in this case show that the plaintiff was injured after he tripped over the lip of carpet outside the men's room where the carpeted area met the uncarpeted

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area. The plaintiff did admit that prior to his fall, he had been in and out of the men's room at least once with the floor in the same condition as when he fell. The facts also establish the defendant had a written contract with a general contractor to install carpet for the employer. The general contractor was responsible for providing the defendant with carpet and the defendant was responsible for installation of the carpet in connection with the employer's renovation. All of the defendant's work was done under the instruction of the defendant's employees. During the installation, the general contractor ran out of carpet squares resulting in areas of bare concrete in the employer's offices for about a week, which was acceptable to the employer. When the shortage occurred, defendant had suggested to the employer that the edge of the carpeting be taped, but the employer decided that might present more of a hazard then the edge of the carpet meeting bare floor. The Georgia Court of Appeals stated wherein an independent contractor or supplier properly executes the directions of the owner, only the owner, not the contractor or supplier, may be liable for injuries to a third party resulting therefrom. There is no evidence in the record that the defendant's installation of the carpet was not in compliance with his contract or the general contractor and the general contractor's contract with the employer or industry standards for installing carpet. Also, the employer was in day to day control of the phasing of the defendant's work and was aware of the fact that the defendant had run out of carpet squares and was aware and approved of leaving areas of the workplace containing bare concrete abutting installed carpet squares until more carpet squares could be obtained. Therefore, the defendant was entitled to summary judgment. The defendant was also entitled to summary judgment because the plaintiff's only claim was that he tripped on the 3/8 inch carpet square which had been properly glued to the floor, and this difference in height could not constitute negligence. Therefore, the denial of summary judgment was reversed by the Georgia Court of Appeals.

* *C. Jason Willcox is a partner in Moore, Clarke, DuVall & Rodgers, PC, which has offices in Albany, Atlanta and Valdosta, Georgia. Jason's practice focuses on the defense of individuals, insureds and self-insureds, with an emphasis in insurance defense, employment defense, workers' compensation defense, and general civil litigation.*

Mark your Calendars!

2004

August 5-8

GDLA Annual Meeting
Sandestin, Florida

2005

June 16-19

GDLA Annual Meeting
Ponte Vedra, Florida

See you there!

THE GEORGIA DEFENSE LAWYERS ASSOCIATION FALL BOARD MEETING, REYNOLDS PLANTATION, GEORGIA NOVEMBER 1, 2003

1. **Call To Order** – President Rominger called the meeting to order at 8:58 a.m. In attendance were: Al Parnell, David Whitworth, Bruce Welch, Walter McClelland, Jerry Buchanan, Steve Kyle, Lynn Roberson, Ted Freeman, Art Glaser, Bubba Hughes, George Hall, Clay Ratterree, Jim Elliott, Greg Ellington, Mel Haas, Jo Jagor, Jimmy Singer, Warner Fox, Johnny Foster, Grant Smith, and Rick Rominger.

2. **Recognition of Board Members** – New board members Lynn Roberson, Ted Freeman and Jim Elliott were in attendance.

3. **Approval of Minutes** of July 26, 2003 Annual Business Meeting were distributed to all those present. Walter McClelland moved to dispense with the reading of the minutes and for approval of the minutes. Seconded and passed.

4. **Treasurer's Report** – Johnny Foster reported the present balance in the Smith/Barney account. All annual meeting expenses with the exception of the continuing legal education credit have been paid.

We presently have 567 members, an increase of 77 in the past year.

The account set up with Smith/Barney for the Dick Richardson Scholarship money has in it an amount less than $100.00. Al Parnell moved to contribute the sum of $100.00 to the Dick Richardson Scholarship at the University of Georgia and close that account. Seconded and passed.

Johnny Foster read a letter dated May 8, 2003, from Michael Adams to Jerry Buchanan thanking the association for its gift to the Willis J. "Dick" Richardson Student Award Fund in the School of Law.

5. **Amicus Committee** – Jimmy Singer reported that there are presently no requests or inquiries for assistance from the Amicus Committee.

6. **Membership Report** – The following new members were considered and approved for membership: Frederick C. Dawkins and Duke R. Groover.

Lynn Roberson accepted the position of chairperson of a Steering Committee whose function will be to develop and execute a strategy to increase membership. Other board members appointed to that committee are Art Glaser, Bob Travis, and Bubba Hughes. It was noted that Atlanta and the large firms is where most of our potential members are and thus where our focus should be. It was also noted that we should focus on attracting attorneys who do defense work but not necessarily insurance defense work, and in that connection, it would be helpful to shed being labeled as an organization of insurance defense lawyers.

7. **Sponsorship and Exhibitors** – It was agreed that Clay Ratterree will head up the Sponsorship and Exhibitors Committee.

There was discussion as to whether any sponsors should be given exclusivity.

Steve Kyle suggested restructuring the charges to sponsors. Johnny Foster recommended putting all of the sponsors on an annual renewal date of May 15. The consensus was in favor of these proposals but it was decided upon motion of Ted Freeman, which was seconded and passed, to let the committee address these issues and provide a recommendation to the board.

8. **Workers' Compensation Academy** – Staten Bitting and Luanne Clarke are working on this.

9. **Trial Academy** – Jim Elliott reported on the Trial Academy. The brochures are at the printer. The Trial Academy will be held at Callaway Gardens December 4 – 6, 2003. Attendance is limited to 42 people and last year the Trial Academy was full. President Rominger noted that the Trial Academy has been very valuable and successful. Jimmy Singer will, if possible, scan the brochure and email it to the entire membership.

10. **Annual Meeting** – Grant Smith discussed the program for the annual meeting. The board authorized Grant to ask Jim McElhaney to speak both days. In the event that Jim McElhaney is not available, Grant is authorized to put together a program consisting of federal and state appellate judges.

