CALENDAR CALL
GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA
Vol. XV Fall 2007 No. 1

2007 Tradition of Excellence Awards

The General Practice and Trial Section 2007 "Tradition of Excellence Award" Recipients

(l-r) Charles J. Driebe, (General Practice), Justice, Carol W. Hunstein, (Judicial), L. Hugh Kemp, (Defense), Paul Kilpatrick, (Plaintiff)

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March 13 - 15, 2008

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The General Practice and Trial Section Institute

at the
Amelia Island Plantation
Amelia Island, Florida

It promises to be a spectacular program - one you won't want to miss.

Chairman Cal Callier

CALENDAR CALL

"Georgia's Largest Law Firm"

GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA

Vol. XV Fall 2007 No. 2

ARTICLES

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 James W. Hurt, Jr., Winburn, Lewis & Stolz, LLP, 279 Meigs Street, Athens, GA 30601, jimmyhurt@Charter.net **Published by Appleby & Associates, Austell, Georgia.**

Chairman's Corner

By Cal Callier
Section Chair

Throughout this year as Chairman of the General Practice and Trial Section of the State Bar of Georgia, there have been several occasions where I have really gotten to know and appreciate the breadth of this Section. We are over two thousand members strong and come from all corners of the State. Our members come from all practice areas. We are large firm lawyers, solo practitioners, trial lawyers (plaintiff and defense), corporate lawyers, transactional lawyers, and everything in between. In my view, we are truly the most diverse Section of the Bar. I am honored to have served as Chairman of this Section this past year.

Our State and our Nation face may challenges right now. There are deep divisions in this country on so many fronts. One of those is with the state of our judiciary and the civil justice system. I have been heartened at the extent to which our numbers have risen to the defense of our civil justice system and the right to trial by jury. Whether SB3 tort reform was right or wrong, most deplore the heavy handed way in which it was passed. Now that the "new" is beginning to wear off and the rhetoric of tort reform is beginning to subside, our trial and appellate courts are beginning to take a thoughtful and reasoned review of its impact on our civil justice system. I am confident that these important issues could not be entrusted to a finer group of men and women that occupy our trial and appellate courts.

This issue of the Calendar Call is devoted to honoring those who have been chosen to receive the Tradition of Excellence award. Each recipient is extraordinarily deserving of the award and of our appreciation for their lifelong service to the citizens of our State. At the awards breakfast, the common theme for this year's recipients was the extent to which each of them, through courageous and selfless service, had devoted their professional lives to protecting the rule of law. I am proud to have been able to present the Tradition of Excellence Award to this year's recipients.

In closing, I must thank Betty Simms for her tireless work in support of this Section. Betty's organizational skills and administrative efforts are unsurpassed and are vital in keeping the Section running smoothly. Betty, thank you for your hard work, support, and encouragement this year.

Timber! - Falling Tree Liability in Georgia

David J. Burge
Smith, Gambrell & Russell, LLP
1230 Peachtree Street NE
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Atlanta, Georgia 30309

David J. Burge is a partner in the Real Estate Section of Smith, Gambrell & Russell, LLP in Atlanta. He served as Chairman of the Real Property Law Section of the State Bar of Georgia for 2006-2007 and as Chairman of the Real Estate Section of the Atlanta Bar Association for 1999-2000. In 2007, he was appointed by Governor Perdue to the Board of the Georgia Superior Court Clerks' Cooperative Authority. Burge earned his B.A., magna cum laude, from Vanderbilt University and received his J.D., with first honors, from the University of North Carolina. Prior to private practice, Mr. Burge served as a judicial clerk for Judge Albert J. Henderson of the U.S. Court of Appeals for the Eleventh Circuit.

Forests have always played a very important role in the history, economy and environment of Georgia. Forestry is and will remain an important industry in rural Georgia. Trees also play an important role in Georgia's cities: Savannah streets are framed by great live oaks and Atlanta is known as a city within a forest. Given the adage that what goes up must come down inevitably applies to trees, Georgia courts have increasingly had to address liability for casualties caused by falling trees. Under Georgia law, tort liability for falling trees depends upon the location of the tree and whether the landowner has, or should have, notice that the tree was unsafe. An important distinction is drawn based on the location of the tree. A higher standard of care is required of a landowner in an urban area than is required of a rural landowner. Most Georgia property owners are probably unaware of the liability risks that are literally growing on their property. Georgia lawyers would be doing a valuable service to their clients by advising them of this potential area of liability.

TREES LOCATED ON RURAL LAND

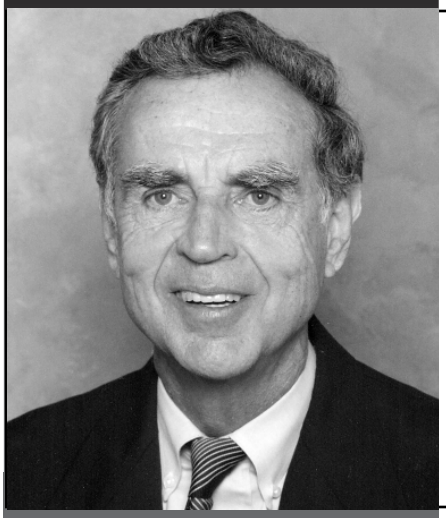
Georgia trespass law has long respected the sanctity of property boundary lines.[1] For example, trespass can occur if any artificial object crosses a boundary line without the permission of the landowner. [2] The person responsible for the trespassing artificial object can be held liable for all property damage and personal injury caused by the wayward object, even if that person does not cross the property boundary himself. [3] Trees, however, are naturally occurring objects and are considered part of the realty itself. [4] As such, trees that fall over property lines are treated under very different rules of liability.

Georgia law regarding liability for falling trees from privately owned property was first articulated in *Cornett v. Agee.* [6] In Cornett, the Georgia Court of Appeals explained that traditionally liability for falling trees in rural areas was governed by the common-law principal that a rural landowner is "under no affirmative duty to remedy conditions of purely natural origin," even if the conditions "may be highly dangerous or inconvenient" to adjoining landowners.[6] This rule regarding owner liability for natural conditions on rural land was articulated by the Georgia Supreme Court in *Roberts v. Harrison*,[7] in which an landowner was sued in nuisance for accumulations of water on his land that were claimed to have emitted "noxious and deleterious gases injurious to the public health" of adjacent landowners. The *Roberts* Court held that if the landowner had not contributed to the nuisance by his own act, the owner could not be held liable. [8] Regardless of the ease with which the owner could have cured the nuisance, in comparison with the harm the ongoing nuisance caused, the owner was not liable for the nuisance because it arose from

continued on page 20

DEFENSE

L. Hugh Kemp



Introduced by
Laurel Kemp Wilkerson

Tradition of Excellence Award

Good morning, I'm LTC Laurel Kemp Wilkerson. My sister, Elaine, and I are very proud to introduce to you the 2007 Recipient of the Defense Lawyer category, our father, L. Hugh Kemp.

I was honored that my Dad asked me to introduce him today. I joined the Army JAG Corps immediately upon graduation from the University of Georgia's School of Law and admittance to the bar in May 1988. After 19 years in the Army, there is little that gets my heart-rate up, whether that is an unhappy general, an irate military judge, or having to jump out of a perfectly good airplane while in flight. However, today I must say is a different story. Today is my first time ever to attend a Georgia State Bar meeting. To be among such distinguished members of the Bar and these outstanding Awardees is an honor, and has me quaking in my boots – so to speak.

My father grew up in LaGrange, Georgia in a family of very modest means (i.e., poor). Recognizing that hard work and an education were critical to success, Dad began his achievements early in life by obtaining the rank of Eagle Scout. He later attended Emory at Oxford and Emory University in Atlanta, a recipient of a Methodist Scholarship and a Rotary Club Scholarship. He received his Bachelors and Masters Degree in Political Science. He was initiated into "Phi Beta Kappa" in 1955. He received his Doctor of Laws Degree from the University of Chicago Law School in 1959, where he was a National Honor Scholar. While attending law school, he worked 20 hours a week for the American Bar Association, which at that time was located a block or so from the law school.

Dad escaped the frigid climes of Chicago, returning to his beloved, and warm, home state of Georgia, and worked as a legal assistant to the Honorable Elbert P. Tuttle, Chief Judge, United States Fifth Circuit Court of Appeals and the Honorable Joseph D. Quillian, Associate Justice, Supreme Court of Georgia. He began practicing law in Dalton in 1960 with the firm Pittman & Pope, later Kinney, Kemp, Sponcler, and Joiner for over 40 years. He was a sole practitioner from 2001-2005, and he is currently Of Counsel with the Chattanooga firm of Leitner, Williams, Dooley & Napolitan, PLLC.

His bar activities include sixteen

years on the Board of Governors of the State Bar of Georgia, President of the Conasauga Bar Association, Member of the Disciplinary Board of the State Bar of Georgia, and he is a certified Mediator. Dad was elected to become a fellow for the American College of Trial Lawyers in 1979. He has also been a member of various other legal organizations, including the national Association of Railroad and Trial Counsel, Federation of Insurance and Corporate Counsel, Lawyer's Club of Atlanta, and the American Board of Trial Advocates. From his resume, it's very evident that he is indeed a Trial Lawyer. As with any Trial Lawyer, there are always a few memorable moments in the courtroom. I thought I'd share a few amusing vignettes.

For those of you who know my father well, you know he is quick to smile, tell a joke or a story, and he talks really fast. In 1976, Dad had the honor of arguing a case before the Supreme Court of the United States, a case involving the constitutionality of Georgia's garnishment statute. Dad decided we would all take the train up from Atlanta to Washington, D.C. Entering the chambers of the Supreme Court was awe inspiring, and we were all pretty speechless as Dad's case was called late in the afternoon on that Thursday. At that time, there was a 30 minute time limit on counsel's argument. Another Dalton attorney, Mr. Warren Coppedge, was opposing counsel and made his argument first. It was close to Five O'Clock when Mr. Coppedge finished. About 18 minutes into Dad's argument Justice Berger looked at my father and said: "Mr. Kemp, we will recess for the afternoon and you can finish your arguments in the morning, you have 12 minutes remaining." Our family had return tickets to Atlanta, so my Dad said: "May it please the court, I had planned to return to Georgia tonight on the train with my family. I believe that my Brief contains all the important points, and if you will permit me to wrap up me to wrap up my argument quickly, I will waive my remaining 12 minutes. I distinctly remember the Justices straightening up in their chairs, and Justice Berger, with a doubtful look, telling my father to proceed. True to his word, Dad finished his argument and we left. About a year or so later he saw Justice Berger at an American College of Trial Lawyers meeting and Justice Berger said: "You look familiar." Dad recounts that he told Justice Berger that he had argued a case before the Supreme Court fairly recently, and Justice Berger said, "Ah, yes, you're that fast talking lawyer from Georgia." Hopefully, Justice Berger meant it as a compliment.

One other memorable trial was when Dad was defending the Moose Lodge. A woman, Mrs. Hamilton, had filed suit, claiming she injured her back when she slipped on ice cubes on the floor. A week or so before the trial date, Dad was in line behind Mrs. Hamilton entering a dance at the Elks Club. Dad felt like it was his duty to disclose to Mrs. Hamilton that he was at the dance and any activity she may engage in could be brought up at the trial. Mrs. Hamilton had a few drinks and danced throughout the night, apparently she was feeling no pain. At the trial, Mrs. Hamilton was on the witness stand and Dad was questioning her:

Mr. Kemp: Mrs. Hamilton, do you recall seeing me at the Elks Club 2 weeks ago at a dance?

Mrs. Hamilton: Yes Sir, I do.

Mr. Kemp: Mrs. Hamilton, do you remember me telling you that any activity you engaged in at the club could come up at trial?

Mrs. Hamilton: Yes I do.

Mr. Kemp: Mrs. Hamilton, isn't it true that night on the dance floor you did this –(Mr. Kemp makes a dancing motion)?

Mrs. Hamilton: I don't recall.

Mr. Kemp: And, isn't it true that night on the dance floor you did this (Mr. Kemp kicks his leg up in a dancing motion).

Mrs. Hamilton: How do you know, you were probably drunk.

Judge: Mr. Kemp, while your dancing skills are admirable, please just ask the plaintiff a question.

Clearly getting nowhere with Mrs. Hamilton, Dad called another witness, a local insurance executive who was a tee-totller, who was at the dance that night.

Mr. Kemp: Sir, will you describe the motions of Mrs. Hamilton on the dance floor.

Witness: Mr. Kemp, I must say it's indescribable, I can't recount a motion she didn't make on the dance floor that evening……

So, whether it was my father's dancing skills or the witness's testimony, the verdict was for the defendant, the Moose Lodge. His hard work has earned him the respect and thanks of many clients such as Mohawk Industries, Atlanta Gas Light Co, North Georgia Electric Membership Corp., Norfolk Southern Railway Co. and a whole host of doctors and their insurance companies.

As evidenced by his distinguished career, my father truly enjoys the practice of law, its challenges, and the opportunity to mentor other young lawyers. In addition, he has been a contributing member to his community in Dalton. We dug out a newspaper article from the Dalton paper, dated February 16, 1968, which noted "Mr. Kemp is a real fireball in civic and community activities and has shown fine and able leadership in various categories since coming to Dalton." Dad incorporated and was on the first Board of Directors of the O.N. Jonas Foundation, Dalton Hospice, Inc., Looper Speech and Hearing Clinic, Inc., The Creative Arts Guild, Inc., and Big Brothers and Big Sisters of Northwest Georgia Mountains, Inc. He was President of the Dalton Whitfield Chamber of Commerce from 1966-1967, and received the Outstanding Young Man of the Year Award. He

continued on next page

Tradition of Excellence Award

continued from previous page

is the past President of the Emory University Alumni Association and for many years was a member of the Dalton Kiwanis Club and thereafter, the Carpet Capital City Rotary Club. He is a member of St. Mark's Episcopal Church, where he served on the vestry and as Secretary for the Church.

Most all of these things I have highlighted, you can read on a resume. The things you don't know about L. Hugh Kemp, in addition to being a tremendously talented lawyer, is that he is an exceptional father. When we were in school, he came home in time to play a game of catch in the backyard or attend the numerous tennis matches, plays, ballet and piano recitals, church events or school activities, and then going back to work after we were asleep. He always took us along to those CLE meetings in Colorado in ski season, which we really enjoyed. Most importantly, he taught us that we could accomplish any goal if we studied hard and worked hard.

Finally, to quote Emerson: "Success is…to laugh often and much; to win the respect of intelligent people and affection of children…." Dad, I'd say you have succeeded.

Ladies and Gentlemen, my sister and I are proud to present to you Lemuel Hugh Kemp, a worthy recipient of the 2007 Tradition of Excellence Award.

Remarks by

L. Hugh Kemp

Good Morning to everyone.

Thank you Laurel your kind presentation, which you composed without censorship. I would also like to thank the committee and Betty Simms for reviewing the nominees and scheduling the enjoyable events for all of us.

I tried to talk Laurel out of going to law school and out of going into the Army, but she did not follow my advice. She would have made an excellent trial attorney. She received the American Bar Association award for outstanding military lawyer in 2001. She has also made several parachute jumps. She and her husband, retired "Bird" Colonel Kevin Wilkerson, live in Columbus. He was awarded the Bronze Star and Infantry Star for his service in Afghanistan.

