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PRODUCT LIABILITY

LAW SECTION · STATE BAR OF GEORGIA

Volume 1, Number 3 • May 2000

Section Activities

June 9, 2000
Product Liability Institute
Atlanta, Georgia

June 15, 2000
Section Meeting
Savannah, Georgia
(Annual Meeting of State Bar)

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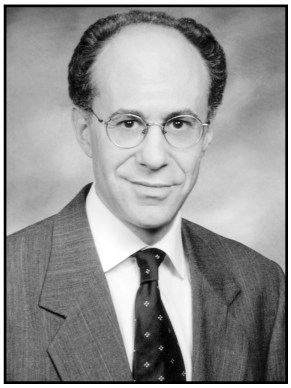
Ninth Annual Product Liability Institute

Friday, June 9, 2000

The popular Ninth Annual Product Liability Institute will take place on Friday, June 9 in Atlanta. Once again, this seminar will be sponsored by the Product Liability Section and the Institute for Continuing Legal Education.

The seminar will be held at the Ritz-Carlton in Buckhead from 9:00 a.m. until 3:30 p.m. The agenda for the seminar is re-printed on page 7 of this newsletter.



Robert H. Klonoff
Jones, Day,
Reavis & Pogue

The special guest speaker is Robert Klonoff of Washington, D.C. Robert Klonoff is a partner at Jones, Day, Reavis & Pogue in Washington, D.C. He previously served as an Assistant to the Solicitor General of the United States and as an Assistant United States Attorney. He specializes in class action litigation (including mass torts, securities fraud, and employment discrimination) and teaches class actions as an Adjunct Professor at Georgetown Law Center. He is the author of **Class Actions and Other Multi-Party Litigation in a Nutshell** (West Group 1999) and a co-author of **Class Actions and other Multi-Party Litigation: Cases and Materials** (West Group 2000). In addition, he is currently working on a treatise on class actions. He is on the board of BNA's **Class Action Litigation** and the ABA's **Class Actions and Derivative Suits.** Mr. Klonoff has argued numerous appeals, including eight U.S. Supreme Court arguments. He also has extensive trial experience and is a co-author of **Sponsorship Strategy: Evidentiary Tactics for Winning Jury Trials** (Michie 1990),

Lunch is included as part of the seminar fee. Bill Cannon will speak during lunch on professionalism. He has received very positive responses to his earlier presentations on the "Foundations of Freedom" program.

All attendees will receive West's Nutshell on Class Actions in addition to the seminar materials.

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Message from the Chair

Stephanie E. Parker
Jones, Day, Reavis & Pogue

We have another terrific seminar coming up for product liability lawyers on June 9. I want to thank all the speakers for contributing their time and energy to make the seminar a success. The overall theme of the seminar is Emerging Trends and Recent Developments, including in the areas of class actions, medical issues, and consolidation of cases. As always, we appreciate the good work of Dan White and Brian Davis of ICLE to make this seminar possible. I hope to see you there!

Section Leaders Retreat

Lesley Smith, our Section Coordinator at the State Bar, held a very informative seminar for section leaders on March 24 in Macon. I attended on behalf of the Product Liability section and presented a presentation on "How to Invigorate a Section."

New Officers

Thanks to the Nominating Committee, election of officers will also take place on June 9 at the seminar. For more information, please contact me.

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:

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Businesses Catch a Break: The "Civil Litigation Improvement Act of 2000."

by A.J. Singleton
Jones, Day, Reavis & Pogue

Faced with the threat of increasingly large jury verdicts, corporations doing business in Georgia recently received some protection from the Georgia legislature. On March 30, 2000, Governor Roy Barnes signed the "Civil Litigation Improvement Act of 2000" (the "Act"). The Act sets the maximum bond amount an appellant must post to cover the punitive damages portion of a civil judgment. Further, the Act prevents Georgia courts from enforcing potentially crippling foreign judgments until after the appellate process concludes. Lastly, the Act allows corporations to defend tort claims in the county where they maintain their principal place of business.

