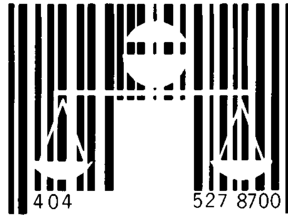


PRODUCT LIABILITY

LAW SECTION · STATE BAR OF GEORGIA

Volume 1, Number 2 • December 1999

Section Activities

February 3-5, 2000
American Bar Association
Section of Litigation
Product Liability Committee
Midyear Meeting
Las Vegas, Nevada
(see www.abanet.org/litigation/committee/products/home.html for more information)

February 24, 2000
Aviation Law Seminar, Atlanta

January 7, 2000
12:00 Noon
Section Lunch
Swissotel - Atlanta, Georgia
(Midyear Meeting of State Bar)

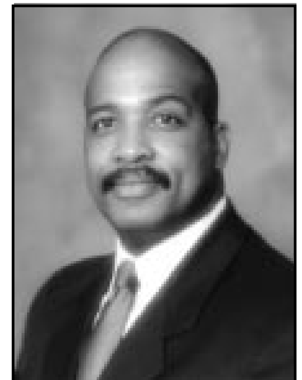
April 28, 2000
Product Liability
Institute Seminar
Atlanta

June, 2000
Section Meeting
Savannah, Georgia
(Annual Meeting of State Bar)

Product Liability Section Meeting

January 7, 2000

As part of the State Bar of Georgia's mid-year meeting, the Product Liability Section will hold a luncheon meeting on Friday, January 7, 2000. The luncheon will be held at the Swissotel in Atlanta at 12:00 p.m.



Ted Hawkins of PricewaterhouseCoopers

Ted Hawkins will be the featured speaker. We are planning an informal presentation with plenty of time for questions.

Mr. Hawkins, CPA, is a Partner in Dispute Analysis and Investigations, a division of PricewaterhouseCoopers' Financial Advisory Services Group specializing in commercial and consumer disputes. Mr. Hawkins has approximately twenty-two years of experience providing business and financial advice to clients operating in a wide range of industries including, among others, retail, distribution, consumer lending, banking, insurance, mortgage banking, manufacturing, contracting, software and technology, real estate, and automotive.

Mr. Hawkins will discuss:

- Defending punitive damages claims
- Historical trends
- Bases used in computing punitive damages
- Presenting evidence of corporate conduct
- Case examples.

To register, please go to **www.gabar.org.** The mid-year meeting registration form is on the front page. There is no charge for Section members.

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Message from the Chair

Stephanie E. Parker
Jones, Day, Reavis & Pogue

I am pleased to report that our Section has been very active over the last few months, and is approaching some of the goals established for this Bar year.

Proposed Bylaws

The Section's proposed bylaws will be considered by the Board of Governors at its January 8, 2000 meeting. All indications are that the bylaws will be approved, so we will be "official."

Product Liability Megaconference

Thank you, thank you to the speakers and participants at the November 12th "Product Liability Megaconference" co-sponsored by the ABA, ICLE, and our Section. We had first-rate speakers on every topic -- interesting, knowledgeable, and committed to ensuring a terrific program. Thank you!

Also, thank you to Larry Jones, Martha Phillips, and Bryan Davis of ICLE for all their patience and help.

Our next seminar, the annual Product Liability Institute, is set for Friday, April 28th in Atlanta. Please mark your calendars.

January 7, 2000 Meeting

I hope all of you will attend our meeting on January 7th in Atlanta at the Swissotel. (See page 1 for more information.) Ted Hawkins is an interesting speaker so we should have a good luncheon meeting.

Volunteers Needed

Thank you to the writers who have contributed articles to this issue of the newsletter. They each took valuable time away from their busy work schedules to help, and I sincerely appreciate their assistance.

If you would like to volunteer, please contact me at:

Stephanie E. Parker
Jones, Day, Reavis & Pogue
3500 SunTrust Plaza
303 Peachtree Street, NW
Atlanta, Georgia 30308
(404) 581-8552
(404) 581-8330 - FAX
SEParker@JonesDay.com

Best wishes for the Holidays and for a safe, healthy, happy and prosperous New Year.

