CALENDAR CALL

GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA

Vol. XXV Spring/Summer 2023 No. 1

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MARK YOUR CALENDAR NOW

for the
22nd Annual
GENERAL PRACTICE
and
TRIAL SECTION INSTITUTE

MARCH 13, 14, 15, 16, 2024
to be held at
Hotel Monteleone
214 Royal Street
New Orleans, Louisiana

Stay after the event for St. Patrick's Day on March 17!!!

Chairman: Wm. Parker Sanders

CALENDAR CALL

"Georgia's Largest Law Firm"

GENERAL PRACTICE AND TRIAL SECTION STATE BAR OF GEORGIA

Vol. XXV Summer/Fall 2023 No. 1

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 Gregory C. "Greg" Sowell, One Press Place, Suite 200, Athens, GA 30601 or by email to gsowell@jamesbatesllp.com.

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FROM THE EDITOR'S DESK

Gregory C. Sowell

Abbey Patterson

Devin Hartness Smith

Welcome to the latest issue of *Calendar Call*. This has been a year of transition for our Section and for our publication. A little over a year ago, our long-time Executive Director Betty Simms passed away. Many of you knew her, or at least saw her and spoke to her at one of our events. She seemed to know everyone and everything related to our Section. We miss her. We miss her friendship. And, we miss her institutional knowledge.

To step into Betty's role, we welcome Abbey Patterson as our new Executive Director. As our Chairman Parker Sanders noted in his message, Abbey has hit the ground running and is doing an excellent job.

In another transition, after many years of faithful service to the Section, Dave Sleppy stepped away as Editor of Calendar Call and his colleague Becky Payne likewise stepped away as Co-Editor. They were both extremely helpful to me in my first year as Co-Editor alongside of them, and I hope that we will continue to carry forward their quality work.

Joining me as Co-Editor is Devin Hartness Smith. Devin is a first-rate lawyer with a sharp mind and wit to match, and she refuses to be outworked by anyone. Her undergraduate degree is in journalism from UGA, and she spent time on the staff of *Southern Living* magazine before going to law school. I am fortunate to have her working with me on our Section's magazine.

I hope you will enjoy this issue. In these pages, we celebrate our most recent Traditions of Excellence Award recipients; we are reminded of both our annual Meet the Judges event at the mid-year Bar meeting and our Spring Seminar on trial techniques; we meet Judge Ben Land and get his perspective on lawyers from his vantage point first as a trial lawyer himself, and then on the Superior Court bench, and now on the Court of Appeals; we learn about death claims in workers' compensation cases from Preston Holloway and Jordan Brown; Matt Maguire tells us about an exception to the rule against remote damages; and we get the first installment of what I hope will be a continuing feature--perspective and comments on the practice of law from one of our prior Traditions of Excellence winners. Our inaugural interview is Ed Tolley. Ed is well- known around the state as both a civil and criminal litigator, and I am sure that you will benefit from his insights.

We welcome the submission of articles on topics of interest to Section Members. If you have any questions, or if you are interested in submitting an article, please call me or email me at gsowell@jamesbatesllp.com.

Message to the Membership From the Chairman

Wm. Parker Sanders

Around the turn of last year, we lost our longtime Executive Director, Ms. Betty Simms. She ran our Section seamlessly and kept our leadership focused on moving ahead. We've recognized Betty at our events since we lost her, and so once again we remind everyone of her never-failing contributions and just how much we still miss her.

As a result of losing Betty and the pandemic, we've spent a good portion of our time rebuilding. We could not have done this without tireless support from Ms. Mary Jo Sullivan and Mr. Lane Sosebee of the State Bar. In the first quarter of 2022, they helped interview candidates to replace Betty. Not only were we fortunate enough to find Ms. Abbey Patterson, but Mary Jo somehow persuaded her to accept our offer.

And oh, what a godsend Abbey has been. Since taking over, Abbey has proved herself to be a quick study in the art of managing stubborn lawyers, planning board meetings, tracking board-member terms, and hosting CLE and social events. She's also gone a long way towards filling Betty's big shoes. As a result of Abbey's attention to detail, we're pleased to report that over the last year the Section has finally begun to return to its historical rhythms.

But as times have normalized, the Section's leadership has deliberately decided to resonate on slightly different frequencies. As a result of losses incurred by the pandemic, we've tried to improve the Section's finances. We cancelled our office lease at the State Bar to stop paying rent for unused space, and with the help of Mr. Rob Register, we reconfigured the Jury Trial Seminar and to offer both in-person and virtual attendance options, which promoted attendance and generated funds for other initiatives. We also combined our Tradition of Excellence Awards Ceremony with a cocktail reception to follow immediately afterwards, which should be more efficient, convenient, and festive for award recipients and their families.

Our other events also have been a success. With Lane's constant e-mail promotions to membership, we saw a record attendance at our Meet the Judges Luncheon, during which Mr. John Manly entertained a packed room and facilitated the program flawlessly. Our Immediate-Past Chair, Ms. Zahra Karinshak organized and chaired our well-attended General Practice and Trial Institute, which occurred at a new location on Jekyll Island. Our editor, Mr. Greg Sowell has done a fine job with this publication.

For next year, we have finalized plans to host the General Practice and Trial Institute for the first time in New Orleans. It will be at the top of Hotel Monteleone, on Royal Street, from March 13-16, 2024. The day after the event ends is St. Patrick's Day. So mark your calendars to join us for CLE in the tallest building in the French Quarter and to stay an extra day for the green parades through the Irish Channel!

In closing, our Section strives to offer something special. We have a proud history of dedicated service by prominent judges and attorneys and offering outstanding articles and CLEs received by a diverse membership ranging the State. We are, however, only as good as our current volunteers, and we take these final words to thank them for everything they do. If you're interested in pulling on the oar and enjoying our fellowship, please don't hesitate to reach out. Opportunities abound, and we promise to welcome you graciously, with open arms.

Tradition of Excellence Award

Katherine L. "Kathy" McArthur
PLAINTIFF

Katherine L. "Kathy" McArthur has more than 40 years' experience representing clients who have been severely injured or killed as the result of the negligence of others. She focuses her practice on serious personal injury and wrongful death cases caused by car wrecks or medical malpractice. McArthur is AV-rated by Martindale-Hubbell, Board Certified by NBOTA, and is a past president of the Georgia Chapter of ABOTA and the William A. Bootle American Inn of Court.

She has served as lead and co-counsel on numerous cases resulting in verdicts and recoveries for her clients in excess of $1 million. McArthur has been designated by her peers as one of the Top 10 attorneys in the state of Georgia across all fields of law in 2018-2021.

She graduated Phi Beta Kappa from the University of North Carolina in 1976 and received her J.D. from the University of North Carolina in 1979.

McArthur is married to Waldo E. Floyd III, M.D. She has two daughters: Lindsey Macon (32), who joined the McArthur Law Firm's Atlanta office as an attorney in 2019, and Holly Stephens (28) a public defender in the Brunswick Judicial Circuit.

Acceptance speech

Thank you, Lindsey, for that wonderful introduction! How lucky am I to have my daughter practice in the law firm with me and be here with me this morning to give that introduction—it doesn't get much better than that!

I'm also lucky to have my other daughter, Holly Stephens, here with me, who is also a lawyer and is a public defender in Brunswick, Georgia. I am completely blessed to have two daughters who have followed me into the practice of law!

I would like to thank the General Practice and Trial Section of the Bar for this wonderful and meaningful award! It is a great honor to me to receive this award, along with the other honorees, Gino Brogdon, Tony Cochran, and Judge Timothy Walmsley. It is my great privilege to have been selected with this group of honorees! I would also like to thank Jeff Helms and Lindsey Macon for nominating me.