Elaine is a school teacher and tennis player. She lives in Atlanta with her husband, Jon, who is in advertising, and their two sons, Jonathan 13 and David, 11.

When I was interviewed in Dalton for a job in 1960 by Carter Pittman, he looked briefly at my resume', (I thought too briefly), and then rather sternly said, "Nice resume', but I have one question, do you have any common sense?" After some hesitation, I replied, "Sir, I am a little short on it." He then responded, "By God, you know it, I will hire you for $400.00 a month." At that time I was making $700.00 as a law clerk on the Supreme Court of Georgia, but took the cut and have never regretted it. To this day, I still realize that I am more than a little short on common sense, and very frequently consult the lawyers in my firm and lawyers outside my firm for the best common sense approach to some problems. The best thing about practicing law, in addition to the satisfaction of winning lawsuits and traveling on someone else's money is being in cases with lawyers such as Bobby Lee Cook, Ben Weinberg, Edgar Neeley, Frank Love, Kay Demming, Paul Hawkins, Buck Murphy, Judge Wilber Owens, Eileen Crowlee and Bob Brinson, just to name a few.

Over the forty-seven years I have been in Dalton, I have had a variety of interesting cases. Including a $3,000.000.00 train derailment, a gemstone contribution to the Smithsonian Institute, involving a trip to the bowels of the Smithsonian. Multiple lemon law cases for General Motors that King Spalding elected to forward to me, multiple carpet cases for some of the major carpet companies involving volatile organic compounds, misdyed carpet, major patent cases in which I was second chair. Product cases involving everything from rat poisoning to grain augers to foot pads for Dr. Scholls to a million dollar roof case. Unfortunately, untold numbers of automobile wrecks, worker's compensation claims. Two cases carried me to Dublin Ireland and Jerusalem. Fortunately, I only tried two or three divorce trials and two or three criminal cases. One of the criminal trials resulted in an attack on my competence as a counsel and the Supreme Court of Georgia graciously declared that the criminal was given representation that exceeded the standards required by law.

If you will indulge me, I will discuss one or two experiences which will not be included in detail in the printed response.

1. Justice Hal Clark and I as Olympians in Greece;
2. "Tally-Ho" Voir Dire experience;
3. Independent Contractor;
4. Mighty useful purpose.

On the serious side, let us all hope that there will never be a demise of the need for trial lawyers, that increased professionalism will continue to be the watch word; and all of us and the lawyers who come after us, will continue to live by the advice attributed to Robert E. Lee: "Always do your best—you can not do anymore and you should never do any less."

Thank you again for your attendance and attention.

GENERAL PRACTICE

Tradition of Excellence Award

Charles J. Driebe

Introduced by
Keith Martin

I want to congratulate you for finding something that will get Chuck Driebe somewhere before 11:00 a.m. I was telling the folks at the door, if a judge looks and says we're going to set it for July 12th at 9:00, I just go ahead and pull my pen out and put it on the calender. If it's okay, we will come July 12th at 1:30, I look over at him, "It's yours."

So I had no idea that Chuck Driebe could be vertical before about 10:00 until this morning; and by the way, if anyone sees, hears or knows the other Keith Martin, the one processing my Social Security number and driver's license number and the contents of my checking account as of yesterday morning, please tell him I would like to meet him.

Colonel Wilkerson, people have fathers of various degrees. People have personal fathers and people have professional fathers and people have fathers of paternity. One of the people, one of the personal fathers and professional fathers that got me through two years ago this month, the loss of my very, very dear father, was this morning's honoree.

You can read the details of Chuck's accomplishments in his life, but I will hit the high spots. He is a native of Scranton, Pennsylvania. Now, for any of you, excuse me, any of y'all that have ever gone to Eastern Pennsylvania to the Poconos to ski, you will know that they are the rudest people on God's planet. Once you use the word "y'all," they will say, "You got any grits?"

Somehow or another Chuck escaped that. He attended Temple on a football scholarship, Penn State. He went into the United States Army, which apparently -- I've never asked him about this, but apparently was the cause for him showing up in Atlanta, Georgia. He went to the University of Georgia Law School. He was the first honor graduate in 1958. He was admitted to the Bar in 1957. He drifted a bit between Rome and up in that corner, your way, Mr. Kemp, until finally he came to roost in Jonesboro, Georgia, which had just endured its last urban renewal as General Sherman proceeded toward Macon.

In 1969 or in 1968 the State Bar and its authority and its existence was I think could be described as somewhat unsettled. In Clayton County, which must be Cherokee, Clayton must be a Cherokee word for unsettled political waters or

something, Albert Bailey Wallace had been the solicitor general, now district attorney, and had decided not to run. Another man with an extremely similar name, who is not with us today after his second unfortunate disbarment, his time in Maxwell Air Force, not as a member of the military, and his very, very poor choice of taking a 25 automatic to a 12-gauge shotgun fight and losing and the possessor of the shotgun was his brother Dickie.

He decided to run for solicitor general, but he decided to run not as the name that everyone knew him. We actually called him Dirty, his middle name. He decided to run as Albert Wallace, and Albert Wallace was and is a very respected attorney in Jonesboro. Albert Wallace was at that time the incumbent solicitor general and was at the time the position changed to district attorney.

Albert Wallace took out newspaper ads that said, "I'm not running. It isn't me." And no one who knew what was going on thought that the county could tolerate the other person winning. He did. He did. The powers that be decided that this couldn't happen, and they went to a relatively new lawyer in Jonesboro but someone that they thought that could take care of the issue. They went to Chuck Driebe. And they said, "Find a way to make this end." And we called him DA for a day.

Chuck got to researching it and came up with a file a quo warranto. It seems as though Dirty had not paid his Georgia Bar dues. Wallace versus Wallace was filed in 1969. The opinion issued by the Supreme Court in 1969 once and forever established the existence and constitutionality of the State Bar of Georgia, and it established the Georgia Supreme Court's authority to supervise our profession.

Later on, to go back and tie into taking care of the law and taking care of the community, later on my brother was a newspaper reporter covering a trial. It was a trial where a certain person convicted of perjury, already convicted of perjury, had said very scurrilous things about our county chair at the time. Chuck sued a minister of a very large church for damages; and in the trial, which went on for several weeks -- I believe your case lasted -- plaintiff's case lasted about two weeks, am I right, Chuck? All of the proof of the falsity of these accusations of helicopters coming in and landing and throwing out bales of marijuana and all of these things was disproven. My brother then told me what happened as the plaintiff rested.

There was a short break, and Chuck came back and said, "The plaintiff dismisses." My brother said, "I've seen the Bolshoi. Nothing has been so well orchestrated." And the waters were settled, the issue was closed, and it all calmed down. The law was taken care of, and the community was taken care of.

To this day one can find the six sides of each political issue in Clayton County, Georgia, walking in and out of 6 Courthouse Way sitting and talking to Chuck and saying, what do you think about this or that.

As Chuck came to Jonesboro, he had already finished a period as a legal assistant to Judge Homer Eberhart with the Court of Appeals. He was the founder, youngest and first president of the Young Lawyers Section, who to this day remains the youngest president and the oldest member.

In 1969 he founded what was to become Driebe & Driebe. The other Driebe being one of his four children, Charles, Jr., who we call Charles who engages in entertainment law practice. Over the years Driebe & Driebe have given rise to many lawyers that have come and left. Many have gone on to -- all have gone on to magnificent practices, some have gone onto the bench and to other service in the community.

In 2004 after I had cast my bread upon the waters of the electorate one too many times and it had become a matter of public knowledge and public record that more people in Clayton County, Georgia, disliked me than liked me -- okay, for those of you who have to go through that, that's the only way to put the loss of an election. There is more people out there that don't like me than like me. Come to grips with that, guys.

So I began to wonder with three college age children what I was going to do. So Driebe and I acted like two 6th graders at the dance for a little while. And finally I said -- it was this weird courtship of two guys with gray hair. Finally I said, "Driebe, do you need any help over there?"

What had made me think that I wanted to practice with Chuck was, number one, over the years Chuck had been a mentor to me for years. One of the times that I think that the folks around me knew just how important he was to me was I got into a difficulty with a judge, and it was extremely difficult. It was as short of violence as you could get in a level of difficulty. And there were two very, very angry people, and my secretary decided that she needed to get me out of the courthouse as quickly as possible. And she called Chuck and she said, "Can I bring him over there before he absolutely strokes out?"

I went over there and we went in the conference room and sat down, and Chuck said what happened, and I told him. And there were two men with very, very, very bad tempers had gotten cross at each other. And Chuck looked at me and all he said was exactly what needed to be said. He said, "You know what you've got to do." And I said, "Yeah." And he said, "What do you have to do?" I said, "I've got to go back over there and talk to him." And he said, "Why?" And I said, "Because I will not work with that man with a curtain between us." And he said, "That's right."

I walked back across the street. There was a call waiting from the judge, and he said, "Hey, come up here and let's talk." And that issue was closed. But at that moment I got

Continued on next page

Tradition of Excellence Award

continued from previous page

two things that I desperately needed. I got away from it and disengaged, and I got an objective evaluation of what was going to be best for me and best for that court in the future all from him.

Now, those kinds of things still go on 20 years later at 6 Courthouse Way where the professional father and the personal father that Chuck has become to so many people will troop in and ask his advice and troop out. When I went over there, the things that made me settle upon Chuck was that reputation, that friendship, the fact that he smoked in the office, the reputation that he had among his peers and among the government and the fact that he smoked in the office, which was very important to us. Our office smells like, forgive us, the inside of a New York taxicab.

I cannot tell you all of the things that Chuck has meant to the Bar in Clayton County, to me and to many, many other people in Clayton County over the years. It is my honor to present to you Charles J. Driebe who I believe in every respect has formed his own Tradition of Excellence locally, statewide and in the American Bar Association. And he remains to this day my mentor, my friend and my partner. Thank you.

Remarks by

Charles J. Driebe

Will you hold that plaque, it might give me some ideas about something to say. Thanks to Keith Martin for that interesting introduction. Keith is, as he mentioned, the former Solicitor of the State Court of Clayton County for 18 years. Before that he was Assistant DA. Before that he was a cop. So that kind of combination coming over to our office has made for some interesting situations.

And I probably owe a couple of other thanks here. Folks who helped me, wrote letters on my behalf. Linda Klein helped me, and Rudolph Patterson back there wrote a letter and probably did some more things, too, Rudolph.

Two former Judicial Section winners of this Award, Norman Fletcher, notwithstanding that we were law school classmates, and Willis Hunt also supported whatever the process is. And, talking about Judges, it's kind of interesting because I did work for Homer C. Eberhart on the Court of Appeals so many years ago I can't even remember. One of the outstanding things I thought we did was institute footnotes in the Appellate decisions. Until 1962 or '63, there were no footnotes in the appellate courts, and we had a lot of resistance to that idea. What are you doing? You want footnotes? And, of course, now it is obviously so much easier to read a case with footnotes.

As to my family, my wife, Gail, is right here and she has supported me. My son, Charles, the entertainment lawyer, he's in Los Angeles today. So he can't be bothered with small things like coming to State Bar meetings. I've got two children out in Flagstaff, Arizona, who can't be here. My other daughter is in Davidson, North Carolina -- she ain't here either. But they have all been a source of support during my career.

You know, I appreciate the General Practice and Trial Section for giving me this award and I'm deeply honored by it. But you know what I figured out is that endurance and longevity leads to recognition. Think about that concept. If you stick around long enough, somebody will give you some sort of plaque or award telling you what a great person you are. So you younger people can aspire to that. So if you've been around as long as I have, like I say, it works that way.

But you know what, I consider this General Practice award to be a particular recognition of what the general practice is. We've had a defense lawyer presentation, we're going to have a plaintiff's lawyer and then a judge; but the general practice category is a little different. It's not specific. General practice lawyers make up more than half of the members of the State Bar of Georgia and more than half of the lawyers in the United States of America. And we don't get the all kinds of recognition because we have no specialty. We take care of people problems. We handle civil cases. We handle criminal cases. We handle domestic cases. We handle business disputes. We are the mainstreet lawyers. What we do is help solve everyday problems for everyday people. We don't usually represent big corporations, which means we probably don't make the mega bucks like some of the larger firm lawyers do but we get our satisfaction in helping people solve problems. And it's true that a general practicioner handles a lot of routine cases.

I have been to court more than a thousand times. And I'm sure it's true that every general practitioner has some career highlights that they look back on fondly. I'm going to mention a few of mine, some examples from my 42 years in Jonesboro. In the criminal category, I defended a guy who shot his brother-in-law 31 times, in self-defense. Guess what, I got him off... to Milledgeville. I once defended a fellow who committed sodomy on a male pony but no details here, see me later. I helped Hosea Williams and other elected officials who were dumb enough to go to the airport with a gun. Guess what happened to them? Mr. Williams, over here, you're going to jail.

The first big divorce case I ever had was against a fellow named John Westmoreland, Sr., is what he called himself, who had been practicing law 50 years and here I was a young lawyer just thinking "Where's the courtroom," and that was a lot of fun and a great learning experience.

In the business and real estate area, I've been lucky enough, like last year, to close $24 million worth of transactions. It wasn't too many transactions, but it was a lot of money, and I enjoyed that. And last year I also help sell a $2 million 85 foot yacht. That's a little unusual for a general practitioner. But 25 years ago, I helped a client buy a resort for $5 million in St. Thomas, and I still have got a place down there, which I love to visit.

In zoning, I have zoned around Lenox, if you all know where that is, and the W Hotel in Atlanta and a good part of Clayton County. And how many lawyers can say they have relocated a cemetery? Think about this. You have got to notify all the dead people or their relatives, and then you have got to wait some time, you got to get this permission, you have to have a genealogical and archeological study, and then you got to figure out a place to move the graves. Now that's a kind of interesting process, but that's one of the things I've had fun doing. Worked on the new Fifth Runway at the Atlanta Airport and particularly the conveyor system of moving 28 million yards of dirt there.

We have done a lot of probate work. Handled case where the main asset was the Clermont Lounge—you've been there or at least admit you've heard of it! Recently, Keith and I had a four day will contest trial that resulted in a verdict in 15 seconds. Of course, our side prevailed or I wouldn't be telling you this. Did a lot of condemnation work on I-675 representing the State of Georgia and later represented condemnees.

Keith mentioned my State Bar years and my longest and, I hope, most lasting contribution was in dealing with the State Bar. And I have some background on that. After I got out of law school, I worked with the what is it now the ICLE, Institute for Continuing Legal Education, and the president of the Georgia Bar Associationm because the State Bar did not exist at that time, was a fellow named Bob Heard from Elberton, Georgia. He got interested in the State Bar concept, but we couldn't call it integration back then. We're talking 1959, people. We couldn't call it integration of the State Bar. So we had to call it the incorporation of the State Bar. I actually wrote an article about that in 1959, and it appeared in the Georgia Bar Journal.

Then after that, I was involved in the Young Lawyers Section. I made the mistake of saying -- this is a complicated way to say this, but it's real simple really. I said, "Oh, we should have a newsletter." And guess what happened. Everybody said, "Oh, why don't you do it, Chuck." I said, "Sure." I did it and founded The Young Lawyers Section Newsletter.

