

CALENDAR CALL

GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA

Vol. XXII

Special Edition

No. 1



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*Judges Dax Lopez,
Bonnie Chessher Oliver
and Rusty Smith
answer questions
from the bench*

See article on pages 6 -12

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CALENDAR CALL

"Georgia's Largest Law Firm"

GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA

Vol. XXII

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Calendar Call is the official publication of the General Practice and Trial Section of the State Bar of Georgia. Statements and opinions expressed in the editorials and articles are not necessarily those of the Section of the Bar. Calendar Call welcomes the submission of articles on topics of interest to the Section. Submissions should be doublespaced, typewritten on letter-size paper, with the article on disk or sent via e-mail together with a bio and picture of the author and forwarded to Editor: David A. Sleppy, 649 Irvin St., P.O. Box #689, Cornelia, GA 30531, dsleppy@catheyandstrain.com.

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CHAIRMAN'S CORNER

Kristine Orr Brown
Section Chair



It was an honor and pleasure to serve as Chairman of the General Practice and Trial Section (“GPTS”) last year. I would like to begin by thanking Executive Director Betty Simms for all of her work during the year. She truly keeps the Section in order, and her institutional knowledge is invaluable. I am pleased that she is continuing with the Section for another year. Thank you also to Immediate Past Chairman Trey Underwood for planning and chairing the 2017 Trial Institute. The Institute was a great success with an esteemed group of presenters who offered excellent trial strategies, legal authority, and war stories. Survey results also indicated that the St. Simons location was favored by the membership.

The Section made some significant changes in the last year. We transitioned from the Ask-A-Lawyer Day in which attorneys volunteered to meet with pro bono clients one day a year to participation in Georgia Legal Services’ new program <http://georgia.freelegalanswers.org> in which clients submit legal questions and volunteer attorneys respond to those questions. Volunteer attorneys can log in whenever/wherever they choose

and select which question(s) they answer. Volunteer attorneys are covered by the program’s malpractice insurance. We hope that members will take advantage of this pro bono opportunity.

We conducted a membership survey concerning our annual Trial Institute. We received feedback concerning dates, locations, and topics. Given the feedback, we are exploring a variety of options for the 2018 Trial Institute. We are awaiting pricing information from the State Bar. Once received, I look forward to announcing the dates and location for the 2018 Trial Institute.

We reintroduced the section listserv. We hope this service will be helpful to the membership by providing a method for notification of GPTS events and allowing the membership to communicate on a variety of matters. I personally found it helpful recently when I needed to refer a potential client to a zoning attorney in a particular town. I emailed the listserv requesting recommendations and received numerous responses.

Membership dues increased by \$5 from \$35 to \$40. Dues have not increased in at least 15 years. The board approved the increase given the State Bar’s increased

assessment of almost \$4 per member for each section.

Some important Section events remained the same. The Traditions in Excellence Award Breakfast which was held during the State Bar Annual Convention. We were privileged to hear from the 2017 award recipients Judge Alvin T. Wong (judicial recipient), Phillip C. Henry (plaintiff recipient), Thomas G. Sampson (defense recipient), and Laura E. Austin (general practice recipient) who all gave memorable presentations and provided inspiration to the membership regarding sacrifice, dedication, humility, and being better lawyers. Not only was it rewarding to hear from the recipients themselves, but also the individuals who introduced the recipients. The introductions provided insight into the recipients’ lives and the recipients’ impact on others that evidenced exactly why they were receiving the award. I encourage all members to attend this breakfast in the future.

Additionally, the Section again presented numerous ICLE seminars. The Section presented more than 20 programs, with such broad ranging topics as Jury Trials, E-Discovery, Criminal Law and Procedure, Personal Injury (in various types of cases),

Milich on Evidence, Advanced Cross Examination, and more.

In closing, I would like to thank all of you for allowing me to serve as Chairman. It was a great experience. I truly believe that involvement in this

section betters one's law practice. Attending numerous GPTS events during the course of the year allowed me to meet so many attorneys from around the State who I otherwise would not have met. These new friendships

already benefit my law practice. I look forward to supporting current chairman Paul Painter. I know from his board involvement over the years that he will be an excellent chairman.

GENERAL PRACTICE AND TRIAL SECTION

SCHEDULE OF EVENTS

2017-2018

09/1-2/17	URGENT LEGAL MATTERS – KING AND PRINCE HOTEL, ST. SIMONS ISLAND
09/07/17	SECRETS TO SUCCESSFUL PERSONAL INJURY CASE, BAR CENTER
09/14/17	DRAM SHOP, BAR CENTER
09/15/17	SOCIAL MEDIA AND THE LAW, BAR CENTER
10/27/17	TRIAL ADVOCACY, GPT-TV
11/01/17	MILICH ON CRIMINAL EVIDENCE, BAR CENTER
11/10/17	KEEP IT SHORT AND SIMPLE BAR CENTER
11/10/17	RECENT DEVELOPMENTS, GPT-TV
12/07/17	HEALTH FRAUD INSTITUTE, BAR CENTER
12/15/17	CARLSON ON EVIDENCE, BAR CENTER
01/4-6/18	STATE BAR MID-YEAR MEETING, WESTIN ATLANTA PERIMETER NORTH
01/07/18	SECTION LUNCHEON, WESTIN ATLANTA PERIMETER NORTH
01/12/18	JURY TRIALS, GPB-TV
01/19/18	DEFENSE OF A PERSONAL INJURY CASE, BAR CENTER
02/23/18	PLAINTIFF'S PERSONAL INJURY, GPT-TV
03/02/18	TRUCK WRECK CASES BAR CENTER
03/09/18	MILICH ON EVIDENCE, BAR CENTER
05/04/18	DUI UPDATE, BAR CENTER
TBA	GENERAL PRACTICE AND TRIAL INSTITUTE
06/07-10/18	STATE BAR ANNUAL MEETING, OMNI AMELIA ISLAND, FL.
06/08/18	TRADITION OF EXCELLENCE BREAKFAST AND RECEPTION



After practicing law for several decades - and being alive for several more - I have found that it is often useful to have a quote available to enhance communication. A fitting quote at the right time helps me convey a message - whether it be in the context of family discussions, (including conflicts with my kids); at a wedding; to a client, partner, judge or jury; at a PTA meeting; cocktail party or a presentation. So, in the event that someone finds at least one of these helpful or interesting - here are a few. Please feel free to give me some feedback with your own best quotes - even if you made them up yourself - so I can include them in a future edition.