I grew up in Wilson, North Carolina, a town of 35,000 people, and our family business was a small, 18-room motel that was open 24/7. Serving people was everything in that business, and I learned more about customer service, cleaning rooms, making beds, and adjusting television sets than I did about any profession. In fact, I didn't ever meet a lawyer, that I was aware of, until after I was in law school. I'm not one of those who grew up knowing that they wanted to be a lawyer or who had lawyers in their family. I'm the first!

Back in 1976, I can recall my parents having a discussion about whether my father would give me the same $1,500 graduation gift from college that he had given my brother, Pat, ahead of me. My mother was insisting that I needed it to go to law school, and my father said, "my daughter is not the type of woman who would be a lawyer!" Needless to say, I got the $1,500! My point in sharing that is to say that female trial lawyers have come quite a long way, and have overcome a number of obstacles and stereotypes over the last four decades.

I didn't know that I wanted to be a lawyer even when I was in law school or what type of law I wanted to practice. I graduated from law school at the University

of North Carolina and went with my husband at the time from Chapel Hill, North Carolina to Milledgeville, Georgia, where he had been hired at Georgia College as a political science professor. I got a job in Macon with Carl Reynolds at what was then called Mullis, Reynolds, Marshall, Horne & Phillips. I did whatever came in the door that no one else wanted, but it soon became clear that Carl needed help with his growing personal injury and wrongful death trial practice.

Carl Reynolds took me on, trained me, and made me his side-kick, right arm on his trial practice. We tried cases all over the United States, and it molded me into the trial lawyer that I have become today. I cannot thank him enough for the opportunity that he gave me. Of course, I put a lot of hard work into that opportunity. If I had to say anything about the success I've had in my practice, it would be due to the opportunity Carl Reynolds gave me, and my following the Malcolm Gladwell principle of putting 10,000 hours very quickly into my profession to become as proficient and as expert as I could possibly be. I have made up for lack of talent at story telling and imagination by outworking those opposite me and around me. There is no substitute for a strong work ethic.

I have been very blessed to be in the presence of and trained by excellent attorneys, and I am currently blessed with being in the practice of law with five excellent attorneys who are all here with me today. I would like to ask them to stand at this time and be recognized! The Tradition of Excellence Award would not have been possible without their efforts and the efforts of my whole firm. Our trial successes are always a team effort rather than an individual effort. I may be the leader of the team, but a team effort is what creates a successful outcome!

Thank you to my firm, thank you to my husband Waldo and the rest of my family, and thank you to the Section. I'll end with saying what my brother, who is the clerk of court in Chowan County, North Carolina, said when he received an award recently--that it has been his practice over his 45-year career to do the right thing, for the right reason, the first time; and when I heard that, I thought, "you know, that about sums it up." That creates a tradition of excellence, and that, I believe, is why I am standing here today. I've tried to do the right thing for the right reason, the first time for the last 43 years!

Thank you!

Tradition of Excellence Award

Hon. Timothy R. Walmsley
JUDICIAL

Hon. Timothy R. Walmsley was appointed to the Superior Court of the Eastern Judicial Circuit in February 2012 by Gov. Nathan Deal and was elected to a full four year term in May 2014.

Prior to joining the Superior Court, he served as counsel to the Chatham County Board of Tax Assessors, part-time judge in the Magistrate Court of Chatham County and as a partner in the Savannah office of Hunter, Maclean, Exley Dunn, P.C., where he specialized in commercial and real estate litigation. While on the Superior Court, Walmsley has managed a full caseload and presided over the Court's Major Crimes Division for three years.

Walmsley received a B.S., with honors, in Environmental Studies in 1991 from Allegheny College and his J.D., with honors, along with a Certificate in Environmental Law from the Tulane University School of Law in 1996. He is actively involved in the State Bar of Georgia and the Council of Superior Court Judges. In May 2020, Walmsley was appointed to preside over the trial of three men accused in the death of Ahmaud Arbery in Brunswick. During that same period he, along with his fellow judges in the Eastern Circuit, managed the continuation of court in Chatham County through all of the disruptions associated with the COVID-19 pandemic.

Walmsley was born in Durban, South Africa, and settled with his family in Rochester, New York. He has lived in Savannah for 26 years with his wife, the former Alison Rae Rodgers of Lafayette, Louisiana, with whom he has two children, Adler (16) and Gavin (14).

Acceptance speech

Good morning and thank you. What an honor to be up here with my fellow award winners. Every one of them is a force in their own right, a leader in our profession, and highly deserving.

On November 1, 1996 I was sworn in as a Georgia Lawyer by my predecessor, Judge Perry Brannen. I was new to Savannah having moved from New Orleans earlier that year with my dear wife, Alison, who is here today along with my boys, Adler and Gavin. Before we get too far down the path today, I want to recognize them and acknowledge the joy that they bring in my life. They keep me centered; Alison who has her own successful career, is happy to remind me that the trash needs to be put out and that not everyone stands when I walk into a room. My boys are true joys in my life and although it may drive them crazy, I try and stay as engaged as I can because I realize time is fleeting.

You see sometimes we forget, as lawyers and judges, that there is a life out there beyond the law and the hours it takes to do what we do. I am regularly contacted by students and others asking to come sit in the courtroom or otherwise observe a day in the courtroom. I tell them that what they see is just a snapshot of what we do and that a lawyer's inventory is his, or her, time. With that being the case, having others around you to ground you and guide you is a blessing – we should all do the duty that lies most near – and that should invariably include quality time with you family.

To say I am honored by this

award is an understatement. The past recipients are a who's who of lawyers and judges in this State who have made a difference both professionally and personally. To be in the company of judges such as Judge Alaimo, Justice Carley, Justice Benham (just to mention a few) is humbling … as is the fact that there appear to have been only two previous recipients from Savannah (Paul Painter Jr won the defense award in 1996 and Jim Pannell won the general practice award 2018) and despite the strength of the bench in the Eastern Judicial Circuit no other judge from Savannah has received the award.

Now … I knew a lot of people were watching the Arbery trial, and what I have now come to appreciate is how many people that case touched. I have received comments and correspondence from all over the world since my return from Glynn County. Of note are the number of messages I have received from people remarking on their concerns about how the case would be tried and, for some, their new found faith in our justice system. This should not be surprising given all of the racial justice conversations that
this case, along with others, have triggered in recent years. But, as a judge with a commitment to the rule of law these comments have hit hard. As did the narratives that were being pushed, that a case like the Arbery matter could not be tried in South Georgia. We saw during the trial attempts by many different interests to control the story and raise passions that had no place in the court. So there lies the challenge – how do you manage a trial where many are skeptical, others have separate agendas, and others might be looking to celebrate failure.

In the eye of that hurricane you fall back to the basics. When I say the basics, I mean the character builders that were taught me by my mother who has always been another strong influence in my life, they included:

1. Always trust your instincts
You didn't just muddle into this situation. You have experience, solid training and great mentors. So, if something doesn't feel right, it probably isn't.

2. Don't just meet expectations, exceed them
I think this is self-explanatory. Don't cut corners … do the work required to satisfy not just yourself, but everyone, that decisions are well thought out and properly researched.

3. Act with integrity
Again, I knew a lot of people were watching and that there was some mistrust in the system due to the path the case took to get into court. With all of the competing interests focusing in on the courtroom I felt it was imperative that there be no question as to the integrity of the court. Everything was managed to encourage transparency.

