GEORGIA DEFENSE LAWYERS ASSOCIATION NEWSLETTER

Number 5 *November 1993*

The President's Column

Hendley V. Napier

Since I assumed my duties as President of the Georgia Defense Lawyers Association in mid June, I've had the opportunity to become better acquainted with many members on a personal basis. It has been very rewarding.

We had excellent response to our request for those of you who would like to serve on the various committees of the Association. It has been rather overwhelming to have responses from about 25%, many of whom not only were willing to work but have actually been called upon and have responded admirably.

While we have been increasing the number of members, we have also tried to increase our service to the members. Last year we established a newsletter and it has been well received. We also have established a CLE program so as to offer to our members without additional cost four hours of credit. This is to be done each December towards the end of the year trying to pick up subjects which have been a little bit difficult for some members to obtain otherwise. We have increased the trial academy from twelve to fourteen hours and have added an extra half day to the length of instruction.

We have agreed that in the event an eligible member is unable to attend the CLE program in December, we will allow that member without extra charge to send an associate or partner in their place.

At any time anyone wishes to make a contribution to the newsletter we will welcome those contributions. Likewise, Joe Chambless, who is editing the journal, will be glad to discuss with anyone any articles which you would like to see or which you might wish to contribute.

Again, I appreciate all the suggestions and contributions which have been made so far towards the success of the Georgia Defense Lawyers Association.

RECENT DEVELOPMENTS IN GEORGIA LAW

Arthur H. Glaser
Douglas T. Lay
Drew, Eckl & Farnham
Atlanta, Georgia

Rather than summarize many cases, this article will focus on only a few recent decisions in the following areas:
(1)Punitive damages in negligent hiring and retention cases;
(2)Premises liability rules applied to common carriers;
(3)Georgia seat belt law held constitutional; and
(4)Wrongful death -- adoptive child's rights.

NEGLIGENT HIRING AND RETENTION - PUNITIVE DAMAGES

Following in a line of cases which have recently narrowed the availability of punitive damages, the Eleventh Circuit upheld Judge William O'Kelley's ruling in Hutcherson v. Progressive Corp., 984 F.2d 1152 (1993) that a trucking company which hired a truck driver knowing of a previous refusal to take an alcohol test and retained the truck driver after the company learned of a five (5) year old DUI conviction, was entitled to a partial summary judgment on the punitive damages portion of a negligent hiring and retention count. Hutcherson and his wife were traveling south on I-75 when Mr. Hutcherson pulled his tractor trailer into the emergency lane to check the truck's refrigeration system. His wife was asleep in the cab of the truck, while Mr. Hutcherson was checking the refrigeration system at the driver's side rear of the truck. A TABS truck swerved out of the right-hand lane and into the emergency lane, striking and killing Hutcherson. It was later determined that the TABS driver was on amphetamines at the time of the accident.

At the time of the accident, TABS maintained an internal company safety program which required all new drivers to be at least twenty-five (25) years of age and have a minimum of two (2) years verifiable over the road tractor-trailer experience. TABS further required each potential driver submit a three (3) year motor vehicle record. At the time of the driver's hire, the company knew the following:
(1)The TABS driver did not meet the experience requirement when hired in February 1988.
(2)Within the last three (3) years the driver received four speeding tickets;
(3)the driver had a citation for operating his truck without proper brake lights;
(4)the driver's license was suspended for refusing to take an alcohol test;
(5)the driver had a citation for improper backing; and
(6)the driver had been involved in an accident.

During the driver's initial interview with TABS, he explained that his refusal to take the alcohol test was connected with an incident where he backed into someone which resulted in a minor accident. Later, the police came to his home as a part of their investigation and requested that he take an alcohol test. The driver explained in the interview that he refused to take the test because he had been drinking beer at home.