- *It's only when the tide goes out, you discover who is swimming naked.*
Warren Buffett
- *It is not enough just to have a good mind; the main thing is to use it well.*
Rene Descartes
- *There's no such thing as bragging - you're either lying or telling the truth.*
Al Oliver
- *Words, like people, are judged by the company they keep.*
Anderson v. SE Fidelity Co.
351 Ga 556 (1983)
Hon. Charles L. Weltner
- *Nothing is sometimes the right thing to say.*
Malcom Forbes
- *It is not enough just to stand and stare.*
Pink Floyd ("On the Turning Away")
- *You can observe a lot by just watching.*
Yogi Berra
- *There is nothing that cleanses your soul like getting the hell kicked out of you.*
Woody Hayes
- *The world is a better place for him having graced it and a poorer place with his passing.*
Author Unknown
- *If you're going through hell, keep going.*
Winston Churchill
- *If you can't explain it simply, you don't understand it well enough.*
Albert Einstein
- *There's no such thing as a free lunch.*
Milton Friedman
- *Pain is an inescapable part of the human experience but misery is not. Misery is an option.*
Randy Wayne Smith (Everglades)

-
- *Failure doesn't mean you are a failure... it just means you haven't succeeded yet.*
Charles Kettering
 - *Old age ain't no place for sissies.*
Betty Davis
 - *Raising kids is part joy and part guerilla warfare.-*
Ed Asner
 - *Stop chasing the money and chase the passion.*
Tony Hsieh
 - *Only put off until tomorrow what you are willing to die having left undone.*
Pablo Picasso
 - *Each play must accept the cards life deals to him or her; but once they are in hand, he or she alone must decide how to play the cards in order to win the game.*
Volltaire
 - *A failure to plan, is a plan to fail. -Original author unknown (Coined by Benjamin Franklin)*
 - *The pursuit of happiness will make you miserable.-*
Author Unknown
 - *Do that which you fear most, and the death of fear is certain.*
Mark Twain
 - *Facts do not cease to exist because they are ignored. -*
Aldous Huxley
 - *It is a dangerous business going out your front door.*
JRR Tolkein
 - *To be prepared is half the victory.*
Miguel de Cervantes
 - *Whatever you do will be insignificant. But it is very important that you do it.*
Gandhi
 - *Truth often suffers more by the heat of its defenders than the arguments of its opposers.*
William Penn
 - *A rolling ball always has a child attached to it.*
Anonymous
 - *When you find yourself in a hole, the first thing you need to do is stop digging.*
Will Rogers
 - *When life looks like easy street there is danger at your door.*
J. Garcia ("Uncle John's Band")



Calendar Call recently asked several judges to contribute to our publication by considering a list of 25 questions and answering 10 or 12 (or more) to give readers an idea of their backgrounds, experiences and perspectives

from the bench. Judges Dax Lopez, Bonnie Oliver and Rusty Smith were kind enough to volunteer for this task and the interviews follow below. Hopefully, we will be able to recruit more judges from state, superior and federal courts around the state to participate in this forum in future editions.



Judge Dax Lopez

Born in Ponce, Puerto Rico, Judge Dax López moved to Georgia at the age of six. Constantly on the move, Judge López lived in six states, mostly in the South, throughout his childhood. Judge López attended Vanderbilt University where he obtained a Bachelor of Science in Political Science. He obtained his law degree from Vanderbilt Law School, where he served as president of the Vanderbilt Bar Association and as an editor on the Vanderbilt Journal Transnational Law.

After law school, Judge López served as the law clerk for the Hon. Hector M. Laffitte in the Federal District Court for the District of Puerto Rico. He returned to Atlanta in 2002 to commence his career as an attorney at Holland & Knight, LLP, where he practiced in the complex civil litigation group for three years. Before joining the DeKalb State Court, Judge López also worked in the litigation groups of Ashe, Rafuse & Hill and Foltz & Martin LLC, where he handled class actions, complex civil litigation, employment mat-

ters, and product liability cases.

On August 10, 2010, Georgia Governor Sonny Perdue appointed Dax to the State Court of DeKalb County, where he has presided over both criminal misdemeanor and civil matters. Judge López also presides over two sections of the DeKalb County DUI Court, which includes the only such court conducted entirely in Spanish.

Judge López is a past president of the Georgia Hispanic Bar Association, and serves on the Board of Directors of CETPA and the Advisory Board of Caminar Latino. He also served on the Board of Directors of the Georgia Association of Latino Elected Officials. Judge López remains active in and committed to several other civic and community organizations.

On July 30, 2015, President Barack Obama nominated Judge López to the Federal District Court for the Northern District of Georgia.

Judge López is married to attorney Zulma López. Together they are the proud parents of four children: Roberto Carlos, Sebastian, Elisa and Leo.

Tell us about your life and professional experience before becoming a Judge. [e.g., your background/growing up/ education/career before the bench, including legal and non-legal jobs

I was born in Ponce, Puerto Rico and moved to the United States when I was 6 years old. Growing up, my family moved around several times, and I ended up living in 6 different states. In 1988 we moved back to Georgia, and I was able to graduate

from high school in Cobb County in 1994 . I then attended Vanderbilt University and then Vanderbilt Law School. While in college, I had two jobs: teaching ballroom dance and working in the library. During my summers, I worked as a camp

counselor at a Jewish community center or as an intern at a law firm. After law school, I clerked for a federal district court judge in Puerto Rico before making my way back to Atlanta to work for Holland and Knight. After a few years, I moved to the small boutique firm of Ashe Rafuse & Hill, and then a few years after that I went to Foltz Martin LLP, another boutique firm. Then in 2010, I applied for an opening on the state court of DeKalb County not having any expectation that I would be chosen. I was therefore shocked when then Governor Sonny Perdue appointed me to the bench in August of 2010.

Why did you decide to become a Judge and what best prepared you for being a Judge?

Though I had clerked for a judge and was friends with several judges, I never had any aspiration to become a judge. That all changed when one of my mentors (who was a judge at the time) encouraged me to seek an appointment to the state court. He told me he thought I had the qualities necessary to be a good judge and that I should seriously consider becoming a public servant. I, however, was very hesitant to pursue a judgeship as I was only 33 years old at the time and I did not believe I had the experience for such an important position. Several of my mentors assured me that I was ready and pushed me to apply. Looking back, I am grateful that they saw something in me that I did not yet see in myself.

What advice would you give to a lawyer who wanted to become a Judge?

Strive for excellence in your profession. No matter what area of the law you practice (defense, plaintiff, criminal, workers compensation, etc.), strive to be the very best lawyer you can in that area. Make sure to develop and cultivate a reputation for excellence, honesty, and professionalism. Without such a reputation, an appointment to the bench may be difficult. Outside of your professional reputation,

you should also strive to positively impact your community. Follow your passions and get involved with religious, charitable or non-profit organizations. A demonstrated commitment to your community will not only make you a better candidate for a judgeship, but will make you a better judge if you are appointed or elected.

What was one of your most interesting or uplifting cases?

I am one of two judges who preside over the DeKalb County DUI Court, an accountability court designed to help individuals who have a history of multiple DUIs obtain treatment to address their dependence on alcohol. Through this program, I help individuals struggling with alcohol abuse seek treatment through group counseling, Alcoholics Anonymous, random drug screening, and regular court sessions to gauge a participant's progress and compliance with program requirements. This is by far the most rewarding aspect of my job because I have seen the positive transformation many of my participants have made in my program into productive, responsible, and law abiding citizens. I have seen participants with 3, 4 or 5 DUIs turn their lives around, reconnect with their families, and become better employees with the capacity and ability to advance at their jobs. As a community, we all benefit from this type of accountability court because our streets are now safer as we reduce the number of people who drink and drive while impaired.

What do you do when you're not on the bench for fun/relaxation? [e.g., what do you do when you're not working or thinking about law]

I have four kids, so outside the office I dedicate most of my free time to them and their activities. However, I am a huge soccer fan and always make time to support my two teams, FC Barcelona and our home team Atlanta United. On those rare occasions when my wife and I can make some time for

ourselves, we enjoy travelling both domestically and internationally. We are hoping to schedule a trip to Spain in 2018.

What do you read, when you're not reading the law, or about the law?

Every evening I read children's books with my daughter. For myself, I enjoy legal thrillers (I just can't get away from the law), biographies, and historical fiction novels. Currently, I am reading a book about Hitler and the Third Reich as well as Malcolm Gladwell's Tipping Point.

I have heard that Judges can choose their own chair. Do you have a "special" chair, and if so why did you choose it/where did you get it/describe it/why is it special?

