Georgia Defense Lawyer©

Advancing the Civil Defense Bar©

Spring 2008

Be Clear About the Standard of Review

by **Amy Snell**, *Fulcher Hagler*

The is the third of a three-part series on "nuts and bolts" of appellate practice presented by the Appellate Practice SLC.

In this final article, we focus on the standard of review, which is simply the level of deference that the reviewing court will give to the decision of the court below.

As a general rule, lower court rulings on questions of law are reviewed de novo under a "plain legal error" or plenary standard, and no deference whatsoever is owed to such rulings.

Conversely, trial court rulings involving the exercise of discretion, such as discovery rulings, are reviewed under an abuse of discretion standard, which is highly deferential although not insurmountable. Appellate courts accord the highest level of deference to a trial court's factual findings due to the trial court's ability to observe witnesses and weigh credibility. Such findings are reviewed under a variety of standards – any evidence, substantial evidence, or clear error – but rarely are such findings reversed on appeal. Since the appellant's chances of winning on appeal increase as the reviewing court's level of deference decreases, the appellant should strive to advocate the least deferential standard possible, while the appellee should advocate the most stringent standard possible.

Because the standard of review is so fundamentally important to the success of an appeal, you should begin the briefing process by asking yourself what the trial court did. Then, determine the proper standard of review for that decision and include a concise statement of that standard in your brief. In fact, briefs filed in the Court of Appeals of Georgia and the United States Court of Appeals for the Eleventh Circuit ***are required*** to contain a statement of the standard of review. See, e.g., Court of Appeals of Georgia Rules 25(a)(3), (b)(2); 11th Cir. Rule 28-1(i)(iii). The Supreme Court of Georgia has no such rule; but Justice Robert A. Benham considers the failure to be clear about the standard of review (in a tie with failing to research the Court's juris-

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Inside This Issue

Supreme Court Upholds Georgia Daubert Standard

GDLA Amicus Position on Prevailing Side

The Georgia Supreme Court upheld the constitutionality of the expert witness provisions of the Tort Reform Act of 2005 in its ruling in Mason v. The Home Depot U.S.A., Inc. and The Flecto Company, Inc., S07A1486.

It also held the statute was to be given prospective application to all matters pending at the time of the Act's passage.

In Mason, the court excluded opinions of two plaintiffs' experts on the grounds the opinions were unreliable under Georgia's new standard governing admissibility of expert opinions in civil cases set forth in O.C.G.A. 24-9-67.1. On appeal, plaintiffs challenged the constitutionality of section 24-9-67.1 primarily on the grounds that it denied them equal protection under the law, as it applies to civil but not criminal cases, and denied them the right to a jury trial.

When Mason went to the Georgia Supreme Court, several amicus briefs were filed in support of Plaintiffs/Appellants, including a brief by the GTLA. The GDLA submitted an amicus brief, written by **Lee Ann Jones**, *Powell Goldstein*, Atlanta, in support of Defendants/Appellees in the case.

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President's Message

GDLA Increasing Statewide Stature

One of the most telling signs that the Georgia Defense Lawyers Association is increasing its visibility and role in statewide matters of importance to the civil defense bar is that our board meetings are now stretching to four-hour, jam-packed work sessions with more than 20 attorneys from across the state gathering to discuss dozens of items that affect the practices of lawyers in our area of the profession.

From responding to tort reform to adding more training for younger lawyers, from filing amicus briefs in important matters before our appellate courts to increasing our face-to-face social contacts with the judiciary, from creating a vibrant younger lawyer section to building a database of expert witnesses and trial work product . . . the GDLA is becoming known today as a very strong and more respected voice of the civil defense bar in Georgia.

We are even making inroads with the one group of attorneys who have traditionally not participated in the GDLA — those who practice at the "mega firms" in Atlanta.

-- Georgia's Judicial Nominating Commission now requests that the GDLA review applications of potential candidates and participate in the screening process, including appearing before the Commission.

-- Membership is increasing each year, as more and more Georgia lawyers learn about the breadth and quality of the benefits we offer to their practice.

-- Industry vendors are approaching us in record numbers.

-- More and more judges are attending our cocktail receptions in cities across the state and getting to hear our voices.

We are even making inroads with the one group of attorneys who have traditionally not participated in the GDLA — those who practice at the "mega firms" in Atlanta. These firms have traditionally viewed the GDLA as insurance defense lawyers, and have had little to no knowledge of what the association actually does.

The perception of the GDLA at these firms has begun to change, and they are learning about the value of GDLA membership for their associates, including our invaluable blast e-mail system which connects an attorney with close to 700 of his or her peers across the state for case research at the touch of a button.

While many associations ask members to "support the association," the GDLA board of directors works hard to ensure that the association supports the members.

If we can get you involved with the GDLA, you will not simply be supporting your association, but rather helping your peers advance the civil defense bar in Georgia.

Never before has there been a time when the possibilities for you to make your mark on the profession have been this great.

Please visit www.gdla.org and click on the "About Us" button to see how you can make a substantive contribution to the profession in our state.

We look forward to continuing to serve you and hope you will join us in "Advancing the Civil Defense Bar" in Georgia.

Yours for the Defense,

Bob Travis
President, GDLA

Member & Legal News

Comings, Goings, Etc.

Charles R. Beans has joined *Goodman McGuffey Lindsey & Johnson*, Atlanta, as a partner.

Callie Dickson Bryan is now a partner at *Jones, Cork & Miller*, Macon.

Eugene "Gene" S. Hatcher, Jr. is now a partner at *Jones, Cork & Miller*, Macon.

Philip W. Lorenz is now at *Goodman McGuffey Lindsey & Johnson*, Atlanta.

T. Case Maner is now a partner at *Owen, Gleaton, Egan, Jones & Sweeney*, Atlanta.

Condolences

Melburne T. "Mac" McLendon, a past president of the GDLA and founder of the GDLA's popular trial academy, passed away recently. In honor of Mac's dedication to the GDLA and the trial academy, the board of directors of the association unanimously agreed to re-name the trial academy the Melburne T. "Mac" McLendon Trial Academy in his honor.

More than 50 New Members Admitted this Year so Far

More than 50 defense attorneys applied for and have been accepted into membership in the GDLA this year. This includes a large number of younger lawyers who have come in via the efforts of our newly re-energized YL committee. More members means more civil defense attorneys who will share what they have in response to your blast e-mails, more contacts for you around the state and more attorneys contributing to our Brief Bank, Tort Reform Database, Discovery Tools and expert witness database portion of the blast e-mail system.

GDLA Continuing to Increase Visibility

GDLA members **Will Ellis** & **Evelyn Fletcher**, *Hawkins & Parnell*, Atlanta, attended the swearing in ceremony for new Georgia Bar members, giving a short presentation about the GDLA, answering questions and passing out materials. The GDLA attends each of the bi-annual swearing in ceremonies in order to educate new lawyers about the defense bar's voice in Georgia.

Cases of Note

Hugh McNatt, *McNatt, Greene & Peterson*, Vidalia, received a defense verdict in an electric shock injury case in Donalsonville, Seminole County, Georgia. The plaintiff was injured when his fishing pole allegedly struck a power line. The plaintiff had over $300,000 in medical expenses and was the popular owner of a local marina. He was represented by Tom Taggart of Savannah and Bill Shingler of Donalsonville. Hugh and Chip Stewart represented the defendant utility.

The case was tried over four days and the jury issued a defense verdict. Hugh argued assumption of the risk and notice of the alleged danger. There was also an issue as clearance and whether the power line was compliant with the National Electrical Safety Code.

GDLA member **George Hall** and Alana Kyriakakis of *Hull, Towill, Norman, Barrett and Salley*, Georgia recently obtained a defense verdict on behalf of the Medical College of Georgia and four individually named defendants in the U.S. District Court for the Southern District of Georgia. The plaintiff, a former faculty member at the Medical College, sought $5 million in damages for his federal civil rights lawsuit which alleged employment retaliation, false arrest, false imprisonment and excessive force. After a four day trial, the jury returned a unanimous verdict in favor of all of the defendants on all of the plaintiff's claims.

The plaintiff was employed as a faculty member in the Department of Pathology at the Medical College of Georgia. After receiving numerous complaints about the plaintiff's unprofessional and sometimes confrontational interactions with colleagues and staff, the chairman of

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Daubert Upheld

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The GDLA's brief focused on explaining the need for and benefits of a "Daubert" type reliability standard as a threshold for the admissibility of expert opinions in civil cases and the effective application of such a standard in the federal courts and other state courts with similar standards. GDLA's brief also addressed the jury trial issues raised by Appellees and amicus curiae.

In its opinion, the Supreme Court made clear that in interpreting and applying the rules regarding the admissibility of expert opinions, the trial court "may draw from the opinions of the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 [, 113 S. Ct. 2786, 125 L.Ed.2d 469] (1993); General Electric Co. v. Joiner, 522 U.S. 136 [118 S. Ct. 512, 139 L.Ed.2d 508] (1997); Kumho Tire Co. Ltd. v. Carmichael, 526 U.S. 137 [, 119 S. Ct. 1167, 143 L.Ed.2d 238] (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases."

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the department decided not to renew the plaintiff's employment contract. The chairman intended to notify the plaintiff of this decision and to obtain the plaintiff's keys and identification badge. Due to the concern that the plaintiff might respond unpredictably to news of this decision, a campus police officer was asked to attend the personnel meeting as a precaution. This type of precaution was not unusual.

The plaintiff refused to attend the personnel meeting. He was instructed by both his supervisor and a campus police officer to turn in his keys and badge. The plaintiff refused. This led to a brief confrontation between the plaintiff and the police officer in the hallway of the Department of Pathology, but ended when the plaintiff ran out of the building. The plaintiff left the building and went to the Provost's Office and he refused to leave. After ignoring multiple directives to leave the office, the plaintiff was placed under arrest by campus police officers who were called to the scene by frightened administrative staff. The plaintiff resisted arrest and fought with police as they attempted to escort him out of the office. As a result of the incident, one officer sustained a broken foot and other officers received minor injuries. The plaintiff alleged that he sustained a ruptured tendon because of the incident.

The plaintiff was charged with criminal trespass, battery and obstruction of justice. He was held without bond for 95 days. The plaintiff was ultimately acquitted of criminal charges and his civil lawsuit followed. The plaintiff sued his employer alleging he was wrongfully discharged for filing an EEO grievance in violation of Title VII. He also sued four individual police officers who were involved in his arrest pursuant to 42 U.S.C. § 1983. He argued that he was arrested and imprisoned without probable cause and that the amount of force used to affect the arrest was excessive.

After four days of trial, a jury of 12 agreed with the defense, returning a verdict in favor of the defendants on all of the plaintiff's claims.

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Lynn M. Roberson of *Swift, Currie, McGhee & Hiers,* Atlanta, won an appellate victory in Scott Youngblood v. Walgreen Co., Case No. A07A1045 (Ga.App., Sept. 14, 2007). The Court of Appeals affirmed without opinion Judge David Darden's grant of summary judgment to the defendant. The plaintiff claimed the pharmacist improperly substituted a generic drug for his brand name Ritalin prescription and that he suffered heart palpitations as a result, necessitating a trip to the hospital and testing. Summary judgment was granted, based upon the absence of evidence proving a causal link based upon different ingredients in the generic drug and the brand name Ritalin. The decision was affirmed on appeal.

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GDLA member **Michael Goldman**, *Hawkins & Parnell*, Atlanta, and Richard Mueller and Carl Pesce, Thompson Coburn, St. Louis obtained a defense verdict on behalf of Kawasaki Motors Corporation in a wrongful death action following a six-day trial in U.S. District Court in Athens, Georgia. The decedent, a 21-year-old, was floating on a small raft when he was struck in the head by a Jet Ski, resulting in death by drowning. The novice operator of the craft claimed that he was unable to steer it once he released the throttle, a condition known as "off throttle steering (OTS)," and that this loss of steering control left him unable to avoid running into the raft. Kawasaki believed that the operator was attempting to execute a "splash maneuver" and simply lost control of the craft due to his inexperience in the operation of personal watercraft.