First, the Act amends O.C.G.A. §5-6-46 so as to limit the supersedeas bond appellants must post while seeking appellate review. Pursuant to the new O.C.G.A. §5-4-46(e), if an appellee in a civil action receives a judgment containing punitive damages, the bond amount the appellant must post as security on the punitive damages portion is limited to $25,000.00. The Act, however, provides safeguards for an appellee as well. If, through a preponderance of the evidence, the appellee shows that the appellant is "purposefully dissipating or secreting its assets, or diverting assets outside the jurisdiction of the United States courts," the court can revoke the $25,000.00 limitation. O.C.G.A. §5-4-46(f).

Second, the Act replaces O.C.G.A. §9-12-134(b) regarding the appeal or stay of foreign judgments. The new O.C.G.A. §9-12-134(b) requires a court to stay enforcement of a foreign judgment if the judgment debtor shows that an appeal of the foreign judgment is pending or that the time for appealing that judgment has not expired. The stay of enforcement shall continue until all available opportunities to appeal the foreign judgment have expired. Subject to the limitations of O.C.G.A. §5-4-46(e) and

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Case Updates

A.J. Singleton
Jones, Day, Reavis & Pogue

Weisgram v. Marley Co.

No. 99-161
120 S.Ct. 1011 (Jan. 18, 2000)

Facts: Weisgram died of carbon monoxide poisoning when an electronic baseboard heater in her town home caught fire. Her son, individually and on behalf of Ms. Weisgram's heirs, sued the manufacturer of the heater, Marley Company ("Marley"), alleging that the defective heater caused both the fire and his mother's death.

Procedural History: At trial, Weisgram relied on the testimony of three expert witnesses to prove both defect and causation. Marley objected to the proffered experts' testimony before and during the trial, arguing that the testimony was unreliable and inadmissible under *Daubert*. The trial court overruled Marley's objections. The jury returned a verdict in favor of Weisgram and Marley moved for judgment as a matter of law based on its overruled objections. The trial court denied Marley's motion and Marley appealed. The Eighth Circuit held that the district court should have granted Marley's motion for judgment as a matter of law because it found (1) that Weisgram's only evidence in support of his defect was the speculative, inadmissible testimony of Weisgram's three proffered experts who should have been excluded under *Daubert* and (2) that the remaining evidence viewed in the light most favorable to Weisgram was insufficient to support the jury verdict. Rather than remand the case to the trial court, the Eighth Circuit ordered the trial court to enter judgment in favor of Marley. Weisgram appealed and the Supreme Court granted certiorari.

Question: Does an appellate court have the authority to decide, as a matter of law, that judgment should be rendered in favor of a verdict loser?

Holding: The authority of appellate courts to order the entry of judgment as a matter of law extends to cases in which, on the exclusion of testimony erroneously admitted, there remains insufficient evidence to support the jury's verdict. In such a situation, the appellate court need not remand the case to the district court.

Reasoning: Ordinarily, the trial court's familiarity with the facts and issues of the case provides it with a superior understanding of the case from which to review the merits of a motion for judgment as a matter of law. Thus, appellate courts should normally not order judgment as a matter of law, but rather remand the case to the district court for further proceedings. This is not, however, an ironclad rule. Under Federal Rule of Civil Procedure 50, an appellate court has the authority to order the district court to enter a judgment in favor of the verdict loser where the only evidence to support the claim is inadmissible. Here, the Eighth Circuit found that the case was not a close call and that Marley was entitled to judgment. Further, since *Daubert*, parties relying on expert evidence to prove their claims or defenses have been on notice of the standards of reliability they must meet. Therefore, Weisgram was on notice that he should put forth his best expert evidence at the onset and had every opportunity to add or substitute evidence.

DeLoach v. Rovema Corp.

