Georgia Defense Lawyer ©

Advancing the Civil Defense Bar©

Fall 2006

Metadata—Do you Know What's in your Electronic Documents?

Scenario #1 - A member of a business organization advocating changes to the Social Security program was asked to testify in a government hearing. His testimony included an e-mailed Microoft Word document which included supporting arguments in favor of reform. Unbeknownst to the author, the document also included comments that had been added by an associate commissioner of Social Security working for the White House. The comments revealed that the author – supposedly a non-partisan member of the business community – was receiving guidance from the administration and advocating their position on the matter.

Scenario #2 - An unclassified Pentagon document containing highly sensitive information related to the death of an Italian secret agent in Iraq was exposed. Confidential information, including the names of the secret agent and the name of the US soldier who shot her, were revealed. The document, a Word document containing large sections of redacted text, had been converted to PDF file format. The PDF file was made public by the Pentagon who thought it was secure. However, when the text of the PDF file was copied and pasted back into Word or Notepad, all of the redacted text appeared.

Scenario #3 - In 2004, SCO Group filed lawsuits against Daimler-Chrysler and AutoZone. Metadata revealed that SCO had initially intended to sue Bank of America, but switched defendants. The revelation was made by the media, not opposing counsel.

The culprit in each of these situations? Metadata - which is defined literally as "the data behind the data". Metadata functions as the DNA of all electronic documents. It is data that may not be visible on a printed document, is stored with and travels with the document and thus, may be shared with adverse parties when electronic files are exchanged. Inadvertent disclosure of metadata may be one of the most acute risks facing lawyers today.

What is Metadata?

Metadata is structured information that describes, explains, locates or otherwise makes it easier to retrieve, use or manage an information resource. Metadata can be imbedded in a digital object or it can be stored separately.

Software programs that attorneys and expert witnesses commonly use such as Microsoft Word, Excel and

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Inside This Issue

First GDLA Paralegal Seminar Sells Out

The GDLA's first seminar for paralegals attracted more than 40 paralegals from 30 firms across the state to Manuel's Tavern on November 3rd.

The event was hosted by GDLA sponsor, **Delve Information Resources**, and included presentations on trial preparation, research and time management.

"Delve has been very pleased with our relationship with the GDLA since we became associated with the organization, and we hope to host additional seminars in other cities," said Thad Holway, Delve's director of marketing.

Presenters included **Richonda Scales**, of Huff, Powell and Bailey, **Robin Correll**, of Hall, Booth, Smith & Slover and Delve president, **Jonas Berwick**.

GDLA board member, **Jo Jagor**, Hall, Booth, Smith & Slover, attended the event and welcomed the paralegals on behalf of the association.

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President's Message

What are the goals of the GDLA? First and foremost, we strive to meet the needs of our members by offering valuable benefits. The Web site is the most visible and often-used of those. Most of you know about our blast e-mail system, and you'll be pleased to know that the GDLA office will now be cataloguing responses to help us create a searchable expert witness database. We'll also be providing quarterly case law updates in 12 practice areas. We provide up-to-date information on decisions regarding tort reform issues. Spend a few minutes looking at the topic areas in the site and you will find that it's a very useful tool.

You'll be please to know that the GDLA office will now be cataloguing responses to blast e-mails to create a searchable expert witness database.

Do you need to meet and get to know some of the judges in front of whom you practice? The GDLA hosts a judge's reception every year in Atlanta and we are now branching out into other areas of the state. Last year, we held a reception in Savannah to honor the retiring Honorable Frank Cheatham. This year, we honored Honorable Tommy Day Wilcox in Macon.

Are you interested in working on a committee and working your way up into a position of leadership? Many opportunities exist within the GDLA for just that. Those possibilities have become even broader now that we have formed substantive law committees.

What may be the greatest benefit of the GDLA is the ability to form long-lasting friendships. After all, we do spend a lot of time with other lawyers and probably nothing improves the practice of law as much as increasing civility. By spending time together, we gain respect and trust in each other. To culminate those opportunities, we have an annual meeting that's always held in a beautiful location (such as Ponte Vedra, Hilton Head, Bermuda), and the Annual Meeting not only provides opportunities for CLE, but also plenty of opportunity for conviviality. Next year's annual meeting will be in Amelia Island, Florida, from June 7-10. If you are a member, please plan on attending.

But let's get back to our goals. Our second goal is to grow the GDLA and, while doing that, improve our diversity. For many years, our organization was perceived, probably with some degree of accuracy, as an "old boys club" made up of insurance defense lawyers. That perception is no longer correct, but we still need to do more to change it. First, we have established substantive law committees in many practice areas outside of what would be perceived as the traditional "insurance defense" type of practice. The SLCs include construction, commercial litigation, employment and labor, just to name a few. They provide far-reaching opportunities for lawyers in areas other than "insurance defense" to become involved in the organization. Additionally, not only are we moving forward to make the organization more diverse from the standpoint of practice types, but we are also pushing as hard as possible to make the organization itself more diverse. We are actively seeking to expand our membership among women and minorities and to offer them positions of leadership within the GDLA. A review of the chairs of our substantive law committees will reveal that we are making progress towards the goal of diversity. So, please come join us in growing the organization.

Warner Fox

Member & Legal News

Attorneys & Firms on the Move

Kevin D. Abernethy is now with Hall, Booth, Smith & Slover, Atlanta.

Sandy Fine is now with Cullen Hammond & Associates, Atlanta.

Jo A. Jagor has recently accepted a position with Hall, Booth, Smith and Slover, Atlanta.

Kevin O. Skedsvold and **Craig R. White**, formerly with Donahue, Hoey & Skedsvold, have formed Skedsvold & White, located at 1050 Crown Pointe Parkway, Suite 710, Atlanta, 30338 (tel) 770-392-8610, (fax) 770-392-8620, e-mail: kskedsvold@skedsvoldandwhite.com

Christopher H. Smith is now with Hunter Maclean Exley & Dunn of Savannah.

Rex Smith, Mabry & McClelland, Atlanta, is now mediating at Henning Mediation.

Sharon Stewart is now with Brock, Clay & Calhoun, Marietta.

Anne Allen Westbrook is now with Bouhan, Williams & Levy, Savannah.

Baker, Donelson, Bearman, Caldwell and Berkowitz has moved to 6 Concourse Parkway, Suite 3100, Atlanta, GA 30328.

Balch & Bingham has moved to 30 Allen Plaza, Suite 700, 30 Ivan Allen Jr. Blvd. NW Atlanta, 30308.

Cowsert & Avery has moved to 2405 West Broad St., Ste 250, PO Box 627 Athens, GA 30603, tel: 706-543-7700, fax: 706-543-7731.

Gray, Rust, St. Amand, Moffett & Brieske has moved to 1700 Atlanta Plaza, 950 East Paces Ferry Road, Atlanta, GA 30326

Strawinski & Stout have moved to 3340 Peachtree Road, N.E., Suite 1445, Tower Place 100, Atlanta, Georgia 30326. All other contact information remains unchanged.

Noteworthy

The University of Georgia School of Law's alumni association recently presented its highest honor the **Distinguished Service Scroll Award**, to GDLA past president **Paul Painter**, Ellis, Painter, Ratterree & Adams, Savannah. The award is given annually to individuals whose dedication and service to the legal profession and the law school deserves recognition.

W. "Mel" Haas, III, Constangy, Brooks & Smith, Macon, and **Kirby Gould Mason**, Hunter, Maclean, Exley & Dunn, Savannah, have been elected to become a Fellow of the American Bar Foundation (ABF). The Fellows of the ABF is the preeminent attorney group in the country. Members are selected because of their leadership in the legal profession. Membership in the Fellows is limited to one third of one percent of the lawyers in America. Fellows of the ABF is recognition of a lawyer as one whose professional, public and private career has demonstrated outstanding dedication to the welfare of the community, the traditions of the profession and the maintenance and advancement of the objectives of the American Bar Association.

Steve Gilliam, Smith, Gilliam, Williams & Miles, Atlanta was the commencement speaker at Rabun Gap Nacoochee School at graduation ceremonies.

Matthew Stone, a partner in the Corporate & Governmental Liability Section of Freeman Mathis & Gary, Atlanta, recently presented a training seminar on "Arrests and the Impact of the ADA" at the Annual Conference of North Dakota Peace Officer's Association.