The decedent's parents sued Kawasaki alleging that the jet ski was defective in design since it did not have a rudder or other steering assist device to overcome the loss of steering due to OTS. The plaintiffs also claimed that the warnings concerning OTS were inadequate and insufficiently conspicuous to alert an operator to the potentially hazardous OTS condition.

OTS is a condition common to all personal watercraft, since they are all steered by thrust from a water jet. The plaintiffs had two experts who testified that a rudder should have been utilized and that such a device would have allowed the operator to steer the Jet Ski, despite his releasing the throttle. The experts devised a mock-up rudder and performed testing to support their position. However, on Kawasaki's motion under Daubert, the trial court found this work to be unscientific, struck the experts on all design issues and then granted partial summary judgment to Kawasaki on the design claims.

This left only the warnings claims for jury determination. On this point, the plaintiffs claimed that the warning panel on the side of the craft that had an OTS warning was not visible to an operator sitting on the craft, that the OTS warning was in small type and far down on a list of other "less important" warnings and that OTS is so important that it should be warned about in a more visible manner and conspicuous location where an operator can see it from a seated position.

Despite compelling damage testimony from numerous witnesses concerning the young man who was

killed in the accident, the jury ultimately concluded that the OTS warnings on the craft and in the owner's manual were adequate to inform an operator about the characteristic. It was evident that the jury believed that this was a "splashing event" gone wrong.

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Lynn M. Roberson, *Swift, Currie, McGhee & Hiers*, Atlanta, and **Christopher Reeves**, *Lantz & Reeves,* Kennesaw, prevailed in the Court of Appeals on behalf of their hotel clients in a suspected suicide case. In Carol Leech, individually and as Administrator of the Estate of John Edward Leech v. La Quinta Inns, Inc., et al., Case Nos. A07A2432 and A07A2433 (Ga.App., Jan. 25, 2008), the Court of Appeals affirmed in part and reversed in part the ruling of the trial court judge who had granted in part and denied in part the hotel defendants' Motion for Summary Judgment in a case in which plaintiff's decedent either committed suicide by jumping out the seventh floor window of his room or accidentally fell out of the window of his room. Plaintiff claimed the front desk clerk did not respond quickly enough when notified that the guest was threatening to kill himself or, in the alternative, that the defendant was negligent in having windows that opened too wide. The Court of Appeals held that, if the decedent committed suicide, his action was an intervening cause of his death. The Court found that if the decedent accidentally fell out the window that he had equal knowledge of the alleged hazardous condition in that he opened the window.

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Judicial Appointments

January Appointments

Warren P. Davis - to Superior Court, Gwinnett Judicial Circuit from Chief Magistrate for Gwinnett County

Ed Ennis - to Macon Judicial Circuit from partner at Constangy, Brooks & Smith, Macon to fill the vacant seat created by the retirement of Chief Judge G. Bryant Culpepper

T. Harry Hurt - to Superior Court, Cordele Judicial Circuit

Murphy C. Miller - to Superior Court, Enotah Judicial Circuit from Public Defender, Enotah Circuit

Ethelyn N. Simpson - to State Court of Clarke County from magistrate judge in Clarke County

February Appointments

Daniel Craig - to Superior Court of the Augusta Judicial Circuit from District Attorney of the Augusta Judicial Circuit

Henry Newkirk - to Superior Court of the Atlanta Judicial Circuit from State Court of Fulton County to fill the seat vacated by the retirement of Judge **Stephanie B. Manis**'s. Judge Newkirk will take over Judge **Bensonetta T. Lane**'s calendar, however, as she goes on the family court. Judge **Melvin K. Westmoreland**, who is coming off family court, will take Judge Manis's case load.

March Appointments

E. Trenton Brown, III to fill the vacancy left by Judge **Jesse Copeland's** retirement from the State Court of Putnam County

James C. Garner - to State Court of Treutlen County from Solicitor-general to fill the vacancy created by Judge **Donald Gillis**'s elevation to the Superior Court

Susan Eichler Edlein - to State Court of Fulton County, filling the vacancy left by Judge Newkirk, from partner at *Holland & Knight*, Atlanta

Other Appointments

The Judicial Nominating Commission has forwarded a candidate shortlist to the governor to fill the superior court judgeship in the Waycross Judicial Circuit. The GDLA was asked by the committee to comment on the applications.

Employment Law Case Law Update

By David A. Cole,
Freeman Mathis & Gary, Atlanta

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

First Amendment

Boyce v. Andrew,
510 F.3d 1333 (11th Cir. 2007).

Internal complaints about caseloads by two case workers were not constitutionally protected speech that shielded them from transfer or termination because, in filing the complaints, they spoke as employees to improve their work environment, not as citizens addressing a matter of public concern.

The plaintiffs worked as case workers for the DeKalb County Department of Family and Child Services ("DeKalb DFCS") who frequently complained to their supervisors that their case loads were too high. One plaintiff was fired after she was placed on a performance plan and failed to meet her quota for closing cases. The other requested and received a transfer, but it resulted in a 5 percent reduction of her salary. They filed suit under § 1983, alleging that their termination and transfer were in retaliation for protected First Amendment speech. The district court denied the defendants' motion for summary judgment on qualified immunity grounds, which the defendants challenged on interlocutory appeal.

The Eleventh Circuit stated that, following Garcetti v. Ceballos, the First Amendment does not protect government employees when they speak as employees as opposed to citizens; to be protected speech, an employee must speak as a citizen on a matter of public concern. The plaintiffs argued that they spoke as citizens on a matter of public concern because children could be mistreated or die because they were overworked and could not handle all cases assigned to them. However, none of the plaintiffs' complaints specifically identified a single child was in danger. Therefore, the court concluded that "the form and context in which the complaints by Boyd and Robinson were made are indicative of the fact that they intended to address only matters connected with their jobs at DeKalb DFCS." Therefore, the plaintiffs "spoke as government employees about their jobs and not as citizens," and they had no First Amendment cause of action based on the their employer's reaction to the speech.

Legitimate, non-discriminatory reason

Springer v. Convergys Customer Mgmt. Group, Inc.,
509 F.3d 1344 (11th Cir. 2007).

For purposes of articulating a legitimate, non-discriminatory reason, it was unnecessary for the plaintiff to have actually been considered for position, where the decision maker had first-hand experience with the plaintiff and believed she was not a good candidate.

A long-term African-American employee filed an action against her employer alleging a racially discriminatory failure to promote under §1981. In moving for summary judgment, the employer conceded that the plaintiff established a prima facie case, but argued that it promoted another employee over the plaintiff for the legitimate and non-discriminatory reason that the other employee was more qualified. The plaintiff claimed, however, that the promotion opportunity was never posted, as required by company policy. As such, she argued the company should be precluded from relying on superior qualifications as a legitimate, non-discriminatory reason because she was not considered for the promotion.

Indeed, the decision maker testified she did not consider the plaintiff a candidate for the promotion. The Eleventh Circuit noted, however, the decision maker's testimony, when read in context, indicated only that her familiarity with the plaintiff's qualifications and prior work performance led her to the conclusion the plaintiff was not a good candidate for the position. A subjective impression of respective candidates, provided there is a clear and reasonably specific factual basis for it, is a permissible reason for employment action. Accordingly, there was no genuine issue of material fact the company selected what it considered to be the superior candidate for the position, and the court affirmed summary judgment.

Rehab Act: qualified individual with disability

Garrett v. Univ. of Alabama at Birmingham,
507 F.3d 1306 (11th Cir. 2007).

Employee receiving treatment for breast cancer failed to establish she was a qualified individual with a disability under the Rehabilitation Act because the periods of her impairment were short term and did not substantially limit her in a major life activity.

The plaintiff was diagnosed with breast cancer and underwent two surgeries. In the following months, she underwent radiation therapy and a course of chemotherapy treatments. At work, she completed all her duties, but needed additional time and took frequent breaks. The plaintiff also experienced periodic episodes of diarrhea during her therapy, which sometimes affected her at work. At home, the plaintiff experienced difficulty sleeping, and her husband performed the household tasks of cleaning, laundry, shopping, and cooking.

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Products Liability Case Law Update

By Charles R. Beans & Philip W. Lorenz,
Goodman, McGuffey, Lindsey & Johnson, Atlanta

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

The first quarter has been a relatively quiet one for product liability decisions. The biggest news might be the recent Supreme Court decision on medical device preemption, and the Georgia Supreme Court decision upholding the constitutionality of Georgia's "Daubert statute."

1. Federal Preemption of State Law Claims, Medical Devices

The United States Supreme Court decision in the Riegel case has attracted much attention from commentators on all sides of the issue. The opinion is limited in direct scope, since it only applies to medical devices which are subjected to Premarket Approval (PMA), an elaborate and time consuming procedure which most manufacturers avoid in favor of the 510k process. However the swift and fairly unified (8-1) decision may hint at improved future prospects for other preemption defense scenarios involving other regulated products.

Facts: The Medical Device Amendments of 1976 (MDA) contains a preemption clause which bars common-law challenges regarding the safety or effectiveness of medical devices marketed in a form that received Premarket Approval. Plaintiff underwent coronary angioplasty using the Evergreen Balloon Catheter, despite the fact the catheter's labeling contraindicated its use for patients with diffuse or calcified stenoses. The warning label also cautioned against inflating the catheter past its rated burst pressure. Despite such warning language, plaintiff's physician inflated the catheter five times to a pressure greater than its rated burst pressure, and on the fifth inflation the catheter burst. Plaintiffs filed suit, alleging a number of violations of New York common law, and the district court held plaintiffs' strict liability, breach of implied warranty, and negligent design, testing, inspection, distribution, labeling, marketing and sale claims were preempted by the MDA. The district court also held that the MDA barred plaintiff's wife's loss of consortium claim.

Held: The MDA only preempts state requirements "different from, or in addition to, any requirement applicable ... to the device" under federal law. 21 U.S.C. § 360k(a)(1). To determine whether plaintiffs' claims were preempted by the MDA, the Court had to first determine whether the federal government had established requirements applicable to the catheter, and if so, whether the plaintiffs' claims were based on New York requirements that differed from, or were in addition to, federal ones. State requirements are preempted "only when the Food and Drug Administration has established specific counterpart regulations or there are other specific requirements applicable to a particular device." Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996) (citing 21 CFR § 808.1(d)). The FDA grants premarket Approval only after determining a device offers reasonable assurances of safety and effectiveness, and as such, premarket approval serves to establish that the federal government has established requirements applicable to that device. The Court had previously held that common law causes of action for negligence and strict liability impose "requirements" and were therefore preempted under the MDA. Riegel v. Medtronic, Inc., 522 U.S. _____ (2008), Scalia, J.

2. Constitutionality of SB3 Daubert Statute

The Georgia Supreme Court recently affirmed a trial court ruling which upheld the constitutionality of the new state expert witness statute, O.C.G.A. § 24-9-67.1, and which thus applied the statute to exclude two plaintiff experts and grant summary judgment to a defendant. The ruling may well spur legislative tinkering.

Facts: A couple sued the manufacturer and seller of a floor refinishing product, claiming the product caused injury. The trial court initially denied a defense motion to exclude two plaintiff experts on causation and labeling. The case mistried, and the defendants renewed the motion. The trial court found that the causation expert's use of differential diagnosis without applying proper methods of ruling in and ruling out alternative possibilities rendered those opinions inadmissible. The trial court likewise excluded the labeling expert's opinions because his methods did not again satisfy the statute. The trial court rejected plaintiffs' constitutional challenge to the statute, except the court found two sections of the statute unconstitutional, and so disregarded those portions of the statute in judging the expert testimony. Plaintiffs appealed.

