Product Liability – Quarterly Update on Recent Georgia Cases, 2008

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The first quarter has been a relatively quiet one for product liability reported decisions affecting Georgia defense lawyers. The biggest news might be the recent Supreme Court decision on medical device preemption, and the Georgia Supreme Court decision upholding the constitutionality of Georgia's "*Daubert* statute."

1. Federal Preemption of State Law Claims, Medical Devices

The United States Supreme Court decision in the *Riegel* case has attracted much attention from commentators on all sides of the issue. The opinion is limited in direct scope, since it only applies to medical devices which are subjected to Premarket Approval (PMA), an elaborate and time consuming procedure which most manufacturers avoid in favor of the 510k process. However the swift and fairly unified (8-1) decision may hint at improved future prospects for other preemption defense scenarios involving other regulated products.

Facts: The Medical Device Amendments of 1976 (MDA) contains a preemption clause which bars common-law challenges regarding the safety or effectiveness of medical devices marketed in a form that received Premarket Approval. Plaintiff underwent coronary angioplasty using the Evergreen Balloon Catheter, despite the fact the catheter's labeling contraindicated its use for patients with diffuse or calcified stenoses. The warning label also cautioned against inflating the catheter past its rated burst pressure. Despite such warning language, plaintiff's physician inflated the catheter five times to a pressure greater than its rated burst pressure, and on the fifth inflation the catheter burst. Plaintiffs filed suit, alleging

a number of violations of New York common law, and the district court held plaintiffs' strict liability, breach of implied warranty, and negligent design, testing, inspection, distribution, labeling, marketing and sale claims were preempted by the MDA. The district court also held that the MDA barred plaintiff's wife's loss of consortium claim.

Held: The MDA only preempts state requirements "different from, or in addition to, any requirement applicable ... to the device" under federal law. 21 U.S.C. § 360k(a)(1). To determine whether plaintiffs' claims were preempted by the MDA, the Court had to first determine whether the federal government had established requirements applicable to the catheter, and if so, whether the plaintiffs' claims were based on New York requirements that differed from, or were in addition to, the federal ones. State requirements are preempted "only when the Food and Drug Administration has established specific counterpart regulations or there are other specific requirements applicable to a particular device." *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996) (citing 21 CFR § 808.1(d)). The FDA grants Premarket Approval only after determining that a device offers reasonable assurances of safety and effectiveness, and as such, premarket approval serves to establish that the federal government has established requirements applicable to that device. The Court had previously held that common law causes of action for negligence and strict liability impose "requirements" and were therefore preempted under the MDA.

Riegel v. Medtronic, Inc., 522 U.S. _____ (2008), Scalia, J.

2. Constitutionality of SB3 *Daubert* Statute

The Georgia Supreme Court recently affirmed a trial court ruling which upheld the constitutionality of the new state expert witness statute, O.C.G.A. § 24-9-67.1, and which thus

applied the statute to exclude two plaintiff experts and grant summary judgment to a defendant. The ruling may well spur legislative tinkering.

Facts: A couple sued the manufacturer and seller of a floor refinishing product, claiming the product caused injury. The trial court initially denied a defense motion to exclude two plaintiff experts on causation and labeling. The case mistried, and the defendants renewed the motion. The trial court found that the causation expert's use of differential diagnosis without applying proper methods of ruling in and ruling out alternative possibilities rendered those opinions inadmissible. The trial court likewise excluded the labeling expert's opinions because his methods did not again satisfy the statute. The trial court rejected plaintiffs' constitutional challenge to the statute, except that the court found two sections of the statute unconstitutional, and so disregarded those portions of the statute in judging the expert testimony. Plaintiffs appealed.

Held: A majority rejected the equal protection challenge, which argued that the statute is unconstitutional because it applies only to civil cases. The Court held that plaintiffs lacked standing to complain about unequal treatment given to criminal defendants, because they are not criminal defendants. Plaintiffs argued that the statute violates due process because subsections (a) and (b)(1) are contradictory; the first says that facts and data relied upon need not be admissible, the second that experts are restricted to relying upon potentially admissible facts and data. The Supreme Court majority agreed with the trial court that the provisions cannot be harmonized, but upheld the trial court in disregarding a phrase in the first subsection and applying the second to exclude the experts. The Supreme Court disagreed with the trial court that the statement in the statute that courts "may" consider case law applying *Daubert* and its progeny is an unconstitutional delegation of legislative power, as well as the statement that the courts of Georgia are not to be open to expert testimony that is

not admissible in other states. Finally, the majority decision declared the statute is a retroactive law because it is procedural and not substantive, and upheld the trial court decision on the experts themselves as not an abuse of discretion.