In the summer of 1988 after the driver was hired and before the December 1988 accident, Progressive Insurance, the

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The Newsletter is a regular publication of the Georgia Defense Lawyers Association. Please direct any inquiries, articles, or black and white photos for the Newsletter to

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Ga. Defense Lawyers Ass'n
P.O. Box 1863
Macon, GA 31202-1863
(912) 742-2201
Fax: (912) 742-4989

Board Meeting Minutes

IN ATTENDANCE

Hendley V. Napier, President
David Whitworth, Exec. V. Pres.
F. Clay Porter, Sec.-Treasurer
Gregory J. Spicer, Exec. Sec.
Steve Kyle
Greg Melton
Ken Moorman
J. Bruce Welch
Wiley Wasden
Jerry Buchanan
Charlie Goetz
George Duncan
Hank Scrudder
Rick Marchetti
Hubert Howard
Kenny Carswell
Douglas Dennis
Joe Chambless
Bill Pinson
Willis J. Richardson

COMMITTEE REPORTS

BRIEF BANK AND EXPERT WITNESS

Report by Steve Kyle: The expert witness bank program is in progress with experts divided by subject matter and territory. Presently, the program suffers from a lack of input from members. Steve Kyle urged board members to have their firms submit expert information as it becomes available. Kyle has organized a committee to contact members to request additional information.

MEMBERSHIP EXPANSION COMMITTEE

Report by George Duncan: George Duncan's committee recommended that potential members be invited to join the Association. It is the belief of the committee that there exists a good deal of interest in joining the Association among the defense bar, but for one reason or another, these people are not sure how to initiate the process. Efforts will be made to contact these people and provide them with applications.

WINTER CLE SEMINAR

Report by Charlie Goetz: The winter seminar is scheduled for December 9,1993 (Thursday) in Macon, Georgia at the Macon Conference Center (Holiday Inn). The speakers are Ken Moorman, Joe Watkins, and Charlie Goetz. It is anticipated that the program will amount to four hours of CLE credit. Considering that this seminar is provided at no cost to the attendees, the Board agreed that each firm may substitute only one non-member for a member.

TRIAL ACADEMY

Report by Jerry Buchanan: The trial academy is scheduled to take place on December 3 and 4, 1993 at Callaway Gardens. The charge will be $195.00 per person which is expected to, more or less, cover costs.

AMICUS CURIAE COMMITTEE

No one from that committee was in attendance, but a recent brief filed by the committee was attached to the agenda.

LONG RANGE PLANNING COMMITTEE

Report by Ken Moorman: The recommendations of the Long Range Planning Committee are set forth in detail on a report submitted by Ken Moorman dated October 25, 1993, which has been provided to all board members. The report generated considerable discussion about in-house and staff counsel membership. Currently, practicing Georgia defense lawyers who happen to be in-house or staff counsel for insurance companies are eligible for associate membership if they otherwise meet membership criteria. The consensus of the Board was to make no changes in the eligibility of such counsel.

There was additional discussion regarding whether to have some sort of function on the opening night (Thursday) of the annual meeting. It was decided to have no additional functions on that night.

Moorman proposed early GDLA eligibility for graduates of the Georgia Trial Academy if they otherwise meet the criteria of the Association. It was agreed that Moorman and Porter would draft an amendment to

Minutes from the Board Meeting at The Cloister

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the by-laws to be reviewed by the Board at the Winter Board Meeting and voted upon by the general membership at the next annual meeting.

MEMBERSHIP APPROVAL COMMITTEE

Report by Dick Richardson: The applicants shown on Attachment "A" have been investigated and approved by the committee. A motion was made and seconded to accept all 19 applicants as general members. The motion was carried unanimously.

LEGISLATIVE COMMITTEE

Report by Hank Scrudder: The committee has prepared a letter to all Georgia Congressmen opposing the new Federal Rules of Civil Procedure disclosure requirement. It is expected that the final draft will be mailed shortly. Hank Scrudder pointed out that his committee has difficulty acting upon legislation because they have no reliable source for promptly finding out about new bills. This information could be provided through a lobbyist at a cost of $5,000 per year. After some discussion, it was decided that Hank would look into the possibility of obtaining dailies from the legislature either through the Legislative Committee of the Georgia State Bar or directly from the House and Senate. However, it was decided not to expend funds for lobbyists at this time. Hank's committee will also rely upon information provided by the membership.

LAW JOURNAL

Report by Joe Chambless: Joe has received some volunteers on topics of interest for the Journal and has requested additional volunteers and suggestions for available for printing costs and other expenses involved in the preparation of the Journal. It was generally agreed that a spiral binding is better than a book binding unless the cost is too great.