Held: A majority rejected the equal protection challenge, which argued that the statute is unconstitutional because it applies only to civil cases. The Court held that plaintiffs lacked standing to complain about unequal treatment given to criminal defendants, because they are not criminal defendants. Plaintiffs argued that the statute violates due process because subsections (a)

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Mass Torts Case Law Update

By Ernest L. Wetzler II,
Hawkins & Parnell, Atlanta

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

I. Georgia Statutes

Georgia has passed two statutes since the start of 2007 dealing with asbestos. The first is a part of Georgia Senate Bill 182, signed by Governor Purdue on April 30, 2007. Senate Bill 182 was codified as O.C.G.A. §§ 51-14-1 to -13, and is known as the "Georgia Asbestos and Silica Bill." The purpose of O.C.G.A. §§ 51-14-1 to – 13, is to cure the deficiencies of the Asbestos and Silica Bill passed by the Legislature on April 12, 2005 and was subsequently overturned by the Georgia Supreme Court in November 2006 in DaimlerChrysler Corp. v. Ferrante 637 S.E.2d 659 (GA 2006). The Asbestos and Silica Statute required all new claims filed after that date to establish that exposure to asbestos was a substantial contributing factor in a plaintiff's injuries; however, claims filed before April 12, 2005 only had to establish that asbestos was a contributing factor to a plaintiff's injuries. In DaimlerChrysler, the Court opined the statute of April 12, 2005 is unconstitutional and violates the ban on retroactive laws because the statute "imposes upon appellees a greater evidentiary burden than was required under the law in effect at the time their actions were filed." Id. Furthermore, the Supreme Court in DaimlerChrysler also concluded the unconstitutional sections of the statute could not be severed because they "are the heart of the Act, and their severance from the Act would result in a statute that fails to correspond to the main legislative purpose, or give effect to that purpose." Id.

Georgia Senate Bill 182, signed into law April 30, 2007, seeks to cure the unconstitutional provisions of the Asbestos and Silica Law. Franklin P. Brannen, Jr., Richard L. Sizemore and Jacob E. Daly, in their paper titled "Product Liability," published in the Fall 2007 *Mercer Law Review*, described O.C.G.A. §§ 51-14-1 to -13:

Under the new law, prima-facie evidence of physical impairment remains "an essential element of an asbestos claim or silica claim." The new law simply redefines "prima-facie evidence of physical impairment" so that the type of evidence necessary to sustain an asbestos or silica claim depends on the nature of the alleged injuries and whether the claim accrued before April 12, 2005, or on or after May 1, 2007. Like the 2005 version, the new law provides that a claim cannot be brought or maintained in a Georgia court unless the claimant resides in Georgia at the time of filing or did at the time of exposure. Finally, the General Assembly attempted to avoid a subsequent decision like Ferrante by including the following language in the severability clause..."This chapter shall be interpreted consistently with the General Assembly's intention not to make any substantive changes in the law applicable to cases that accrued before April 12, 2005. The General Assembly expressly declares its intent that Code Section 51-14-9 [requiring claimants to reside in Georgia at the time of filing or exposure] remain in full force and effect if any other part or parts of this chapter shall be declared or adjudged invalid or unconstitutional" (59 Mercer L. Rev. 331, 347-348 (Fall 2007)).

Consequently, SB 182 cures the earlier Georgia Constitutional law defects of O.C.G.A. §§ 51-14-1 to -13 as enacted on April 12, 2005.

The new statute of O.C.G.A. §§ 51-15-1 to -8, was also signed into law contemporaneously with O.C.G.A. §§ 51-14-1 to -13, as part of Senate Bill 182. O.C.G.A. §§ 51-15-1 to -8 is a series of statutes that protect innocent successor liability corporations from asbestos related liability. In summary, this statute applies to a corporation that assumed or incurred successor asbestos related liabilities before January 1, 1972, and limits the cumulative successor asbestos related liabilities of a corporation to the fair market value of the total gross assets of the transferor determined as of the time of the merger or consolidation.

In addition to the statutes above, the Georgia House proposed HB 503. The Bill has yet to be enacted, but would amend paragraph 4 of O.C.G.A. § 12-12-3 to read:

(4) 'Contractor' means any person who contracts with an owner or operator of a facility or residential dwelling to perform the removal or encapsulation of friable asbestos-containing material from any such facility or residential dwelling. Such term shall not include any employee of a owner or operator *of a facility or residential dwelling*.

This law is pending in the House and would seek to add the words "of a facility or residential dwelling." If enacted, employees of owners or operators of facilities or residential dwellings could not be considered contractors for asbestos removal under this statute.

II. Georgia Case Law

The only case decided within the past year that comments on the decision of DaimlerChrysler is Johnson v. Ga. Pac. Corp., 285 Ga. App. 44, 44, 645 S.E.2d 583, 584 (2007). Johnson reaffirmed the decision from DaimlerChrysler. The Court of Appeals remanded the cases back to trial court in light of the DaimlerChrysler case that was originally dismissed because of the April 12, 2005 version of O.C.G.A. §§ 51-14-1 to -13. No other cases have since been decided that apply O.C.G.A. §§ 51-14-1 to -13 as passed on April 30, 2007.

Insurance Law Case Law Update

By Brian T. Moore, Drew, Eckl & Farnham, Atlanta
Alex M. Barfield, Hawkins & Parnell, Atlanta

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

Georgia Farm Bureau Mutual Insurance Company v. Pawloski,
284 Ga. App. 183 (Feb. 14, 2007).

FACTS: Plaintiffs sued Georgia Farm Bureau ("GFB") under a homeowners' policy, seeking coverage for water and mold damage following an October, 2002 pipe burst at the residence. Plaintiffs submitted a claim and, in March, 2003, GFB issued Plaintiffs a payment. Plaintiffs rejected the payment as insufficient to cover the damages.
In July 2003, GFB arranged for an evaluation of Plaintiffs' residence by an environmental consulting firm. This firm informed GFB that elevated levels of mold had been identified in the residence and recommended relocation of Plaintiffs pending the completion of a mold remediation. Plaintiffs alleged that GFB did not follow the recommendation and that GFB did not take any further action on the claim following July 2003.

The policy contained the following limitation: "Suit Against Us. No action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of the loss."

On July 8, 2004, Plaintiffs brought suit against GFB in contract and tort alleging that GFB's failure to repair the water damage resulted in the growth of toxic mold. GFB moved for summary judgment on the grounds that the action was barred by the suit limitation. The trial court denied GFB's Motion and the decision was appealed.

HELD: The Georgia Court of Appeals reversed the trial court, holding that an insurance policy provision placing a one year limitation on the right of the Plaintiff to sue the GFB was generally valid and enforceable, assuming that GFB did not waive this contractual limitation. In review of the record, the Court found no evidence demonstrating waiver or fraudulent inducement on the part of GFB and, accordingly, summary judgment to the insurer was proper.

RATIONALE: The Court focused on the lack of evidence demonstrating fraudulent inducement, affirming that "mere negotiation for settlement, unsuccessfully accomplished, is not that type of conduct designed to lure the claimant into a false sense of security so as to constitute a waiver of the limitation defense." Specifically, "evidence that [GFB] investigated and offered to settle does not suggest that it tried to trick [Plaintiffs] into believing that it intended to enlarge the one year limitation period." In so holding, the Court distinguished Owners Insurance Company v. Ogden, 275 Ga. 565 (2002) on the grounds that the insurer in Ogden was attempting to rely on the contractual limitation to avoid paying an amount it had already conceded that it owed. In the instant case, GFB had not conceded that it owed Plaintiffs anything more than the $7,247.43 Plaintiffs rejected. Further, GFB's failure to act on the environmental consulting firm's recommendation amounted to an implicit denial of liability for any mold damages.

Certain Underwriters at Lloyd's of London v. Rucker Construction Company, Inc.,
285 Ga. App. 844 (June 15, 2007)

FACTS: Certain Underwriters at Lloyd's of London ("Lloyd's") insured a bulldozer owned by Plaintiff. Plaintiff left the bulldozer in a fenced pasture with the key in the ignition. The bulldozer was subsequently stolen and submerged in a pond. Plaintiff submitted a claim, which Lloyd's denied based on the "Locked Vehicle Warranty" exclusion. The Policy stated: "we will not pay for any loss or damage caused by, resulting from, contributed to or aggravated by theft, including attempted theft, from any one vehicle covered or any one owned vehicle covered unless the covered property is contained in a fully enclosed and securely locked body or compartment and the theft results from forcible entry, evidenced by visible marks."

Plaintiff filed suit for breach of contract, seeking compensatory damages and bad faith. Lloyd's moved for summary judgment based on the exclusion. Plaintiff responded, claiming that the policy was ambiguous because it excluded coverage due to theft from any one vehicle covered, but did not exclude coverage due to theft of a vehicle; and because a bulldozer was not a vehicle as defined under the policy. The trial court denied summary judgment.

Plaintiff later received a jury verdict, awarding damages and bad faith penalties. Lloyd's appealed, but the Court of Appeals affirmed the verdict.

HELD: The Court of Appeals declined to rule on Lloyd's objection regarding the summary judgment motion, as the challenge was rendered moot by the subsequent entry of verdict and judgment. However, the Court considered Lloyd's contentions regarding its motions for directed verdict and judgment notwithstanding the verdict at trial, both of which raised the same arguments.

In so doing, the Court held an ambiguity existed in the policy with regard to whether it covered theft of

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Construction Litigation: the Forensic Engineer

EXTRA! EXTRA!
READ ALL ABOUT IT!
BUILDING COLLAPSES
DURING CONSTRUCTION!
WORKERS TRAPPED
IN RUBBLE!

Years ago, that's how the world got its news, from a paperboy on the corner hawking his wares. Nowadays, Internet Web sites and "breaking news" broadcasts on HD TV have replaced the paperboy. But the end result is the same. The world hears about a catastrophe almost as soon as it occurs, and the presentation is almost always as sensationalized as the cries of the paperboy. If you are an owner, developer, contractor, design professional or insurer, a headline like this will make you cringe. What happened? What went wrong? Who was at fault? Am I on the hook? If you are an attorney who represents any of these entities, you will likely field your share of panic phone calls from your client as the headlines and accompanying story gain momentum.

Obviously everyone wants and needs fast answers as to why the incident took place. After all, time is money in the construction industry. Equally obvious should be the fact that a thorough, independent and objective investigation of the collapse must be conducted, not only to determine cause, but also to silence the inevitable "finger pointing" that materializes after such a catastrophic event. An official OSHA investigation would no doubt be in order in the case of our headline event, resulting in an OSHA representative having timely access to the collapse site. The contemporaneous information gathered during an OSHA investigation would likely answer many of the questions that will inevitably arise in the aftermath of a construction accident, at least from a regulatory standpoint.

However, OSHA's emphasis may not be the same as one of the involved parties. Additionally, other mitigating contractual and business factors may not be of importance to the OSHA representative. As such, there are many instances where economics and business savvy would also dictate the prompt retention of an experienced forensic engineer to develop intelligent and supportable conclusions as well.

The ability of a forensic engineer to answer the classic "who-what-where-when-why" questions that evolve from a construction failure depends upon two interrelated factors . . .

The ability of a forensic engineer to answer the classic "who-what-where-when-why" questions that evolve from a construction failure depends upon two interrelated factors, his credentials and the amount of information available to him. Just as you would not hire the Maytag repairman to do a heart transplant, you should not accept anything less than a qualified individual to perform the investigation. In the case of construction-related failures, such as our collapse example, this usually means a degreed, licensed civil or construction engineer, educated and trained to understand the effects of loads, pressures and stresses placed upon building components during the construction process. Both the expert's degree and his licensure must be in the appropriate field of expertise, and it is preferable that he or she be licensed in the jurisdiction where the collapse occurred. In an increasing number of jurisdictions, such licensure is a requirement. There are two reasons for this: (a) to prevent an astute attorney on the other side from using licensure issues to mount an attack on the credibility of the expert, and (b) to preclude a state board of professional registration from tarnishing the expert's investigation by seeking to charge him with performing engineering work without a license.

The expert must also be practical as well as theoretical in his investigative approach, and be capable of appreciating the fact that textbook prose does not always exist in the real world. A technical explanation for why a failure occurred requires both a working knowledge of the applicable engineering principles and practical application of those principles to the facts of the situation. The ability of an expert to successfully accomplish this crucial analytical task usually comes from seasoned field experience. This often means that he/she has spent time "in the trenches", i.e., learning by getting one's feet muddy.

