



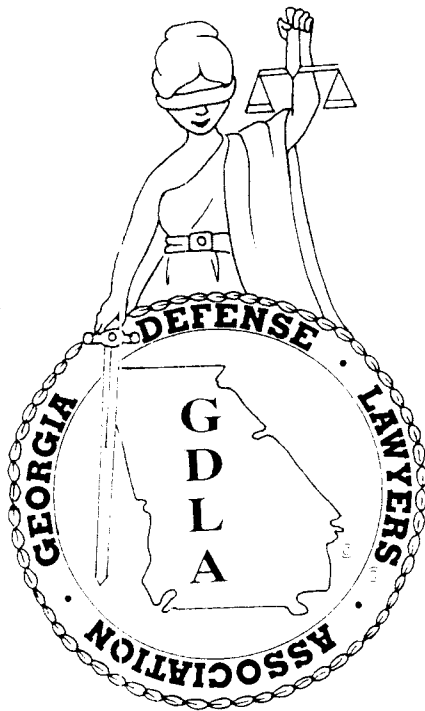
# GDLA NEWSLETTER

JUNE 1996

Volume 3 Issue 3

## THE PRESIDENT'S MESSAGE

By: R. Clay Porter



By all accounts, the annual meeting in Cancun was a complete success. As usual, Dick Richardson made certain that the accommodations were top notch. Some took advantage of special tours of Mayan ruins. Others found their niche lying on the beach or near one of the several pools. David Hanks' seminar, featuring Sandy Owens, addressed many of the economic problems facing defense lawyers across the country. I only regret that more of our membership was not present. Our far away meetings are never as well attended as our meetings in Ponte Vedra and other locations closer to home, but the more distant programs seem to be enthusiastically supported by those who attend. Traditionally, the board tries to include an exotic meeting place every third year. Next year, the annual meeting will be at Ponte Vedra, which always draws our best membership attendance. The seminar chairman for that meeting will be Joe Chambless (Macon), who has been elected as our new vice president. I perceive that the Association would appreciate more discussion of changes in the defense practice, particularly on the subject of alternative billing methods. I am sure Joe would love to hear from you if you have any thoughts on that.

editor of this year's law journal. These additions will enhance the leadership of the Association.

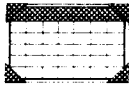
It has been a great honor to have served on the board of directors and as president and I am proud to have worked with all the volunteers that have made this Association what it is.

Clay

I congratulate the Association on selecting David Hanks (Augusta) as its new president. I am also quite pleased at the election of new board members Kay Deming (Atlanta) and Rick Rominger (Savannah). Kay has been active in the trial academy for the last few years and Rick served as the



## CALENDAR OF EVENTS



### 1996 Events

- Oct./Nov. **Fall Board Mtg.** -  
President's Choice
- Oct. 9-13 **DRI First Annual  
Membership Mtg.** -  
Chicago, Illinois

### 1997 Events

- Apr. 24-27 **Annual Mtg.**-  
Ponte Vendra Golf and  
Country Club, Fla.
- Feb. Winter Board  
Mtg.

### ANNUAL MEETINGS IN 1998

April 23-26, 1998 - Cloister at Sea Island

### MINUTES OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION'S ANNUAL MEETING



The 29th Annual Meeting of the Georgia Defense Lawyers Association was held in Cancun, Mexico at the Omni Cancun Hotel from April 24 through April 28, 1996. David Hanks, Executive Vice President, organized and planned an excellent and informative program which was presented by David L. Grumbine, Senior Counsel, Whirlpool Corporation, Benton Harbor, Michigan, Ralph C. Doran, III, Managing Partner, Professional Services Marketing, Atlanta, Georgia, and our own Sandy Owens, Jr., of Nall, Miller, Owens, Hocutt & Howard, Atlanta, Georgia, and Steve Kyle of Bovis, Kyle & Burch, Atlanta.

The Program centered around the changes that are occurring in corporate America with respect to their expectations from outside counsel, the process for the selection of outside counsel, requests for

proposals (REP's), outside counsel dilemmas and prospectives in responding to such request for proposals, use of consultants to assist the attorneys in "covering the bases" and responding to a request for proposal, and ethical dilemmas in serving as local counsel.

