Product Liability Case Law Update

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American Home Products Corp. v. Ferrari, 284 Ga. 384 (2008)

Ferrari involved claims relating to childhood vaccines containing thimerosal. The Georgia Supreme Court held that the National Childhood Vaccine Injury Act of 1986 "does not preempt all design defect claims against vaccine manufacturers, but rather provides that such a manufacturer cannot be held liable for defective design if it is determined, on a case-by-case basis, that the particular vaccine was unavoidably unsafe." The court reasoned that, while the section of the Act codified at 42 U.S.C. § 300aa-22(b)(1) "indicates that Congress intended to preempt some state law," the history of the Act, and particularly the Act's adoption of comment k to Section 402A of the Restatement (Second) of Torts, indicated a congressional intent to preempt only claims in which it could be shown that the side effects of the vaccine were unavoidable "by means other than proper manufacturing and packaging." In so doing, the court interpreted the clause found in 42 U.S.C. § 300aa-22(b)(1) that states a manufacturer is not civilly liable "if the [vaccine-related] injury or death resulted from side effects that were unavoidable" to be "conditional" and stated that the clause "contemplates the occurrence of side effects which are unavoidable, and for which a vaccine manufacturer may be civilly liable."

Denton v. DaimlerChrysler Corp., 2008 WL 5111222 (N.D. Ga. Dec. 2, 2008)

Denton arose from an automobile collision during which the passenger-side airbag deployed, and the driver-side airbag did not. The trial court granted summary judgment to the vehicle manufacturer on the plaintiff's punitive damage claims under Georgia law. The manufacturer conceded that the driver-side airbag was designed to deploy in the type of collision at issue and explained that a malfunction had prevented the airbag from deploying. The operative facts on which the court based its decision were that the subject vehicle was equipped with a warning lamp, which all experts agreed had illuminated at least 32,000 miles before the subject collision, and the manufacturer had issued a comprehensive NHTSA-compliant recall and had sent a recall letter to the vehicle owner's address. The trial court reasoned that, while there may be factual issues as to whether the owner received the recall letter, no reasonable jury could find by clear and convincing evidence that the manufacturer's action exposed it to liability for punitive damages.

Mason v. Home Depot U.S.A., Inc., 283 Ga. 271 (2008)

Mason concerned the constitutionality of O.C.G.A. § 24-9-67.1. The Georgia Supreme Court upheld the plaintiffs' challenge to the statute as a whole but also upheld the trial court's striking of subsection (b)(1), which provides that facts and data on which experts rely must be admissible, holding that section (b)(1) contradicts subsection (a), which provides that facts and data upon which experts rely need not be admissible.

The court rejected the plaintiffs' equal protection argument that the statute places stricter standard on tort plaintiffs than on criminal litigants or litigants in civil condemnation actions, finding that the plaintiffs did not have standing to challenge the statute on equal protection.

With regard to the due process arguments, the court held that the trial court did not err by striking only subsection (b)(1), because invalid portions of a statute may be severed when they are "not mutually dependent on the remaining portions and legislative intent is not compromised." The plaintiffs also argued that subsection (f) violated due process and improperly delegated legislative authority. The court held that the statute did not improperly delegate authority or invade the province of the judiciary, because the statute did not require the application of federal law decisions and instead had a "permissive suggestion" that federal *Daubert* authority be followed.

Parks v. Hyundai Motor America, 294 Ga. App. 112 (2008)

Parks arose out of an automobile collision and concerned claims relating to a lap-only seat belt in the center rear seat of a 1989 Hyundai Excel. The version of Federal Motor Vehicle Safety Standard 208 applicable to the subject vehicle required the manufacturer to choose between installing either a lap-only belt or a lap/shoulder belt. The Georgia Court of Appeals held that FMVSS 208 impliedly preempted any claim that the subject vehicle was defective under state law (whether under negligence or strict liability theories) because the manufacturer had installed a lap-only belt or other restraint system, as well as any claim that Hyundai had failed to warn about the dangers of any preempted claim. In so doing, the court of appeals noted that the "regulatory and rulemaking history of FVMSS 208 shows a comprehensive regulatory scheme in which the NHTSA considered technological constraints, child safety concerns, and cost efficiency issues applicable to restraint systems in the rear center seat and adopted a policy that expressly required [the manufacturer] to choose between installing a lap-only seat belt or a lap/shoulder seat belt," and that any action by the plaintiffs that seeks to impose liability on the manufacturer for choosing to install a lap-only belt is preempted because it conflicts with and frustrates the policy of the National