NEWSLETTER ADVERTISING

The Board agreed to permit advertising in the Newsletter so long as the party submitting the advertising and the content of any advertising is approved by the Committee Chairman.

TREASURER'S REPORT

Report by R. Clay Porter: The current balance of the Association account is $38,927.42. This figure does not include expenses incurred in the Fall Board Meeting.

NEW BUSINESS

CLE CREDITS FOR OUT-OF-STATE SEMINAR ATTENDEES

It was decided that individual out-of-state lawyers would be responsible for arranging for their own CLE credits.

CASE BASE REQUESTS

It was agreed that the Board does not object to Case Base solicitation of the membership, so long as it is understood that Georgia Defense Lawyers Association does not endorse their services.

PROPOSED BOARD MEETING AT THE ANNUAL MEETING

David Whitworth inquired of the Board whether anyone felt that an extra board meeting to take place at the annual meeting was desired. The Board decided that such meetings could be scheduled if needed. Otherwise, no board meeting would be held at the annual meeting.

PERMANENT REPOSITORY FOR FILES OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION

David Whitworth proposed that there be some central depository for the records of the Georgia Defense Lawyers Association as it does not make much sense for these records to be shipped to every new Secretary-Treasurer of the organization. No decision was made on this subject. However, the idea is certainly a good one and needs to be followed up on. David also suggested that Macon would be the ideal location for these records and has asked Hendley Napier or Joe Chambless to indicate whether or not they would have some sort of storage space that the Association could permanently occupy for this purpose.

INDEX TO PAST JOURNALS

Greg Spicer reported that Dick Richardson was providing the needed information and that such an index should appear in next year's Defense Lawyers Journal.

COST OF ANNUAL MEETING

In reaction to questions raised at the Georgia Defense Lawyers Executive Officer Meeting of June 11, 1993, Dick Richardson reported that costs of annual meeting have been kept at an appropriate low level and have not unduly burdened the finances of the Association. It was agreed that costs charged to members for annual meeting seminar would be kept as low as possible and adjusted as needed based on the circumstances of the particular meeting.

FEBRUARY BOARD MEETING IN 1994

A motion was made that Dick Richardson will look in to Innisbrook in Tarpon Springs, Florida and the Ritz in Naples, Florida and, weighing all factors, including costs, make a decision on behalf of the Board and make appropriate arrangements for reservations.

1996 ANNUAL MEETING

Several locations were considered and this subject was tabled until the February 1994 Board Meeting. Meeting adjourned.

Respectfully submitted,
R. Clay Porter
Secretary-Treasurer

Please make an ample supply of photocopies of this blank form for your files

Georgia Defense Lawyers Association

Expert Brief Bank Information

1. Expert's Name: _____

2. Specialty: _____

3. Office Location: City _____

   State _____

4. Expert's Status:
   - ◯ Hired by Plaintiff
   - ◯ Hired by Defendant
   - ◯ Treating Physician

5. Style of the Case: _____

6. Court:
   - ◯ Federal Court
   - ◯ State Court

7. Year of Testimony: _____

8. Form of Testimony:
   - ◯ Deposition
   - ◯ Trial
   - ◯ Both

9. Expert's Effectiveness:

On Deposition	At Trial
◯ Exceptional	◯ Exceptional
◯ Average	◯ Average
◯ Poor	◯ Poor

10. Attorneys:

    For the Plaintiff: _____

    For the Defendant: _____

Return completed form to

Steven J. Kyle
Bovis, Kyle & Burch
Suite 330
53 Perimeter Center East
Atlanta, GA 30346-2298

(404) 391-9100

—Recent Developments in Georgia Law —

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commercial fleet insurer for TABS, obtained an additional MVR. After the driver was hired and before the December 1988 accident, the company discovered the following: (1)A 1983 DUI conviction; and (2)An assault conviction.

After discovering the 1983 DUI conviction, Progressive requested that TABS place the driver on "watch status" for six (6) months. At the conclusion of the six (6) month period, Progressive would obtain a new MVR and if any additional violations were found, the insurer would ask TABS to place the driver in a non-driving capacity. The accident involving the Hutchersons took place on December 29, 1988, before the six (6) month period expired.