The ability to choose a chair is dictated primarily by the amount of money the county commission awards my division for furniture. Because of budget shortfalls, that amount is not very much. As a result, I actually was able to swap out my chair for a great old, comfortable chair one of my colleagues had in his courtroom when he resigned from office.

What are some of the most common (or devastating) mistakes made by attorneys in front of a jury?

Killing a dead horse. Attorneys love to talk and to hear themselves talk. That does not mean that juries enjoy hearing them talk in a repetitive fashion. Juries are more sophisticated than most lawyers give them credit for. As such, lawyers do not need to make the same point over and over and over again. Asking the same question 5 different ways and eliciting the same or similar response 5 different times can frustrate jurors as they may think you don't respect their intelligence and/or their time.

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Questions & Answers

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Do you ever wake up in the middle of the night wondering if you made a wrong decision in one of your cases?

Every judge will at some point encounter a case with such significant issues and consequences that it will keep the judge up at night. However, as a general rule, a judge must be decisive and must

trust in his or her own judgment. Judges should gain comfort in their decisions so long as they are made after a proper consideration of the evidence and of the applicable law.

What do you think you might do if you ever leave the bench?

I don't know what opportunities may lay ahead so I cannot say with

certainty. Sometimes I do miss practicing law, so I could see myself returning to the practice in the future. As of right now, however, I have no plans but to continue serving the people of DeKalb County as a state court judge.



Judge Bonnie Chessher Oliver

Walter F. George School of Law, Mercer University 1981. General civil litigation practice with some criminal defense for 17 years. Appointed State Court Judge of Hall County by Gov. Zell Miller June 1998. Appointed Judge of the Superior Court, Northeastern Judicial Circuit by Gov. Roy Barnes, September 1999 where she currently is serving. Institute of Continuing Judicial Education (ICJE) Trustee. State Bar Bench and Bar Committee Member. Former Chair State Bar General Practice and Trial Section, former Chair Client Security Trust Fund, former Judicial Council of Georgia Workload Assessment Committee Member, former Trustee ICLE, former Vice Chair Judicial Qualifications Commission, former member

State Bar Board of Governors, former member of the State Bar Special Committee on Criminal Justice Reform, former vice chair of the State Bar Investigative Panel, former chair of the State Bar Committee on the Judiciary, former director YLD State Bar of Georgia. Past President and member of the Rotary Club of Gainesville. Immediate Past President, E. Wycliffe Orr Inn of Court, Gainesville GA. Member of Old Warhorse Lawyers Club, Lawyer's Club of Atlanta, Northeastern Circuit Bar Association and American Bar Association.

Married with three children and two grand daughters. Resides in Gainesville, Georgia.

Tell us about your life and professional experience before becoming a Judge. [e.g., your background/growing up/education/career before the bench, including legal and non-legal jobs]

I was born in Atlanta but moved to Lake Lanier before my sixth grade year and graduated from Buford High School. My mother was less than excited about my first two career choices: artist and hair stylist. She encouraged me to aim a little higher. When I said I would instead be the first female President of the United States, she was satisfied. I planned my higher education with that goal firmly in mind, and graduated *cum laude* from Shorter College in 1978 and from the Walter F. George School of Law, also known as Mercer, in 1981. After law school, I became active in the Democratic party and was leader

of the Hall County Democratic Club. I spent my seventeen-year legal career trying cases. I began with insurance defense but, as time passed, my practice grew to incorporate Plaintiff's cases, worker's compensation, divorces, business litigation and criminal defense. Throughout most of these years, I was lucky enough to work with E. Wycliffe Orr, and learned much under his tutelage.

Why did you decide to become a Judge and what best prepared you for being a Judge?

In the mid 90's, I was a happy and successful trial lawyer. My former law partner, Wyc Orr, had other plans and nominated me for the Superior Court bench. Many of my colleagues joined him in this scheme, and I was sworn in as a State Court Judge in 1998 and elevated by appointment to Superior Court in 1999.

My experiences trying cases all over North Georgia, and once in Alabama, had left me with an idea of what kind of Judge I wanted to be. Having appeared in front of so many different Judges, I had come to admire some of their qualities and to deplore many of the rest. I knew that if I ever became a judge, I wanted to be fair, patient, firm, and above all else, lawful.

I also got some coaching from seasoned Judges early after having taken the bench. One piece of advice has stuck with me ever since. A wise jurist advised me: no one can know all the laws and rules and cases, but if you make your decisions based on good solid common sense, 99% of the time the law will back you up.

How long have you been a Judge?

I've been a Judge for 19 years.

What thing(s) do you like most about the job?

My favorite part about being a Judge is being able to control the calendar and most aspects of what goes on in the Courtroom. No one has ever accused the court system of being efficient, but I try to do what I can. Plus I'm a little bit of a control freak.

What is the hardest/most difficult/most frustrating part or parts of the job?

The most frustrating parts of my job are unprepared lawyers and pro se litigants. Both seem to eat up more than their fair share of my time. Similarly, I grow extremely frustrated when lawyers treat lightly the burden the system places on jurors. I think that when jurors are present everyone should be striving to inconvenience them as little as possible.

What advice would you give to a lawyer who wanted to become a Judge?

My advice to a lawyer who wanted to be a Judge is to remember that the practice of law is a profession, not a business. A large part of being a Judge is maintaining objectivity. To learn to think that way, it is helpful for lawyers to deal with their opponents in a professional manner with the understanding that they are merely representing their client, and to try to always keep in mind that a lawyer's role is to advocate for a party, not to stand in the shoes of the party. Many decisions can only be made by the party, but some are for the lawyer only. Never let yourself be a hired gun and never do anything unethical or even ethically questionable just because your client demands it. I also can't overemphasize how important it is to have lots of courtroom experience before thinking of becoming a Judge.

Who are some of your personal/professional/legal heroes and why do you admire them?

Wyc Orr was a law partner, a close friend, a mentor, and will always be a great hero of mine. He taught me how to practice law, how to dig deep into cases and statutes, how to think outside the box when analyzing issues, and most importantly how to win a case and lose

a case with the same calm and grace. Again, the way to do so is to understand your role as advocate, not a party, and to understand that the facts are what they are. You didn't create them and you can't change them.

What is a common trait or approach you see in the most successful lawyers who appear before you?

The most successful lawyers are the ones that manage to be themselves in front of the jury. Jurors respect authenticity and directness and can tell when a lawyer is putting on an act or asking the same question over and over not to clarify but just for emphasis.

Give us a breakdown of the types of civil and criminal cases you hear regularly; e.g., the most frequent; the most infrequent; jury trials per year versus bench trials per year.

About 75% of my courtroom time is spent on criminal matters, typically jury trials involving violent offenses like aggravated assault and murder as well as child molestations. The other 25% is civil matters comprised mostly of bench trials in divorce and custody cases.

From your experience/observation how do most people who are called for jury duty feel about serving/about the jury system/litigation in society/lawyers, etc. Do most understand the different burdens of proof?

In my experience, most jurors seem honored to serve in that position. They respect the system and appreciate that it is the bedrock of the freedom we have as Americans. There does appear to be some hesitancy to trust attorneys in the litigation setting and this is probably because there are two different lawyers making incompatible claims about the truth. Jurors do appear to take their role seriously and accurately understand and apply the different burdens of proof.

When you have a difficult motion or issue to decide, what are some of the things you do to feel comfortable/confident about your own final decision? [e.g., doing your own independent research/ask lawyers for supplemental briefing/talk with other Judges either in-state or out-of-state about similar issues; research cases with similar issues from other jurisdictions/compare other judges analyses, etc.]