Steve Kyle reported that the 2005 annual meeting could be held at Ponte Vedra either the first, second or third weekend in June. It was decided that Steve will determine the date of the State Bar annual meeting and schedule our annual meeting for Ponte Vedra in June so as not to conflict with the State Bar.

11. **Law Journal** - Jimmy Singer accepted the responsibility of putting together the 2004 Law Journal. There was discussion about whether the present format of the journal; that is, not in hard copy, is worthwhile. Steve Kyle suggested distributing a special binder to the membership so that the journal in

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electronic format could be printed off and placed into the binder. Jimmy Singer made a motion, which was seconded and passed, that he investigate the cost of this and report back to the board.

12. **DRI Annual Meeting Report** – Johnny Foster reported that the DRI's annual meeting was held October 16 – 18, 2003 in Washington, DC. George Duncan, Steve Kyle and Johnny Foster attended that meeting. George Duncan circulated to the board an email on October 29, 2003 summarizing information gained through the SLDO conclave seminars and workshops which, if considered and implemented, could be a great assistance to the association.

13. **Website Committee** - Jerry Buchanan accepted the responsibility of heading a committee (other committee members being George Hall and Greg Ellington) to clean up the website and make the website more usable and up-to-date and informing members about using the website. There was further discussion of this in relation to other matters discussed below.

14. **Y.L.S. Membership Recruitment Committee** – This committee (Jo Jagor and George Duncan) will put on another Skits and Suds Seminar early next year. There was concern that new members gained as a result of last years Skits and Suds Seminar have complained that they received no benefit from being in the association due to the fact that they have not received any of the broadcast emails and they have not been able to access the website and seem to not be on the mailing list. Johnny Foster reported that it is his understanding from Al Shurley and Andy Haslam that the website was updated September 3, 2003 and should be up-to-date at least since that time.

15. **Younger Lawyer Section of GDLA** – Greg Ellington accepted the responsibility of chairing this committee.

16. **Legislative Liaison** – Barry Fleming has agreed to act as our liaison in the legislature and will respond to questions of the board concerning legislation or proposed legislation.

Warner Fox and George Hall will communicate with Mike Bowers and Jim Purcell regarding how the association can provide input to the judicial nominating committee.

17. **Executive Director Search** – Clay Ratterree reported that the committee has refined the job description. An ad will be posted in the Fulton County Daily Reporter. The goal is to narrow the field by November 15, 2003 to four or five candidates to be interviewed by the committee consisting of Clay, Mel Haas and George Duncan, and any other board members who wish to participate in the interview process. The board has previously authorized the committee to hire someone to work 25 to 30 hours per week.

18. **Annual Meeting Committee** – At the suggestion of Lynn Roberson, Steve Kyle will look into holding the 2006 annual meeting at Amelia Island Plantation.

It was decided that Steve Kyle and his committee consisting of Warner Fox and Walter McClelland will set up a function involving the judges to coincide with the Winter board meeting. The basic concept that was ultimately agreed upon was that the function would be held on a Thursday night and the board meeting would be held on Friday. All members of GDLA would be eligible to attend. The judges that will be invited are the trial judges in Fulton and DeKalb Counties, the Georgia appellate judges, the Eleventh Circuit judges and the Northern District judges. Spouses will be invited as well.

We will have a cash bar, however, the judges will be given free drink tickets. Steve Kyle asked that all board members notify him promptly if they have any scheduling conflicts with any Thursday or Friday in January or February, 2004.

19. **Old Business** – None.

20. **New Business** – There was discussion of attempting to renew and improve the substantive law committee program and to use the substantive law committees as a source of material for the newsletter. It was noted that the more material that becomes available, the more often the newsletter can be distributed and that the more often the newsletter is distributed, the more likely we are to provide a noticeable benefit to our members and therefore, reduce attrition.

21. **Adjourned** – The meeting was adjourned at 11:00 a.m.

NEWSWORTHY ITEMS WANTED

Are you aware of a recent important legislative enactment or a major defense victory in the Courtroom? Have you attended any events our readers would be interested in? We would like to report it in the GDLA Newsletter. Send your items to: John Foster, Post Office Box 13929, Savannah, Georgia 31416, or call him at (912) 352-1190, or e-mail him at:

jfoster@forbesbowman.com

SCENES FROM HILTON HEAD

Catherine and Cam Bowman, Salty and Lee Forbes

Mel Haas, LeAnn and Ray Kurey

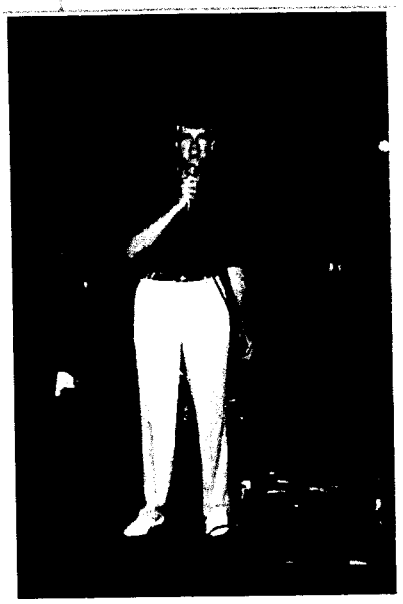
Kayce and Clay Ratterree and Judge Neal Dickert and his wife Floride

Barry, Paige and Zach Fleming, Dee Dee and Deena Willcox

Mel and Linda Haas, Gary and Connie Seacrest

Lynn Roberson with her husband Judge Henry Newkirk and Steve Kyle

Salty Forbes, Tommy Carlock and Bruce Welch



Judge Neal Dickert

Ahoy Mates!