Mr. Hutcherson's widow filed suit against TABS, Progressive, and the driver. The suit was initially filed in state court and then removed to the district court. Judge William O'Kelley granted TABS partial summary judgment on the punitive damages issue for the negligent hiring and retention and the negligent entrustment claims. The district court found that while there was sufficient evidence to allow the negligence claims to proceed to trial, there was insufficient evidence of TABS' conscious indifference to allow the punitive damage question to proceed to trial.

The court held,

> "Punitive damages may be awarded only in such tort actions in which it is proven by clear and convincing evidence that the defendant's actions showed willful misconduct, malice, fraud, wantonness, oppression, or that entire want of care which would raise the presumption of a conscious indifference to consequences."

Id. at 1155. [quoting O.C.G.A. 51-12-5.1]. The court also held that conscious indifference is defined under Georgia law as

> "An intentional disregard of the rights of another, knowingly or willfully disregarding such rights." Gilman Paper Co. v. James, 235 Ga. 348, 219 S.E.2d 447, 450 (1975). Negligence alone, even gross negligence, will not support an award of punitive damages. Colonial Pipeline Co. v. Brown, 258 Ga. 115, 365 S.E.2d 827, 830, appeal dismissed, 488 U.S. 805, 109 S.Ct. 36, 102 Led.2d 15 (1988).

Hutcherson, supra, at 1155.

In order to prove negligent hiring, as distinguished from negligent entrustment, Georgia law requires that:

> the employer know, or in the exercise of ordinary care should have known, that its employee was incompetent.

Id. at 1155. The plaintiffs in Hutcherson attempted to show TABS' conscious indifference by TABS's knowledge or construction knowledge of the offenses the company was aware of at the time it hired the driver,

including the failure to meet the two (2) year experience requirement and the refusal to take the alcohol test. However, the court found that the driver's explanation for his refusal to take the alcohol test in 1987, lulled TABS into discounting the employee's failure to take the test.

Plaintiff further alleged that TABS was consciously indifferent in retaining the driver and for failing to take him off the road after it discovered the driver's 1983 DUI conviction. The court found that TABS first learned of the employee's DUI conviction when TABS' insurer informed TABS that the conviction was five (5) years old and could, therefore, probably be overlooked. Furthermore, the letter from TABS' insurer focused primarily on the driver's refusal to take the alcohol test. Based on the employee's explanation for failing to take the test, the court affirmed the district court's grant of summary judgment, finding that the evidence was insufficient "for a reasonable juror to conclude that TABS was consciously indifferent" in retaining the driver. Id. at 1155.

Since the evidence supporting plaintiff's negligent entrustment claim was the same as that which supported the negligent hiring and retention claim, the Eleventh Circuit also upheld the district court's grant of summary judgment

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GEORGIA DEFENSE LAWYERS ASSOCIATION

1993-94 MEMBERSHIP APPLICATION

NAME: _____ STATE BAR NO.: _____

AGE AND BIRTH DATE: _____ SPOUSE'S FIRST NAME: _____

DATE ADMITTED TO BAR: _____ DATE BEGAN PRACTICE: _____

FIRM NAME: _____

OFFICE ADDRESS: _____
Street and P.O. Box Number

_____
City, State, and Zip Code

PHONE NUMBER: _____ FAX NUMBER: _____

NUMBER OF YEARS WITH PRESENT AFFILIATION: _____

NUMBER OF INDIVIDUALS IN FIRM PRESENTLY MEMBERS OF THE GEORGIA DEFENSE LAWYERS ASSOCIATION: _____

I certify that I am substantially engaged in trial litigation primarily for the defense in the State of Georgia, am a member in good standing of the State Bar of Georgia, and have been a member of the State Bar or a State Bar Association for a period of at least three (3) years.

_____ _____
(Date) (Signature of Applicant)

_____ _____
(Type or Print Name of Nominator) (Type or Print Name of Sponsor)

_____ _____
(Signature of Nominator) (Signature of Sponsor)

Upon completion of the form by applicant, **applicant must mail same along with letter of recommendation from the nominator and sponsor** above (who must be members in good standing of the GDLA) to the Executive Secretary of the Association, Gregory J. Spicer, c/o Georgia Defense Lawyers Association, at the following address: P.O. Box 1863, Macon, GA 31202-1863. If you need further information, contact Greg Spicer at (912) 742-2201.