Aviation Section Seminar to Emphasize Product Liability Issues

By: Alan Armstrong
Chair, Aviation Section, State Bar of Georgia

The Aviation Section of the State Bar of Georgia, in conjunction with the Institute for Continuing Legal Education, will present a seminar on Aviation Law on February 24, 2000. The seminar will focus on product liability issues in aviation litigation. Although the seminar is still in the planning stages, it is expected that the content of the seminar will include the following:

1. Dennis Shanahan, M.D. is a physician and pilot who has investigated a number of air crashes while serving in the United States Army. Dr. Shanahan will discuss restraint systems in aircraft and motor vehicles and the tolerance of the human body in relation to absorbing dynamic loads (G-forces).

2. We are hopeful of having Donald Kennedy, Ph.D. speak on aeronautical engineering issues as those relate to aviation litigation. Dr. Kennedy has worked in air crashes such as the Sioux City, Iowa DC-10 crash and the Detroit, Michigan EMB-120 crash, and he is conversant with litigation surrounding the MU-2 Mitsubishi aircraft and the McDonald Douglas MD-11 aircraft.

3. Marshall Turner, Esq. is a partner in the firm of Condon & Forsyth in New York, and he will discuss aviation product liability litigation from the perspective of a defense attorney. Mr. Turner has extensive experience in this area and routinely represents Mitsubishi Heavy

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ABA's PRODUCT LIABILITY MEGACONFERENCE

Approximately 90 people attended the Product Liability Megaconference held on November 12th at the Ritz-Carlton Hotel in Atlanta.

The topics ranged from preemption to trial techniques to liability of non-manufacturers. All of the speakers' presentations were terrific. The speakers spent considerable time and effort preparing for the program.

Some highlights were the panel discussions on trial techniques, an update by Tom Branch on the City of Atlanta's case against gun manufacturers, and a luncheon address by Laura Ellsworth of Jones, Day, Reavis & Pogue on "how to manage 1,000 trials."

Here are some photographs from the conference.

Lisa Heerman, Jenice Simmons and speaker Tom Branch at the ABA's booth

Speakers Judge Yvette Miller, Rebecca Schupback, and Neal Pope

The panel on plaintiff's trial techniques: Moderator Judge Yvette Miller, Dennis Cathey, Billy N. Jones, and Neal Pope

Ursula Henninger, Diane Pulley, and Professor Shubda Gosh of Georgia State University Law School

An Analysis of *Ogletree v. Navistar*

THE PROPER ROLES OF JUDGE AND JURY IN DESIGN DEFECT CASES

*by John Barrow**

For the second time in the same appeal, the Georgia Supreme Court has reversed on *certiorari,* a decision of the Court of Appeals affirming a grant of j.n.o.v. in favor of a manufacturer, and in the process has rejected a claim that courts should have a broader power to grant j.n.o.v. in design defect cases than they have in negligence cases generally. *Ogletree v. Navistar International Transportation Corp.*, Case No. S99GO770 (10/18/99), 99 FCDR 3791 ("*Ogletree VII*").

Introduction

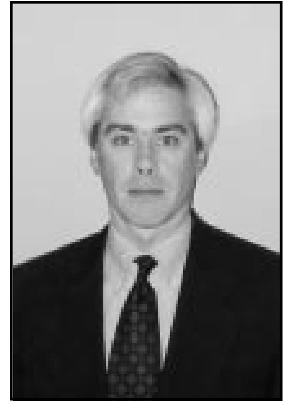
A judge's disapproval of a jury's verdict is one thing, but a judge's substitution of his or her judgment for that of the jury is quite another. The former merely requires the prevailing party to try the case all over again, and (except when based on an error of law) is generally immune from review on appeal the first time around. The later ends the case.

Because of this enormous difference in outcome, the discretion to grant a new trial and the power to grant a j.n.o.v. are subject to very different standards. The power to grant a new trial is subject to the discretion of the trial judge who, as the 13th juror, essentially has the same right as any other juror to "hang" the jury and thereby require a new trial. But the power to grant a j.n.o.v. is the power both to set aside the jury's verdict and to prevent the case from being submitted to any other jury, thereby preventing the case from being decided by any jury at all. As a result, the power to grant a j.n.o.v. is much more tightly circumscribed.

As a general rule, a judge cannot grant a motion for j.n.o.v. if there is "any evidence" to support the claim of the party that prevailed at trial, no matter how much the judge may feel that the greater weight of the evidence preponderates in favor of the losing party. In some jurisdictions, the question has arisen whether there is, or ought to be, a different rule in design defect cases: For example, can a judge grant a j.n.o.v. to the manufacturer if satisfied that the evidence in support of the design defect claim is minuscule while the weight of the evidence in favor of the manufacturer's design choice is overwhelming? By its most recent decision in *Ogletree VII,* the Georgia Supreme Court has answered with an emphatic "no."

