



The Joint Tortfeasor Maze

By Daniel J. Huff
Huff, Powell & Bailey, Atlanta

Georgia's statutes and case law regarding joint tortfeasors, apportionment of liability, and contribution have always been challenging. When the Georgia Legislature amended O.C.G.A. §§ 51-12-31 and 51-12-33 in 2005, new rules created a whole new playing field for tort lawsuits involving multiple parties. It may appear that the amendments and non-amendments to these Code sections are inconsistent. An understanding of the history of the numerous legal concepts encompassed by these statutes and the seemingly endless scenarios they cover allows the practitioner to recognize that these provisions attempt to provide a framework that eliminates joint and several *liability*, and to maintain other important rights. Joint *tortfeasors* still exist, but the allocation of fault and payment

responsibilities has changed. This article analyzes several common joint tortfeasor issues and how the new amendments apply to them.

THE PAST

Joint Tortfeasors

Defendants are joint tortfeasors if their separate and distinct acts of negligence concur to proximately cause an injury.¹ Concert of action among defendants is not required to be considered joint tortfeasors.² The fact that a plaintiff's injuries would not have been sustained had only one defendant's act of negligence occurred did not make another's act of negligence the sole proximate cause.³ Plaintiffs could sue whoever was liable for damages, together or separately. However, where one defendant is the sole proximate cause of an injury, there are no joint tortfeasors.⁴ The doctrine of joint tortfeasor liability has not been changed

by the Tort Reform Act of 2005 or the amendments to O.C.G.A. §§ 51-12-31 and 51-12-33.⁵

Joint and Several Liability

Before 2005, joint and several liability was the law in Georgia for more than 100 years.⁶ If the negligence of two persons combined to produce an injury, either could be sued for the entire amount of damages. There was no accounting of comparative negligence between the two negligent parties causing the injury, and either of them could be held liable for all the damages even though one was more negligent than the other.⁷ Leaving policy arguments aside, it was well-established that joint and several liability benefited plaintiffs. Moreover, even if the injury would have happened regardless of the defendant's negligence, the plaintiff could still recover.⁸ Joint and

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New Officers & Board Elected

The GDLA held its Annual Meeting at the Westin Casuarina in Grand Cayman from June 11-14, 2009, where members and guests enjoyed a sunset dinner cruise among other networking events. Members also earned CLE credits and, during the business meeting, unanimously accepted the Nominating Committee's report thereby electing the 2009 officers and Board members, including President N. Staten Bitting, Jr., of Fulcher Hagler in Augusta.

For the complete list of the new officers and Board of Directors, plus highlights from the Annual Meeting, see page 14.



(l-r) President Staten Bitting, Immediate Past President Jimmy Singer, and DRI Southeast Regional Director Evelyn Fletcher Davis enjoy the poolside Welcome Y'all Reception.

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Editor: Peter D. Muller

Georgia Defense Lawyer, the official publication of the Georgia Defense Lawyers Association, is published four times annually. For editorial information, please contact Peter Muller at pdmuller@bouhan.com.

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President's Message

While the Georgia Defense Lawyers Association has enjoyed growth in membership through the years, we seem to have hit a plateau recently. The association needs your assistance in making this a better organization.

The GDLA has numerous programs which are intended to help members develop practice skills and to provide tools to more effectively defend civil suits. These include:

- ♦ Information sharing via our blast e-mail service.
- ♦ Quality CLE programs for experienced practitioners and young lawyers.
- ♦ *Amicus Curiae* briefs on topics important to the defense bar.
- ♦ Publications.
- ♦ Receptions for the judiciary to promote communication and understanding between the bench and bar.
- ♦ Substantive law committees to promote information sharing and practice development in specialty areas.

The GDLA will greatly benefit if each member will personally invite someone to join.

This list is not exhaustive. The association also continues to provide opportunities for fellowship and participation by families at its functions. GDLA members tend to be disinclined to pursue their goals with furrowed brows.

The GDLA will greatly benefit if each member will personally invite someone to join. This may be an experienced practitioner. It may be a young lawyer who you think will be a good fit and who will contribute for years to come.

Invite a lawyer you know to attend a GDLA event. Make sure to introduce them around. Invite them to dinner with other members. Suggest activities they can participate in, such as a substantive law committee. The more active members we have, the better we can serve all members.

Yours for the defense,

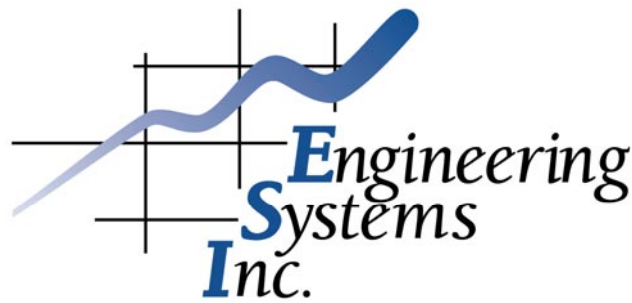
Staten Bitting
GDLA President

Jennifer Davis Joins GDLA as Executive Director

The GDLA pleased to announce that Jennifer M. Davis has joined the association as Executive Director, bringing almost 20 years of experience in professional services marketing.

After graduating from Emory University in 1988, Jennifer commenced her career at the State Bar of Georgia, ultimately serving as Director of Communications. In that role, she was Managing Editor and Publisher of the *Georgia Bar Journal*. In addition, she handled all of the Bar's external and internal communications, including media relations. She also redesigned the State Bar's logo, stationery and collateral materials, and spearheaded the development of its first Internet presence at www.gabar.org.

After 12 years at the State Bar, she entered the world of law firm marketing as a Business Development Manager at Hunton & Williams. She moved on to become Director of Business Development and Marketing at Weinberg Wheeler and, most recently, served as Director of Marketing at Sutherland Asbill & Brennan. Among other marketing initiatives, Jennifer directed the firm's massive rebranding campaign, culminating in its use of the trade name Sutherland. Her efforts won a SE Legal Marketing Association first place award for firm identity and second place for Website.



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Member & Legal News

Member News

Lynn M. Roberson of *Swift, Currie, McGhee & Hiers LLP* was elected Treasurer and **Rita A. Sheffey** of *Hunton & Williams LLP* was elected Secretary of the Atlanta Bar Association for 2009-2010.

W. Melvin Haas, III of *Constangy Brooks & Smith LLP* in Macon was selected by *Human Resources Executive* magazine for inclusion in the Most Powerful Attorneys of 2009.

Clinton F. Fletcher of *Nelson Mullins Riley & Scarborough LLP* was reelected to serve as a Member-at-Large on the Board of Directors for the Atlanta Council of Younger Lawyers (Atlanta Bar).

Bouhan, Williams & Levy LLP is proud to announce that the following GDLA members have been named by *Atlanta* magazine as Super Lawyers: **Peter D. Muller**, **Walter C. Hartridge** and **Carlton Joyce**.

William E. "Bo" Gray II is now practicing with *Gray King Chamberlin & Martineau LLC*, with offices in Atlanta and Charlotte.

Christopher Ray, a partner at *Oliver Maner LLP*, recently completed training to be registered with the Georgia Office of Dispute Resolution. He has added ADR to his practice focusing on business disputes, personal injury and wrongful death.

Cases of Note

Hugh McNatt of *McNatt, Greene and Peterson* in Vidalia recently obtained a defense verdict in a subrogation matter in Augusta. The claimed damages were \$847,000. The case arose out of an airplane crash which occurred in Augusta. The plaintiff was the insurer of the airplane. The case involved complex issues of joint and several lia-

bility and took approximately four days to try. The plaintiff was represented by Robin Browning of Atlanta, and Ben Brewton of Augusta tried the case with Hugh.

On February 19, 2009, **Matthew G. Moffett** and **Wayne S. Melnick**, of *Gray, Rust, St. Amand, Moffett & Brieske LLP* in Atlanta obtained a defense verdict for a daycare worker accused of intentionally injuring an 8-month-old child under her care at the daycare facility. Plaintiffs brought claims for negligence, intentional torts and punitive damages claiming that the child had received a "buckle fracture" to his leg while in daycare. Prior to the trial, plaintiffs dismissed the punitive damages claim but proceeded on the negligence and intentional tort claims. The daycare worker, who was under indictment for felony charges related to the subject incident, did not testify and her videotaped "confession" to the investigating law enforcement officers was played for the jury. The court also instructed the jury that she had been arrested on charges related to the subject incident. The defense contended that what happened to the child, if it even occurred at the daycare center, was an accident and not negligence. Further, they contended the "confession" obtained by law enforcement officers was a false confession that was coerced as a result of improper interrogation techniques. After four days of testimony, a Cobb County jury returned a defense verdict.

New Members

The following new members were inducted at the most recent Board meetings: **Clayton M. Adams**, *Carlock Copeland*, Columbus; **Judy Farrington Aust**, *Goodman McGuffey Lindsey & Johnson*, Atlanta; **Timothy H. Bendin**, *Hall, Booth, Smith & Slover PC*, Atlanta; **Mark J. Boyd**, *Savell &*

Williams LLP, Atlanta; **Kyle W. Brent**, *Savell & Williams LLP*, Atlanta; **Craig A. Brookes**, *Hanks Brookes LLC*, Atlanta; **Carrie L. Christie**, *Rutherford & Christie LLP*, Atlanta; **Allison Escott**, *Mozley Finlayson & Loggins*, Atlanta; **Musa L. Eubanks**, *Insley & Race LLC*, Atlanta; **Laura M. Forrest**, *Gray, Rust, St. Amand, Moffett & Brieske LLP*, Atlanta; **Shuli Green**, Decatur; **Jerald R. Hanks**, *Hanks Brookes LLC* Atlanta; **Sarah-Elizabeth Herrup**, *Drew Eckl & Farnham LLP*, Atlanta; **M. Anne Kaufold-Wiggins**, *Balch & Bingham LLP*, Atlanta; **Joshua Mayes**, *Sutherland*, Atlanta; **John L. McKinley, Jr.**, *Mozley, Finlayson & Loggins LLP*, Atlanta; **K. Martine Nelson**, *Swift, Currie, McGhee & Hiers LLP*; **Gregory T. Presmanes**, *Bovis, Kyle & Burch LLC*, Atlanta; **Taylor Stevens**, *Drew Eckl & Farnham LLP*, Atlanta; **Michael J. Sullivan**, *Womble Carlyle Sandridge & Rice PLLC*, Atlanta; **Charles K. Wainright II**, *McCall, Williams, Wilmot & Powell*, Albany; **Kindu A. Walker**, *The Finley Firm PC*, Atlanta.