The program had a great deal of substance and left us with a great deal of "food for thought" and with suggestions that would help the defense bar in establishing a new basis for cementing a healthy relationship with current clients and in developing a new client base. The Association is indebted to our speakers for the time and effort which they obviously dedicated in presenting such an informative program.

In accordance with the by-laws of the Association, the election of officers and board members was held, and the following members were elected unanimously for the positions:

President.....David H. Hanks  
Executive Vice  
President.....Joseph H. Chambless  
Secretary Treasurer.....Steven J. Kyle  
Vice Presidents:

Charles M. Goetz, Jr.  
George Duncan  
William H. Pinson, Jr.  
Gregory F. Melton

Board of Directors:

Districts:  
Northern.....Henry E. Scudder, Jr.  
Middle.....F. Thomas Young  
Southern.....Richard A. Rominger

Directors for the State at Large:

J. Kenneth Mooman  
Neal W. Dickert  
N. Karen Deming

The Annual Meeting was attended by 34 members of the Association, along with their spouses and guests. Dick Richardson, as usual, did an excellent job in the hotel selection and in all of the tedious arrangements that were necessary in order to make this Annual Meeting such a success.

### GEORGIA WORKERS' COMPENSATION UPDATE

Luanne Clarke  
Moore, Clarke, DuVall & Rodgers,  
P.C.

### HOUSE BILL 1291

House Bill 1291, which was sponsored by House Industrial Relations Committee Chairman, Bob Lane, was signed into law by Governor Zell Miller on April 15, 1996. The following changes will become effective on July 1, 1996:

O.C.G.A. §34-9-1 (4) has been amended to require that in order to be compensable, an employee's heart attack or cardio... injury must be deemed causally related by a physician to the work of employment at the time the condition occurred. This change was motivated by Reynolds Construction Company v. Reynolds, Case No. A9580788 (07/14/95) wherein the court chose to ignore the medical evidence in order to find the claimant's injury compensable. O.C.G.A. §34-9-1 (5) has been removed and relocated to O.C.G.A. §34-9-263 (d). The relocated subparagraph states the requirement that permanent partial disability ratings must be based on the American Medical Association's Guidelines to the Evaluation of Permanent Impairment, 4th Edition.

O.C.G.A. §34-9-2 has been amended to include a standard definition of independent contractor, which is similar to the definition used by the Internal Revenue Service.

O.C.G.A. §34-9-2.1 has been amended to provide limited liability companies the same five officer exemption from coverage that already applies to corporation.

O.C.G.A. §34-9-179 (a), which required that the State Board approved work place safety rules, has been struck.



O.C.G.A. §34-9-18 (f) has been amended to reflect that all civil penalties are now payable to the State Board of Workers' Compensation.

O.C.G.A. §34-9-19 has also been amended to reflect that all assessed penalties and costs are now payable to the State Board of Workers' Compensation.

O.C.G.A. §34-9-40 has been added in order to give the State Board of Workers' Compensation the authority to provide training seminars for employers.

O.C.G.A. §34-9-200.1 (h) requires certification and registration by vocational rehabilitation suppliers.

O.C.G.A. §34-9-226 has been modified to require guardians be appointed by the probate court of the county of residence of the minor child or incompetent.

O.C.G.A. §34-9-243(a)-(f) allows employers to take a setoff or credit for unemployment benefits paid to workers' compensation claimants during eligible periods of disability.

O.C.G.A. §34-9-261 has been amended to increase the claimant's weekly temporary total disability income benefits from \$275.00 to \$300.00.

O.C.G.A. §34-9-263 has been amended to include the language previously contained in O.C.G.A. §34-9-1 (5), regarding the requirement that permanent partial disability ratings be based on the American Medical Association's Guide to the Evaluation of Permanent Impairment, 4th Edition.

O.C.G.A. §34-9-265 has been modified to require all payments for non-dependent death benefits be paid to the State Board of Workers' Compensation.