4. Don't do everyone's job – just do your job well
I am the judge, but there are a lot of other critical functions that make the court run. There is the clerk, the court reporter, the sheriff, his deputies, IT, facilities and maintenance, the DA, defense counsel and all of their staff. If you try and micromanage all of those functions you can't help but fail. Instead, I focus on the court's core function which is to create an environment where we can conduct a fair trial. Bottom line is you create rules and expectations and trust the other professionals will do their job.

5. Express appreciation to someone that helps
I have a great staff who have for the most part been with me the entire time I have been on the bench. Some are here today. Without these individuals I could not do my job. This is particularly true in a high profile case like Arbery. I have thanked them, but want to publically thank them again for their hard work and the effort they made to ensure that we had a fair and transparent trial.

6. Listen first, talk second
When you walk into a room and see two people and they look like they are talking, note who listens, because they are generally the one more willing to learn. I would like to believe I am a listener. It's a character trait that has served me well and one that has helped shape my judicial philosophy.

The environment that these traits produced was obviously appreciated. However, unfortunately, that environment was seen by many as the exception, not the rule. This is the challenge we face as lawyers and judges, and this award is a clear message from the Bar that we as a profession embrace the rule of law and know that when the system is given an opportunity to work, the result
breeds confidence in the institutions we hold so dear.

Again, thank you … I am honored by this award.

Tradition of Excellence Award

Anthony L. "Tony" Cochran
DEFENSE

Anthony L. "Tony" Cochran is a partner in the litigation practice of Smith Gambrell Russell, LLP. During the 45 years he has been practicing law in Atlanta, Cochran has tried dozens of jury trials in many areas of the law, bench trials, administrative and regulatory hearings, and medical peer review hearings at hospitals. In 2005, he was inducted into the American College of Trial Lawyers. Cochran is active as a yoga instructor, teaching several classes each week. He also served for many years as former chair and director for the Zaban Paradies Center which assists homeless couples obtain housing and employment. Cochran regularly appears on continuing education panels, speaking at a large number of seminars on a variety of topics, including the application of *Daubert* to expert testimony, and a host of topics spanning from representing physicians to TROs. He has also served as an adjunct faculty member of the Emory University School of Law from 1986-2000, and editor of *The Litigator*, the newsletter of the Litigation Section of the Atlanta Bar, for several years. Cochran graduated *magna cum laude* from Northwestern University Law School in 1976, beginning his legal career in Atlanta with the firm Powell, Goldstein, Frazer Murphy. From 1982-85, he served as an Assistant U.S. Attorney for the Northern District of Georgia.

Acceptance speech

I have been blessed with many great mentors and teachers.

My first mentor was my Dad. When I was a boy, my Dad used to read to me at night. I can still hear his voice. He loved to read from the Book of Ecclesiastes.

"… the race is not to the swift, nor the battle to the strong, … ; for time and chance happens to us all."

I can't count the number of times over my years as a lawyer I have seen the wisdom in those words.

Perhaps the greatest lesson I ever learned from my Dad was after he died and hundreds of letters poured in from former students at the University where he worked telling us how much they appreciated his help, his guidance, and his encouragement.

That is what mentoring is all about – helping others the way you've been helped, or would have liked to have been helped. None of us got where we are by ourselves.

My first job was a legal secretary and go-fer for the law firm of English, Lucas, Priest, Owsley in my hometown of Bowling Green, Kentucky. Charlie English, Jim Lucas, Wayne Priest and Mike Owsley were wonderful mentors who taught me that the practice of law is a calling to help others. I was so fortunate to have known them at the start.

Mentoring is leading by example to exemplify that the greatest reward as a lawyer is helping others solve life's problems.

But, that doesn't happen all by itself. Being a good mentor means being thoughtful, and caring about others.

Nick Chilivis – another one of my mentors – always had his door open to answer questions and to help solve problems. He set a good example by freely giving of his time and attention.

Nick had a piece of advice I've always remembered: "Don't make a decision until you have to; and before you

make that decision, get as much information as you can."

Daryll Love showed me how to try a case to a jury. I can still hear Daryll. "When you win, you didn't do everything right; and when you lose, you didn't do everything wrong. But you learn more when you lose because it hurts." As Dad reminded me, "Time and chance happen to us all."

As young lawyers, Frank Hull set a good example for me. She was a hard-working associate just down the hall from me at Powell, Goldstein, Frazer & Murphy.

Gary Grindler taught me to leave no stone unturned. As Nick would say, "A healthy paranoia is a good trait for a trial lawyer."

John Larkins taught me to be an exhaustive researcher and to craft a written argument – to carefully select your words. "Words are the skin of a living thought."

Bob Castellani reminded me that we've been given a privilege to be a lawyer – We should be respectful of the courthouse as a temple of justice.

Mark Kadish and Alan Baverman showed me how to be innovative and to have fun practicing law. I once tried a case as a prosecutor. Mark and Alan were defending the case. The government's star witness was a federal inmate whose name was Salvatore Boriello.

Mark Kadish got up in his closing argument and said, "Who did the government bring in here as its star witness – none other than one Salvatore Boriello. What did Mr. Boriello tell you?" Mark then got up on the witness stand and did a perfect mimic of Salvatore Boriello, complete with his thick Brooklyn accent. Judge Marvin Shoob was laughing so hard, he had to duck down below the bench.

Justice Charles Weltner and Judge Tom Thrash encouraged me to serve as an Assistant United States Attorney. Steve Cowen taught me that being a prosecutor as an AUSA is an awesome responsibility representing the United States of America. Julie Carnes was a student of the law as an AUSA – she had a file cabinet organized with cases addressing every imaginable legal issue that could arise in a criminal prosecution.

Larry Thompson reminded me that if you really believe in something, you have to step up.

Rick Deane, whose office was next to mine when we were Assistant United States Attorneys taught me, with his example, about professionalism. I can still see Rick's picture in Time magazine as one of the 2001 Top 100 Innovators. Rick has set an example to which we should all aspire.

Harrison Kohler showed me that you can go toe-to-toe in the courtroom and end up being friends.

As I reflect back on my mentors, I am very grateful for all they taught me. I am here today because of them. I didn't get here by myself. I had help, encouragement, and challenges along the way.

As I look forward, I hope to continue to teach younger lawyers. I want to teach them that what we do is solve problems for folks who often are confronting one of the most threatening problems in their lives.

I need to remember, and heed, the advice of Judge Luther Alverson, "The mind can only absorb what the seat can endure."

I want to thank the Committee that selected me. And, of course, I want to thank Emily Ward, Sarah Gordon and Tom Bever for nominating and supporting me, and for being the very best law partners any lawyer could possibly have. I have learned much from them. Tom taught me to craft what we say when speaking in Court. As an older lawyer, you often learn new things from younger lawyers. Emily and Sarah dragged me into the 21st century electronically. Emily sets a wonderful example with her many Bar activities. No one knows court rules better than Sarah.

There are so many lawyers and staff at Smith Gambrell & Russell who I need to thank. I would violate Judge Alverson's rule if I named them all. I owe SGR a debt of gratitude for reinvigorating me with a new home.

Thank you to my children for reminding me not to take myself too seriously, for enduring my long hours at work, and for reminding me to stop digging when I'm in a hole.

Finally, I want to thank my greatest mentor and critic, my wife, Anne, who has had to endure me awakening in the middle of the night worrying about cases or clients, or fretting over mistakes, real or imagined.

The time has come for me to sit down.

Thank all of you for being here.

Tradition of Excellence Award

Hon. M. Gino Brogdon Sr.
GENERAL PRACTICE

Hon. M. Gino Brogdon Sr. is among the most well-known and highly-regarded trial lawyers in Georgia. He was most recently an equity partner at Alston Bird, where he was one of the firm's foremost trial lawyers and was called upon to try complex and high-stakes cases for ome of the firm's largest clients. Immediately prior to joining Alston & Bird, Brogdon served as a judge in Fulton County, Georgia, for nearly a decade, where he presided over complex civil matters and various felony cases.

