Georgia Defense Lawyer ©

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Discoverability of the Release Obtained by a Plaintiff from a Joint Tortfeasor

In lawsuits involving two or more joint tortfeasors, the terms of a settlement release between the plaintiff and one tortfeasor are discoverable, and should not be permitted to be kept secret from the remaining tortfeasors.

Recently, some plaintiff's attorneys and judges have attempted to keep the terms of settlement releases, including the dollar amount paid to the Plaintiff by the tortfeasor, secret from the remaining tortfeasors. However, such secrecy would be contrary to Georgia law and public policy which encourage settlement, and liberally construe the rules of discovery. The remaining parties are entitled to know about any interest the defendant involved in the release may have in the ultimate litigation pursuant to the release. In addition, the other defendants have a right to know the amount to which any judgement against them will be offset or credited by the settlement amount provided in the release.

Recently, some plaintiff's attorneys and judges have attempted to keep the terms of settlement releases secret...

I. Parties To A Release Should Not Be Permitted To Keep The Terms Of The Agreement Secret From Remaining Tortfeasors

"Releases" include a broad range of documents including covenants not to sue, covenants not to levy, "High/Low" agreements with many variations, or perhaps may contain an agreement to assist the plaintiff in prosecution of the lawsuit, loan receipts, oral agreements or separate side agreements. The defendants are entitled to review the release to determine the terms and to ascertain exactly what was released, as well as the amounts paid. Such knowledge may materially affect the handling of remaining issues, and the possibility for settlement among the parties still actively involved in the suit.

Continued on page 6

Inside This Issue

Member News - 5

Annual Meeting Highlights - 10

2004 Overview of Changes in Georgia Law and Practice - 16

GDLA Trial Academy - 18

The Obesity Epidemic: Issue and Potential Product Liability - 20

GDLA Summer Board and Annual Business Meeting Highlights - 22

New Board Announced

New additions to the GDLA board of directors were elected at the board's annual meeting, held August 7, 2004. The 2004-2005 board consists of the following members:

Grant Smith, President;
Johnny Foster, Ex. Vice President;
Warner Fox, Secretary/Treasurer;
Rick Rominger, Imm. Past Pres.;
Bob Travis, Vice President;
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Jimmy Singer, Vice President;
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Director, Middle District;
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Luanne Clarke
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Art Glaser
Director, State-at-Large;

Jim Elliott, Greg Ellington, George Hall, Bubba Hughes, Jo Jagor and Gary Seacrest were not up for re-election and remain on the board.

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President's Message

Before outlining the coming year for the Georgia Defense Lawyers Association, let me first thank our outgoing president, Rick Rominger, for an outstanding job. From the first day of his tenure to the last, Rick worked tirelessly for our organization. During his term, membership remained solid and 64 new members joined. We were also proud to hire executive director, Steve Milano. The trial academy continued in its tradition of success and the GDLA *Law Journal* was published on line. The GDLA also established a new tradition: a cocktail party honoring the appellate and state judges in the Atlanta area. Please join me in thanking Rick for his excellent work for the GDLA.

The annual meeting in August was a success at the Sandestin Hilton Beach Resort. Nationally prominent trial tactics speaker Jim McElhaney gave a spellbinding seminar about experts and closing arguments. In addition to a top-notch seminar, there were many extracurricular events that added to the enjoyment of this meeting. Many thanks to Steve Kyle who organized this meeting that progressed with the precision of a Swiss watch. Steve Milano was also instrumental making this meeting a success.

During 2004, Steve Milano took over the reigns as executive director of the GDLA. Many thanks to Al Shurley, Steve's predecessor. Steve has extensive experience in managing organizations and has done a terrific job so far. Steve has accomplished many critical tasks for the organization. For one of the more visible improvements, please visit our Web site at www.gdla.org. Steve is energetic and overflowing with new ideas. In addition to being a top organization professional, Steve has a mean tennis game. Please welcome Steve to our organization. (Many thanks to Past Presidents Steve Kyle, George Duncan, Walter McClelland and Jerry Buchanan and Board members Clay Ratteree and Mel Haas for their efforts in locating and hiring Steve.)

In the coming year, I hope to continue to build on the momentum that Rick built. We plan to continue to grow our organization. Jim Elliott will once again head the Trial Academy December 2-4, 2004 at Callaway Gardens. This is a fantastic NITA-type program for lawyers with 1-4 years experience. The GDLA will conduct the second annual judge's reception at the Capital City Downtown Club on February 10, 2005 from 5:00 p.m. to 7:00 p.m. Last year we had judges from the Court of Appeals of Georgia, the Supreme Court of Georgia, the Atlanta Division of United States District Court and the State and Superior Courts of Fulton County. The February reception will be a wonderful opportunity to get to know some of the judges who have a huge impact on your practice. The Board is exploring the possibility of holding additional judicial receptions in Augusta and Savannah.

As Executive Vice President, Johnny Foster is working on an outstanding program for the 2005 Annual Meeting, which will take place at the Ponte Vedra Inn and Club June 16-19. This is a fantastic resort located just north of Jacksonville. Please plan to bring your family to this wonderful resort and enjoy the amenities while receiving first class CLE. In addition to his duties as Executive Vice President, Johnny continues as the intrepid editor of this fine Newsletter. The Board is evaluating whether to continue with the annual *Law Journal*, which has been published on line for the past several years or enhance the newsletter with short law review type articles.

I am really looking forward to serving as your President in the coming twelve months. I invite you to get involved. This is a great organization with great people. You will have a blast.

Grant B. Smith
President

Executive Director's Message

If you have not been to the GDLA Web site lately, you'll want to check out our new member database, which has your contact info in a searchable format for the public to see.

You can now keep it up to date with your own password.

It's very important that you stop by the site to check the accuracy of your profile as the public sees it. This information also makes up the GDLA database, and this is how we contact you for dues renewals, let you send a blast e-mail, keep track of your dues paid or owed and otherwise make sure we have accurate information on you.

That's it! You are now able to use the Members Area of the GDLA Web site with your own userid and password.

We hope you find this new feature useful and are happy to have any feedback about the Web site. Please e-mail me at contact@gdla.org with your comments.

Forgot Your Password?

If you ever forget your password, simply go to the Home Page and click on "Forgot My Password" in the upper, right-hand corner. Enter and submit your e-mail address and your password will be instantly sent to that address (if it matches what we have for you. Check your online profile to make sure).