Justice Melton concurred specially, expressing the view that (a) and (b)(1) are not inconsistent, because while an admissible expert opinion must have support in admissible facts and data, it may rely in part on data that is inadmissible or which may be admissible. Justice Hunstein dissented, finding that the statute is unconstitutional in every way urged by appellants, and Justice Carley joined in one of the grounds of the dissent.

Mason v Home Depot, __ Ga. ___ (March 10, 2008).

3. Proof of Defect

Facts: Plaintiffs were injured when their used, 1999 Lincoln Town Car was involved in an accident. Plaintiffs alleged Ford negligently manufactured and assembled the front passenger side seatbelt and air bag, and failed to warn of these defects. Ford's motion for summary judgment was granted on grounds the plaintiffs failed to produce any evidence the seatbelt and air bag contained a manufacturing defect.

Held: To establish a negligent manufacturing claim, a plaintiff must present evidence establishing that a defect existed in the product when it left the manufacturer's control. *Owens v. General Motors Corp.*, 272 Ga. App. 842, 613 S.E.2d 651 (2005). Plaintiffs failed to offer any evidence as to the condition of their car's condition prior to purchasing it in 1999, such as repairs, alterations, or accidents; nor did they offer expert testimony on the issue of a defect, instead relying on their own allegations the seatbelt did not lock and side air bag did not deploy. Plaintiffs also relied on two product recalls involving front seatbelt assemblies in an attempt to show their car contained an original manufacturing defect.

"[T]he mere failure of automobile equipment is not 'itself evidence of an original defect,' since the failure can be the result of myriad causes not related to its manufacture." *Jenkins v. General Motors Corp.*, 240 Ga. App. 636, 524 S.E.2d 324 (1999). With respect to the product recall, "[a] product recall can serve as circumstantial evidence of an original defect, however only when 'there is first introduced some independent proof that the particular product in question suffered from the same defect.'" *Rose v. Figgie Int'l*, 229 Ga. App. 848, 495 S.E.2d 77 (1997). Here, the product recalls related only to vehicles in which the original safety belt retractor had been replaced in service and further, Lincoln Town Cars were not among the models involved in the recalls. Plaintiffs' efforts to oppose summary judgment by the doctrine of *res ipsa loquitur* failed because "that doctrine does not apply to mechanical devices because they get out of working order, and sometimes become dangerous and cause injury without any negligence on the part of anyone." *Millar v. Elevator Svc. Co. v. O'Shields*, 222 Ga. App. 456, 475 S.E.2d 188 (1996).

Miller v. Ford Motor Co., 287 Ga. App. 642, 653 S.E.2d 82 (2007), Bernes, J.

4. Proper Party; Successor Liability

Facts: Plaintiff was injured when he fell from a wing stand while servicing a military C-5 aircraft. Plaintiffs initially alleged the wing stand's lock pins popped, and that FSS knew the stand had problems but allowed them to remain in use. Plaintiffs amended their complaint to allege FSS, dba SKE Support Services, had fabricated and installed defective locking pins, and asserted causes of action for negligent installation, inspection and training, failure to warn, and breach of implied warranties of mechantability and fitness for a particular purpose. Plaintiffs were awarded a total of $1,523,000 after a jury trial, and FSS's motion for direct

verdict on the grounds it was not the proper party and plaintiffs failed to establish that the allegedly defective pins had proximately caused his fall was denied.

Held: In Georgia, a successor or purchasing corporation does not assume its predecessor's liabilities unless: (1) there is an agreement to that effect; (2) the transaction is, in fact, a merger; (3) the transaction is a fraudulent attempt to avoid liabilities; or (4) the purchaser is merely a continuation of the predecessor entity. *Bullington v. Union Tool Corp.*, 254 Ga. 283, 328 S.E.2d 726 (1985). To establish the new company is a continuation of the old company and therefore liable for its predecessor's debts and liabilities, the new corporation must have the same "objects, assets, and stockholders." *Ney-Copeland & Assoc. v. Tag Poly Bags*, 154 Ga. App. 256, 267 S.E.2d 862 (1980). Plaintiffs produced no evidence of either common ownership or establishing any of the four exceptions, therefore FSS's motion for directed verdict should have been granted.