Blast E-mail Database Changes

Previously, the complete text of the original e-mail request and all responses were stored in a searchable database along with the date and names of requestor and responder(s). Going forward, the GDLA Board of Directors has decided that the GDLA will retain only the requestor's name, the date of the request, the subject line and the names of any who respond. Please keep this in mind when composing the subject line so that it includes all necessary information. This policy is in line with other organizations that utilize blast e-mail requests for gathering information, and it addresses reported problems pertaining to unauthorized use of database information.

Product Liability Case Law Update

By Rachel A. Fuerst, Weinberg, Wheeler, Hudgins, Gunn & Dial, Chair; and Jeffrey S. Bazinet, Peters & Monyak, Vice-Chair, GDLA Product Liability Law SLC



American Home Products Corp. v. Ferrari, 284 Ga. 384 (2008)

Ferrari involved claims relating to childhood vaccines containing thimerosal. The Georgia Supreme Court held that the National Childhood Vaccine Injury Act of 1986 “does not preempt all design defect claims against vaccine manufacturers, but rather provides that such a manufacturer cannot be held liable for defective design if it is determined, on a case-by-case basis, that the particular vaccine was unavoidably unsafe.” The court reasoned that, while the section of the Act codified at 42 U.S.C. § 300aa-22(b)(1) “indicates that Congress intended to preempt some state law,” the history of the Act, and particularly the Act’s adoption of comment k to Section 402A of the Restatement (Second) of Torts, indicated a congressional intent to preempt only claims in which it could be shown that the side effects of the vaccine were unavoidable “by means other than proper manufacturing and packaging.” In so doing, the court interpreted the clause found in 42 U.S.C. § 300aa-22(b)(1) that states a manufacturer is not civilly liable “if the [vaccine-related] injury or death resulted from side effects that were unavoidable” to be “conditional” and stated that the clause “contemplates the occurrence of side effects which are unavoidable, and for which a vaccine manufacturer may be civilly liable.”

Denton v. DaimlerChrysler Corp., 2008 WL 511222 (N.D. Ga. Dec. 2, 2008)

Denton arose from an automobile collision during which the passenger-side airbag deployed, and the driver-side airbag did not. The trial court granted summary judgment to the vehicle manufacturer on the plaintiff’s punitive damage claims under Georgia law. The manufacturer conceded that the driver-side airbag was designed to deploy in the type of collision at

issue and explained that a malfunction had prevented the airbag from deploying. The operative facts on which the court based its decision were that the subject vehicle was equipped with a warning lamp, which all experts agreed had illuminated at least 32,000 miles before the subject collision, and the manufacturer had issued a comprehensive NHTSA-compliant recall and had sent a recall letter to the vehicle owner’s address. The trial court reasoned that, while there may be factual issues as to whether the owner received the recall letter, no reasonable jury could find by clear and convincing evidence that the manufacturer’s action exposed it to liability for punitive damages.

Mason v. Home Depot U.S.A., Inc., 283 Ga. 271 (2008)

Mason concerned the constitutionality of O.C.G.A. § 24-9-67.1. The Georgia Supreme Court upheld the plaintiffs’ challenge to the statute as a whole but also upheld the trial court’s striking of subsection (b)(1), which provides that facts and data on which experts rely must be admissible, holding that section (b)(1) contradicts subsection (a), which provides that facts and data upon which experts rely need not be admissible.

The court rejected the plaintiffs’ equal protection argument that the statute places stricter standard on tort plaintiffs than on criminal litigants or litigants in civil condemnation actions, finding that the plaintiffs did not have standing to challenge the statute on equal protection.

With regard to the due process arguments, the court held that the trial court did not err by striking only subsection (b)(1), because invalid portions of a statute may be severed when they are “not mutually dependent on the remaining portions and legislative intent is not compromised.” The plaintiffs

also argued that subsection (f) violated due process and improperly delegated legislative authority. The court held that the statute did not improperly delegate authority or invade the province of the judiciary, because the statute did not require the application of federal law decisions and instead had a “permissive suggestion” that federal *Daubert* authority be followed.

Parks v. Hyundai Motor America, 294 Ga. App. 112 (2008)

Parks arose out of an automobile collision and concerned claims relating to a lap-only seat belt in the center rear seat of a 1989 Hyundai Excel. The version of Federal Motor Vehicle Safety Standard 208 applicable to the subject vehicle required the manufacturer to choose between installing either a lap-only belt or a lap/shoulder belt. The Georgia Court of Appeals held that FMVSS 208 impliedly preempted any claim that the subject vehicle was defective under state law (whether under negligence or strict liability theories) because the manufacturer had installed a lap-only belt or other restraint system, as well as any claim that Hyundai had failed to warn about the dangers of any preempted claim. In so doing, the court of appeals noted that the “regulatory and rulemaking history of FMVSS 208 shows a comprehensive regulatory scheme in which the NHTSA considered technological constraints, child safety concerns, and cost efficiency issues applicable to restraint systems in the rear center seat and adopted a policy that expressly required [the manufacturer] to choose between installing a lap-only seat belt or a lap/shoulder seat belt,” and that any action by the plaintiffs that seeks to impose liability on the manufacturer for choosing to install a lap-only belt is preempted because it conflicts with and frustrates the policy of the National

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Insurance Coverage Case Law Update

By Brian T. Moore, Chair
GDLA Insurance Law SLC
Drew, Eckl & Farnham, Atlanta



Aaron v. Georgia Farm Bureau Mut. Ins. Co., A09A0354 (Ga. Ct. App. April 8, 2009)

The possibility of settling a disputed first-party insurance claim does not discharge the insured from his duty to file suit within the limitation period.

Plaintiff's home was struck by a vehicle. Plaintiff initially rejected his insurer's estimate of damages but then accepted the estimate more than one year after the date of loss. The insurer then denied the claim, citing the one-year contractual limitation of action clause. Plaintiff filed suit, and the trial court agreed that the insured's claims were barred by the policy's one-year contractual limitation period.

The Georgia Court of Appeals affirmed, holding that the possibility of a settlement did not discharge the insured of his duty to

file suit within the contractual limitation period. The court reasoned that settlement negotiation is not the type of conduct designed to lull the claimant into a false sense of security, estopping an insurer from asserting a suit limitation defense. To hold otherwise, the court noted, would allow a party to extend the statute of limitation by making an offer to settle.

Thorton v. Georgia Farm Bureau Mut. Ins. Co., A08A1801 (Ga. Ct. App. March 27, 2009)

In the absence of fraud inducing an insured not to file suit within a contractual limitation period, the acts of an insurance agent or adjuster do not waive a contractual limitation period.

Plaintiff's home was destroyed by fire. During the investigation, Plaintiff's insurer made several advanced payments to Plaintiff.

Each payment indicated that the insurer did not waive any provision of the policy. The claim was then denied four months before the expiration of the policy's one-year contractual limitation period. More than one year after the loss, the insured filed suit against his insurer, asserting that the insurer's actions prejudiced his ability to file suit within one year after the loss. The trial court granted summary judgment in the insurer's favor, based on the insured's failure to file suit within one year following the loss.

The Georgia Court of Appeals affirmed, holding that absent fraud on the part of the insurer which induces an insured to delay bringing suit until after the time for bringing suit has expired, the insured cannot rely on the agent's conduct as an excuse for the failure to sue.

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Below are some of the bills passed during the 2009 Legislative Session, as excerpted from Rep. Lindsey's full report "2009 Under the Gold Dome: What Have They Done Now?"

I. Civil Practice

HB 29: Service by Electronic Means, Stay of Discovery Pending Motion to Dismiss

This Bill blended together two different proposed changes to the Georgia Civil Practice Act. First, it sets out a method for how attorneys in a civil action may agree to serve by electronic means all pleadings after the complaint. For those attorneys that agree to accept pleadings electronically, the three-day mail rule still applies. Second, the Bill allows for a 90-day stay of discovery if a defendant files a 12(b)(6) motion to dismiss at or before the filing of his answer.

HB 195: EMC Members on Juries

Particularly in more rural areas, there has been a great problem with selecting juries in cases that involve the local Electrical Membership Corporations, be-

cause so many jurors belong to the EMC. This Bill simply allows prospective jurors to serve on juries in such cases even though they belong to the EMC.

HB 283: Filing fees in Appellate Courts; Fees for Taking the Bar

The cost of appealing a civil case to the Georgia Court of Appeals or Supreme Court is about to increase dramatically. The cost is being increased from \$80. 00 to \$300. 00. The cost for appealing criminal and habeas actions remains at \$80. 00. In addition, responsibility for setting the fee for taking the Bar Examination is now with the Georgia Supreme Court.

HB 324 — State Courts, Payment of Cost on Appeal

The law currently requires that in any appeal from a lower court to the superior court the appellant is required to pay all costs of the tribunal appealed from. HB 324 requires that any appeal to the state court from a lower court be similarly treated in terms of the payment of costs.

SB 213: Market Share Liability in Products Liability Cases

In products liability cases, the manufacturer of an allegedly defective product shall not be held liable for the manufacture or for public nuisance on theories of market share or enterprise, or other theories of industry-wide liability.

HB 529: Agritourism, Good Faith Immunity

This Bill recognizes the inherent risks involved in agritourist activities, including hunting, fishing, apple picking, etc. The owner of property who properly post warnings of this danger and obtains a signed waiver from guests will enjoy good-faith immunity from civil law suits.

II. Business Law

HB 126: Uniform Electronic Transactions Act

Georgia now becomes the forty-seventh state to pass the Uniform Electronic Transactions Act ("UETA"). It basically takes generally accepted business and contract principles and applies them to business transactions taking place over the internet. For those who wish to conduct business electronically, the Bill covers everything from how offers and acceptances are handled and electronic signatures and notaries are perfected, to requiring that both parties be able to download to their own computer the final agreed-upon terms of the agreement: and everything in between.

HB 127: Uniform Real Property Electronic Recording Act

The Uniform Real Property Electronic Recording Act ("URPERA") grants responsibility to the Georgia Clerk's Cooperative Authority to county clerks to accept filing of real estate transactions by electronic means. In addition, the Authority will be vested with the responsibility for establishing uniform regulations for how these electronic transactions will be handled in all 159 Georgia counties.

III. Domestic Law and Juvenile Court Proceedings

HB 145: Child Support Revisions

In the 2006 rewrite of the Georgia Child Support laws, the General Assembly also created the Georgia Child Support Commission to monitor how the new law was working and to make suggested modifications as the need arises. HB 145 contains this year's recommended changes dealing with deviations required in situations involving parents with very low income. The Bill basically gives the judges greater discretion to set aside the child support tables in fixing the level of child support in such situations.