It's very important that you stop by the GDLA Web site to check the accuracy of your profile as the public sees it.

We set up the Web site passwords to make it easy for even the most computer-phobia member to use! Just follow these simple steps:

#1 Go to www.gdla.org and click on the words "Find a Defense Lawyer." Do a search for your listing to see if we have the correct information for you. Note the e-mail address displayed...that is what you will use to login to the Members Area.

#2 After you have reviewed your profile information, click on the words "GDLA Home Page" and then click on the words "Members Area" in the upper, right-hand corner.

#2 You will be prompted for a userid and password. The first time you visit the site, type in the e-mail address we have for you and your bar number.

#3 Look over your information and make sure it is correct. Toward the bottom of the page, find the password field and change your password from your bar number to something you'd like to use from now on. Hit "Save."

Can't Get In?

If you get an error message when you try to log in, one of three things has happened: You have mistyped your information (try it again); we have a different e-mail address for you than the one you are trying to use; your bar number begins with a zero, and during the transition to the new password system a few GDLA members' bar numbers were entered wrong. Try deleting the zero in front of your bar number and see if that works.

Personal Information

Your personal information is not displayed online and is only for office use (for condolences, to contact you regarding meetings registration SNAFUS, etc.).

Continued good luck in your practices!

Steve Milano
Executive Director

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Join a Committee!

Do you want to help serve the interests of defense lawyers in Georgia? There are opportunities for you to serve on GDLAcommittees or sub-committees. Call or e-mail the GDLA today and let us know your area of interest.

Member News

New Members

The GDLA welcomes the following news members:
Dawn Benson, Spence, Lowe and Chambless, Albany; **Timothy Buckley III**, Finley & Buckley, Atlanta; **Zachary Cowart**, Coleman, Talley, Newbern, Kurrie, Preston & Holland; **Eric Frisch**, Carlock, Copeland, Semler & Stair, Atlanta; **Thomas Holcomb**, McLain & Merritt, Atlanta; **William Horlock, Jr.**, Goldner, Sommers, Scrudder & Bass, Atlanta; **Daniel Huff**, Huff, Powell & Bailey, Atlanta; **Gregory Lawton**, Ace Westchester Specialty Group, Roswell; **Barbara Marschalk**, Drew, Eckl & Farnham, Atlanta; **Tara Moulds**, Law Office of **Douglas A. Wilde**, Peachtree City; **Scott Allen Rhodes**, White, Schuerman, Rhodes & Burson, Brentwood, TN; **Laurel Schmitt**, Savell & Williams, Atlanta; **Todd Schwartz**, Hawking & Parnell, Atlanta; **Kenneth Sisco**, Hawkins & Parnell, Atlanta; **Douglas Smith, Jr.**, Mozley, Finlayson & Loggins, Atlanta; **Lee Ann Sparks**, Nelson, Mullins, Riley & Scarborough, Atlanta; **Caroline Tanner**, Holland & Knight, Atlanta; **Tim Tanner**, Coleman, Talley, Newbern, Kurrie, Preston & Holland, Valdosta; **Wayne D. Taylor**, Mozley, Finlayson & Loggins, Atlanta; **Kenneth Thompson, Jr.,** Troutman, Sanders, Atlanta

Lynn M. Roberson, Swift, Currie, McGhee & Hiers, Atlanta, will assume the position of chair of DRI's Trial Tactics committee at the annual meeting October 6-9, 2004 in New Orleans.

Albert H. Parnell, Hawkins and Parnell, Atlanta, has been selected as this year's Louis B. Potter Lifetime Professional Services Award by the DRI. The award honors an individual who exemplifies the highest professionalism and service to the legal profession. In awarding the distinction, the DRI noted that Mr. Parnell's years of service to DRI has set a standard by which all others are judged.

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Discoverability of a Release...

continued from page 1

A covenant not to sue, for example, only discharges the party(s) actually named therein. *Miller v. Grand Union Co.*, 270 Ga. 537, 512 S.E.2d 887 (1999). Thus, if the release obtained in a claim involving potential liability of an employee and employer fails to name both the employer and the employee in the terms of the agreement, the injured party will not be barred from pursuing a claim against the unnamed party. *Id.* Knowledge of such an omission may be pertinent to the strategy of others.

In addition, the language of the release may result in the dismissal of some or all claims against the remaining tortfeasors. *Revis v. Forsyth County Hosp. Auth.*, 170 Ga.App. 366, 368, 317 S.E.2d 237 (1984); *Weems v. Freeman* 234 Ga.App. 575, 216 S.E.2d 774 (1975); *Philips Audio Video Systems Corp. v. Bateman*, 160 Ga.App. 12, 285 S.E.2d 747 (1981). Furthermore, the parties to the release may ultimately work together in pursuit of the claims against the remaining defendants. Courts have serious concerns about releases or secret special agreements in which the released defendant is vested with a potential recovery if the plaintiffs prevail, or which commit the released defendant to assist the plaintiff. Such agreements are misleading because they are between parties with ostensibly adverse interests when, in fact, their interests may be aligned because of the "secret" agreement.

Evidence of a settlement compromise can be admissible when offered for a purpose other than to establish liability or invalidity of a claim or its amount, such as proving bias or prejudice of a witness. *Norfolk Southern Corp. v. Decubas*, 260 Ga. 136, 390 S.E.2d 216 (1990). The release may contain a provision, such as a "Mary Carter Agreement," where the joint tortfeasor who has settled maintains an economic interest in the outcome of the case. *Booth v. Mary Carter Paint Co.*, 202 So.2d 8 (Fla. Dist. Ct. App. 1967); *Ward v. Ochoa*, 284 So.2d 385 (Fla. 1973). Secrecy is the key factor in "Mary Carter Agreements" to prevent the court or jury from weighing the testimony and conduct of the signing defendant differently based on knowledge that said defendant secretly agreed to defend himself in court in order to diminish his own liability proportionately by increasing the liability of the co-defendants. *Ward v. Ochoa*, 284 So.2d 385, 387 (Fla. 1973). These releases and/or agreements work to mislead the jury, the remaining parties, and the court, and may deprive the remaining defendants of some peremptory challenges that are shared by all defendants. The remaining defendants are entitled to know who their true adversaries are in order to adequately defend themselves at trial.