However, when looking for an expert, you should not unduly limit your search. For example, a competent structural engineer can address whether or not a concrete column should have been able to withstand certain applied loads, without that same engineer having any experience in the field placing concrete into a column form. Dealing with similar facts on previous cases, or applying similar technical principles to a fact pattern analogous to the case at hand, can also supply or supplement the requisite experience. One of the most valuable attributes of an expert is their ability to bring these experiences to the table, since they will enable the expert to competently address the issues being litigated, and enhance his/her credibility in the eyes of the judge or jury, the ultimate decision makers.

By Alan J. Kundtz, J.D., P.E.,
Senior Project Engineer, SEA, Ltd.

All the credentials and relevant experience in the world, however, may be of little use if the expert is not brought into the case in a timely manner or, worse yet, not until years "after the fact". It is admittedly possible in rare cases to analyze a failure by reviewing photographs, pleadings, and deposition transcripts from an office chair. Arguably, an expert retained "late in the game" can also provide valuable pretrial assistance to the legal team, helping to focus on relevant issues and identifying potential weak points (both in his client's case and with regard to the theories posed by the opposition).

However, the prospects of the expert being able to successfully give conclusory opinions in a courtroom setting is directly proportional to the amount of useful and usable information available. Access to the jobsite as soon as possible after the failure occurrence is one key to a successful investigation. Physical evidence is fresh and readily available for inspection. Witness accounts are clear. Project records are accessible. Such are some of the advantages available to an OSHA investigator looking into, for example, our headline collapse event. But, are his/her credentials sufficient to address the many nuances of a construction accident, beyond the simple application of the OSHA rules? Can he/she testify later as to their findings? Nevertheless, if the decision is made early on to get an outside expert involved, the scope of investigation, and the time/cost necessary to complete it, is often constrained by budgetary considerations. The "benefits" of such constraint are, however, often illusory. If supportable opinions as to causation are truly the desired end result, it is more persuasive to a jury and more palatable to the parties involved if it can be said that the engineer-expert was at the loss site sifting through the debris and interviewing witnesses shortly after the accident took place, rather than basing conclusions on photographs taken "by others" and reviewing documents years later.

In the alternative, if an on-site inspection cannot be accomplished, then sifting through relevant documents in an effort to recreate the sequence of events leading up to the failure is the next best thing. All available and pertinent project records must be reviewed so that a complete analysis can be performed based upon full disclosure of all relevant facts. The key word here is relevance. "Pre-screening" records in the interest of saving a few bucks in review time may be admirable, particularly in the eyes of the party footing the bill, but such a task must be done carefully.

If a key document is inadvertently omitted or overlooked (the proverbial "smoking gun"), the entire investigation, and any opinions predicated upon that investigation, can be put in jeopardy. The key word in this regard is communication. Lines of communication should be established early and kept open throughout the pendency of the case. Defining the desired scope of investigation, and communicating that scope to the expert, will allow him to determine what documents to initially secure. The relevance of other documents (or group of documents) should become clear as the investigation progresses. Meeting with the expert, going over his role, and deciding what documents to initially procure for review is the starting point to a successful and efficient investigation.

In order to expect peak performance by the expert, he/she must also be given sufficient time to review salient documents and properly formulate opinions. If the expert is handcuffed in this process in the interest of economics, any proferred opinions can be riddled by a sharp lawyer armed with a cadre of undisclosed facts, causing the "end result" to be almost as catastrophic as the event itself. Preparing a realistic timeline for conducting the investigation will also allow for the considered development of solid theories of causation and responsibility that will become the cornerstone for any future legal action that may arise as a result of the collapse incident.

The role of the forensic engineer encompasses more than simply the technical aspects of a failure investigation. Construction disputes are inherently complex, and invariably there is a myriad of economic, political, social and human factors that come into play in any accident or failure analysis. The personalities of the parties involved, the status and import of the project itself, and the construction means and methods used can all impact the ultimate determination of cause. The expert must be able to distill the mountains of potentially conflicting information into only those issues that are germane to the fundamental cause-and-effect relationship, i.e. what is the baseline problem and what damages resulted therefrom? The relevancy of each such issue must then be adequately explained in the context of the case at hand. This process not only demands superior analytical tools, but excellent communication skills, both written and oral, as well.

A wealth of valuable information can be obtained by asking the right people the right questions and in the right manner. That is one trait of a good expert. A byproduct of this is being able to advise legal counsel during the discovery phase of litigation to request certain key documents or seek certain admissions from a party to a lawsuit, or to query an opposing expert during a

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Five Tips for Hiring a Private Investigation Firm

By Jonas M. Berwick
Owner, Delve Information Resourses, Inc.

1. Check Credentials

If you were to look in the greater Atlanta phone book and or Yellow Pages, or even peruse the Secretary of State Web site for licensed investigators, you'd be amazed just how many agencies there are claiming to be able to service your every investigative need. The fact of the matter is, a staggering percentage of these "companies" are merely one-man or one-woman companies with an extraordinarily limited capability to meet the complex needs of many law firms. Merely having a license does not qualify or reflect on an agency's bandwidth and track record. In short, ask for references, check licenses and talk to your colleagues about the work that has been done by these agencies for other attorneys.

2. Don't be Afraid to Negotiate

Most detective agencies, when asked, will quote an hourly fee plus expenses. Inevitably this results in an invoice that includes charges for miscellaneous items such as mileage, report writing time and perhaps even that Subway sandwich they ate while on surveillance. Insist on an agency that operates on a flat-fee basis which includes all of the above (except the sandwich) and does not pad that bill with incidental and unnecessary costs.

3. Communicate with your Investigator

Any investigator with your best interests in mind over the interests of his own wallet will take the time, at no cost to you, to spend a minimum of one hour going over the file in detail, filtering fact from fiction. The more information the investigator has at the onset of his project, the more efficient and accurate his report and results to you will be.

Any investigations agency worth working with will have a managerial staff to streamline the billing and paper-flow, an investigative staff with multiple capabilities and specialties and a highly experienced owner, who is also a Board Certified Instructor who will be able to solve problems during the process, rather than after. Litigation is a fluid process whereby the needs of an investigator's clients change constantly, and the ability for an agency to react as quickly and with the least amount of wasted time shows the difference between a fully staffed agency and an agency that relies on contractors with whom they barely have a working relationship.

4. Bandwith and Diversity

When hiring an agency, ensure that their capabilities are not limited to one or two specialties. Many single operators are limited by their specific area of previous employment or background and are forced to use subcontractors for other tasks whenever there is a need for an additional area of expertise. Inevitably subcontractors are underinsured and do not feel as though a true employee-employer relationship exists and this results in many cases compromising the ability of the agency to exercise true quality control

5. Don't be Afraid to Complain

You are the boss. If you feel that an agency is not focusing correctly on the task at hand, or is failing to perform as promised, it is your responsibility to make it known. Any agency of quality would welcome feedback, both positive and negative, because the goal of any reputable agency should be to establish a long-term business relationship with you — not just to complete one transaction.

Jonas M. Berwick is the owner and operator of Delve Information Resources, Inc., which provides investigation services in a variety of areas, including Federal banking regulation, insurance claims, complex business litigation, intellectual property litigation, law enforcement, real estate transactions and creditor's rights.

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Skits & Suds

Manuel's Tavern
February 22, Atlanta

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More than 30 younger lawyers met at Manuel's Tavern in Atlanta to listen to seasoned lawyers act out and discuss a variety of ethics dilemmas in the GDLA's Skits & Suds seminar.

Paula J. Frederick, president of the *State Bar of Georgia*, moderated the event. Faculty members included **Shaun Daugherty** and **Kevin Leipow**, *Hall, Booth, Smith & Slover*, Atlanta; **Henry Green**, *Green, Landers & Johnson*, Atlanta; **Evelyn Fletcher**, **Michael Goldman** and **Al Parnell**, *Hawkins & Parnell*, Atlanta and **Anna Mackowiak**, *Hall, Booth, Smith & Slover*, Atlanta. The event was coordinated by GDLA YL committee co-chairs, **Will Ellis**, *Hawkins & Parnell*, Atlanta, and **Jo Jagor**, *Hall Booth, Smith & Slover*, Atlanta.

Clockwise from top left: GDLA president **Michael Goldman**, *Hawkins & Parnell*, Atlanta and **Anna Mackowiak**, *Hall, Booth, Smith & Slover*, Atlanta, act out a skit on the ethics of billing; GDLA past president **Al Parnell**, *Hawkins & Parnell*, Atlanta, showed what happens when a senior partner gives a young associate no help on an important case; **Al Parnell** and GDLAexecutive vice president, **Jimmy Singer**, *Bovis, Kyle & Burch*, Atlata, with **James Ponton**, **Min Koo** and **Lauren Kruck**, *Downey & Cleveland*, Marietta; **Mary McKay** and **Doug Pristach** of *Merrill Legal Solutions*; 30+ YLs who enjoyed skits, suds and CLE; **Bob Travis**, *Powell Goldstein*, Atlanta, welcomed members and non-members to the event;

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GDLA Holds Biomechanic CLE

More than 40 attorneys attended "Effective Use of Biomechanic Consultants: Engineering & Legal Perspectives," at Maggiano's in Atlanta on March 20.

In order to continue to serve the membership, the GDLA partnered with **Forcon International** to hold the seminar, which featured internationally known author, lecturer, consultant and expert witness **Jeff Pike**.

Jay Traynham, *Hall, Bloch, Garland & Meyer*, Macon, discussed Bowers v. Norfolk Southern Corp., et al., a case he defended wherein a federal judge in Georgia denied a plaintiff's biomechanical expert the right to testify on matters of specific injury causation in the case; denied the plaintiff's motion to exclude the testimony of one of defendants' experts; and limited in part the testimony of defendants' other biomechanical expert.

Clockwise from top right: long-time GDLA sponsor, **Bill VerEecke** of *Forcon* introduces the program; **Jay Traynham** lectures; **Trish Peters**, *Hawkins & Parnell*, Atlanta and GDLA premises liabilty SLC chair, provided input on the curriculum; GDLA past president **Warner Fox**, *Hawkins & Parnell*, Atlanta, and others enjoyed a lunch buffet and three hours of CLE credit; GDLA board member **Matt Moffett**, *Gray, Rust, St. Amand, Moffett & Brieske*, Atlanta, will be heading up efforts to bring more CLE seminars specific to civil defense to GDLA members

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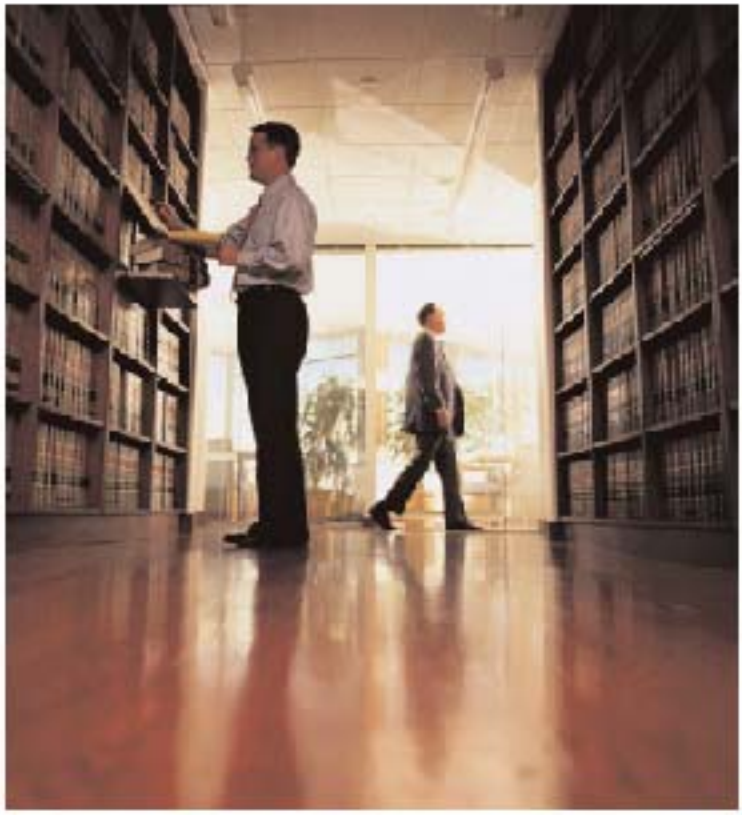

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GDLA Winter Board Meetings Highlights

Highlights from the GDLA Winter, 2008 Board of Directors meeting, February 22, Atlanta. Submitted by N. Satten Bitting, secretary/ treasurer, and redacted by Steve Milano, executive director.