Background

Mrs. Ogletree's husband was crushed to death when he was struck from behind by a truck driven by Campbell, a man who hired himself out to farmers as a fertilizer spreader. Campbell was attempting to back one of Navistar's trucks alongside a bulk-transport trailer which required off-loading from the side. However, there were two such trailers side-by-side, virtually identical in appearance. Campbell saw the second trailer in his side-mounted rear view mirror, mistook it for the first, and therefore aimed the back of his truck directly toward the front of the first trailer, where Mr. Ogletree was in the process of starting the hydraulic motor used to unload the trailer s contents.



Campbell could not see Mr. Ogletree because he was in the "blind zone" created by the material spreader that Campbell had mounted on the back of Navistar s truck. Mr. Ogletree could not see Campbell's truck coming because starting the motor on the trailer required that he face the trailer, away from the truck. He could not hear the truck coming because the starter was loud enough to drown out the sound of the truck that had no back-up alarm. Mrs. Ogletree's evidence showed that the presence of an automatic back-up alarm would have prevented this tragedy from happening. Mrs. Ogletree claimed that Navistar s product was defectively designed because a reasonable alternative design — incorporating an automatic back-up alarm as standard equipment — would have eliminated the risk of harm that killed her husband.

* A.B. 1976, University of Georgia; J.D. 1979, Harvard Law School. Mr. Barrow is a member of WINBURN, LEWIS & BARROW, P.C., 279 Meigs Street, Athens, Georgia 30601 (706/353-6585) barrow@athens.net.

Mr. Barrow represents the winning party, plaintiff-appellant *Ogletree*.

Navistar's defense was based on the fact that most heavy-duty trucks in this country are made in more than one stage, by more than one manufacturer, and that the practice throughout the industry is that cab-and-chassis manufacturers (such as Navistar) only make back-up alarms available as optional equipment, and thereby delegate to the decision whether or not to install back-up alarms to their purchasers. However, Mrs. Ogletree's evidence showed that it was foreseeable to Navistar that its truck would be completed in such a way as to require a back-up alarm and that its purchaser would not install such a device. Therefore, she claimed that Navistar contributed to the decision not to install a back-up alarm in an application where it was needed.

In *Ogletree I*,[1] the Court of Appeals rejected Navistar's claim that its purchaser's decision not to install a back-up alarm was the sole proximate cause of the decision not to install a back-up alarm, and held that Mrs. Ogletree had the right to have a jury decide whether Navistar's decision not to install back-up alarms as standard equipment on all its incomplete trucks was a concurring proximate cause of the result, so as to render Navistar jointly liable along with the purchaser.

Navistar also argued that the absence of a back-up alarm was not a latent defect, but was "open and obvious," so that the absence of the safety device could not be considered the cause of injury as a matter of law. *Ogletree I* also rejected that claim, holding that the scope of the "open and obvious danger" rule was essentially the same as the scope of the defense of assumption of risk, which requires proof that the injured party was subjectively aware of the danger he was in at the time he was injured.

Immediately thereafter, in *Weatherby v. Honda*,[2] the Court of Appeals repudiated *Ogletree I*'s application of a subjective standard of care on the part of the injured party, and held that the "open and obvious danger" rule required that an injured party be held to an objective standard of care, barring recovery in any case where he should have been aware of the danger he was in at the time of injury, no matter what he actually knew at the time. Commenting on the facts in *Ogletree I*, *Weatherby* concluded that Mr. Ogletree should have known of the danger he was in at the moment he was preoccupied with operating the machinery that prevented him from seeing or hearing the approach of the backing truck, and that therefore his widow was not entitled to recover. Thereafter, in *Ogletree II*,[3] the Court of Appeals rejected Navistar's attempt to apply the rule in *Weatherby* rather than *Ogletree I*, holding that the scope of the open and obvious danger rule as applied in *Ogletree I* remained the law of the case.

Meanwhile, in *Banks v. ICI Americas, Inc.*,[4] the Supreme Court formally adopted the risk-utility analysis, which requires the jury to decide whether a manufacturer's design decision was reasonable by comparing the risks posed by the design decision with the utility of that decision, taking into account a comprehensive list of factors.