The terms of a release may also affect the rights of the parties to the agreement in the remainder of the litigation. In *Uniroyal Goodrich Tire Company v. Ford*, the Georgia Court of Appeals cited "fundamental unfairness" as a reason for holding that it was error for the trial judge to require a defendant who had settled with the plaintiff to remain as a party. 218 Ga.App. 248, 256, 461 S.E.2d 877, 885-886 (1995). If the release is full and valid, the defendant involved in the agreement may forfeit their rights to be involved in further proceedings. Without access to the terms of the release, the remaining defendants would be precluded from even raising such a pertinent issue.

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II.Georgia Rules Of Discovery Are Liberally Construed To Include Discovery Of Settlement Releases

Parties may obtain discovery regarding any non-privileged matter which is relevant to the subject matter involved in the pending action, whether it relates to the claim, the defense of the party seeking discovery, or to the claim or defense of any other party. O.C.G.A. § 9-11-26. The fundamental rule of discovery, which permits each party to obtain all information which appears reasonably calculated to lead to the discovery of admissible evidence, must be liberally construed in favor of supplying each party with facts underlying the opponent's case, regardless of whether the information sought would ultimately be admissible at the trial of the case. *Bridges v. 20th Century Travel, Inc.*, 149 Ga.App. 837, 256 S.E.2d 102 (1979). The purpose of the broad discovery rules is for the parties to prepare for trial with full knowledge of the issues and facts. *Travis Meat & Seafood Co. v. Ashworth*, 127 Ga.App. 284, 193 S.E.2d 166 (1972). The rules of discovery are designed not only to narrow and clarify the issues, but also to remove the potential for secrecy and to provide the parties with the opportunity to obtain knowledge of all relevant facts. *Hanna Creative Enters., Inc. v. Alterman Foods, Inc.*, 156 Ga.App. 376, 274 S.E.2d 761 (1980).

Georgia law clearly provides that settlement agreements by co-defendants are discoverable. *Barger v. Garden Way, Inc.*, 231 Ga.App. 723, 499 S.E.2d 737 (1998). In *Barger*, the Georgia Court of Appeals held that the "trial court erred in concluding that a confidential settlement agreement, even if incorporated as another court's final order, can operate to preclude discovery by Georgia litigants of the parties to that confidential settlement agreement." *Id.* at 726. The remaining amount of exposure for co-defendants' in light of the offset or credit from the release is clearly relevant, discoverable information.

The circumstances and conditions surrounding any payment by alleged tortfeasors are discoverable by joint tortfeasors as to the amount of payment. As explained in *Moore's Federal Practice*, there are frequently special agreements among some of the parties – often intended to be kept secret – that may cause serious problems in the litigation. "Non-disclosure of these agreements may ultimately necessi-

Continued on page 8

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continued from page 7

tate a new trial. Since secrecy is the principal problem and **these agreements are clearly discoverable**, the court should, early in the litigation, declare that counsel are under a continuing duty, without the need for specific interrogatories, to disclose immediately all such agreements and understandings." I– Part II, James W. Moore, et.al., *Moore's Federal Practice*, ¶ 23.23 (2d ed. 1993) (emphasis added).

III.The Remaining Tortfeasors Are Entitled to An Offset Or Credit For the Settlement Received By The Injured Party

The well-established rule under Georgia law is that for any injury, there is but one satisfaction. *Ford Motor Co. v. Lee*, 237 Ga. 554, 556, 229 S.E.2d 379, 381 (1976). Thus, a settlement received from one joint tortfeasor for an indivisible injury is applied as a partial or an entire offset or credit for the same claim against the remaining tortfeasors. *Id.* The offset or credit is accomplished in one of two ways: (1) by disclosing the settlement amount to the jury and instructing the jury to deduct that amount from its own assessment of the full satisfaction to which the plaintiff is entitled; or (2) to withhold the settlement amount from the jury, instruct the jury to disregard any evidence regarding settlement, and to have the trial court subtract the full settlement amount from any damages awarded by the jury. *Id.;* see also *Georgia Pipe Company v. Lawler*, 262 Ga.App. 22, 584 S.E.2d 634 (2003).

In *Ford Motor Co v. Lee*, Ford was allowed to plead and prove a covenant not to sue, and the covenant not to sue was admitted into evidence, but the jury was instructed to award the plaintiff his entire damages without regard to any payments previously made to him. The judge then reduced the jury's award by the amount paid pursuant to the covenant not to sue. *But see Barnes v. Wall*, 201 Ga.App. 228, 411 S.E.2d 270, *cert. denied* (1991)(The trial court may inform the jury to consider the settlement amount disclosed to them in determining any damages to be awarded.); *Carney v. J.D.N. Construction Co.*, 206 Ga.App. 785, 426 S.E.2d 611 (1992), *cert denied* (1993). Conversely, in *Allison v. Patel*, the Georgia Court of Appeals held that to avoid prejudice, the trial judge should just deduct the amount of the settlement from the verdict. 211 Ga.App. 376, 438 S.E.2d 920 (1994). However, while some courts have held that in regard to damages, there is no purpose in disclosing the settlement amount to the jury, who may be unfairly prejudiced by such information, the holding in *Patel* did not go so far as to imply that the terms of the release with one defendant or the amount thereof can be kept secret from the remaining defendant(s). The fact that such information may not be admissible does not mean that it is undiscoverable. The joint tortfeasors are entitled to know the amount of the credit to which they will be entitled, and to conduct their own settlement negotiations with access to all information which may be relevant to their handling of the claim.

The law encourages settlement. O.C.G.A. § 24-3-37. If secrecy were the law, defendants would have no choice but to try their cases to verdict in order to learn the amount of the credit. Defense attorneys cannot realistically evaluate their cases in accordance with their professional and ethical duties if the courts were to permit the release information to be treated as a shared secret between only the court and the plaintiffs. Refusal to permit the defendants to discover the "release" and any related side agreements, and to learn the amount of the credit or setoff to which they are entitled, would deprive the defendants of due process of law and equal protection of the law in violation of the Fourteenth Amendments of the U.S. Constitution and the Constitution of the State of Georgia. Thus, plaintiffs are not entitled to withhold the release from the remaining tortfeasor(s), and it is a clear abuse of discretion for any judge to permits such secrecy.

William Wray Eckl is a founding partner with Drew, Eckl and Farnham in Atlanta. He specializes in civil tort litigation for both self-insureds and insureds and represents both primary and excess insurance companies.