O.C.G.A. §34-9-290 has been eliminated. This section previously

required the State Board to file reports with the Department of Human Resources.

Lastly, O.C.G.A. §34-9-367 has been amended with respect to the payment of interest and attorney's fees by the Subsequent Injury Trust Fund. This amendment reverses a recent Georgia Supreme Court decision, which held that the SITF was not liable for attorney's fees even where they had unreasonably denied reimbursement to an employer.

Zurich American Insurance Company v. Dicks, No. A95A1861 (Ct. App. Ga., dec'd March 15, 1996).


June Dicks suffered a compensable work-related injury on September 26, 1990. Subsequently, her employer's insurance company, Zurich American Insurance Company (hereinafter "Zurich"), authorized medical treatment. The Employee/Claimant's authorized treating physician ordered her not to return to work until he released her. On June 21, 1991, Zurich requested the Employee/Claimant undergo an independent medical examination by Dr. Basil Griffin, Jr. Dr. Griffin concluded that the Employee/Claimant, "Should be either terminated from her job or put in a work hardening program where she can get back to work..." Following the IME physician's advice, the Employer suspended the Employee/Claimant's medical benefits and terminated her employment on August 29, 1991. As a result of these actions, the Employee/Claimant ceased her physical therapy, which had been prescribed by her treating physician. The Employee/Claimant resumed treatment seventy-one days later, after the Administrative Law Judge ordered that benefits be restored to the Employee/Claimant effective August 29, 1991. The Administrative Law Judge additionally awarded assessed attorney's fees to the Employee/Claimant pursuant

to O.C.G.A. §34-9-108 (b) (2). Nevertheless, the Employee/Claimant's treating physician opined, "The more than two month long delay in treatment exacerbated [her] medical condition, greatly worsened her symptoms, adversely affected her ability to be rehabilitated, caused additional pain behavior, and substantially affected her permanent partial impairment rating."

The Employee/Claimant sued Zurich, alleging that Zurich intentionally and wrongfully terminated her medical benefits, thereby aggravating her injuries. Zurich moved for summary judgment on the ground that the Employee/Claimant's complaint was barred by the exclusive remedy provision of the Act. The trial court denied Zurich's motion, and the Georgia Court of Appeals granted Zurich's application for interlocutory appeal.

The sole issue before the Court was whether the Employee/Claimant's common law claim against Zurich is barred by the exclusive remedy provision of the Act. O.C.G.A. §34-9-11 (a) provides in part that "The rights and remedies granted to an employee by this Chapter shall exclude all other rights and remedies of such injury, loss of service, or death..." In the six/three decision, written by Chief Judge Beasley, the Court points out that not all employee claims against employers for intentional injuries are barred pursuant to O.C.G.A. §34-9-11 (a). In this regard, an insurer could be held liable for certain egregious torts. Nevertheless, where the Act provides a penalty for delayed benefit payments, a claim based on the delay is barred by the exclusive remedy provision.

In the majority's decision to affirm the trial court's denial of Zurich's Motion for Summary Judgment, the Court distinguishes Bright v. Nimmo, 153 Ga. 378 (1984), where the



Supreme Court held that the intentional delay of workers' compensation benefits does not give rise to an independent cause of action against the employer or its insurer for financial injury. The Court also distinguished Aetna Casualty v. Davis, 253 Ga. 376 (1984), where the Supreme Court acknowledged that O.C.G.A. §34-9-108 provides for the assessment of attorney's fees against a party who unreasonably controverts medical payments. The Court ruled that "The employee's use of common law remedies [was therefore] excluded." Id. at 378.

The Court in the present case, however, relied on Jim Walter Homes v. Roberts, 196 Ga. App. 618 (1990). In Roberts, the Court found that the alleged injury was "an intentional physical injury resulting from the [employer's] refusal to authorize necessary treatment..." and therefore concluded that the complaint set forth a common law cause of action which was not barred by the Act's exclusive remedy provision. Id. at 621.