A meeting of the Board of Directors was specially called for February 22, 2008 at noon at the offices of Powell Goldstein in Atlanta. The purpose of the meeting was to approve business of the association not approved at a meeting was held February 9, 2008 in Phoenix, Arizona because of questions raised as to the sufficiency of the quorum at that meeting.

Attending the February 22nd meeting were officers Ted Freeman, George Duncan, Jo Jagor, Warner Fox, Walter McClellan, Bob Travis, Hall McKinley, Dave Nelson and Staten Bitting. Also present was the executive director, Steve Milano. The meeting was called to order by GDLA president Bob Travis.

1. First order of business was a motion to approve new members. A list was provided by admissions chair Salty Forbes. George Duncan moved that all be approved. Ted Freeman seconded the motion. The list of new members was approved unanimously.

2. The next item of business was approval of the minutes of the Fall 2007 board meeting. George Duncan moved they be approved. Ted Freeman seconded. The minutes were approved unanimously.

3. Next item of business was the treasurer's report. Staten Bitting presented the association's income and expenses since the beginning of the fiscal year and a current bank balance. George Duncan moved the report be approvied. Ted Freeman seconded and the report was approved unanimously.

4. The next item of business was consideration of the contract of the executive director. The Board went into an executive session, with Steve Milano not present. A contract between the GDLA and Steve Milano & Associates, LLC was approved.

5. Jo Jagor gave a report on the upcoming Skits and Suds CLE seminar for YL.

6. Discussion occurred regarding the 2008 annual meeting. It was generally agreed a reminder card should be sent several months before the meeting suggesting people reserve the dates on their calendar. It was also generally agreed that the brochure should be mailed no sooner than 90 days before the start of the meeting. The board discussed the 2009 annual meeting, scheduled to be the third-year "couples getaway" at an "exotic" locatin. The possibility of a resort in Costa Rica was discussed, and the consensus was this was not likely to be appealing to the membership. A Caribbean site was generally agreed to be the preference. A suggestion was made concerning a resort in San Juan, Puerto Rico. Additional information on this will be provided at the April 4, 2008 Board meeting.

7. A report from the Judicial Committee was received regarding a nomination for Ware County/ Waycross.

No further business came before the meeting and it was adjourned shortly after 1:00 p.m.

Highlights from the GDLA Winter, 2008 Board of Directors meeting, February 09, 2008, Phoenix, AZ Submitted by Jimmy Singer, executive vice president, and redacted by Steve Milano, executive director.

President Travis called the meeting to order . Eight Board Members were physically present; Bob Travis, Jimmy Singer, Lynn Roberson, Evelyn Fletcher, Joe Jagor, Steve Kyle, Warner Fox, and Bruce Welch. Attending by phone were Salty Forbes and Staten Bitting. Also in attendance was executive director Steve Milano.

The meeting began with a challenge to the quorum of nine members "at" the meeting. All agreed to proceed with the agenda since a number of board members had planned to attend but at the last minute emergencies arose, and to take votes and enter discussions, but to follow that with another board meeting in the near future when at least nine members could be physically present.

The Admissions Committee moved for admission of 30 individuals. All were accepted unanimously by those present and on the phone. That was followed with the discussion concerning a possible change to the by-laws creating a special category for younger lawyers. It was agreed a decision would be tabled until the Spring meeting in April.

Staten Bitting gave the treasurer's report. All bills are paid and current and the association is financially sound.

The Board then went into executive session to discuss the contract of Steve Milano & Associates, LLC.

The board ended executive session and President Travis gave a report on membership recruitment

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Industrial Safety Investigations
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Winter Board Meeting Highlights

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and retention. He discussed scheduling lunches with the larger law firms, which are planned between now and the April board meeting. Additionally, the Skits and Suds scheduled for February 28, 2008 was discussed as a way to draw younger lawyers.

As a way of assessing how the GDLA is fulfilling its mission, the question was asked "If the association disbanded, would it be missed?" The Board gave a resounding "yes" on the GDLA itself, the brief bank, the blast e-mails, the charge book, the fellowship and marketing opportunities, trial academy, and hopefully the growing input by the Substantive Law Committees, among others. The Board agreed that the "16 Reasons to Join the GDLA" as set forth in our membership recruitment brochure would be continually evaluated, and Evelyn Fletcher volunteered to update the brochure. We also agreed that we would evaluate the format of the brochure. A more slick, multi-colored, fold-out brochure was suggested to enhance the image of the GDLA.

Jo Jagor discussed the younger lawyers committee. She and Evelyn are making efforts to gather information for the creation of a deposition boot camp. The association agreed that the YL committee should have a page in the newsletter. Details were given on the upcoming Skits & Suds CLE seminar. A mentor program was also discussed. Since the Bar now has in place a formal mentor program, the discussion was tabled at present as it was of questionable benefit to the younger lawyers.

Steve Milano provided Johnny Foster's report on the Substantive Law Committees. There are 13 in place.

Steve Milano reported on the Worker's Compensation Academy. The minutes were reviewed from a prior Board meeting when it was determined not to hold the academy for calendar year 2008. Mr. Milano will work with Johnny Foster and Rick Thompson, the Chair of the Worker's Comp SLC, to determine whether efforts to put on ancademy would be beneficial in 2009, particularly if we begin a deposition boot camp.

The GDLA has been receiving requests for input on all judicial appointments. It was agreed it is good for the association to have a voice, and the Board viewed this function as very important to furthering our goal of public service to not only the judiciary, but the defense community at large.

Lynn Roberson gave an update on the Judicial Relations Committee. The GDLA has been receiving requests for input on all judicial appointments. It was agreed it is good for the association to have a voice, and the Board viewed this function as very important to furthering our goal of public service to not only the judiciary, but the defense community at large.

Steve Kyle gave the report on the 2008 annual meeting scheduled for Ponte Vedra. Jimmy Singer gave the report that the program has been set and all speakers are on board. It has been approved for a six hours of CLE, with two trial, one ethics, one professionalism and two general.

There was much discussion on the location of the 2009 annual meeting, and annual meetings in general and their costs. There was discussion of two locales, Exuma and Costa Rico, and the attendees agreed that based on a number of factors presented by Steve Kyle, we should proceed with researching other options. Evelyn Fletcher volunteered to research Caribbean venues which met certain criteria regarding air travel and costs.

A report was given by Steve Milano on the trial academy. There were 29 attendees, which is slightly down, but overall it was a success.

Steve Milano gave a report on sponsorships and exhibitors. We have several potential new sponsors and Mel Haas, sponsorship chair, will meet with them concerning possible sponsorships and the level of commitment.

There was no report of the Amicus Committee.

Bruce Welch gave the DRI report. It was brought to the attention of the Board that DRI receives a copy of the GDLA blast e-mails and should be providing information about experts to the members who send them. Bruce will check to make sure this is being done when he attends the annual DRI State Representatives meeting in March.

There was no old business. Under new business, Forcon wishes to begin a biomechanics seminar and it is being scheduled for March 20, 2008 Steve Kyle, Matt Moffett and Steve Milano will work with Forcon on this. There is also a potential new sponsor interested in hosting an e-discovery seminar. Warner and Steve Milanowill work with them.

A change in name of the GDLA was discussed, though briefly. There does not seem to be a consensus from anyone that the name should be changed or that it would be beneficial to change the name.

The meeting was adjourned shortly after 11:30 a.m.

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diction) to be the number one error he sees in briefs filed in the Supreme Court. An easy way to boost your side's credibility, therefore, is to include an express statement of the standard of review as to each enumeration of error in your Supreme Court brief.

To assist you with this important step in the appellate process, here is a list of standards of review in some specific types of cases:

1. Pre-Trial Rulings

Opening Default

The sole function of an appellate court reviewing a trial court's denial of a motion to open default is to determine whether all the conditions set forth in OCGA § 9-11- 55 have been met and, if so, whether the trial court abused its discretion based on the facts peculiar to each case. Gilliam v. Love, 275 Ga.App. 687, 687, 621 S.E.2d 805, 805 (2005). A federal reviewing court will review the denial of a motion filed under Fed.R.Civ.P. 55(a) for setting aside a default judgment under an abuse of discretion standard. Mitchell v. Brown & Williamson Tobacco Corp., 294 F.3d 1309, 1316 (11th Cir. 2002).

Motion to Compel Arbitration

The construction of an arbitration agreement, like any other contract, presents a question of law, which is subject to de novo review. Harrison v. Eberhardt, 287 Ga.App. 561, 563, 651 S.E.2d 826, 828 (2007). The de novo standard also applies in federal court. Dale v. Comcast Corp., 498 F.3d 1216, 1219 (11th Cir. 2007)

Discovery Rulings

The trial courts have broad discretion to determine what is and what is not discoverable, and the appellate court will not interfere with those decisions absent a clear abuse. Georgia Cash America, Inc. v. Strong, 286 Ga.App. 405, 411, 649 S.E.2d 548, 554 (2007). Federal appellate courts similarly review a district court's discovery rulings for abuse of discretion. Smith v. School Bd. of Orange County, 487 F.3d 1361, 1365 (11th Cir. 2007).

Motion for Summary Judgment

Upon reviewing the grant or denial of a motion for summary judgment, the appellate court conducts a de novo review of the law and the evidence. General Elec. Capital Computer Services v. Gwinnett County Bd. of Tax Assessors, 240 Ga.App. 629, 630, 523 S.E.2d 651, 653 (1999). In federal court, review is "plenary." The appellate court will view the facts in the light most favorable to the non-moving party and examine the district court's conclusions of law de novo. Polkey v. Transtecs Corp., 404 F.3d 1264, 1267 (11th Cir. 2005).

Decision to Bifurcate Trial

Falls within the discretion of the trial judge under OCGA § 9-11-42(b). The decision to bifurcate will not be reversed absent a clear and manifest abuse of discretion. Bolden v. Ruppenthal, 286 Ga.App. 800, 803, 650 S.E.2d 331, 335 (2007). A federal court will review the district court's rulings on bifurcation for abuse of discretion. Griffin v. City of Opa-Locka, 261 F.3d 1295, 1298 (11th Cir. 2001).

2. Rulings During Trial

Selection of Jurors

Trial courts have broad discretion to evaluate and rule upon a potential juror's impartiality, based upon the ordinary general rules of human experience, and a trial court may only be reversed upon a finding of "manifest abuse" of that discretion. Trial court, however, is no longer permitted to rehabilitate jurors by using "loaded" questions to justify retaining biased jurors and should err on the side of caution by dismissing, rather than trying to rehabilitate, biased jurors. Kim v. Walls, 275 Ga. 177, 178, 563 S.E.2d 847, 849 (2002).

Evidentiary Rulings

Trial court retains broad discretion in determining whether to admit or exclude evidence, and an appellate court generally will not interfere with that discretion absent abuse. Carlisle v. Abend, 288 Ga.App. 150, 151, 653 S.E.2d 388, 390 (2007). A federal court will also review the district court's rulings on the admissibility of evidence for abuse of discretion. Griffin v. City of Opa-Locka, 261 F.3d 1295, 1298 (11th Cir. 2001).

Mistrial

The granting of a mistrial is within the discretion of the trial court. The standard of review is abuse of discretion. McEachern v. McEachern, 260 Ga. 320, 322, 394 S.E.2d 92, 94 (1990); Defusco v. Free, 287 Ga.App. 313, 315, 651 S.E.2d 458, 460 (2007). A federal court will also review the district court's ruling on a request for mistrial for abuse of discretion. Griffin v. City of Opa-Locka, 261 F.3d 1295, 1298 (11th Cir. 2001).