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One Step Forward, Two Steps Back: Expert Witness Requirements

By Shaun M. Daugherty, Hall,
Booth, Smith & Slover, Atlanta



Through the issuance of one decision, the Georgia Court of Appeals has effectively given O.C.G.A. § 24-9-67.1 a full-mouth extraction as it applies to the expert witness affidavit requirement of O.C.G.A. § 9-11-9.1. *Houston v. Phoebe Putney Memorial Hosp., Inc.*, 295 Ga. App. 674 (2009)

After O.C.G.A. § 24-9-67.1 was created through the passage of S.B. 3 in 2005, the expectation was that plaintiffs would be required to find qualified experts to support their claims before filing of suit. Taken at its face, the new statute looked as though it might bring back the original purpose of the affidavit requirement, *i.e.*, to reduce the number of frivolous malpractice suits. *See, e.g., Thompson v. Ezor*, 272 Ga. 849, 852 (2000).

However, early decisions from the court of appeals appeared to give S.B. 3 more form than substance, essentially explaining that

the new requirements were just like the old requirements, in that as long as there was some arguable overlap in the knowledge base of the expert affiant and the defendant physician, that was close enough. *See, e.g., Abramson v. Williams*, 281 Ga. App. 617 (2006); *Cotten v. Phillips*, 280 Ga. App. 280 (2006).

Then, the Georgia Supreme Court stepped in with the decision in *Nathans v. Diamond*, 282 Ga. 804 (2007), and O.C.G.A. § 9-11-9.1 suddenly had teeth again. Seemingly, one physician, by virtue of his training and education alone, was not necessarily equal to another for purposes of dragging him into court on a malpractice claim. The trial court's determination of experience was essential under the statute.

The court of appeals then weighed in on at least two occasions regarding the competency of

expert testimony in affidavits filed with a malpractice complaint. *See Cogland v. Hosp. Auth. of the City of Bainbridge*, 290 Ga. App. 73 (2008); *Spacht v. Troyer*, 288 Ga. App. 898 (2007). Both decisions indicated that, *from the face of the affidavits*, the proffered experts did not meet the qualification requirements set forth under O.C.G.A. § 9-11-67.1. Both lawsuits were dismissed.

Unfortunately, Judges Bernes, Andrews, and newly-elected Doyle have derailed the competency requirements established by statute and recent case law. In *Houston*, 295 Ga. App. 674, a 61-year-old man presented to the emergency room of Phoebe Putney Memorial Hospital with complaints of dizziness, vomiting, and sweating which were apparently noted by the triage nurse, defendant Posey. After some time

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Supreme Court Narrowly Upholds Acceptance Doctrine

Ruling Favorably Impacts Contractors' Liability

By Carrie L. Christie
Rutherford & Christie, Atlanta



Attorneys who regularly represent contractors in Georgia received good news from the Supreme Court of Georgia earlier this year. In *Bragg v. Oxford Construction Co.*, 285 Ga. 98 (2009), the court upheld 4-3 the 100-year-old acceptance doctrine, which shields contractors from liability to injured third parties where the contractor does not hold itself out as a design expert, has completed its work according to specifications, and has turned it over to the owner, and the owner has accepted the work.

The case reached the supreme court after Oxford Construction Company, represented by the Atlanta law firm of Rutherford & Christie, was granted summary judgment in two separate lawsuits filed by plaintiffs Kenneth and Francesca Bragg. The Braggs sued Oxford after Mrs. Bragg was involved in a car accident on County Line Road in Dougherty County, which seriously injured her and their two-year-old child and resulted in the stillbirth of their unborn child.

Dougherty County had solicited bids on a contract to repave and overlay asphalt spot patches in specified areas on County Line Road, and it selected Oxford to perform the work. The County directed Oxford where to place the patches and supervised the work daily. Following completion of the scope of work, wet subsurface conditions caused "movement" in the final pavement, but the County accepted the work despite notice of these conditions. Every witness testified that Oxford completed its work in accordance with the directions, specifications, and orders of the County. The plaintiffs' expert testified that the overlay created a height variance between the existing pavement surface and the patch, which collected water and caused the at-fault driver to hydroplane.

The Braggs alleged the accident, which occurred more than seven months after acceptance of the work, was caused by the pavement variance. Oxford defended on the basis that all work was properly performed and was completed and accepted by the owner prior to the accident, and the proximate cause of the plaintiffs' injuries was the negligence of the other driver, who was driving too fast for conditions.

The superior court granted summary judgment to Oxford based on Georgia's acceptance doctrine. The Georgia Court of

The facts of this case were a key factor in the decision to uphold the acceptance doctrine.

Appeals affirmed the decision, and the Braggs petitioned the supreme court to overturn the acceptance doctrine. Oxford's attorney argued that completion and acceptance of a contractor's work means that he loses all control over it, including the ability to monitor and maintain the safety of it. The acceptance doctrine allocates liability to the party which is responsible for control of the property and completion of the work. Because a contractor is bound by his contract and does not own the property, the contractor does not control the scope or nature of the work performed on the property. Therefore, once the contractor's work is completed within compliance with the contract and accepted by the owner, the contractor would not be liable unless certain exceptions listed within the doctrine apply.

Oxford was not responsible for, nor did it hold itself out as an expert in, road design, and it had

followed the plans, specifications, and contract terms. The supreme court found, "Under such circumstances, liability, if any, should rest with the entity that hired Oxford."

The 4-3 majority opinion stated that the application of the acceptance doctrine to the facts of this case "makes perfect sense." As the court pointed out, "[I]f Oxford had somehow been negligent in the performance of the requested work such that its work fell within one of the exceptions to the acceptance doctrine, it could still have been subjected to liability under Georgia law regardless of whether or not the County accepted its work."

The court also declined "to propose [an] ad hoc invention of a new legal doctrine," finding that it was not the court's role to "formulate new law in the abstract." The majority was not persuaded by the fact that courts in other states have rejected the acceptance doctrine. Rather, the majority cited to the acceptance doctrine's long-standing existence and the likely presumption that contractors have come to rely on this doctrine. Based on the fact that Georgia's legislature has not changed our state's acceptance doctrine, the court held that it must be left intact ... at least for now.

As the supreme court majority opinion makes clear, the facts of this case were a key factor in the decision to uphold the acceptance doctrine. Therefore, it remains unclear whether future cases, with facts not as compelling, will one day sway the court to abolish the doctrine. Accordingly, whenever possible, attorneys should ensure that motions for summary judgment filed on behalf of Georgia contractors argue that the contractor is not liable because it followed the instructions and directions of the owner, without regard to the

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The Evolving Scope of the “Occurrence” Requirement

In Georgia Construction Defect Coverage

By Philip W. Savrin
Freeman Mathis & Gary, Atlanta



Introduction

Many liability policies cover damages caused by an “occurrence,” which is typically defined in the policy as “an accident including continuous or repeated exposure to substantially the same general harmful conditions.” Applying this definition to construction defect cases can be problematic; whereas a contractor rarely intends his work to be defective, a claim for damages often results from work intentionally done. Georgia courts have struggled with the proper application of the occurrence requirement in these contexts, which occasionally results in case decisions that are difficult to reconcile. This article discusses the key cases that apply the occurrence definition in construction defect cases to give the reader a working knowledge of the current state of Georgia law in this emerging area.

The Meaning of “Accident”

Although liability policies define occurrence as an accident, they do not further define the terms. In such circumstances, Georgia’s rules of construction require courts to construe words according to “their usual and common signification and customary meaning.” *Cuyler v. Allstate Ins. Co.*, 284 Ga. App. 409, 412 (2007). For purposes of interpreting Georgia’s statutes, “accident” is defined as “an unintended happening rather than one occurring through intention or design.” O.C.G.A. § 1-3-3(2). Georgia courts have looked to this definition to construe the term “accident” in insurance policies as well. See *Allstate Ins. Co. v. Grayes*, 260 Ga. App. 419 (1995).

The construction of the term in insurance policies appeared initially in the context of life and disability policies that provide

benefits for injuries sustained “by accidental means.” In *Winters v. Reliance Standard Life Ins. Co.*, 209 Ga. App. 369 (1993), for example, the court of appeals considered whether benefits were owed for a death that resulted from voluntary intoxication. In finding that benefits were not available, the court relied on un rebutted evidence that injury and death are foreseeable results of the intentional act of imbibing. Because the policy required that the loss caused by accidental means, no benefits were afforded. *Id.* at 370-71. See also *Jefferson v. Nat’l Life & Acc. Ins. Co.*, 130 Ga. App. 208 (1973) (finding that a death resulting from the voluntary ingestion of heroin was not accidental within the meaning of the insurance policy).

This reasoning was applied more recently by the Supreme Court of Georgia in *Provident Life*

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Dust Explosions

Timothy J. Myers, Ph.D., P.E., CFEI, CFI,
Senior Managing Engineer, Exponent, Inc.



Introduction

The February 7, 2008 dust explosion in Port Wentworth, Georgia has created an increased focus on dust explosion hazards in both Georgia and throughout the United States. This article describes the fundamentals of dust explosions and reviews the types of dusts that can fuel dust explosions, the regulations and standards for the prevention of dust explosions, and the available test methods for evaluating dusts. This information should assist attorneys who are involved in lawsuits resulting from dust explosions, defending OSHA citations, or assisting clients to reduce dust explosion hazards in new or existing facilities.

What is a “dust explosion”?

Most people are probably familiar with news reports of dust explosions in coal mines or grain elevators. Dust explosions, however, can and do occur in a wide variety of industries and are fueled by many different materials.

Most materials that burn or oxidize when present as bulk solids will burn much more rapidly when in the form of a fine dust. The combustion rate of solids is typically limited by the surface area of the solid in contact with the oxidizer (air). Therefore, as the particle size of a material decreases, the surface area per unit volume increases, and the combustion rate per mass of material generally increases. One common example is that a log burns much faster when split into small wood kindling, and even faster when dispersed as a dust.

Some solids that a lay person might not consider a fire hazard, such as aluminum, can support a dust explosion when present in a sufficiently fine powder form. As a general rule of thumb, the concentration of dust required to fuel a dust explosion is so high that you would not be able to see your hand extended in front of you. For most materials, these concentrations are

in orders of magnitude that are higher than the concentrations that would represent a breathing hazard.

When a combustible dust is dispersed in proper concentrations, it can behave similar to clouds of fuel vapors (e.g., gasoline) or flammable gases (e.g., natural gas) when ignited. Similar to vapors or gases, if a dust cloud is ignited in an open area or outdoors, a flash fire will typically occur, creating a fire ball but little or no overpressure damage. If a dust cloud is ignited in a confined environment, such as a building or piece of process equipment, the fire ball will typically be accompanied by an explosion with damage-causing overpressure that can collapse building walls or burst process vessels.

Industries Affected by Dust Explosion Hazards

Many companies are unaware of dust explosion hazards that are

present in their facilities. A dust explosion hazard can be present whenever combustible dusts are handled or created as part of a process. Facilities may use combustible dusts as their primary raw material or additives, generate combustible dusts as an intermediate or final product, or create combustible dusts as a byproduct or waste material in their manufacturing operations.