Thereafter, in the only trial of the case to date, the jury found for Mrs. Ogletree and against Navistar as to the issue of liability, and awarded the entire amount of the damages sought by Mrs. Ogletree in her capacity as administratrix of her husband's estate while awarding her "$0" as the full value of the life of her husband. Thereafter, Mrs. Ogletree claimed that she was entitled to a new trial as to the issue of damages, and Navistar claimed that it was entitled to j.n.o.v. Applying the rule in *Weatherby*, the trial court granted Navistar a j.n.o.v. but did not rule on Navistar's conditional motion in the alternative for a new trial as to all issues.

In *Ogletree III*,[5] the Court of Appeals granted Navistar's request for a remand in order to obtain a ruling on Navistar's motion in the alternative for a new trial. After the trial court denied Navistar's motion for a new trial, the case once again returned to the Court of Appeals.

In *Ogletree IV*,[6] the Court of Appeals affirmed the trial court's application of the rule in *Weatherby* to hold, as a matter of law, that the danger was "open and obvious" so as to bar any claim against Navistar. On *certiorari*, the Supreme Court reversed, holding that the "open and obvious danger" rule upon which both the trial court and the Court of Appeals had relied was no longer viable under *Banks*. In *Ogletree V*, the Supreme Court held that the risk-utility analysis of *Banks* requires that the "obviousness" of the danger be considered by the finder of fact as but one factor in deciding whether it was reasonable to pose such

1 *Ogletree v. Navistar Transportation Corp.*, 194 Ga.App. 41, 390 S.E.2d 61 (1989).

2 *Weatherby v. Honda,* 195 Ga.App. 169, 393 S.E.2d 64 (1990).

3 *Navistar International Transportation Corporation v. Ogletree,* 199 Ga.App. 699, 405 S.E.2d 884 (1991).

4 264 Ga. 732, 450 S.E.2d 671 (1994).

5 *Ogletree v. Navistar International Transportation Corp.*, 221 Ga.App. 363, 471 S.E.2d 287 (1996).

6 *Ogletree v. Navistar International Transportation Corp.*, 227 Ga.App. 443, 488 S.E.2d 97 (1997).

a danger, inasmuch as there was evidence that an alternate design would have eliminated that risk of harm without impairing the utility of the product in any way. Thus, *Ogletree V* holds that a court cannot rely upon its assessment of that one factor in taking the issue away from the jury.

On remand, in *Ogletree VI*,[7] the Court of Appeals undertook what purported to be a comprehensive review of the evidence as to all of the *Banks* factors, and concluded that Navistar's decision to delegate the decision whether or not to install back-up alarms to someone it knows would not do so was not only a reasonable choice but was *the only* reasonable choice for a manufacturer such as Navistar, as a matter of law. Thereafter, the Supreme Court granted Mrs. Ogletree's second petition for *certiorari* in this case to address the following issue: "Whether the Court of Appeals erred by applying the risk-utility analysis and deciding the issue of negligent design as a matter of law?"

The position of the parties before the Supreme Court

The decision of the Court of Appeals in *Ogletree VI* raised the next question posed by *Banks*: Now that it is clear what factors must be weighed in the balance, and that a judge cannot prevent a jury from weighing the evidence as to all the pertinent factors on the basis of the judge's assessment of any one such factor, can a judge take away the jury's right to decide the issue based on the judge's assessment of the evidence as to all of the factors taken as a whole? In short, if judge and jury disagree, when will the judge be authorized to take the issue away from the jury and enter judgment in favor of the manufacturer?

In its briefs before the Supreme Court, Navistar argued that all of the evidence as to all of the *Banks* factors supported Navistar's decision to delegate the decision to install backup alarms to the purchasers, and that none of the evidence as to any of the *Banks* factors supported the plaintiff's claim that it was unreasonable for Navistar to delegate that decision to end stage manufacturers when Navistar knew that they would not install them before the truck was completed and placed in the stream of commerce. In the alternative, Navistar argued that, even if some of the evidence supported the plaintiff's claim, the totality of the evidence as to all of the other factors was so overwhelmingly in favor of the manufacturer's decision as to require that the issue be taken away from the jury.