Brian Moore, Drew, Eckl, Farnham, was an A*tlanta Business Chronicle* 2006 Top 40 Attorneys Under 40 nominee. He also received *Atlanta* magazine's 2006 Rising Star Award, along with **Karen Raby Monson**, Alembik, Fine & Callner, (also selected for inclusion in *Metropolitan Who's Who* in 2006), **Lee Ann Anand**, Nelson Mullins Riley & Scarborough, **Josh Archer**, Balch & Bingham, **Jo Jagor**, Hall, Booth, Smith & Slover, **Matt Barr**, Hawkins & Parnell, **Allison Bloom**, Hawkins & Parnell, **Jason Bring**, Arnall Golden Gregory, **Jeff Brown**, Carlock, Copeland, Semler, & Stair, **Sun Choy**, Freeman Mathis & Gary, **Clint Crosby**, Baker, Donelson, Bearman, Caldwell & Berkowitz, **Tom Curvin**, Sutherland, Asbill & Brennan, **Alex Galloway**, Moore, Ingram, Johnson & Steele**Mary Katherine Greene**, Carlock, Copeland, Semler, Stair, **Jack Gresh**, Hall, Booth, Smith & Slover, **Shane Keith**, Hawkins & Parnell, **Kelly Amanda Lee**, Womble Carlyle Sandridge & Rice, **Barbara Marschalk**, Drew Eckl & Farnham, **Brian Moore**, Drew Eckl & Farnham, **David Nelson**, Chambless, Higdon, Richardson, Katz & Griggs, **Jim Painter**, Hull, Towill, Norman, Barrett & Salley, **Mahaley Paulk**, Hawkins & Parnell, **Gregg Porter**, Savell & Williams, **Chris Ray**, Oliver, Maner & Gray, Michelle Rothenberg-Williams, Balch & Bingham, **Shannon Sprinkle**, Carlock, Copeland, Semler & Stair, **Kimberly Stevens**, Hawkins &

Parnell, **Lisa Wade**, Swift, Currie, McGhee & Hiers, and a number of other GDLA members. To see who else made the list, visit www.superlawyers.com.

Joe Chambless has retired from his firm, Chambless, Higdon, Richardson, Katz and Griggs an moved to Newnan. His new contact information is 150 Shoreline Circle, Newnan, 30263 770-683-1147, jchambless@numail.org.

GDLA Attends DRI SE Region Meeting

DRI's 2006 regional meeting was held in Florida in conjunction with the Florida Liability Claims Institute and the Florida Defense Lawyers Association. Alabama, Florida and Georgia were represented. Marc E. Williams, DRI's second vice president, discussed the recent Diversity Seminar held in Chicago and other DRI initiatives. W. Benjamin Broadwater, a partner in the Alford, Clausen & McDonald, law firm in Mobile, gave a topical presentation on hurricane lawsuits. GDLA board member, **J. Bruce Welch**, Hawkins & Parnell, Atlanta, attended. The meeting concluded with reports from the state representatives to help each association garner new information to help manage their associations.

GDLA Commits Funds to NFJE

The GDLA is the Ninth State Legal Defense Organization (SLDO) to Pledge Support to The National Foundation for Judicial Excellence (NFJE), an organization which supports a strong, independent, responsive judiciary by providing officers of the courts with educational programs and other tools that enable them to perform at their highest level. DRI had challenged all SLDOs to pledge financial support. The GDLA Board recently voted to commit $10,000 to NFJE over the next three years. The NFJE appreciates GDLA's generosity and that of SLDOs in Indiana, Kansas, Maryland, Michigan, North Carolina, Ohio, Texas and West Virginia. If you would like to make a contribution or receive further information regarding the NFJE, contact Margot Vetter, NFJE Managing Director, at 312.698.6211 or mvetter@nfje.net.

The NFJE has sponsored two judicial symposia in 2005 and 2006. In July of 2005, the first Annual Judicial Symposium sponsored by the NFJE was held and 136 state appellate court judges from 39 states attended. In 2006, the symposium focused on judicial independence and client privileges. One hundred and thirty eight state appellate judges attended from 38 states. Many of the judges have expressed thanks for the opportunity for the judges to get together at no expense and the fair and balanced programs (in contrast to those sponsored by ATLA's Roscoe Pound Institute).

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Cases of Note

Peter H. Schmidt II, Drew, Eckl & Farnham, Atlanta, recently won a first-party bad faith case. In that matter, an African-American plaintiff sued an insurer, claiming a property claim was improperly denied and the insurer racially discriminated against the insured in the handling of the claim. Mr. Schmidt represented the insurer. The defense contended it denied plaintiff's claim properly, based on evidence of plaintiff's fraud in the claim, inflation of the insured's property loss, that the insured did not use the property as a residential premise and violation of the policy's conditions precedent to suit, including failing to file his lawsuit timely. In addition to the racial matters, the insured/plaintiff claimed he lived in the premises, despite evidence the property was used as a storage facility for business equipment, and there was little to no use of the structure's utilities. Finally, the plaintiff claimed the insurer waived the policy's suit limitation. After the court granted defendant's directed verdict on the bad faith count, a jury of 12 found in favor of the defendant insurer within 30 minutes.

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Henry D. Fellows, Jr., Fellows, Johnson & La Briola, Atlanta, obtained a defense verdict in a jury trial in the Superior Court of Fulton County. The case was brought by a minority shareholder who asserted claims for breach of fiduciary duties and breach of contract against the officers and majority shareholders of the corporations and the corporations themselves. Attorney Fellows represented all defendants. The trial lasted an entire week, and the jury deliberated for three hours before returning a verdict in favor of the defendants on two of the three counts tried to the jury. The trial judge granted a directed verdict as to the remaining count. The plaintiff was seeking more than $300,000 in unpaid dividends and salary, punitive damages and attorneys' fees. Judgment was entered in favor of all of the defendants on January 30, 2006.

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Member & Legal News

James W. Scarbrough, Mabry & McClelland, Atlanta, recently tried an 11-day trial in the State Court of Clayton County which resulted in a defendant's verdict. Bagnell, et al v. Ford Motor Company and Barbara Myers concerned a single-car accident that occurred on July 15, 2001 in Houston, Texas. His client was the driver of a 1991 Ford Aerostar van. The van rolled over while traveling over the San Jacinto River on Interstate 10. The van rolled two times on the bridge before falling into the San Jacinto River. Five people drowned, including three children, and two people, including the driver, were seriously injured but survived. The Plaintiffs were the representatives of four of the deceased passengers and the parents of the surviving child. The Plaintiffs sued Ford Motor Company, alleging Ford negligently designed the van and negligently failed to warn of the hazards of the van when fully loaded. The Plaintiffs also sued the driver of the van for negligence. After 10 days of trial, Plaintiffs withdrew their claim for negligent design and the issues of Ford's negligent failure to warn and the driver's negligence went to the jury. The jury deliberated for approximately six hours during two days. The jury found that Ford was negligent in failing to warn of the hazards with the Aerostar but that Ford's negligent failure to warn was not the proximate cause of the accident. The jury found the driver of the van was not negligent.

Frederick N. Gleaton and an associate of Owen, Gleaton, Egan, Jones & Sweeney, Atlanta obtained a defense verdict in November for an obstetrician and her professional corporation in the State Court of Fulton County. Plaintiff suffered an ectopic pregnancy (her second) which resulted in the loss of her ability to conceive naturally. She contended the obstetrician failed to perform serum quantitative testing for pregnancy in addition to urine pregnancy testing and, therefore, missed the opportunity to diagnose the ectopic pregnancy at a time when her fallopian tube might have been saved with medical or minimally invasive surgical treatment. Trial issues primarily involved the relative reliability of urine versus serum pregnancy testing when ectopic pregnancy is suspected. Plaintiff sought damages for pain and suffering, as well as loss of fertility, and asked the jury for damages in excess of $1 million. The trial lasted five days, with a verdict returned after two hours.

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Brian Moore, Drew, Eckl, Farnham, Atlanta, recently won summary judgment on replacement cost coverage issue in U.S. District Court, Western District of Tennessee; Genuine Parts Company v. Allianz Global Risks U.S. Insurance Company and Lexington Insurance Company.

Lynn M. Roberson, Swift, Currie, McGhee & Hiers, Atlanta, and an associate recently obtained a defense verdict in a security negligence case. The case was styled Leodegario Vega and Carlos Vega v. La Movida, Inc., State Court of Fulton County; Civil Action File No. 04VS070145-B, before the Honorable Patsy Y. Porter. Plaintiffs sued for injuries from a shooting inside a nightclub in Sandy Springs. Plaintiffs were shot by a man known to one or more of them. Plaintiffs sought in excess of $2.5 million in closing argument. The jury returned a defense verdict in less than three hours.