Qualification of Witness as Expert

Admissibility or exclusion of expert testimony rests in the broad discretion of the court, and the trial court's ruling thereon cannot be reversed absent an abuse of discretion. Nathans v. Diamond, ___ Ga. ___, 654 S.E.2d 121 (2007); MCG Health, Inc. v. Barton, 285 Ga.App. 577, 580, 647 S.E.2d 81, 85 (2007). Abuse of discretion is also the standard applied in federal court. Cook ex rel. Estate of Tessier v. Sheriff of Monroe County, Fla., 402 F.3d 1092, 1107 (11th Cir. 2005) ("[W]e

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review a trial court's ruling on the admissibility of expert testimony only for an abuse of discretion, mindful of the Supreme Court's directive that it is very much a matter of discretion with the court whether to receive or exclude the evidence, and that an appellate court will not reverse ... unless the ruling is manifestly erroneous.).

Jury Instructions

Because the review of an allegedly erroneous jury instruction is a legal question, the appellate court owes no deference to the trial court's ruling and applies the "plain legal error" standard of review. White v. American Family Life Assur. Co., 284 Ga.App. 58, 60, 643 S.E.2d 298, 300 (2007). A trial judge is entitled to wide discretion over the wording and style of instructions as long as the instructions accurately reflect the law. The reviewing court will examine the jury instructions as a whole to determine if the jurors understood the issues and were not misled. If the instructions as a whole properly express the law, then no reversible error has occurred even if an isolated clause may be inaccurate, ambiguous, incomplete, or otherwise subject to criticism. Lowe's Home Centers, Inc. v. General Elec. Co., 381 F.3d 1091, 1094 (11th Cir. 2004).

3. Post-Trial Rulings

Directed Verdict

The standard of review upon the denial of a motion for directed verdict is the "any evidence" test, and the evidence is construed most favorably towards the opposing party. The question before the reviewing court is not whether the verdict and judgment of the trial court were merely authorized but, rather, whether a contrary judgment was demanded. Singleton v. Terry, 262 Ga.App. 151, 155, 584 S.E.2d 613, 617 (2003); see also OCGA § 9-11-50(a) ("If there is no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefrom, shall demand a particular verdict, such verdict shall be directed.").

Special Verdict Form

The form of a verdict and the submission of a special verdict are within the discretion of the trial court, and, absent an abuse of that discretion, the court's choice will not be overturned. Certain Underwriters at Lloyd's of London v. Rucker Const., Inc., 285 Ga.App. 844, 852, 648 S.E.2d 170, 177 (2007). The same standard applies in federal court. Bogle v. McClure, 332 F.3d 1347, 1357 (11th Cir. 2003).

Judgment Notwithstanding the Verdict

In reviewing the denial of a motion for judgment notwithstanding the verdict ("j.n.o.v."), we apply the any evidence test. We consider not whether the verdict and the judgment of the trial court were merely authorized, but whether a contrary judgment was demanded. A j.n.o.v. is properly granted only when there can be only one reasonable conclusion as to the proper judgment; if there is any evidentiary basis for the jury's verdict, viewing the evidence most favorably to the party who secured the verdict, it is not error to deny the motion. Douglas v. Bigley, 278 Ga.App. 117, 118, 628 S.E.2d 199, 203 (2006).

Judgment as a Matter of Law

The Court of Appeals reviews Rule 50 motions de novo, viewing the evidence in the light most favorable to the nonmoving party. Chambless v. Louisiana-Pacific Corp., 481 F.3d 1345, 1348 (11th Cir. 2007).

Denial of Motion for New Trial

The denial of a motion for a new trial is a matter within the sound discretion of the trial court. Accordingly, it will not be disturbed if there is any evidence to authorize it. Defusco v. Free, 287 Ga.App. 313, 314, 651 S.E.2d 458, 459 (2007). A federal court will also review the district court's rulings on requests for new trial for abuse of discretion. Griffin v. City of Opa-Locka, 261 F.3d 1295, 1298 (11th Cir. 2001).

Grant of Motion for New Trial

An appellate court shall not disturb the first grant of a new trial "unless the appellant shows that the judge abused his discretion in granting [the new trial] and the law and facts require the verdict notwithstanding the judgment of the presiding judge." OCGA § 5-5-50. Similar to the standard of review applicable to judgments notwithstanding the verdict, where the evidence is conflicting and the jury would have been authorized to issue a verdict for the movants, the first grant of a new trial will not be reversed. Mosley v. Warnock, 282 Ga. 488, 489, 651 S.E.2d 696, 698 (2007).

Excessive or Inadequate Verdict

Reviewing court will not overturn a jury's verdict unless it is so flagrantly excessive or inadequate, in light of the evidence, as to create a clear implication of bias, prejudice, or gross mistake on the part of the jurors. If there is evidence to support that the jury's verdict, the reviewing court cannot disturb it. Lou Robustelli Marketing Services, Inc. v. Robustelli, 286 Ga. App. 816, 816, 650 S.E.2d 326, 328 (2007). "The granting of a new trial based upon alleged inadequacy of the verdict is reviewed for abuse of discretion." Millennium Partners, L.P. v. Colmar Storage, LLC, 494 F.3d 1293, 1303 (11th Cir. 2007)..

Punitive Damages

State and federal courts review claims that punitive damages awards are grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution de novo. Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 u.S. 424 (2001); Time Warner Entertainment Co. v. Six Flags Over Georgia, LLC, 254 Ga. App. 598, 563 S.E.2d 178 (2002).

To read Part I of this article, go to www.gdla.org, go to the Members Area, and download a copy of the Summer 07 issue of Georgia Defense Lawyer. *To read Part II, download a copy of the Fall 07 issue.*

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The plaintiff argued that the side effects of her treatment for cancer disabled her by substantially limiting her in the major life activities of caring for herself, performing manual tasks, lifting, and working. The Eleventh Circuit disagreed, reasoning that the most severe periods of limitation that the plaintiff suffered during her cancer treatment were short-term, temporary, and contemporaneous with her treatment. A severe limitation that is short term and temporary is not evidence of a disability. Additionally, evidence of the plaintiff's impairments and limitations at the time of litigation, several years after the employment decision at issue, are irrelevant. "Since the disability must be the cause of the discrimination, the requirement that a person must presently be substantially limited necessarily means that the person must be substantially limited in a major life activity at the time of the discrimination, and not several years later."

Temporal Proximity: Causal Connection

Thomas v. Cooper Lighting, Inc.,
506 F.3d 1306 (11th Cir. 2007).

When temporal proximity alone is relied upon to establish a causal connection between alleged protected activity and adverse action, the proximity must be "very close" to withstand a motion for summary judgment.

The plaintiff complained of sexual harassment by a supervisor in writing to his company's human resources department. Approximately three months later, he was terminated for excessive absenteeism under the company's "no fault" absenteeism policy. Among other things, the plaintiff filed a Title VII retaliation claim against the company, claiming his termination was in retaliation for his prior complaint of sexual harassment. The district court granted summary judgment to the employer because the employee's allegations "did not come close to the threshold of a hostile work environment required by Title VII," and thus did not constitute protected activity because he did not have an objectively reasonable belief the complained-of conduct violated Title VII.

The Eleventh Circuit affirmed, but did not reach the issue of whether the employee held an objectively reasonable belief of unlawful conduct. Instead, the court held the employee failed to produce sufficient evidence of a causal connection between his complaint and termination. Although the burden of causation can be met by showing close temporal proximity between the protected activity and adverse action, the court explained, "mere temporal proximity, without more, must be 'very close' . . . a three to four month disparity between the statutorily protected expression and the adverse employment action is not enough." The three-month period between plaintiff's complaint and termination, did not rise to the level of "very close" and, since he produced no other evidence of causation, his claim failed as a matter of law.

Religious accommodation

Morrissette-Brown v. Mobile Infirmary Med. Ctr.,
506 F.3d 1317 (11th Cir. 2007).

The plaintiff, a Seventh Day Adventist, claimed she was terminated because her "deep religious convictions" prevented her from working any shift on Friday or Saturday from 3:00 p.m. to 11:00 p.m. She filed a Title VII claim for religious discrimination, but after a bench trial, the district court granted judgment to the employer on the basis it reasonably accommodated her religious beliefs.

The Eleventh Circuit reviewed the decision for clear error. The evidence showed that the company employed a neutral rotating shift system and allowed employees to make independent arrangements to swap shifts. The company did not have an obligation to affirmatively take efforts to swap the plaintiff's shifts for her. Additionally, the company encouraged the plaintiff to transfer to another position within the company that did not require her to work shifts during the specified times. Finally, the company did not terminate or otherwise discipline the plaintiff for a period of approximately three months, even though she refused to work her scheduled Friday shifts and did not find a replacement. Based on these facts, the district court's decision was not clearly erroneous.

Title VII Retaliation: Protected Activity

Scarbrough v. Bd. of Trustees Fla. A&M Univ.,
504 F.3d 1220 (11th Cir. 2007).

Employee's call to campus police for protection against hostile faculty member and swearing out protective order was a protected activity under Title VII anti-retaliation section, and could not be considered a legitimate, non-discriminatory reason for termination.

The plaintiff (a male) was an academic advisor in the school of nursing who claimed he was subject to unwanted sexual advances by a female supervisor. He filed a written complaint and was transferred under the dean's direct supervision. Thereafter, the plaintiff's tires were slashed and the former supervisor confronted the plaintiff in the hallway, ostensibly about a telephone bill, and used profanity and threatened the plaintiff with physical violence. The plaintiff then filed a

campus police report and requested an injunction against the supervisor. He immediately went to the county courthouse to get the injunction papers signed and then gave copies of the police report and injunction papers to the dean. The following day, the dean terminated the plaintiff for "unprofessionalism."

Florida A&M argued that the employee's involvement of the police in his dispute with the supervisor was unnecessarily disruptive and, therefore, adequate grounds for termination of his employment. The Eleventh Circuit disagreed, however, and reversed the district court's grant of summary judgment. "Although involving the police in an employment dispute will not always be considered part of the protected conduct that prohibits retaliatory action, where, as here, it allegedly derived from an effort to protect against actions that are intertwined and interrelated with alleged sexual harassment, it cannot be deemed the 'unprofessional' conduct for which an employee can be terminated . . . Accepting Florida A&M's rationale would, for example, permit the termination of an employee who reported a rape by a supervisor to the police." Accordingly, the police report could not serve as a legitimate, non-discriminatory reason, and the court remanded the case for a determination of whether other reasons justified the plaintiff's termination.

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and (b)(1) are contradictory; the first says that facts and data relied upon need not be admissible, the second that experts are restricted to relying upon potentially admissible facts and data. The Supreme Court majority agreed with the trial court that the provisions cannot be harmonized, but upheld the trial court in disregarding a phrase in the first subsection and applying the second to exclude the experts. The Supreme Court disagreed with the trial court that the statement in the statute that courts "may" consider case law applying Daubert and its progeny is an unconstitutional delegation of legislative power, as well as the statement that the courts of Georgia are not to be open to expert testimony that is not admissible in other states. Finally, the majority decision declared the statute is a retroactive law because it is procedural and not substantive, and upheld the trial court decision on the experts themselves as not an abuse of discretion.

Justice Melton concurred specially, expressing the view that (a) and (b)(1) are not inconsistent, because while an admissible expert opinion must have support in admissible facts and data, it may rely in part on data that is inadmissible or which may be admissible. Justice Hunstein dissented, finding that the statute is unconstitutional in every way urged by appellants, and Justice Carley joined in one of the grounds of the dissent. Mason v Home Depot, __ Ga. ____ (March 10, 2008).

3. Proof of Defect

Facts: Plaintiffs were injured when their used, 1999 Lincoln Town Car was involved in an accident. Plaintiffs alleged Ford negligently manufactured and assembled the front passenger side seatbelt and air bag, and failed to warn of these defects. Ford's motion for summary judgment was granted on grounds the plaintiffs failed to produce any evidence the seatbelt and air bag contained a manufacturing defect.

Held: To establish a negligent manufacturing claim, a plaintiff must present evidence establishing that a defect existed in the product when it left the manufacturer's control. Owens v. General Motors Corp., 272 Ga. App. 842, 613 S.E.2d 651 (2005). Plaintiffs failed to offer any evidence as to the condition of their car's condition prior to purchasing it in 1999, such as repairs, alterations, or accidents; nor did they offer expert testimony on the issue of a defect, instead relying on their own allegations the seatbelt did not lock and side air bag did not deploy. Plaintiffs also relied on two product recalls involving front seatbelt assemblies in an attempt to show their car contained an original manufacturing defect.