In affirming the trial court's denial of Zurich's Motion for Summary Judgment in the present case, the Court placed emphasis on the findings of the Administrative Law Judge and Board that defendant insurer's suspension of benefits was "unconscionable." The Court also found persuasive the Employee/Claimant's allegations that the defendant's acts constituted "willful and wanton misconduct and misfeasance" and that its "unlawful controversion of [her] benefits was willful, intentional, [and] with conscious disregard of the consequences." Based on the above, the Employee/Claimant alleged a breach of legal duty on the part of Zurich for which the plaintiff seeks tort damages. In this regard, the Court found that the Act does not contemplate physical injury flowing from and being caused by willful and wanton misconduct of an insurer in refusing to make payments. The Court distinguished the present case from Bright and Davis in determining that the Employee/Claimant in the present case is

not seeking a monetary penalty for the delay but rather compensation for the physical injury "she alleges was caused by the tortious delay, a new or exacerbated injury which is not related to employment, but rather to the actions of the insurer as a source independent of her work-related injury." In this regard, the Court found, as it did in Roberts, that this was outside the purview of the Act, and therefore, the Employee/Claimant's alleged breach of duty over and above the mere delay, is not covered by the Workers' Compensation Act. Thus, the exclusive remedy provision of the Workers' Compensation Act does not apply to the Employee/Claimant's cause of action.

Judge Ruffin, joined by Judge Andrews and Judge Blackburn, provided the dissent in this six/three decision. The dissent questioned the soundness of this Court's decision in Roberts, and stated that the Supreme Court's decision in Davis does not allow for such a result as provided by the majority in the instant case. In this regard, Judge Ruffin states, "While I sympathize with the plaintiff in this case and concede that an award of attorney's fees is likely not sufficient to redress injuries such as are involved here." "[i]t is not our function to enlarge these statutory sanctions; rather, any enlargement of sanctions already available is for the General Assembly. [cit.]" Bright, at 381.

#### **EMPLOYMENT LAW** **THE CATCH-22 OF SEXUAL HARASSMENT SUITS**

The federal government is actively working to end sexual harassment in the workplace. According to Forbes, last year the Equal Employment Opportunity Commission (EEOC) reported that sexual harassment suits reached an all time record high totaling 15,549. However, there is a paradoxical twist that merits examination. According to Timothy Lynch of the CATO Institute "unjust dismissal laws were created on

the state level with one set of objectives and sexual harassment on the federal level with another." For example if an employee is dismissed for illicit behavior he may in turn sue his former employer for wrongful termination under state law. Yet if illicit behavior is left unchecked, the employer may face sanctions from the EEOC. Businesses are damned if they do and damned if they don't, and for the employer, it can be a no win situation.

Currently, the EEOC is suing Mitsubishi Motors on behalf of the company's female employees at Mitsubishi's Norman, Illinois plant. According to an EEOC spokesperson, the Mitsubishi suit could involve as many as 700 women who would be eligible under federal law to receive \$300,000 each—potentially making this the largest harassment award in history. The EEOC promises more class actions in the future according to their deputy district director in Chicago, Cynthia Pierre. "We'll get a much bigger bang for the buck doing class actions."

#### **DRI FIRST ANNUAL MEETING**

Every member will have the opportunity to actively participate in the NEW DRI! This is the first Annual Meeting of all members. Every defense lawyer will benefit by being in Chicago in October of 1996. Plan on it!

- Up to 14 hours of "Bread and Butter" CLE programming Planned
  - Business and Organization Meetings for All DRI Committees
  - Regional Meetings and Workshops for National, State and Local Defense Bar Leaders
  - Nominations for DRI Board of Directors and Officers
- DRI's first annual meeting for members—first for your future plans are in place for the first ever annual meeting of the Defense Research Institute, the voice of the national defense bar. Every member of DRI is invited to attend the meeting in Chicago



On October 9-13, 1996. The event will give defense attorneys opportunities to meet and work with national, state, and local defense bar association leaders; learn about and participate in DRI Committees; attend acclaimed DRI educational programs; socialize and network; and become an active defense bar lawyer.