If you are approved for membership, you will be notified and billed $100 covering the initiation fee plus the amount of annual dues in effect at the time of your admission to membership.

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on the negligent entrustment claim.

PREMISES LIABILITY RULES APPLIED TO COMMON CARRIERS

In a 4-1-4 split decision, the Court of Appeals applied premises liability concepts to an assault on a common carrier by an armed assailant who was only visually inspected during the boarding of the bus. In Stringer v. Southeastern Stages, Inc., 207 Ga. App. 223, 427 S.E.2d 494 (1993), Judge Pope, writing the majority opinion, expanded the use of the "substantially similar" acts requirement from premises liability law to prove notice to the bus company of a foreseeable risk of harm to other passengers based on prior acts. The dissent by Presiding Judge, now Justice, Carley, relied on a very early decision of the Supreme Court of Georgia in finding that there was not sufficient evidence in this circumstance to have required further action by the bus company. See, Savannah, Fla. W.R. Co. v. Boyle, 115 Ga. 836, 42 S.E. 242 (1902).

The plaintiffs in Stringer filed a wrongful death action against Southeastern Stages, Inc., for the death of their son who was shot to death in a sudden and unprovoked criminal assault by another passenger. The plaintiffs alleged that the common carrier breached its duty of extraordinary care for the safety of its passengers by failing to take sufficient precautions to prevent passengers from boarding the bus with loaded firearms. The only inspection conducted by the common carrier was a visual inspection as the passengers were boarding.

Plaintiffs argued that additional precautions were reasonably necessary since prior "substantially similar" assaults had made reasonably foreseeable future acts on the bus lines. In allowing "substantially similar" acts to provide notice, the court noted that:

> [e]ven though the cited cases involved premises liability, we see no reason why the rule of these cases must be confined to knowledge of a dangerous static condition on real property . . .. Thus, we see no reason why this rule is not applicable to the duty of care owed to passengers by a common carrier.

Id. at 495.

The prior acts which plaintiffs' alleged were "substantially similar" included incidents where a bus driver was assaulted with a knife by a passenger and where a bus driver was stabbed by a passenger. Defendants argued that since these prior incidents did not involve passengers being assaulted by a co-passenger and involved knives instead of guns, the incidents were not substantially similar. However, the court held

> [s]imply because the previous incidents involved knives instead of a gun and drivers instead of passengers does not establish, as a matter of law, that the previous incidents are not substantially similar.

Id. The court further held that previous incidents need not be identical in order to meet the substantial similarity standard.

> "All that is required is that the prior (incident) be sufficient to attract the [defendant's] attention to the dangerous condition which resulted in the litigated (incident)."

Id. [quoting Marta v. Allen, 188 Ga. App. at 903, 374 S.E.2d 761.] Since the court determined that a jury could find that the previous substantially similar incidents were sufficient to provide notice to the bus company, the court reversed the trial court's grant of summary judgment.

Plaintiffs also argued that the defendant breached the standard of care owed to its passengers by failing to follow their own safety rules and by failing to take action based on the prior words and conduct of the assailant. Defendant's employee manual required that

> "[a]ll incidents and unusual occurrences, however trivial they may seem at the time, involving customers, employees, or other persons, must be reported immediately to a supervisor of the company."

Stringer at 496. Plaintiff argued that this requirement demonstrated that defendant was negligent in violating this provision of the company rules. Evidence was offered that the assailant told the ticket agent there "probably would be an undercover cop . . . looking for him" and that the ticket agent should "tell them that he hadn't

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seen him." Id. Once again, before boarding the bus, the assailant told the agent not to "forget what I told you." Id.

The record before the court included testimony of the ticket agent who stated that he did not find the statement important and that he did not report it to the supervisor. In the ticket agent's deposition, he stated that he found the customer's statements as "unusual." Furthermore, when a newspaper reporter asked the ticket agent what he thought about the shooting, the ticket agent responded, "I bet you that's him." Id. The majority agreed with plaintiffs that such evidence at least created a jury question on both theories.