"[T]he mere failure of automobile equipment is not 'itself evidence of an original defect,' since the failure can be the result of myriad causes not related to its manufacture." Jenkins v. General Motors Corp., 240 Ga. App. 636, 524 S.E.2d 324 (1999). With respect to the product recall, "[a] product recall can serve as circumstantial evidence of an original defect, however only when 'there is first introduced some independent proof that the particular product in question suffered from the same defect.'" Rose v. Figgie Int'l, 229 Ga. App. 848, 495 S.E.2d 77 (1997). Here, the product recalls related only to vehicles in which the original safety belt retractor had been replaced in service and further, Lincoln Town Cars were not among the models involved in the recalls. Plaintiffs' efforts to oppose summary judgment by the doctrine of res ipsa loquitur failed because "that doctrine does not apply to mechanical devices because they get out of working order, and sometimes become dangerous and cause injury without any negligence on the part of anyone." Millar v. Elevator Svc. Co. v. O'Shields, 222 Ga. App. 456, 475 S.E.2d 188 (1996). Miller v. Ford Motor Co., 287 Ga. App. 642, 653 S.E.2d 82 (2007), Bernes, J.

4. Proper Party; Successor Liability

Facts: Plaintiff was injured when he fell from a wing stand while servicing a military C-5 aircraft. Plaintiffs initially alleged the wing stand's lock pins popped, and that FSS knew the stand had problems but allowed them to remain in use. Plaintiffs amended their complaint to allege FSS, dba SKE Support Services, had fabricated and installed defective locking pins, and asserted causes of action for negligent installation, inspection and training, failure to warn, and breach of implied warranties of mechantability and fitness for a particular purpose. Plaintiffs were awarded a total of $1,523,000 after a jury trial, and FSS's motion for direct verdict on the grounds it was not the proper party and plaintiffs failed to establish that the allegedly defective pins had proximately caused his fall was denied.

Held: In Georgia, a successor or purchasing corporation does not assume its predecessor's liabilities unless: (1) there is an agreement to that effect; (2) the transaction is, in fact, a merger; (3) the transaction is a fraudulent attempt to avoid liabilities; or (4) the purchaser is merely a continuation of the predecessor entity. Bullington v. Union Tool Corp., 254 Ga. 283, 328 S.E.2d 726 (1985). To establish the new company is a continuation of the old company and therefore liable for its predecessor's debts and liabilities, the new corporation must have the same "objects, assets, and stockholders." Ney-Copeland & Assoc. v.

Tag Poly Bags, 154 Ga. App. 256, 267 S.E.2d 862 (1980). Plaintiffs produced no evidence of either common ownership or establishing any of the four exceptions, therefore FSS's motion for directed verdict should have been granted. First Support Services, Inc. v. Trevino, 288 Ga. App. 850, 655 S.E.2d 627 (2007), Barnes, C.J.

5. Product Identification

Facts: Medical stapler allegedly malfunctioned during plaintiff's surgery. Plaintiff propounded discovery requests seeking information for the "#25 EEA stapler" referenced in the physician's post-operative notes, but did not specify any particular model manufactured by Defendant. Defendant objected to plaintiff's discovery on grounds plaintiff's requests did not identify any specific stapler manufactured by Defendant. Plaintiff moved to compel Defendant's responses.

Held: A plaintiff must first identify a specific defective product manufactured by the defendant to trigger that defendant's duty to respond to discovery requests. "The only logical starting point for discovery in a product liability case based on the malfunction of a particular stapler is to identify a particular type of stapler manufactured by the defendants." Butts v. Tyco Healthcare Group LP, 2008 WL 80357 Slip Copy (N.D. Ga.), Vining, J.

6. "Stand 'N Seal": Access to Media Interviews Of Plaintiffs

Hundreds of plaintiffs in various states have sued Home Depot and some of its suppliers, alleging that a spray-on grout sealer product caused them respiratory problems. The litigation is consolidated in an MDL before Judge Thrash in the Northern District of Georgia.

Facts: Aerofil is one of the Tile Perfect Stand 'n Seal Spray-On Grout Sealer product liability defendants. Aerofil deposed plaintiff Friedel, who disclosed he had appeared on CNN's *Anderson Cooper 360* addressing complaints about Stand 'n Seals' safety. Aerofil subpoenaed CNN to produce "all footage, raw and final, aired or unaired," of any interviews relating to Stand 'n Seal. CNN moved for protective order based upon reporter's privilege.

Held: Though neither the Supreme Court nor the Eleventh Circuit have recognized a nonparty reporter's privilege in a civil action, FRE 501 authorizes federal courts to honor privileges recognized under state law. Jaffe v. Redmond, 518 U.S. 1 (1996). Federal and state laws are substantially identical as to the determination of whether the reporter privilege applies. To successfully overcome the reporter privilege, the party seeking production must show: (1) the material is relevant; (2) it cannot be reasonably obtained by alternative means; and (3) the material is necessary to the proper presentation of the party's case. Flynn v. Roanoke Companies Group, Inc., 2007 WL 4564113 Slip Copy (N.D. Ga.), Thrash, J.

7. Automobile Seat; Wrongful death; Res Ipsa Loquitur

Facts: After plaintiffs' daughter died from head injuries sustained in an auto accident, plaintiffs filed a product liability action against the manufacturer alleging negligence, design defect, and breach of warranty.

Held: Plaintiffs introduced evidence the rear seat was unclipped from the floor at the time of the accident. Therefore they argued the doctrine of res ipsa loquitur with respect to their negligence claim. Negligence, however, requires a showing of proximate cause between the defect and the injury, and plaintiffs had admitted the unclipped rear seat did not contribute to their daughter's fatal head injuries. Design defect claims are analyzed pursuant to the risk-utility guidelines set forth in Banks v. ICI Americas, Inc., 450 S.E.2d 671 (Ga. 1994). Plaintiffs' experts provided expert testimony that the design of the rear seatbelt allowed for excessive spool, that this excessive spool caused their daughter's head injury and that at the time of her injury Ford knew of an alternate seatbelt design which would not have allowed such excessive spool. Such showing created a genuine issue of fact as to the reasonableness of Ford's choice of seatbelts. Finally, Georgia law prohibits wrongful death actions based upon breach of warranty. Ryals v. Billy Poppell, Inc., 386 S.E.2d 513. Summary judgment granted as to plaintiffs' negligence and breach of warranty claims; denied as to design defect claim. Davenport v. Ford Motor Co., 2007 WL 4373601 Slip Copy (N.D. Ga.), Duffey, J.

8. Prescription Drugs; Removal; Fraudulent Joinder

Facts: Plaintiffs sued Novartis alleging their infant son developed leukemia after using Elidel, a prescription topical cream used to treat eczema. Plaintiffs alleged Elidel was not safe for the treatment of pediatric eczema claiming that Novartis (1) did not adequately test, (2) did not provide an adequate warning, and (3) made fraudulent misrepresentation with respect to Elidel's safety treating pediatric eczema. Plaintiffs also sued the treating physician for negligence in pre-

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scribing Elidel as well as the hospital he worked under vicarious liability. Novartis sought to remove the action asserting federal diversity and federal question jurisdiction.

Held: The citizenship of fraudulently joined defendants is ignored when determining whether complete diversity exists. Pacheco de Perez v. AT & T Co., 130 F.3d 1368 (11th Cir. 1998). Mutually exclusive allegations against the defendants can result in fraudulent joinder. Betts v. Eli Lilly and Co., 435 F. Supp. 2d 1180 (S.D. Ala. 2006). Plaintiffs' allegation the physician was negligent in prescribing Elidel contrary to the prescribing information and indications was not mutually exclusive of their claims Novartis did not provide an adequate warning or made fraudulent misrepresentations. Additionally, Novartis' assertions that plaintiffs' claims challenge certain FDA decisions resulted only in potential federal defenses and was not enough to confer federal question jurisdiction. Plaintiffs' motion to remand granted. Greene v. Novartis Pharm. Corp., 2007 WL 3407429 Slip Copy (M.D. Ga.), Lawson, J.

9.Statute of Repose, Failure to Warn; Pre-impact Pain and Suffering; Punitive Damages

Facts: A 1993 Ford Explorer was broadsided by another car and then rolled over several times, killing decedent. Plaintiffs contended excessive roof crush caused decedent's death, and filed suit alleging strict liability, negligent design, and failure to warn. Ford moved for summary judgment.

Held: In Georgia, the question of whether adequate efforts were made to warn the ultimate user of a potential defect and whether the warning was adequate are typically questions for the jury. Thornton v. E.I. DuPont de Neours & Co., 22 F.3d 284 (11th Cir. 1994). Also, Ford's argument that the failure to warn claim merged into the design defect claim was contrary to O.C.G.A. § 51-1-11(c), which states "[n]othing ... shall relieve a manufacturer from the duty to warn of a danger arising from the use of a product once that danger becomes known to the manufacturer." In Georgia, the duty to warn is a continuing one. Watkins v. Ford, 190 F.3d 1213 (11th Cir. 1999).

As for claims of pain and suffering, a recovery is possible even where an individual was held to have perceived his impending death mere seconds before it occurred. Monk v. Dial, 212 Ga. App. 362 (1994). According to the medical examiner, the death was only 'almost instantaneous.' Given the nature of the catastrophic injury, and the relatively long response time by paramedics after the accident (five minutes), the court held that the record contained sufficient evidence to defeat summary judgment on conscious pain and suffering. Georgia courts do not always require witnesses from the scene to establish survivorship and have allowed a survivorship claim to be proven by the totality of the circumstances. Finally, "[u]nder Georgia law, any automobile manufacturer placing profit over safety risk punitive damages liability." Woodard v. Ford Motor Co., 2007 WL 4125519 Slip Copy (N.D. Ga.), Thrash, J.

10. Discovery; Experts; Proximate Cause; Failure to Warn

Facts: Action arising from the death of plaintiff's son during an accident. Plaintiff propounded discovery to General Motors Corporation seeking the total amount of money paid to various experts and consulting firms for work performed on behalf of GMC for seven years. GMC responded by offering to make available for inspection and copying all such information with respect to the instant case only and plaintiff moved to compel. Plaintiff also filed a motion in limine, and GMC moved to exclude the testimony of plaintiff's expert witnesses and for summary judgment.

Held: With respect to motion, whether an expert has an ongoing relationship with a party or earns a significant portion of their income from testifying on behalf of that party is relevant and discoverable. Collins v. Wayne Corp., 621 F.2d 777 (5th Cir. 1980). The extended period of time sought by plaintiff was held to be unduly burdensome. As an unforeseeable intervening criminal act is generally treated as the sole proximate cause of an injury, the other driver's intoxication at the time of the accident was highly relevant to the issue of causation. Timmons v. Ford Motor Co., 982 F. Supp. 1475 (S.D. Ga. 1997). With respect to experts, only those expert opinions not included in the Rule 26 expert report were deemed admissible. With respect to summary judgment, the relevant proximate cause inquiry was whether, as a general matter, "the original negligent actor should have anticipated that the general type of harm might result." Smith v. Commercial Transp., Inc., 220 S.E.2d 446 (Ga. App. 1996). Whether GMC should have reasonably foreseen the possibility of a drunken driver causing an accident with the Blazer was held to be a question of fact as to proximate cause. Since the decedent was ejected through the window, plaintiff's claims of a possible defect with respect to the door were properly dismissed. Under the "simple product defects" line of case law, no

expert testimony is required if the jury is able to understand and analyze properly presented facts. Bishop v. Bombadier, Inc., 399 F. Supp. 2d 1372 (M.D. Ga. 2005). Finally, a plaintiff alleging failure to warn can either show the manufacturer's failure to take adequate measures to communicate the warning to the ultimate consumer, or alternatively show that the manufacturer failed to provide a warning which, if communicated to the end user, was adequate to apprize the user of the potential risk. Rhodes v. Interstate Battery Sys., 722 F.2d 1517 (11th Cir. 1984). Under the second avenue, a plaintiff's failure to read the warning bars recovery. Walker v. Merck & Co., 648 F. Supp. 931 (M.D. Ga. 1986). Reynolds v. General Motors Corp., 2007 WL 2908564 Slip Copy (N.D. Ga.), Story, J.