In 1964, I got to be on the first Board of Governors of the State Bar by a mere happenstance because I was the president of the Young Lawyers Section that particular year. In that same capacity, I also served on the committee that drew the rules for the new State Bar.

So fast forward a few years, and 1968 comes around. The State Bar has been formed. I had been on the Rules Committee and helped promulgate the rules for the State Bar with all the real legal giants around and I was just sitting there in awe most of the time. But I did contribute on one or two things. And up comes the Wallace case, and just as a happenstance or coincidence, an odd sort of thing, that me, who had been involved with the State Bar, with the formation and conceptual part of it, got involved in what turned out to be the first case that testing the constitutionality of the State Bar. I was the lead counsel for the people who wanted to get rid of a District Attorney who'd been elected in Clayton County BUT had failed to pay his State4 Bar dues. We attacked his qualifications to hold office because of that failure. He, of course, attacked the constitutionality of the State Bar. This lawyer was known locally as Dirty Ed Wallace, et al. And, we threw that sucker out of office, and thank God we did.

The incidental result was the 1969 decision Wallace versus Wallace -- it's in 225 Georgia Reports at page 102 if you ever want to read it. Wallace is the first

continued page 31

JUDICIAL

Justice Carol Hunstein

Introduced by
Linda Klein

Tradition of Excellence Award

We all count among the most precious things in our life to be the rule of law, and everyone in this room works every day to protect our system of justice or loves and supports someone who does, and a few of us do both.

Whenever justice has a challenger, Carol Hunstein rises to protect justice and asks nothing in return. Indeed, she is so humble, she specifically forbade me from telling you her very compelling life story today. But suffice it to say that hard work is no stranger to Carol Hunstein, and she never runs from hard work either. And I guess we know that also because she is the mother of three wonderful children and grandmother, too. Yesterday I was talking to her son, and he said, "When you see my mom, tell her I love her." And he's a grown man in his mid 40s.

As a new lawyer in practice in Decatur, Georgia, over 30 years ago, Carol Hunstein found many challenges to justice. She represented real people with real legal problems: child custody, divorce, criminal troubles; and what she didn't learn about the importance of access to justice from her personal life, she learned as a lawyer - how the law has to work for everyone or it works for no one; how our system of justice is meaningless if a single citizen is denied justice under law. And it was this empathetic passion for service and justice that led Carol Hunstein to seek election 23 years ago to the Superior Court of DeKalb County.

Unknown, but working hard against a field of four other candidates, she made the run-off. Confident of his victory, her opponent went on vacation before the run-off. I guess that was the biggest mistake he ever made because, you guessed it, she became the first woman elected to the Superior Court of DeKalb County. And later Superior Court judges throughout the state of Georgia, her peers, elected her to be the first woman president of the Council of Superior Court judges.

After distinguished service on the trial bench, establishing a reputation for being tough but fair, in 1992 she was appointed to the Georgia Supreme Court by then Governor Zell Miller. That made her the second woman in history to serve as a permanent member of the Georgia Supreme Court.

As a Supreme Court Justice we know she applies the law, popular or unpopular, to do equal justice for all. And we admire her integrity because she's the epitome of an honest judge. She can't be bought. She rules as the law requires, she's moral, and she's absolutely incorruptible.

Central to her service to the justice system is an enormous amount of pro bono time that she gives to various boards and committees. In her early days in DeKalb County, she chaired four different justice commissions: Alimony and Child Support, The Diversion Center, Domestic Violence Prevention and The Probation Committee. She has been an adjunct professor of law at Emory University Law School for 16 years. She currently chairs three Supreme Court commissions: Access and Fairness in the Courts, The Commission on Interpreters and The Committee on the Unauthorized Practice of Law. These are not small jobs. I'm sure you know that.

Indeed, I personally recall when the Bar leadership went to the Supreme Court Justices and asked that they help with the problems that were caused by the unauthorized practice of law. I want you to know that Justice Hunstein has been with us ever since that day.

Now, although she's known as one of the toughest justices on crime, she strongly supports the right to counsel and she serves as the Supreme Court's liaison to the Public Defender Standards Council. Three times she chaired the Georgia Commission on Child Support, and she also chaired the Gender Bias Commission. And in those positions in particular but also in lots of other public service jobs, she has stood up to some very nasty and dangerous threats from those who are opposed to fair and impartial courts. And I guess when we speak about threats to our justice system -- and we have been talking about justice having a challenger -- we know that last year Justice Hunstein had a challenger, and we all came out to help. And we helped because we admire her integrity, and we helped because she is fair and impartial, and we helped because we knew in this particular challenge to Justice Hunstein, that justice itself had a challenger.

And what unfolded before us here in Georgia was unprecedented because the challenger benefitted from the largest political contribution from a single source in Georgia history. I keep remembering that $1.3 million. And what was this group opposing Justice Hunstein trying to buy? It wasn't justice for all. It was justice for some, and it was a challenge to justice in Georgia.

Carol Hunstein withstood what has been called the toughest judicial campaign in American history this past November, and when you have to fight for something, it is just so much more valuable and precious. And Carol Hunstein fought; and guided by her courage, we all fought with her. And with your support she was reelected to a third term on the Georgia Supreme Court, won every county in Georgia despite being outspent nearly four to one and despite being targeted by all those special interests.

And as a proud Georgia lawyer, I want to thank the General Practice and Trial Section -- my section -- for recognizing all the awardees today: Hugh Kemp, Paul Kilpatrick, Chuck Driebe. You're all my mentors and fine role models. But my job as her friend and her admirer is to thank you especially for recognizing this phenomenal friend, mother, jurist, Carol Hunstein, with the highest honor, the Tradition of Excellence Award. Thank you.

Continued on next page

continued from previous page

Remarks by

Justice Carol Hunstein

Thank you very much. I'm delighted to be here this morning, and thank you for getting up so early to come and join all of us on this occasion. You know, former United States Supreme Court Chief Justice Charles Evans Hughes said that the greatest reward you can receive is the respect of your peers, and that's what you have given me today, and thank you very much.

I've done my best to earn it, and I hope that I have, and I think that this is a real indication of my efforts being rewarded. To look at the prior recipients of this award, I mean it is really overwhelming. These are some of the greater lawyers and judges in the state of Georgia, and I'm honored -- and in the United States. I'm honored to be part of this group now. So thank you so much for giving me this honor.

I want to thank my colleagues for coming here. This is the first time in history that we have two women on the Georgia Supreme Court leading the court. We have Chief Justice Sears, and I'm the presiding justice. And, you know, the state is still doing okay. It's not too bad. We haven't caused too many problems. And we have Chief Judge Ann Barnes of the Court of Appeals, and I think she is the second woman to serve in that position. So we have made some progress.

I can remember, it's in my lifetime, women were not supposed to do the things that so many women do now. I can remember -- actually, I wasn't very good in school up until about the 11th grade. I was not necessarily the best child in the world. My father, thank God, he's dead now or he could tell you some horrible stories about me. But to think that I have had the opportunities that I have had has really been -- have had has really been amazing to me. Women weren't supposed to go to college. If you did, you were a nurse or you were a teacher. I can tell you that if you polled my high school class and asked them where they thought I would be in 40 years, it would not be here. And that's for sure.

But life does bring you opportunities, and I have been fortunate to have some opportunities offered to me, and I've had, I guess, some kind of intelligence to accept them and make the best of them. And the very best has been having the opportunity to serve the citizens of the state of Georgia for over 22 years now, and it has been remarkable, and it's been my privilege.

I have to tell you that this last year probably has been one of the greatest challenges of my life and certainly of my career. It was daunting to say the least, but it has had its rewards. I guess the old saying, what doesn't kill you, only makes you stronger has some truth to it. I perserved, and perserved not only for myself but for our system of justice and for the citizens of the state of Georgia. I received many thank you notes, many letters congratulating me, but the congratulations shouldn't just go to me because I really did have an army of lawyers, all across this state, that stood shoulder to shoulder with me, not just for my reelection but stood up really for the justice system in the state of Georgia. And I am proud that they were there for me and they were there for the system of justice, and I ask you please if they come back -- and they may -- that you will do the same thing, that you will stand up and protect a fair and impartial judicial system in the state of Georgia.

One of the interesting parts of the campaign was that some people think I'm Jewish, even still, and that's okay with me. I can remember one time when Elliott Levitas was up for appointment. He was on the short list to the Georgia Supreme Court. And I was having lunch with Willis Hunt one time, and Willis said, "Well, I think Elliott Levitas is going to get it because we don't have a Jew on the Georgia Supreme Court," and I said, "Yes, we do. I'm the Jewish judge." And he looked at me and he was kind of stunned, and he said, "You know, you're right." Because of my name, people think I'm Jewish. He said, "Okay, I think you're right."

So during this campaign, Linda Klein bought me a gold cross for my birthday, and she says -- which is in August. She says, "I want you to wear this all the time." And I thought that, no.

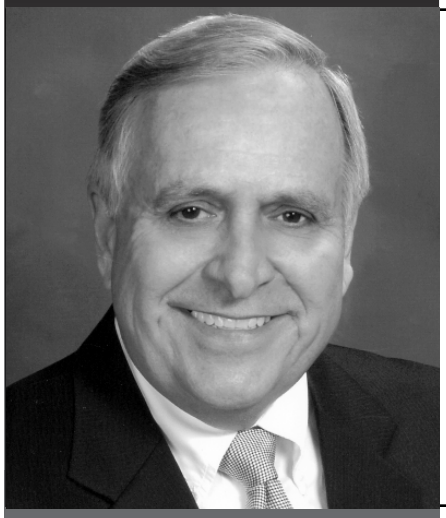
But then Miles Alexander, a good friend of mine, bought me a gold cross, and I said two Jewish friends buy you a gold cross, maybe there is something to this. So if you watched the debate, you would see my gold cross.

But it really was interesting. It was challenging. We prevailed. We all prevailed. I was part of it, but everybody in this room was part of it also. And I really want to thank you for all your hard work and ask you again, please, be ready next time because I think they've got, frankly, more money than sense and I'm afraid they will be back.

Let me tell you that I'm so honored, absolutely delighted and so humbled by receiving this award, and I really want to thank you so much for honoring me. Thank you.

PLAINTIFF

Paul V. Kilpatrick, Jr.



Introduced by
Evans Plowden

Tradition of Excellence Award

It is my great pleasure to present Paul V. Kilpatrick, Jr. to receive the 2007 Tradition of Excellence Award as plaintiff's counsel for the General Practice and Trial Section of the State Bar.

While there are a number of great people dedicated to service who are members of the State Bar, I can think of no one more deserving than Paul. I have had the privilege of knowing Paul and his wife, Franny, for a number of years. Franny and my wife, Jerry, actually played high school basketball against each other and were friends in college. Consequently, I know some of Franny's family background which, as you will see in a moment, has had a great effect on Paul's career.

To say that Paul is a leader would be the understatement of the year. I don't know what he did in high school, but he was selected his senior year to lead the Kappa Alpha Social Fraternity at the University of Georgia. I did talk to some of his KA constituents, but none would be quoted on the record. We will just have to assume that he did a great job.

After completing his undergraduate degree at the University of Georgia and his service to numerous organizations there, including KA, he went on to the University of Georgia Law School and, again, distinguished

himself as President of the Student Bar Association, a justice on the Honor Court, ODK and Gridiron.

Perhaps his dedication to service was formed in these years at the University of Georgia. In any case, after completion of law school, he, like many of us during that era, continued his life of service with the United States Army. By this time, he and Franny were married.

When he was about to complete his term serving his country, Paul began to contemplate how he could continue his service to the public and greater good in his law practice. About that time, Atlanta Legal Aid was really expanding and there was significant emphasis in the Bar on a more formalized method of assisting those less fortunate. One evening Paul discussed his future with Franny and expressed to her his desire to dedicate his life to serving the less fortunate and that he thought working for Atlanta Legal Aid would be a great way to do that. Franny, always the person

concerned with fiscal matters said to Paul at the time,

"Now, let me make sure 1 understand your thoughts. We have this debt from college and law school, we are about to start a family, and you are proposing to go to work in that expensive city of Atlanta for a fraction of the compensation you could make in the private practice in Columbus, your hometown."

Paul said, "Yes, I think that's what I want to do, I've just always been dedicated to service, and there are a lot of people who simply need lawyers and can't afford them, and I just feel like I have to serve people that can't help themselves."

Franny was understanding since she grew up in a small South Georgia town, the daughter of a family doctor. Like Paul, her father had dedicated his life to serviciong people, many of whom could not afford to pay for his services. So, Franny told Paul she really would like to think about their situation before they made a final decision.

After about a week to ten days, Franny told Paul she was ready to further discuss his career. She told Paul that she had done a lot of research since their last conversation, and while she fully understood his dedication to service, she thought she had found a way for him to really help a greater number of people.

While her father had worked very had throughout his life to serve many less fortunate people, he had always been limited to helping one person at a time, and there was no real way to leverage his good works into helping lots of people. She told Paul that in her research over the last week or so, she had discovered what she thought would be a better way for Paul to serve. She had discovered that the law was beginning to develop something called Class Actions. She told Paul that this would be a way for him to help a lot of less fortunate people at one time. At Atlanta Legal Aid he would be limited to just one individual at the time, but with this new developing trend in the law of Class Actions, he could help hundreds and thousands of less fortunate at the same time and, thus, have a much larger impact on society.

After some further discussion and thought, Paul began to see the wisdom in Franny's thinking. Consequently, he joined with other dedicated public servants, like Neal Pope, and they began to serve large numbers of people, beginning a number of years ago with unfortunate trust beneficiaries whose investments had been mismanaged by a large southern bank and moving on to more recent times, assisting owners of automobiles in insuring that they were properly compensated when the Mercedes hit the deer on the way home from the beach. So Paul, with Franny's help has led a life of service to a large number of people. His efforts have touched so many more people than would have been possible at Atlanta Legal Aid.

In addition to the service in his private law practice, Paul has been a great husband, father to three children and grandfather to five grandchildren. He's held just about every office in the organized Bar, and is actually a member of the bars of Georgia, Florida, Alabama and the District of Columbia (you see it was necessary to be members of a number of bars to continue this broad sense of public service). He's been President of the State Bar, a member and Chair of the Board of Bar Examiners. Any of you who have known a member of the Board of Bar Examiners can only have deep admiration and appreciation for this dedication. It's tough, tough work, requiring a high degree of both intellect and dedication to work.

Paul is a member of St. Luke Methodist Church in Columbus. For me and those of you who are familiar with the Methodist Church, there is no higher service than Paul's service as a member of the Board of Trustees of the Methodist Home for Children and Youth in Macon. It's a great organization for youth who find themselves in unfortunate circumstances. Paul has served there for a number of years.

Paul has been a great lawyer, leader, public servant and member of the organized bar. Our profession, our State and our society are better because Paul has been here.

So, I give to you a great lawyer and a great member of the Bar, a great public servant, and my good friend - - - Paul Kilpatrick, Jr.

Continued on next page

continued from previous page

Remarks by

Paul V. Kilpatrick, Jr.