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2004 Annual Meeting Highlights

Professor Jim McElhaney informed and delighted members of the Georgia Defense Lawyers Association with his two-day seminar on trial tactics at the 37th Annual GDLA Annual Meeting.

The gathering of more than 130 attorneys, family members and sponsors included an event filled with social and professional events at the beautiful Hilton Sandestin Beach Golf Resort and Spa.

The weekend also included a board of directors meeting, the GDLA's annual business meeting and the election of new officers (see page 10 of this issue of *Georgia Defense Lawyer* for the new board).

Next year's meeting will take place at the Ponte Vedra Inn and Club in Florida, June 16-19.

Clockwise from top right: attendees received lots of advice from a variety of legal services providers; Scot Pool updated attendees on Georgia law; outgoing GDLA president Rick Rominger receives DRI's Exceptional Performance award from GDLA board member and DRI state rep, George Duncan.

Special Thanks to the GDLA's Annual Meeting Sponsors!

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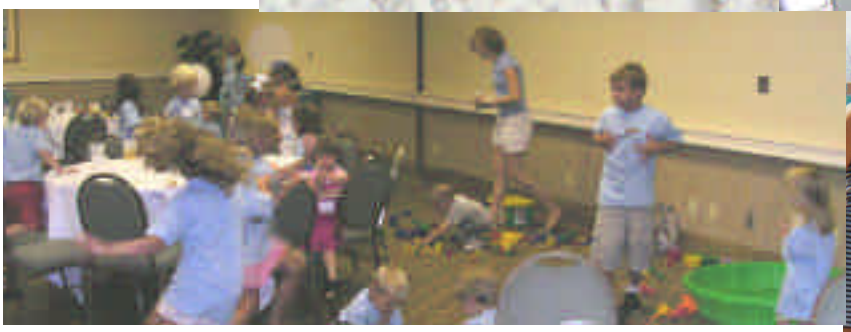

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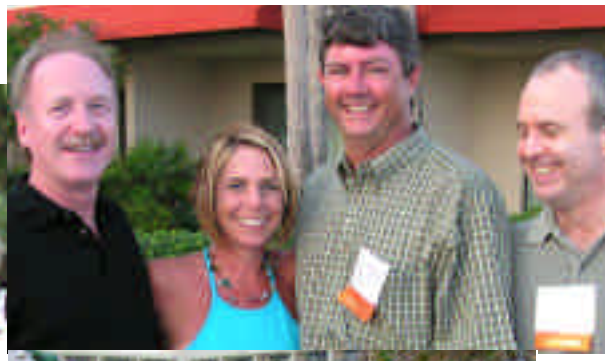
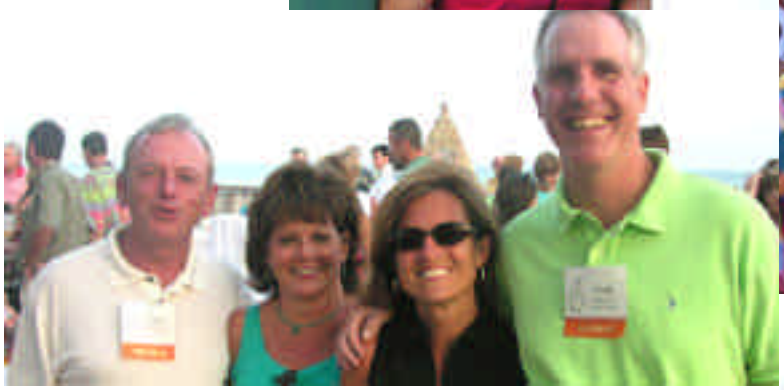
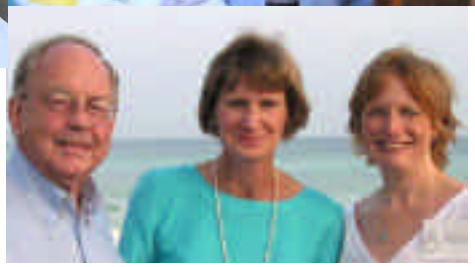




Clockwise from top left: Doug Wilde, Jo Jagor and Alison Wilde; Ryan Mock, Ruth and Walter Ballew and Bill Clifton; Joe Chambless and Larry Fouche, with LegaLink's Ken Riddle in background; GDLA "First Lady" Holly Smith, GDLA executive vice president, Johnny Foster, and Exponent's John Straus; The Kirby Mason family; Larry and Becky Hogan, Resa and Craig Avery



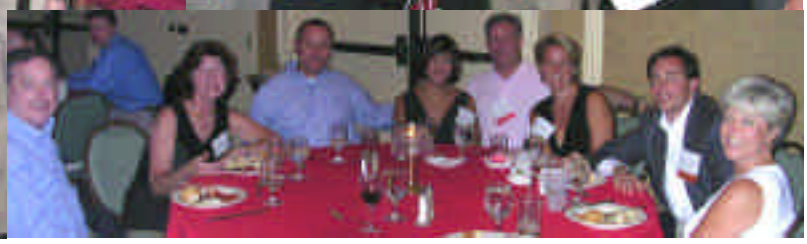
Clockwise from top left: Debbie Hughes, GDLA Meetings Chairman, Steve Kyle, Marcia Welch and GDLA board member, Bubba Hughes; Andrew Fox can't believe his luck! Lorraine Milton, Sarah Ballew and Kathleen and Maryellen Hogan; Bruce and Marcia Welch with Bobbie Foster; Steve Kyle, A.J. Gallagher & Associates' Rich Robertson and Keith Bell; David and Pat Dekle and crew, with babysitter Libby Bitting -- GDLA immediate past president, Rick Rominger speaking with GDLA membership chairman, Salty Forbes in background

Annual Meeting Highlights

continued from page 17

Forcon International Annual Dinner & Dance

Clockwise from top left: pre-dinner cocktail reception; Ryan Mock, Jo Jagor, Doug Wilde, GDLA board member Warner Fox and Pat, Dave and Gina Marshall; GDLA sponsors, Julie Gowen of Benedict Engineering, Teri Eaton of Special Counsel, Pam Ridgway of LegaLink, Keisha Robbins of Minnesota Lawyers Mutual; The Dancin' Fosters; Brown Reporting Company Tennis Tournament Winners, Jimmy Singer, Resa Avery, Becky Hogan, Bill Cowsert, Doug Wilde, Holly Smith, Marcia and Bruce Welch; GDLA board member Walter and Kathy McClelland, David and Pat Dekle, GDLA board member Staten Bitting, Diane and Matt Moffett, Cindy Bitting; Benedict Engineering Golf tournament winners, Ken Riddle, Grant Smith, Jerry Buchanan, Craig Avery, Julie Bowen, Steve Kyle



Brown Reporting Company Tennis Tournament

From left to right: Patty Singer watches Craig Avery zing an ace; the tournament participants; Becky Hogan watches Grant Smith practice in his second-best court.