The most important thing to do when deciding a difficult motion is to listen carefully and closely to any oral argument. When you do that having already grasped what the disputed and undisputed facts are, the linchpins become much more apparent than just from a reading of the briefs. I also conduct research independent of the lawyers, including consideration of other jurisdictions if necessary.

What was one of your most disturbing/upsetting/saddest cases?

The most upsetting cases for me are child molestation cases involving teenaged offenders. Similarly, many cases involving a mandatory minimum sentence can be difficult because I find myself handing down a sentence that perhaps I wouldn't be if it were up to me.

What do you do when you're not on the bench for fun/relaxation? [e.g., what do you do when you're not working or thinking about law]

In my free time I enjoy hiking in the mountains, white water rafting, oyster roasts, boating on the lake, cornhole (or any competitive game), pleasure reading, shopping, grandchildren, and spending time with friends and family.

What do you read, when you're not reading the law, or about the law?

I read primarily fiction, as long as there's no legal drama involved. Some of my favorite authors are Conroy, Larsson, Baldacci, and Follett.

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Questions & Answers

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What are some of the most common (or devastating) mistakes made by attorneys in front of a jury?

The biggest mistake an attorney can make in front of a jury is overstating their case. Jurors react negatively if an attorney has promised too much in opening or if they try to make too much out of too little in closing.

Can you describe a decision where you fully grasped the power, responsibility and seriousness of being on the bench (sentencing someone, determining child custody, etc.)?

Signing a death warrant and having the execution carried out exactly as I directed.

What are some ways that being on the bench is totally different than you might have thought prior to taking the bench?

Upon first becoming a Judge, after having had an active practice as an attorney, I was stunned by the fact that I had no phone calls to return after a day in Court.

Tell us about a tense moment or event in your courtroom or the courthouse and the outcome.

When a guilty verdict was read after a child molestation trial, the father of the defendant stood and started leaping over the rows of benches moving toward the front of the courtroom. He was apprehended, but it was chaotic for a time.

Another time, in the old Dawson County courthouse, a large ceiling light blew, sounding just like a gun shot.

Rather than duck-and-cover or a hurried evacuation to a safe room, everyone, deputies included, just froze in place.

Do you ever wake up in the middle of the night wondering if you made a wrong decision in one of your cases?

I've never woken up in the middle of the night questioning a decision I've made. Being decisive is a critical characteristic for someone wanting to be a Judge, and there are too many decisions to be made for you to rehash ones that have already been handed down.

What do you think you might do if you ever leave the bench?

If I ever leave the bench, the title of first female President of the United States remains as yet unclaimed.



Judge Russell W. Smith

Sworn in April 23, 2010, as Judge of Superior Court – Mountain Judicial Circuit Chief Judge 2012-2012/2014-2016 (Now shared on rotating bi-annual basis). Georgia Family Violence Commission 2010-2012. Presiding Judge Stephens and Rabun County Drug Courts 2011-present. Graduate National Judicial College-General Jurisdiction-2011. B.A. History, Valdosta State University - 1986. J.D. Georgia State University College of Law - 1989. Partner Sanders, Smith & Ranck, PC, Toccoa, GA 1993-2010. Stephens County Attorney 2002-2007.

Currently serving on the following committees: Counsel of Superior Court Judges Indigent Defense Committee (Chair), Judicial Workload Assessment Committee, Georgia Judicial Needs Assessment Committee, Judicial Council Education Committee (Advisory member).

Married: Mary Williams Smith, Two children, Maggie (18) and Ben (16)

Tell us about your life and professional experience before becoming a Judge. [e.g., your background/growing up/ education/career before the bench, including legal and non-legal jobs]

I was born in Atlanta, but moved to Tennessee when I was a year old. I grew up in Memphis and Germantown, TN, but also lived in the mid-west for several years before moving back to Georgia. I

finished high school at Milton in Alpharetta. I worked at the Dairy Queen in Alpharetta for several years during high school and while I was in college I worked at the Men's Department at Davidson's and also at a book store. During college first at Mercer-Atlanta and then at Valdosta State, I started out a music major, but eventually decided that was not for me and changed my major to history. During law school at Georgia State

I clerked for Jack Turner and what was then Nall, Miller, Owens, Hocutt and Howard. During my last year of law school I also worked on weekends at the reference desk at the law library. My first year out of law school I worked in Macon with Reynolds and McArthur. I moved on to Toccoa where I practiced for 20 years with the firm of Adams, Clifton and Sanders until my appointment by Governor Perdue. Initially, I did title work, closed

real estate transactions, handled domestic cases and appointed criminal cases. As time went on, I spent more and more of my time handling contested domestic cases and other trial work. I also served as the Stephens County attorney for seven years.

Why did you decide to become a Judge and what best prepared you for being a Judge?

When the opportunity became available, I did not immediately consider offering myself for the position, but I was encouraged to do so by the local bar as well as the former members of the judiciary and my former law partners. I have always enjoyed problem-solving and helping people and I hoped that the job would offer the opportunity to do so. Professionally, my experience doing legal research and writing and the time I spent in the courtroom, trying cases and observing good lawyers at work prepared helped prepare me for my role as a judge.

How long have you been a Judge?

7 years.

What thing(s) do you like most about the job?

Judges often have the opportunity to help people during the most difficult points in their lives. I have found the accountability court programs to be particularly rewarding because I have the opportunity to see firsthand the physical and emotional rewards that struggling addicts attain by maintaining their sobriety as well as the profound impact those changes have on the lives of their children and families.

What is the hardest/most difficult/most frustrating part or parts of the job?

My greatest frustration is that, as much as I enjoy being in the courtroom, I rarely have the time I need in chambers to do legal research, draft orders and handle administrative matters. For me

the two most difficult parts of the job are probably also the most important: criminal sentencing and child custody cases. There is no time when the job is more difficult than when someone (particularly a young person) is receiving a sentence that will result in all or a majority of their life spent behind bars, even though that sentence may be necessary or appropriate. In custody cases, the most difficult decisions are where there are two great parents or where both are bad parents and there is no good alternative for the children.

What advice would you give to a lawyer who wanted to become a Judge?

I would advise them to spend as much time in the courtroom as possible. Trial experience, particularly jury trial experience is very helpful.

What is a common trait or approach you see in the most successful lawyers who appear before you?

They are passionate about their work. That doesn't necessarily mean that they are dramatic in the courtroom, but that they care deeply about doing the best they can for their clients. Also, the best attorneys appreciate the importance of their personal credibility with the court. They never take unreasonable positions or mislead the court as to facts or the law.

Give us a breakdown of the types of civil and criminal cases you hear regularly; e.g., the most frequent; the most infrequent; jury trials per year versus bench trials per year.

My time is divided pretty evenly between hearing civil (primarily domestic) and criminal cases. The number of jury trials varies from year to year, but I usually have at least 2 or 3 civil and 2 or 3 criminal trials each year. As far as bench trials, I hear bench trials almost every week and often several times in one week. I also preside over the Drug Court programs in two counties and a Parental

Accountability Court (child support) court in one county.

From your experience/observation how do most people who are called for jury duty feel about serving/about the jury system/litigation in society/lawyers, etc. Do most understand the different burdens of proof?

Most people appreciate the importance of jury service. There are certainly those who believe that jury duty is an imposition. I have found, however, that those who are selected and actually serve on a jury take their role very seriously and afterwards express an appreciation and understanding of the importance of the jury system.

What was one of your most interesting or uplifting cases?

Because our circuit borders North Carolina and South Carolina we frequently have interstate jurisdiction cases that require application of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). Oftentimes, resolution of the jurisdictional issue requires a conference with the court of the other state. I find it interesting, talking to the judges from other states and learning about the differences and similarities between our judicial systems.