Before his tenure on the bench, Brogdon—who regularly appears as a legal analyst on CNN—operated a successful plaintiff's practice for four years. He tried cases ranging from commercial disputes to medical malpractice to wrongful death, and obtained seven figure verdicts and settlements on behalf of his clients. Before entering private practice, Brogdon served as a law clerk to Judge William I. Garrard of Indianapolis.

Brogdon is also a highly-sought after mediator. Over the past 10 years, he has successfully mediated numerous cases in most areas of civil litigation, including automobile liability, premises liability, commercial, construction, medical, wrongful death, legal malpractice, employment, aviation and divorce-related matters.

Acceptance speech

I deeply appreciate this Award. My goal is to live a life of significance. "Significance" is what you do for others. A rich person is a grateful person. If you are not grateful, then you are truly poor.

Thank you again for this Award.

A Little Known Exception to the Rule Against Remote Damages

J. Matthew Maguire, Jr.
Parks, Chesin & Walbert, P.C.

Matt Maguire is a partner at Parks, Chesin & Walbert, P.C. For more than 25 years, he has represented businesses and individuals in all manner of disputes arising from business and real estate transactions, employment relationships, and public procurements. Matt is a former Chair of the Litigation Section of the Atlanta Bar Association.

I was working away in my office a few years ago when an old lawyer friend called me to ask if I had ever heard of O.C.G.A. § 51-12-10. I pulled it up on Westlaw while we were talking and was surprised that I had never heard of it before:

> **§ 51-12-10. Exception to rule as to remote damages:** When a tort is committed, a contract is broken, or a duty is omitted with knowledge and for the purpose of depriving the plaintiff of certain contemplated benefits, the remote damages occasioned thereby become a proper subject for the consideration of the jury.

One look at the six or seven annotations showed me that I was not alone in my ignorance of this statute, which has been around since 1863. I was intrigued. I became even more intrigued when I learned why my friend was calling to get me involved in an interesting case. His client was a general contractor that had allegedly withheld payments from a subcontractor on a large commercial development. The subcontractor filed a breach of contract action seeking not only the withheld payments, but also many millions of dollars representing the value of the subcontractor's business based on the claim that these withheld payments caused the subcontractor's business to fail.

My first reaction was that anytime you withhold funds from another, you are acting intentionally and for the purpose of depriving the other person of the benefit of those funds. If I am unhappy with the work that my contractor is doing on my house, I act intentionally to withhold payment from him but this surely does not mean I have exposure to a claim for remote damages. After the general contractor hired me as co-counsel, I made that exact argument to a Fulton Superior Court judge, and it landed with a resounding thud. Motion denied.

As a lawyer who just as often represents plaintiffs, I embraced § 51-12-10 like a new friend on the playground—amending pending complaints left and right to assert remote damage claims. Having spent more time briefing the issue, I now know that the statute is as powerful as I had initially believed but it is a valuable tool that many experienced lawyers know nothing about. To appreciate § 51-12-10's value, we must understand what remote damages are in the first place. The best place to start is the Georgia Code:

> **O.C.G.A. § 13-6-2. Damages Contemplated by Parties:** Damages recoverable from a breach of contract are such as arise naturally and according to the usual course of things from such breach and such as the parties contemplated, when the contract was made, as the probable cause of the breach.

O.C.G.A. § 13-6-8. Remote or consequential damages: Remote or consequential damages are not recoverable unless they can be traced solely to the breach of the contract or unless they are capable of exact computation, such as the profits which are the immediate fruit of the contract, and are independent of any collateral enterprise entered into in contemplation of the contract.

O.C.G.A. § 51-12-8. Damages too remote, when: If the damage incurred by the plaintiff is only the imaginary or possible result of a tortious act or if other and contingent circumstances preponderate in causing the injury, such damage is too remote to be the basis of recovery against the wrongdoer.

O.C.G.A. § 51-12-9. Rule to Ascertain Remoteness: Damages which are the legal and natural result of the act done, though contingent to some extent, are not too remote to be recovered. However, damages traceable to the act, but which are not its legal and natural consequence,

continued on next page

> are too remote and contingent to be recovered.

In classically circular fashion, the Code says that remote damages are not generally recoverable because… they are remote. We know from caselaw that damages are remote if they were not within the contemplation of the parties when they signed the agreement or if they are not the legal and natural result of the act done. *See, e.g., Molly Pitcher Canning Co. v. Cent. of Ga. Ry. Co.,* 149 Ga. App. 5, 11 (1979) ("The rule against the recovery of vague, speculative, or uncertain damages relates more especially to the uncertainty as to cause, rather than uncertainty as to the measure or extent of the damages.") The caselaw also provides helpful examples of the types of damages that courts have found to be remote. For example, mental distress damages in a breach of contract action are too remote because they were not "naturally in the contemplation of the parties at the time of the making of the contract." *Howard v. Cent. of Ga. Ry. Co., 9 Ga. App. 617 (1911).* And lost profits are too remote in a breach of contract action if the plaintiff has no history of profitability. *Johnson Cnty. Sch. Dist. v. Greater Savannah Lawn Care,* 278 Ga. App. 110, 112–13 (2006) (lost profits are only recoverable if they are the legal and proximate result of the breach, they are based on a proven "track record" of profitability, and they may be calculated with a reasonable degree of certainty (albeit not mathematical precision)).

Based on these holdings, we can conclude that if a breach of contract plaintiff can satisfy the requirements of § 51-12-10, he or she might be able to recover mental distress damages or lost profits for a new venture. There are no such holdings in Georgia. The closest I could find was where a plaintiff recovered lost profits under § 51-12-10 that were arguably not the legal and natural consequence of the act. In *John D. Robinson Corp. v. Southern Marine Indus. Supply Co.,* plaintiff's employee went to work for a competitor (the defendant) and then got the bright idea to send a disparaging letter to his former employer's customers. 196 Ga. App. 402, 407 (1990). In its libel claim, the plaintiff sought lost profits but failed to prove that any of the letter recipients would have continued doing business with plaintiff if they had not received the letter. *Id.* This would seem fatal to a lost profits claim in a garden-variety breach of contract case, but the court awarded them under § 51-12-10 because the employee had acted maliciously and with the intent to cause plaintiff to lose customers. *Id.*

The *John D. Robinson Corp.* holding makes sense because the employee's tortious conduct was so obviously calculated to impair the plaintiff's customer relationships that it is difficult to conceive of any good faith motive. The same was true in a federal case involving a salesman's claim that the defendant had converted his sales records thus preventing him from collecting payments from his customers. *Richards v. Int'l Agric. Corp.,* 10 F.2d 218 (N.D. Ga. 1926). In ruling for the plaintiff, the district court clearly articulated how § 51-12-10 requires proof that the defendant intended not only the act, but also consequences of the act:

> If, in point of fact, the information in the book was necessary to the plaintiff to make his collections, and was known to the defendant to be, and with a purpose of defeating the collections the information was wrongfully withheld, it cannot be said that the failure to collect which arose from that cause was too remote to be recoverable damages. A result intended by a wrongdoer cannot be remote.

Id. at 219. *See also Bankers Health Life Ins. Co. v. Fryhofer,* 114 Ga. App. 107, 114 (1996) ("A result intended by a wrongdoer cannot be remote") (citing what is now O.C.G.A. §§ 51-12-9 and 51-12-10).