Powder or dust may be present within closed operating equipment or may build up over time on horizontal surfaces throughout a facility. In many facilities, surfaces such as floors may be cleaned regularly, whereas elevated surfaces such as tops of equipment and ceiling beams may have a significant amount of dust accumulations.

Table I shows a sample of recent explosions investigated by Exponent staff and the range of industries involved. As part of a recent study of dust explosions, the

Continued on page 27

Table I: Sample of Recent Dust Explosions Investigated by Exponent Staff

Type of Facility	Dust Involved in Explosion
Power Plants	Coal Dust, Hybrid Gas/Coal Dust Mixtures
Cast Iron Foundry, Fiberglass Insulation Plant	Phenolic Resin Powder
Rubber Part Molding for Pharmaceutical Delivery Systems	Polyethylene Dust
Tire Recycling Facility	Ground Rubber
Plastic Recycling Facility	Laser Printer Toner
Wood Products Facilities	Wood Dust
Powder Metallurgy, Aluminum Coating, Bicycle Rim Assembly, Automobile Wheel Manufacturing Medical Electrode and Patches	Aluminum Dust
Textile Manufacturer	Fleece Dust
Flour Grinding Mill	Flour Dust
Plastic Manufacturing Facility	PVC Dust
Pharmaceutical Facility	Vitamin Powder
Fiberboard Manufacturer	Paper Dust
Bakery Waste Processing	Bakery Waste
Cattle feed Mill	Grass Seed
Grain Processing Facilities	Grain Dust
Pharmaceutical Company	Sucrose
Composite Handling Company	Resin and Carbon Dust
Food Product Facility	Non-dairy coffee creamer
Corn to Ethanol Plant	Spent corn/yeast

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(left) Walter McClelland, Barry Fleming and Mel Haas.

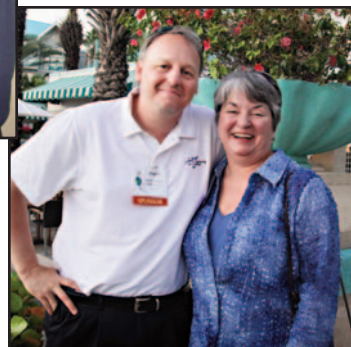
(below) Pictured at the President's Reception are Pat Fox, Bobbie Foster, Debbie and Bubba Hughes, Sally Akins and Johnny Foster.



(right) Gary and Connie Seacrest, Jimmy Singer and sponsor Jeff Pike and wife, Debbie, from **FORCON International**.



(left) Sponsor Randy Watson of **SEA Limited** and Staten Bitting.



(above) Sponsor Frank Hagan of **ESI Inc.** and Alabama Defense Lawyers President Helen Alford. Photo courtesy of Jacqueline Ward Photography.



(above) **ESI Inc.** sponsored the annual golf tourney. Photo courtesy of Jacqueline Ward Photography. **Esquire Solutions** sponsored the annual tennis round robin, with winners being drawn from a hat after a rainout. **Kimley-Horn** was a participating sponsor of Friday's continental breakfast before the CLE seminar.



(above) Catherine Bowman, Kirby and Frank Mason.



(right) Rusty Gunn, Steve Kyle and Walter McClelland led the CLE panel discussion on Ethics Issues in Trial.

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(right)
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Staten Bitting
before setting
sail with his
family: Cindy,
Libby and Neil.
Photo courtesy of
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(above) Larry
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(left) Brent and
Rusty Gunn of
sponsor **South
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(above) Ted Freeman and Mary Peironnet;
(below) Warner Fox - center - with Lynn
Roberson and Judge Henry Newkirk.



(above) Michael Sullivan, sponsors Angela Abel and
Paula Gabier of **DecisionQuest**, and Dan Gabier.



(above) Ed and Laura Stabell.



Expert Witness Requirements

continued from page 9

passed, the patient's symptoms included numbness in his arm and a twitch in his chest, which the court of appeals diagnosed as "clear signs and symptoms of a stroke." The patient was not seen by a physician for another three hours and was found to have suffered a cerebral stroke with permanent impairment to his right side.

The patient and his wife sued the nurse and the hospital for claims of medical negligence. Attached to the complaint were the affidavit and curriculum vitae of a registered nurse licensed to practice in Georgia. Her experience

paragraph of the opinion, the court ignored the requirements completely and reminded the reader, and the trial courts, that O.C.G.A. § 9-11-9.1 is merely a pleading requirement, and that the liberal pleading rules require that any and all doubts in an expert affidavit must be resolved in favor of the plaintiff. The court cited multiple pre-tort reform cases to support its holding. Ironically, the court also reminded us that the purpose of the statute is to reduce the number of frivolous malpractice suits.

The court seemingly went out of its way to cite and expand upon

made. It seems as though the court could have come to the same conclusion, and perhaps even been consistent with prior decisions, without the need for additional commentary and the apparent reversion to pre-tort reform analysis.

There appear to be at least two errors in the court's foundation for its decision. First, the court seemingly chastised the trial court for having granted the motion to dismiss without an evidentiary hearing and based only on its review of the "complaint and attachments thereto." Contrary to the opinion, that is exactly the standard that the trial court was supposed to apply. An evidentiary hearing would have changed the motion to dismiss into a motion for summary judgment, which is not the proper vehicle to challenge the sufficiency of an affidavit filed pursuant to O.C.G.A. § 9-11-9.1, or at least it never has been.

Another apparent error in the court's logic is the omission of the trial court's role as the gatekeeper for expert evidence. O.C.G.A. § 24-9-67.1 places a *Daubert*-like responsibility on the trial judge to determine the competency of a proposed expert witness, even at the initial pleading stage of a malpractice claim. This opinion not only ignored that requirement, but it also removed the obligation completely by stating in dicta that an expert affiant's conclusory statements that he is qualified to provide opinions on standard of care are legally sufficient to establish the fact at that stage. The only cases cited by the court to support this proposition came well before 2005. This simply cannot be the current state of the law in Georgia.

Hopefully, in a year or two, we will be able to look back at *Houston v. Phoebe Putney Memorial Hospital, Inc.*, as an anomaly. Based on the apparent errors and omissions in the decision, the defense bar should be able to challenge the opinion on its merits. The statutory requirements are there, set forth in black and white to be followed, and the purpose remains the same: to reduce the number of frivolous malpractice suits. ■



Based on the apparent errors and omissions in the decision, the defense bar should be able to challenge the opinion on its merits.

included time as a family practice nurse, labor and delivery nurse, and a clinical nursing instructor. The affidavit indicated that Nurse Posey violated the standard of care by not properly triaging the patient and assuring that he was timely seen by a physician. The defendants answered the complaint and moved to dismiss, claiming that the affidavit and curriculum vitae of the nursing expert, on their face, failed to show competency to testify against the emergency room nurse defendant. The trial court agreed and dismissed the case.

Upon review, the court of appeals evaluated things differently. The court seemed confused at the fact that the trial court had granted the motion to dismiss "without conducting an evidentiary hearing and based solely on the complaint and attachments thereto." Although the court discussed the requirements set forth in O.C.G.A. § 24-9-67.1 as applied to the pleading requirements of O.C.G.A. § 9-11-9.1, in the very next

the experience and qualifications of the plaintiff's affiant based on its review of the affidavit and curriculum vitae. Resolving all doubts in favor of the plaintiff, the court was unable to conclude that the affidavit and curriculum vitae of the expert nurse "disclosed with certainty" that she was not qualified to opine on the standard of care. Yet the court did not stop there. In dicta, the court unnecessarily stated, "Standing alone, [the expert's] conclusory statements in her affidavit [regarding her competency] were legally sufficient to establish competency at the motion to dismiss stage." Basically, if an affiant states that he is qualified to render an opinion, then that is good enough to defeat a motion to dismiss.

This opinion, if accepted and followed, has all but obliterated the defense's ability to move for dismissal based on an insufficient initial affidavit. No doubt it will be brandished by the plaintiff's bar if any attempt at early dismissal is

Spring Board Meeting Highlights

The GDLA Board of Directors met at the Charleston Place Hotel in Charleston, South Carolina in conjunction with the DRI Southeast Regional Meeting on April 25, 2009.

In attendance were: President Jimmy Singer; Executive Vice President Staten Bitting; Secretary/Treasurer Bubba Hughes; Past Presidents and Directors: Steve Kyle, Kirby Mason, Evelyn Davis, Lynn Roberson, Mel Haas, Rusty Gunn, Johnny Foster, Bob Travis, Salty Forbes, Peter Muller, Jamie Weston, Ted Freeman, Warner Fox, Sally Akins; Young Lawyers Section co-chair Will Ellis; and Executive Director Jennifer Davis.

The minutes of the Winter Board meeting, held February 27, 2009 at Hawkins & Parnell in Atlanta, were approved.

Admissions Committee Chair Warner Fox presented six applicants for membership. The issue of lawyers not in private practice was discussed, as was the fact that lawyers engaged in practice as in-house counsel for an insurance company are not eligible for membership. Those eligible applicants were approved for membership.

Ted Freeman, Membership Recruitment and Retention chair, reported his group's recommendation that we first improve our Web site, and let our new Executive Director get up to speed, before commencing a major membership drive. Ted also noted we should focus on potential members we are missing in smaller markets like Albany, Gainesville and Columbus, and we should plan programs there too. Our sponsors would also likely appreciate an expanded geographic reach. Hosting a major CLE event at mid-year rather than just at the Annual Meeting was discussed. Ted added that we need to have enough activities to give members the opportunity for involvement. Kirby Mason suggested recruiting through the Substantive Law Committees (SLC). That is, if the SLC chairs know of lawyers who practice in that specialty, but who are not members, then they should

be target recruits. Mel Haas mentioned using Webinars as a recruitment and education method.

Jimmy Singer reviewed recently discovered inadequacies in our membership record-keeping. We are working to discern who is "active" versus "inactive" in our database. We have implemented QuickBooks, which should allow for better tracking of membership and dues payments.

The Board voted to adopt a dues increase, effective with the 2009 dues notice, with the new amounts being \$200 for regular members and \$125 for younger members (admitted to one's first bar five years or less).

On behalf of Education Committee Chair Matt Moffett, Jimmy Singer said we are trying to plan an event every month. Deposition Boot Camp is scheduled for August and Platinum sponsor Exponent will host a CLE in September at no cost to us.

Will Ellis reported on the Young Lawyers Section, which he co-chairs with Jo Jagor. They are focused on planning Deposition Book Camp, and also wish to host social outings for younger members to network with their peers and older lawyers. He suggested tying into the work of the SLCs.

Staten Bitting reported on the Workers' Compensation Academy, and the Board discussed whether it was still a vital need in the legal community. The Board decided to tentatively set it for Spring 2010 and, between now and October, to determine if there is a need and, if so, to create a dedicated group from the Workers' Comp SLC to actively organize and market it.