In support of the latter position, the Product Liability Advisory Council, Inc., filed an *amicus curiae* brief in support of Navistar's position, openly advocating the adoption of a "gatekeeping function" for the courts in design defect cases, authorizing the courts to substitute their judgment for that of a jury in design defect cases whenever the "clear" or "overwhelming" weight of the evidence was on the side of the manufacturer, even in cases where the evidence was in dispute or where there was room for difference of opinion as to whether or not negligence should be inferred. For her part, Mrs. Ogletree claimed that, even if the evidence of *Banks* factors upon which Navistar relied was not in dispute, there was other evidence of *Banks* factors which supported the jury's finding that it was unreasonable for Navistar to rely on someone else to make its product safe when it knew or had reason to know that no one else would do so. She also challenged the claim that courts should have a greater degree of latitude in granting j.n.o.v.'s in product liability cases than they have in other negligence cases, and argued instead that the courts should apply the same "any evidence" standard in granting j.n.o.v.'s in product liability cases that they are required to follow in other kinds of negligence cases.

The Supreme Court speaks again

In *Ogletree VII*, the Supreme Court once again reversed the Court of Appeals, and in so doing firmly established that the "any evidence" rule applies in design defect cases to the same extent as in any other kind of case.

First, *Ogletree VII* holds that all of the evidence must be taken into account in deciding whether there is any evidence to support a claim of design defect. The fact that the evidence which supports the manufacturer's decision is "undisputed" will not authorize a judge to take the issue away from the jury if there is other evidence as to any of the other *Banks* factors which points the other way. "In determining whether a judgment is demanded as a matter of law, a court should not rely upon certain evidence merely because it is not specifically contradicted, while disregarding other relevant evidence which may be equally undisputed." Thus, it is not necessary to "dispute" the evidence as to each factor relied upon by the manufacturer in order to have the right to submit the issue to the jury for decision.

Expanding upon its view of the proper role of the jury, *Ogletree VII* drew upon the law in negligence cases

7 *Ogletree v. Navistar International Transportation Corp.*, 236 Ga.App. 89, 511 S.E.2d 204 (1999).

generally to hold that a jury has the right to decide the issue "even if the facts in a case are entirely uncontradicted and uncontroverted," in any case where the same facts might cause reasonable persons to disagree over what is reasonable. Thus, even when all the facts are uncontroverted, where "there is room for difference of opinion between reasonable men as to whether or not negligence should be inferred, the right to draw the evidence is peculiarly within the exclusive province of the jury." *Ogletree VII*, *quoting* ***Bryant v. Colvin***, 160 Ga.App. 442, 444, 287 S.E.2d 238, 240 (1981).

Conclusion

In the years since ***Banks***, the Supreme Court has continued the work of dismantling old rules, and of rejecting new claims, which are inconsistent with the role of the jury in design defect cases envisioned by ***Banks***. In its vigorous exposition of the "any evidence" rule in *Ogletree VII*, the Supreme Court has continued that process by rejecting an attempt to establish a larger, "gatekeeping" role for the courts in design defect cases. *Ogletree VII* thereby assures that juries will continue to have the same discretion to apply community values in design defect cases that they have in other kinds of negligence cases.

JUDGE BROGDON'S ORDER IN THE CITY OF ATLANTA'S LAWSUIT AGAINST GUN MANUFACTURERS

The following is the text of the order recently entered by Judge Brogdon. He denied the defendants' application for certificate of immediate review on November 4, 1999.

* * *

IN THE STATE COURT OF FULTON COUNTY, STATE OF GEORGIA

CIVIL ACTION FILE NO. 99VS0149217J

THE CITY OF ATLANTA, PLAINTIFF,

VS.

SMITH & WESSON CORP., STURM, RUGER & COMPANY, INC., BERETTA U.S.A., COLT'S MANUFACTURING CO., GLOCK, INC., TAURUS INTERNATIONAL MARKETING, INC., SIGARMS, INC., BRYCO ARMS, B.L. JENNINGS, INC., PHOENIX ARMS, DAVIS INDUSTRIES, NAVEGAR, INC. (D/B/A "INTRATEC"), FULL METAL JACKET, INC., ARMS TECHNOLOGY, INC., AMERICAN SHOOTING SPORTS COUNCIL, INC., NATIONAL SHOOTING SPORTS FOUNDATION, INC., SPORTING ARMS AND AMMUNITION MANUFACTURERS INSTITUTE, INC., DEFENDANTS.