What do you do when you're not on the bench for fun/relaxation? [e.g., what do you do when you're not working or thinking about law]

I enjoy playing tennis (although not very well nowadays), language learning, reading, hiking in the mountains, watching movies and spending time with my family.

I have heard that Judges can choose their own chair. Do you have a "special" chair, and if so why did you choose it/where did you get it/describe it/why is it special?

I have not heard that! In a multi-county circuit, we often share the

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Questions & Answers

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courtrooms (and the same chair) with other judges. When one of our counties built a new courthouse, the judges all had the opportunity to participate in selecting the type of chairs to be purchased, but everyone got the same chair. In the other counties we use the chairs that are provided.

What are some of the most common (or devastating) mistakes made by attorneys in front of a jury?

Sometimes lawyers fail to appreciate the intelligence of the jurors. It is not necessary to ask the same questions over and over. There are times when I see that the jurors are fidgeting, bored or visibly frustrated and the lawyers seem to be oblivious. A well-trying case with good lawyers never takes too long and a poorly tried case always does.

What was the funniest story you can remember from the courtroom (i.e. funniest answer by a witness, statement by a lawyer, incident, etc.)?

I was hearing an uncontested divorce involving a May-December relationship. The much older husband was having difficulty remembering the date of the marriage. The wife quipped "Sorry your honor, he's just old and decrepit." She then looked up at me and said "No offense, your honor."

What are some ways that being on the bench is totally different than you might have thought prior to taking the bench?

I don't think that I appreciated the enormous difference between arguing the position that is most advantageous for your client as a lawyer and the responsibility that

a judge has for making the right decision. Issues that might seem clear-cut and simple to the lawyer as an advocate, are sometimes more difficult from the court's perspective looking objectively at the positions of both parties.

Do you ever wake up in the middle of the night wondering if you made a wrong decision in one of your cases?

I believe that you have to have confidence in your decisions and move on

What do you think you might do if you ever leave the bench?

I hope to have the opportunity to serve as a senior judge someday. Personally, I look forward to doing some travelling.

Motions in Limine in Civil Litigation

Rebecca A. Payne
Cathey & Strain
649 Irvin Street
Cornelia, Georgia 30531



Rebecca A. "Becky" Payne is a plaintiff's civil trial attorney with the law firm of Cathey & Strain in Cornelia, Georgia. Becky was raised in Rabun County, Georgia and received her undergraduate degree cum laude with a double major in journalism and criminal justice from Mercer University in December of 2011. Upon graduation, she attended Georgia State University College of Law where she graduated with highest pro bono distinction in May of 2015. Prior to joining Cathey & Strain, Becky clerked for Ragland & Jones, LLP, a firm specializing in medical malpractice and nursing home cases, in Atlanta, Georgia for two years. She also spent her summers interning with the Mountain Judicial Circuit District Attorney's Office where she was involved in several high profile criminal cases. Since joining Cathey & Strain in November 2015, Becky has been actively involved in numerous personal and catastrophic injury cases with a focus on medical malpractice and car accidents, as well as premises liability cases.

A Motion in *Limine* is a pre-trial procedural device which essentially seeks to prohibit the opposing party, the party's counsel, and witnesses from offering prejudicial, inadmissible or inflammatory evidence at trial. Motions in *Limine* also seek to preclude even mentioning the evidence at trial, without first having its admissibility determined outside the presence of the jury. The motion gives the court an opportunity to rule on the admissibility of evidence in advance and prevents encumbering the record with immaterial or prejudicial matters, as well as providing a means of ensuring that privileged material as to which discovery has been allowed by the court, will not be used at the trial if it is found to be inadmissible.

The rationale behind a Motion

in *Limine* is the recognition that the mere *asking* of an improper question within the hearing of the jury may prove so prejudicial or inflammatory that, notwithstanding a cautionary instruction by the court to disregard the offensive matter, the moving party will be denied his right to a fair trial. The basic purpose of a Motion in *Limine* is to give the trial judge notice of the movant's position so as to avoid the introduction of damaging evidence which may irretrievably infect the fairness of the trial. Motions in *Limine* also shorten the trial, simplify the issues and reduce the possibility of a mistrial.

The term "*in limine*" is a Latin phrase which may be translated as "on the threshold" or "at the outset". Typically the motion is presented in writing before trial; however, occa-

sionally trial dynamics will dictate that the motion be made orally during the trial. The format for presentation of Motions in *Limine* is not fixed by rule or statute. When made in writing, a motion *in limine* should be accompanied by a memorandum of law in order to give the judge a valid legal basis for his ruling. The Supreme Court of Georgia has recognized that the use of a Motion in *Limine*, and the Court's power to consider rulings on such motions are part of the inherent power of the Court to control the conduct of a trial and to make decisions regarding the admissibility or exclusion of evidence at trial. Harley Davidson Motor Co. v. Daniel, 244 Ga. 284, 260 S.E.2d 20 (1979).

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Motions in Limine in Civil Litigation

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In Daniel the Supreme Court noted that the purpose of filing a Motion in *Limine* to exclude evidence, or to instruct opposing counsel not to offer it, is to prevent the asking of prejudicial questions and the making of prejudicial statements in the presence of the jury about matters which have no proper bearing on the issues in the case or the rights of the parties in the suit. The Daniel case involved an alleged motorcycle defect and the defendant sought to exclude evidence of a recall notice by way of a Motion in *Limine*. The trial court denied the motion and the defendant failed to object when the recall letter was offered into evidence at trial. The Court of Appeals held that an objection was necessary despite the fact that the Motion in *Limine* had been considered and denied and held that the issue was not preserved for appeal. The Georgia Supreme Court reversed, holding that a Motion in *Limine* was sufficient to preserve error and an objection was not necessary:

All of the purposes of an objection have already been fulfilled by a Motion in *Limine*. The trial court has been apprised of the possible error in admitting the evidence and has made its ruling and the record has been perfected for appeal purposes. Therefore, we see no reason for another objection at trial in order to preserve the denial of a Motion in *Limine*. *Id.* at 286. (See also, Hale v. State, 214 Ga. App. 899 (1994)).

Be aware, however, that the 11th Circuit has adopted a much different rule than the Georgia Appellate courts. In Judd v. Rodman, 105 F.3d 1339, 1342 (11th Cir. 1997), the Court stated “[A]s a general proposition, an overruled Motion in *Limine* does not preserve a party’s objection for purposes of appeal; a timely objection at trial is required.” See also, Frederick v. Kirby Tank Ships, Inc., 205 F.3d 1277, 1285 (11th Cir. 2000); Goulah v. Ford Motor Co., 118 F.3d 1478, 1483 (11th Cir. 1997). Although there are

some cases in the 11th Circuit which can be cited for the proposition that the failure to object at trial when the evidence is offered may not be necessary and the error is preserved by the mere ruling on the Motion in *Limine*, the much better practice in the 11th Circuit is to object when the evidence is offered. There is absolutely no guarantee in the 11th Circuit that a Motion in *Limine* ruling will preserve your objection as there is in the trial courts of Georgia.

It is the prejudicial and inflammatory effect of the questions asked or the statements made in connection with the offer of the evidence which the Motion of *Limine* is intended to address. Daniel, at 244 Ga. 285, n. 1. A ruling on a Motion in *Limine* and the Order granting or denying the Motion, just like a pretrial order, controls the subsequent course of the parties’ action unless the ruling is modified at trial to prevent manifest injustice. *Id.*, at 286.