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Lynn also obtained a defense verdict in a product liability case in the State Court of Gwinnett County; Civil Action File No. 04C04014-2, before the Honorable Randy Rich. The case was styled Tommy Murray v. Lakeland Industries, Inc. Plaintiff sued to recover for chemical burns sustained working at a chemical plant producing methyl iodide. Plaintiff was given a protective garment by his employer; however, the garment was not rated for use with methyl iodide. In addition, on the date of injury, plaintiff wore the suit (which had built-in sock boots) without any overboots, walked outside onto a gravel surface, wearing holes in the soles of the feet in the suit, allowing methyl iodide vapors to enter and burn him. Plaintiff claimed in excess of $1 million in past and future medicals and lost earnings. The jury returned a defense verdict in 25 minutes after a four-day trial.

Kenneth Sisco, Hawkins & Parnell, Atlanta recently won a significant construction defect lawsuit. In the case of Sterling Works vs. Dr. George and Jane Cibik, Mr. Sisco represented Sterling Works, a high-end home remodeling contractor, which was terminated approximately three-fourths of the way through a $450,000.00 remodeling project on the Cibiks' house. Sterling Works brought an arbitration claim against the Cibiks for the unpaid contract work. The Cibiks counterclaimed against both Sterling Works and its owner, alleging that they were negligent and breached the contract. In addition to unspecified punitive damages, the Cibiks claimed damages of more than $1.27 million for property damage, contract completion costs, repairs costs and attorney's fees, as well as unspecified punitive damages. The Cibiks' claim included a subrogation claim by

their home owners' insurance carrier which had paid them more than $460,000 for property damage to fine art, furniture, Persian rugs and for mold remediation. The arbitration was bifurcated into liability and damages phases. At the conclusion of the liability phase, the arbitrator dismissed the claims against the Sterling Works' owner and ruled that the Cibiks were in breach. However, the arbitrator also ruled Sterling was both negligent and in breach. Despite this finding of liability against it, Sterling was able to defend the damages claims by presenting evidence the alleged damages were caused by the Cibiks' failure to properly secure the home after they terminated Sterling. Sterling's defense also focused on the Cibiks' failure to prove any causal relationship between their alleged damages and the work of Sterling after more than 20 days of testimony and extensive post hearing.

Premises Liability

In Nevitt v. CMD Realty Investment Fund IV LP, Case No. A06A2143 (Ga.App., Nov. 1, 2006), the Court of Appeals reversed a verdict for the property owner in Nevitt's trip and fall suit, holding, among other things, the trial court erred in admitting an edited version of Nevitt's recorded statement given to the claims adjuster because the recorded statement was given because the adjuster told Nevitt "it was necessary for Nevitt to do so in order for the adjuster to even discuss the matter. Admissions induced by an offer to enter into settlement negotiations are inadmissible as evidence. And even if the adjuster made no such statement, she unquestionably induced Nevitt to give the statement concerning his version of the incident shortly after he sent a proposed settlement letter to CMD. Therefore, although they were not discussing the terms of a settlement agreement, he certainly gave the statement 'with a view to a compromise' of his claim, rendering it inadmissible under OCGA § 24-3-37." Thus, the defense was barred from impeaching Nevitt with his prior inconsistent statement about how the fall occurred when his story changed at trial.

U.S. Supreme Court to Hear GDLA Member's Cert Petition

The U.S. Supreme Court has granted a certiorari petition filed by **Philip W. Savrin**, Immediate Past Chair of DRI's Governmental Liability Committee, and a member of Freeman Mathis & Gary, Atlanta. In *Scott v. Harris*, Case # 05-1631, the court agreed to review the scope of a law enforcement officer's qualified immunity in the context of a high-speed chase.

The case arose on the evening of March 29, 2001, when Clint Reynolds, a deputy sheriff in Coweta County, spotted Victor Harris driving 73 mph in a 55 mph zone. Harris refused to pull over and reached speeds in excess of 100 mphon a two-lane road.

Reynolds radioed ahead that he was pursuing a fleeing vehicle. Deputy Timothy Scott responded he was in the area and would provide backup. When Harris swerved into a strip shopping center, Scott maneuvered his vehicle to block the exit. Harris collided with Scott's vehicle and continued to flee, once again at speeds of 90-100 mph.

Given the perceived danger to the public, Scott obtained approval from his supervisor to make physical contact with the vehicle in a Precision Intervention Technique (PIT) maneuver, a sweeping motion designed to bring a vehicle to a stop by causing it to spin. Scott called off the PIT maneuver due to the high speed, but made contact with the Harris's bumper. He decided to make this contact when no other motorists appeared to be in the immediate area.

After the vehicles made contact, Harris slammed on his brakes and went down an embankment, rolling his vehicle several times. Harris, who was not belted, was rendered a quadriplegic.

Harris brought suit in the U.S. District Court for the Northern District of Georgia under 42 U.S.C. § 1983, claiming violations of federal and state law. The district judge denied qualified immunity to Scott on the Fourth Amendment claim, finding that a jury could conclude that Scott's use of force was unreasonable under clearly established law. The Eleventh Circuit agreed with the district court that fact issues precluded the entry of judgment as a matter of law.

Scott filed a petition for certiorari to the Supreme Court, arguing he used reasonable force to end the pursuit because Harris had demonstrated that he would continue to be a menace on the roads if not stopped. From a public policy perspective, he argued, forcing a police officer to wait until someone is actually in the zone of danger "would exponentially increase the harm to the public that law enforcement officers are sworn to protect. This result is simply untenable."

In granting review, the Supreme Court agreed to consider whether Scott's use of force was "objectively reasonable" under the Fourth Amendment standard, as well as whether the use of deadly force was precluded by "clearly established" law. Oral argument is scheduled for February 2007, and a decision is expected by July.

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Trucking Case Law Update

By John D. Dixon,
Dennis, Corry, Porter & Smith, Atlanta
Chair, GDLA Trucking SLC

The following case law update was provided by the GDLA's Trucking Substantive Law Committee.

R. J. Kolencik v. The Stratford Insruance Co., No. 06-12136, 2006 U.S. App. Lexis 21964 (11th Cir. Aug. 28, 2006) (unpublished)

Plaintiff obtained a judgment against a carrier. Plaintiff filed suit seeking to enforce the judgment against Stratford Insurance Company. Stratford filed a motion for summary judgment on the grounds that its policy was canceled several months prior to the accident. Plaintiff contended Stratford could not rely upon the cancellation because it failed to comply with O.C.G.A. § 46-7-12. However, the carrier never registered with the State. The district court granted summary judgment. The Eleventh Circuit affirmed, holding "[h]ad Stratford attempted to file a notice of cancellation with the State, it would have been rejected and returned. . . . We agree with the district court that the law cannot require an impossible act." 206 U.S. App. Lexis 21964, at *3-4.

Knight v. Swift Transportation Co., Inc., Civ. No. 1:05-CV-1060-JEC, 206 U.S. Dist. Lexis 56551 (11th Cir. July 31, 2006)

Plaintiff alleged that a Swift tractor-trailer pulled in front of him causing his vehicle to leave the roadway and overturn. There were no witnesses to the accident. When investigating officers questioned the plaintiff on the scene about the accident, he could only describe the other vehicle as a truck. One week later, he saw a Swift tractor-trailer. He then identified Swift as the motor carrier that ran him off the road. Swift moved for summary judgment arguing the plaintiff presented no evidence that Swift owned, hired or borrowed the tractor-trailer and that there was no evidence any agent or employee of Swift was driving the truck. The district court granted Swift's motion holding Georgia law "provides that, as plaintiffs have produced no evidence that defendant Swift owned or leased that tractor-trailer, or that one of its agents was driving the truck, plaintiff cannot prevail." 206 U.S. Dist. Lexis 56551, at *17.

Altadis U.S.A., Inc. v. Sea Star Line, LLC, et al., 458 F.3d 1288 (11th Cir. 2006)

Plaintiff contracted with Sea Star to transport a shipment of cigars from Puerto Rico to Tampa, Florida. Sea Star issued an ocean through bill of lading upon receipt of the shipment in Puerto Rico. Sea Star handled the ocean carriage. Sea Star contracted with American Trans-Freight (ATF) to handle the inland carriage. ATF took possession of the cargo, and it was subsequently stolen. Both carriers moved for summary judgment on the grounds that plaintiff failed to bring suit within the one year statute of limitations provided by the Carriage of Goods by Sea Act ("COGSA"). The district court granted the motion. The Eleventh Circuit affirmed, holding "[i]n the absence of a separate domestic bill of lading covering the inland leg – the Carmack Amendment, and its two-year minimum statute of limitations, does not apply to this maritime contract covering the shipment pursuant to a single through bill of lading which governs the ocean voyage from Puerto Rico to Jacksonville and also the inland transportation to Tampa." 458 F.3d at 1294.