ORDER

The above-styled action has come before the Honorable Court on Defendants Smith & Wesson Corp. and Beretta U.S.A.'s[1] (hereinafter "Movants") MOTIONS TO DISMISS. Upon consideration of the pleadings, the applicable law and the arguments presented by counsel for Plaintiff and the Movants *via* briefs and the lengthy and thorough hearing, the Court finds as follows:

Plaintiff having admitted *in judicio* that it is not a "natural person" as defined in O.C.G.A. § 51-1-11, Movants' Motion to Dismiss Plaintiff's claims sounding in strict product liability is GRANTED and Plaintiff's said claims are hereby DISMISSED.

Movants' Motion to Dismiss Plaintiff's claims for negligence set forth in Counts I, II, and II is DENIED.[2] The Court shall revisit the merits of said claims upon filing of motions for summary judgment.

The Court does not now address whether Plaintiff's Amended Complaint fails to properly or adequately state claims for nuisance, fraud/fraudulent concealment, unjust enrichment, negligent marketing and distribution, and civil conspiracy as to manufacturers[3] as the same is not addressed in Movants' Motions to Dismiss.

SO ORDERED, this 27th day of October, 1999.

M. GINO BROGDON,
JUDGE STATE COURT OF
FULTON COUNTY

---

1 Defendants Beretta U.S.A., Sporting Arms and Ammunition Manufacturers Institute, Inc., American Shooting Sports Council, Inc., National Shooting Sports Foundation, Inc., Navegar, Inc., Tauras International Marketing, Inc., Phoenix Arms, Bryco Arms, B.L. Jennings, Inc., Sturm, Ruger & Company, Inc., and Colt's Manufacturing Co. joined and adopted verbatim Defendant Smith & Wesson Corp.'s Motion to Dismiss. However, only Defendants Smith & Wesson Corp. and Beretta U.S.A. presented oral arguments on their Motions to Dismiss.

2 In reaching its decision, the Court did not find to be of merit Plaintiff's argument that House Bill 189, approved *in toto* by Governor Barnes on February 9, 1999, was enacted as Amended O.C.G.A. § 16-11-184 excluding Section 3 of the same which provides: "This act shall apply to any action pending on or brought on or after the date this act becomes effective."

3 Additionally, the Court does not now address Plaintiff's negligence claim set forth in Count IV of the Complaint as Movants do not address the same in their Motions to Dismiss, said claims being inapplicable to Movants and directed only to defendant trade associations.

AVOIDING CAREER INJURY:
Tips for Successful Product Liability Placement

By: Lee Ann Bellon, * *Bellon & Associates*

Product Liability attorneys present unique challenges in the world of legal search. In the vast majority of practice areas, the legal marketplace directly reflects activities in the general business sector. For example, our economy is booming, so most law firms and corporations are enjoying unprecedented growth. Companies are merging and new ventures emerging at a mind-boggling rate, generating a pressing need for transactional attorneys. As technology continues to change the way the world conducts business, technology attorneys are the new darlings of legal employers.

Conversely, when our economy is weaker, everyone tends to focus more on disputes and defensive strategies, thus creating a rash of lawsuits and a greater need for good litigators.

Fortunately, the nature and scope of product liability matters largely protect its litigators from experiencing the swings of the economy. Consumers will sue companies whose products they believe have harmed them whether the economy is up or down, and some product liability cases have been known to span decades. At first blush, this would seem to suggest that it is easier to place product liability attorneys than other specialists. There is some basis for that premise, but attorneys who specialize in product liability law still face singular challenges when entering the job market.

Employers tend to focus on the expertise within a particular specialty when assessing a product liability attorney's qualifications. For example, if the employer is seeking an attorney to handle breast implant cases, he or she may eliminate excellent candidates who have great experience in a variety of other product areas. Obviously, one way to avoid this problem is to capitalize upon every opportunity to participate in cases that involve different products and issues. Keep a running list of these projects on your computer. When it comes time to seek a new career opportunity, this document will serve as the basis of the second page of your resume to be entitled "Representative Projects". This list should consist of concise, bulleted examples of cases that you have handled.

Another way to deal with this problem is to stress the breadth and depth of litigation skills you possess. Do it in introductory telephone conversations, cover letters, resumes and interviews. Emphasize your writing skills, courtroom experience, and ability to grasp new concepts and create new strategies. Do it until your tongue bleeds and then do it some more. Remember that in 99% of all interview scenarios, the person you meet with will have to talk to someone else in the organization about you. We want them to talk about your capabilities as a product liability litigator, not as a one-product specialist.