Kimberly Nunnley, Jo Jagor, Quin Jagor and C. Shane Keith

Rachel Chambless

Holly and Grant Smith, Debbie and Bubba Hughes

Grant Smith, Judge Neal Dickert and Clay Ratterree

Lisa and John Muller

Joe Chambless and Granddaughter Rachel Chambless

Bruce and Marsha Welch,
Peggy and Joe Chambless

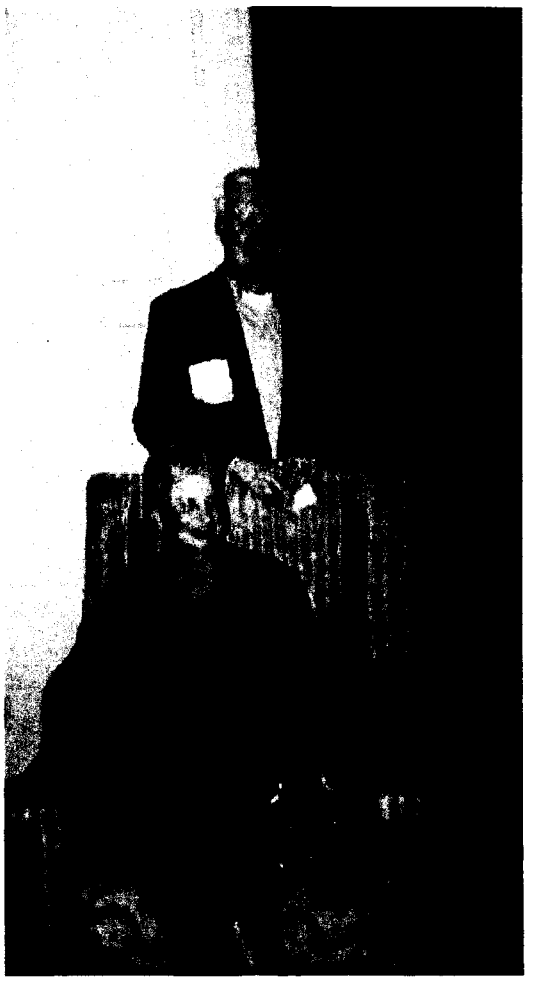
Bill and Susan Vereecke,
Terry and David Smith,
George Hall

The Sancastle Contest Competitors

A Sand Castle building contest entry under construction

Rachel Chambless, Hunter and Sarah Bowman

Walter and Kathy McClelland and Marsha and Bruce Welch



Alabama Executive Director Ed and his wife Louise

Joe and Peggy Chambless

2002—2003 LEGISLATION AND CASE LAW UPDATE

By John A. Foster

INTRODUCTION

Between July 2002 and July 2003, the United States Supreme Court delivered a landmark decision on punitive damages. The Georgia legislature considered numerous tort reform proposals. The Georgia appellate courts addressed issues dealing with, among other things, jury instructions in medical malpractice cases and jury selection. Also, the Supreme Court, which ordinarily does not grant petitions for certiorari on motion for reconsideration after having previously denied them, did so three times in the following cases discussed below: ***Cotton States Mutual Insurance Co. v. Brightman***, ***Beach v. Lipham***, and ***Ontario Sewing Machine v. Smith***.

LEGISLATION

TORT REFORM:

Three versions of proposed tort reform were considered by the legislature.

Senate Bill 133, "The Common Sense Civil Justice Reform Act," was introduced by Senators Thomas E. Price, R-Roswell, Eric Johnson, R-Savannah, Tim Golden, D-Valdosta, William G. Hamerick, III, R-Carrolton, Don Balfour, R-Smellville, and Robert Lamutt, R-Marietta. It included the following proposed provisions: A $250,000 cap on non-economic damage awards in product liability and medical malpractice cases, waiving punitive damages for care given in emergency rooms, prohibiting plaintiffs from collecting any damages if the plaintiff is found 50 percent or more at fault, doing away with joint and several liability and allowing juries to assign proportional liability to defendants, setting new standards for expert witnesses, reducing damage awards by the amount insurers have already paid to plaintiff or plaintiff's healthcare providers, reducing the number of times plaintiffs can voluntarily dismiss, and tying pre and post-judgment interest to the weekly average of T-bills.

Senator Charles B. Tanksley, R-Marietta, offered a substitute bill, which provided for tying pre and post judgment interest rates to the prime rate, transferring control of venue from plaintiffs to judges, reducing the number of voluntary dismissals allowed to plaintiffs, and capping non-economic damages at $250,000 in product liability cases only.

Senate Bill 225 entitled "Frivolous Litigation Prevention Act," was introduced by Senators Steve Thompson, D-Powder Springs, Charles B. Tanksley, R-Marietta, Michael S. Meyer Von Bremen, D-Albany, and B. Seth Harp, Jr., R-Midland. It provided for sanctions against lawyers, insurers or parties for legal action meant to harass, delay or increase needlessly the cost of litigation, including frivolous claims and defenses, allowing for sanctions and attorney's fees and costs. The medical malpractice provisions, the joint and several liability provisions, the expert witness provisions, the collateral source provisions, and the frivolous litigation provisions did not make in to law, however, the other provisions did, at least in some form.

PROPOSED TORT REFORM PROVISIONS THAT DID NOT PASS:

The following provisions were proposed but did not make it into law: A $250,000 cap on non-economic damages in product liability and medical malpractice cases, a prohibition against punitive damages arising out of negligence in the emergency room, proportional liability in all multiple defendant tort cases; in other words, no more joint and several liability, and, new standards for the admissibility of expert testimony.