A Motion in *Limine* is a powerful tool when a party is faced with potentially prejudicial or inflammatory evidence that will substantially affect his right to a fair trial. The obvious advantage to a Motion in *Limine* is that the grant of one eliminates the kind of evidence from the consideration of the jury. A Motion in *Limine*, however, also serves to educate the trial judge on issues which may arise at trial, even if the judge decides to delay ruling on the admissibility of the evidence until the trial itself. The proper way to handle a situation where a judge decides to delay ruling on the evidence, is to make a clear and unequivocal request on the record, before the trial starts, that the opposing party who seeks admission of the evidence be prohibited from making any mention of the evidence until a separate hearing is held during the trial out of the presence of the jury. A “proffer” can then be made of the evidence outside the presence of the jury so that the Judge can consider it within the context of all of the evidence which has been adduced at trial.

A Motion in *Limine* is designed to examine the admissibility of evidence under the rules of evidence procedure, not to challenge sufficiency of evidence under substantive law. State Department of Transportation v. Douglas Asphalt Company, 297 Ga.App. 470 (2009). “A motion in *limine* is a pretrial motion which may be used in two ways, (1) the movant seeks, not a final ruling of admissibility of evidence, but only to prevent the mention by anyone, during trial, the certain item of evidence or area of inquiry until its admissibility can be determined during the course of trial outside the presence of the jury... (2) the movant seeks a ruling on the admissibility of evidence prior to trial. The trial court has the absolute right to refuse to decide the admissibility of evidence, allegedly violative of some ordinary rule of evidence, prior to trial.” State v. Johnson, 249 Ga. 413 at 415 (1982); see also Campbell v. Northeast Georgia Medical Center, 225 Ga.App. 365 (1998); Wiggins v. State, 249 Ga. 302 (1982); *accord*, Rogers v. State, 282 Ga. 649 (2007).

There are numerous matters which can be the subject of a Motion in *Limine*. Some of the issues and types of evidence which this writer has seen include Motions in *Limine* regarding the following:

Filed by the Plaintiff to exclude::

- The non-use of seatbelts by an injured driver or passenger (unless, of course, the issue in an automotive defect case is whether the seatbelt functioned properly). See O.C.G.A. §40-8-76.1(a) and (d); CW Mathews Contracting Co., Inc. v. Glover, 263 Ga. 108 (1993).
- The pending divorce between Plaintiff and her deceased spouse which was not yet finalized when a husband was killed. The spouse, although separated from the husband and in the process of obtaining a divorce, still had the right of action in the wrongful

- death case. See *Wright v. Dilbeck*, 122 Ga. App. 214, 216 (1970).
- Collateral source payments made to the plaintiff. (See, *Denton v. Conway s. Express, Inc.*, 261 Ga. 41 (1991)).
 - Certain types of statistical data, surveys and evidence. (See Federal Rules of Evidence 401, 402, 403 and 702). *Daubert v. Merrell Dow Pharm*, 509 U.S. 579 (2010); *TK-7 Corp v. Estate of Barbouti*, 993 F2d 722, 732 (10th Cir. 1993).
 - Drinking by the plaintiff driver where plaintiff admits that the wreck was his fault but where a defective vehicle enhanced the injuries sustained by the plaintiff. The results of a blood alcohol test administered after a collision. (See *Ensley v. Jordan*, 244 Ga. 435 (1979)).
 - The allegation of Plaintiff's comparative negligence in a strict liability case. (See *Deere & Co. v. Brooks*, 250 Ga. 517 (1983)).
 - The "parroting" by one expert or adoption or another experts conclusions/studies as his/her own. *Eberli v. Cirrus Design Corp.*, 615 F.Supp 2d 1357 (S.D. Fla. 2009) or merely serving as a "mouthpiece" of a scientist in a different specialty. *Dura v. Automotive Systems of Indiana, Inc. v. CTS Corp*, 285 F.3d 609, 614 (7th Cir. 2002).
 - Attempts to introduce dissimilar wrecks/acts/incidents. *Cooper Tire & Rubber co. v. Crosby*, 273 Ga. 454, 455-56 (2001); *Stovall v. DaimlerChrysler Motors Corp.*, 270 Ga. App. 791, 793 (2004).
 - Improper argument or testimony about the supposed "overall safety" of a company/manufacturer and its products generally, or "studies" of the supposed "overall safety" of different component/part/product defects. O.C.G.A. §24-4-404(a); *Beam v. Kingsley*, 255 Ga. App. 715, 716 (2002); *Kloepfer v. Honda Motor Co., Ltd.*, 898 F.2d 1452, 1458 (10th

Cir. 1990).

- The admissibility of offers of settlement and compromise to prove liability for or
- invalidity of any claim or its amount. O.C.G.A. §24-4-408.

Filed by the Defendant to exclude:

- Applicable liability insurance coverage, respective liability insurance companies of the defendant(s), or use of terminology which suggests the presence thereof. *Goins v. Glisson*, 163 Ga. App. 290 (1982).
- "Golden Rule" Argument – references to jurors placing themselves in the shoes of the parties. *SCL v. Wallace*, 227 Ga. 363 (1971) (overruled on other grounds).
- Measurements/calculations taken without sufficient protocol; lack of precision. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); *HNTB Georgia, Inc. v. Hamilton-King*, 287 Ga. 641, 644 (2010).
- Allegations or evidence of liability based on an alternative design not available at time of design and development of a product. *Banks v. ICI Ams.*, 264 Ga. 732 (1994).
- Dissimilar prior incidents based on the requirement of "substantial similarity" of other incidents to the present case. (Note: It is common for both plaintiffs and defendants to move in *limine* on this issue). *Cooper Tire & Rubber co. v. Crosby*, 273 Ga. 454, 455-56 (2001); *Stovall v. DaimlerChrysler Motors Corp.*, 270 Ga. App. 791, 793 (2004).
- Medical records and bills not produced during discovery or prior to entry of pre-trial order. O.C.G.A. § 9-11-9(g); *Torok v. Yost*, 194 Ga. App. 94 (1989).
- Hypothetical questions based on facts or reports not in evidence. *Braswell v. Owen of Georgia, Inc.*,

128 Ga. App. 528 (1973).

- Failure to consider/rule out other causes of an incident. *Fireman's Fund Ins. Co. v. Canon USA, Inc.*, 934 F3d 1054, 1060 (8th Cir. 2005).

The ruling on a Motion in *Limine* is an interlocutory ruling, and is normally appealable only after final judgment, unless the trial court grants a Certificate of Immediate Review. *Hale v. State*, 214 Ga. App. 899 (1994). Any evidence which has potentially inflammatory characteristics or where the prejudicial effect of the evidence outweighs whatever materiality it may have, is a target for a Motion in *Limine*.

CONCLUSION

The use of Motions in *Limine* has increased rapidly in civil litigation over the past twenty years. They are versatile and can help streamline the trial and allow a party to frame his order of proof properly based on prior knowledge of the inclusion or exclusion of certain evidence. If a party violates the court's ruling on a Motion in *Limine*, the opposing counsel should immediately request a mistrial or seek other sanctions. Oftentimes there is no proper or alternative remedy available other than a new trial because the jury will have been so tainted by the mention of the prejudicial evidence that a fair trial is not possible.

REFERENCES

1. *Successful Techniques for Civil Trial*, Ronald L. Carlson, Lawyers' Cooperative Publishing Co. (1983).
2. 75 Am. Jur. 2d §§94-114, pp. 306-328.
3. *Motion Practice*, 2nd Ed., David F. Herr, Rogers. Haydock, and Jeffery W. Stempel, Little Brown Company (1991) §18.5, pp. 493-499

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Motions in Limine in Civil Litigation

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**IN THE STATE COURT FOR THE COUNTY OF FULTON
STATE OF GEORGIA**

_____ as next of kin and
Administratrix of the Estate of __
Individually and _____ Individually

Plaintiffs

CIVIL ACTION

v.