Going back to my contractor example, if I withheld payment because I knew it would cause the contractor to default on his office lease and suffer an eviction from his building, then under the above holdings, I could be liable for lost business occasioned by his eviction. On the other hand, if I withheld payment because I was unhappy with the workmanship (even if a jury later found it to be adequate), I would only be liable for the contractor's direct contract damages and not his eviction-related damages. The Court of Appeals illustrated this principle in *Whiteside v. Decker, Hallman, Barber Briggs, P.C.,* in which a former client accused a law firm of breaching fiduciary duties that resulted in an excess judgment against the client. 310 Ga. App. 16 (2011). The Court of Appeals rejected the client's claim for remote damages under § 51-12-10 because there was no evidence that the law firm intended to expose the client to an excess judgment. *Id*. at 20 ("Even assuming Decker Hallman knowingly violated fiduciary duties, as alleged, there was no evidence that any violation was for the purpose of imposing an excess verdict on Lucio-Amaya.")

These cases support the rule that recovery of remote damages requires specific intent to cause a specific harm. Although the Court of Appeals decision in *Slater v. Russell* seems on first reading to be in conflict with this rule, closer examination reveals that it is consistent. 100 Ga. App. 563 (1959). In *Slater*, a lawyer sued his former client to recoup a legal fee in a divorce matter after the client terminated the relationship and retained new counsel. The fee was to be 100% of the net earnings of a company in which the client held an interest. *Id.* at 564. The client testified that she terminated the lawyer because she felt he was not looking out for her interests. The Court found for the lawyer because

> [t]he defendant's motive in breaching the contract with the plaintiff was to prohibit him from recovering fees which he would earn under the contract and under [what is now § 51-12-10] the mere fact that such fees are contingent upon the profits of a going business concern does not prohibit the plaintiff from recovering *damages* for the breach of the contract, the damages being what the contract was worth to him.

Id. at 568 (emphasis in original).

Slater seems to be in conflict with the prior holdings because it purports to allow recovery under § 51-12-10 where the defendant withheld payment because of dissatisfaction with the quality of the services rendered. But the last sentence in the quoted passage above emphasizes that the damages the lawyer was seeking in *Slater* were not remote at all; they were direct damages representing the benefit of the lawyer's bargain under the fee agreement. Id. See *also Mitchell Assocs., Inc. v. Glob. Sys. Integration, Inc.*, 356 Ga. App. 200, 202 (2020) ("In a breach of contract action, lost profits are viewed as direct damages where those profits 'represent the benefit of the bargain (such as a general contractor suing for the remainder of the contract price less is saved expenses.'") Thus, the *Slater* court's only sin was to apply § 51-12-10—the exception to the rule against remote damages—to a case that did not involve remote damages in the first place.

In conclusion, my initial concern that § 51-12-10 would transform every run-of-the-mill breach of contract action into an opportunity for a plaintiff to recover remote damages was unwarranted. The appellate courts in Georgia have faithfully limited the statute to only those cases in which the defendant evidenced a specific intent to cause the plaintiff harm. But even so, a claim for § 51-12-10 remote damages certainly has the potential to broaden the scope of discovery significantly and therefore can be a valuable tool for the plaintiff. For example, in the case involving the subcontractor payment dispute discussed above, the subcontractor used § 51-12-10 to successfully compel the general contractor to produce reams of subcontractor payment records from unrelated jobs under the theory that the general contractor had a practice of underbidding its jobs and then inventing reasons to short pay the subcontractors in order to meet budget. Without the § 51-12-10 claim, discovery would more likely have been limited to only the one project.

Death Valley: Defending Death Claims in Workers' Compensation

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Preston Holloway is a partner at Swift, Currie, McGhee & Hiers, LLP. For more than ten years he has defended workers' compensation claims on behalf of employers, insurers, self-insureds and third-party administrators in Georgia.

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Generally, the workers' compensation process is viewed as a step-by-step path for returning injured employees to the workforce. As we know, sometimes the employee may return to the workforce under another employer if a settlement occurs within their claim. Other times, the claimant receives the treatment necessary to effect a cure, give relief and return the employee to suitable employment with their current employer. Despite this typical scenario, some workers' compensation claims do not result in the employee returning to work at all. Unfortunately, in some cases, the workplace injury results in the death of the employee.

Once this occurs, we are thrown into a new arena of workers' compensation — Death Benefits — and navigating this arena can be tricky. Common questions arise such as: Who is eligible to file a claim for death benefits? When can such a claim be filed? What is the standard of proof of death claims? The biggest question is: How much are we obligated to pay upon a compensable death claim and for how long? Throughout life, unpredictable outcomes occur more often than we assume. As such, it is imperative for employers and insurers to gain a sense of direction in navigating these particular cases. This paper seeks to provide a go-to roadmap on workers' compensation death claims, and how employers and insurers can be prepared for when these claims arise.

Even though death claims arise when the employee passes away as a result of their workplace injury, the burden remains on the claimant — in these cases, the *eligible* surviving family members — to prove compensability and entitlement to benefits. The Workers' Compensation Act (the Act) provides for the payment of benefits to dependents of a deceased employee where the death was caused by "an accident arising out of and in the course of their employment."[1]This requirement follows the same framework of compensable claims filed by the employee themselves. As such, proximate cause must be proven; the claimant will have to show that the employee's death directly resulted from the injuries sustained in the workplace accident.[2] Once the claimant or claimants prove their entitlement to death benefits, their entitlement is not infinite. The Act provides limitations on the amount and duration of death benefits to protect employers and insurers from a never-ending obligation.[3] Having established the standard used in determining compensable death claims, we will address who is eligible to file a death benefit claim against employers and insurers.

WHO MAY FILE A CLAIM FOR DEATH BENEFITS?

The intent behind the Code section regarding death benefits[4] is to provide compensation to surviving family members of the employee who were dependent on the employee's earned compensation and remain dependent on such compensation. A dependent is defined as "one who looks to another for support or one who is dependent on another for the ordinary necessities of life to which he has become accustomed."[5] O.C.G.A. § 34-9-13 outlines who is considered a dependent for purposes of death benefit claims. According to this Code section, there is a rebuttable presumption of dependency where the employee is survived by a spouse who did not live separately from the deceased employee 90 days before the accident took place, and a child of the employee.[6] Dependency can take two forms: wholly dependent and partially dependent.[7] While both a surviving spouse and a child of the employee possess a rebuttable presumption to dependency, other surviving family members are able

to obtain eligibility to death benefits if dependency is proven.[8] Proof of dependency will be determined based on the facts present at the time of the employee's accident, and such dependency must have existed three months prior to the employee's death.[9] Thus, employers and insurers are not liable for compensating surviving family members of the employee who were not dependent upon the employee at the time of their death.

Establishing eligibility and dependency is a crucial element, but is only half of the initial requirement to prove compensability. The eligible claimant must assert their entitlement to death benefits by filing a claim with the State Board of Workers' Compensation within one year of the employee's death.[10] The court in *Zachary*[11] reiterated this concept by declining to authorize death benefits to a surviving spouse of the employee who failed to file her claim within the applicable filing period. The only eligible claimant to have filed for benefits in this case was the employee's mother. The court noted that while O.C.G.A. § 34-9-13(c) authorized the payment of death benefits to only a surviving spouse when the deceased employee did not have any surviving children, the spouse failed to assert her entitlement to the employee's benefits by filing a claim within the applicable time frame. As the surviving spouse forfeited her right to the employee's death benefits, the employee's mother was the only dependent eligible to receive them. Thus, despite being a dependent as a matter of law, the court strictly construed the Act's filing requirement and denied benefits to an otherwise dependent spouse.