Case No. A99A2431
(Ga. Ct. App. Jan. 12, 2000)

Facts: DeLoach worked for the Tetley Tea Company as a mechanic responsible for maintaining tea-bagging machines. While attempting to remove a paper jam from one such machine, DeLoach sustained severe cuts and burns to his hands which resulted in the amputation of four fingers. At the time of the accident, DeLoach knew that other employees had been similarly injured when pushing the jog switch with the safety door open as he had done. Rovema Inc.[1] ("Rovema") sold Tetley Tea Company the machine in question. DeLoach sued Rovema, claiming that Rovema failed to warn of the machine's dangerous condition that caused his injury.

Procedural History: The trial court granted summary judgment to Rovema. DeLoach appealed, arguing that Rovema had a duty to warn because it became aware of the danger after selling the machine to the Tetley Tea Company.

Question: Can sellers be held liable for failing to warn of dangers which become known after the product is sold?

Holding: Upholding the trial court's decision, the Georgia Court of Appeals held that a product seller has no duty to warn of dangers that become known after selling the product.

Reasoning: The Court of Appeals recognized that Georgia law distinguishes between a manufacturer's duty to warn and a seller's duty to warn. A manufacturer's duty to warn extends to dangers which become known after the sale of the product. However, a seller's duty to warn is limited to only those dangers "actually or constructively known" when the product is sold. Further, the Court of Appeals refused to extend a post-sale duty to warn to Rovema based on § 13 of the Restatement (Third) of Torts (imposing liability where a successor to a seller undertakes or agrees to provide maintenance and fails to warn of product risks). Even under § 13, no warning is required unless the successor knows or reasonably should know that the product poses a substantial risk and that the person to be warned is unaware of the danger. DeLoach was already aware of the danger. Therefore, any alleged failure to warn was not the proximate cause of his injury.

[1]Rovema Inc. later split into Rovema Corp., which services the Rovema tea-bagging machines, and Rovema L.P., which continues to sell Rovema tea-bagging machines.

Battersby v. Boyer

Case No. A99A1540, A99A1541 (Ga. Ct. App. Nov. 24, 1999)

Facts: Boyer was a passenger on a four-wheel all-terrain vehicle operated by her thirteen-year- old son. The vehicle flipped, landed on Boyer, and injured her back. Boyer and her husband sued both the manufacturer (American Honda Motor Co., Inc. and Honda Motor Co., LED ("Honda")) and the seller (Eric Battersby d/b/a Cherokee Cycle ATV and Small Engines ("Battersby")). Boyer sought recovery based on negligence, strict liability, and breach of warranty.

Procedural History: The trial court granted Battersby summary judgment on Boyer's strict liability and failure to warn claims, but denied summary judgment on the breach of warranty claims. Battersby appealed, arguing that the trial court erred in not granting summary judgment on the warranty claims because Boyer failed to present evidence that the vehicle was defective.[1] The trial court also granted Honda summary judgment on the strict liability claim but not on the failure to warn claim. The trial court found that an issue of fact remained regarding the adequacy of Honda's warning on the vehicle.

Questions: Must a trial court grant summary judgment to a manufacturer on failure to warn claims if the court finds that the seller had no duty to warn?

Holding: It is not inconsistent for a court to grant summary judgment to a seller on failure to warn claims and deny summary judgment for a manufacturer on the same claims.

Reasoning: Sellers and manufacturers have different duties when it comes to warning about a product's dangers. A seller's duty to warn may end if a manufacturer has already warned the consumer of a particular danger. This insures that the seller need not "second guess" whether the manufacturer's warning is adequate. However, even though a manufacturer provides a warning, this alone does not shield the manufacturer. Where a duty to warn arises, the duty may be breached by (1) failing to adequately communicate the warning or (2) failing to provide an adequate warning of the potential risk. Here, Honda placed a warning on the vehicle, cautioning against operating the vehicle with a passenger. However, there remains a question of fact as to whether Honda's warning was adequate.

[1]Boyer put forth no evidence that the vehicle was defective when used by only one rider. Further, there was no evidence that Battersby knew plaintiffs intended to operate the vehicle with more than one person when he sold the machine. Therefore, the Court of Appeals reversed the trial court's denial of summary judgment to Battersby on the warranty claim.