PROVISIONS THAT DID PASS:

O.C.G.A. §7-4-12.
This is the code section that provides for post-judgment interest. It previously provided for post-judgment interest at a rate of 12 percent per year. It has been amended to provide for interest at a rate equal to the prime rate as published by the Board of Governors of the Federal Reserve System on the day the judgment is entered plus 3 percent. The change is applicable to all civil actions filed on or after the effective date of the code section, which is July 1, 2003.

O.C.G.A. §9-9-13. This is the code section that provides for vacation by a court of an arbitrator's award pursuant to the Georgia Arbitration Code. It has in the past provided and continues to provide that a court may vacate an arbitration award if the court finds that the rights of the party were prejudiced by: (1) Corruption, fraud, or misconduct in procuring the award; (2) Partiality of an arbitrator appointed as a neutral; (3) An overstepping by the arbitrators of their authority or such imperfect execution of it that a final and definite award upon the subject matter submitted was not made; or (4) A failure to follow the procedure of the arbitration code. This code section was amended by adding a fifth ground: "The arbitrator's manifest disregard of the law." This legislation appears to be in reaction to the Supreme Court's decision in ***Progressive Data Systems, Inc. v. Jefferson Randolph Corporation***, 275 Ga. App. 420, 568 S.E.2d 474 (2002), in which the Georgia Supreme Court refused to

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apply the "manifest disregard of the law" ground for vacatur sometimes cited by the federal courts. Another section of this still states that the fact that an arbitration award "could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award," which arguably creates a conflict within the arbitration statute. The head of the state bar's alternative dispute resolution section criticizes the amendment on the basis that it will make most arbitration awards subject to a lengthy and expensive set of appeals thereby negating the effect of going through arbitration in the first place and requiring that a record be made in nearly every arbitration.

O.C.G.A. §9-11-23. Old O.C.G.A. §9-11-23 was stricken in its entirety and a new version was adopted, which tracks the present federal rule. The original class action rule adopted in 1938 in Federal Rules of Civil Procedure provided for three types of class actions: "True" (to enforce joint or common rights; e.g., estate beneficiaries, shareholders, or members of unincorporated associations joining together to enforce the rights of their estates, corporations, or associations), "Hybrid" (to enforce several rights where the object of the action is specific property; e.g., recovery out of a limited common fund), and "Spurious" (where the rights are several, the object of the action is not specific property, but where there are common questions of law or fact; e.g., owners of property damaged by fire negligently started by a railroad joining together to sue the railroad). In 1966, when Georgia adopted the Civil Practice Act, it essentially adopted the 1938 version of Rule 23 of the Federal Rules of Civil Procedure but deleted the "spurious" classification of class actions. However, in ***Georgia Investment Co. v. Norman***, 229 Ga. 160, 190 S.E.2d 49 (1972), the Supreme Court read the "spurious" classification of class actions back into the Georgia rule. In the quarter century that followed the adoption of the Federal Rule in 1938, the federal courts had experienced notable difficulty applying these classifications. There were instances where different courts would put the same class into different classifications at the same time and there were other instances where the same court would put the same class into different classifications at different times. Consequently, at the same time Georgia adopted, in essence, the 1938 Federal Rule, the federal courts adopted a new rule. The 1966 Federal Rule divided class actions into the following three categories: 23(b)1 (where separate suits could yield inconsistent adjudications or could affect the rights of non-parties; e.g., recovery out of a limited common fund), 23(b)2 (where injunctive or declaratory relief is sought against conduct affecting the whole class; e.g., civil right suits), and 23(b)3 (common questions of law or fact). The new rule adopted in Georgia is essentially the 1966 Federal Rule. The new rule should result in more predictability as to what classes are appropriate for certification and more uniformity in the application of the rule. An additional provision, which would have allowed for interlocutory appeal of decisions certifying a class did not become law.

O.C.G.A. §9-11-41. Previously, plaintiffs could voluntarily dismiss their case twice without order of court anytime before he rests his case. Now, plaintiff's can dismiss only once without order of court and must do so before the first witness is sworn. Otherwise, a first dismissal must be upon order of the court, or by filing a stipulation of dismissal signed by all parties who have appeared in the action.

O.C.G.A. §50-2-21. This code section previously and continues to provide that the courts of this state have jurisdiction over all persons while within this state's limits. The legislature has added subsections adopting the forum non conveniens doctrine adopted by federal courts in ***Gulf Oil Corporation v. Gilbert***, 330 US 501 (1947). The amendment allows the courts of this state to decline to exercise jurisdiction of any civil case filed by a non-resident accruing outside Georgia if there is another forum with jurisdiction over the parties in which the trial could more appropriately be held. The following factors are to be considered: (1) The place of accrual of the cause of action; (2) The location of the witnesses; (3) The residence or residences of the parties; (4) Whether a litigant is attempting to circumvent the applicable statute of limitations of another state; and (5) the public factor of the convenience to and burden upon the court. Procedurally, the moving party must file its motion to dismiss no later than 90 days after the last day allowed for it to file its answer. If the requisite showings are made, including that there is in fact another forum which can assume jurisdiction, the court may dismiss the action without prejudice to its being filed in any appropriate jurisdiction.

O.C.G.A. §51-12-14. The non-liquidated damages act was amended so as to change the interest rate from 12 percent to "An annual rate equal to the prime rate as published by the Board of Governors of the Federal Reserve System... on the thirtieth day following the date of the mailing of the last written notice (pursuant to the non-liquidated damages act) plus 3 percent.