THE PAYMENT ALLOCATION AND LIMITATIONS ON DEATH BENEFITS

As we discussed above, dependency is determined at the time of the claimant's injury and dependency can be either whole or partial. Upon proving that a compensable death occurred, O.C.G.A. § 34-9-265 outlines a framework for employers and insurers to follow when issuing death benefits. As a preliminary matter, employers and insurers are obligated to pay reasonable expenses of the deceased employee's burial, but such payment shall not exceed $7,500. If the deceased employee did not have any surviving dependents, this burial expense will serve as the only compensation received by the employee's family.[12] However, the exposure is not capped at burial expenses. If the deceased employee is survived by dependents who were wholly dependent on the employee, weekly death benefits must be paid equal to the employee's temporary total disability (TTD) rate.[13] For dependents who are partially dependent on the income of the deceased employee, their entitlement will be in proportion to the amount received from the deceased employee in relation to their average weekly wage.[14] Regarding partial dependency, it is not required that contributions made by the deceased employee occur on a regular basis or interval. Partial dependency will be found so long as the deceased employee made contributions during the three-month period preceding the accident.[15] If a deceased employee is survived by two dependents, one wholly dependent and the other partially dependent, only the wholly dependent will receive death benefits.[16] However, we learned from Zachary, if a primary dependent, such as a surviving spouse, failed to timely file their claim, a secondary dependent, such as the deceased employee's mother, can receive the full sum of death benefits upon timely filing their claim.[17]

Employers' and insurers' obligation to pay death benefits does not continue into infinity. O.C.G.A. § 34-9-13(e) outlines the circumstances that will absolve employers and insurers of such obligation.[18] If the deceased employee received income benefits prior to their death, the number of weeks paid to the deceased employee is subtracted from the 400-week timeframe the surviving spouse can receive benefits[19]. In the event the deceased employee is survived by only a spouse as a sole dependent, the Act imposes a statutory cap on the amount employers and insurers must pay.[20] The Act's Code sections on dependency and payment allocation harmonize to ensure that employers and insurers are aware of the extent of their obligations to surviving dependents. The court in *Baxter*[21] dealt with an issue of whether the statutory cap provided to surviving spouses applied when the surviving spouse contended she was not the sole dependent at the time of the deceased employee's death. The surviving spouse argued the statutory cap should not apply as the deceased employee's mother was alive at the time of the employee's death. Notwithstanding this contention, by the time the suit was brought, the deceased employee's mother had passed away. The court held that the deceased employee's mother never applied for death benefits with the State Board of Workers' Compensation during her lifetime, thus making the surviving spouse the sole dependent of the deceased employee. Furthermore, the court in *Baxter* taught us the statutory cap applies regardless of whether the surviving spouse elected to cease benefits either at the age of 65 or upon the 400-week cap.[22]

Lastly, in the event the deceased employee does not leave behind any dependents, compensation outside of burial expenses is still required. The Act requires employers and insurers to issue either one-half of the benefits which would have been paid to a dependent or the lump sum of $10,000, whichever is less[23]. This payment will

continued on next page

be placed in the general fund of the State Treasury. Fortunately, if a dependent is discovered and can assert their entitlement to the deceased employee's death benefits, the money paid to the State Treasury will be returned.

RECOMMENDED STRATEGIES FOR EMPLOYERS AND INSURERS

Given the similarities between non-death and death workers' compensation claims, we recommend that employers and insurers thoroughly investigate any death claim to determine the severity of potential exposure. This investigation can take place upon hiring an employee. Employers should ask employees to list all dependents — wholly or partially — on their application or post-hire documents. This information will allow the employer to know who may potentially file a claim for death benefits should a workplace accident result in death. Employers and insurers should verify by comparing the information provided by the employee to their state and federal tax documents.

Pre-hiring physical examinations will be helpful in discovering any potential pre-existing conditions the employee has that can potentially absolve employers and insurers of liability for death claims. Liability only attaches when the employee's death is proximately caused by the workplace injury and not by a pre-existing condition that was not aggravated by the injury. Additionally, in regard to employers engaged in physically demanding jobs — such as construction — employers should ensure that employees are properly trained in the operation of heavy machinery and safety protocols.

Unfortunately, people have a tendency to falsify information on employment documents. To circumvent that possibility, we recommend obtaining a medical canvas and authorized release from the employee so a representative of the company can investigate the employee's physical condition. Upon receiving a filed claim for death benefits, certainty is a key element in determining the amount of potential exposure. As a preliminary matter, ensure the claimant is someone who can assert a valid claim for the deceased employee's benefits and that the claim was timely filed. Some claims can be resolved before anything occurs solely because the claim was untimely filed or filed by an improper party. Since a proper claimant will have the burden of proving dependency and their entitlement to the deceased employee's benefits, employers and insurers should ask for documentation or statements regarding the claimant's dependency on the deceased employee. Through this, employers and insurers will have an idea as to what form of dependent they are facing and what the potential payout will look like if the injury is deemed compensable.

Workers' compensation is not always as straightforward as we would like it to be. However, there is no need to fear the unpredictable.

FOOTNOTES

1 O.C.G.A. § 34-9-265(b).

2 Gennett Lumber Co. v. Stanley, 101 Ga. App. 555, 556 (1960) (finding that an intervening cause could have resulted in the employee's death and the claimant failed to present competent evidence that death proximately resulted from workplace injury); See also Lib. Mut. Ins. Co. v. Harden, 85 Ga. App. 830 (1952).

3 The Act expressly provides that it "shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act and to provide protection for both." Davis v. Louisiana-Pacific Corp., 344 Ga. App. 757, 760 (2) (2018).

4 O.C.G.A. § 34-9-265 (Amended by Ga. Laws Act 781 (H.B. 1409) Effective July 1, 2022).

5 Glens Fall Indem. Co. v. Jordan, 56 Ga. App. 449 (1937).

6 Regarding children of the employee, a child is deemed to have been a dependent of the employee if: the child is under the age of 18 or enrolled in high school; the child is over the age of 18 and is physically or mentally incapable of earning a livelihood; or the child is under the age of 22 and is a full-time student or the equivalent in good standing enrolled in a post-secondary institution of higher learning.

7 O.C.G.A. § 34-9-265 (b)(2) & (3).

8 See Zachery v. Royal Indem. Co., 80 Ga. App. 659 (1949).

9 O.C.G.A. § 34-9-13(d); Md. Cas. Co. v. Campbell, 34 Ga. App. 311, 311 (1925); Atkinson v. Atkinson et a!., 47 Ga. App. 345, 345 (1933).

10 O.C.G.A. § 34-9-82.

11 Zachery v. Royal Indem. Co., 80 Ga. App. 659 (1949).

12 O.C.G.A. § 34-9-265(b)(l).

13 O.C.G.A. § 34-9-265 (b (2).

14 O.C.G.A. § 34-9-265(b)(3). See also Ga. Workers' Comp. Law & Practice § 19:3: Amount of benefits for partial dependency: "For example, assume that a deceased employee earned an average weekly wage of $500 at the time of his accidental death and that the maximum amount of compensation benefits at that time was $300 per week under O.C.G.A. § 34-9-261. If this deceased employee had contributed an average of $100 per week to the partial dependent claimant, then the contribution would have been one-fifth of the employee's average weekly wage, and the partial dependent would therefore be entitled to one-fifth of the compensation rate of $300, or $60."

15 Glens Fall Indem. Co. v. Jordan, 56 Ga. App. at 449.

16 O.C.G.A. § 34-913(c) (partial dependents may receive death benefits if a total dependent passes away before receiving the full amount of death benefits).