FILE NO.

Defendants

**PLAINTIFFS' MOTION IN LIMINE TO PRECLUDE EVIDENCE
AND ARGUMENT AS TO INDEPENDENT CONTRACTOR STATUS**

Come now the Plaintiffs, by and through their undersigned counsel, and move the Court to preclude from the trial of this case any evidence that-----were independent contractors at the time that repossession of the vehicle at issue was attempted or made, and further prohibiting counsel and witnesses for Defendants _____from arguing to the jury that liability should not be imposed because the persons or institutions carrying out the repossession were independent contractors. Plaintiffs' Motion is made upon the following grounds:

1.

_____, [Defendant] had a statutory and contractual duty to conduct any repossession without a breach of the peace. This statutory and contractual duty cannot be delegated. Accordingly, if a breach of the peace occurred, _____ is liable for that breach of the peace regardless of the status of _____ as independent contractors. Any evidence of their status would be irrelevant and likely to confuse the jury. Argument by _____ that it should not be held liable for the actions of _____ would be legally incorrect.

2.

Defendant_ had a statutory duty to conduct any repossession without a breach of the peace. If a breach of the peace occurred, _____ is liable for that breach regardless of the status of _____ as independent contractors. Evidence of their independent contractor status would therefore be irrelevant and likely to mislead the jury. Argument that _____ should not be held liable because of their status would be legally incorrect.

In support of their Motion, Plaintiffs rely upon all materials of record and the accompanying brief.

WHEREFORE, Plaintiffs pray that the Court enter an Order excluding from the trial of this case any evidence of the independent contractor status of any defendant involved in the repossession of the _____ vehicle, and prohibiting counsel and witnesses for the Defendants from making reference to such status or arguing that liability should not be imposed because of the independent contractor status of any other defendant.

This ___ day of _____ 20__

ATTORNEYS FOR PLAINTIFFS

**IN THE STATE COURT FOR THE COUNTY OF FULTON
STATE OF GEORGIA**

_____ as next of kin and
Administratrix of the Estate of _
Individually and _____ Individually

Plaintiffs

CIVIL ACTION

v.

FILE NO.

Defendants

**BRIEF IN SUPPORT OF PLAINTIFFS' MOTION IN LIMINE
TO PRECLUDE EVIDENCE AND ARGUMENT AS TO
INDEPENDENT CONTRACTOR STATUS**

Defendant _____, (hereafter _____) has made it clear that it intends to introduce evidence and argue at trial that it _____ should not be held liable for the acts of _____ (hereafter-----), because _____ was an independent contractor (Consolidated Pretrial Order, p. 24). Similarly, _____ intends to offer evidence and argue at trial that it was not responsible for the acts of _____ an independent contractor, or (Id., p. 31). These arguments would be legally improper, as the law imposes liability for a breach of the peace upon both _____ regardless of their use of independent contractors. Accordingly, such argument should be prohibited, and evidence of the independent contractor status of anyone involved in the repossession should be excluded.

Georgia law permits a secured party to repossess the collateral upon default without judicial intervention so long as this can be done without breach of the peace. O.C.G.A. §11-9-503. Georgia courts have interpreted this code provision as prohibiting self-help repossession if there is *threat* of violence, injury or intimidation during repossession. Fulton v. Anchor Savings Bank, FSB, 215 Ga.App. 456, 458, 452 S.E.2d 208 (1994); Hopkins v. First Union Bank of Savannah, 193 Ga.App. 109, 110, 387 S.E.2d 144 (1989). This duty imposed upon _____ as a matter of Georgia law was expressly written into the contract between _____ and _____, which contract was assumed by _____ (Plaintiffs' Exhibit 41 on Pretrial Order). _____ has both a statutory and a contractual duty to repossess the _____ automobile, if at all, without breaching the peace.

While the general rule is that an employer is not liable for the acts of an independent contractor, the hiring of an independent contractor does not insulate the employer from duties imposed by statute or contract. O.C.G.A. §51-2-5 (3, 4). Such duties are nondelegable. Fulton v. Anchor Savings Bank, FSB, 215 Ga. App. 456, 462, 452 S.E.2d 208 (1994). While the Fulton case is physical precedent only, Ct. App. Rule 33(a), it does express the *universal* rule from every court which has considered the question of whether the Uniform Commercial Code statutory duty to repossess without a breach of the peace may be avoided by delegating the task to an independent contractor. General Finance Corp. v. Smith, 505 So.2d 1045 (Ala. 1987); Henderson v. Security National Bank, 72 Cal.App.3d 764, 140 Cal.Rptr. 388 (1977); Loughan v. HargerHaldeman, 184 Cal.App.2d 495, 7 Cal.Rptr. 581 (1960); Nixon v. Halpin, 620 So.2d 796 (Fla. Dist. Ct.App. 1993); Sammons v. Broward Bank, 599 So.2d 1018 (Fla. Dist. Ct.App. 1992); Massengill v. Indiana

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Motions in Limine in Civil Litigation

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National Bank, 550 N.E.2d 97 (Ind.App. 1990); James v. Ford Motor Credit Company, 842 F.Supp. 1202 (D.Minn. 1994); Nichols v. Metropolitan Bank, 435 N.W.2d 637 (Minn.App. 1989); Hester v. Bandy, 627 SO.2d 833 (Miss. 1993); Robinson v. Citicorp National Services, 921 S.W.2d 52 (Mo.App. 1996); DeMary v. Rieker, 302 N.J.Super. 208, 695 A.2d 294 (App.Div. 1997); Mauro v. General Motors Acceptance Corp., 164 Misc.2d 871, 626 N.Y.S.2d 374 (Sup.Ct. 1995); Williamson v. Fowler Toyota, Inc., 956 P.2d 858 (Ok. 1998); Clark v. Associates Commercial Corp., 877 F.Supp. 1439 (D.Kan. 1994) (Applying Tennessee law); McCall v. First Tennessee Bank, 820 S.W.2d 748 (Tenn. 1991); M Bank El Paso, Inc. v. Sanchez, 836 S.W.2d 151 (TX. 1992). Having initiated the repossession process, _____ had a statutory duty to insure that the repossession was conducted in a peaceful manner, no matter how tenuous the connection between it and the person who ultimately repossessed the automobile, regardless of whether _____ had authority to hire _____ as a repossessor, and regardless of whether _____ knew that _____ had hired to repossess the vehicle. Clark, 877 F. Supp. 1439, 1444-1447.

_____ is similarly prohibited from avoiding its duty to conduct repossessions in a lawful manner. When an employer delegates the performance of a duty owed to third persons, its agent is liable for a breach of that duty. See Total Equity Management Corp. v Demos, 191 Ga.App. 21, 381 S.E.2d 51 (1989); Paul v. Sharpe, 181 Ga. App. 443, 352 S.E.2d 626 (1987). _____ stepped into the shoes of _____ under the loan agreement and under duties imposed upon a secure creditor by law when it agreed to repossess the _____ automobile. Fulton v. Anchor Savings Bank, 215 Ga.App. 456, 463.

It is axiomatic that _____, as a company whose sole business is the exercise of functions regulated by the Uniform Commercial Code, has no more freedom to violate that code than does the secured party upon whose behalf it acts. All of the authority cited above, interpreting the UCC provision for repossession, applies equally to the repossession company as it does to the secured party. The duty to repossess without a breach of the peace cannot be delegated.