Busbee v. Chrysler Corp.

Case No. A99A1452 (Ga. Ct. App. Nov. 3, 1999)

Facts: Busbee was driving a Chrysler Corp. ("Chrysler") manufactured truck that broke down and stranded Busbee in rush hour traffic. When a Chrysler investigation revealed that the truck's engine seizure was caused by oil sludge (likely the result of Busbee's failure to change the oil), Chrysler refused to repair the vehicle. Busbee was not the owner of the truck, but had obtained exclusive use of the truck in exchange for making payments on the truck. The truck's owner sued Chrysler for breach of express warranty and breach of the service contract. Busbee also sued Chrysler for "strict liability for property damage for the loss of use of the vehicle."

Procedural History: The trial court granted summary judgment to Chrysler on all of Busbee's claims. Busbee subsequently appealed.

Question: Where a product user lacks privity of contract, can he still pursue a claim under strict liability in tort through application of O.C.G.A. §51-1-11?

Holding: Georgia's "economic loss rule" prevents recovery in tort when a defective product has resulted in a loss of value in the thing sold or the cost of repairing it.

Reasoning: O.C.G.A. §51-1-11(b)(1) allows recovery in tort, irrespective of privity, from the manufacturer of a product which causes injury to person or property due to the product not being merchantable or the product not being reasonably suited for its intended use, or simply when the product's condition when sold is the proximate cause of the injury. However, Georgia's "economic loss rule" provides that purely economic losses — such as loss of the use of the product or the cost of repairing the product — are not recoverable in negligence or strict liability absent personal injury or damage to other property. Busbee sought to recover only the costs of his losing the use of the vehicle and therefore, his recovery under O.C.G.A. § 51-1-11(b)(1) is barred as a matter of law. Further, the "accident" exception to the "economic loss" rule is not applicable as the inconvenience or frustration Busbee suffered did not reach the level of catastrophe necessary for application of the exception.

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Civil Litigation Improvement Act of 2000

(f) outlined above, the judgment debtor must still post the appropriate bond amount.

Finally, the Act replaces O.C.G.A. §14-2-510's venue provisions for business corporations. The Act's most notable change to O.C.G.A. §14-2-510 allows a business corporation to choose where to defend tort actions. For tort damage claims, if the defendant is a domestic corporation or a foreign corporation authorized to conduct business in Georgia, venue lies in the county where the cause of action originated. If, however, this is the sole basis for venue, the defendant corporation may remove the case to the Georgia county where it maintains its principal place of business. The corporate defendant has 45 days from service of the summons to so remove the case under this Act. Within 45 days of removal, the plaintiff may petition the court to remand the case if removal was improper. O.C.G.A. §14-2-510(b)(4).

Dinner in Savannah Planned

Please join us for our Section Dinner held as part of the State Bar of Georgia's Annual Meeting. The dinner will be held on Thursday evening, June 15 at 7:00 p.m. in Savannah.

The dinner will take place at "Elizabeth's on 37" restaurant. We especially hope this dinner will provide an opportunity for product liability lawyers who live in the Savannah area to become more active in the Section.

To register, please return to the State Bar the registration form for the Annual Meeting. The form has been mailed to all State Bar members and is also available at www.gabar.com/Annual Meeting 2000. The dinner is listed under the "Section activities "part of the form.

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.

June 9th Seminar

Message from Chair and Bios

Schedule of Speakers

Schedule of Speakers

Section Member Questionnaire

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PHONE: _____ **FAX:** _____

I would like to become more involved in:

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- ☐ **The Newsletter**
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To Join the Product Liability Section

*** * * * * Please pass along to a friend * * * * ***

TO: MEMBERSHIP DEPARTMENT
State Bar of Georgia
800 The Hurt Building
50 Hurt Plaza
Atlanta, Georgia 30303

FROM: _____

_____

_____

_____

Yes, I'd like to join the Product Liability Section. Dues are $20.00 per year.