17 See Zachery v. Royal Indem. Co., 80 Ga. App. at 664.

18 "For purposes of this chapter, the dependency of a spouse upon a deceased employee shall terminate with remarriage or cohabitation in a meretricious relationship;... The dependency of a child, except a child physically or mentally incapable of earning a livelihood, shall terminate with the attainment of 18 years of age ... the dependency of a spouse and of a partial dependent shall terminate at age 65 or after payment of 400 weeks of benefits, whichever provides greater benefits." O.C.G.A. § 34-9-13 (e).

19 O.C.G.A. § 34-9-265 (b)(4).

20 O.C.G.A. § 34-9-265 (d) (please note that this statutory cap has been increased from $270,000.00 to $290,000.00 pursuant to H.B. 1409 effective July 1, 2022).

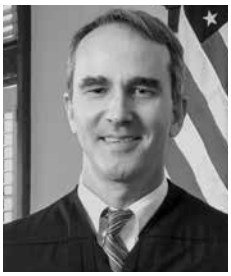
21 Baxter v. Trade McCormick, 360 Ga. App. 445 (2021).

22 One Beacon Ins. Co. v. Hughes, 269 Ga. App. 390, 392 (2004).

23 O.C.G.A § 34-9-265(f).

An Interview with Judge Ben Land:

A View from the Trial Bench and from the Appellate Bench



Judge Ben Land

Judge Ben Land was admitted to the Georgia Bar in 1992.He practiced law in his hometown of Columbus before joining the Superior Court bench of the Chattahoochee Judicial Circuit (Chattahoochee, Harris, Marion, Muscogee, Talbot, and Taylor Counties) in February of 2018. In July of 2022, he joined the Court of Appeals of Georgia. Judge Land recently sat down with *Calendar Call.*

Where are you from and what prompted you to become a lawyer?

I am a lifelong resident of Columbus except for the seven glorious years I spent in Athens. I got a business degree and then headed to law school, not sure at the time that I even wanted to be a lawyer. But, in my first year I had the privilege of having the legendary Perry Sentell for torts, and my entire perspective as to what my life could be changed at that time. Professor Sentell was tough in the classroom, but I have come to realize that was because he cared so deeply about the Law and about his students and what they could do after graduation to help others obtain justice. I did well enough in Professor Sentell's class for him to help arrange a summer clerkship for me with Georgia Supreme Court Justice George T. Smith. That summer at the Court solidified my thinking that a life in the Law was for me.

Tell us about your private law practice.

After graduating from law school, I had the option to go to one of the big firms in Atlanta that offered me a guaranteed income—and a good income at that. On the other hand, I had the option of going back to Columbus and joining Jerry Buchanan and my brother Clay in a fledgling law practice that had been a going concern at that time for about five months. I chose Columbus and the small firm because I knew it would give me the chance to get into the courtroom sooner. In a three-man firm where you're the only associate, there is no place to hide. You either jump in or get thrown into the deep end of the pool very quickly. And that kind of "learn as you go" courtroom experience was extremely beneficial to me. I learned to practice law, try cases, and help real people with real problems in all types of civil cases. That experience served me well as a civil trial lawyer and ultimately gave me the background, experience, and solid foundation I needed to serve as a judge.

Clay left our firm after ten years to join the bench of the U.S. District Court for the Middle District of Georgia, and Jerry and I continued to practice together for a total of 25 ½ years when I left to join the trial bench in our six-county circuit. We had a wonderful partnership, and we got to do a lot of good for a lot of people during our time together. I would not trade that experience for anything.

What prompted you to seek the trial bench?

During my more than 25 years as a lawyer, I appeared in front of lots of judges in Georgia and Alabama, many of whom I admired greatly. Naturally, that wasn't true of all of them. I had thought about offering myself for the Superior Court bench at times before, but I didn't think I had enough experience for the job or enough savings to justify the pay cut I would take going from private practice to the bench.

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In late 2017, I decided the time was right, and I offered myself for service. I felt very strongly that judges should have unquestioned character and integrity and that their sense of fairness should not reasonably be questioned by anyone. I knew the importance of providing a level playing field for all litigants, and I was committed to providing just that. I felt that a judge also needed to have the experience to know how to handle the many moving parts of the courtroom while at the same time ensuring to the best of his or her ability that justice is being done for all who come to court. I thought I had something to offer. Fortunately, others thought so too, and I found myself on the Superior Court bench.

Where there any surprises on the trial bench?

I wouldn't call them surprises, but I did need to quickly learn the worlds of domestic and criminal practice that form large parts of the Superior Court's work. What I learned is that at the end of the day, it's all about being fair, applying the law to the applicable facts, giving folks their day in court, and doing your best to see that justice is done.

What is the profile of a good lawyer appearing before the trial bench?

Preparation. Meticulous preparation, in fact. As a trial lawyer myself, I knew I wouldn't always be the smartest person in the courtroom, but I could always strive to be the most prepared person in the courtroom. That's how I approached each case, and it worked well for me.

Passion. It's easy to see who brings an energy to their work and who genuinely cares about what they're doing as opposed to those simply going through the motions. In my experience, the former have a much higher success rate than the latter.

Integrity and Credibility. Tell judges–and juries–the truth. Fact-finders are very perceptive at identifying those that are shooting straight with them as opposed to those that are fudging or stretching the truth. When I talk about integrity and credibility, I'm not just talking about avoiding lies and misrepresentations. That is elementary. I'm also talking about the danger of getting so caught up in winning that you start to embellish or exaggerate to the point that reality is in the rearview mirror. When this happens, a hard-earned reputation for trustworthiness can be lost in an instant, and, usually the case is lost too. Judges and juries don't forget lawyers who are untrustworthy, and for those lawyers it rarely ends well.

In my own law practice, when we had to deal with a bad fact in one of our cases, my law partner Jerry Buchanan used to say all the time: "Embrace the Truth." If we had a motto, that was it. Own it and get it out there first; don't run from it or let the other side tell it first. You can always do your best to explain how one bad fact doesn't ruin your case, but you can never hide the truth. Lawyers must remember that their number one job in the courtroom is to persuade, not to embellish, exaggerate, hide the truth, or obfuscate. The sooner a lawyer learns this basic principle, the better off they and their clients will be.

How can lawyers best prepare for a hearing or bench trial before a Superior Court Judge?

Trial judges have crowded dockets and don't have the luxury of unlimited time to spend preparing for each case. Trial judges depend on lawyers to help educate them as to the pertinent facts and the applicable law that will be pivotal in deciding the case. Trial judges quickly learn who they can depend on and will listen to lawyers who have proven themselves to be prepared and credible.

What is the biggest difference between the trial bench and the appellate bench?

The trial bench can be characterized by chaos–albeit controlled chaos–but still chaos. Every day the trial judge is called on to put out other people's fires. There are nonstop phone calls and emails, folks banging on your door wanting to know when their divorce is going to be finalized, parents in a panic about what is going to happen to their kids, and that sort of thing–emergencies galore. The life of an appellate judge is peaceful and serene by comparison. We don't get the constant phone calls and emails. We rarely have anyone knocking on our doors, and the concept of an appellate emergency is not quite the same as what trial judges face. As an appellate judge, I never forget what it is like to be a trial judge. I understand and appreciate the fact that the trial judge often has about six seconds to make a ruling on an issue that we may have six months or more to review. That is one reason the law gives trial judges discretion and why we as appellate judges often defer to their exercise of it. Having spent 30 years in the shoes of either the trial lawyer or the trial judge, I don't think I will ever forget what that experience is like. I hope I don't because it is that practical hands-on experience that helps make me better at my current job.

How can lawyers best prepare for a case before an appellate judge?