Trial Academy Chair Lynn Roberson reported that the 2008 seminar was very successful and we are considering enhancements in light of student feedback. While the Trial Academy has recently been in December at Callaway Gardens, we are exploring dates in January to get better rates and rooms when it's not the venue's peak holiday season.

SLC Chair Johnny Foster reported we are entering the third year of the current program and

need to work succession within the committees. The SLCs participation in the *Law Journal* was noted and is encouraged.

Kirby Mason reported that Dave Nelson, her Website Committee co-chair, and she will seek bids to redesign our site. Not only will the design be improved, but also we will enhance the supporting database structure.

Jimmy Singer noted that our new Executive Director, Jennifer Davis, is a marketing specialist and will no doubt help convey our mission as a civil defense organization so that we can avoid contacts by newspapers and prisoners with respect to criminal cases.

Jimmy Singer next discussed the blast e-mail system. Previously, the complete text of the original e-mail request and all responses were stored in a searchable database along with the date and names of requestor and responder(s). Going forward, however, the Board decided that the GDLA will retain only the requestor's name, the date of the request, the subject line and the names of any who respond. This policy is in line with other organizations that utilize blast e-mail requests for gathering information, and it addresses reported problems pertaining to unauthorized use of database information.

Jimmy Singer reported the GDLA had been asked again by the National Council on Judicial Excellence to make a donation; we had previously given \$10,000 over three years. The Board agreed to donate \$2,500 then to review annually. The GDLA also contributed \$750 for the Women Judges Association meeting.

Meetings Chair Steve Kyle reported on the upcoming meetings and reviewed a list of members and sponsors registered to attend the Annual Meeting. A general discussion was held regarding the Annual Meeting and whether it made sense to return to the same venue every year as Alabama does. The 2010 annual meeting will be held in Ponte Vedra, Florida, and Steve reviewed

Continued on page 22

Young Lawyers News: *A Place for the Pups*

By Eric Jenniges and Kathy So
Bovis, Kyle & Burch, Atlanta

As young associates, we are used to flipping through the pages of your typical newsletter or bar journal and seeing articles by, about, and for the “big dogs.” We are inspired by the success of the big dogs. We learn from the big dogs. We want to be big dogs. But, we are not. We are pups.

As pups, we share many of the same obsessions: I’m sorry Aunt Linda, if I read the fourteenth email that you forwarded me today, I will lose another .2.

We share many of the same insecurities: Either I am an idiot or that partner just spent the last 30 minutes giving me an assignment in Farsi!

We share many of the same problems: I can’t believe that adjuster has not sent me a file even with my two years of experience and my 4-0 trial record.

So what if the trials were in magistrate court and were dismissed because the pro se plaintiff failed to show?

As a result of these common obsessions, insecurities, and problems, *Georgia Defense Lawyer* is creating a recurring column by and for the pups. We will be your regular columnists but will be actively soliciting guest contributors. The column will address a wide array of issues from marketing advice for young lawyers, to common ethical conundrums faced by young associates and suggestions on how to handle them, to highlights from events geared towards younger lawyers sponsored by the GDLA and other organizations. For our first column, we are providing a

brief recap of one such event, the 2009 DRI Young Lawyers Seminar.

DRI YL Seminar: What Happens in Vegas

The seminar entitled “Maximizing Litigation Success: Developing, Evaluating and Preparing Your Case from Beginning to End” was held on June 4-5, in Las Vegas, Nevada.

The seminar hosted a wide range of speakers including the Chief Justice of the Nevada Supreme Court, partners and associates from law firms around the country, in-house counsel, and even a major in the U.S. Office of Military Commissions who is currently representing a 9/11 co-conspirator suspect detained at Guantanamo Bay. Seminar topics addressed all facets of litigation practice from discovery to collecting judgments. Speakers also addressed the importance of diversity in law firms, communicating with corporate clients, and professional responsibility.

Most of the seminar speakers pointed out the importance of communicating with our corporate clients throughout litigation. As young associates, most of us are likely to enjoy such interactions with the client at times. Sophia Lee, senior counsel at Sunoco, Inc.,

however, advised that we should be mindful of not jeopardizing our relationships with our partners for the sake of trying to gain more contact with the client: “the best approach for maximizing contact with the in-house attorney is to demonstrate your knowledge of the case and to supply excellent work product during those opportunities where you are authorized to participate.”

The seminar also offered several networking opportunities through nightly receptions, organized dine-arounds, a golf outing, and an after-party at the Rio bowling alley.

For those young lawyers more obsessed with billing time than attending these well-organized seminars, visit YouTube for your theme song “I’m Billing Time” by the Bar & Grill Singers, which was shown by David Campbell and Rebecca Sullwold during their presentation “The Battle for Billables” (<http://www.youtube.com/watch?v=5TkuZ5oI9uY>). Just be sure to watch it at home, so you don’t lose that .2.

If you have any comments, questions, requests, or just vents for the column, please e-mail Eric Jenniges at emj@boviskyle.com or Kathy So at kcs@boviskyle.com. We look forward to hearing from all of the “pups”! ■



Young lawyers from across the U.S. enjoyed golf, bowling, CLE and more at the DRI Young Lawyers seminar in Vegas.



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several liability was allowed despite different duties being owed to a plaintiff by different defendants.⁹

The percentage of culpability did not matter, "[w]here one is injured by the concurring negligence of two tortfeasors, each is liable for the whole injury although the other defendant may have contributed thereto in greater degree."¹⁰ Even where the negligence of one tortfeasor was only 3% and the other was 97%, both were jointly and severally liable for the entire verdict.¹¹ The effect of these principles was to allow recovery of an entire verdict against any defendant. Except in limited cases, that defendant would be required to pay an entire verdict regardless of the percentage of fault. Defendants with minimal responsibility for an injury could be held liable for entire verdicts. The most dramatic examples of this took place in product liability lawsuits and third-party criminal act lawsuits against product owners.

Apportionment

In causes of action for personal injuries arising prior to February 16, 2005, unless a jury under O.C.G.A. § 51-12-33 (as amended July 1, 1987) chose to apportion fault in a case where the Plaintiff was found to be at fault to some degree, a verdict was split evenly among defendants included in the verdict who were joint-tortfeasors. This apportionment did not apply to defendants who were vicariously liable for the acts of another defendant.¹²

Contribution

Often confused with rights of indemnification, contribution has undergone a tortured history in the Georgia appellate courts and progressive expansion by the General Assembly prior to 2005. Generally, the right of contribution exists between parties who are jointly liable where one party has paid more than their share.¹³ The right

of contribution is often cited in support of joint and several liability because it allows a party who pays an entire verdict, or more than its share, to pursue other parties who have not paid their share. Proponents of joint and several liability believe that the right of contribution eliminates the inequities of joint and several fault. Contribution allows the tortfeasors to sort out any disproportionate payments among themselves. However, the risk of an insolvent or under-insured party was on the defendant, not the plaintiff. The amendments have shifted this risk from solvent defendants to the plaintiff, so that no defendant will pay more than its share, as determined by the jury.

O.C.G.A. § 51-12-32

(a) Except as provided in Code Section 51-12-33, where a tortious act does not involve moral turpitude, contribution among several trespassers may be enforced just as if an action had been brought against them jointly. Without the necessity of being charged by action or judgment, the right of a joint trespasser to contribution from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom.

(b) If judgment is entered jointly against several trespassers and is paid off by one of them, the others shall be liable to him for contribution.

(c) Without the necessity of being charged by an action or judgment, the right of indemnity, express or implied, from another or others shall continue unabated and shall not be lost or prejudiced by compromise and settlement of a claim or claims for injury to person or property or for wrongful death and release therefrom.

O.C.G.A. § 51-12-33

(a) Where an action is brought against one or more persons for injury to person or property and the plaintiff is to some degree responsible for the injury or damages claimed, the trier of fact, in its determination of the total amount of damages to be awarded, if any, shall determine the percentage of fault of the plaintiff and the judge shall reduce the amount of damages otherwise awarded to the plaintiff in proportion to his or her percentage of fault.

(b) Where an action is brought against more than one person for injury to person or property, the trier of fact, in its determination of the total amount of damages to be



THE PRESENT

The current statutes, as amended effective February 16, 2005, follow:

O.C.G.A. § 51-12-31

Except as provided in Code Section 51-12-33, where an action is brought jointly against several persons, the plaintiff may recover damages for an injury caused by any of the defendants against only the defendant or defendants liable for the injury. In its verdict, the jury may specify the particular damages to be recovered of each defendant. Judgment in such a case must be entered severally.

awarded, if any, shall after a reduction of damages pursuant to subsection (a) of this Code section, if any, apportion its award of damages among the persons who are liable according to the percentage of fault of each person. Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution.

(c) In assessing percentages of fault, the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit.

(d)(1) Negligence or fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice not later than 120 days prior to the date of trial that a nonparty was wholly or partially at fault.

(2) The notice shall be given by filing a pleading in the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing the nonparty to be at fault.

(e) Nothing in this Code section shall eliminate or diminish any defenses or immunities which currently exist, except as expressly stated in this Code section.

(f)(1) Assessments of percentages of fault of nonparties shall be used only in the determination of the percentage of fault of named parties.

(2) Where fault is assessed against nonparties pursuant to this Code section, findings of fault shall not subject any nonparty to liability in any action or be introduced as evidence of liability in any action.

(g) Notwithstanding the provisions of this Code section and any

other provisions of law which might be construed to the contrary, the plaintiff shall not be entitled to receive any damages if the plaintiff is 50 percent or more responsible for the injury or damages claimed.

PURPOSE OF TORT REFORM ACT OF 2005

There was no specific purpose given for the amendments to O.C.G.A. §§ 51-12-31 and 51-12-33, except the general language of the purpose of the Act as a whole:

The General Assembly finds that there presently exists a crisis affecting the provision and quality of health care services in this state. Hospitals and other health care providers in this state are having increasing difficulty in locating liability insurance and, when such hospitals and providers are able to locate such insurance, the insurance is extremely costly. The result of this crisis is the potential for a diminution of the availability of access to health care services and a resulting adverse impact on the health and well-being of the citizens of this state. The General Assembly further finds that certain civil justice and health care regulatory reforms as provided in this Act will promote predictability and improvement in the provision of quality health care services and the resolution of health care liability claims and will thereby assist in promoting the provision of health care liability insurance by insurance providers. *The General Assembly further finds that certain needed reforms affect not only health care liability claims but also other civil actions and accordingly provides such general reforms in this Act.* -- 2005 Ga. Laws Act 1 (emphasis added).