Thank you, Evans, for that wonderful and yet overstated introduction. While I do think it's important for each of us to be active in our profession and to do so for the right reasons, one of the great benefits of bar activities is meeting and getting to know people like Evans Plowden. Franny and I have known Jerry since they were freshmen at Georgia, but only met Evans through Jerry and our bar activities. Through the years, we have become very close, and I appreciate the fact that he would take time from such a difficult schedule to participate in this presentation.

I want to start my remarks by thanking some very important people, in addition to Evans and Jerry. First and foremost, my wife Franny, who has been so supportive throughout my career and so understanding about the time it takes to be a lawyer and to participate in activities that I believe are important to the profession. While we certainly have enjoyed the bar functions, and have made many wonderful friends in the process, it is impossible to do something for this long without the complete support of your wife. I also want to thank my family who have also been so patient and understand ing, and I am delighted to have with me here today our daughter Meg Croxson and her husband Mike, our son Pat and his wife Eve, and our daughter Lea, all of whom have come a great distance to participate. We thought it wise to leave the five grandchildren asleep this morning, but I thank them for attending, and they will be with us at the reception this afternoon.

Next, I want to thank my former and current law firms for being patient and supportive over the years. I cannot think of anything more difficult than trying to practice law and participate in outside activities without the complete support of your firm. I have been with many of my current partners for almost 23 years, and I thank them and our newer partners for their support.

Finally, I want to thank the General Practice Section for this honor, which truly means a great deal to me. I believe it was Jimmy Franklin last year who made the comment that his first reaction to the notice that he was receiving the award was, "Why me?". I share that thought, and as I look around this room and as I think of great lawyers I have known over the years, it is very humbling, and a little bit embarrassing, to have been selected out of that vast number who should be recognized. Despite public criticism of lawyers from various factions, we have an outstanding bar in Georgia, and we have some great lawyers and judges who are members of our bar.

As I look back on the decision to become a lawyer, I have to smile. From the time I was old enough to think about what I wanted to do in my life, I wanted to be a doctor. In fact, I wanted to be a pediatrician. I planned for that through high school and through my early years at Georgia, and then I ran into advanced science courses. That experience made me rethink my career. It soon became obvious that medical school was not in my future. I was grumbling about that one day with a close friend, and he suggested that I just go to law school with him. On that day and at that time, we literally walked across the campus, put in an application, presented a check, and we were admitted to law school. Things have certainly changed, but the rest, as they say, is history. My friend, who decided not to continue to practice law and went into banking with some degree of success, convinced me that law was the place for me.

I told this story to a writer for a Savannah newspaper on the eve of my taking office as president of the State Bar. I thought it was an interesting story and a little bit humorous until the next day when his article basically said that I was not smart enough to be a doctor or a banker, so I became a lawyer. That may have been closer to the truth than I want to recognize. But I believe the Lord has a plan for us all and I finally realized, this is mine.

Without talking for too long, I do want to cover two points that I think are very important to our profession. First, as we all know, there has been a general deterioration in the public's mind of respect and esteem for lawyers. Some of that is our own fault. As the great American philosopher Pogo once said, "We have met the enemy and they is us". What's most interesting to me is that every survey

I have ever seen over the last 15 — 20 years concludes that while people don't like "lawyers", they love their own lawyer. What this tells us is that the demand for being successful financially and the time required to be a successful lawyer no longer allows lawyers to move out of the realm of the practice of law and into the realm of public service. We've got to find a way to change this trend.

I've always believed that one of the key differences between being a lawyer, or other professional, and having a job, is that being a profession carries with it a sense of responsibility, both to the profession and to the general public. Let me quickly make it clear that there's nothing wrong with having a job, some of the finest people I know are plumbers, electricians, auto mechanics, and similar workers, but I truly believe that as professionals we have a responsibility to share our training and education with the public in order to make our communities, our state and this country a better place to live. I have often told law students, when I've had an opportunity to speak to them, that if they are in law school only because they believe it's a way to make a lot of money, they really should change their career goals and find another place to be. While there is nothing wrong with making money, and many lawyers are financially successful, if the one and only reason you want to be a member of the profession is to make money, you are doing a disservice to yourself and to the public. We have an obligation to lead and to give back, whether it's to our community, our church, a deserving charity, or any other similar way. We need to encourage our young lawyers to give back to the community, even if it means that their billable hours will not reach a level that we might otherwise desire.

Second, I think we have an inherent duty to protect the integrity of the legal system. This starts at the entry level by ensuring that we select people of good intellect and good character to become members of our first year law classes. It continues by providing a good education and practical training while they are in law school, and to ensure that they are being instructed by individuals who not only understand the theory of the law, but also the need to provide legal services with a sense of ethics and professional responsibility.

Next, we need to maintain the highest possible standards for admission to our membership. As you may know, there is an effort in our state at this time to take the decision of who can take the bar examination away from the court and place it in the hands of the legislature. For many reasons, that's a bad decision, and, while we must be open to looking at all the options, including the current rise in Internet education and how that may or may not be accommodated within our system, we need to maintain the highest possible standards of admission in order to adequately protect the public.

Next, we need to maintain the highest standards for allowing lawyers to continue to practice. We cannot allow ourselves to permit lawyers to cut corners, to do dishonest things, or to fail to represent or, even worse, mistreat their clients, without appropriate ramifications.

Finally, we need to protect the integrity of our judiciary. This is the highest point in our judicial system, and it is constantly under attack. We have all seen that over the last few years. We must continue to do everything possible to ensure that the integrity of our judiciary is not degraded. Lawyers are often criticized for making financial contributions to judicial candidates. The way I view it, if not us, who?

In this day and time people are inundated with requests for political contributions, ranging from the local city council or county commission up to the president of the United States. It is very difficult to interest people, who don't otherwise have any interest in or contact with the legal system, to give financially to judicial candidates to enable them to run for election or re-election. I have no problem with people running for judicial office against incumbents, but I have great difficulty with organized efforts of special interest groups, whether in the state or out of the state, who want to put tremendous financial resources into such races in the hope they can elect judges who "see things our way". Judges are not supposed to see things either way. They are supposed to see things as the law provides.In closing, let me say that I have loved being a lawyer, and I love it just as much today as I did 43 years ago. I thank you again for this honor and for the privilege of being a lawyer.

natural causes.[9] According to the *Cornett* Court, this "rule of nonliability for natural conditions" was, historically, a practical necessity in rural areas.[10] The Court noted that the rule was not applicable in urban situations, however, because of the heightened danger and consequences of such a nonliability policy in an urban setting.[11]

Even for trees located in rural locations, the *Cornett* Court recognized a growing trend away from blanket nonliability since *Roberts* was decided. Instead, if a rural landowner has actual notice of a hazardous condition [12] on the land, the landowner can become liable for damages arising from the condition. Under current law, a rural landowner is not required to inspect the land to make sure that every tree is safe.[13] However, if a rural landowner has actual notice that a particular tree poses a danger to a neighbor or to the public, the owner must take affirmative steps to remedy that hazard.[14]

TREES LOCATED IN AN URBAN AREA

General Liability of Urban Landowner

An urban landowner is held to a standard of reasonable care in inspecting trees that could fall over a property line to ensure the safety of others. This duty is limited to trees having "patent visible decay and not the normal usual latent micro-non-visible accumulative decay."[15] In essence, the landowner is not burdened with a "duty to consistently and constantly check all trees for non-visible rot," because "the manifestation of decay must be visible, apparent, and patent so that one could be aware that high winds might combine with visible rot and cause damage."[16] The urban landowner is liable for injuries caused by a falling tree only if the landowner knew or reasonably should have known that the tree was diseased, decayed, or in an otherwise dangerous condition.[17] The only duty imposed upon an urban landowner with regard to knowledge of the health or condition of trees is that of a reasonable person. The landowner is not charged with the knowledge or understanding of an expert trained in the inspection, care, and maintenance of trees.[18] Two cases illustrate this point.

In *Cornett*, a tree located in a Fulton County residential neighborhood fell due to an apparent combination of high winds and the tree's visible rot.[19] Before the tree fell, the owner had been notified of the tree's diseased condition and that the tree was visibly leaning toward the neighboring yard.[20] The Court explained that when a tree is in an urban area and falls into the neighboring property, there "is no dispute as to the landowner's duty of reasonable care, including inspection to make sure that the tree is safe."[21] A landowner that knows that a tree is decayed and may fall and damage the property of an adjoining landowner has a duty to eliminate the danger, even if the tree grew on and became part of the land by natural condition. Because the defendant in *Cornett* had notice of the hazardous condition of the tree that fell, and because the tree was located in an urban neighborhood, the defendant had breached his duty of reasonable care.

Similarly, in *Willis v. Maloof*, [22] the plaintiff was severely injured when struck by a falling tree. The tree was located on the boundary dividing the land owned by the plaintiff and the defendant in a residential area in DeKalb County.[23] Because the tree was not solely located upon the defendant's property, the Georgia Court of Appeals first confronted the question of who was responsible for maintaining the tree. The Court held that adjoining landowners of a tree growing on a property boundary do not own the tree as tenants in common, but "each owns in severalty the part thereof which rests upon his side of the line, with an easement of support from the other."[24] As in the case of a party wall, the adjoining landowners have a joint duty to maintain the tree and take reasonable steps to guard against any hazardous condition the tree may pose. Next, the Court determined whether the defendant had breached any duty to maintain the tree. The plaintiff's expert, who inspected the fallen tree, testified that several visible conditions on the tree indicated to him that the tree was diseased and posed a hazard.[25] However, the Court held that the expert's testimony failed to establish that a non-expert should have reasonably known the tree was diseased.[26] The Court explained that the defendant was not charged with the knowledge of the expert witness with regard to the health of trees.[27] Supporting the conclusion that a layperson would not have the expertise to recognize the diseased nature of the tree was the plaintiff's own testimony that he did not realize before the accident that the tree was dangerous or defective.[28] Other witnesses testified that the tree was bearing green leaves at the time it fell and did not appear to be diseased.[29] The plaintiff did not demonstrate that the defendant was or should have been aware that the tree was hazardous, and therefore the defendant could not be held liable for the plaintiff's injury.

The *Willis* Court did not address whether the defendant had an implied easement to cross the property line and render the jointly owned tree safe by the exercise of self help if the other owner failed to acknowledge their joint duty of maintenance. Similarly, a nervous neighbor is not entitled to enter adjoining property to remove an unsafe tree growing near the boundary that threatens to fall over the property line onto that neighbor's property.[30] Although Georgia will allow a neighbor to trim branches that actually cross over the property line,[31] a self help foray onto the adjoining property would likely

be trespass. The nervous neighbor's sole right is to point out the threatening tree and the associated potential liability to the neighbor and, perhaps, to any applicable property owner's association or municipal authority. If the property in question is subject to a municipal tree ordinance or subdivision covenants, the neighbor may have some additional rights and remedies not provided by general law.

A related question is whether a property owner has the right or duty to enter a neighbor's property to remove a fallen tree that has fallen across the property line. Although cases in other states suggest the fallen tree remains the property of the original owner with an implied right of retrieval,[32] Georgia law has not yet addressed this issue and the *Willis* case suggests Georgia courts may be reluctant to imply such an easement or license due to Georgia's long standing respect for the sanctity of property lines. Absent an agreement between the two neighbors, the right and responsibility to actually remove the fallen tree appears to stop at each owner's property line, with the liability for the cost of that removal likely to be resolved between the owners as provided in Cornett and its progeny.

Liability of Municipalities

Municipalities, like individual urban landowners, are under a duty to inspect and remove dangerous trees growing in the public right-of-way if the municipality has, or should have, notice of the diseased nature of the tree. In two cases from the 1950's, *City of Bainbridge v. Cox*[34] and *City Council of Augusta v. Hammock*,[35] the Georgia Court of Appeals upheld jury verdicts against municipalities for injuries caused when visibly decayed trees growing in the public right of way fell on citizens using adjacent streets and sidewalks, citing the failure of both municipalities to exercise due care in inspecting its respective streets.[36] The Court of Appeals most clearly explained the theory of such municipal liability in *Carter v. Ga. Power Co*.[37] In *Carter*, the plaintiff was injured by a falling tree limb as he walked along a Macon city street.[38] The plaintiff sued the city of Macon for negligence, based on the assertion that the fallen limb had been dead for so long that it had detached from the tree and was resting on other limbs in the tree.[39] The plaintiff argued that the city, pursuant to the duty of a municipality to maintain the public roads free from defects, should have discovered the defect and danger posed by the tree through an exercise of reasonable care.[40] The Court explained that the determination of the city's liability hinged on whether the municipality had actual notice of the danger of falling limbs from the tree.[41] Relying on *Cornett* and *Willis*, the Court explained that "[j]ust as the owner of a tree has no duty to check it constantly for nonvisible rot, a city has no duty to check limbs overhanging a public road for nonvisible rot."[42] The fact that a tree or limb may be leaning or overhanging in one direction is not alone sufficient as a basis for notice that the tree or limb is in a dangerous condition. The limb that fell on the plaintiff in Carter was actually decayed, but because undisputed eyewitness testimony established that the limb appeared normal, the Court held the city free of liability.[42]

Liability for Undeveloped or Uninhabited Urban Land

The duty of care established in *Cornett* applies to undeveloped land in its natural state that is located within an urban area such as metropolitan Atlanta, even if the land is located in an unincorporated section of a metropolitan county. Without expressly so ruling, Georgia courts have also assumed that the Cornett duty applies to urban land on which the owner does not reside, and have assumed the duty applies even if the owner is physically unable to exercise reasonable care in tree inspection. [45]

In *Wade v. Howard*, the plaintiffs' children were killed when a tree fell across a road during a thunderstorm.[47] The tree was located on a parcel of land in unincorporated DeKalb County owned by an elderly woman who was very ill and had not lived on the property for ten years.[48] Due to her poor physical condition, the landowner was unable to personally inspect the trees with reasonable care.[49] The landowner had never received actual notice of a problem with the tree that fell, and the tree evidenced no signs of disease, so the landowner was not deemed to have constructive notice of a hazardous condition.[50] Consequently, the *Wade* Court relied on the "three leading cases" of *Cornett, Willis,* and *Carter,* to hold for the defendant landowner because the plaintiff failed to prove that the defendant was, or should have been, on notice of the hazardous tree. [51]

The application of *Cornett* to uninhabited and undeveloped land in urban areas is also demonstrated by *Wesleyan College v. Weber*.[52] In *Wesleyan College*, a motorist was killed when a tree fell onto her car while she was driving on a Macon street next to land owned by the defendant, Wesleyan College.[53] The college owned a narrow strip of undeveloped land, containing a large number of trees, located across a highway from the college president's home.[54] The Georgia Court of Appeals reiterated the rule, established by *Cornett*, that a landowner has no duty to check all trees for non-visible rot. However, despite the fact that the land was undeveloped, a reasonable landowner does have a duty to inspect trees in the presence of "visible, apparent, and patent"[55] decay. Thus, a landowner is presumed to have constructive notice of what a reasonable inspection would reveal as to the condition of trees on his or her land. The

continued next page

trees in the general area where the tree fell were "blighted," and many were "dead, diseased, dying, or had fallen," and the Court reasoned that a drive-by inspection of the trees would reveal to a reasonable landowner the hazardous condition of this stand of trees.[56] Such an obvious hazard would give notice to the landowner that an individual inspection of each tree within the blighted stand was warranted. Based on this constructive notice of the hazard, and the defendant's failure to attempt to remedy the dangerous situation, the Court held that Wesleyan College was liable for the death of the motorist, even though the college had no notice that this particular tree was diseased and unsafe.[57]

LIABILITY FOR INJURIES TO INVITEES

The previous cases all addressed situations in which the falling tree crossed over a property boundary and struck someone in either an adjoining tract of land or in the public right of way. In these cases, the courts focused exclusively on the actual and constructive knowledge of the tree owner, and did not consider the knowledge of the person struck by the tree. Georgia courts uses a different analysis if the plaintiff has entered upon the property on which the tree is located and is struck by a tree growing in the interior of the property, one that considers the knowledge of the risk by both the landowner and the person struck.