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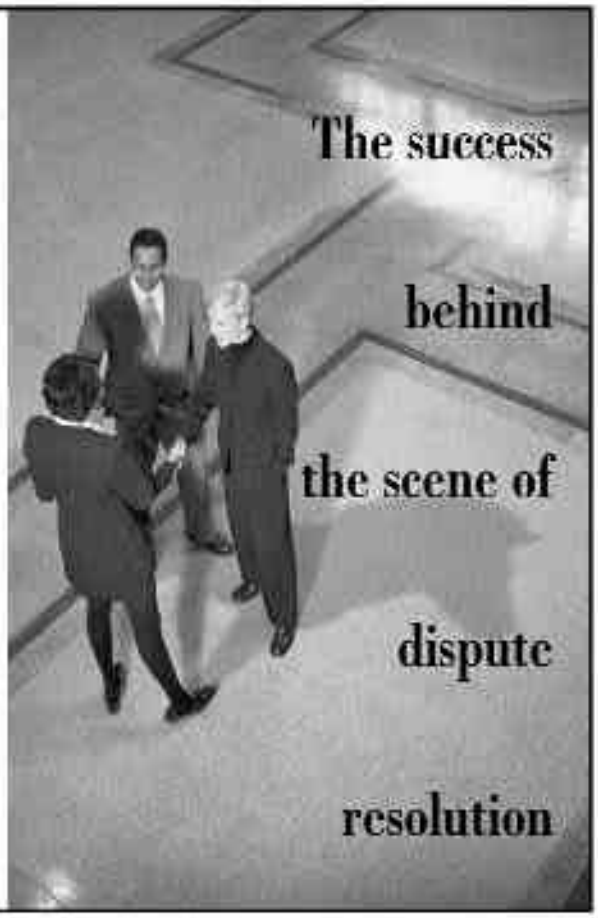

2004 Overview of Changes in Georgia Law and Practice

From the legislative sessions in Atlanta in 2004, the Act that seems to have received most of the attention so far originated in House Bill 1303, which allows medical care providers in Georgia to file liens on third-party actions for their bills of treatment. It formally amends O.C.G.A. §44-14-470 to add "physician practice" to those persons entitled to a lien under O.C.G.A. §44-14-471. The latter section is also significant for its deletion of the "within thirty days after the person has been discharged" time limit. Notice is still provided, but only "not less than thirty days prior to filing" the lien with Clerk of the Superior Court in the county of treatment and in the county were the patient resides. By O.C.G.A. §44-14-472, the verified statement is filed in the hospital lien book. O.C.G.A. §44-14-473 is unchanged as to the effects of releases, effectively treating the new liens as hospital liens. Besides creating a new lien on behalf of physicians, the removal of the time limit benefits not only holders of the new lien but also hospitals, nursing homes, and other parties previously protected thereby. In practice, the county of residence of the claimant may be easier to check for filed liens than every county where any treatment has been received. On a similar issue, Medicare reimbursement continues to grow more complicated; 42 U.S.C. § 1395y(B) is a starting point if you are facing these issues.

While the creation of a lien for a physicians impacts settlement most directly, one bill passed in the 2004 sessions impacts the acquisition of medical records during discovery. Senate Bill 457 amends, among others, O.C.G.A. §24-9-41 and §24-9-42 to make medical records of nurses confidential as a part of a bill more specifically aimed at sexual assault prosecutions and investigations. Finally, O.C.G.A. §51-1-29.15 arises from House Bill 1793 to make free health clinics immune from liability to patients. Issues remaining unresolved at the end of the 2004 legislative sessions include the catch-all of "tort reform," which died on the vine at the end of this year's sessions but remains a hot topic that will be watched with interest next year.

Of appellate opinions issued in the last twelve months, *Craig v. Holsey*, 264 Ga. App. 344, 590 S.E. 2d 742 (2003) is most notable for the denial of certiorari on March 29, 2004. In so doing, the Supreme Court of Georgia left in place an award of punitive damages that was 22 times the actual and compensatory damages, far in excess of the single digit (9 to 1) ratio the U.S. Supreme Court recently approved in *State Farm v. Campbell*, 538 U.S. 408 (2003). The case arose out of an automobile collision and the punitives appear to have been motivated by drug use by the Defendant driver. The drug use evidence was not limited to intoxication at the time of the collision and the Court of Appeals pointed to his counsel's opening statement as opening the door to some of the additional drug-related evidence. However, the crux of the opinion from a punitive damages standpoint comes from the Court of Appeals' application of the second Supreme Court guidepost, the disparity between the actual or potential harm suffered by the Plaintiff and the punitive damages award. On that point, the Georgia Court of Appeals justified the disparity in ratio between the punitives and the actual damages by observing that the claimant "could have died," and thus, "the potential harm was much greater than the actual." 590 S.E. 2d at 748. Judge Andrews files a dissent on the punitives issue, and points out that the cases cited on potential harm by the majority are inapplicable wrongful death cases. Hulsey, the claimant, had suffered only a minor back and neck strain.

Ashley Lakes v. Jennings, 264 Ga. App. 456, 590 S.E. 2d 807 (2003), is notable to a defense practice on two points: (1) liability for negligent hiring or retention can attach despite an employee's conduct being outside the scope of his or her employment where there is a relationship between the employer and the victim; and (2) the defense that put up no evidence in response to the Plaintiff's case lost the right to open and close argument by cross-examining defendants called by the Plaintiff, which the majority construed as direct examination by the defense, despite having obtained the Court's permission. The majority places the negligent hiring and retention claim analysis on whether the employer could have reasonably anticipated the conduct, regardless of whether it was within or outside of the scope of employment. Judge Andrews again files a dissent, here on the issue of the closing argument. *Munroe v. Universal Health Services, Inc.*, 277 Ga. 861, 596 S.E. 2d 604 (2004), is another negligent hiring/retention case, which places a loose standard on the connection between the employee's "tendencies" and the act that caused the victim's injury. In footnote 3 in the Opinion, the Supreme Court distinguishes between the "substantially similar" standard of premises liability and the lower standard in negligent hiring and retention cases. 596 S.E. 2d at 606. Interestingly, though, on the facts of the Opinion, the Defendant prevails on Summary Judgment largely because of its hiring of a professional investigation service and its reliance on that service, which had not disclosed information suggesting personal harm to others.