As a result, litigants and courts considering these amendments do

not have a specifically stated purpose for the amendments which are not limited to medical liability actions and would be considered "general reforms". Another interesting aspect of these amendments is that there is no expression that the General Assembly was abolishing joint and several liability. However, the absence of such a declaration is not dispositive of the intent of the amendments; we need only to look at the language of O.C.G.A. § 51-12-33 to recognize that joint and several liability has been eliminated.

THE FUTURE ...



For the continuation of Mr. Huff's article, visit the Members Only area of our Website:

www.gdla.org/members/NEWSLETTER/newsletter.html

¹*St. Paul Fire Ins. Co. v. MAG Mutual Ins. Co.*, 209 Ga. App. 184, 185 (1993).

²*See Gilson v. Mitchell*, 131 Ga. App. 321, 327 (1974).

³*See Central Truckaway System v. Harrigan*, 79 Ga. App. 117(3) (1949); *Stern v. Wyatt*, 140 Ga. App. 704, 705, 231.

⁴*See State Auto Mutual Ins. Co. v. Relocation & Corporate Housing Services, Inc.*, 287 Ga. App. 575 (2008).

⁵In fact, O.C.G.A. §9-10-31(c), enacted as part of the Tort Reform Act of 2005, expressly referred to joint tortfeasors in this venue statute. (Declared unconstitutional on other grounds in *EHCA Cartersville, LLC v. Turner*, 280 Ga. 333 (2007)).

⁶*See Central Railway Company v. Brown*, 113 Ga. 414 (1901).

⁷*Fields v. Jackson*, 102 Ga. App. 117, 131(7) (1960); *City of Atlanta v. Harris*, 52 Ga. App. 56 (1935).

⁸*See generally Hicks v. Talbott Marsh et al.* 196 F.3d 1226, 1242-43 (11th Cir. 1999), (affirmed trial court's decision not to charge jury on proximate cause or intervening cause with respect to non-defendant's concurrent cause of injury).

⁹*McBerry v. Ivie*, 116 Ga. App. 808, (1967).

¹⁰*Isom v. Schettino*, 129 Ga. App. 73, 75(1).

¹¹*Gates v. L. G. DeWitt, Inc.*, 528 F.2d 405, 413 (5th Cir.1976).

¹²*See Travelers Indem. Co. v. Liberty Loan Corp.*, 140 Ga. App. 458; *St. Paul Fire & Marine Ins. Co. v. MAG Mut. Ins. Co.*, 209 Ga. App. 184.

¹³*See Weller v. Brown*, 266 Ga. 130. ■

Spring Board Meeting Highlights

continued from page 17

the attrition policies and contractual arrangements required by the various resorts, and explained their taxes and fees continue to climb. We will need to consider raising registration fees for the meetings to be self-sustaining. Our current registration cost is low compared to similar meetings. Salty Forbes mentioned if we contract for annual long-term resort arrangements, we might get a better deal; however, several members commented that some believe going the same place each year is a negative. The Board discussed the need to closely review our sponsorship levels to ensure we are charging enough based on their return.

Lynn Roberson reported on her work as *Law Journal* editor. The dues notices are mailed with it to save postage. While we previously sent the judges a print version and members a CD, this year, we are doing CDs for both. We believe this will be even more welcome by the judges and their staffs, as the CD will be searchable. Judges will also receive a personalized letter.

Newsletter Editor Peter Muller

reported that, in light of the Executive Director transition, the next one will be out in the summer. Ted Freeman suggested instituting a column geared specifically toward younger lawyers. The newsletter cost was discussed; this year's budget is \$24,000.

Sponsorship Chair Sally Akins provided a list of current sponsors and urged the Board not only to use our sponsors, but also to tell them their sponsorship was a deciding factor. She will work with Jennifer Davis to develop a list of potential new sponsors. Sally is contacting former sponsors, asking them to reconsider supporting us and offering a reduced rate for the rest of 2009.

Evelyn Fletcher Davis gave the DRI report. The Annual Meeting scheduled for Chicago will be the 50th anniversary celebration.

The Treasurer's report was provided by Bubba Hughes who described recent changes in the federal tax form 990 applicable to non-profits including 501(c)(6)'s, such as GDLA. We are following up on the need for having a conflict of interest

policy and a whistleblower's policy. We are working with the GDLA accountant to resolve related issues.

He also discussed the Dick Richardson scholarship fund, which awards \$500 annually to the UGA law student who is most outstanding in Georgia Practice and Procedure. The fund balance as of November 2008 was \$22,287.48. Some individual contributions have been made in the past and, for a few years, the contribution was five dollars per member. The Treasurer will get further details on the investment of the proceeds to report at an upcoming meeting.

Jimmy Singer presented the President's Report. He confirmed the recent hiring of Jennifer Davis as the Executive Director and he felt we had made an excellent choice in Jennifer. The Executive Committee was thanked for their efforts during the staffing transition, as was President Singer who did much of the Association's work. ■

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& *Acc. Ins. Co. v. Hallum*, 276 Ga. 147 (2003), which also involved a life and disability policy. In explaining the difference between non-covered accidental injuries and covered injuries by accidental means in broader terms, the supreme court wrote:

Georgia law distinguishes between insurance coverage for accidental injuries and coverage for injuries caused by accidental means. An accidental injury is an injury that is unexpected but may arise from a conscious voluntary act. In contrast, an injury from accidental means is one that is the unexpected result of an unforeseen or unexpected act that was involuntarily or unintentionally done.

Id. at 147-48 (2003) (citations omitted).

Whereas life and disability policies cover injuries caused by “accidental means,” liability policies tie coverage to damages caused by “accident.” Nevertheless, in construing the reach of liability policies, the courts have applied similar interpretations as in the life and disability context. In *Allstate Ins. Co. v. Grayes*, 260 Ga. App. 419 (1995), for example, the insured intentionally shot a neighbor. Because the insured “intended to shoot the gun and hit those whom he intended to shoot,” *Id.* at 419, there was no “occurrence” to trigger coverage under the liability policy. Similar to the voluntary intoxication that was ruled a non-accidental death in *Winters*, the injury in *Grayes* was an expected result of the insured’s intentional act of shooting the gun.

This interpretation of liability policies logically applies to circumstances where the insured’s intentional acts caused an expected result. The same application of the occurrence requirement has been extended to circumstances where the insured’s intentional act caused a foreseeable but not an intended result. In *Georgia Farm Bur. Mut. Ins. Co. v. Meriwether*, 169 Ga.

App. 363 (1983), the insured intentionally blocked a road believing it was on private property. He was sued, however, for blocking a public right of way. Even though the insured did not intend to block a public road, he did intend to block the roadway. Consequently, the court found that there was no coverage because the injury alleged did not result from an accident. *See also Mindis Metals, Inc. v. Transportation Ins. Co.*, 209 F.3d 1296 (11th Cir. 2000) (finding no occurrence where the insured cut up metals for scrap believing erroneously that the metals belonged to the insured); *Perry v. State Farm Fire & Cas. Co.*, Nos. A08A2279, A08A2280 (Ga. Ct. of App. Dec. 22, 2008) (because initiating sexual activity is an intentional act with foreseeable injuries, there was no occurrence for unexpected injuries).

Application of “Accident” in Construction Defect Cases

The “occurrence” definition was discussed comprehensively in a construction defect claim in *Owners Ins. Co. v. James*, 295 F. Supp. 2d 1354 (N.D. Ga. 2003). There, homeowners claimed that negligent construction allowed water to penetrate the siding of their residence “and caused other property damage, including deterioration of windows, breaking down of gypsum sheathing, wood rot, and elevated moisture within the wood cavities.” *Id.* at 1357. Relying expressly on *Hallum*, Judge Pannell found that “Georgia law distinguishes between insurance coverage for accidental injuries and coverage for injuries caused by accidental means” as follows:

An *accidental injury* is an injury that is unexpected but may arise from a conscious voluntary act. In contrast, an *injury from accidental means* is one that is the unexpected result of an unforeseen or unexpected act that was involuntarily or unintentionally done. *Id.* at 1364 (emphasis in original; citations omitted).

Based on that distinction, he reasoned that occurrence policies cover “only injury *resulting from accidental acts* and not injury *accidentally caused by intentional acts*.” *Id.* (emphasis in original). In then applying this construct, Judge Pannell held that there was no insurance coverage available because the insured intentionally installed the stucco, which was alleged to have caused damage to the homeowners. Because the installation was intentional, the resulting injury was foreseeable though not intended.

Judge Pannell’s reasoning in *James* has been followed by other federal courts. *See Hathaway Development Co. v. Illinois Union Ins. Co.*, 274 Fed. Appx. 787 (11th Cir. 2008) (damages caused by the insured’s poorly designed product is not a covered occurrence); *The Travelers Indem. Co. v. Douglasville Development, LLC*, 2008 WL 4372004 (N.D. Ga. 2008); *Smith v. Continental Cas. Co.*, 2007 WL 2071538, *8 (N.D. Ga. 2007) (Duffey, J.) (“Georgia law defines ‘accident’ for insurance purposes as ‘the unexpected result of an unforeseen or unexpected act’”); *Clean Air America, Inc. v. Hartford Cas. Ins. Co.*, 2007 WL 1247152, *3 (N.D. Ga. 2007) (Tidwell, J.) (finding no occurrence where the damages were “accidentally caused by the intentional act of [the insured’s] design”); *Owners Ins. Co. v. Chadd’s Lake Homeowners Assoc., Inc.*, 2006 WL 1553888, *4 (N.D. Ga. 2006) (Forrester, J.) (“any act intentionally undertaken by the insured – such as constructing a residential home – is not an ‘occurrence’ under the policy”).

The Donmac Decision

Although applying the occurrence definition to preclude coverage for unintended (but foreseeable) injuries in construction defect cases makes sense, no state court has adopted (or rejected) that approach. *Owners Ins. Co. v. James* itself recognized one state court decision that is diffi-

cult to reconcile. In *Glens Falls Ins. Co. v. Donmac Golf Shaping Co., Inc.*, 203 Ga. App. 508 (1992), the court of appeals found that the “occurrence” definition was met where a contractor was sued by a developer for building a golf course on protected wetlands. In so doing, the contractor had followed the design provided to him by the developer’s architect and engineer. Because the contractor intended to build the project where it stood, the insurer argued that there was no “occurrence.” This argument follows the reasoning that there is no coverage for accidental injuries caused by intentional acts. In finding nevertheless *against* the insurer, the court wrote:

There is no evidence that the resulting damage alleged by the developer was intended or expected by Donmac. The issue is not whether Donmac intended to build the project in its present

location according to the project specifications, but whether Donmac had a specific intent called for by the policy to cause the alleged damages.

Id. at 509 (citation omitted).

The court continued that “[t]he mere knowledge and appreciation of a risk, short of substantial certainty, is not the equivalent of intent.” *Id.* (quoting *Colonial Penn Ins. Co. v. Hart*, 162 Ga. App. 333, 335 (1982)).