Frey v. Gainey Transp. Servs., Civ. No. 1:05-CV-1493-JOF, 2006 U.S. Dist. Lexis 59316 (N.D. Ga. August 22, 2006)

The accident occurred on November 10, 2003. On November 20, 2006, Frey's attorney sent Gainey's safety director a spoliation letter which requested the preservation of many documents, including all Qualcomm records. The Qualcomm satellite records were not retained. Plaintiff moved to strike Gainey's answer or, in the alternative, receive a jury instruction for spoliation of evidence. The district court applied the five factor analysis set forth by the Georgia Court of Appeals in *Bridgestone/ Firestone North American Tire, LLC v. Campbell*, 258 Ga. App. 767 (2003). The district court denied the motion finding the Plaintiff "has already secured testimony from the driver as to his activities on November 9-10. . . [and the Qualcomm data was irrelevant] "to the allegedly unsafe practices of Gainey's other truck drivers and therefore [the data] would not advance" her claims of negligent supervision and punitive damages. 2006 U.S. Dist. Lexis 59316, at *23.

Products Liability Case Law Update

By Franklin P. Brannen,
King & Spalding, Atlanta
Vice Chair, GDLA Products Liability SLC

The following case law update was provided by the GDLA's Products Liability Substantive Law Committee.

Caldwell v. Howard Indus., Inc., 2006 U.S. Dist. LEXIS 45711 (M.D. Ga. July 6, 2006)

The defendant Howard Industries moved to exclude the testimony of plaintiff's expert witness M.T. Harrelson in this product liability matter arising from an allegedly defective bolt in a transformer lifter. In addition, Howard Industries moved for summary judgment.

In his Daubert analysis, Judge Clay Land found that Harrelson, a Georgia Tech graduate who had worked for Georgia Power for 28 years, was qualified to offer his opinions. In addition, Harrelson used a proper methodology by interviewing witnesses and examining the bolt at issue. Accordingly, Howard Industries' motion to strike was denied, and with these opinions from Mr. Harrelson, plaintiff had sufficient evidence to prevail on the motion judgment motion.

Johnson v. Ford Motor Co., 2006 U.S. Dist. LEXIS 843 (Ga. Ct. App. July 7, 2006)

This automotive product liability case before the Georgia Court of Appeals involved two issues: (1) when does the statute of repose begin to run – on the date of manufacture, the date of sale, or at some other time; and (2) does a negligent failure to warn claim require bodily harm. The lawsuit arose from a car fire that plaintiff contended was caused by a defective switch in the car. There was no claim for personal injury, only property damage. Statute of Repose: The analysis of the statute of repose issue involved an examination of the phrase "first sale for use or consumption" in O.C.G.A. § 51-1-11(b)(2). The defendants argued that the statute of repose began to run when the car was usable, i.e., drivable off the assembly line. Plaintiff contended that the statute should not begin to run until the sale to the consumer. The court of appeals held that the statute of repose began to run from the time manufacture, when the car became "usable" – not from the date of sale to the consumer.

Negligent Failure to Warn: The trial court, relying on *Fluidmaster, Inc. v. Severinsen*, 238 Ga. App. 755, 520 S.E.2d 253 (1999) (physical precedent), had granted summary judgment to Texas Instruments because the plaintiff failed to show any physical harm arising from the alleged failure to warn. But the Court of Appeals found Fluidmaster to be unpersuasive. Instead, the court looked to section 7 of the Restatement (Second) of Torts and concluded that physical harm can include damage to property. Thus, "bodily harm" is not required to maintain a claim for negligent failure to warn.

For the entire case law update, visit the GDLA Web site (www.gdla.org) enter the Members Area, and visit the Products Liability section of the Brief Bank.

Employment Law Case Law Update

By Catherine M. Bowman,
Forbes & Bowman, Savannah
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The following case law update was provided by the GDLA's Employment Law Substantive Law Committee.

Burlington Northern & Santa Fe Railway Co. v. White, 548 U.S.;126 S.Ct. 2405, 165 L.Ed.2d 345 (June 22, 2006)

This Supreme Court case, while technically decided prior to this quarter, is important enough to address here. The Burlington case has clarified "retaliation" under Title VII –previously some Circuits required the same standard for retaliation that they apply to a substantive discrimination offense, holding that the challenged action must "result in an adverse effect on the 'terms, conditions, or benefits' of employment." Other circuits included behavior that would have been material to a reasonable employee, and others required an "ultimate" employment decision such as hiring, firing and demotion. Justice Breyer wrote that the anti-retaliation statute in Title VII, is not limited to stopping employment related behavior, but also forbids behavior that might occur outside the workplace. The court also determined however, that only those employer actions that would have been materially adverse to a reasonable employee or job applicant would be covered. Reassignment of duties can potentially constitute retaliatory discrimination within scope of Title VII retaliation provision, even though unaccompanied by demotion or change in pay – whether the reassignment rises to the level of retaliation will depend on whether it is materially adverse to a reasonable employee.

Metropolitan Atlanta Rapid Transit Authority v. Mosley; --- S.E.2d ----, 2006 WL 1914633 (Ga.App.), 06 FCDR 2405, July 13, 2006

Plaintiff was one of 600 employees supervised by the individual defendant. The defendant supervisor had previously had two grievances filed against him by other female employees. The Plaintiff contended that as she was walking into the dispatch office, the defendant supervisor appeared to wish to shake her hand, but as the Plaintiff took his hand, the supervisor allegedly spun her toward him so that her backside was compressed against the front of his body, he rubbed his hand along her side between her waist and underarm, squeezed her waist, "moaned" and then smiled. The interaction lasted for approximately two seconds. The supervisor later admitted hugging Plaintiff and denied the remaining allegations. Plaintiff filed an internal complaint and the supervisor was reprimanded and ordered to go to counseling. Plaintiff then sued the supervisor, and her employer, MARTA.

The Court of Appeals affirmed a granting of summary judgment on Plaintiff's claim of intentional infliction of emotional distress holding that although crude and inappropriate, the supervisor's actions did not rise to the necessary level to become intentional infliction of emotional distress - only appropriate "when a defendant's conduct is so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community".

However the Court of Appeals did state that the action for battery could be supported by even minimal touching. The Court held that "generally speaking, an "unlawful touching" is one which is offensive, and an "offensive touching" is one which proceeds from anger, rudeness, or lust; the test is what would be offensive to an ordinary person not unduly sensitive as to his dignity". Therefore summary judgment was not appropriate for the battery claim against the supervisor. Because MARTA had notice of the supervisor's tendencies to be sexually inappropriate, neither was summary judgment appropriate for the negligent retention claim against it, as it related to the battery claim.

Plaintiff also brought a claim against MARTA alleging that it failed to provide safe work environment but did not allege that her supervisor ever placed her in fear of her physical safety.

The court held that the duty imposed upon an employer to provide its employees with a safe working environment contemplates safety in the physical sense; that is, the workplace be organized and maintained in such a manner as to minimize the likelihood of physical injury. As Plaintiff's physical safety was not threatened, summary judgment on behalf of MARTA was appropriate for this claim.

Remediation Resources, Inc. v. Balding;--- S.E.2d ----, 2006 WL 2271261 (Ga.App.), 06 FCDR 2590 (Aug. 9, 2006)

Gassaway v. Precon Corp.;--- S.E.2d ----, 2006 WL 1882673 (Ga.App.), 06 FCDR 2332 (July 10, 2006)

These cases arose from automobile collisions in which the employer was sued under the theory of respondeat superior, and the Courts had to determine whether the employee was in the scope of employment.

For the entire case law update, visit the GDLA Web site (www.gdla.org) enter the Members Area, and visit the Employment Law section of the Brief Bank.

Mass Torts Case Law Update

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The following case law update was provided by the GDLA's Mass Torts Substantive Law Committee.

Parallels Between O.C.G.A § 51-14-2's "Prima-facie Evidence of Physical Impairment" and O.C.G.A. § 9-11-9.1's Affidavit Requirement

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There are no new appellate decisions involving environmental or mass toxic tort cases this quarter. The retroactive application of Georgia's Asbestos and Silica Claims Act (the "Act") to pending cases remains in question until a decision is issued in the consolidated appeals from the State Court of Cobb County in the Ferrante matter.

One of the more significant developments arising out of the Act is the requirement that a plaintiff must establish, as an essential element of their claim, "prima-facie evidence of physical impairment" as defined pursuant to O.C.G.A. § 51-14-2(15) and 51-14-2(16). Though no case law exists from which the environmental and mass toxic tort practitioner can draw guidance, certain similarities exist between the detailed medical narrative report required under O.C.G.A. § 51-14-2(15)(B) and (16)(B) and the affidavit required in medical malpractice actions brought pursuant to O.C.G.A. § 9-11-9.1.