The Uniform Commercial Code, enacted by the Georgia Legislature, limits the circumstances under which a secured party may avoid bringing an action to recover secured property to those situations in which a breach of peace can be avoided. O.C.G.A. §11-9-503. Permitting the secured party to insulate itself from liability by hiring an independent contractor violates the statute's limitation of the circumstances in which such self-help repossession may be utilized. All parties involved in repossession are under a statutory duty to insure that it occurs without a breach of the peace. If such a breach of the peace occurs, all parties involved in the repossession, from the person who actually performed the repossession through the secured party who initiated the process, have failed in performing their statutory duty to avoid a breach of the peace. Accordingly, all are liable.

Because the law requires that _____ be held liable for any breach of peace which may have occurred during the repossession of the _____ vehicle, evidence that _____ and/or _____ were independent contractors is not relevant. Nor would it be proper for _____ to argue that it should escape liability because of the status of these other actors. Similarly, because _____ has a statutory duty, the independent contractor status of _____ and/or _____ is irrelevant. It would be legally improper for _____ to argue that it should escape liability because of their status. For these reasons, Plaintiffs' Motion in *Limine* should be granted.

This _____ day of ----- 20__.

ATTORNEYS FOR PLAINTIFFS

**IN THE SUPERIOR COURT FOR THE COUNTY OF DOUGHERTY
STATE OF GEORGIA**

_____ as next of kin and
Administratrix of the Estate of _
Individually and _____ Individually

Plaintiffs

CIVIL ACTION

v.

FILE NO.

Defendants

PLAINTIFF'S MOTION IN LIMINE REGARDING SEATBELT EVIDENCE

Comes now the Plaintiff by and through her undersigned counsel, and requests that the Court enter an order forbidding the introduction of evidence or the argument of counsel on the issue of any failure to wear seatbelts by ----- . Plaintiff relies upon the entire record in this case, as well as the Plaintiff's Brief in Support of Motion in Lirnine Regarding Seatbelt Evidence, filed concurrently herewith.

This ___ day of __, 20__.

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Motions in Limine in Civil Litigation

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**IN THE SUPERIOR COURT FOR THE COUNTY OF DOUGHERTY
STATE OF GEORGIA**

_____ as next of kin and
Administratrix of the Estate of __
Individually and _____ Individually

Plaintiffs

CIVIL ACTION

v.

FILE NO.

Defendants

**PLAINTIFF’S BRIEF IN SUPPORT OF MOTION IN LIMINE
REGARDING SEATBELT EVIDENCE**

By telephone call to defense counsel, Plaintiff’s counsel has determined that Defendants intend to present evidence and argument at trial as to the lack of seatbelt usage by _____ at the time of the incident upon which this complaint is based. Plaintiff did not inquire as to whether Defendant would be offering such evidence on the issues of contributory negligence or diminution of damages, and believes that this is not relevant to this motion *in limine*.

Georgia law requires the use of seatbelts in passenger vehicles. O.C.G.A. §40-8-76.1. The statute expressly provides, however, as follows:

The failure of an occupant of a passenger vehicle to wear a seat safety belt in any seat of a passenger vehicle which has a seat safety belt shall not be considered evidence of negligence, shall not be considered by the Court on any question of liability of any person, corporation, or insurer, shall not be any basis for cancellation of coverage or increase in insurance rates, and shall not diminish any recovery for damages arising out of the ownership, maintenance, occupancy, or operation of a passenger vehicle.
O.C.G.A. §46-8-76.1(d)

The expressed legislative purpose was to provide that a failure to use seat safety belts may not be introduced into evidence in *any* civil action. 1988 Ga.L. 31 (emphasis added). Accordingly, evidence of failure to wear a seatbelt is also impermissible to show that such failure is the sole cause of the plaintiff’s injuries. *C.W Matthews Contracting Company, Inc. v. Glover*, 263 Ga. 108, 428 S.E.2d 796 (1993).

From examining Defendant’s portion of the proposed pretrial order, it appears that Defendant will contend that this statute is not applicable to the Bronco II involved in this case because it is capable of off-road operation. The portion of the statute which requires passengers to use safety belts does exempt pick-up trucks and “vehicles equipped for off-road use”. O.C.G.A. §40-8-76.1(a). However, the portion of the statute which forbids introduction of failure to wear a seatbelt in evidence is not so limited. It expressly says that failure to wear a seat safety belt shall not be considered. The Bronco II involved in this case does not possess four-wheel drive; it is a 4x2 (Complaint ¶21). It is not equipped for off-road use. Even assuming that proof that a vehicle is not subject to the requirement that seatbelts be worn is sufficient to permit evidence to be introduced on this issue, ----- bears the burden of proving that the vehicle

is equipped for off-road use. This requires more than proving that the vehicle can be driven off road, since every passenger vehicle can be driven off-road in some circumstances.

Defendant's portion of the pretrial order also appears to offer the theory that evidence of failure to use seatbelts can be introduced to prove that a warning in this case would have been ineffective. However, the express language of the statute states that evidence of failure to wear seatbelts "shall not be considered by the Court on *any question of liability* of any person". O.C.G.A. §40-8-76.1(D) (emphasis added). As noted above, the legislature stated its intention that a failure to use seat safety belts may not be introduced into evidence in any civil action. Accordingly, Defendant's somewhat novel theory is expressly precluded by the plain language of the statute.

The statutory law of Georgia prohibits the introduction of seatbelts at the time of this incident. Plaintiff therefore evidence that _____ were not wearing their seatbelts requests that the Court enter an Order directing defense counsel not to introduce evidence of failure to wear seatbelts or to make argument that such failure occurred or should have any effect on Defendants' liability or the amount of damages.

The statute, by its express terms, also states the legislative purpose that the burden of non-use of seatbelts be placed on parties causing accidents rather than those who are subject to accidents. Thus, the statute expressly provides that lack of seatbelt use will not diminish damages. Because all three injured parties were ejected from the vehicle during this rollover, a jury is likely to infer that they were unbelted and use that inference for whatever purpose it may think appropriate. Accordingly, Plaintiff also requests that the Court instruct the jury that no evidence regarding use or non-use of seatbelts will be introduced, and explain that the reason for the lack of such evidence is the Georgia statute, and further requests that the terms of the Georgia statute be charged to the jury.

Plaintiff requests that the Court hear and consider oral argument on this motion at the hearing on _____.

Respectfully submitted this _____ day of __ 20__.

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Dear Members:

We are re-launching the General Practice and Trial Section e-mail listserv to improve service for our section members. The listserv will be hosted by the Pro Bono Project at the State Bar of Georgia which hosts several law-related programs and local bar associations in Georgia, including the Savannah Bar Association, the Rome Bar Association, and the Columbus Bar Association.

The GPTS listserv will be a private, moderated listserv. The Section will use this listserv for GPTS business, news and events. The Section is cognizant that the number of listserv messages can become overwhelming and will limit the number of messages it sends to the listserv. Members may also post to the listserv. The Section Board decided that the listserv would be a benefit to the members for a variety of reasons. While members may not all be in a financial position to join a multitude of individual practice group listservs. Because the GPTS has members practicing in all areas of the law in all areas of the state, the listserv can be a good resource for requesting guidance in an area of the law or seeking briefs or pleadings. The listserv should also serve as a good resource for finding attorney referrals. Remember that the section membership includes judges, plaintiffs' attorneys, defense attorneys, government attorney, transactional attorneys, etc. So, post accordingly! The Section membership is not limited to one point of view.

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