On its face, this language conflicts with the cases (both state and federal) that do not construe the occurrence term as requiring that the insured intended the risk but only that the injury was a foreseeable result of an intentional act. In that regard, it is noteworthy that the above quotes were preceded by the court’s statement that “an occurrence is defined as an ‘accident,’ while the policy otherwise

excludes coverage for property damage ‘expected or intended from the standpoint of the insured.’” *Id.* at 509. Indeed, both Judge Pannell and the Eleventh Circuit have distinguished *Donmac* on precisely the ground that it was relying on the intentional damage exclusion as opposed to the occurrence definition. See *James*, 295 F. Supp. 2d at 1363, n.5; *Mindis Metals, Inc.*, 209 F.3d at 1300.

This distinction is not completely satisfying, because there would be no reason for *Donmac* to have addressed the exclusion absent a finding that the allegations met the occurrence definition. See *Scottsdale Ins. Co. v. Great Am. Assur. Co.*, 271 Ga. App. 695 (2005) (exclusions are not reached if the claim is not within the grant of coverage). The distinction is complicated further by the fact that the court of appeals ultimately found that coverage existed for the con-

Continued on page 28

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State Farm Fire and Cas. Co. v. Walnut Avenue Partners, LLC; Big B Cleaners of Dalton, Inc. v. State Farm Fire and Cas. Co.; Walnut Avenue Partners, LLC v. State Farm Fire and Cas. Co., Nos. Ao8A2059, Ao8A2139, Ao8A2146 (Ga. Ct. App. March 16, 2009)

A policy's pollutants exclusion ("exclusion") does not exclude all property damage caused by pollutants if the policy provides an exception to the exclusion.

This case involved pollution resulting from the operation of a dry cleaning business. After being sued by the property owner, the dry cleaner sought a defense from its insurer. The insurer refused to provide a defense, asserting that the policy eliminated any pollution coverage. The policy excluded "property damage . . . arising out of the actual, alleged or threatened discharge, seepage, migration, dispersal, spill, release or escape of pollutants . . . [and] any . . . property damage arising out of the actual, alleged or threatened discharge, seepage, migration, dispersal, spill, release or escape of pollutants." However, the policy also provided an exception to the exclusion for "pollutants which occur . . . quickly and abruptly and [are] accidental."

The Georgia Court of Appeals held that the insurer's interpretation of the policy rendered the exception for quick, abrupt, and accidental discharge of pollutants meaningless. Further, the court held that applying the "quick, abrupt and accidental" exception to the exclusion does not render the pollutant exclusion meaningless, because the exclusion still excludes a category of damages arising out of the discharge of pollutants.

Rentrite, Inc. v. Sentry Select Ins. Co., 293 Ga. App. 643 (2008)

The Georgia Court of Appeals rejected an insurer's interpretation of a policy exclusion and allowed a bad-faith claim to proceed.

A business policy excluded coverage for a false pretense loss where the insured has failed to obtain the customer's business address, phone number, and driver's license number, or where the customer has provided false information on a credit application. The insured, a rental equipment company, leased three pieces of equipment to a customer, who later converted the equipment. The insured filed a claim with his insurer, seeking reimbursement for the stolen equipment. The insured had failed to obtain the customer's driver's license number before renting the first piece of equipment but had obtained it before renting the next two pieces. The insurer denied coverage for all three transactions, asserting that the claims were excluded because the insured had failed to obtain a copy of the customer's driver's license or a credit application. The trial court granted summary judgment to the insurer.

The court of appeals reversed the holding on the second and third transactions, holding that the trial court had interpreted the policy exclusion too broadly. The court rejected the trial court's interpretation of the exclusion, holding that the clause could not be interpreted broadly to require that the insured obtain a copy of the customer's driver's license or credit report. Because Plaintiff had obtained the customer's driver's license number for the second and third rentals, the exclusion did not bar coverage for those claims. Because the exclusion did not support the insurer's position, the court reversed the summary judgment which had been granted to the insurer regarding the insured's claim for bad faith as to the second and third transactions. ■

The author extends special thanks to Eric Mull of Drew Eckl & Farnham for his contribution to this update.

HB 189: Child Support Collection Agencies

Child support collection agencies have existed for some time in Georgia primarily targeting low income families that cannot be helped by the State Child Support Recovery Agency. This Bill provides greater regulation of these services by capping the maximum amount of fees they can charge at 33% and requiring that their standard contracts must be approved by the Governor's Consumer Affairs Office.

SB 207 & HB 254: Juvenile Proceedings

There has long been a debate over whether juvenile court proceedings should be confidential and closed. Generally, under SB 207, juvenile court hearings after January 1, 2010, will be open to the public except in the following circumstances:

(A) The proceeding involves an allegation of an act which, if done by an adult, would constitute a sexual offense under Chapter 6 of Title 16; or

(B) It is in the best interest of the child. In making such a determination, the court shall consider such factors as:

- (i) The age of the child;
- (ii) The nature of the allegations;
- (iii) The effect that an open-court proceeding will have on the court's ability to reunite and rehabilitate the family unit; and
- (iv) Whether the closure is necessary to protect the privacy of a child, of a foster parent or other caretaker of a child, or of a victim of domestic violence.

HB 254 deals with juvenile court deprivation and abuse proceedings where the child is being removed from his or her parents. In cases in which the child is to remain out of the parent's custody for more than 30 days, the court shall look first to relatives of the child for placement. ■

U.S. Chemical Hazard and Safety Investigation Board (CSB) identified 281 dust explosions that occurred between 1985 and 2005 and caused 119 fatalities and 781 injuries.¹

Regulatory Issues

Most building codes provide at least minimal guidance related to facilities with dust explosion hazards. The National Fire Protection Association (NFPA) has developed a series of standards for the prevention and mitigation of dust explosions. The NFPA has no enforcement authority, and these standards only become regulations when adopted by an authority having jurisdiction. The NFPA standards are increasingly being adopted by building codes and local and state regulations.

Many of the NFPA standards originated in the early 1900's as standards for specific industries with a history of dust explosions. Through the years, these standards have been combined into more general documents that describe prevention methods that are applicable across most types of industries. Specific standards do still exist for some specialized industries. NFPA standards for the prevention of dust explosions include:

- ♦ NFPA 61 *Standard for the Prevention of Fires and Dust Explosions in Agricultural and Food Processing Facilities*
- ♦ NFPA 120 *Standard for Fire Prevention and Control in Coal Mines*
- ♦ NFPA 484 *Standard for Combustible Metals*
- ♦ NFPA 654 *Standard for the Prevention of Fire and Dust Explosions from the Manufacturing, Processing, and Handling of Combustible Particulate Solids*
- ♦ NFPA 655 *Standard for Prevention of Sulfur Fires and Explosions*
- ♦ NFPA 664 *Standard for the Prevention of Fires and*

Explosions in Wood Processing and Woodworking Facilities

In general, these standards provide requirements to prevent the occurrence of ignitable dust clouds in the presence of ignition sources. Additionally, the standards contain requirements for mitigation methods that minimize the effect of dust explosions when they do occur. Some of the standards are quite comprehensive, containing requirements for the design, operation, modification, and maintenance of facilities, as well as the training and protection of employees.

A number of additional standards are referenced by these dust explosion standards and provide additional requirements or guidance for facilities with dust explosion hazards, including explosion prevention and venting methods and classification of areas for electrical equipment and industrial trucks.

- ♦ NFPA 68 *Standard on Explosion Protection by Deflagration Venting*
- ♦ NFPA 69 *Standard on Explosion Prevention Systems*
- ♦ NFPA 70 *National Electric Code*
- ♦ NFPA 499 *Recommended Practice for the Classification of Combustible Dusts and of Hazardous (Classified) Locations for Electrical Installations in Chemical Process Areas*
- ♦ NFPA 505 *Fire Safety Standard for Powered Industrial Trucks Including Type Designations, Areas of Use, Conversions, Maintenance, and Operations*

In some jurisdictions, these standards have not yet been adopted into local regulations. Additionally, compliance with these standards might not be required by law for many existing facilities, if the standards had not been adopted by the local jurisdiction at the time of construction or

major modifications, because retroactively applying these standards to many existing facilities would be prohibitively expensive.

Some local and state building codes, as well as fire codes, have adopted much of the National Fire Code (NFC) of the NFPA that contains key standards for the prevention of dust explosions. In 2008, the state of Georgia created Emergency Regulation Chapter 120-3-24-0.12 *Rules and Regulations for Loss Prevention due to Combustible Dust Explosions and Fire*, which adopts a number of NFPA standards related to dust explosions.

OSHA does not currently have a general industry regulation for the prevention of dust explosions. The CSB, however, has recently recommended the development of such regulation. OSHA has historically fined facilities for dust explosion hazards under the general duty clause, using NFPA standards as evidence that the hazard was known in the industry and that there are known methods of abating the hazard.² However, the application of some requirements in NFPA standards as law enforcement criteria has been questioned. In 2008, the U.S. House of Representatives passed The Worker Protection against Combustible Dust Explosions and Fires Act (H.R. 5522) which would have required OSHA to issue rules regulating combustible dusts. The bill did not pass the Senate. An identically name bill, H.R. 849, was recently introduced in 2009.

Evaluating the Hazard of Dusts

Understanding the hazards of a specific powder or dust can be important in investigating dust explosions, analyzing the validity of OSHA citations, and assessing the hazard at a new or existing facility. It is typically necessary to test actual dust samples from a facility, rather than relying on

Continued on next page

published data. The specific hazard of a dust is strongly dependent on the chemical composition, volatility, particle size and morphology, and moisture content. Additionally, much of the published testing data was based on older testing methods that may underestimate the hazard of some materials.

Common Dust Tests

Table 2 at right lists common test methods used to characterize combustible dusts, which in the United States are created by ASTM. In general, these tests measure: the ease of ignition of a dust by electric sparks, heated air, or hot surfaces; concentrations of dust clouds and oxygen that are ignitable; and the severity of a dust explosion if it occurs.

Conclusion

Industrial dust explosions can range from minor incidents to cat-

astrophic events causing multiple fatalities and destroying facilities. Although dust explosion hazards can exist in a wide range of industries, the hazard is often not fully appreciated by facilities. Once the hazard is recognized, consensus standards exist for analyzing the hazard of specific dusts and for the prevention and mitigation of dust explosions. Currently, specific regulations for the prevention and mitigation of dust explosions vary by jurisdiction. There is continued pressure for OSHA to create a general industry rule for the prevention of dust explosions, and it is likely that such a new rule will be implemented under the new administration. ■

¹ U.S. Chemical Safety and Hazard Investigation Board, Investigation Report: Combustible Dust Hazard Study, REPORT NO. 2006-H-1, November 2006, Appendix A.