11. Experts; Fire Causation; Defect

Facts: As a result of a fire allegedly caused by defects in the motor of an exhaust fan, plaintiff filed suit alleging causes of action for negligent design and manufacture, and breach of duty to warn. Defendant moved to exclude certain expert testimony and for summary judgment.

Held: After Daubert analysis, plaintiff's experts were held to be qualified to testify, and their opinions the product of proper scientific method. Both experts relied in part upon fire investigation procedures outlined in the National Fire Protection Agency (NFPA) fire investigation manual – NFPA 921, Guide for Fire and Explosion Investigation. The experts opined the fire was caused by one or both alleged defects; the insulation on the windings was defective because it was not rated for the temperature the fan could reach during operating, and that the thermal cut off protector ("TCO") was misplaced or improperly rated. To prevail on its negligent design claim, plaintiff was required to show the product was defective, and that the defect was the proximate cause of the injury. SK Hand Tool Corp. v. Lowman, 223 Ga. App. 712 (1996). This determination is made using Banks v. ICI Americas' risk-utility analysis, and the appropriate analysis is whether the manufacturer failed to adopt a reasonable alternative design which would have reduced the foreseeable risk of harm presented by the product. Jones v. NordicTrak. Inc., 274 Ga. 115 (2001). Here, defendant's person in charge of product performance and separate 30(b)(6) witness both testified that TCO motors were used because they were cheaper than impedance motors, and that one potential cause of the failure was that the insulation on the motor windings failed. This testimony created a genuine issue of fact which defeated summary judgment. Finally, the duty to warn arises whenever a manufacturer knows or reasonably should know of the danger arising from the use of its product. Hunter v. Werner, 258 Ga. App. 379 (2002). Inam Intern., Inc. v. Broan-Nutone LLC, 2007 WL 4730649 Slip Copy (N.D. Ga.), Pannell, J.

12. Standing to Sue; Defect; Anticipation of Litigation

Facts: By paying for losses to its insureds' home caused by fire, Allstate became subrogee of all causes of action relating to the fire. After paying its insureds' claims, Allstate began an investigation as to the cause and origin of the fire, and its investigator determined that the fire had been caused by a manufacturing defect in the plug of an extension cord. Defendant moved for summary judgment, and Allstate moved to compel.

Held: To recover on a products liability claim, a plaintiff must establish proximate cause. Chapman v. Am. Cyanamid Co., 861 F.2d 1515 (11th Cir. 1988) (applying Georgia law). Though the extension cord in question was destroyed in the fire thereby preventing Allstate from introducing evidence as to the manufacturer of the extension cord, one of the prongs of the plug contained the defendant's trademark, and this sufficed to support a reasonable inference that the defendant had manufactured the cord and plug that caused the fire. Defendant alleged that Allstate had not fully responded to its request to admit concerning alternate cause of the fire, and also sought production of the adjuster's diary notes. Typically, claims files straddle the line between being prepared in the regular course of business and being prepared or obtained because of the prospect of litigation. As such, claims files do not constitute work product in the early stages of investigation, but once litigation becomes imminent the file and its contents are protected by the work product doctrine. Carver v. Allstate Ins. Co., 94 F.R.D. 131 (S.D. Ga. 1982). Allstate Ins. Co. v. Ever Island Elec. Co., 2007 WL 2728979 Slip Copy (N.D. Ga.), Carnes, J.

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a vehicle. The Court further held a jury could determine a bulldozer was not a vehicle under the policy and was not subject to the exclusion. Accordingly, the jury was entitled to find for Plaintiff on the issue of bad faith, as Lloyd's could not say as a matter of law it had a reasonable defense in light of Lloyd's having notice of the ambiguity.

RATIONALE: The Court held the provision at issue in the warranty was genuinely ambiguous. The warranty excluded coverage for damages "caused by theft from any one vehicle", but nonetheless defined "equipment" and "vehicle" differently. Accordingly, evidence existed to support the jury's findings the bulldozer constituted "contractor's equipment", which would not be a "vehicle" subject to the exclusion. In addition, testimony from Lloyd's' adjuster indicated the phrase "theft from a vehicle" as worded in the policy, could be construed to mean "theft of the vehicle's component parts" and not the vehicle itself. The Court held this testimony demonstrated a reasonable insured could have come to the same conclusion, and reiterated insurance contracts are to be read in accordance with reasonable expectations of the insured where possible. In light of the above, the Court ultimately held, based on the ambiguity, the trial court did not err in submitting to the jury the question of whether the bulldozer was either a "vehicle" excluded from coverage under the policy, or "contractor's equipment" not excluded from coverage.

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Construction Litigation: The Forensic Engineer

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deposition concerning his background, experience, or certain key issues in his analysis.

The ability to put together a technical report that takes complex engineering principles, defines them in simple layman language, and applies them in a rational logical manner to the case facts, is another trait of a good expert. A well-written report can often mean the difference between amicable resolution and protracted litigation. And, in light of legal cases that now require expert opinions to be based upon accepted scientific principles and methods in order to be admissible in court, an expert report must be subjected to peer review to assure that the investigation was conducted in a systematic, logical manner, resulting in the reliable and relevant opinions stated in the report. This is paramount to the admissibility of the report in the first place, and to any future success in the courtroom.

By the same token, successful courtroom testimony depends upon the ability of the expert to simplify the complex technical issues involved, and present them in court in a way that is both understandable and convincing. Simple answers to simple questions should be paramount here, and adequate preparation between the expert and counsel is the key to a successful presentation. Make sure that the legal elements of the case are covered, but also make sure that the questions and answers allow the judge and/or jury to follow the same systematic and logical path to the desired ultimate opinions as those presented in the written report. Bring out the weaknesses of the investigation in direct examination to lessen their impact. Let the expert take center stage so that jury rapport can be established, but be careful to confine the testimony to the expert's specific area of expertise so as to avoid damaging cross examination.

The use of experts in all kinds of litigation has been on a steady increase over the years, to the point where many trials have been characterized as a "battle of the experts". The forensic engineer nevertheless plays a vital role in our increasingly litigious society, being called upon to address complex technical questions or sort out the relative contributions of various participants on a construction project so that the judicial bench or the average juror can make an educated judgment on the issues involved in the lawsuit. If that role is performed ethically, competently, and objectively, input from the expert can allow for the proper assessment of responsibility as between the involved parties, and may also prevent costly future litigation. So the next time you hear the hawking cries of a modern day newsboy, or receive a panic "bad news" phone call from your client, a responsible and prudent reaction may very well be: "Let's have a qualified expert look into this right away!"

Alan J. Kundtz, J.D., P.E., is a Senior Project Engineer with SEA Limited, Charlotte, NC, and has more than 24 years of forensic engineering experience, analyzing and evaluating structural failures in concrete, masonry, steel, wood and roofing products and applications. Mr. Kundtz is a member of the American Society of Civil Engineers, and the Institute of Transportation Engineers. Mr. Kundtz also has a Juris Doctor degree from Capital University, Columbus, Ohio, and is a member of the Ohio Bar, DRI, and the Columbus Bar Association. He is a registered professional engineer in 20 states.

GDLA Annual Calendar

2008

June 12-15 -- GDLA Annual Meeting
(Ponte Vedra Inn & Club, FL)

June 12 -- Summer Board Meeting
(Ponte Vedra, FL)

June 14 -- Annual Business Meeting
(Ponte Vedra, FL)

June 21 -- DRI SE Region Meeting
(Sandestin Beach Resort, FL)

October 18 -- Fall Board Meeting
(Reynolds Plantation)

December 4-6 -- Melburne D. "Mac" McLendon Trial Academy
(Callaway Gardens)

2009

February -- Winter Board Meeting
(Hawkins & Parnell)

April -- Atlanta Judges Reception
(Capital City Club, Atlanta)

April -- Spring Board Meeting
(TBA)

June 25-28 -- GDLA Annual Meeting
(Grand Caymans - tentative)

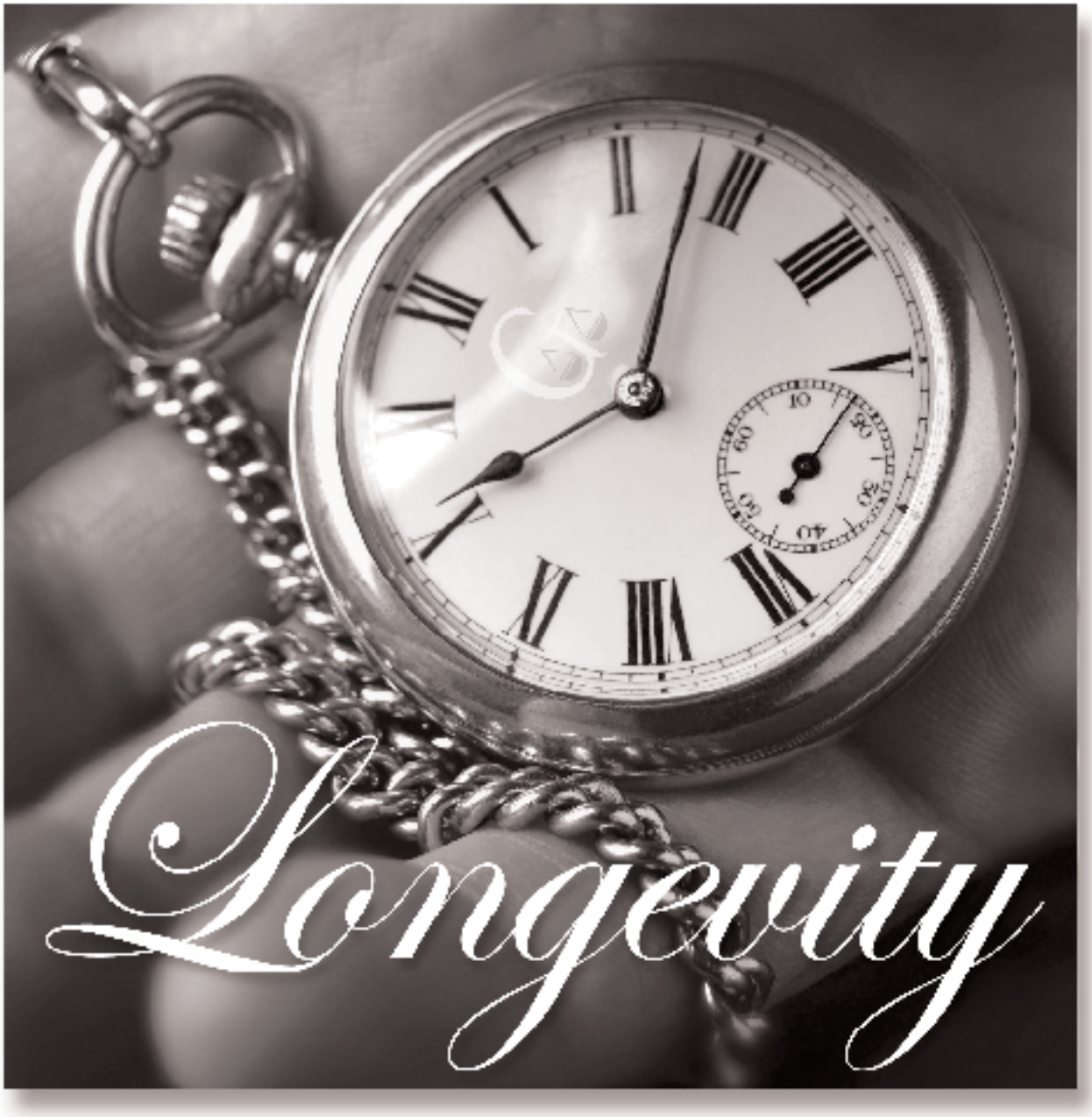
June 25 -- Summer Board Meeting
(Grand Caymans - tentative)

June 26 -- Annual Business Meeting
(Grand Caymans - tentative)

October -- Fall Board Meeting
(TBA)

December 3-5* -- Melburne D. "Mac" McLendon Trial Academy
(Callaway Gardens)

**Tentative Dates*



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