Finally, practice your interview skills before you interview. As any successful litigator knows, there are several ways to answer most questions, your objective should be to select the answers that will best highlight your skills and expertise. Approach a job search as though you were plotting strategy for your most important client. How do you make your case? What information do you need to know? What issues may arise? What questions should you ask? Your mind is trained to provide these services to others. During a job search, it is imperative that you use your legal skills to your own best advantage. At this stage of your life, your most important client is yourself.

* Lee Ann Bellon can be reached at (404) 885-7034 or visit Bellon & Associates' website at www.bellon.com. Bellon & Associates is a legal recruiting and consulting firm established in 1984.

Submission of Materials

The Product Liability Newsletter welcomes submission of articles and case summaries involving issues of interest to product liability lawyers. If you are aware of a significant or interesting case, please bring it to our attention.
We are also interested in short articles.

Thank you to Christine Panchur of Jones, Day, Reavis & Pogue for contributing the design and layout of this newsletter.

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Case Updates

Robin Schmähl and Laura Lanzisera
Jones, Day, Reavis & Pogue

Cotton v. Bowen,

Case No. A99A1274
(Ga. Ct. App. Nov. 2, 1999)

Facts: Cotton was an employee of a printing company whose primary duty was to web the presses. Webbing the presses involved hand-feeding a sheet of paper over the top roller and reaching in the bottom to remove the paper. However, the rollers on one machine were modified, which resulted in the rollers being closer together. During testing of the newly-modified press, Cotton's arm was caught and crushed between the rollers. Cotton brought suit against Reed Bowen ("Bowen"), a coworker who designed the modified rollers, and H & J Erectors ("H&J"), the company that installed the printing press.

Procedural History: The trial court granted Bowen's motion for summary judgment. At trial, H&J contended that Cotton assumed the risk because he testified: (i) he knew the rollers did not have protective guards; (ii) there was always a possibility of being caught by the rollers; and (iii) the rollers were turning in opposite directions, and he would not have been caught if they were turning in the same direction. The trial court instructed the jury on assumption of the risk, and the jury found in favor of H&J. Cotton appealed.

Question: Did the trial court err in giving the jury an assumption of the risk charge?

Holding: The Georgia Court of Appeals held that the evidence was insufficient to support the charge; however, the error was harmless. After reviewing the record as a whole, the appellate court determined that H&J was merely hired to install, align, and level the press after the rollers were modified. Because there was no evidence that H&J designed or manufactured the rollers, it could not be liable to Cotton for his injury and his recovery was limited to Workers' Compensation. The verdict was affirmed in favor of H&J.

Reasoning: Before an assumption of the risk instruction may be given, the defendant must present some evidence that the plaintiff: (i) had actual knowledge of the danger; (ii) understood and appreciated the risk; and (iii) voluntarily exposed himself to the risk. Knowledge of the risk means that the plaintiff had both actual and subjective knowledge of the specific, particular risk of harm associated with the injury-causing activity or condition. Accordingly, the burden was on H&J to show Cotton knew that the modified rollers were closer together, understood the risk of placing his arm between the new rollers, and chose to take the risk that his arm would be crushed. Based on his experience webbing the presses for years before the modification, Cotton was generally aware of the risks associated with placing his arm between the rollers. Although his generalized awareness may have been evidence of contributory negligence, it fell short of the specific, particularized knowledge required to support the assumption of the risk instruction.

Jenkins v. General Motors Corp.,

Case No. A99A1012
(Ga. Ct. App. Nov. 2, 1999)

Facts: Jenkins purchased a new Chevrolet C-3500 pickup truck through a lease financing arrangement for business purposes. Thirteen months after purchasing the truck, the truck's brakes failed while towing a loaded trailer, and Jenkins collided with an automobile. Jenkins sued the truck's manufacturer, General Motors Corporation ("GM"), to recover property damages under negligence, strict tort liability, and breach of warranty.

Procedural History: The trial court granted partial summary judgment in favor of GM on all claims, except breach of written warranty, and Jenkins appealed.

Question Presented: Is the failure of the brakes, without more, sufficient evidence to create a triable issue of fact?

Holding: The Georgia Court of Appeals affirmed the trial court's order. Evidence that the brakes failed 13 months later was not evidence that the brakes were defective at the time of sale or that GM was negligent.