² OSHA General Duty Clause Search, <http://www.osha.gov/pls/imis/generalsearch.html>

Table 2: Common Tests Methods Used to Characterize Combustible Dusts

ASTM Method	Title	Value
E2019	Minimum Ignition Energy (MIE) of Dust Clouds	MIE
E1491	Minimum Autoignition Temperature of Dust Clouds	AIT
E2021	Hot Surface Ignition Temperature of Dust Layers	HSIT
E1515	Minimum Explosible Concentration (MEC) of Dust Clouds	MEC
WK1680	Limiting Oxygen Concentration (LOC) in Dust Clouds	LOC
E1226	Maximum Pressure and Maximum Rate of Pressure Rise	dP/dt, K _{ST} , P _{MAX}

The Evolving Scope of the “Occurrence” Requirement

tractor, thereby necessarily finding (either expressly or impliedly) that the occurrence definition was met.

A better distinction might be that whereas the contractor in *Donmac* was merely following the developer’s directions in building the golf course, the insureds in most of the construction defect cases were following their own designs and installations. This distinction has not been articulated in the case law, but it would promote the notion that liability policies respond to unforeseen risks as opposed to intentional designs. In that regard, liability policies are not performance bonds, which guarantee that the insured’s work will function as promised. By construing the occurrence definition so as to preclude coverage for damage caused by the insured’s intentional design, liability policies are restricted to unforeseen risks of

unintentional acts.

Despite the logic of the approach articulated by *James* and its progeny, Judge Royal wrote an opinion critical of its reasoning. The issue in *Essex Ins. Co. v. H&H Land Development Corp.*, 525 F. Supp. 2d 1344 (M.D. Ga. 2007) was whether a water runoff claim against a property developer due to alleged faulty construction was covered by a liability policy. In first determining that the damage was caused by an occurrence, Judge Royal focused on whether the developer intended the injury as opposed to whether he intended the act (the construction activities). His rejection of the coverage framework outlined in *James* and similar cases was pointed:

Almost every conceivable accident for which an insured could be held liable involves some

intentional action at some point in the chain of causation. A person who trips while walking may not have intended to trip, but his stumble would have been the result of the intentional act of putting his foot down in a particular place. Despite the intentional act of walking in a particular place, a reasonable person would be disinclined to call the resulting stumble anything but an accident. In this case, the intentional act of developing the property could be compared to the act of taking a step in a particular direction, whereas the drainage problems that resulted from the construction could be compared to the stumble. Although the construction work was intentional, the runoff that occurred was not

Continued on page 30

Traffic and Motor Vehicle Safety Act of 1966, under which FVMSS was promulgated.

Porter v. Eli Lilly & Co., 2008 WL 544739 (N.D. Ga. Feb. 25, 2008), *aff'd* 2008 WL 4138115 (11th Cir. Sept. 9, 2008)

Porter arose out of the prescription of Prozac to a patient who later committed suicide. The manufacturer did not defend the adequacy of the warnings and instead argued that the plaintiff could not prove proximate causation, because the prescribing physician had testified that a different warning would not have changed his decision to prescribe Prozac. The plaintiff contended that the defendant's admission of warning inadequacy barred the use of the learned intermediary doctrine. Noting that Georgia courts "have never directly discussed the impact of an arguably inadequate warning on the element of causation," the trial court found that Georgia courts would apply the presumption set forth in comment j to Section 402A of the Restatement (Second) of Torts. The court then found that Georgia courts would employ a "rebuttable presumption" approach

(and not a heeding presumption) under which (1) the plaintiff carries the initial burden to produce evidence that the manufacturer failed to warn about a known risk; (2) if the plaintiff carries the burden, a rebuttable presumption arises that a physician would have heeded an adequate warning; (3) the defendant then must produce evidence to rebut the presumption; and (4) if the presumption is rebutted, the plaintiff must produce evidence sufficient to create a triable issue of fact as to causation. The court then granted the defendant's summary judgment motion on the ground that the plaintiff failed to rebut the prescribing physician's testimony. The Eleventh Circuit affirmed the trial court in an unpublished opinion.

In December 2008, the United States District Court for the Northern District of Georgia granted summary judgment to a defendant in a factually analogous case, citing *Porter* as the operative precedent. *Dietz v. SmithKline Beecham Corp.*, 2008 WL 5329295 (N.D. Ga. Dec. 9, 2008).

Trickett v. Advanced Neuromodulation Systems, Inc., 542 F. Supp. 2d 1338

The product at issue in *Trickett* was an implanted spinal cord stimulator. Before the suit was filed, the manufacturer had written a letter to the plaintiff in which the manufacturer agreed to pay certain medical expenses incurred in addressing issues with the stimulator. The manufacturer later declined to pay the expenses. The trial court denied the manufacturer's summary judgment motion on the plaintiff's breach of express warranty claim, holding, without citing any authority for the proposition, that the manufacturer's letter in which it agreed to pay certain expenses modified the manufacturer's express warranty, which contained a clause stating that the warranty could be modified in a writing signed by the manufacturer.

Vibratech, Inc. v. Frost, 291 Ga. App. 133 (2008)

The court of appeals affirmed the denial of Vibratech's motion to dismiss holding that the trial court had jurisdiction over Vibratech, a foreign company, even though Vibratech had no direct business contracts with Georgia. Vibratech had sold an airplane part to an Alabama company that installed the part into an airplane damper which a Georgia company then installed in an airplane that later crashed in Tennessee. The court held that Vibratech's longstanding business arrangement with the Alabama company, the hundreds of parts it sold each year to the Alabama company, and the Alabama company's agreement to indemnify Vibratech and list it as an additional insured were sufficient to establish jurisdiction. The court held that Vibratech's actions in selling a product to the Alabama company "with the intention of deriving an economic benefit from its sale in other states, were purposeful actions which should have led Vibratech to reasonably anticipate being hauled into court in those states, especially a border state such as Georgia." ■

Acceptance Doctrine

continued from page 10

timing of acceptance and payment for the work performed. Additionally, attorneys should advise their contractor clients to be cautious about entering into contractual agreements that require the contractor to retain sole liability for all negligence, which could be construed as a waiver of the acceptance doctrine. While obligations to defend, indemnify, or hold harmless an owner or government entity are standard, attorneys should advise Georgia contractors to limit such obligations to defend, indemnify, and hold harmless the owner if the owner is sued. ■

Courtney M. Norton contributed to this article.



intentional. It was the unintentional runoff, not the intentional construction, that caused injury to the neighboring property owners. *Id.* at 1351.

Although Judge Royal found that the occurrence definition was met, he proceeded to find that coverage was excluded under the pollution exclusion in the policy. From a technical standpoint, therefore, his rejection of the holdings in the “occurrence” cases is *dicta*. His criticisms have gotten the attention of at least one judge, who found himself “sympathetic to Judge Royal’s arguments” but nevertheless “loath to rule against three prior cases in this district with virtually identical facts.”

Douglasville

Development, LLC,

2008 WL 4372004,

*9 (Forrester, J.).

Further, Judge

Royal’s reasoning

is followed in

some jurisdictions.

See generally *U.S. Fire Ins.*

Co. v. J.S.U.B., Inc., 979

So. 2d 871 (Fla. 2007)

(compiling cases from different states in construing

the occurrence term). Georgia

courts do not follow the lead of

other states absent a compelling

reason consistent with the laws of

this state. See *Bragg v. Oxford*

Construction Co., 285 Ga. 98, 100

(2009) (refusing to change Georgia

law “simply because several of ‘our

sister states” have done so – article

on page 10). Whether Georgia

courts will see cause to reject

James or otherwise fashion a different

application of occurrence for

construction defects cases remains

to be seen.

Damage to Other Property

Occasionally, the application of the “occurrence” definition is mixed in with the application of the business risk exclusions, which exclude coverage for repairing or replacing the insured’s own work by limiting coverage to damage to

other property only. In *Canal Indemnity Company v. Blackshear Farmers Tobacco Warehouse, Inc.*, 227 Ga. App. 637 (1997), the insured negligently repaired the roof of a tobacco warehouse, which allowed water to seep into the warehouse and damage the tobacco. A claim was presented to the insurer to pay for not only the damaged tobacco, but also for correcting the defects in the roof. Based on the business risk ex-

clusions, the only covered

items would be the

tobacco and those

areas of the roof

that the insured

had not repaired.

In some

instances, the

business risk

concept over-

laps with the

occurrence

definition. In

Custom Planning

& Development, Inc. v.

American Natl. Fire

Ins. Co., 270 Ga. App.

8 (2004), the court

stated that “where faulty

workmanship causes damage

to other property, there may be an

occurrence within the policy mean-

ing of occurrence from such faulty

workmanship, which was negli-

gently performed, which could cre-

ate an issue of fact as to an accident

within the policy.” *Id.* at 10 (cita-

tion omitted). Similarly, in

SawHorse, Inc. v. Southern

Guaranty Ins. Co., 269 Ga. App.

493 (2004), the insurer argued

that there was no occurrence

because faulty workmanship was a

foreseeable result of the contrac-

tor’s intentional work at a resi-

dence. In rejecting this argument,

the court wrote that “policies with

similar ‘occurrence’ language pro-

vide coverage for ‘the risk that . . .

defective or faulty workmanship

will cause injury to people or dam-

age to other property.” *Id.* at 499.

Based on that reasoning, the

insurer was not entitled to sum-

mary judgment regarding the

absence of an occurrence.

Given the language in these cases, some practitioners believe that the existence of an occurrence depends on whether there is damage to other property. Other courts, however, have found that there may *not* be an occurrence even if damage to other property results. In *James*, for example, the homeowner alleged that the stucco contractor had caused damage to the residence beyond repair and replacement of the cladding, such as damage to windows, wall cavities, and other areas. Despite this, the fact that the contractor intentionally installed the siding in the manner that he did meant that the policy was not triggered. 295 F. Supp. 2d at 1364. Similarly, in *Clean Air America*, the insured’s design of an air filtration system resulted in a fire that damaged not only the insured’s system but the facility as well. Because the liability claim was based on the design of the system – which was an intentional act – there was no occurrence to trigger coverage under the policy. 2007 WL 1247152, *3. Because these decisions are by federal courts, it remains to be seen whether they would be followed by Georgia appellate courts on facts involving damage to other property.

Conclusion

Construction defect claims can implicate many aspects of liability insurance policies, including such disparate inquiries as the trigger of coverage, the layer of coverage, the definition of “property damage,” the rights and responsibilities of additional insureds, and the business risk exclusions. Whether an “occurrence” exists applies across the board to all of these inquiries, yet is often overlooked by the bench and bar alike. Because the foreseeability concept that is at the heart of the occurrence definition implicates core insurance issues, special attention should be accorded to its meaning to advise clients on coverage issues in construction defect cases. ■

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