Georgia courts have long held that the mere ownership of land will not cause one party to be liable for injuries sustained by another party while upon the land.[58] A landowner is not considered to be an insurer of those persons who enter upon the land, even when those persons are invitees. Under well establish Georgia[59] law, a landowner will only be liable to invitees, or other persons who enter upon the land, if the landowner has superior knowledge of a hazardous condition[60] upon the land, while the invitee has no knowledge of the perilous condition. An invitee that has knowledge equal to that of the landowner with regard to the hazardous condition may not recover from the landowner if injured while on the land. If an invitee enters upon land while "as fully aware of the dangers and defects of the premises" as the landowner, the invitee has assumed the risk of injury, and the landowner will not be held liable upon injury to the invitee[61]. Therefore, a landowner has no obligation to protect an invitee from dangers "which are known to [the invitee] or which are so obvious and apparent [that the invitee] may be reasonably expected to discover them."[62]

The law regarding landowner liability for injuries to invitees caused by falling trees is demonstrated in *Byrd v. Rivenbark*.[63] In *Byrd*, the plaintiff's decedent was fatally struck on the head by a tree limb located on the defendant's property.[64] The deceased was on the land as a business invitee, specifically for the purpose of removing the tree limb, which had detached during a storm.[65] The Court of Appeals explained that the hazardous condition of the branch was obviously known to the deceased,[66] because he had been invited onto the property for the express purpose of removing the branch. Therefore, the defendant's knowledge regarding the hazardous limb was not superior to the knowledge of the deceased, and the defendant was not liable for the accident.[67] Although the risk was obvious in *Byrd*, if there is a dispute about the safety of a particular interior tree, presumably Georgia courts will look at the factors cited in *Cornett* and *Willis* to determine the standard of knowledge for both owners and visitors regarding unsafe interior trees.

The most recent case on falling tree liability, *Klein v. Weaver,*[68] also involved injuries suffered by an invitee who was struck by a diseased tree limb that fell from a tree located within the landowner's property.[69] The Georgia Court of Appeals in Klein upheld summary judgment for the landowner citing an absence of evidence in the record that the tree limb had any outward appearance of disease or decay.[70] The Court also held that the fact another limb had fallen from the same tree two weeks previously did not constitute notice of a dangerous condition in the absence of any evidence that the prior limb also was diseased or decayed.[71] Finally, the Court found the landowner's efforts to have limbs trimmed from the tree that were near a power line did not establish notice of a dangerous condition because the landowner was motivated by a different concern—fear of a power line accident.[72]

UNANSWERED QUESTIONS

This case law resolves a number of common situations, but leaves others unanswered. First, how will the *Cornett* rule treat an otherwise healthy tree that grows up at an odd angle, or that is top heavy or lopsided with an unusually heavy crown? If the tree grows in a way that appears dangerous to a layman, *Cornett* may require remedial action. Second, if a tree falls across property lines, who bears the burden of removal? Given Georgia's emphasis on the sanctity of property lines, there is no implied easement to cross a property line to retrieve any item that falls onto the property of another. Moreover, given that a tree is a product of nature, it, like soil or a stone, may automatically become the property of the landowner of the land on which it then lies. Thus, a property owner is probably responsible for removing that part of the fallen tree located on his property, with financial responsibility to be assigned under the *Cornett* rules. Finally, does a property owner have the right to remove branches and roots crossing the property line from a tree growing in a neighbor's

property? The common law would clearly give this permission, as each property line extends indefinitely both above and below the surface. However, there may be an argument that the party wall analogy used in *Willis* for boundary-line trees precludes root and branch removal that might kill or severely damage the tree.

CONCLUSION

Landowners in a rural area are subject to a less stringent standard of care than landowners in an urban area. A rural landowner is not required to inspect the land to make sure that every tree is safe. When put on notice, however, that a particular tree is dangerous to a neighbor or to the public, a rural landowner must then take affirmative steps to remedy the hazard. An urban landowner, by contrast, must satisfy a standard of reasonable care in inspecting trees to ensure the safety of others. However, liability for urban landowners is limited to trees having "patent visible decay and not the normal usual latent micro-non-visible accumulative decay."[73] Finally, a landowner is liable to invitees for injuries from trees growing in the interior of the land if the landowner had superior knowledge to that of the invitee regarding the hazardous nature of those interior trees.

Footnotes

[1] "The right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a tort for which an action shall lie." O.C.G.A. § 51-9-1 (2000 & Supp. 2003)
[2] See, e.g., Hall v. Browning, 195 Ga. 423, 24 S.E.2d 392 (1943) (firing a bullet across boundary line constitutes trespass); Ledbetter Bros. Inc. v. Holcomb, 108 Ga. App. 282, 132 S.E.2d 805 (1964) (a quarry operation that throws rocks, smoke and other debris across property line liable for trespass); Belt v. Western Union Tel. Co., 63 Ga. App. 469, 11 S.E.2d 509 (1940) (telephone line crossing property line without consent constitutes trespass)
[3] Id. See also Reinertsen v. Porter, 242 Ga. 624, 250 S.E.2d 475 (1978) (owner of personalty that inadvertently lands on the property of another has no implied license to retrieve that property without the landowner's permission, whereas the land owner has the right to remove the wayward object without fear of liability for conversion as long as it exercises reasonable care in removing the object)
[4] O.C.G.A. § 44-1-2 (1991 & Supp. 2003)
[5] 143 Ga. App. 55, 237 S.E.2d 522 (1977)
[6] 143 Ga. App. at 55, 237 S.E.2d at 523
[7] 101 Ga. 773, 28 S.E. 995 (1897)
[8] Id. at 775, 28 S.E. at 996
[9] Id.
[10] Cornett, 143 Ga. App. at 55, 237 S.E.2d at 523
[11] Id. at 56, 237 S.E.2d at 523
[12] Id.
[13] Id. at 55, 237 S.E.2d at 523
[14] Id. at 56, 237 S.E.2d at 523
[15] Id. at 57, 237 S.E.2d at 524
[16] Id.
[17] Id.
[18] Id. See also infra note 27
[19] Id. at 55, 237 S.E.2d at 523
[20] Id.
[21] Id. at 56, 237 S.E.2d at 523
[22] 184 Ga. App. 349, 361 S.E.2d 512 (1987)
[23] Id. at 349, 361 S.E.2d at 512
[24] Id. at 349, 361 S.E.2d at 513
[25] Id. at 350, 361 S.E.2d at 513
[26] Id. at 350-351, 361 S.E.2d at 513-514
[27] Id. at 350-351, 361 S.E.2d at 514
[28] Id. at 350, 361 S.E.2d at 513
[29] Id. at 351, 361 S.E.2d at 514
[30] See Daniel F. Hinkel, Pindar's Ga. Real Estate Law § 9-21 (6th ed.)
[31] Id.
[32] Id.
[33] See supra note 1.
[34] 83 Ga. App. 453, 64 S.E.2d 192 (1951)
[35] 85 Ga. App. 554, 69 S.E.2d 834 (1952)
[36] City of Bainbridge, 83 Ga. App. at 458, 64 S.E.2d at 195; City Council of Augusta, 85 Ga. App. at 561, 69 S.E.2d at 839
[37] 204 Ga. App. 77, 418 S.E.2d 379 (1992)
[38] Id. at 77, 418 S.E.2d at 379
[39] Id. at 77, 418 S.E.2d at 380
[40] Id.
[41] Id. at 77-78, 418 S.E.2d at 380
[42] Id. at 78, 418 S.E.2d at 380
[43] Id.
[44] See Wade v. Howard, infra note 46
[45] Id.
[46] 232 Ga. App. 55, 499 S.E.2d at 652 (1998)
[47] Id. at 56, 499 S.E.2d at 653
[48] Id.
[49] Id.
[50] Id.
[51] Id. at 59, 499 S.E.2d at 655
[52] 238 Ga. App. 90, 517 S.E.2d 813 (1999)
[53] Id. at 90, 517 S.E.2d at 815
[54] Id.
[55] Id. at 92, 517 S.E.2d at 816
[56] Id. at 94, 517 S.E.2d at 817-818
[57] Id. at 95, 517 S.E.2d at 818
[58] See, e.g., Harris v. Star Servs., Co., 170 Ga. App. 816, 318 S.E.2d 239 (1984); Amear v. Hall, 164 Ga. App. 163(2), 296 S.E.2d 611 (1982)
[59] Id.
[60] Id.
[61] Harris, 170 Ga. App. at 817, 318 S.E.2d at 240
[62] Amear, 164 Ga. App. at 169, 296 S.E.2d at 616
[63] 183 Ga. App. 564, 359 S.E.2d 433 (1987)
[64] Id. at 564, 359 S.E.2d at 434
[65] Id.
[66] Id. at 565, 359 S.E.2d at 434
[67] Id. at 566, 359 S.E.2d at 435
[68] 265 Ga. App. 390, 593 S.E.2d 913 (2004)
[69] Id. at 391, 593 S.E.2d at 914
[70] Id. at 392, 593 S.E.2d at 914
[71] Id. at 392, 593 S.E.2d at 915
[72] d.
[73] See also Barnes v. St. Stephen's Missionary Baptist Church, 260 Ga. App. 765, 580 S.E.2d 587 (2003) (recent reiteration of Cornett and Wade holdings)

Preserving the Record for Appeal

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This paper is based on Chapter 4, "Bringing Up the Record on Appeal", Federal Appellate Practice in the Eleventh Circuit (Harrison Co. 1995)

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§1 Duty of Appellant to Bring Up His Record

The diligent lawyer will begin preparing for an appeal long before his/her case reaches the appellate court. In fact, the appeal process begins at least as early as the drafting of the complaint. Even the most meritorious case will fail on appeal if the questions sought to be presented to the appellate court were not properly raised in the trial court and are not adequately presented in the record brought before the reviewing court.[1] Thus, the courts continue to hold that it is the appellant's duty to preserve his or her record and then to bring it up to the appellate court.[2]

§2 Mechanics for Forwarding the Record on Appeal

All issues raised on appeal must not only have been properly presented to the district court, but must also appear in the written record before the appellate court. It is the responsibility of counsel for the appellant to work with the district court clerk and court reporter to assure the accurate and timely transmittal of the record on appeal. The actual mechanics of preparation and transmittal are fairly routine in the federal system.[3] Also, a review of the Federal Rules of Appellate Procedure (F.R.A.P.), Eleventh Circuit Rules, and Internal Operating Procedures (I.O.P.) is mandatory. The Clerk's Office has printed them all in one interpolated manual. Get it and read it.

It is the appellant's duty to order the transcript.[4] The transcript is required to be ordered in the federal system on a prescribed form known as an Appeal Information Sheet within 10 days of filing the notice of appeal.[5] Of course, appellant must also pay its appellate filing fee. Unlike state practice, once counsel has timely ordered the transcript, the Eleventh Circuit will query the district court clerk over concerns about delay, and not blame the appellant. Counsel does not need repeated orders extending the time for filing the transcript.[6] However, in the state system, once the transcript has been ordered, counsel must regularly obtain an order from the trial court every thirty (30) days to extend the time for the court reporter to finalize and file the trial transcript.[7]

Practice Pointers:

(1) Be sure to request the court reporter to transcribe the opening statements and the closing arguments. For example, it is the practice of many court reporters to typically prepare the following transcript in both civil and criminal cases:

* * *

The Court: The court will come to order. If you are both prepared to proceed, then please do.

[Counsel for the parties each made an opening statement.]

The Court: Call your first witness.

* * *

If, during opening statement, there was a colloquy, motion in limine, objection or omission of

a theory, the appellate court will never know, unless you order the opening statements to be transcribed. In a non-jury trial, e.g. with the federal government as a civil defendant, or in a preliminary injunction hearing, legal issues often are ruled on or are preserved/waived/abandoned as counsel are presenting their opening statements. Omit the opening statement at your own peril.

(2) Ask the court reporter about exhibits. If they were returned to counsel by the court reporter at the end of the trial, get them back to the court reporter so they may be included in the certified transcript. If opposing counsel had relevant exhibits returned to him/her, and if they are important to the issues, request opposing counsel in writing to return them to the court reporter for inclusion.

(3) Counsel for appellee should make sure the key evidence in favor of appellee is transmitted in the main Record on Appeal. If not, then be sure to have it sent up by a Supplemental Record on Appeal in the federal system.[8] File the motion to supplement the record in the trial court in federal cases and send a copy of the motion to the clerk of the Eleventh Circuit Court of Appeals;[9] or in state cases, file a Cross Designation of the Contents of the Record on Appeal.[10]

§3 Substance of the Record

All issues must be presented first to the trial court. As a general rule an appellate court will not consider issues asserted for the first time on appeal.[11] The governing principle is that a party is not entitled to claim error by the trial court when the basis for the assertion of error was not called to that court's attention so as to give the trial court an opportunity to correct the alleged mistake. However, on occasion, appellate courts depart from this principle for "plain" or "jurisdictional" errors.

This general rule applies to substantive grounds for recovery or defenses,[12] evidentiary rulings,[13] Dietz v. Consolidated Oil & Gas, Inc., 643 F.2d 1088, 1093 (5th Cir. 1981). jury instructions,[14] and other allegations of error in the conduct of the trial.[15]

§4 Exceptions to the Rule – Plain Error

As stated, there are, of course, exceptions to the general rule discussed in §3. The Supreme Court has left this matter to the discretion of the courts of appeal, stating in general that a federal appellate court does not consider an issue which was passed upon below.[16] "The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. We announce no general rule."[17] Issues presented for the first time on appeal are addressed by the Eleventh Circuit in the instance of plain error.[18]

Federal Rule of Evidence (F.R.Evid.) 103(d) expresses the "plain error" principle of Rule 52(b) of the Federal Rules of Criminal Procedure. While there is no Federal Rule of Civil Procedure which explicitly states the principle now reiterated in F.R.Evid. 103(d), numerous civil cases have applied a substantially similar "plain" or "fundamental" error rule. An appellate court will address issues not previously asserted (1) when the issues raises a pure question of law and refusal to consider it results in a miscarriage of justice, (2) when there is no opportunity to object to an order at the time of its issuance, (3) where the interest of substantial justice is at stake, (4) when the proper resolution is beyond any doubt, or (5) if the issue presents significant questions of general impact or of great public concern.[19]

Stated more concisely:

—Is the error obvious?

—Would a different result be likely, if the error had not occurred?