First Support Services, Inc. v. Trevino, 288 Ga. App. 850, 655 S.E.2d 627 (2007), Barnes, C.J.

5. Product Identification

Facts: Medical stapler allegedly malfunctioned during plaintiff's surgery. Plaintiff propounded discovery requests seeking information for the "#25 EEA stapler" referenced in the physician's post-operative notes, but did not specify any particular model manufactured by Defendant. Defendant objected to plaintiff's discovery on grounds plaintiff's requests did not identify any specific stapler manufactured by Defendant. Plaintiff moved to compel Defendant's responses.

Held: A plaintiff must first identify a specific defective product manufactured by the defendant to trigger that defendant's duty to respond to discovery requests. "The only logical

starting point for discovery in a product liability case based on the malfunction of a particular stapler is to identify a particular type of stapler manufactured by the defendants."

Butts v. Tyco Healthcare Group LP, 2008 WL 80357 Slip Copy (N.D. Ga.), Vining, J.

6. "Stand 'N Seal": Access to Media Interviews Of Plaintiffs

Hundreds of plaintiffs in various states have sued Home Depot and some of its suppliers, alleging that a spray-on grout sealer product caused them respiratory problems. The litigation is consolidated in an MDL before Judge Thrash in the Northern District of Georgia.

Facts: Aerofil is one of the Tile Perfect Stand 'n Seal Spray-On Grout Sealer product liability defendants. Aerofil deposed plaintiff Friedel, who disclosed he had appeared on CNN's *Anderson Cooper 360* addressing complaints about Stand 'n Seals' safety. Aerofil subpoenaed CNN to produce "all footage, raw and final, aired or unaired," of any interviews relating to Stand 'n Seal. CNN moved for protective order based upon reporter's privilege.

Held: Though neither the Supreme Court nor the Eleventh Circuit have recognized a nonparty reporter's privilege in a civil action, FRE 501 authorizes federal courts to honor privileges recognized under state law. *Jaffe v. Redmond*, 518 U.S. 1 (1996). Federal and state laws are substantially identical as to the determination of whether the reporter privilege applies. To successfully overcome the reporter privilege, the party seeking production must show: (1) the material is relevant; (2) it cannot be reasonably obtained by alternative means; and (3) the material is necessary to the proper presentation of the party's case.

Flynn v. Roanoke Companies Group, Inc., 2007 WL 4564113 Slip Copy (N.D. Ga.), Thrash, J.

7. Automobile Seat; Wrongful death; *Res Ipsa Loquitur*

Facts: After plaintiffs' daughter died from head injuries sustained in an auto accident, plaintiffs filed a product liability action against the manufacturer alleging negligence, design defect, and breach of warranty.

Held: Plaintiffs introduced evidence the rear seat was unclipped from the floor at the time of the accident. Therefore they argued the doctrine of *res ipsa loquitur* with respect to their negligence claim. Negligence, however, requires a showing of proximate cause between the defect and the injury, and plaintiffs had admitted the unclipped rear seat did not contribute to their daughter's fatal head injuries. Design defect claims are analyzed pursuant to the risk-utility guidelines set forth in *Banks v. ICI Americas, Inc.*, 450 S.E.2d 671 (Ga. 1994). Plaintiffs' experts provided expert testimony that the design of the rear seatbelt allowed for excessive spool, that this excessive spool caused their daughter's head injury and that at the time of her injury Ford knew of an alternate seatbelt design which would not have allowed such excessive spool. Such showing created a genuine issue of fact as to the reasonableness of Ford's choice of seatbelts. Finally, Georgia law prohibits wrongful death actions based upon breach of warranty. *Ryals v. Billy Poppell, Inc.*, 386 S.E.2d 513. Summary judgment granted as to plaintiffs' negligence and breach of warranty claims; denied as to design defect claim.

Davenport v. Ford Motor Co., 2007 WL 4373601 Slip Copy (N.D. Ga.), Duffey, J.

8. Prescription Drugs; Removal; Fraudulent Joinder

Facts: Plaintiffs sued Novartis alleging their infant son developed leukemia after using Elidel, a prescription topical cream used to treat eczema. Plaintiffs alleged Elidel was not safe for the treatment of pediatric eczema claiming that Novartis (1) did not adequately test,

(2) did not provide an adequate warning, and (3) made fraudulent misrepresentation with respect to Elidel's safety treating pediatric eczema. Plaintiffs also sued the treating physician for negligence in prescribing Elidel as well as the hospital he worked under vicarious liability. Novartis sought to remove the action asserting federal diversity and federal question jurisdiction.