Moving to premises liability, a Court of Appeals case, *Hobday v. Galardi*, 598 S.E. 2d 350 (2004) again demonstrates a still existing

By Scot V. Pool
Forbes & Bowman, Savannah

way to win Summary Judgment on defense in this context, that being vague testimony by the victim in deposition as to what actually causes the injury. There, a patron struck in the eye at a shooting range could not say what in fact had hit him and this inability to identify a specific cause was enough for Summary Judgment to be granted. Elsewhere, particularly in the slip and fall context, the 2004 cases remain hard to reconcile and are as plentiful as ever as the subject of appellate opinion.

Critser v. McFadden, 277 Ga. 653, 593 S.E. 2d 330 (2004), is notable for its rejection of the following charge submitted on behalf of the defense in a negligence action:

First, you should consider the question of negligence or whether the Defendant departed from the standard of care, as I will explain that phrase to you. If you find that the Defendant did not depart from the applicable standard of care, then you should go no further and you would return a verdict in favor of the Defendant. If you find that the Defendant departed from the standard of care, you would then consider the second question. That question is whether the acts or omissions departing from the standard of care proximately caused the damages the Plaintiff is claiming. I will instruct you further on the meaning of proximate cause. If you find that the alleged negligent acts or omissions of the Defendant were not the proximate cause of the damages claimed, then you would go no further and you would return a verdict in favor of the Defendant. If you find that the defendant acted negligently and that those negligent acts or omissions proximately caused the damages claimed, you should then consider the third issue, which is the amount of damages.

The Court's rationale for rejecting the charge was that restricting the order for addressing the constituent elements of a negligence claim could preclude the jury from considering the totality of the facts and circumstances. Specifically, the Court provided that restricting the jury from considering proximate cause there that the injections, if negligently administered, could have resulted in her condition until after a determination that a breach took place was grounds for reversal of both the State Court and the Court of Appeals. 593 S.E. 2d at 332. In other words, the court said

Continued on page 19

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continued from page 17

what a Plaintiff suffers from shall be a consideration in the jury's determination as to whether there was first a breach. As a practical matter, the case suggests trying to tell the jury how to think, whether in charges or in a verdict form, poses a much greater threat for reversal on appeal than making such an argument in closing.

In the uninsured motorist coverage context, in *Nationwide v. Boylan*, 263 Ga. App. 723, 589 S.E. 2d 280 (2003), the victims of a collision allegedly caused by vehicles driven by a known driver and a second unknown driver were entitled to seek the full amount of insurance coverage from the known driver and to separately seek the UM coverage applicable to the third vehicle. *Cooper v. Binion*, 598 S.E. 2d 6 (2004), is a medical malpractice case important principally for the way the case looks at apparent authority in the agency context. The Opinion applies a step by step analysis as to "employee versus independent contractor" analysis but more cursorily concludes the hospital was not entitled to Summary Judgment on the issue of whether the doctor was an employee by apparent authority because a witness testified that he did not remember the sign at admission saying the doctor was not a hospital employee; the Court of Appeals used this to conclude there was some evidence that no such sign was posted, or if so, it was not conspicuous, despite that there was positive, un-contradicted evidence presented by the hospital that the sign existed. 598 S.E. 2d at 11-12. Judge Smith concurred only to point out that a question of fact exists as to whether it was conspicuous, but the circumstantial evidence pointed to by the majority should have had no probative value against the hospital's evidence that the sign existed. The Court of Appeals made this determination despite generally observing that posting a sign and having a patient sign an acknowledgement would "generally" preclude a claim of apparent authority. 598 S.E. 2d at 11. It did not there.

Finally, *Anderson v. Smith*, 265 Ga. App. 469, 594 S.E. 2d 688 (2004) is a slip and fall Opinion interesting mainly for its procedural posture as the Plaintiff, having recovered less than desired, failed on a Motion for New Trial. The Court of Appeals affirms the denial of the Motion for New Trial, but in its examination provides facts suggesting what in the past should have been a Summary Judgment case. There, the Plaintiff knew she was diabetic and had not eaten; admitted she was in a hurry; admitted to a store employee she should not have worn the shoes she had worn; had just come in the same door that she later exited; had noticed the walkway was wet as she entered the restaurant; and knew it was slippery and its slipperiness was what caused her fall; and yet the Court simply concludes that "a jury" could have concluded that she failed to exercise ordinary care. 594 S.E. 2d at 691-692. The good news, as a defense lawyer, is that the award, still almost $60,000.00, was only $7,000.00 more than her medical bills, implying that "a jury" must have, at least in part, heard these arguments of the Plaintiff's own fault.

Scot V. Pool is a partner with Forbes & Bowman in Savannah. This article follows the annual update on Georgia law provided at the GDLA Annual Meeting, which was held this year in Sandestin, Florida.

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The Obesity Epidemic: Issues and Potential Product Liability

According to recent reports (McArdle, 2004), we can expect obesity-related lawsuits, most likely class actions, against quick service restaurants and food and beverage manufacturers before the end of the year. The plaintiffs' bar is apparently considering the claims regarding obesity and related conditions and "fast food" and "snack foods" to be analogous to those for which large damage awards have been made related to health effects linked to tobacco (Hirsch, 2004). If the "successful" (for the plaintiffs) tobacco lawsuits provide a road map for plaintiff's lawsuits, the cases will be aimed at sectors of the food industry that provide "fast food" or calorie dense food to consumers. Two areas that may be targeted are the marketing and advertising plans of companies as well as their approach to selling to children.

The plaintiffs' bar is apparently considering the claims regarding obesity and related conditions and "fast food" and "snack foods" to be analogous to those for which large damage awards have been made related to health effects linked to tobacco.