The following are two examples of plain error in criminal cases, where this exception most often arises. In Darland v. United States,[20] the defendant was convicted of bank robbery. At trial he had presented character testimony although he elected not to testify. The court, without objection, instructed the jury to disregard the character testimony. The court of appeals held that exclusion of relevant character evidence was plain error, because despite his decision not to testify, his reputation for honesty, integrity and peacefulness was relevant in view of the offense charged.[21]

In Government of the Canal Zone v. P. (Pinto),[22] defendants were convicted of assault with intent to rob. The Court of Appeals held that the district court erred in admitting preliminary hearing testimony into evidence when there was no showing that the witnesses were unavailable.[23] Conceding error, the government argued that it was not a ground for appeal as it was never raised in the district court.[24] Stating that appellate courts will consider objections raised for the first time on appeal when defendants are denied procedural rights, the court of appeals held that it was plain error to admit the former testimony against a co-defendant who was not present at the preliminary hearing and who therefore had no opportunity to cross-examine the witnesses. Even though his attorney had, in his absence, cross-examined the witnesses at the preliminary hearing, the Court of Appeals found this to be a poor substitute for cross-examination at trial, and thus "plain error."[25]

In state cases, the "plain error" rule is limited in application to death penalty cases and other criminal cases where the trial judge impermissibly expresses its opinion as to the guilt of the accused.[26]

Plain error is only occasionally found in civil cases also. One example

continued next page

is *Hunt v. Liberty Lobby.*[27] The Eleventh Circuit held that in a suit by a public figure against a publisher for libel, an instruction that a public figure could recover damages on a showing of highly unreasonable conduct constituting extreme departure from standards of investigating and reporting ordinarily adhered to by responsible publishers, was erroneous and despite the fact that no objection was taken, a new trial was necessary.[28] Remember, however, that this case involved First Amendment issues, and this may explain why the plain error rule was successfully invoked.

§5 Exceptions to the Rule — Subject Matter Jurisdiction (Federal Cases)

In federal cases, appellate courts will always undertake a thorough examination of matters pertaining to subject matter jurisdiction regardless of whether the issues were brought to the attention of the district court. Indeed, because subject matter jurisdiction concerns the power of the federal court to decide the case, it is incumbent on the Court of Appeals to inquire into its jurisdiction even if neither party marks such a challenge.[29]

This can result in the Eleventh Circuit ruling on the issue sua sponte, but there still must be something in the record on which the Court of Appeals can base its decision.[30]

§6 Motion for Summary Judgment

An appellate court employs the same standard in reviewing the grant or denial of a motion for summary judgment as does the district court initially under Rule 56(c) — summary judgment is proper when it appears "that there is no genuine issue as to a judgment as a matter of law."[31] At the appellate level, this test is applied so as to give the party opposing summary judgment the benefit of any doubt as to the propriety of granting summary judgment. However, the Court of Appeals is limited in its review to only those documents and evidence that were before the trial court. The parties cannot add exhibits, depositions or affidavits to support their position, nor can they advance new theories or raise new issues on appeal.[32] For this reason, it is crucial that the party opposing a motion for summary judgment make a good record at the summary judgment stage, in order to allow the appellate court access to every conceivable argument against summary judgment. Likewise, the movant should protect his hard-fought victory by ensuring that the summary judgment order has a factual support for every issue addressed, e.g., proper physician's affidavit in malpractice case, verified pleadings for res judicata ruling, and certified portions of key deposition.

Where the Local Rules so provide in federal court, the opponent of summary judgment must file an alternative statement of facts, contesting the movant's statement of facts if he or she intends to challenge the facts on appeal. A failure to do so precludes appellate review of the alleged error because facts set forth on a motion for summary judgment are deemed admitted unless controverted by the opponent's own statement of facts.[33]

However, this is not the rule in Georgia courts.[34] Yet, the respondent must raise issues in his memorandum in opposition to summary judgment because the appellate court will not consider contentions of error raised for the first time on appeal after summary judgment has been granted, unless there are interests of substantial justice at stake. This includes defenses that were pled in the responsive pleadings.[35] However, issues not raised in the complaint but cited in opposition to the motion for summary judgment by a plaintiff are properly before the appellate court.[36]

§7 Motion in Limine

The purpose of a motion in limine is to exclude evidence which is prejudicial, misleading, confusing or too time consuming, whether relevant or not. Examples of such occasions include, but are not limited to: (1) verdict or judgment where case was previously tried; (2) defendant's statement that he carried liability insurance; or (3) witness' testimony that he discussed case with or gave a statement to defendant's insurance carrier.

The movant must always get his or her motion in the record, and, if possible, it should be in writing. If possible, movant must invoke a ruling and it must in the record. If the court reserves a ruling until all of the evidence is in, the movant must raise the point again at the close of the evidence.[37]

If the motion is denied, an objection to the evidence must be made when it is offered at the trial in order to preserve the issue on appeal.[38]

The opponent of the motion must make an offer of proof for the record.[39]

The motion in limine can be, and should be, used to test both the admission and exclusion of evidence.

§8 Motion in Limine — Admission of Evidence

To preserve an assignment of error pertaining to the admission of evidence, the party must make "a timely objection or motion to strike ... stating the specific ground of objection, if the specific ground was not apparent from the context."[40] In this regard, the trial court's overruling of a motion in limine is not grounds for appeal; the party must still object when the evidence is tendered during the trial.[41] Furthermore, even if the trial court excludes evidence by the grant of a pretrial motion in limine, admission of that same evidence during the trial, although in violation

of the ruling on the motion in limine, is not appealable, unless the objection is renewed at that time.[42]

§9 Motion in Limine — Exclusion of Evidence

To preserve an assignment of error to the exclusion of evidence, the party must alert the trial court to the "substance of the evidence", unless it was "apparent from the context".[43] Under this rule, a party's failure to provide legal authority to support the admission of evidence, when requested to do so by the trial judge, precludes a challenge to the exclusion of the evidence on appeal.[44] Wright v. Hartford Accident and Indemnity Co., 580 F.2d 809 (5th Cir. 1978).

§10 Evidentiary Questions Arising During Trial — Objection to Evidence Sustained on Direct or Cross-Examination

When dealing with an objection to evidence sustained on direct or cross-examination, one first must make an offer of proof as to what witness was expected to answer or appellate court will not consider the erroneous ruling.[45] The federal rule thus requires that the substance of the excluded evidence be made known to the court by offer of proof or that the substance of the evidence was apparent from the context within which the questions were asked.[46]

Counsel must not acquiesce in the adverse ruling or agree to it. A litigant is required to stand his or her ground and fight in order to successfully enumerate as error an erroneous ruling by the trial judge. Acquiescence completely deprives one of the right to complain further because he or she has agreed that the trial court's ruling was correct by submitting to it.[47]

If one is the objecting party and the evidence is already in, then a motion to strike should be made.[48]

There is an apparent exception to the foregoing principles in the Federal Rules of Evidence. "Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court."[49] However, the Advisory Committee felt that this "plain error principle" would more likely apply to the admission of evidence rather than to exclusion, since failure to comply with the normal requirements of offers of proof is likely to produce a record which simply does not disclose the error.[50]

§11 Evidentiary Questions Arising During Trial — Objection to Evidence Overruled on Direct Examination

Where an objection to evidence is overruled on direct examination, it is harmless error if other evidence on point is legally admitted. Likewise, if the objecting party asks the same question, it is waived, although it can be explained to the jury.[51]

If a party introduces evidence first or if the same question is admitted without objection previously, it is harmless error, and an appeal by that party on the issue is barred.[52]

The objecting party must object every time question is asked or the evidence is offered, even if question is rephrased or error is harmless, and, thus, permission should be requested to make it a continuing objection.[53]

The objecting party must object specifically to the inadmissible part if one part is admissible or the objection will be invalid. The court of appeals may, in this instance, decline to reverse if the specific objection is not valid even though another objection would have been proper.[54] Counsel must also be prepared to cite authority for the objection or it may be deemed waived.[55]

The objecting party must not be dilatory, and if the objection is made after evidence is in, then there must promptly be a motion to strike.[56]

§12 Evidentiary Questions Arising During Trial — Objection to Evidence Overruled on Cross-Examination

Later testimony on the same objectionable subject matter must be objected to, or there is no reversible error. Likewise, the introduction of evidence on the same subject matter will be a waiver.[57] Counsel should consider stipulating a continuing objection if necessary.[58]

§13 Evidentiary Questions Arising During Trial — Documentary Evidence

The same rules apply to documentary evidence as with oral testimony.[59].

In all cases proper grounds for objections must be stated. Even though testimony may be objectionable on other grounds, it is not error to overrule an objection which is not founded on the proper grounds.[60] .

§14 Evidentiary Questions Arising During Trial - - Co-Party Made the Necessary Specific Objection

Evidentiary errors are adequately preserved for review even though the appealing defendant does not make the objection if a co-defendant did object, thereby placing the trial court on notice of the specific ground for the objection.[61]

§15 Motion for Directed Verdict / Judgment as a Matter of Law — At the Close of Opponent's Case/ Close of Evidence

In federal court, in the absence of a motion for judgment as a matter of law at the case of the opponent's evidence (known in state court as a directed verdict), the sufficiency of the evidence supporting the verdict is not reviewable on appeal.[63] In federal court, a motion at the close of plaintiff's (opponent's) case must be renewed at the close of all the evidence in order to preserve any perceived errors.[64] Absent a timely motion for directed verdict / judgment as a matter of law, a federal appellate court's review is limited to determining whether there was any evidence to support the verdict,

continued next page

and it may not question the sufficiency of whatever evidence it does find.[65] In the Georgia courts, the "any evidence" rule applies even if a timely motion is made for directed verdict/ judgment n.o.v.[66]

Another crucial point to remember is that the grounds must be stated on a motion for directed verdict / judgment as a matter of law.[67] A federal appellate court will not review the sufficiency of the evidence if the trial court has denied a motion which did not state specific grounds.[68] The Georgia appellate courts will consider the sufficiency of the evidence in the absence of a proper directed verdict motion, but the only remedy available will be a new trial, not a judgment as a matter of law.[69] An appellate court will not reverse the grant of a directed verdict / judgment as a matter of law on the basis that no grounds were stated unless that issue was presented to the trial court.[70] .

> The reasons for requiring a motion for judgment as a matter of law during trial are: [A] litigant may not gamble on the jury's verdict and then later question the sufficiency of the evidence on appeal ... Similarly, the litigant who has not moved for a directed verdict in the trial court must have been of the view that the evidence made a case for the jury; he should not be permitted on appeal to impute error to the trial judge for sharing that view.[71]

Again, however, plain error is an exception to this rule.[72]

§16 Motion for Judgment N.O.V. / Judgment as a Matter of Law — After Verdict

A motion for judgment N.O.V. / judgment as a matter of law after verdict cannot be made unless a motion for a directed verdict / judgment as a matter of law was made by the party at the close of all evidence.[73] The post-trial motion for judgment as a matter of law (in state court, a motion for judgment N.O.V.) must state the grounds on which it is made, and cannot include a ground not pursued in the earlier motion at the close of evidence.[74] .

A party's failure to move for judgment N.O.V. / judgment as a matter of law, after verdict and judgment, does not preclude appellate review of the ruling on an earlier motion for judgment as a matter of law at the close of the evidence. However, in federal court where a post-verdict motion for judgment as a matter of law has not been filed, the only relief a party may obtain in the appellate court is a new trial.[75] Also, in the absence of a motion judgment N.O.V. / judgment as a matter of law after verdict, the federal appellate court will not review the sufficiency of the evidence supporting the jury's verdict.[76] The rule is different in Georgia, and a failure to file a valid motion for judgment N.O.V. does not preclude review of a denial of directed verdict.[77]

§17 Motion for Mistrial

This more frequently arises in criminal cases. Situations arise at trial in which the fundamental fairness of the proceeding is so adversely affected as to prompt a declaration of mistrial by the court. The mistrial may be the result of an appropriate motion by one of the parties or it may be declared sua sponte by the trial judge. Most often mistrials are prompted by prejudicial statements of counsel or a witness which cannot be adequately corrected by a jury instruction. Not all declarations of mistrial raise the bar of double jeopardy. Much will depend upon factual circumstances and the motive of the party causing the mistrial.

The original standard for a mistrial declaration which would permit retrial consistent with the Double Jeopardy Clause was stated by Justice Story in Perez v. United States.[78] *Perez v. United States*, "[T]he law has invested the courts of justice with the authority to discharge a jury from giving a verdict, whenever, in their opinion, taking all circumstances into consideration, there is manifest necessity for the act or the ends of public justice would otherwise be defeated."[79] The discretion of the court in declaring a mistrial and aborting the trial was severely restricted by United States v. Jorn.[80] The court found that the valued right to take a case to the jury is, in itself, enough to bar retrial unless the mistrial declaration is necessary to protect other important interests. Jorn places the duty with the trial court to exhaust all avenues prior to taking the case from the jury.

In Illinois v. Somerville,[81] the U.S. Supreme Court found the "manifest necessity" for a mistrial which was lacking in Jorn. In Somerville, the Supreme Court held that an Illinois judge did not abuse his discretion in declaring a mistrial over defendant's objection after the jury had been impanelled and sworn but before any evidence was taken, when the prosecution discovered that the indictment failed to allege a material element of the crime. Illinois law forbids amending an indictment. In its 5-4 decision, the Court held that the mistrial declaration was necessary in having his fate determined by the first jury impanelled, and thus, a retrial did not violate the Fifth Amendment.

The U.S. Supreme Court has reaffirmed the distinction between mistrials granted sua sponte and those granted at the defendant's request or with his consent.[82] In the former case, unless there was a "manifest necessity" for ordering a mistrial, the Double Jeopardy Clause will bar a retrial. In the latter case, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the

defendant for mistrial is ordinarily assumed to remove any barrier to re-prosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error. This is the standard in Georgia also.[83]

Again, if counsel wishes to invoke the remedy of a mistrial, counsel must act promptly and cannot be seen as dilatory. Be specific and obtain a ruling. Non-action by the court without counsel's insistence on a ruling or counsel's failure to file the requisite written motion may be viewed as a waiver or an abandonment.[84]

§18 Jury Instructions

Fed.R.Civ.P.51 states:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."[85]

Uniform Superior Court Rule 10.3 provides:

> All requests to charge shall be numbered sequentially on separate sheets of paper and submitted to the court in duplicate by counsel for all parties at the commencement of trial, unless otherwise provided by pre-trial order; provided, however, that additional requests may be submitted to cover unanticipated points which arise thereafter.86

These rules are straight-forward and are applied accordingly.

§19 Jury Instructions — Plain Error Rule on Failure to Object

Failure to object to a jury instruction at the trial precludes consideration by the appellate court, absent plain error.[87]

In order to successfully attack an allegedly erroneous jury instruction on the ground of plain error, the appellant must establish that the instruction was an incorrect statement of the law and that it was probably responsible for an incorrect verdict, leading to substantial injustice.[88] The plain error rule may apply even if the instruction requested by the party complaining on appeal shared the same legal defect as the complained of instruction which was actually given.[89] However, the strict limitations of the plain error rule make this a difficult issue for an appellant.