Georgia's Asbestos and Silica Claims Act requires that a plaintiff asserting an asbestos or silica claim must establish prima-facie evidence of physical impairment as an essential element of their claim. Generally speaking, prima-facie evidence of physical impairment is established when a board certified physician has signed a detailed medical narrative report and diagnosis stating that the claimant suffers for an asbestos-related malignant or non-malignant disease, and that exposure to asbestos was a substantial contributing factor to the diagnosed disease. Similarly, O.C.G.A. § 9-11-9.1 requires that a plaintiff asserting a claim for medical negligence must file with their complaint an affidavit of an expert, competent to testify, specifically setting forth at least one negligent act or omission alleged to exist as well as the factual basis for each claim asserted. The applicability of the Act's prima-facie evidence of physical impairment requirement is currently before Georgia's Supreme Court, and there are no reported cases from which to ascertain what does or does not constitute a sufficient showing. This does not, however, prevent an examination of O.C.G.A. § 9-11-9.1's affidavit requirements for the potential application to the Act.

In both O.C.G.A. § 51-14-1, et seq. and O.C.G.A. § 9-11-9.1, the initial expert showing is an essential element of the plaintiff's claim, and any plaintiff failing to meet this showing has their claim dismissed. The expert witness who signs the 9-11-9.1 affidavit must meet several key criteria, and the absence of any one criteria renders the entire affidavit insufficient as a matter of law. Under § 9-11-9.1, the expert must have either actively practiced or taught in their profession for at least three of the past five years. The expert must also be a member of the same profession against whom the affidavit is being offered; however, a doctor of medicine may offer an affidavit against a doctor of osteopathy regarding the standard of care, and vice versa. O.C.G.A. § 24-9-67.1(c)(2)(C).

The Act's criteria as to who may sign the medical narrative report are a bit more extensive. The first criteria is that the individual must be a "qualified physician." O.C.G.A. § 51-14-2(17). A qualified physician is one who spends no more than 10 percent of the professional time consulting or providing expert services in connection with legal actions; receives payment from either the patient/claimant or that individual's health maintenance organization, and does not require that as condition of the evaluation and diagnosing of an asbestos or silica-related disease the claimant retain legal services. Id. Once the initial requirement of being a qualified physician has been met, the qualified physician must also be board certified in either internal medicine, pathology or pulmonology. O.C.G.A. § 51-14-2(4) – (6). Under the Act, even those individual who serve as B-readers must be qualified physicians. O.C.G.A. § 51-14-2(7).

O.C.G.A. § 51-14-2's qualified physician requirement is narrower than O.C.G.A. § 24-9-67.1's same profession requirement in that qualified physicians are restricted to just 3 specialties; internal medicine, pathology, and pulmonary medicine whereas under § 24-9-67.1, a qualified medical doctor belonging to specialty A can render an opinion as to the acts or omissions of a qualified medical doctor in specialty B so long as the expert A's opinion pertains to expert A's specialty. See Cotten v. Phillips, __ Ga. App. __ (Case No. A06A0014, decided July 6, 2006). See also Abramson v. Williams, __ Ga. App. __ (Case No. A06A1493, decided September 20, 2006 citing with approval Cotton).

For the entire case law update, visit the GDLA Web site (www.gdla.org) enter the Members Area, and visit the Mass Torts section of the Brief Bank.

Construction Case Law Update

By Ken Sisco,
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The following case law update was provided by the GDLA's Construction Substantive Law Committee.

Clive et al. v. Gregory et al. Aim Land, Inc. v. Clive et al., 2006 Ga. App. LEXIS 880; 2006 Fulton County D. Rep. 2394

This case is significant in that it holds that government building inspectors can no longer rely upon the public duty doctrine as a defense. That doctrine holds that where the duty owed by the government runs to the public in general and not to any particular member of the public there is no duty upon which liability may be attached. This defense was extended to building inspectors in *City of Lawrenceville v. Macko*, 211 Ga. App. 312, 315 (2) (439 SE2d 95) (1993).

The Court of Appeals in Clive, however, reasoned that the Georgia Supreme Court's rulings in City of *Rome v. Jordan*, 263 Ga. 26, 27 (1) (426 SE2d 861) (1993) and subsequent cases such as *Hamilton v. Cannon*, 267 Ga. 655, 656 (1) (482 SE2d 370) (1997) limited the application of the public duty doctrine to police protections not police powers and held that the extension of the public duty doctrine to building inspectors in the *City of Lawrenceville* was inconsistent with these Supreme Court decisions and therefore overruled.

Progressive Plumbing, Inc. v. Abco Builders, Inc., 2006 Ga. App. LEXIS 1209; 2006 Fulton County D. Rep. 3041

Progressive Plumbing illustrates the narrow the scope of review for courts hearing motions to vacate an arbitration award. The case involved a dispute between a general contractor and a subcontractor over money due on a construction project. The general contractor and the subcontractor arbitrated their claims which resulted in a net arbitration award of $ 60,249.67. to the subcontractor.

The subcontractor moved to confirm the award and the general contractor moved to vacate the award. The superior court held a hearing on both motions where the parties stipulated to the presentation of all of the documentary evidence presented at arbitration. The trial court also heard testimony from one the general contractor's expert witness. Ultimately the trial court vacated the arbitration award on the grounds that the arbitrator manifestly disregarded the law.

The Court of Appeals held that trial court exceeded the scope of its authority because it reviewed the sufficiency of the evidence before the arbitrator. The Court of Appeals held that since the arbitration hearing was not transcribed and the award was silent as to the law it applied, the court was without authority to vacate the arbitrators' award on the ground that they manifestly disregarded the law.

Taylor v. S&W Development, Inc., 279 Ga. App. 744; 632 S.E.2d 700; 2006 Ga. App. LEXIS 693;

This was a personal injury matter where the plaintiff attempted to overcome the eight-year statute of repose provided for by *O.C.G.A.* § 9-3-51 (a) by alleging claims for failure to warn claims and subsequent independent acts of negligence.

In *Taylor*, the plaintiff was injured in May 2004 when he fell through a pub's plate glass window. The window was originally installed during a 1990 renovation project performed by defendant S & W Development, Inc. ("S&W"). Plaintiff alleged that the window violated the applicable law because its size and proximity to the floor required it to be made of tempered or safety glass and not plate glass. S & W also performed renovation work at the pub in 1995 and 1996, which involved removing and reinstalling many of the windows installed in 1990, but not the window that plaintiff fell through.

Plaintiff tried to overcome the statute of repose by arguing that his claim was a failure to warn claim and therefore a continuous tort to which the statute of repose did not apply. Plaintiff also argued that S&W failure to replace the window during the 1995 and 1996 projects constituted independent torts which fell within the statute of repose. The trial court rejected both arguments and the Court of Appeals affirmed.

Premises Liability Case Law Update

By C. Shane Keith,
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The following case law update was provided by the GDLA's Premises Liability Substantive Law Committee.

On February 13, 2006, the Georgia Supreme Court issued its opinion in *Alexander Properties Group, Inc. v. Doe, et al.*, 280 Ga. 306, 626 S.E.2d 497 (2006). Doe addressed the ability of a civil defendant to obtain evidence for use in its defense of a premises liability lawsuit, which otherwise would be considered illegal child pornography. In Doe, the Plaintiffs alleged that Jane Doe, who was 13 years old at the time, was the victim of a "gang rape/sexual molestation" on the premises of the Forrest Creek Crossing Apartments in Marietta, Georgia. Defendant Alexander Properties Group ("APG") managed the Forrest Creek Crossing Apartments at the time of the alleged sexual assaults. The Plaintiffs brought suit against APG, as well as the owner of the premises, Charleston Trace, LP, alleging that both were liable to Jane Doe under a negligent security/premises liability theory.

During the investigation of the criminal acts, a videotape made by some of the perpetrators was discovered by the Cobb County Police Department. The Police Department seized the videotape and it was used in the prosecution of the criminal matters. The tape was maintained by the Cobb County District Attorney, Patrick Head. After the filing of the civil lawsuit, APG attempted to obtain a copy of the videotape, first by obtaining the consent of the Plaintiff's counsel for the trial court to enter a consent order ordering the Cobb District Attorney to turn over the tape. Later, the Plaintiff reneged on that agreement and subsequently fought APG's attempts to obtain the tape. Additionally, APG served upon the Cobb County District Attorney requests pursuant to the Georgia Open Records Act, and subsequently served a non-party request for production of documents pursuant to O.C.G.A. § 9-11-34.