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Traffic and Motor Vehicle Safety Act of 1966, under which FVMSS was promulgated.

Porter v. Eli Lily & Co., 2008 WL 544739 (N.D. Ga. Feb. 25, 2008), *aff'd* 2008 WL 4138115 (11th Cir. Sept. 9, 2008)

Porter arose out of the prescription of Prozac to a patient who later committed suicide. The manufacturer did not defend the adequacy of the warnings and instead argued that the plaintiff could not prove proximate causation, because the prescribing physician had testified that a different warning would not have changed his decision to prescribe Prozac. The plaintiff contended that the defendant's admission of warning inadequacy barred the use of the learned intermediary doctrine. Noting that Georgia courts "have never directly discussed the impact of an arguably inadequate warning on the element of causation," the trial court found that Georgia courts would apply the presumption set forth in comment j to Section 402A of the Restatement (Second) of Torts. The court then found that Georgia courts would employ a "rebuttable presumption" approach

(and not a heeding presumption) under which (1) the plaintiff carries the initial burden to produce evidence that the manufacturer failed to warn about a known risk; (2) if the plaintiff carries the burden, a rebuttable presumption arises that a physician would have heeded an adequate warning; (3) the defendant then must produce evidence to rebut the presumption; and (4) if the presumption is rebutted, the plaintiff must produce evidence sufficient to create a triable issue of fact as to causation. The court then granted the defendant's summary judgment motion on the ground that the plaintiff failed to rebut the prescribing physician's testimony. The Eleventh Circuit affirmed the trial court in an unpublished opinion.

In December 2008, the United States District Court for the Northern District of Georgia granted summary judgment to a defendant in a factually analogous case, citing *Porter* as the operative precedent. *Dietz v. SmithKline Beecham Corp.*, 2008 WL 5329295 (N.D. Ga. Dec. 9, 2008).

Trickett v. Advanced Neuromodulation Systems, Inc., 542 F. Supp. 2d 1338

The product at issue in *Trickett* was an implanted spinal cord stimulator. Before the suit was filed, the manufacturer had written a letter to the plaintiff in which the manufacturer agreed to pay certain medical expenses incurred in addressing issues with the stimulator. The manufacturer later declined to pay the expenses. The trial court denied the manufacturer's summary judgment motion on the plaintiff's breach of express warranty claim, holding, without citing any authority for the proposition, that the manufacturer's letter in which it agreed to pay certain expenses modified the manufacturer's express warranty, which contained a clause stating that the warranty could be modified in a writing signed by the manufacturer.

Vibratech, Inc. v. Frost, 291 Ga. App. 133 (2008)

The court of appeals affirmed the denial of Vibratech's motion to dismiss holding that the trial court had jurisdiction over Vibratech, a foreign company, even though Vibratech had no direct business contracts with Georgia. Vibratech had sold an airplane part to an Alabama company that installed the part into an airplane damper which a Georgia company then installed in an airplane that later crashed in Tennessee. The court held that Vibratech's longstanding business arrangement with the Alabama company, the hundreds of parts it sold each year to the Alabama company, and the Alabama company's agreement to indemnify Vibratech and list it as an additional insured were sufficient to establish jurisdiction. The court held that Vibratech's actions in selling a product to the Alabama company "with the intention of deriving an economic benefit from its sale in other states, were purposeful actions which should have led Vibratech to reasonably anticipate being hauled into court in those states, especially a border state such as Georgia."