§20 Jury Instructions — Exception

An objection to the charge must be made after the instruction is given and before the jury retires in order to preserve the objection for appeal.[90] The failure to object may be disregarded by the federal appeals court if the party's position was previously made clear to the trial court, and it is obvious that a further objection would have been unavailing.[91] However, in Georgia the failure to renew an objection constitutes a waiver, and only in capital cases will the challenged jury instruction be considered under the "plain error" doctrine.[92]

§21 Interrogatories to Jury

Where a party makes no specific objection to an interrogatory to the jury until the time of the motion for a new trial and on appeal, the objection is waived.[93] Also, both parties may be held to have waived any objection to inconsistent answers by the jury where neither party objects at the time the answers are announced.[94] Likewise, if judgment is entered on the inconsistent verdict with the trial judge modifying it, but neither side objecting, the judgment will be upheld.[95] Entry of judgment in the absence of objection would not be plain error.[96]

Footnotes

1 Rogero v. Noone, 704 F.2d 518, 520 n.1 (11th Cir. 1983); City of Dalton v. Smith, 210 Ga. App. 858, 859(1), 437 S.E.2d 827 (1993).
2 Daniel v. Taylor, 808 F.2d 1401, 1403 n.2 & 1405 n.3 (11th Cir. 985); White v. Arthur Enterprises, Inc., 219 Ga. App. 124(2), 464 S.E.2d 225 (cert. denied 1995).
3 FRAP 10 & 11.
4 FRAP 10(b); Alexander v. Guthrie, 216 Ga. App. 461(1), 454 S.E.2d 805 (1995).
5 11th Cir. R. 10-1.
6 See M. Eastwood, Federal Appellate Practice in the Eleventh Circuit, Chapter 3, §3-2 (1995).
7 O.C.G.A. §5-6-42.
8 FRAP 10(e); 11th Cir.R. 10-1.
9 FRAP 10(e); 11th Cir.R. 10-1.
10 O.C.G.A. §5-6-42; see also C.J. McFadden, et al., Georgia Appellate Practice, Chapter 9, "Perfecting the Appellate Record" (2d ed. 2005).
11 Daniel v. Taylor, 808 F.2d 1401, 1405 n.3 (11th Cir. 1985); Seminole Tribe of Florida v. Butterworth, 658 F.2d 310, 316 (5th Cir. Unit B 1981); City of Dalton v. Smith, 210 Ga. App. 858, 859(1), 437 S.E.2d 827 (1993).
12 In re Novack, 639 F.2d 1274 (5th Cir. Unit B 1981).
13 Dietz v. Consolidated Oil & Gas, Inc., 643 F.2d 1088, 1093 (5th Cir. 1981).
14 Johnson v. Bryant, 671 F.2d 1276, 1281 (11th Cir. 1982).
15 See, e.g., Coats & Clark, Inc. v. Gay, 755 F.2d 1506, 1511 (11th Cir. 1985) (allegedly improper conduct by trial judge).
16 Hormel v. Helvering, 312 U.S. 552, 556 (1941).
17 Singleton v. Wulff, 428 U.S. 106, 121 (1976) (Stevens, J., concurring).

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[18] Dean Witter Reynolds, Inc. v. Fernandez, 741 F.2d 355, 360-61 (11th Cir. 1984); Matter of Novack, 639 F.2d 1274, 1276-77 (5th Cir. Unit B 1981).
[19] Rogers v. State, 253 Ga. App. 675, 676(2), 560 S.E.2d 286 (2002); see also footnote 3, supra.
[20] Darland v. United States, 626 F.2d 1235 (5th Cir. 1980).
[21] Darland v. United States, 626 F.2d at 1237-38.
[22] Government of the Canal Zone v. P. (Pinto), 590 F.2d 1344 (5th Cir. 1979).
[23] Government of the Canal Zone v. P. (Pinto), 590 F.2d at 1346-47, 1352.
[24] Government of the Canal Zone v. P. (Pinto), 590 F.2d at 1352-53.
[25] Government of the Canal Zone v. P. (Pinto), 590 F.2d at 1354-55.
[26] Paul v. State, 272 Ga. 845, 848-49(3), 573 S.E.2d 58 (2000); Abernathy v. State, 252 Ga. App. 635, 635-36(1), 556 S.E.2d 859 (2001).
[27] Hunt v. Liberty Lobby, 720 F.2d 631 (11th Cir. 1983).
[28] Hunt v. Liberty Lobby, 720 F.2d 647.
[29] See, e.g., Dobard v. Johnson, 749 F.2d 1503, 1507 (11th Cir.), reh. denied, 755 F.2d 176 (1985).
[30] E.g., United States v. State of Alabama, 791, F.2d 1450, 1454 (11th Cir. 1986).
[31] F.R.Civ.P. 56(c); O.C.G.A. §9-11-56(c).
[32] Daniel v. Taylor, 808 F.2d 1401, 1403 n.2 (11th Cir. 1985); Local Union No. 59, Int'l Bd of Elec. Workers v. Namco Electric, Inc., 653 F.2d 143, 146 (5th Cir. 1981); Video Power, Inc. v. First Capital Income Properties, Inc., 188 Ga. App. 691(2), 373 S.E.2d 855 (1988).
[33] Simon v. Kroger Co., 743 F.2d 1544, 1546-47 (11th Cir.), reh. denied, 749 F.2d 733, cert. denied, 471 U.S. 1075 (1985).
[34] Rapps v. Cooke, 234 Ga. App. 131, 132(1), 505 S.E.2d 566 (1998).
[35] Daniel v. Taylor, supra at n.3; Calmaquip Engineering West Hemisphere Corp. v. West Coast Carriers Ltd., 650 F.2d 633, 637 (5th Cir. 1981); see Almonte v. West Ashley Toyota, 281 Ga. App. 808, 810(4), 637 S.E.2d 755, 757 (2006); Fulton County v. American Factors of Nashville, Inc., 250 Ga. App. 366, 370(3), 551 S.E.2d 781, 784 (cert. denied 2001).
[36] Evans v. Bexley, 750 F.2d 1498, 1499 n.1 (11th Cir. 1985).
[37] United States v. York, 722 F.2d 715, 716 (11th Cir. 1984); Overton v. State, 270 Ga. App. 285, 289(3), 606 S.E.2d 306, 310 (2004); Barnett Bank of S.E. Ga. v. Hazel, 251 Ga. App. 836, 838(2), 555 S.E.2d 195, 198 (2001); Daker v. State, 243 Ga. App. 848, 854(16), 533 S.E.2d 393, 400 (cert. denied 2000).
[38] Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1503-04 (11th Cir. 1985); Wilson v. Weggener, 837 F.2d 220, 222 (5th Cir. 1988); Petty v. Ideco, 761 F.2d 1146, 1150 (5th Cir. 1985); Thomas v. State, 249 Ga. App. 571, 572-73(3), 549 S.E.2d 408, 411 (2001).
[39] F.R.Evid. 103(a)(2); see, Perry v. State Farm Fire & Cas. Co., 734 F.2d 1441, 1446 (11th Cir. 1984); Zone Enterprises, Inc. v. George L. Smith II World Congress Center, 234 Ga. App. 238, 240, 506 S.E.2d 424, 426-27 (1998); Sawyer v. Cardiology of Ga., P.C., 258 Ga. App. 722, 723-24(2), 575 S.E.2d 11, 13 (reh. denied 2002).
[40] F.R.Evid. 103(a)(1); see, United States v. One 1963, Hatteras Yacht Ann Marie, 584 F.2d 72, 75 (5th Cir. 1978) (failure to object bars challenge on appeal); Carona v. Pioneer Life Ins. Co., 357 F.2d 477, 480 (5th Cir. 1966) (ground of objection must be specifically stated); Hodge v. Lott, 251 Ga. App. 288, 290, 553 S.E.2d 652, 653-54 (reh. denied 2001).
[41] Hendrix v. Raybestos-Manhattan, Inc., 776 F.2d 1492, 1503-04 (11th Cir. 1985); Thomas v. State, 249 Ga. App. 571, 572-73(3), 549 S.E.2d 408, 411 (2001).
[421] Collins v. Wayne Corp., 621 F.2d 777, 785-86 (5th Cir. 1980); Ford Motor Co. v. Sasser, 274 Ga. App. 459, 462(2), 618 S.E.2d 47, 52 (reh. denied 2005); but see Reno v. Reno, 249 Ga. 855, 855-56(1), 295 S.E.2d 94, 96 (1982).
[43] F.R.Evid. 103(a)(2), see also, Liner v. J.B. Talley & Co., 618 F.2d 327, 331 (5th Cir. 1980); Rosequist v. Pratt, 201 Ga. App. 45, 46 n.1, 410 S.E.2d 316, 318 (1991).
[44] Wright v. Hartford Accident and Indemnity Co., 580 F.2d 809 (5th Cir. 1978).
[45] Watkins v. Bowden, 105 F.3d 1344, 1352 n.16 (11th Cir. 1997); United States v. Todd, 108 F.3d 1329, 1332-33 (11th Cir. 1997); Worn v. Warren, 191 Ga. App. 448, 449(2), 382 S.E.2d 112, 114 (cert. denied 1989).
[46] F.R.Evid. 103(c); compare Worn v. Warren, supra, at 191 Ga. App. 449(2), 382 S.E.2d 114.
[47] See, Murphy v. City of Flagler Beach, 761 F.2d 622 (11th Cir. 1985) (where plaintiff preserved issue when he made offer of proof in evidence conference, after being precluded from eliciting line of testimony from one witness, but prior to putting up subsequent witnesses for same line of testimony); Watkins v. Bowden, 105 F.3d at 1352 n.16; Bixby v. State, 254 Ga. App. 212(1), 561 S.E.2d 870, 873 (2002).
[48] Typographical Services, Inc. v. Itek Corp., 721 F.2d 1317, 1320 (11th Cir. 1983); Lionheart Legend, Inc. v. Norwest Bank Minnesota Nat., 253 Ga. App. 663 n.4, 560 S.E.2d 120, 122 (2002).
[49] F.R. Evid. 103(d).
[50] Watkins v. Bowden, 105 F.3d at 1352 n. 16; United States v. Escobar, 674 F.2d 469 (5th Cir. 1982) (prejudicial hearsay admitted, without objection, from police officer discussing computer information listing defendant as suspected drug smuggler; "plain error" and conviction reversed); Bennett v. Terrell, 224 Ga. App. 596, 597(2), 481 S.E.2d 583, 584 (cert. denied 1997).
[51] United States v. Dysart, 705 F.2d 1247, 1252-55 (10th Cir.), cert. denied, 104 U.S. 339 (1983) (defense counsel's overruled objection to psychiatrist's improper reference to statements in pretrial competency hearing was waived or rendered harmless when he cross-examined psychiatrist on point and made it part of defense strategy on issue of mental competency); see also, United States v. Hall, 845 F.2d 1281, 1283-84 (5th Cir. 1988); Bennett v. Terrell, 224 Ga. App. 596, 597(2), 481 S.E.2d 583, 584 (cert. denied 1997).
[52] United States v. Vesich, 724 F.2d 451, 462 (5th Cir. 1984); see also, Willco Kuwait (Trading S.A.K. v. deSavary), 843 F.2d 618, 625 (1st Cir. 1988); Parks v. Brissey, 114 Ga. App. 563, 565-66(3), 151 S.E.2d 896, 899 (1966).
[53] See, United States v. Marshall, 762 F.2d 419, 425 n.3 (5th Cir. 1985); Miller v. State, 189 Ga. App. 587, 589-90(2), 376 S.E.2d 901, 903-04 (cert. denied 1989).
[54] Wilson v. Attaway, 757 F.2d 1227, 1242-43 (11th Cir. 1985); see also, Bryant v. Consolidated Rail Corp., 672 F.2d 217 (1st Cir. 1982); Scott v. State, 261 Ga. App. 341, 343(1), 582 S.E.2d 510, 512 (2003); Barnett v. State, 244 Ga. App. 585, 587, 536 S.E.2d 263, 266-67 (cert. denied 2001).
[55] Wright v. Hartford Accident Indem. Co., 580 F.2d 809 (5th Cir. 1978).
[56] United States v. Martinez, 83 F.3d 371, 376 n.5 (11th Cir. 1996); Typographical Services, Inc. v. Itek Corp., 721 F.2d 1317, 1320 (11th Cir. 1983); see also Ambling Mgmt. Co. v. Purdy, ___ Ga. App. ____, ___ S.E.2d ____, 2006 WL 3410812, *4-5 (Nov. 28, 2006) (objection to expert witness trial depositions on Friday before Monday trial, held untimely under O.C.G.A. §24-9-67.1).
[57] United States v. Hall, 845 F.2d 1281, 1283-84 (5th Cir. 1988); Arnold v. State, 236 Ga. App. 380, 382(1), 511 S.E.2d 219, 211 (cert. denied 1999).
[58] See, United States v. Marshall, 762 F.2d 419, 425 n.3 (5th Cir. 1985); Telcom Cost Consulting, Inc. v. Warren, 275 Ga. App. 830, 831-32(1), 621 S.E.2d 864, 866 (cert. denied 2006).
[59] See §§7 to 12 above; Fletcher v. Estes, 268 Ga. App. 596, 597(1), 602 S.E.2d 164, 165 (cert. denied 2004); cf. United States v. Williams, 837 F.2d 1009, 1012 n.4 (11th Cir. 1988).
[60] Wilson v. Attaway, 757 F.2d 1227, 1242-43 (11th Cir. 1985); Benn v. McBride, 140 Ga. App. 698, 701(7), 231 S.E.2d 438, 442 (reh. denied 1976).
[61] United States v. Hawkins, 905 F.2d 1489, 1493 n.1 (11th Cir.), cert. denied, 498 U.S. 1038, 111 S.Ct. 707, 112 L.Ed.2d 696 (1991); United States v. Love, 472 F.2d 490, 496 (5th Cir. 1973); Williams v. State, 253 Ga. App. 458, 460(2), 559 S.E.2d 516, 520 (2002).
[62] United States v. Hawkins, 905 F.2d at 1493, n.1; United States v. Love, 474 F.2d at 496; Williams v. State, 253 Ga. App. 460(2), 559 S.E.2d at 520.
[63] Dunn v. Sears, Roebuck & Co., 639 F.2d 1171, 1175 (5th Cir. 1981).
[64] Special Promotions, Inc. v. Southwest Photos, Ltd., 559 F.2d 430, 432 (5th Cir. 1977).
[65] Special Promotions, Inc. v. Southwest Photos, Ltd., 559 F.2d at 432; Coker v. Amoco Oil Co., 709 F.2d 1433, 1437 (11th Cir. 1983).
[66] Glennville Hatchery, Inc. v. Thompson, 164 Ga. App. 819, 819-20,