The theme of the DRI annual meeting, first for the future reflects the gathering's departure from the previously held national conference for Defense Bar Leaders and the marked difference from DRI's traditional defense practice seminars. For 36 years, the organization has provided top quality leadership and educational forums. The first annual meeting, however, looks to all DRI members as leaders of the defense bar and focuses on the issues most relevant to their practices and lives.

State and local defense associations are the critical links between DRI and defense lawyers across the country. During the annual meeting, a number of practical workshops will be held for state and local bar leaders, allowing discussions of financial planning, legislative political action, seminar and meeting planning, publicity and public relations, and newsletters and publications. The schedule also includes meetings for state association executive directors, as well as regional meetings for state association executive directors, as well as regional meetings of the state associations and DRI State Representatives.

Each DRI committee will conduct a breakfast meeting, including a brief business segment and an educational program. Committee members are encouraged to attend, and others interested in discovering more about specific committees are invited to attend the meetings.

DRI will also be presenting CLE sessions tackling topics of special interest to defense lawyers. The programs include: **Products Liability and Drug and Medical Device** sessions addressing

plaintiff, jury, witness, and innovative computer strategies to use in defending cases; the trial tactics and **Employment Law** program staging a mock trial in a case of sexual harassment by a female in a law firm setting.

Other presentations will include a model professionalism program and a roundtable discussion on insurer-defense counsel relations. These are in addition to the **National Forum on Cameras in the Courtroom**. A panel will examine the complex issues raised by the presence of television cameras at trial. Bill Kurtis, a leading TV news anchor, will moderate a panel comprised of Christopher Darden, a California prosecutor in the O.J. Simpsons case; Rikki Klieman, lead anchor on Court TV; Steve Morrison, DRI's Immediate Past President; Ralph Nader, consumer advocate; and Nina Totenberg, commentator on National Public Radio.

The DRI Board of Directors will be convening during the annual meeting. All DRI members will be allowed to sit in and "observe" a session of the DRI Board, and sign up for nominations for DRI leadership positions.

A variety of social events will also take place. Plans include family activities, tours, group meals, two special "Late Nights with DRI" with live entertainment, and an annual dinner in the historic Grand Ballroom of Navy Pier. The annual dinner will feature Hugh Sidey, Time magazine columnist and White House Correspondent, who will offer personal insights on the last nine Presidents and First Ladies. Former U.S. Senate

Majority Leader and federal judge George Mitchell and Seventh Circuit Justice William Bauer will address the luncheon crowds.

DRI is currently accepting registrations. To receive further information on the annual meeting or DRI membership, call DRI Headquarters

at (312) 944-0575.

## RECENT MATTERS OF POTENTIAL INTEREST

EFFECTIVE USE OF MOTIONS IN LIMINE: By: Morton G. Forbes

John A. Foster

Continuation from newsletter  
Volume 2 Issue 2...

### V. WHAT ONE MUST DO TO PRESERVE THE DENIAL OF A MOTION IN LIMINE

Our court held in Pierce v. State, 173 Ga. App. 551, 327 S.E. 2nd. 531, that the judge need not make a ruling on a motion in limine but may wait until the evidence is offered at trial to make his ruling. The judge may modify any ruling in a motion in limine at trial. But a ruling on a motion in limine will control the trial unless the court modifies the ruling. Frink v. State, 177 Ga. App. 604, 340 S.E. 2nd. 631. The effect of which negates the purpose of a motion in limine. Now we have an open question. "What must a party do to preserve the issue on appeal."

A prime example of this would be Holland v. State, 176 Ga. App. 343; 335 S.E. 2nd. 739. In this case, it is not clear whether or not there was a ruling on the motion in limine, setting forth that the evidence was proper, then no further action would be necessary to preserve the issue on appeal. But if no objection were made at trial, and the record is not clear as to whether or not the motion in limine had been denied or granted, then the issue could not be raised on appeal. It would seem the better practice to either object at trial or be certain that you have a ruling on your motion in limine in the record.

A motion in limine is interlocutory in nature and as such, a discretionary appeal could be sought

or appeal could be made after final judgment.