The minority was critical of the majority for going beyond the prior rule that a common carrier cannot be held liable for an injury from a criminal assault by another passenger unless the carrier has "'knowledge of the passenger's danger or of facts and circumstances from which that danger may reasonably be inferred . . ..'" Id. at 496. [quoting Savannah, Fl. W.R. Co. v. Boyle, 115 Ga. 836, 839, 42 S.E. 242 (1902).] The majority clearly extends the carrier's inquiry beyond determining whether the assailant's behavior provided notice to allow a jury to determine whether there were substantially similar prior incidents which would have put the carrier on notice that a visual inspection for weapons was not sufficient to meet the extraordinary duty of care standard.

GEORGIA SEAT BELT LAW HELD CONSTITUTIONAL

In C.W. Matthews Contr. Co., Inc. v. Gover, 263 Ga. 108, 428 S.E.2d 796 (1993), the Supreme Court of Georgia broadly upheld the constitutionality of Georgia's seat belt law, O.C.G.A. 40-8-76.1(b) and (d) and its prohibition of the admission of evidence for any purpose of any occupant's failure to wear a seat belt. The plaintiff was an unbelted driver in an accident, which occurred as employees of C. W. Matthews were allegedly directing traffic around a construction site. After the collision, plaintiff underwent an emergency cesarean operation and gave birth to a brain damaged child.

Plaintiff brought a motion for partial summary judgment to exclude evidence that she was not wearing a seat belt. Defendant filed a cross-motion for summary judgment alleging that O.C.G.A. 40-8-76.1(b) and (d) were unconstitutional on several grounds. Defendant alternatively argued that the Code section does not preclude evidence that plaintiff's failure to wear her seat belt was the sole proximate cause of her damages. C.W. Matthews Contr. Co., Inc., supra, at 797.

O.C.G.A. 40-8-76.1(b) provides as follows:

> [e]ach occupant of a passenger vehicle shall, while such passenger vehicle is being operated on a public road . . . be restrained by a seat safety belt . . ..

O.C.G.A. 40-8-76.1(d) provides as follows:

> Failure to wear a seat belt shall not be considered evidence of negligence, shall not be considered by the court on any question of liability of any person . . . and shall not diminish any recovery for damages arising out of the . . . operation of a passenger vehicle.

Defendant's primary constitutional argument was that subsection (d) was arbitrary and denied it due process of law since it allowed plaintiff to introduce evidence as to proximate cause but simultaneously prevented defendant from offering evidence that plaintiff's failure to wear a seat belt was the proximate cause of her injuries. C.W. Matthews Contr. Co., Inc., supra, at 798.

The court held that:

> [a] statute satisfies the requirements of due process if it is reasonably related to a proper legislative purpose and is neither arbitrary nor discriminatory.

Id. [citing Quiller v. Bowman, 262 Ga. 769, 425 S.E.2d 641 (1993); State v. Major, 243 Ga. 255, 257, 253 S.E.2d 724 (1979).]

The court further determined that by enacting the seat belt legislation, the legislature established public policy that seat belts ought to be worn by occupants of automobiles. Furthermore, the legislative purpose of encouraging seat belt use is "a rational exercise of legislative power." C.W. Matthews Contr. Co., Inc., supra,

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at 798. The court determined,

> [w]e conclude, therefore, that acting in a rational and nondiscriminatory manner, the legislature set the state's public policy, but weighed the positive benefits of the policy against the severity of the penalty for noncompliance. This it has a right to do.

Id.

The court's ruling that occupant restraint was now a public policy of Georgia viscerates the argument that only the "violation of this Code section" was inadmissible. By taking the wider stance, the Supreme Court effectively eliminated further attempts to introduce seat belt evidence.

PARENTAL AND ADOPTIVE CHILD'S RIGHT TO BRING A WRONGFUL DEATH ACTION

In Emory Univ. v. Dorsey, 207 Ga. App. 808, 429 S.E.2d 307 (1993), the Court of Appeals of Georgia determined that a child's adoption after his mother's death does not necessarily terminate his right to bring a wrongful death action. In Emory Univ., supra, an unwed mother gave birth to a son and later married a man who was not the child's father. Approximately a year later, the mother became ill and was treated at Emory University Hospital. Another year later, the mother died, leaving a will which requested her parents adopt the child. The deceased's husband moved to New York approximately two (2) weeks later and left the child with the deceased's parents who had adopted him.