298 S.E.2d 512, 516 (1982).
[67] F.R.Civ.P. 50; O.C.G.A. §9-11-50(a).
[68] Guest Houst Motor Inn, Inc. v. Duke, 384 F.2d 927, 928 (5th Cir. 1967).
[69] Aldworth Co., Inc. v. England, 281 Ga. 197, 198-200(2), 637 S.E.2d 198, 199-200 (2006).
[70] See generally, C. Wright & A. Miller, Federal Practice & Procedure: Civil §2533 (1971).
[71] Little v. Bankers Life & Cas. Co., 426 F.2d 509, 511 (5th Cir. 1970).
[72] Little v. Bankers Life & Cas. Co., 426 F.2d at 511; McCorkle v. Department of Transp., 257 Ga. App. 397, 404(4), 571 S.E.2d 160, 167 (cert. denied 2002); but see Foster v. State, 267 Ga. App. 363, 365(3), 599 S.E.2d 309, 312 (2004) ("plain error" in criminal appeals limited to capital cases and cases alleging trial judge intimated opinion of accused's guilt).
[73] Little v. Bankers Life & Cas. Co., 426 F.2d 509, 511 (5th Cir. 1970); Able-Craft, Inc. v. Bradshaw, 167 Ga. App. 725, 727(2), 307 S.E.2d 671, 673-74 (1983).
[74] Litman v. Massachusetts Mutual Life Ins. Co., 739 F.2d 1549, 1557 (11th Cir. 1984); Famiglietti v. Brevard Medical Investors, Ltd., 197 Ga. App. 164, 166-67(2), 397 S.E.2d 720, 722 (cert. denied 1990).
[75] Jackson v. Seaboard Coast Line R.R. Co., 678 F.2d 992, 1021 (11th Cir. 1982).
[76] Dietz v. Consolidated Oil & Gas, Inc., 643 F.2d 1088, 1095 (5th Cir. 1981).
[77] Preferred Risk Ins. Co. v. Boykin, 174 Ga. App. 269, 271, 329 S.E.2d 900, 903 (cert. denied 1985).
[78] Perez v. United States, 22 U.S. (9 Wheat.) 578 (1824).
[79] Perez v. United States, 22 U.S. 578.
[80] United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971).
[81] Illinois v. Somerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973).
[82] United States v. Dinitz, 424 U.S. 600, 96 S.Ct. 1975, 47 L.Ed.2d 267 (1976).
[83] Compare Leonard v. State, 275 Ga. App. 667, 668-69, 621 S.E.2d 599, 600 (2005) ("manifest necessity" present; hung jury), with Haynes v. State, 245 Ga. 817, 818-19, 268 S.E.2d 325, 327 (1980) (mistrial on defendant's own motion not barring retrial), citing United States v. Dinitz, supra at fn. 83.
[84] See §4 supra; also Alexander v. State, 279 Ga. 683, 685(2-a), 620 S.E.2d 792, 794-95 (2005) (abandonment by inaction); Jones v. State, 280 Ga. App. 287, 291, 633 S.E.2d 806, 809-10 (2006) (motion for mistrial must be contemporaneous).
[85] Fed.R.Civ.P.51.
[86] Uniform Superior Court R.10.3.
[87] Johnson v. Bryant, 671 F.2d 1276, 1281 (11th Cir. 1982); see §4 supra for discussion of plain error rule; see also Jones v. State, 280 Ga. App. 287, 291(4), 633 S.E.2d 806, 810 (2006).
[88] Rodrique v. Dixilyn Corp., 620 F.2d 537, 540 (5th Cir. 1980). Note, however, that this remedy only applies in Georgia in a capital case, e.g., Foster v. State, 267 Ga. App. At 365(3), 599 S.E.2d at 312 (plain error in criminal cases limited to capital cases and cases where trial judge intimates an opinion as to the defendant's guilt).
[89] Rodrique v. Dixilyn Corp., 620 F.2d at 540 n.5.
[90] F.R.Civ.P. 51; see also Osterhout v. State, 266 Ga. App. 319, 322, 596 S.E.2d 766, 770 (2004).
[91] Lang v. Texas & Pacific Ry. Co., 624 F.2d 1275, 1279 (5th Cir. 1980).
[92] Pittman v. State, 273 Ga. 849, 850-51 & n.2, 546 S.E.2d 277, 279 (2001).
[93] Central Progressive Bank v. Fireman's Fund Ins. Co., 658 F.2d 377, 381-82 (5th Cir. Unit A 1981); O.C.G.A. §9-11-49(a); Mitchell v. Southern General Ins. Co., 194 Ga. App. 218, 221(8), 390 S.E.2d 79, 82 (cert. denied 1990).
[94] Stancill v. McKenzie Tank Lines, Inc., 497 F.2d 529, 534-35 (5th Cir. 1974); see Ray v. Stinson, 254 Ga. 375, 329 S.E.2d 502(1985); Rosenberg v. Mossman, 140 Ga. App. 694, 697, 231 S.E.2d 417, 420 (reh. denied 1976).
[95] Rosenberg v. Mossman, 140 Ga. App. at 697, 231 S.E.2d at 420.
[96] Stancill v. McKenzie Tank Lines, Inc., 497 F.2d at 535.

Remarks by Charles J. Driebe *continued from page 11*

case that said the Supreme Court of Georgia has the inherent constitutional authority to regulate the practice of law and that the vehicle for doing that is the State Bar of Georgia. And I have to tell you, that is one of my fondest and perhaps proudest moments in the practice -- it's kind of bad when your proudest achievement was almost 40 years ago, but what can I do about that. And that's the story of a general practitioner who has been unusually blessed.

At any rate, I consider this particular award to be is a recognition of general practitioners everywhere in Georgia. I hope that you'll continue that tradition. We maybe ought to give two general practice awards because general practice lawyers are typically in two categories: In small firms or in a solo situation. They don't have the resources, if you will, to ascend to the highest leadership positions in the State Bar. It's very difficult for a small firm lawyer to move up the ranks of the State Bar, but we still participate and we do a good job we believe.

This participation in both the State Bar and the American Bar Association needs to be continually encouraged. The recognition exemplified by this Award does exactly that. I'm honored, I'm humbled, by today's recognition. Thanks to the Section for this award.

Please forgive us....

Due to a computer glitch we are reprinting in it's entirety the introduction of Jimmy Franklin (Tradition of Excellence Award Recipient 2006) by Rebecca Franklin. We are very sorry that only part of the speech appeared in the magazine. Our apologies Rebecca.

Good morning. It's my pleasure to introduce the next and last honoree of this year's Tradition of Excellence Award, Jimmy Franklin. I have to begin by saying that he was sitting next to me yesterday at the Bench and Bar Seminar, and sitting on the other side of me was Court Appeals Judge Ruffin. Judge Ruffin leaned over and he asked, "Are you related to that guy?" I said, "Yes." Judge Ruffin then said, "He must be your grandfather." But, actually the next recipient is instead my father, Jimmy Franklin. And again, I am honored to introduce him today.

I apologize that I'm nervous. It's intimidating for a young lawyer to speak to this group of distinguished lawyers and judges. I am, by far, the least experienced trial lawyer in this room, and I'm not near as funny as Judge Hunt. But, I do think that I am qualified to introduce my Dad; because, after all, I've known him my entire life.

But his journey leading up to this award began long before I was born. You know, kids often think that their parents didn't have any life before they were born, but looking at my Dad's resume and talking to some of these folks here, I realize that he actually did have a life B.C. – "Before Children."

He was born and raised Statesboro, Georgia. After high school, he went away to college, to Georgia Tech. There he earned a bachelor's degree in industrial engineering, which is still hard for me to believe because he can't program a VCR or DVD player, but this is in 1962, so I don't think that they had DVDs or VCR's for that matter. But, anyway, he graduated from Georgia Tech on a Friday and then began law school the following Monday in Athens, where he was president of the -- I think first president -- of the UGA Law School Student Bar Association.

In those days, apparently you could take the Bar Exam after your second year of law school which he did. He passed the Bar and started his own practice during his third year of law school, which amazes me because during my third year of law school I spent most of my time sitting outside at "Son's Place" - which is a place many of you know - where I was definitely *not* practicing law and instead just enjoying being a student. But, in Dad's third year, he started his own practice with one partner. After they graduated, they paid their debts and split their profits which was only enough money for a few steaks and a case of beer. Dad says that to this day that law firm was one of his most profitable partnerships.

After he graduated, he went into the military for a couple of years and then came back to Statesboro and started practicing law, where he's been since. Several years later he married my mother, who -- few people know -- was actually his next door neighbor as a child. But, luckily, they both went away to college before they returned to Statesboro and got married because my mother was only eight years old when her next door neighbor left for Georgia Tech. So we're glad he waited on that one.

He's spent the last forty years in Statesboro, and during that time, along with my mother, he raised me and my sister. My mother and sister are both here today. You know, he doesn't look like it, and you might not believe it, but my Dad has spent a lot of time attending piano recitals; he's learned to braid hair; he's picked out prom dresses; he's repaired - or more accurately - *paid for* many fender-benders. My Dad has heard about all sorts of objects which his girls purported to have "jumped out" in front of vehicles. Garages have jumped out, trees have jumped out, a boat one time jumped out in front of one of my cars. But, he did all of these things – these "Dad duties" - with a smile on his face. Well, maybe not the boat incident, but everything else he did with a smile on his face.

During this time of raising a family, he's also served as President of the Jaycees, the Rotary Club, and the Bulloch County Chamber of Commerce. He's been heavily involved with Georgia Southern University, and all the while trying to practice a little law – after all someone had to pay for those prom dresses and car repairs.

His list of law related activities is just way too long to detail here. One important achievement to note is that he has continued to be active in the State Bar and served as President several years ago where he earned the nickname "Chain Saw Jimmy."

I am proud to say that my Dad is a Plaintiff's Lawyer. He has represented

both plaintiffs and defendants in the past, but he calls himself a plaintiff's lawyer and a trial lawyer. Dad's often said he spent the better part of his life being called, by one group of folks, a "damn trial lawyer" and by another group of folks a "damn Republican." Throughout his life, he has certainly been a champion for unpopular causes.

He became a staunch Republican in the early sixties, way before it was cool to be a Republican. He supported Republican Bo Callaway for Governor in 1966 and has been supporting Republicans since. He's been a delegate to numerous Republican conventions, a faithful campaign contributor, an election coordinator and campaign chairman for countless Republican campaigns.

Dad even ran for Congress as a Republican in 1982 but I guess he didn't get the memo that it wasn't quite cool yet to be a Republican because that race was unsuccessful. What I remember from that race was that we had these T-shirts with "FRANKLIN" spelled across in top in capital letters and underneath, in smaller letters, it read "For Congress." After the election, his law office printed T-shirts that said "FRANKLIN" with the words, "For Lawyer" underneath. Secretly, I always liked that "FRANKLIN… For Lawyer" T-shirt better. I was only four years old at the time of the race, but even then I was more proud that my Dad was a lawyer than a congressman.

Additionally, my Dad has been nominated for a federal judgeship and also a nominee on the short list to replace retiring Justice Norman Fletcher on the Georgia Supreme Court. While neither of these judgeships panned out, there's a little known fact that he has actually served as a judge in the past. When I was a little girl, instead of playing things like "House" or playing "School," I made my friends play "Court" with me. Of course, my Dad was the natural choice to be the judge, wearing my mother's black robe and all. We tried all types of cases in front of my Dad, but I specifically remember that in the personal injury cases, he never once ruled for the plaintiff. Sure, we had no evidence and ignored the concept of a "burden of proof" but that didn't matter to Judge Franklin. He was going to be fair and follow the law no matter how hard I pouted or batted my eyes. One of the few times as a child that crying didn't work with my Dad was when he was wearing that black robe. I learned a lesson early on that judges don't like crying.

All of these things about my Dad, his CV, his community involvement, his commitment to family make him a perfect person for this award. But it is really the things that aren't on his resume, the stuff that I haven't talked about, the stuff that you can't put on paper that TRULY make him deserving of this award. Mother Teresa once said, "The miracle is not that we do this work, but that we are happy to do it."

As for my Dad, the miracle is not these things that I just listed from his CV, but the fact that he enjoys doing them. As all of you know, the life of a litigator ain't easy. We heard it earlier today, and I don't want to sound like a broken record, but there are many other jobs in this world that require less time and pay much better than being a trial lawyer. But the fact that my Dad still loves his work and has passed that passion on to me – and countless other lawyers - is really is what the Tradition of Excellence Award is about.

Now, in closing, I just recently reread the Hemmingway classic, "The Old Man and the Sea." In light of Dad's award, the book took on a new meaning for me. You will remember that it is the story of a fisherman and his long struggle with a huge marlin. It is a story about courage in the face of both personal triumph and defeat. My favorite passage of the book is when the old man is in the middle of this three-day long struggle with the fish and he says to himself, "Perhaps I should not have been a fisherman…but that was the thing I was born for."

Well, my "old man" has lost and won battles with many of his own fish, literally and metaphorically. There are days when he probably said that perhaps he shouldn't have been a litigator, but he knows, we all know, he was born to be a trial lawyer. I am just glad I've been around to watch him do it. I am proud to introduce my father, Jimmy Franklin.

2007

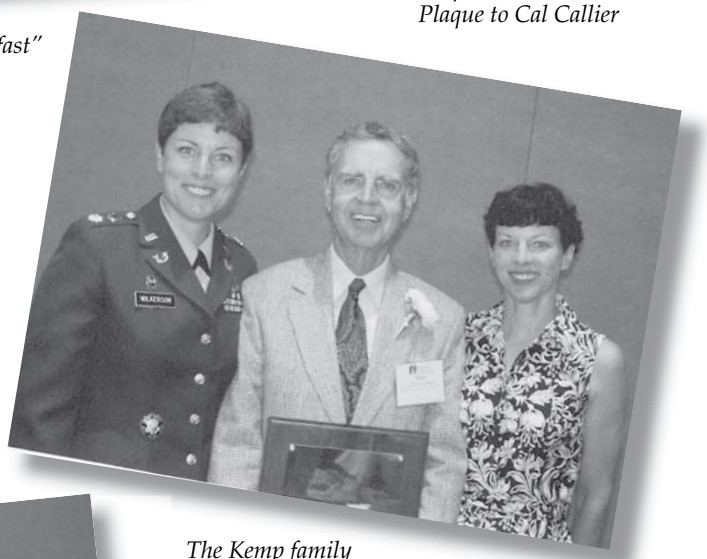
Tradition of Excellence Breakfast and Reception

June 15, 2007 ◆ Sawgrass Marriott Resort and Spa ◆ Ponte Vedra Beach, Flordia

Sold out "Tradition of Excellence Breakfast"

Adam Malone presents the Chairman's Plaque to Cal Callier

Keith C. Martin and Charles J. Driebe

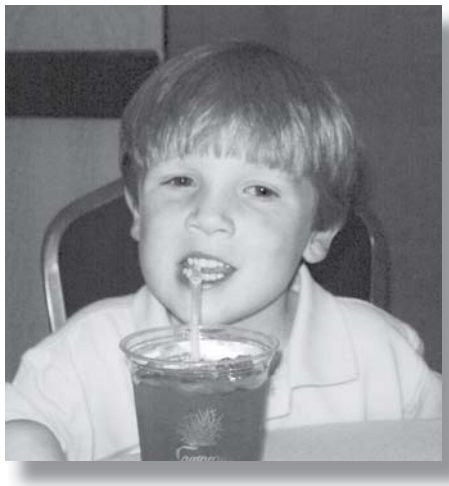


The Kemp family

(l-r) Bill Goodman, Pope Langdale, Adam Malone,Laura Austin and Cal Callier

The Kilpatrick family

and everyone had a great time



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