While the District Attorney made the videotape available for viewing by counsel for both the Plaintiffs and the Defendants in his office, and with one of his staff members present, he refused to produce the videotape in any form or fashion pursuant to any of the requests or the court order. The District Attorney ultimately filed a motion for a protective order seeking to be excused from producing the videotape. The District Attorney argued, among other things, that giving the tape to counsel for APG would amount to felonious conduct under O.C.G.A. § 16-12-100(b)(5) and the possession of the videotape by counsel for APG would be a felony under O.C.G.A. § 16-12-100(b)(8). The State Court of DeKalb County, the trial court, held a lengthy hearing on the motion for protective order and ultimately issued an order granting that motion, stating that to require the District Attorney to "produce" the videotape pursuant to the non-party request for production, would require that the District Attorney commit a felony by turning the tape over. APG sought a Certificate of Immediate Review, which was granted, and because constitutional challenges had been made against the statutes at issue, sought an interlocutory review before the Georgia Supreme Court, which was granted.

In arguing against the entry of the motion for protective order, APG first argued that the statute was inapplicable to the conduct at issue, namely the "production" of the evidence pursuant to a lawful discovery request issued pursuant to the Georgia Civil Practice Act. Additionally, APG argued that if the statute was applicable to the conduct at issue, then the statute was unconstitutionally overbroad and infringed upon a number of constitutionally-protected rights.

In its order, the Georgia Supreme Court agreed the first argument put forth by APG, and held that "O.C.G.A. § 16-12-100(b)(5) does not make criminal the act of producing the videotape in response to a court order or a request for discovery." Doe, 280 Ga. at 308. The Court reasoned that "while the statute expressly prohibits one from creating, reproducing, publishing, promoting, selling, distributing, giving, exhibiting, or possessing with the intent to sell or distribute the videotape at issue, one who receives a request for discovery is asked to produce documents or things, an action not listed in O.C.G.A. § 16-12-100(b)(5)." Id. According to the Court, because of the express mention of a series of prohibited acts, it was assumed that the legislature did not include those acts which were not expressly listed. Because the word "produce" has "distinct meaning in judicial and quasi judicial proceedings that the General Assembly has repeatedly recognized" the Court reasoned that the failure of the General Assembly to include that term in the criminal statute meant that the act of producing evidence pursuant to a lawsuit court order or discovery request was not conduct that was subject to criminal liability. In so ruling, the Court relied upon two principals of statutory construction, "Expressum Facit Cessare Tacitum" (if some things are expressly mentioned, the inference is stronger that those omitted were intended to be excluded), and "Expressio Unius Est Exclusio Alterius" (the express mention of one thing implies the exclusion of another), and held that the omission of the word "produce" from O.C.G.A. § 16-12-100(b)(5) was to be "regarded by the courts as deliberate." Id.

Don't Judge a Crimp by its Cover

Scott G. Davis, Andrew Diamond, Wills Gans,
Peter Hinze and Harri Kytomaa
Exponent Failure Analysis Associates

In more than 10 years of manufacturing, a problematic pattern began to emerge for five different models of portable electrical appliances. The appliances were returned for service to the manufacturer with electrical failures. Initially, the exact cause was unknown despite preliminary investigations by the manufacturer. When the recurring failures became associated with a fire hazard, however, the manufacturer immediately assembled an engineering team to look in to the cause of the failures.

To begin the investigation, the team inspected twenty-seven service-returned appliances, revealing a consistent pattern of failure. Specifically, the failures occurred on the insulated crimp connectors on the power cord or neutral wires, and were characterized by discoloration of the crimp connector insulation (see Fig. 1). These observations were consistent with overheating of the connector at the junction between the wire and the crimp connector. In a few cases, the connector insulation and surrounding material ignited, resulting in fire damage to the connector and unit. Determining the cause of the connector failures required a detailed investigation of the crimp connections.

The appliance design called for 16 AWG and 18 AWG stranded multiconductor wiring, rated to 105°C. The 16 AWG wires carried the full electrical load (nominally 1,500 W) and were comprised of the power cord and neutral wires. All power wiring was fastened to the appliance with crimped, quick-connect flag-type connectors. The manufacturer outsourced assembly of all wires and crimp connections to overseas suppliers.

The appliance power cord used insulated crimp connectors exclusively, while the internal neutral wires had either insulated or uninsulated crimp connectors, depending on model design. Electrical measurements conducted on new units supplied by the manufacturer indicated a maximum load current of 12.5 A on the 16 AWG power cord, neutral wires, and associated connectors. Under normal operation, the appliance was designed to operate under cyclic conditions (meaning the appliance shut off when a given set point was reached); however, the appliance continuously operated at maximum load in certain extreme cases when the set point was not attained.

Investigation

The team examined 20 crimped connectors from the service-returned units under a microscope to qualitatively determine the crimp quality. The 20 connectors chosen were representative of all of the 16 AWG connectors found in the appliance (power cord and internal neutral wire, insulated and uninsulated connectors) at various degrees of failure. In addition to the 20 connectors from the returned units, the engineers examined four unused connectors. These unused crimp connections were randomly chosen from batches that were pre-assembled by the overseas suppliers and recently delivered to the appliance manufacturer for installation.

To prepare the connectors for microscopic examination, they were encapsulated in an epoxy resin and cured for approximately 10 hours. With the epoxy resin set, the connector was sectioned roughly in half at the area of interest, revealing the cross section of the crimp (see Fig. 2). Each cut surface was polished to a 0.05-µm finish. After polishing, the crimp cross sections were examined and photographed under an optical microscope with a 6X objective lens.

Observations

All observed failures occurred in the crimps of the insulated power cord or neutral wire connectors, which carry the maximum current load. These failed connectors show evidence of prolonged overheating, and in certain cases, fire damage. Furthermore, the failed connectors consistently exhibited other notable defects that were only detectable using the cross-sectional analysis, such as limited deformation of the crimped connector, limited deformation of the conductor wire strands inside the crimp, and significant void fraction (limited contact surface) of the conductor wire strands within the crimped connector.

The sectioning also revealed that some connectors consisted of stranded wire that was pre-soldered before crimping, which was not specified by the manufacturer. Wire that was pre-soldered resulted in minimal deformation of the crimp, and reduced contact area between the conductor and the connector. Another notable observation revealed that failure did not appear to be wire specific, because failure was observed in both the stranded wire and the pre-soldered stranded wire configurations. Failures did, however, appear to be connector specific with no failures observed in uninsulated quick-connect flag-type connectors. More specifically, the crimp quality in uninsulated connectors was observed to be superior to insulated connectors.

Uninsulated crimp connectors exhibited increased deformation and proportionately increased surface contact and a lower void fraction as compared to their insulated counterparts (see Fig. 4). The curvature of the crimped connector is indicative of a greater crimping efficacy, as demonstrated by the degree

Continued on page 16

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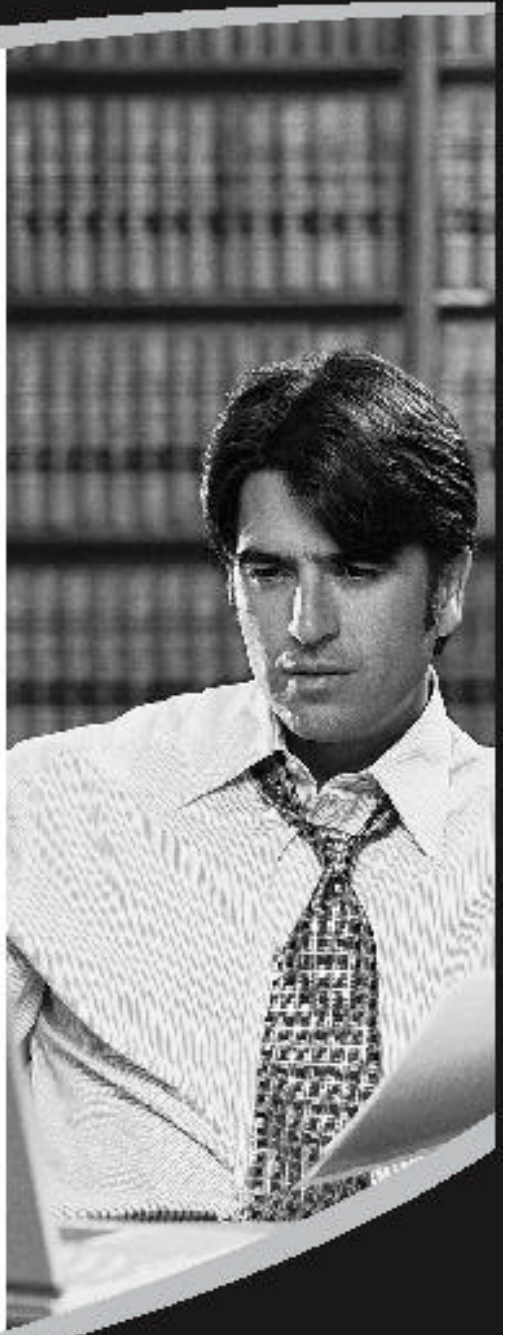

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Don't Judge a Crimp by its Cover

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of deformation of both the connector and the conductor strands within.