Held: The citizenship of fraudulently joined defendants is ignored when determining whether complete diversity exists. *Pacheco de Perez v. AT & T Co.*, 130 F.3d 1368 (11th Cir. 1998). Mutually exclusive allegations against the defendants can result in fraudulent joinder. *Betts v. Eli Lilly and Co.*, 435 F. Supp. 2d 1180 (S.D. Ala. 2006). Plaintiffs' allegation the physician was negligent in prescribing Elidel contrary to the prescribing information and indications was not mutually exclusive of their claims Novartis did not provide an adequate warning or made fraudulent misrepresentations. Additionally, Novartis' assertions that plaintiffs' claims challenge certain FDA decisions resulted only in potential federal defenses and was not enough to confer federal question jurisdiction. Plaintiffs' motion to remand granted.

Greene v. Novartis Pharm. Corp., 2007 WL 3407429 Slip Copy (M.D. Ga.), Lawson, J.

9. Statute of Repose, Failure to Warn; Pre-impact Pain and Suffering; Punitive Damages

Facts: A 1993 Ford Explorer was broadsided by another car and then rolled over several times, killing decedent. Plaintiffs contended excessive roof crush caused decedent's death, and filed suit alleging strict liability, negligent design, and failure to warn. Ford moved for summary judgment.

Held: In Georgia, the question of whether adequate efforts were made to warn the ultimate user of a potential defect and whether the warning was adequate are typically questions for the jury. *Thornton v. E.I. DuPont de Neours & Co.*, 22 F.3d 284 (11th Cir. 1994). Also, Ford's argument that the failure to warn claim merged into the design defect claim was contrary to O.C.G.A. § 51-1-11(c), which states "[n]othing ... shall relieve a manufacturer from the duty to warn of a danger arising from the use of a product once that danger becomes known to the manufacturer." In Georgia, the duty to warn is a continuing one. *Watkins v. Ford*, 190 F.3d 1213 (11th Cir. 1999).

As for claims of pain and suffering, a recovery is possible even where an individual was held to have perceived his impending death mere seconds before it occurred. *Monk v. Dial*, 212 Ga. App. 362 (1994). According to the medical examiner, the death was only 'almost instantaneous.' Given the nature of the catastrophic injury, and the relatively long response time by paramedics after the accident (five minutes), the court held that the record contained sufficient evidence to defeat summary judgment on conscious pain and suffering. Georgia courts do not always require witnesses from the scene to establish survivorship and have allowed a survivorship claim to be proven by the totality of the circumstances. Finally, "[u]nder Georgia law, any automobile manufacturer placing profit over safety risk punitive damages liability."

Woodard v. Ford Motor Co., 2007 WL 4125519 Slip Copy (N.D. Ga.), Thrash, J.

10. Discovery; Experts; Proximate Cause; Failure to Warn

Facts: Action arising from the death of plaintiff's son during an accident. Plaintiff propounded discovery to General Motors Corporation seeking the total amount of money paid to various experts and consulting firms for work performed on behalf of GMC for seven

years. GMC responded by offering to make available for inspection and copying all such information with respect to the instant case only and plaintiff moved to compel. Plaintiff also filed a motion in limine, and GMC moved to exclude the testimony of plaintiff's expert witnesses and for summary judgment.

Held: With respect to motion, whether an expert has an ongoing relationship with a party or earns a significant portion of their income from testifying on behalf of that party is relevant and discoverable. *Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980). The extended period of time sought by plaintiff was held to be unduly burdensome. As an unforeseeable intervening criminal act is generally treated as the sole proximate cause of an injury, the other driver's intoxication at the time of the accident was highly relevant to the issue of causation. *Timmons v. Ford Motor Co.*, 982 F. Supp. 1475 (S.D. Ga. 1997). With respect to experts, only those expert opinions not included in the Rule 26 expert report were deemed admissible. With respect to summary judgment, the relevant proximate cause inquiry was whether, as a general matter, "the original negligent actor should have anticipated that the general type of harm might result." Smith v. Commercial Transp., Inc., 220 S.E.2d 446 (Ga. App. 1996). Whether GMC should have reasonably foreseen the possibility of a drunken driver causing an accident with the Blazer was held to be a question of fact as to proximate cause. Since the decedent was ejected through the window, plaintiff's claims of a possible defect with respect to the door were properly dismissed. Under the "simple product defects" line of case law, no expert testimony is required if the jury is able to understand and analyze properly presented facts. *Bishop v. Bombadier, Inc.*, 399 F. Supp. 2d 1372 (M.D. Ga. 2005). Finally, a plaintiff alleging failure to warn can either show the manufacturer's failure to take adequate measures to communicate the warning to the ultimate consumer, or alternatively show that the manufacturer failed to provide a warning which, if communicated to the end user, was