Just like in the trial court, be prepared and be honest about your case and the law. If a case is out there that cuts against you, don't ignore it and, whatever you do, don't tell us it doesn't exist. Acknowledge it. Embrace it. Then tell us how it is distinguishable from your case and, if it isn't, tell us why it should be overruled. Just like everything else in the law, never compromise your integrity and never lose credibility.

Any final thoughts?

As always, I have the utmost respect for the lawyers who work in the trenches every day in pursuit of justice for their clients. I have been there and have the battle scars to prove it. Those lawyers who enter the arena for their clients and fight the good fight, honorably and ethically, deserve our praise and admiration. As for me, I'm still the same young lawyer I was 30 years ago fueled by a passion for justice and someone who sees the Law as the best method in the world to resolve disputes. I am grateful for the opportunity to work in this profession and to serve alongside all of you in this most worthy endeavor.

This is the first in what we hope will be a continuing series of conversations with recipients of the Tradition of Excellence Award, recognized annually by our Section in the areas of Plaintiff, Defense, General Practice, and Judicial.

❖ ❖ ❖

Our featured guest is Edward D. Tolley of Cook & Tolley, LLP, in Athens. Ed was recognized with the Tradition of Excellence Award in 2008 in the category of Defense.

Tell us a little about your background and what prompted you to become a lawyer?

I was a captain in the United States Army stationed at Aberdeen Proving Ground in Maryland. From that posting I was able to attend the Watergate hearings. After seeing Senators Herman Talmadge and Sam Ervin cross-examine witnesses, I was "hooked" and decided to pursue law school.

❖

Tell us about your practice.

I would best describe my work as a litigator. My law partner says I have "tried two of everything."

❖

Tell us about a memorable case (or two).

Clearly, the most memorable was United States v. Walter Leroy Moody which involved the assassination of a federal judge in Alabama, the murder of a lawyer in Georgia, and the attempted bombing of the Eleventh Circuit Court of Appeals. At the time, the case took on an international dimension.

Insights from past recipients of the **Tradition of Excellance Award**

Edward D. Tolley

Tell us about any mentors you've had.

I had very good law professors who inspired me, but my early work with both my partners J. Vincent Cook and attorney Joe Salem were important to me.

❖

How has the law practice changed for the better or for the worse?

Membership in the bar is a privilege burdened with conditions: zealous representation of the client and civility in the courtroom. The two are not mutually exclusive.

❖

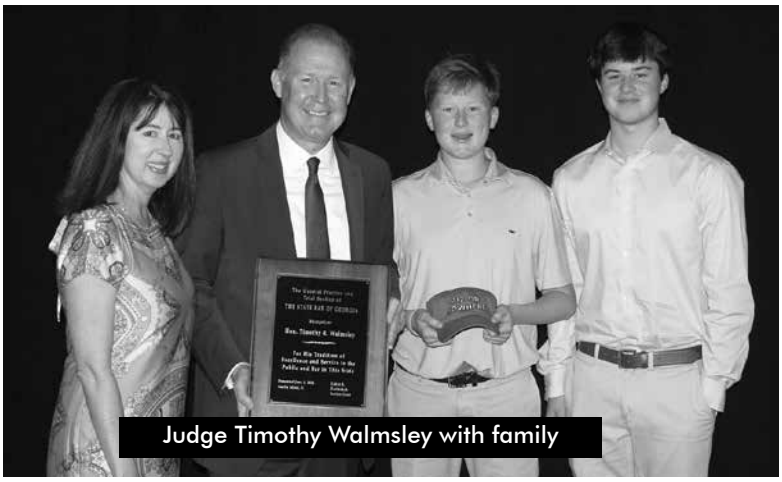
Advice for young lawyers: Always be truthful with the Court and your adversaries.

Advice for mid-career lawyers: Build a reputation for competence and candor.

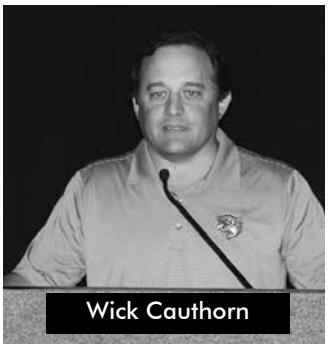
Advice for older lawyers: Keep working as long as your health permits and, very importantly, keep up your CLE even if it is no longer required!

The Year in Pictures


Tony Cochran

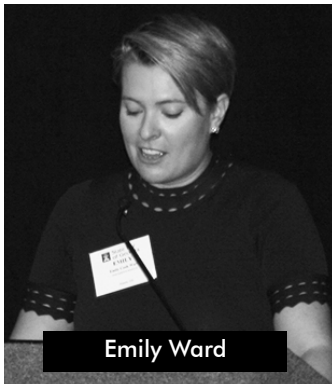

Judge Timothy Walmsley with family

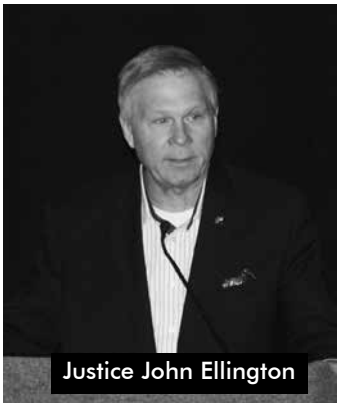

Ernest Greer


Wick Cauthorn

State Bar of Georgia
Annual Meeting
Amelia Island
June 3, 2022
Honoring our 2022

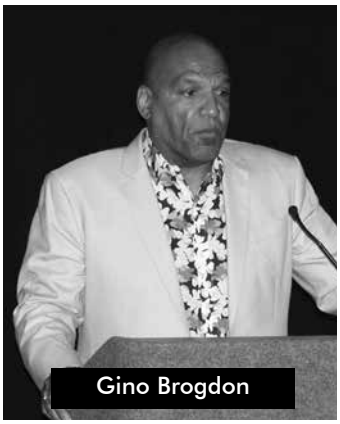
Tradition of Excellence Award Winners


Emily Ward

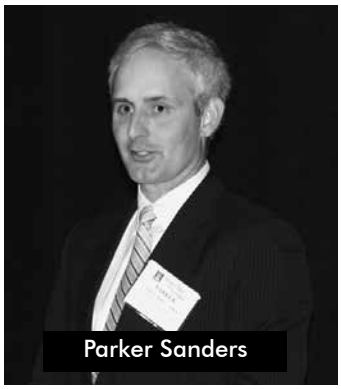

Justice John Ellington


Kathy McArthur with family and friends


Kathy McArthur


Gino Brogdon


Tony Cochran with family and friends


Parker Sanders

The Year in Pictures

January 13, 2023

Meet the Judges at the Mid-Year Meeting of the State Bar of Georgia in Atlanta

Pictured (left to right) are Hon. Andrew A. Pinson, Justice of the Supreme Court of Georgia, Hon. Benjamin Land, Judge of the Court of Appeals of Georgia, Hon. Verda M. Colvin, Justice of the Supreme Court of Georgia and Program Chair: John Manly.

March 16-18, 2023

Georgia Practice and Trial Institute at Jekyll Island, Georgia

Program Chair: Zahra Karinshak.

Professionalism

pictured L-R: presenter Hon. Roy E. Barnes, program chair Zahra S. Karinshak and presenter Hon. John J. Ellington

Failure to Settle and Insurance "Bad Faith"

presenter Richard "Rich" Dolder

Civil Rights Litigation

42 USC Section 1983: Selecting and Prosecuting Police Civil Rights Claims. Presenter Harry M. Daniels

Preparing for the Civil Cases You'll Actually Try

pictured L-R: Program Chair Zahra S. Karinshak and presenter J. Wickliffe "Wick" Cauthorn

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