For example, in the only law suit filed to date against a major quick service restaurant chain on the obesity issue, the plaintiffs in Pelman v. McDonald's (US District Court, Southern District of New York) claimed deceptive practices, marketing targeted to induce children to purchase and ingest McDonald's products, negligence in the manufacture and sale of its products and failure to warn consumers of the potential hazards of consuming its products. In his dismissal of the suit, the judge laid out several aspects of these claims where litigation may be successful in the future (Sweet, 2003).

The lawsuits would likely identify overweight and obese consumers as "victims" and the food industry as "perpetrators." The identification of "victims" and "perpetrators" is perhaps a logical outcome of the immense popularity of "fast food" in the American diet and the increasing prevalence of obesity in the population. With over 65 percent of the U.S. adult population classified as overweight or obese (Hedley et al., 2004) and the rapidly rising incidence of overweight in children, the need to address the problem has been identified as a high priority by virtually everyone. Efforts by the government to decrease the prevalence of obesity, such as the development of the Food Guide Pyramid and public guidance documents, have not been successful. Despite thousands of research reports, there is no agreement on the steps to take to control the epidemic. Numerous possible solutions for the obesity epidemic have been identified, but the likelihood of success of any potential strategy is uncertain at this point.

Clearly diet can play a significant role in the development of obesity. However, numerous other factors that could contribute to obesity have been identified, including genetics, level of physical activity, and stress. The relative importance of each factor is undetermined and needs to be assessed in considering the contribution to each individual's body mass index (BMI), as well as to the collective nutritional status of the population. While it is easy to identify food purveyors who provide food to consumers, it does not follow (either legally or scientifically) that because a person is consuming food from a particular source they will become obese. In addition, the concept that certain foods may be addictive has been proposed. Consumers clearly need food on a daily basis, and there are powerful biological mechanisms that promote food consumption as a way of meeting an individual's needs for nutrients. There are important differences in these mechanisms and those that cause addiction.

The food, beverage, and restaurant industries are in business to provide good-tasting products to meet consumer preferences; industry objectives have largely not included directing consumers to those foods that contribute to an overall healthful diet in the context of their individual nutritional needs and lifestyle. Only recently have consumers begun to suggest, let alone expect, that food companies - either individually or collectively - should be responsible for providing solutions to the obesity epidemic. The feasibility of changing the prevalence of obesity by changing the available product array and or marketing approaches of the food industry is not known.

The possible influence of product advertising on children's dietary choices has been of special concern. A variety of factors have resulted in changes to the advertising strategies of some quick service restaurants, including highlighting more "healthful" menu offerings, offering promotional items to increase exercise, and encouraging healthful lifestyles. The impact of such changes on the incidence of obesity remains to be determined. Studies are critically needed that provide a sound scientific basis for any change to policy and for any legal actions.

The potential for law suits and public policy to dramatically impact the sales and revenues of food companies is certain. Whether those lawsuits and policy changes will have any impact of the prevalence

Harriett H. Butchko, M.D.; Barbara Petersen, Ph.D., M.P.H.,
Exponent, Inc.

of obesity is completely unknown. Concern over the enormous implications of such large-scale litigation against the quick service restaurant industry has prompted state legislatures and the U.S. House of Representatives to pursue legislative initiatives to curb recovery for such types of claims (Hirsch, 2004). Such legislation has been passed in Arizona, Illinois, and Georgia and is pending in several other states, including California, Florida, and Ohio. On March 10, 2004, the U.S. House of Representatives passed the "Personal Responsibility in Food Consumption Act," and action is pending in the Senate. This legislation would prohibit bringing civil actions in state or federal courts against manufacturers, distributors, advertisers or trade associations related to an injury or potential injury resulting from a person's consumption of food and consequent weight gain, obesity, or obesity-related conditions.

In considering the legal issues regarding responsibility for obesity and its adverse health implications and how such litigation may evolve, it is critically important to have a better understanding of the scientific issues with obesity. The status of our knowledge is summarized below along with highlights of "what we don't know."

GDLA NOTE: The complete article can be found and downloaded at www.gdla.org/obesity.pdf. A complete list of footnotes and references are available, and the following topics are addressed in the remainder of the article:

What is overweight and obesity, what causes them and how can they be treated?;

What is the prevalence of overweight and obesity in the U.S.?;

Is the problem of overweight and obesity limited to the U.S.?;

Is there a problem with overweight in children?;

Are overweight and obesity just cosmetic issues?;

What factors in today's diets may be related to overweight and obesity?;

What we don't know and what we need to know before legal actions are undertaken.

You may contact the authors through Exponent, a GDLA sponsor, and will find more about their backgrounds in the online version of this article.

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GDLA Summer Board Meeting & Annual Business Meeting Highlights

GDLA Annual Business Meeting Highlights, Sandestin, FL, August 7, '04

Members of the board and past presidents attending were: Rick Rominger, Grant Smith, Johnny Foster, Bob Travis, Warner Fox, Staten Bitting, Jimmy Singer, Jo Jagor, Greg Ellington, Bubba Hughes, Ted Freeman, Lynn Roberson, Jerry Buchanan, Salty Forbes, Bruce Welch, Joe Chambless, Steve Kyle, George Duncan and Walter McClelland.

The meeting was called to order at 8:30 a.m. by Rominger. Foster gave the treasurer's report and indicated that the association had positive cash flow in the past 12 months, was maintaining a healthy bank balance and overall is in excellent financial condition. Forbes gave the report of the nominating committee as follows:

Grant Smith
President;
Johnny Foster
Executive Vice President;
Warner Fox
Secretary/Treasurer;
Rick Rominger
Immediate Past President;
Bob Travis
Vice President;
Staten Bitting
Vice President;
Jimmy Singer
Vice President;
Mel Haas
Vice President;
Lynn Roberson
Director, Northern District;
David Nelson
Director, Middle District;
Clay Ratterree
Director, Southern District;
Ted Freeman
Director, State-at-Large;
Luanne Clarke
Director, State-at-Large;
Art Glaser
Director, State-at-Large

It was noted that Gary Seacrest, Jo Jagor, Greg Ellington, Jim Elliott, George Hall and Bubba Hughes were not up for re-election. The nominees of the Nominating Committee were elected unanimously.