adequate to apprize the user of the potential risk. *Rhodes v. Interstate Battery Sys.*, 722 F.2d 1517 (11th Cir. 1984). Under the second avenue, a plaintiff's failure to read the warning bars recovery. *Walker v. Merck & Co.*, 648 F. Supp. 931 (M.D. Ga. 1986).

Reynolds v. General Motors Corp., 2007 WL 2908564 Slip Copy (N.D. Ga.), Story, J.

11. Experts; Fire Causation; Defect

Facts: As a result of a fire allegedly caused by defects in the motor of an exhaust fan, plaintiff filed suit alleging causes of action for negligent design and manufacture, and breach of duty to warn. Defendant moved to exclude certain expert testimony and for summary judgment.

Held: After *Daubert* analysis, plaintiff's experts were held to be qualified to testify, and their opinions the product of proper scientific method. Both experts relied in part upon fire investigation procedures outlined in the National Fire Protection Agency (NFPA) fire investigation manual – NFPA 921, Guide for Fire and Explosion Investigation. The experts opined the fire was caused by one or both alleged defects; the insulation on the windings was defective because it was not rated for the temperature the fan could reach during operating, and that the thermal cut off protector ("TCO") was misplaced or improperly rated. To prevail on its negligent design claim, plaintiff was required to show the product was defective, and that the defect was the proximate cause of the injury. *SK Hand Tool Corp. v. Lowman*, 223 Ga. App. 712 (1996). This determination is made using *Banks v. ICI Americas*' risk-utility analysis, and the appropriate analysis is whether the manufacturer failed to adopt a reasonable alternative design which would have reduced the foreseeable risk of harm presented by the product. *Jones v. NordicTrak. Inc.*, 274 Ga. 115 (2001). Here, defendant's person in charge of product performance and separate 30(b)(6) witness both testified that

TCO motors were used because they were cheaper than impedance motors, and that one potential cause of the failure was that the insulation on the motor windings failed. This testimony created a genuine issue of fact which defeated summary judgment. Finally, the duty to warn arises whenever a manufacturer knows or reasonably should know of the danger arising from the use of its product. *Hunter v. Werner*, 258 Ga. App. 379 (2002).

Inam Intern., Inc. v. Broan-Nutone LLC, 2007 WL 4730649 Slip Copy (N.D. Ga.), Pannell, J.

12. Standing to Sue; Defect; Anticipation of Litigation

Facts: By paying for losses to its insureds' home caused by fire, Allstate became subrogee of all causes of action relating to the fire. After paying its insureds' claims, Allstate began an investigation as to the cause and origin of the fire, and its investigator determined that the fire had been caused by a manufacturing defect in the plug of an extension cord. Defendant moved for summary judgment, and Allstate moved to compel.

Held: To recover on a products liability claim, a plaintiff must establish proximate cause. *Chapman v. Am. Cyanamid Co.*, 861 F.2d 1515 (11th Cir. 1988) (applying Georgia law). Though the extension cord in question was destroyed in the fire thereby preventing Allstate from introducing evidence as to the manufacturer of the extension cord, one of the prongs of the plug contained the defendant's trademark, and this sufficed to support a reasonable inference that the defendant had manufactured the cord and plug that caused the fire. Defendant alleged that Allstate had not fully responded to its request to admit concerning alternate cause of the fire, and also sought production of the adjuster's diary notes. Typically, claims files straddle the line between being prepared in the regular course of business and being prepared or obtained because of the prospect of litigation. As such, claims files do not

constitute work product in the early stages of investigation, but once litigation becomes imminent the file and its contents are protected by the work product doctrine. *Carver v. Allstate Ins. Co.*, 94 F.R.D. 131 (S.D. Ga. 1982).

Allstate Ins. Co. v. Ever Island Elec. Co., 2007 WL 2728979 Slip Copy (N.D. Ga.), Carnes, J.