O.C.G.A. §51-12-71. The code section relating to pre-requisites for the transfer of structured settlement payments was amended in several respects. Where the statute previously provided that there could be no transfer of structured settlement payment rights "unless the transfer complies with the requirements of this article and will not contravene other applicable, it now provides that there cannot be a transfer of structured settlement payment rights unless the transfer has been approved in advance in a final court order or order of any government entity vested by law with exclusive jurisdiction over the claim, which order finds that the transfer complies with the requirements of this article and does not contravene any federal or state statute, or the order of any court, or any responsible

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administrative authority, and where the transfer is in the best interest of the payee taking into account the welfare and support of the payee's dependents." In addition, the transferee must file written notice of the transferee's identity with the court and provided the court and all interest parties a notice of the proposed transfer and scheduling a court hearing.

CASE LAW:

1. **Attorney/client:**

Swift, Currie, McGhee & Hiers v. Henry, Ga. Supreme Court case number S02G1248, May 19, 2003. A document created by an attorney belongs to the client who retained him rather than to the attorney who prepared it. The client is entitled to discover any document, which the attorney created during the course of the representation unless good cause to refuse discovery exists; e.g., or disclosure would violate an attorney's duty to a third-party, where the document assesses the client himself, or where the document includes tentative preliminary impressions of the legal or factual issues presented in the representation recorded primarily for the purpose of giving internal direction to facilitate performance of the legal services entailed in that representation.

2. **Bad faith:**

Cotton States Mutual Insurance Co. v. Brightman, Supreme Court case number S02G1739, April 29, 2003. Cotton States insured the defendant vehicle and State Farm insured the defendant driver. Plaintiff offered to settle with Cotton States for its $300,000 limits conditioned on State Farm agreeing to pay its $100,000 limit. State Farm refused. Cotton States did not make an offer until after plaintiff's deadline had passed. The jury returned a verdict of 1.8 million. Defendants assigned their bad faith case to plaintiff and the jury returned a verdict against Cotton States of 2.1 million in that case. The Supreme Court granted cert. to address thequestion of whether Cotton States was excused, as a matter of law, from tendering its policy limits because the plaintiff's demand contained a condition over which Cotton States had no control. The Supreme Court found that Cotton States was not excused as a matter of law. "If Cotton States had tendered its policy limits while the plaintiff's offer was pending, it would have done everything within its control to accept the plaintiff's offer and thus protect its policy holder from an excess verdict." The Supreme Court specifically disapproved the language in the Court of Appeals opinion placing an affirmative duty on the insurance company to engage in settlement negotiations concerning a demand that is in excess of the insurance policy's limits. "An insurance company faced with a demand involving multiple insurers can create a safe harbor from liability for an insured's bad faith claim under ***Southern General Insurance Company v. Holt***, 262 Ga. 267, 416 S.E.2d 274 (1992) by meeting the portion of the demand over which it has control, thus doing what it can to effectuate the settlement of the claims against its insured."

3. **Bankruptcy Estoppel:**

Period Homes, Ltd. v. Wallick, Supreme Court case number S02G0380, September 16, 20002. The Supreme Court refused to apply the doctrine of judicial (bankruptcy) estoppel under the circumstances of this case. First, the plaintiff had filed a Chapter 11, which was subsequently converted to a Chapter 7. The Supreme Court held that in Chapters 7 and 11, debtors are not required to amend their bankruptcy petitions to disclose assets acquired after filing as they are required in Chapter 13, and therefore, where the petition is filed under Chapters 7 or 11, failure to amend the schedule of assets so as to name the after acquired asset does not automatically result in judicial estoppel as it presumably would if the petition were filed under Chapter 13. To the extent this conflicts with ***Wolfork v. Tackett***, 273 Ga. 328, 540 S.E.2d 611 (2001), that case is disapproved. Where judicial estoppel is not automatically appropriate, however, it still may be appropriate pending on the circumstances of the case. Here it was not for two reasons: (1) The debtor/plaintiff's creditors were paid in full and therefore the omission did not result in any benefit to the debtor/plaintiff; and (2) The debtor/plaintiff did in fact tell the bankruptcy trustee, informally, of the existence of the potential claim.

4. **Common carriers:**

Devore v. Liberty Mutual Insurance Company, 257 Ga. App. 7, 570 S.E.2d 87 (2002). The question in this case was whether the amended version of O.C.G.A. §46-7-12(c) allowing a direct action against the insurer of a motor common carrier despite the failure to file prescribed forms evidencing the insurance policy should be applied retroactively. The court held that the amended statute does not effect vested substantive rights, and therefore, the amendment is retroactive.

5. **Experts:**

Orkin Exterminating Company, Inc. v. Carder, 258 Ga. App. 796, 575 S.E.2d 664, November 22, 2002. Plaintiff contended pesticides negligently applied in his office by Orkin caused him physical injury. Plaintiff's expert performed tests exposing plaintiff to mixtures of the pesticides and placebos, and concluded from those tests (which were not double blind) that the pesticides indeed caused a physical reaction. The test results themselves were not entirely consistent with the expert's conclusion and some of the tests were arguably flawed by the expert's introduction of vinegar into the test material to mask odor. The Court of Appeals held that the testing satisfied the basic standard governing the admissibility of scientific evidence in Georgia set out in ***Harper v. State***, 249 Ga. 519, 292 S.E.2d 389 (1982), and rejected Orkin's argument

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that the methodology employed had not been tested by others, there was no written protocol for the testing, the results were not published, and the test had not been subject to peer review. The Court pointed out that ***Doubert v. Merrill-Dow Pharmaceuticals***, 509 US 579 (1993) does not apply in Georgia. The significance of this case is that on April 29, 2003, the Supreme Court granted Orkin's petition for cert. and the order granting cert. says that the justices particularly were concerned with what standards or factors should govern the admissibility of expert scientific evidence in Georgia – specifically with regard to ***Harper***, supra; ***Doubert***, supra; and ***Kumho Tire Co. v. Carmichael***, 526 US 137 (1999).