The Harley Davidson cases were discussed previously because they were the first Georgia cases to attempt to define the purpose and procedure relating the motions in limine. However, the specific issue addressed in the Harley Davidson cases related to what a litigant must do when his motion in limine is denied in order to preserve the error for appeal. The Court of Appeals held that he must make another objection to the evidence when it is offered even though he had already raised that objection by way of a motion in limine and the Court had overruled the objection by denying the Motion. That would make it necessary for the trial court to overrule the same objection a second time. The Court of Appeals reasoned that the trial court's denial of a motion in limine was not a ruling on the evidence. The Court of Appeals held that the denial of a motion in limine could not be reversible error reasoning that "the objectionable material has not yet reached the jury's ears. It may never reach the jury... it is not only when the (objectionable) material is offered in the jury's presence that the harm or error, if any, has been done."

The Court of Appeals also said this: "where the motion in limine is denied and opposing counsel attempts to ask the questions challenged in the motion or offer the prejudicial evidence covered therein, a proper objection at that time is necessary to preserve the right to complain on appeal that such questions asked or such evidence tendered were so prejudicial, the mere asking or tendering would require reversal." This illustrates that there are actually two separate and distinct questions involved in litigating a Motion in Limine. The first is whether or not the particular evidence is admissible or inadmissible. Assuming the evidence is inadmissible, the second question is whether or not the particular evidence is admissible or

inadmissible evidence is so prejudicial that the mere asking of the question or tendering of the evidence would constitute reversible error. Evidence may be inadmissible, but not so prejudicial so as to require an anticipatory ruling.

As stated above, the Supreme Court effectively reversed the Court of Appeals' holding on the issue of whether objection must be made when the evidence is offered when a motion in limine has been denied. The Supreme Court reasoned that, at the time a motion in limine is denied, all the purposes of an objection have already been fulfilled. For example, the trial judge will have addressed the possible error in allowing the evidence in and has made a ruling admitting the evidence and overruling the objection which is on the record for purposes of appeal. Therefore, there should not be any necessity for any further objection. The Supreme Court also pointed out two important strategic considerations.

First, if a litigant wanted to keep objectionable evidence out which would be harmful to his position, but if he knows ahead of time that the evidence he considers objectionable is going to be admitted into evidence, then it might be to his advantage to put that material into evidence himself rather than allowing his opponent to do so in order to mitigate the harmful effects of that evidence. The Supreme Court pointed out that where a litigant in that position has filed a motion in limine as to the harmful evidence and that Motion has been denied, and when the litigant has gone ahead and put that material into evidence himself, that such trial tactics have **not** been considered a waiver of that litigant's right to appeal the denial of the motion in limine by the Fifth Circuit. As an example, the Supreme Court cited Reyes v. Missouri Pacific Rail Company, 598 F. 2nd 791 (5th Cir. 1979).

The second strategic consideration noted by the Supreme Court in the Harley Davidson case is the fact that once prejudicial evidence comes in, it may be to counsel's advantage to not object at that

time because the objection may only reinforce the significance of the prejudicial evidence in the minds of the jury. Jurors may not even hear or pay attention to the evidence they may be inclined to pay close attention to whatever it was that the lawyer did not want them to hear or consider. The Supreme Court said, "requiring another objection, indeed, may **further** highlight the inflammatory evidence, as well as unduly burden the trial court, which has already ruled on the issue."

Thus, under the Supreme Court's opinion in the Harley Davidson case, if a motion in limine is denied, it should not be necessary for the movant to again object to the evidence at issue when it is actually offered into evidence in order to preserve the ruling on the motion in limine and the ruling on the admissibility of the evidence for appeal. However, it is very important to remember that when a motion in limine is filed, the trial judge can grant that motion, can deny the motion, or, has a third option, which is discretion to refuse to rule the motion in limine and to preserve ruling on admissibility of evidence until it is offered during the trial. Morris v. Southern Bell Telephone & Telegraph Company, 180 Ga. App. 145, 348 S.E. 2nd 573; citing Holland v. State. The Court went on to say that no objection was made to the line of questioning which the Court reserved its ruling on and that the Court of Appeals will not consider an objection which was not raised in the trial court. Belluso v. Hall, 176 Ga. App. 281, 335 S.E. 2nd 884 (1985). Therefore, unless it is crystal clear in the record that the motion in limine has in fact been raised and has been denied by the trial judge, a timely objection should be made when the evidence at issue is offered.

