Parallels Between O.C.G.A § 51-14-2's "Prima-facie Evidence of Physical Impairment" and O.C.G.A. § 9-11-9.1's Affidavit Requirement

Todd E. Schwartz, Esq.
Philip W. Lorenz, Esq.
Hawkins & Parnell LLP

There are no new appellate decisions involving environmental or mass toxic tort cases this quarter. The retroactive application of Georgia's Asbestos and Silica Claims Act (the "Act")[1] to pending cases remains in question until a decision is issued in the consolidated appeals from the State Court of Cobb County in the Ferrante matter.

One of the more significant developments arising out of the Act is the requirement that a plaintiff must establish, as an essential element of their claim, "prima-facie evidence of physical impairment" as defined pursuant to O.C.G.A. § 51-14-2(15) and 51-14-2(16). Though no case law exists from which the environmental and mass toxic tort practitioner can draw guidance, certain similarities exist between the detailed medical narrative report required under O.C.G.A. § 51-14-2(15)(B) and (16)(B) and the affidavit required in medical malpractice actions brought pursuant to O.C.G.A. § 9-11-9.1.

Georgia's Asbestos and Silica Claims Act requires that a plaintiff asserting an asbestos or silica claim must establish prima-facie evidence of physical impairment as an essential element of their claim. Generally speaking, prima-facie evidence of physical impairment is established when a board certified physician has signed a detailed medical narrative report and diagnosis stating that the claimant suffers for an asbestos-related malignant or non-malignant disease, and that exposure to asbestos was a substantial contributing factor to the diagnosed disease. Similarly, O.C.G.A. § 9-11-9.1 requires that a plaintiff asserting a claim for medical negligence must file with their complaint an affidavit of an expert, competent to testify, specifically setting forth at least one negligent act or omission alleged to exist as well as the factual basis for each claim asserted. The applicability of the Act's prima-facie evidence of physical impairment requirement is currently before Georgia's Supreme Court, and there are no reported cases from which to ascertain what does or does not constitute a sufficient showing. This does not, however, prevent an examination of O.C.G.A. § 9-11-9.1's affidavit requirements for the potential application to the Act.

In both O.C.G.A. § 51-14-1, *et seq.* and O.C.G.A. § 9-11-9.1, the initial expert showing is an essential element of the plaintiff's claim, and any plaintiff failing to meet this showing has their claim dismissed. The expert witness who signs the 9-11-9.1 affidavit must meet several key criteria, and the absence of any one criteria renders the entire affidavit insufficient as a matter of law. Under § 9-11-9.1, the expert must have either actively practiced or taught in their profession for at least three of the past five years. The expert must also be a member of the same profession against whom the affidavit is being offered; however, a doctor of medicine may offer

[1] Codified at O.C.G.A. § 51-14-1, *et seq.*

an affidavit against a doctor of osteopathy regarding the standard of care, and vice versa. O.C.G.A. § 24-9-67.1(c)(2)(C).

The Act's criteria as to who may sign the medical narrative report are a bit more extensive. The first criteria is that the individual must be a "qualified physician." O.C.G.A. § 51-14-2(17). A qualified physician is one who spends no more than 10 percent of the professional time consulting or providing expert services in connection with legal actions; receives payment from either the patient/claimant or that individual's health maintenance organization, and does not require that as condition of the evaluation and diagnosing of an asbestos or silica-related disease the claimant retain legal services. Id. Once the initial requirement of being a qualified physician has been met, the qualified physician must also be board certified in either internal medicine, pathology or pulmonology. O.C.G.A. § 51-14-2(4) – (6). Under the Act, even those individual who serve as B-readers must be qualified physicians. O.C.G.A. § 51-14-2(7).

O.C.G.A. § 51-14-2's qualified physician requirement is narrower than O.C.G.A. § 24-9-67.1's same profession requirement in that qualified physicians are restricted to just 3 specialties; internal medicine, pathology, and pulmonary medicine whereas under § 24-9-67.1, a qualified medical doctor belonging to specialty A can render an opinion as to the acts or omissions of a qualified medical doctor in specialty B so long as the expert A's opinion pertains to expert A's specialty. See Cotten v. Phillips, __ Ga. App. __ (Case No. A06A0014, decided July 6, 2006). See also Abramson v. Williams, __ Ga. App. __ (Case No. A06A1493, decided September 20, 2006 citing with approval Cotton). In addition, it is important to remember that under the Act the qualified physician requirement applies only to the initial determination of whether prima-facie evidence of physical impairment has been met. Once the prima-facie evidence is established, the standard for expert opinion predicated on the trilogy of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); General Electric Co. v. Joiner, 522 U.S. 136 (1997); Kumho Tire Co. Ltd. v Carmichael, 526 U.S. 137 (1999) and Federal Rule of Evidence 702 apply to asbestos and silica claims just like any other case in which expert testimony is required.