6. **Indemnity:**

George L. Smith, II Georgia World Congress Center Authority v. Miller Brewing Company, 255 Ga. App. 643, 566 S.E.2d 361 (2002), the question here was, "Does a written indemnity agreement obligate the indemnitor to pay the indemnity's attorney's fees where the agreement makes no mention of an obligation to defend the indemnity, or of an obligation to pay the indemnity's attorney's fees or expenses of litigation?" The court held that no obligation to pay attorney's fees arises in such an agreement. The agreement at issue provided that the indemnitor was to "indemnify and save harmless [the indemnity] from any and all liability, or claims of liability, for damage to or loss of property, or for bodily or personal injury of [indemnitor] or of any person admitted to the Center by [indemnitor]... ." Specifically, the phrase "claims of liability" in addition to the phrase "any and all liability" does not give rise to a obligation to pay attorney's fees; prejudgment settlements are ***ESI, Inc. of Tennessee v. West Point Stevens, Inc.***, 254 Ga. App. 332, 562 S.E.2d 198. In this case, the issue was whether O.C.G.A. §13-8-2(b) voided a hold harmless provision, which provided:

> The contractor shall be responsible... for all injuries or damage of any kind resulting from this work, to persons or property. The contractor hereby assumes the obligation to save the owner harmless and to indemnity the owner... arising out of or through injury... or damage to property... suffered through: (1) any act or omission of the contractor or any subcontractor,... or (2) arising out of any act or omission incident to the inspection or supervision by the owner or his representatives of the work included in this contract.

O.C.G.A. §13-8-2(b) is the statute, which provides that certain indemnity contracts are void if they purport to indemnity or hold harmless the promisee against liability for damages caused by the sole negligence of the promisee. The court held that the indemnity provision at issue in this case was not void holding that O.C.G.A. §13-8-2(b) was inapplicable because the contract also required the contractor to furnish insurance coverage, including an endorsement incorporating the hold harmless agreement assumed by the contractor. Where an insurance clause shifts the risk of loss to the insurance company, regardless of which party is at fault, an indemnification provision is not made void by O.C.G.A. §13-8-2(b).

7. **Jury selection:**

Gay v. State, Court of Appeals case number A02A1388, November 27, 2002. The Court of Appeals reversed its prior decision in ***Atfoayiteyfio v. State***, 254 Ga. App. 1 (2002), which held that "where there are multiple reasons for striking a juror, white or black, it cannot be presumed that a reason applied to one juror, of one race, but not applied to another juror, of another race, is racially motivated." The court said that the application of Atfoayiteyfio's "multiple reason" rule would prohibit the trial judge from inferring racial discrimination, and would permit a defendant to find a pretext for a racially motivated strike by stating multiple reasons after extensive voir dire. Authorizing such pretexts gives trial counsel a fool proof way to evade ***Batson*** and its progeny at a whim. An inference of racial motivation is not prohibited when the trial judge determines one is warranted under the totality of the circumstances.

Powell v. Amin, 256 Ga. App. 757, 569 S.E.2d 582 (2002). In this medical malpractice case, one of the prospective jurors was a pharmacist who filled prescriptions for the doctor-defendant. During voir dire, in response to plaintiff's counsel's questions as to whether he could be fair, the pharmacist responded, "I guess. I don't know. I could. [It would] probably [be] difficult and that if he was the plaintiff, he wouldn't want himself sitting on the jury." However, when asked by the judge whether the fact that he filled prescriptions for the defendant would prevent him from basing the verdict exclusively on the evidence, the pharmacist replied, "No." The Court of Appeals reversed holding that this was merely rehabilitating the prospective juror though the use of talismanic questions and that the trial judge should have gone further. Another prospective juror was a patient of the defendant doctor who had said she could be fair, "but it is going to be hard for me." The panel noted that plaintiff's counsel had the opportunity to question the juror further and held that the trial judge properly refused to exclude the prospective juror for cause.

8. **Medical malpractice:**

Breyne v. Potter, Court of Appeals case number A02A1946, December 5, 2002. Defendant doctor advised pregnant plaintiff patient baby would be born with Downs Syndrome. Plaintiff had an abortion.

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chain of causation was broken because it was the patient's decision to have the abortion, and also held that since the fetus was not viable, the plaintiff could sue for physical and emotional damages because the injury to the fetus amounted to an injury to the plaintiff herself.

Beach v. Lipham, Ga. Supreme Court case number SO2G0721, March 10, 2003. The Supreme Court refused to hold that the giving of the standard "presumption of due care" charge in a medical malpractice case was reversible error. However, due to possible confusion about how juries should apply the charge, the court recommended changes in the language of the pattern instruction for use in future cases. The trial court charged the jury:

> In Georgia the law is such where there is a presumption that medical, surgical, and nursing services were performed in an ordinarily skillful manner, and the burden is on the plaintiff to show a want of due care, skill and diligence.

The Supreme Court recommended that the jury be instructed that: (1) The law presumes that physicians [or other medical professionals] perform medical services in an ordinarily skillful manner; (2) The person claiming an injury may overcome this legal presumption by introducing evidence that the physician did not treat the patient in an ordinarily skillful manner; (3) Expert testimony is required to overcome the presumption; and (4) The plaintiff's burden in proving the physician's lack of due care and skill is by the preponderance of the evidence.

Zwiren v. Thompson, Ga. Supreme Court case number S02G1063, March 27, 2003. In this medical malpractice case, the trial court charged the jury in part that the plaintiff had to present expert medical testimony showing that "within a reasonable degree of medical certainty as proven by a preponderance of the evidence" that the injury in question was proximately caused by the negligence of the defendant. The Court of Appeals held that the charge was reversible error for its use of the word "certainty" rather than "probability."