Reasoning: To hold General Motors strictly liable and recover for strict liability, OCGA § 51-1-11(b)(1), Jenkins was required to show that the brakes were defective at the time it came under his control. The mere fact that the brakes failed was insufficient

evidence to create a triable issue of fact, when there were plausible reasons other than a defect. The Court noted that Jenkins' brakes failed 13 months after the lease began, one month after the brakes were repaired, and while towing a loaded trailer. Therefore, the failure may have been caused by negligent brake repair or excessive trailer weight. Under the facts presented, brake failure was not evidence that the brakes were defective at the time the lease commenced. Likewise, brake failure did not establish negligence where the truck was not in the manufacturer's exclusive control for a significant period of time. Finally, Jenkins failed to show a duty to warn, since he failed to prove that General Motors had prior knowledge of similar accidents.

Crosby v. Cooper Tire & Rubber Co.,

Case No. A99A2150
(Ga. Ct. App. Nov. 2, 1999)

Facts: Crosby claimed that a defective tire blew out on her Ford Bronco II, causing a roll-over accident that killed her husband and injured her and her daughter. Crosby sued Cooper Tire & Rubber Company ("Cooper Tire") for negligent design, negligent manufacture, failure to warn, violation of the implied warranty of merchantability, and for strict product liability for a defective consumer product. At trial, Crosby's expert testified on direct examination, without objection, that immediately prior to the roll-over a "rapid air out" occurred from a burst bubble in the tire, which affected the stability of the vehicle and caused the roll-over. After the direct examination was completed, Cooper Tire objected and moved to strike the expert testimony regarding the "rapid air out" because these opinions were not previously disclosed at deposition or in response to interrogatories. The trial court granted the motion and instructed the jury to disregard the expert's testimony regarding the rapid tire deflation.

Procedural History: The jury returned a verdict in favor of Cooper Tire, and Crosby appealed.

Question: Did the trial court abuse its discretion by striking the testimony of Crosby's expert and instructing the jury to disregard the testimony?

Holding: The Court of Appeals found that the trial court erred in striking the expert's testimony and instructing the jury. The Court reversed and remanded for a new trial.

Reasoning: Cooper Tire failed to make its objections at the time the testimony was offered and, therefore, waived its objection. Likewise, waiver occurred when Cooper Tire failed to make its motion to strike contemporaneously with the expert's previously undisclosed testimony. Even without the issue of waiver, "exclusion of relevant and material evidence is an inappropriate remedy for curing a discovery omission or abuse." The appropriate remedy is either: (i) postponement of trial or recess of a trial in progress to allow the other side to obtain rebuttal evidence; or (ii) a mistrial, if there is no reasonable opportunity to conduct discovery and obtain rebuttal evidence. Exclusion of the expert's testimony on manufacturing defect and causation was an abuse of discretion that was harmful error and required reversal.

Aviation Section Seminar

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Industries, Ltd., the manufacturer of the MU-2 aircraft.

4. David Katzman, Esq. is a partner in the firm of Schaden, Katzman, Lampert & McClune, with offices in Troy, Michigan and Broomfield, Colorado. Mr. Katzman has represented plaintiffs in a number of aviation accident disasters, including Northwest Flights 229 and 1482 in Detroit, Michigan, the Pan American Flight 103 air disaster in Lockerbee, Scotland, Northwest Flight 255 in Detroit, the Aero Air disaster in Gander, Newfoundland, Comair Flight 3972 in Monroe, Michigan, American Eagle Flight 3379 in North Carolina, and U.S. Air Flight 427 near Pittsburgh, Pennsylvania, among others.

5. Jeffrey O. Bramlett, Esq., a partner in the firm of Bondurant, Mixon & Elmore, and President Elect of the Atlanta Bar Association, will discuss ethical issues that arise in aviation litigation. Mr. Bramlett has considerable experience in representing attorneys in both professional negligence litigation as well as in litigation before the State Bar of Georgia.

6. At the time this article is prepared, we are attempting to secure a speaker on professionalism. It is our intention to offer one hour of credit for professionalism at the seminar.

7. Our luncheon speaker will be Dent Thompson, a Vice President of Phoenix Air, Inc., with offices in Cartersville, Georgia. Phoenix Air provides services to the United States Military in terms of acting as the "threat" in military intercept missions.

Co-Chairs of the seminar will be Alan Armstrong, Esq. and Ed McCrimmon, Esq.

Section Member Questionnaire

TO: STEPHANIE E. PARKER
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303 Peachtree Street, N.E.
Atlanta, Georgia 30308
or FAX: (404) 581-8330

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