In addition to the failed connectors, unused insulated connectors from the power cord and neutral wire assemblies as received from the overseas suppliers were sectioned and examined. These connectors exhibited the same poor crimp quality and high variability between crimps seen in the failed service-returned connectors. The poor crimping was characterized by limited contact between the conductor wires and crimped connector.

Analysis and Conclusions

Failure of the appliances was due to improperly formed crimps in the insulated connectors. The uninsulated connectors did not experience failure.

The crimp quality, as qualitatively evaluated by optical microscopy of the crimp cross section, was markedly higher for the uninsulated connectors
than the insulated connectors. Poor crimping in the failed connectors led to a decrease in contact area between the connector and the wire conductors, which in turn was accompanied by an increase in the associated contact resistance. This caused additional heat generation at the crimp, and, over time, failure of the connector and the unit. In certain cases this overheating led to ignition of the connector and unit, resulting in a fire hazard.

Contact resistance varies as a function of time and depends on the size and shape of the mating contacts, vibration, temperature, moisture, and other factors.1 Contacts exposed to long-term high temperatures experienced the buildup of an oxide layer, which progressively increases contact resistance, further increasing the temperature. Units that exhibited inadequate crimping did not necessarily fail, as appliance failure was strongly dependent on the cycle use of the product.

Recognizing that price competition often results in the outsourcing of electrical components, this study showed how important it is not only to use reputable suppliers, but also to consider incorporating destructive testing methods in electrical component evaluation. Destructive testing is particularly helpful due to the inherent difficulties in visually evaluating the crimp quality of insulated quick connectors. Examination of randomly sampled crimp connections using the microscopic inspection technique as employed in this study can provide valuable information regarding the quality of the supplier's assembly process. These measures help to ensure the reliability of crimp connections and greatly reduce the potential risk of product failure and, in some cases, fire hazards.

REFERENCE
1 Medora, N. K., Electronic Failure Analysis Handbook, New York, NY: McGraw-Hill (1999).

Scott G. Davis, Andrew Diamond, Wills Gans, Peter Hinze and Harri Kytomaa are with Exponent Failure Analysis Associates. For more information on this article, including a .pdf with additional photographs, contact Scott Davis at 508-652-8557 or daviss@expo - nent.com.

This article originally appeared in the October 2004 issue of Connector Specifier *magazine.*

Hydroplaning and Loss of Skid Resistance Caused by Highway Pavement Defects

Hydroplaning and loss of skid resistance are well-known causes of fatal automobile incidents. During abnormally heavy rainfall, water can build up on well-constructed, properly mixed pavements. Persons traveling at normal, but significant sppeds (40 MPH or higher), with proper tire tread depth can experience hydroplaning and loss of skid resistance. When a relatively new highway surface collects water or loses its skid resistance during light rainfall, a defect is most probably present in the pavement. This paper will discuss and summarize the findings of several forensic investigations into Portland Cement Concrete (PCC) and Hot Mix Asphalt (HMA) pavement defects that caused hydroplaning, or the loss of skid resistance.

Portland Cement Concrete Pavements

The most common indicators relied on by state DOT personnel and highway contractors to determine if a PCC pavement is acceptable is the amount of slump of the wet PCC mix (determined on-site), the percent air entrainment in the wet PCC mix (determined on-site), and the compressive strength of the hardened concrete, usually tested at 7-, 14- and 28-day intervals after the PCC has been placed. These tests cannot be relied upon to determine the quality and quantity of the aggregates (rocks and sand) and other additives with regards to skid resistance and hydroplaning. Nor can these tests determine if the PCC was properly placed on-site.

PCC pavement mix design defects and placement problems that cause skid resistance and/or hydroplaning problems include:

•*Polishing Aggregates:* The use of limestone, dolomite and other soft aggregates that polish under traffic loading must be forbidden or controlled. Over time, the PCC pavement surface will become polished, providing little or no skid resistance.

•*Improper Fine Aggregate (Sand) Size and Shape:* The quality of the fine aggregates is most important in PCC pavement. If the size and shape are not as specified in the construction specs, the bond between the sand and the cement could weaken, causing the surface to polish.

•*Improper Finishing of PCC Pavement:* Once a PCC pavement is placed, it is usually machine finished before grooving or tining. However, when the surface is finished with hand trowels, the potential to overwork the surface is present. Overworking the PCC pavement finish with a hand trowel may cause an undesired change in the water/cement ratio at the surface. As a result, the concrete surface may spall in the wheel tracks, causing loss of skid resistance, or the ponding of water.

•*Placement of PCC Pavement in Cold Weather:* While not routinely a problem, especially in the southern half of the United States, there are cases where PCC pavements were placed in cold weather (less than 40° F) and problems occurred. These situations involve the use of high, early strength concrete in order for traffic loads to be applied within hours of the placement of the PCC pavement. The temperature of the water in a PCC mix is critical to the bonding of the cement to the aggregates. It should be at least 50° F. Because the water temperature on an investigated PCC pavement was to low to properly bond the cement to the aggregates (approximately 33° F), water collecting ruts formed in the wheel tracks when traffic loads were applied.

Hot Mix Asphalt Pavements

Because HMA pavements are cheaper to construct and maintain, most interstate, state and county highways use them. While the polishing of the HMA pavement will occur with the use of improper aggregates, HMA pavements are more susceptible to rutting. Rutting will occur if any one of several mix design variables is adversely changed or if the contractor improperly places the pavement. Because of the susceptibility of HMA pavements to rutting (and hydroplaning), greater care must be during design and construction.

HMA pavement mix design defects and placement problems that cause skidding, rutting, and hydroplaning problems include:

•*Excessive Asphalt Cement (AC) Content:* Excessive AC will fill voids in the HMA pavement intended to provide stability to the HMA pavement under traffic loading. The HMA pavement will become "plastic" and ruts will permanently form in the wheel tracks. Evidence of excessive AC content are rutting (as mentioned), and large, hardened spots of bleeding asphalt cement.

•*High Dust/Asphalt Weight Ratio:* The normal range for this ratio is 0.6 to 1.2. When too much dust (smaller than 200 sieve) is added to the mix, the ability of the AC to bond with the fine and course aggregates is lessened, resulting in cracking and rutting.

•*Polishing Aggregates:* Using limestone, dolomite and other soft aggregates that polish under traffic loading must be forbidden or controlled. Over time, the HMA surface will become polished, providing little or no skid resistance.

•*Improper Course Aggregate (Rock) Size and Shape:* The quality

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of the course aggregates is most important in HMA pavement. If the size and shape do not match the construction specifications, the bond between the rocks and the AC could weaken, causing rutting. In addition, rounded rocks (like river stones) provide less skid resistance than angular, multi-surface rocks.

•*Improper Compaction of In-Place HMA Pavements:* One indictor of a properly compacted HMA pavement is the percentage of air voids in the mix. If the pavement is over-compacted during placement, the percentage of air voids will be low, causing plastic flow of the mix and rutting. If the HMA pavement is under-compacted during placement, the percentage will be high, causing ruts to form when traffic loading compacts the mix.

Accident Reconstruction and Pavement Testing

Once it has been determined that an automobile incident was the result of skidding or hydroplaning, it is important to quickly determine the construction history of the incident area, and if the pavement surface or composition was the cause. Highway maintenance, and/or highway improvements can significantly alter the pavement surface and composition. If rutting is present, the depth of the ruts must be measured. The measurement of the ruts, plus any other incident scene measurements, should be taken during an accident reconstruction investigation if the incident scene has not been significantly altered.

It is highly recommended that all pavement samples taken to test for defects must be considered legal evidence. Documentation to assure a proper chain of evidence is necessary to satisfy all potential parties that the samples were carefully retrieved, stored and submitted to the laboratory. In addition, the samples should be tested with calibrated equipment. National and/or state testing standards and procedures should be used to assure reliable and consistent test results.

Richard Rice is president and forensic engineer at Mutual Engineering, Inc. in Morrow, Georgia. MEI provides accident reconstruction, forensic and engi - neering consulting services to the insurance, legal and construction industries. He cn be reached at 404-361-2992 or mutual@bell - south.net.

Metadata—Do you Know What's in your Electronic Documents?

continued from page 1

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PowerPoint and Adobe Acrobat, all embed metadata. A computer operating system also is a source of metadata.