## **VI. WHAT ONE MUST DO TO PRESERVE OBJECTION TO THE GRANTING OF A MOTION IN LIMINE**



If one is opposing a motion in limine and the motion in limine is granted, does an offer of proof have to be made in order to preserve the issue for appeal? In Ailstock v. State, 159 Ga. App. 482, 283 S.E. 2nd 698 (1981), the prosecution filed a motion in limine to exclude the Defendant's anticipated attempt to introduce evidence as to the character of the victim of simple battery. The State argued that the character of the victim should not be brought out absent a prima facie showing that the victim was attacking the Defendant at the time the crime was committed. The trial court granted the Motion. Thereafter, the Defendant made an offer of proof by examining an impeaching witness outside the presence of the jury. The Defendant was convicted. On appeal, the Court of Appeals held that the motion in limine should have been denied. The Court characterized the State's Motion as "overly expansive." However, the Court then went on to examine the testimony elicited during the offer of proof and held that, although it was error for trial judge to grant the State's motion, the error was not reversible. The offer of proof related to specific acts done by the victim, rather than the general bad character of the victim. Since a witness whom it is sought to impeach because of bad character must be shown to be of general bad character, and since special acts are not admissible for the purposes of impeachment by evidence of bad character, the testimony elicited during the offer of proof was not proper.

In City Council of Augusta v. Lee, 153 Ga. App. 94, 264 S.E. 683 (1980), the Plaintiff had filed a motion in limine prior to trial asking the Court to exclude from evidence PIP payments made by the Defendant's liability insurance carrier to the Plaintiff. The trial judge ruled on the motion prior to trial, granting it as to the PIP payments. Therefore, there was no offer of proof at trial, however, it appears that the trial judge's Order included specific findings of fact as to what payments we made

and by whom.

It would appear from these two cases that if one is opposing a motion in limine, the evidence sought to be introduced should be documented in the record. If the motion will be granted prior to trial, evidence can be presented so that the trial judge can make findings of fact in ruling on the motion. At trial, an offer of proof can be made outside the presence of the jury putting the testimony or documents at issue into the record. However, the Ailstock case illustrates that the offer of proof must properly offer the evidence, because if the evidence offered is not in its proper form, the Appeals Court will find its exclusion to have been harmless even if the motion in limine should have been denied and even if properly offered evidence would have been admissible.

A related point is illustrated by Milton v. State, 245 Ga. 20, 262 S.E.2d 789. In some instances, the admissibility of certain evidence hinges upon whether a prima facie showing is made as to certain other evidence. For example, in the Milton case, a murder case, the State filed a motion in limine to exclude references to previous specific acts of violence on the part of the victim. Specific acts of violence on the part of the victim would generally not be admissible unless the Defendant made a prima facie showing that he was being attacked by the victim at the time of the incident. The trial court granted the State's motion in limine. The Defendant made an offer of proof outside the presence of the jury which made a prima facie showing that he was honestly trying to defend himself, that the victim had threatened to kill him.

that she had told him that she had a gun in her purse and had started to reach into her purse before he shot her and that she had previously shot him and committed other acts of violence against him. Based on the offer of proof, the Court of Appeals was in a position to rule that a prima facie case of present assault had been made out by the Defendant's sworn testimony, and therefore, the previous specific acts of violence which also were documented in the record should have been admissible.

The point illustrated by the Milton case is that where one is opposing a motion in limine, and the admissibility of the evidence at issue depends upon whether or not a prima facie showing is made as to other evidence, in order to preserve the issue for appeal, the prima facie showing should be made on the record as well as the evidence that is directly at issue in the motion in limine.

**To be Continued....**