The Supreme Court reversed. The Supreme Court said Georgia law allows the expert's opinion on proximate causation to be framed in terms of either "reasonable medical probability" or "reasonable medical certainty." However, the court also suggested that the following jury instruction be given in medical malpractice trials in the future:

> In order for the plaintiff to show that the defendant's alleged negligence was the proximate cause of the plaintiff's injury, the plaintiff must present expert medical testimony. An expert's opinion on the issue of whether the defendant's alleged negligence caused the plaintiff's injury cannot be based on speculation or possibility. It must be based on reasonable medical probability or reasonable medical certainty. If you find that the expert's testimony regarding causation is not based on reasonable medical probability or reasonable medical certainty, then the plaintiff has not proven that the plaintiff's injury was proximately caused by the defendant's alleged negligence, and you would return a verdict for the defendant.

Waddel v. Baht, 257 Ga. App. 580, 571 S.E.2d 565 (2002). O.C.G.A. §24-9-46(i) allows healthcare providers to disclose AIDS confidential information regarding a patient thereof if the disclosure is made to a healthcare provider who is providing or will provide a healthcare service to that patient. In this case, the plaintiff was a dental hygienist who was HIV positive. He had not disclosed his HIV status to his employer. It appeared that his employer occasionally provided him with free dental care as a perk of his employment. Without plaintiff's consent, the defendant, a physician who had tested plaintiff for HIV informed plaintiff's employer of plaintiff's HIV status. The court held that the defendant physician did not violate the plaintiff's right of privacy because plaintiff's employer had provided and likely would provide plaintiff with healthcare in the future.

9. **Premise liability:**

Food Lion v. Isaac. Court of Appeals case number A03A0533, April 25, 2003. In this case, the Court of Appeals construed the term "approaches" as that term is used in O.C.G.A. §51-3-1 requiring landowners to exercise ordinary care to keep not only their premises, but also its approaches safe for invitees. Plaintiff fell in the parking lot in front of defendant's grocery store. The parking lot was a common area of the shopping center where the defendant grocery store was located and was owned and maintained by the defendant grocery store's landlord. There was a twelve foot wide sidewalk between the grocery store and the parking lot. The court held that the "approaches" included the sidewalk but not the parking lot.

Bradford Square Condominium Association, Inc. v. Miller, 258 Ga. App. 240, 573 S.E.2d 405 (2002). This is a premises liability case arising out of a third-party criminal attack. The plaintiff was a resident of a condominium and a member of the condominium association. The condominium association declaration and by-laws provided that the association was not responsible for security. While a condominium association's members are invitees with regard to the common elements of the condominium property, the condominium association's duty to its members may be circumscribed by the terms of the condominium instruments/ contract. Absent conflict with the Georgia Condominium Act, a

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condominium association's duty to its members does not require it to do things expressly excluded under the terms of the condominium instruments. This case would not apply to a condominium association's duties to non-members or non-owners.

10. **Product liability:**

Ontario Sewing Machine v. Smith, 275 Ga. 683, 572 S.E.2d 533 (2002). Manufacturer recalled product used by employer, however, employer failed to comply with the recall. Subsequently, employee was injured on the machine and sued the manufacturer. The manufacturer argued that employer's failure to comply with the recall was a superceding and intervening cause of the employee's injury. The trial court agreed and granted summary judgment. However, the Court of Appeals reversed and held: (1) The manufacturer had a duty to warn the user, that is, the employee; (2) The manufacturer had a duty to warn both the employee and the employer of the specific danger; and (3) The employer had a duty not to just to recall the machine, but also to repair it. On the causation issue, the Court of Appeals held that, as a matter of law, the actions of both the manufacturer and the employer were concurrent proximate causes of the employee's injury. The Supreme Court first denied cert., then granted cert. in response to the manufacturer's motion for reconsideration. On the causation issue, the Supreme Court held that it was a jury question. On the other holdings of the Court of Appeals, the Supreme Court held that the Court of Appeals did not need to address those issues and disapproved of the Court of Appeals resolution of them.

11. **Punitive damages:**

State Farm v. Campbell, U.S. Supreme Court case number 01-1289, April 7, 2003. The U. S. Supreme Court reversed the Utah Supreme Court's decision affirming a $145,000,000.00 punitive damages award in a bad faith case where compensatory damages awarded by the trial court totaled $1,000,000.00. The justices set out three "guideposts" for determining the constitutionality of a punitive damages award: (1) The degree of reprehensibility of the defendant's conduct; (2) The ratio between the actual or potential harm suffered by the plaintiff and the amount of the punitive damages award ("Few awards exceeding a single digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process"); and (3) The difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

The Court also curtailed the use by plaintiffs of defendant's out-of-state conduct as evidence of reprehensibility:

> Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant's action in the state where it is tortuous, but that conduct must have a nexus to the specific harm suffered by the plaintiff. A jury must be instructed, furthermore, that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.

May v. Crane Brothers, Inc., Supreme Court case number S02-G0573, March 3, 2003. Where an employer is held liable under respondeat superior for the tort of its employee and punitive damages are sought, the employer has no right to present as mitigative evidence the conviction of its employee for the conduct on which the suit is based.

12. **Statute of limitations:**

Williams v. Bragg, Court of Appeals case number A02A2338, March 19, 2003. Suit was filed April 13, 2000. The statute ran April 15, 2000. A return of service indicating the defendant lived in another county was filed April 18, 2000, but apparently not received by plaintiff's counsel. Plaintiff's counsel mailed another service copy of the complaint to the adjoining county's Sheriff's Department for service on May 10, 2000. When it still had not been served by May 16, 2000, plaintiff's counsel retained a private process server who finally served the summons and complaint on May 21, 2000. The Court of Appeals upheld the trial court's finding that the plaintiff had failed to exercise due diligence.