Metadata in electronic documents that are automatically embedded in a file, without the knowledge of the user may include:

•File name
•File location (pathname or directory structure)
•File size
•Dates of creation, last modification, last access, last printed
•Name of the person who last saved the document, number of revisions made, total time spent editing the document

Some types of metadata are added by the author of an electronic document, such as the ability to track changes made to a word-processing file.

Where is the Metadata?

The following is a quote from the Microsoft Office Online Web site:

"Legal professionals are familiar with the concept of "discovery" and the requirements set out by the courts for complying with discovery demands. They also understand that they are only required to provide the documents and data set out in the discovery demand. Unfortunately, if you are providing electronic versions of your documents, you may 'discover' that you are inadvertently supplying more information than you realize.

Metadata

Whenever you create, open, or save a document in Microsoft Word, the document may store information — known as metadata — that you had no intention of including or disclosing (this also applies to Microsoft Excel spreadsheets and Microsoft PowerPoint® files). Metadata is used for a variety of legitimate purposes, and it adds functionality to the editing, viewing, filing, and retrieving capabilities of Microsoft Office. However, if some of this information is passed on to inappropriate parties (for example, opposing counsel), that disclosure can create adverse consequences for you and your client. In order to avoid these consequences, you should make yourself familiar with the types of metadata contained in your documents and take steps to remove it whenever necessary.

Some metadata is readily accessible through the user interface of each Office program. Other metadata is only accessible through extraordinary means, such as opening a document in a low-level, binary file editor.

Some examples of metadata that may be stored in your documents:

•Your name
•Your initials
•Your company or organization name
•The name of your computer
•The name of the network server or hard disk where you saved the document
•Other file properties and summary information
•Non-visible portions of embedded OLE objects
•The names of previous document authors
•Document revisions
• Document versions
•Template information
•Hidden text or cells
•Personalized views
•Comments"

The Value of Metadata

Metadata makes an information resource easier to retrieve, use or manage. It speeds up and enriches searching for resources, as good cataloguing does, by:

•allowing resources to be found by relevant criteria;
• identifying resources;
•bringing similar resources together;
•distinguishing dissimilar resources; and
•giving location information.

Metadata is used to catalogue published books, electronic documents, art objects, educational and training materials and scientific datasets. Traditional library cataloguing is a form of metadata.

Metadata is useful not only for cataloguing purposes, but because it can be searched or "mined" to obtain information. Internet Search Engines mine metadata from the mass of information available on the World Wide Web to gather and present useful search results.

This ability to mine metadata means that metadata may be a danger to those who are not knowledgeable about its existence because the metadata may be used against them. Although not all metadata is confidential, in many circumstances it may reveal information that is privileged, confidential, and perhaps, detrimental to your case.

Minimizing Metadata

Until your firm establishes firm policies and procedures for incoming and outgoing electronic files, for immediate safety you may print documents and then scan them as PDF or "tif" files. Consider disabling the "fast save" feature in Microsoft Word. Fast save appends changes to the end of the file so it is possible to see what changes were made. Also, be cautious when using the "track changes" feature. If "track changes" is enabled, the previous versions of the file will be easily accessible unless the changes have been accepted. If a document is copied and pasted into a new blank file before being saved, some

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of the metadata (such as previous document authors, revision numbers, the created, accessed and modified dates) will be eliminated.

Microsoft Office products have built-in tools that can help remove some of the metadata. These tools are described on the Microsoft support website. A list of the available help articles is below:

How to Remove Metadata from Your Documents

For additional information about removing metadata from your documents, visit Microsoft's Web site (http://support.microsoft.com/kb/223396/en-us) to view articles in the Microsoft Knowledge Base: How to Minimize Metadata in Microsoft Word; How to Minimize Metadata in Excel Workbooks; How to Minimize Metadata in Microsoft PowerPoint Presentations; How To Minimize Metadata in Microsoft Word 2000 Documents; How to Minimize Metadata in Microsoft PowerPoint Presentations; How to Minimize Metadata in PowerPoint Presentations; How to Minimize Metadata in Word Documents

Microsoft Office also has a free "Remove Hidden Data Tool" which removes certain types of metadata.

Metadata Assistant, developed by Payne Consulting, can be used to view, analyze and clean metadata in Microsoft Office documents. Appilgent has utilities for cleansing metadata from Adobe Acrobat files.

Recent Case Law

KrollonTrack provides a current and comprehensive archive of case law summaries pertaining to electronic discovery and computer forensics (www.krollontrack.com). Some recent case samples regarding metadata follow.

Kansas

When Producing Native Documents, Metadata Must Remain Intact

Williams v. Sprint/United Mgmt Co., 230 F.R.D. 640 (D. Kan. 2005). In an employment case involving allegations of age discrimination, the plaintiffs requested native production of Microsoft Excel spreadsheets so they would be able to determine if the documents "had any actual other columns or types of information available on a spreadsheet." After receiving the spreadsheets from the defendant, the plaintiffs claimed the defendant

"scrubbed" the spreadsheet files to remove metadata without producing a log of the information scrubbed. The plaintiffs also asserted the defendant locked cells and data on the spreadsheets, preventing the plaintiffs from accessing those cells. The defendant admitted it had scrubbed metadata and locked certain cells but argued the plaintiffs never requested production of the metadata and claimed the metadata was irrelevant and contained privileged information. The court gave the defendant seven days to show why it should not produce electronic Microsoft Excel spreadsheets in native format and why it should not be sanctioned for its behavior. The defendant declared its actions were made in good faith, designed to prevent the plaintiffs from discovering information the Magistrate ruled undiscoverable, and maintained data integrity. Although the court did not sanction the defendant, it ordered the defendant to produce the spreadsheets' metadata and to produce "unlocked" versions of those spreadsheets. The court held, "when a party is ordered to produce electronic documents as they are maintained in the ordinary course of business, the producing party should produce the electronic documents with their metadata intact, unless that party timely objects to production of metadata, the parties agree that the metadata should not be produced, or the producing party requests a protective order."

10th Circuit

Computer-generated Metadata Does Not Constitute Excludable Hearsay

United States v. Hamilton, 413 F.3d 1138 (10th Cir. 2005). The defendant appealed from a conviction for transporting child pornography in interstate commerce in violation of federal law. At trial, the government introduced 44 child pornography images the defendant allegedly uploaded to a newsgroup. The images contained computer-generated header information (also known as metadata) linking the defendant to the images. On appeal, the defendant argued the headers constituted hearsay and

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should have been excluded from evidence. The appellate court rejected this argument and found the district court was correct in finding the headers did not amount to hearsay. The court reasoned the information did not fall within the Rule 801(c) definition of hearsay because "the header information was automatically generated by the computer hosting the newsgroup each time Hamilton uploaded a pornographic image to the newsgroup."

New York Court Orders Native Format for Electronic Document Production

In re NYSE Specialists Sec. Litig., 2006 WL 1704447 (S.D.N.Y. June 14, 2006). In an order addressing several discovery disputes, the court directed the defendants to produce all hard copy documents as single page tiff images, along with corresponding Opticon and Concordance load files, and instructed that all electronic documents be produced in their native format with metadata intact.

Electronic Data Protocol for Law Firms

Most law firms have established Internet use and e-mail policies and apply security patches and other software updates as they become available. Many have implemented best practices for computer use.

However, how many firms have policies and procedures in place regarding the dissemination of electronic documents? Probably not enough.

Metadata and electronic discovery issues are becoming more prevalent in the courts and in case law. Knowledge of metadata brings about some ethical issues:

•Do lawyers have a duty to warn clients of the metadata risk?
•If clients are warned, how do lawyers handle the public relations challenge of explaining why they took so long to deal with metadata issues?
•Do lawyers have any kind of duty to look at the metadata in incoming documents?

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For the entire article, including footnotes, please visit www.gdlao.org/metadata.doc.

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GDLA Macon Judiciary Reception

The GDLA recently honored Judge Tommy Day Wilcox for his many years of service to the bench and bar of Georgia at a reception in Macon. GDLAmembers and judges from the area gathered at the City Club, where Judge Wilcox was feted and presented with an engraved memorial clock.

Macon GDLA members Mel Haas, Constangy, Brooks & Smith; David Nelson, Chambless, Higdon, Richardson, Katz & Griggs; and Rusty Gunn, Martin Snow, organized the event.

Hold on to what matters and let us help

Insurance Specialists, Inc. (ISI) is pleased to announce our upcoming Ten Year Level Term Life Insurance offer to members of the Georgia Defense Lawyers Association. This coverage is underwritten by The Hartford[1] and can provide up to $250,000 of protection for Association members and their spouses. For complete plan information, costs, exclusions, limitations and terms of coverage, call the toll-free ISI Sales Direct Line at 1-888-ISI-1959.

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