President Rominger made some final comments. He noted:

1. The importance of bringing new blood into the Association and into the Board of Directors.
2. That Executive Director Steve Milano has been a major contributor to our success in the past year.
3. That we have 64 new members, largely attributable to the efforts of Mr. Milano and the Board.
4. That we held our first judicial reception and there will be more.
5. That plans are underway for a workers' compensation academy.
6. That we have cleaned up the Web site, which will be individually password protected.
7. That we have an improved newsletter, which is more helpful.
8. That we have a good renewal rate of members.
9. That we are continuing to build our sponsorship base.
10. That we are holding down meeting expenses and bringing in revenue through sponsorships.

Following President Rominger's final remarks, incoming president Grant Smith presented President Rominger with a gavel plaque as a token of the association's appreciation for his service. Mr. Smith commented that President Rominger had presided over the selection and hiring of Steve Milano and had set a high bar.

Following this, GDLA's State Representative to the DRI, George Duncan, presented President Rominger with DRI's exceptional performance citation.

The business meeting adjourned at 8:50 a.m. and the annual meeting program resumed.

GDLA Board of Directors Meeting Highlights, Sandestin, FL, August 5, '04

1. Call to Order: The meeting was called to order at 6:42 p.m. Attendees: Walter McClelland, Bruce Welch, Bubba Hughes, Salty Forbes, Lynn Roberson, Grant Smith, Ted Freeman, Jerry Buchanan, Steve Kyle, Warner Fox, Rick Rominger, Staten Bitting, Johnny Foster and Steve Milano. Forbes suggested scheduling a board meeting prior to the President's reception each annual meeting to elect new members prior to the annual meeting.

2. Membership: Forbes proposed 21 applicants for membership: Scott Rhodes, Gregory G. Lawton, Dawn G. Benson, Timothy Buckley, III, Zachary R. Cowart, Eric Frisch, Thomas C. Holcomb, Travis D. Windsor, William W. Horlock, Jr., Daniel Huff, Barbara Marschalk, Tara L. Moulds, Laurel Schmitt, Todd E. Schwartz, Kenneth Sico, Douglas G. Smith, Jr., Lee Ann Sparks, Caroline Tanner, Tim M. Tanner, Wayne D. Taylor, and Kenneth Thompson, Jr. Motions were made, seconded and passed that all 21 applicants be elected to membership. Forbes reported the total number of new members admitted this year was 64. Forbes noted only two of the new members were attending this annual meeting and suggested this issue be placed on the fall board meeting agenda.

3. Annual Meeting Committee: Kyle said attendance had been dropping and requested thoughts from the board as to whether we should go back to holding the annual meeting in the spring. discussion but no consensus.

4. Adjourned: Meeting adjourned at 7:08 p.m.

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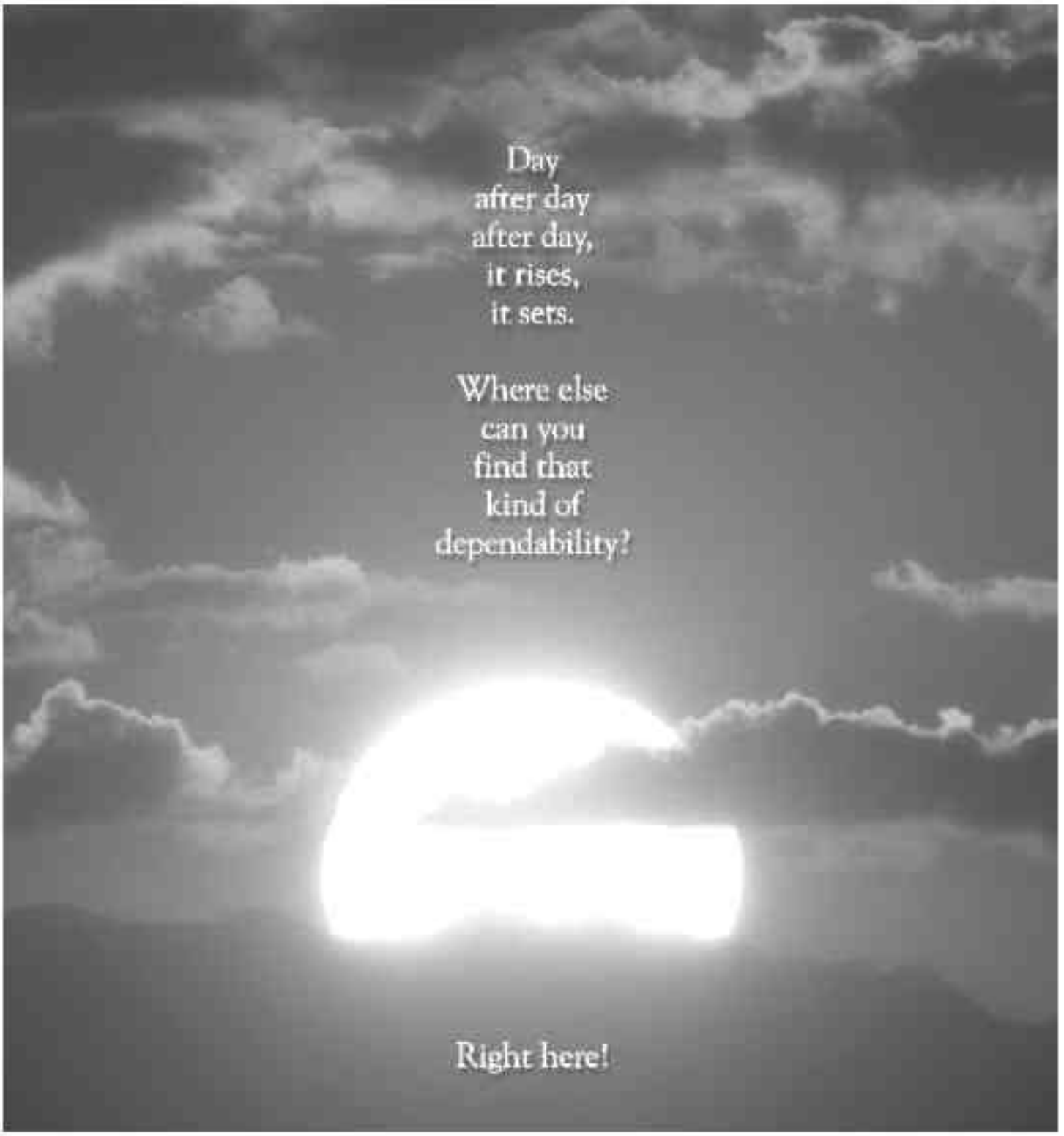

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