The deceased's parents, as executors of the deceased's estate and as the adoptive parents of the deceased's minor child, filed a lawsuit for medical malpractice and wrongful death. Defendant argued that no action could be maintained by the minor child for his mother's wrongful death. The trial court denied defendants' motion for partial summary judgment, and defendants appealed.

The court of appeals noted that defendant first argued that the adoption of the child terminated the child's right to bring an action for wrongful death. As support for its argument, the defendant cited cases where the adoption occurred prior to the death of the natural parent rather than after. The court determined

> [t]he relevant time for determining whether a cause of action for wrongful death exists is when the death of the person occurs.

Emory Univ., supra, at 308. [citing Garvin v. Lovett, 131 Ga. App. 46 (1), 205 S.E.2d 124 (1974).]

The court further concluded

> [a]n adoption which occurs subsequent to the death of a natural parent should not terminate a cause of action for the wrongful death of the parent. To hold otherwise would not foster the public policy of encouraging adoptions, particularly in cases such as this one where the child is rendered an orphan.

Emory Univ., supra, at 308.

Defendants also argued that the child was not entitled to bring a wrongful death action under O.C.G.A. 51-4-2 because there was a surviving spouse. O.C.G.A. 51-4-2(a) provides as follows:

> The surviving spouse or, if there is no surviving spouse, a child or children . . . may recover for the homicide of the spouse or parent the full value of the life of the decedent, as shown by the evidence.

Id. at 308-09. The court recognized that typically a cause of action for wrongful death belongs to the surviving spouse and not to the children of the deceased. However, the court cited Justice Weltner's special concurrence in O'Kelley v. Hospital Auth. of Gwinnett County, 256 Ga. 373, 349 S.E.2d 382 (1986), for the premise that

> although the statute vests the cause of action in the surviving spouse, that should not operate to interfere with a superior court's exercise of its "general equitable powers to supervise litigation pending before it in such a manner as fairly shall protect the substantive and procedural rights of any party at interest."

Emory Univ., supra, at 309. [citing O'Kelley, supra, at 374, 349 S.E.2d 382.]

Relying on Brown v. Liberty Oil

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Continuing Legal Education Seminar

☞ **Four Hours of CLE Credit, including two ethics hours**
☞ **<u>No Cost</u> to GDLA Members**

Thursday, December 9

Macon Conference Center
3590 Riverside Drive
MACON, GEORGIA

If you are coming to the seminar, please notify us by Friday, December 3. This seminar is free to GDLA members. If you cannot attend, you may send someone from your firm to attend in your place at no charge. Additional lawyers from your firm can attend the seminar at a cost of $30 per lawyer.

Agenda

10:15 AM	**CHARLES M. GOETZ, JR.** *The Insurance Defense Lawyer and Conflicts of Interest*
11:15 AM	**BREAK**
11:30 AM	**J. KENNETH MOORMAN** *Ethical Dilemmas Confronting Defense Counsel (part one)*
12:30 PM	**LUNCH**
1:30 PM	**J. KENNETH MOORMAN** *Ethical Dilemmas Confronting Defense Counsel (part two)*
2:30 PM	**BREAK**
2:45 PM	**JOSEPH W. WATKINS** *How to Avoid Possible Malpractice Claims*
3:45 PM	**ADJOURNMENT**

Greg Spicer
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P. O. Box 1863
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Recent Developments
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Corp., 261 Ga. 214, 403 S.E.2d 806 (1991), where the surviving spouse of a deceased had abandoned the deceased's children and could not be located and would not otherwise bring a claim for wrongful death, the court held that the evidence showed that the deceased's husband had left the state shortly "after the deceased's death with no intention of pursuing a wrongful death action." Id. at 309. Therefore, the court determined that the trial court "properly exercised its equitable powers by allowing the minor child to bring the action for the wrongful death of his mother." Id.

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Robert D. Hays
Joseph M. Murphey
Hall F. McKinley, III
Thomas Hunter Manning
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Rodney S. Shockley
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G. Lee Wellborn
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