13. **Trial:**

Ballard v. Meyers, 275 Ga. 819, 572 S.E.2d 572 (2002). A document can be used solely for the purpose of impeachment even if it was not listed as an exhibit on the pretrial order.

14. **Witnesses:**

CSX Transportation, Inc. v. Belcher, Supreme Court case number S02G1624, April 29, 2003, held that when a witness under oath testifies that a previously made unsworn statement is true and accurate, he incorporates the earlier statement into his present sworn testimony. Further, when a contradiction exists between the unsworn statement that the witness has incorporated into his own testimony and other portions of that witness' sworn testimony, courts should apply the rule articulated in ***Prophecy Corporation v. Charles Rossignol, Inc.***, 256 Ga. 27, 343 S.E.2d 680 (1986) to resolve any contradiction that involves a material fact.

At its fall 2000 meeting, the GDLA Board of Directors approved a recruitment incentive. Here's how it works: Henceforth, any member who recruits a new lawyer for membership in our organization will receive a certificate redeemable for a fifty dollar discount on the registration cost of any GDLA event - annual meeting, Winter CLE, and trial academy. Please take advantage of this incentive and help GDLA increase its membership.

If you or someone you know is not already a member of Georgia Defense Lawyers Association we invite you to apply for membership. If interested, please contact Morton G. Forbes at the following:

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DICK RICHARDSON SCHOLARSHIP

At its spring board meeting held April 26, 2003, at Isle of Palms, South Carolina, the Georgia Defense Lawyers Association Board of Directors was informed by then President Jerry Buchanan that the Willis J. "Dick" Richardson, Jr. Scholarship was fully funded and that two recipients had received $500.00 scholarships on Law Day and that E. Davison Burch had spoken at the ceremony on behalf of the GDLA. The GDLA was the only organization present to make a formal presentation. It was noted that both recipients had taken jobs with defense firms.

Subsequently, we received a letter of thanks from the University of Georgia, Office of the President. That letter reads in its entirety as follows:

Dear Mr. Buchanan:

Thank you and the Georgia Defense Lawyers Association for your recent gift to the Willis J. "Dick" Richardson, Jr. Student Award Fund in the School of Law. With support such as yours, the University of Georgia will strengthen its reputation and its ability to provide an outstanding education to highly motivated and talented students.

Our exceptional students and the commitment of our loyal friends and alumni will lead the University to excellence now and in the future. On behalf of the students who will benefit from your generosity, thank you.

Sincerely,

Michael F. Adams
President

GDLA POLICY REGARDING AMICUS CURIAE BRIEFS

It shall be the policy of the Association to authorize the filing of briefs *amicus curiae* sparingly and only in appropriate cases as described. Briefs *amicus curiae* authorized by the Association shall be filed only in the name of the Association.

A. APPROPRIATE CASES

1. Only at the appellate level and only in the highest court where the issue is likely to be determined.

2. Only when such a brief would constitute a significant contribution to the determination of the issue or issues involved and only where the issue or issues sought to be determined is:

   a. Of peculiar significance to the interests of the defense trial bar; or

   b. Of peculiar significance to the administration of justice.

3. Only when the case has some general application to the defense bar in general, and as a general rule, the Georgia Defense Lawyers Association should avoid cases which have application only to the insurance industry.

4. Only to advance argument with respect to the legal issues and not factual questions.

5. The Georgia Defense Lawyers Association desires to have the reputation at the Appellate Court level of:

   a. Being extremely careful in choosing the cases in which it appears; and

   b. Producing briefs of extremely high quality, so that the Georgia Defense Lawyers Association will have greater influence as an Association in the selective few cases in which it submits an *amicus curiae* brief.

B. AUTHORIZATION

Briefs *amicus curiae* filed on behalf of the Association shall be authorized by the Executive Committee (president, executive vice-president, secretary/treasurer and past president) plus the Chairperson of the Amicus Curiae Brief Committee [five voting members]. To the extent possible, the five members should discuss the case by telephone conference before voting whether to accept the case. Furthermore, this committee of five has the option of discussing how the substantive law issues should be approached by the Association's representative, with this additional direction being passes on to the author of the brief. The decision regarding whether to accept a particular case will be made by the majority of the voting members of this five member committee.

C. APPLICATION

1. Application for authorization of briefs *amicus curiae* may be submitted to the Georgia Defense Lawyers Association president and/or chairperson of the Amicus Curiae Brief Committee, who will refer the matter to the committee set forth in Section B above.

2. Each application shall be accompanied by:

   a. A full statement of the facts of the controversy and the status of the litigation;

   b. A statement whether the present appeal is likely to be the highest court where the issue will be determined [see Section A(1) above];

   c. A statement of the principle or principles of law to be supported together with an explanation of the applicant's reasons for believing that the case is an appropriate one for Association involvement [see Section A above]; and

   d. A full disclosure of any personal or professional interest in the matter of any applicant or proponent of the application.

D. JOINT BRIEFS

As a general rule, the Association will not join in briefs *amicus curiae* with other organizations except other local defense associations.

E. COSTS

1. The Association will accept **NO** payment from any applicant for the preparation or argument of briefs *amicus curiae*.

2. Costs of printing and filing the brief, and the costs of telephone conferences related to the authorization process and brief-writing process shall be borne by the Association. The attorney volunteering his or her time to write the brief shall not be paid any fee, but can be reimbursed for his or her out-of-pocket expenses such as long distance telephone calls, etc.

F. APPEARANCES

The brief *amicus curiae* shall show as counsel for the Association the author of the brief, the president of the Association and the chairperson of the Amicus Curiae Brief Committee.