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Product Liability

by **Franklin P. Brannen, Jr.***
Richard L. Sizemore**
and **Jacob E. Daly*****

This Article surveys recent developments in Georgia product liability law.¹ It covers noteworthy cases decided during the survey period by Georgia appellate courts, the Eleventh Circuit Court of Appeals, and United States district courts located in Georgia. In addition, this Article discusses relevant legislative enactments by the Georgia General Assembly revising the Official Code of Georgia Annotated (“O.C.G.A.”).

I. STRICT LIABILITY

Georgia’s product liability practice is centered upon O.C.G.A. section 51-1-11, which provides that the manufacturer of personal property sold as new is strictly liable to individuals who are injured by that property.² To establish a strict liability claim under this statute, a plaintiff must prove that (1) the defendant was the manufacturer of the product; (2) the product was defective when it left the control of the manufacturer; and (3) the product’s defective condition proximately caused the injury to the plaintiff.³ The purpose of the statute is to “ensure that the costs

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1. Because this is the inaugural version of this Article, the survey period runs for two years—June 1, 2004 through May 31, 2006. Future articles will cover either one year or two years depending on the volume of case law and legislative activity.

2. O.C.G.A. § 51-1-11(b) (2000).

3. *Chicago Hardware & Fixture Co. v. Letterman*, 236 Ga. App. 21, 23, 510 S.E.2d 875, 877-78 (1999). For a thorough discussion of these elements, see CHARLES R. ADAMS, III,

of injuries resulting from defective products are borne by the manufacturers that put such products on the market."⁴

A. Manufacturers and Product Sellers

Because the manufacturer is in the best position to discover dangerous product defects and determine how to correct such defects, product liability actions for strict liability can be brought only against the manufacturer of a product. In Georgia, an entity is classified as a manufacturer if (1) the entity actually designs or manufactures the product; (2) the entity is a manufacturer of a component part that failed and caused injury to the plaintiff; or (3) the entity is an assembler of component parts who then sells the assembled item as a single item under its own trade name.⁵ Despite these seemingly broad definitions, courts strictly construe the Georgia strict liability statute,⁶ holding that it only applies to "actual manufacturers—those entities that have an active role in the production, design, or assembly of products and placing them in the stream of commerce."⁷

While manufacturers are subject to strict liability in Georgia, product sellers are specifically excluded from such liability pursuant to O.C.G.A. section 51-1-11.1.⁸ This statute defines a product seller as a person who "leases or sells and distributes; installs; prepares; blends; packages; labels; markets; or assembles pursuant to a manufacturer's plan, intention, design, specifications, or formulations; or repairs; maintains; or otherwise is involved in placing a product in the stream of commerce."⁹

Because an entity may simultaneously display the traits of a manufacturer and a product seller, courts are often required to evaluate the undisputed evidence to determine whether the Georgia strict liability statute applies. In many instances, the dispute is the subject of a motion for summary judgment in which the defendant argues that it is

GEORGIA LAW OF TORTS § 25-8 (2007 ed.).

4. ADAMS, *supra* note 3.

5. *Freeman v. United Cities Propane Gas, Inc.*, 807 F. Supp. 1533, 1539 (M.D. Ga. 1992).

6. *Morgan v. Mar-Bel, Inc.*, 614 F. Supp. 438, 441 (N.D. Ga. 1985).

7. *Freeman*, 807 F. Supp. at 1540.

8. O.C.G.A. § 51-1-11.1 (2000).

9. *Id.* § 51-1-11.1(a).

not subject to strict liability because it is merely a product seller. Such was the case in *Tomlinson v. ResQline, Inc.*¹⁰

In *Tomlinson* the plaintiffs sued for damages arising from personal injuries Herbert Tomlinson sustained while using an evacuation system comprised of a cable and harness. The plaintiffs contended that ResQline, Inc. and Carl Stahl Sava Industries, Inc. ("Sava") were strictly liable because they designed, manufactured, assembled, marketed, and sold the system.¹¹ The evacuation system, known as the SafirRosetti ResQline System, was designed by Moshe Mellor and was marketed and sold by ResQline.¹² Sava, a manufacturer of cables and harnesses, was contacted by ResQline and asked to supply a cable with a minimum breaking strength of 1,300 pounds. Because Sava did not manufacture such a cable, Sava purchased the cable from another company, Indusco, Inc. Upon receipt of the cable from Indusco, Sava tested the cable to ensure that it met ResQline's specifications, modified both ends of the cables in accordance with ResQline's instructions, and sent the cable to ResQline so that it could be incorporated into the system. Sava did not participate in the "integration of the cable assembly into the System."¹³

Relying upon O.C.G.A. section 51-1-11(b)(2), the plaintiffs alleged that Sava was strictly liable because it manufactured the defective cable and cable system that caused the plaintiff's injuries. Sava denied liability for the plaintiff's injuries, arguing in its motion for summary judgment that it was merely a product seller and was not liable as a manufacturer on grounds of strict liability.¹⁴ The district court agreed with Sava, observing that Sava simply assembled the cable pursuant to the plan, intention, design, specifications, and formulation of ResQline.¹⁵ Because Sava did not manufacture the cable, did not play an active role in the design or selection of the cable, and did not participate in the integration of the cable assembly into the system,¹⁶ the court determined that "Sava was not the manufacturer of a defective component part the failure of which caused plaintiff's injury."¹⁷ Accordingly, the

10. No. 2:04-CV-122-WCO, 2006 U.S. Dist. LEXIS 30348 (N.D. Ga. Apr. 24, 2006).

11. *Id.* at *2.

12. *Id.* at *2-6.

13. *Id.* at *12.

14. *Id.* at *11-12.

15. *Id.* at *13.

16. *Id.* at *12-13.

17. *Id.* at *15.

district court granted Sava's motion for summary judgment on the plaintiffs' strict liability claim.¹⁸

The Georgia Court of Appeals recently examined the strict liability statute in a similar case involving a product seller. In *Boyce v. Gregory Poole Equipment Co.*,¹⁹ the plaintiff brought a product liability/wrongful death action arising out of a forklift accident. At the time of his death, the decedent, Robyn Embry, was operating a stand-up forklift that lacked a rear guard. When Embry's forklift made contact with a parked forklift, the forks on the parked forklift entered the operator's compartment and fatally injured Embry. As a result, the plaintiff asserted a strict liability claim against Gregory Poole Equipment Company, alleging that the forklift Embry was operating should have been equipped with a rear guard.²⁰

The forklift Embry was operating was designed and manufactured by Material Handling Associates ("MHA") and Caterpillar. It was sold to Embry's employer by Gregory Poole Equipment Company ("Gregory Poole"). Because the general manager of Gregory Poole served on the advisory board of the MHA design team for the forklift, the plaintiff maintained that Gregory Poole also manufactured the product and was therefore liable under Georgia's strict liability statute.²¹ The trial court disagreed with the plaintiff's argument and granted Gregory Poole's motion for summary judgment on the plaintiff's strict liability claim.²²

After reviewing the evidence submitted in support of Gregory Poole's motion, the Georgia Court of Appeals concluded that Gregory Poole could not be held strictly liable because it was merely a seller of a product manufactured by MHA.²³ In making this decision, the court rejected the plaintiff's claim that Gregory Poole became a manufacturer simply because its employee served on the advisory board for the design team of the manufacturer.²⁴ As the court observed, the strict liability statute must be "strictly construed to apply to actual manufacturers or designers only."²⁵

18. *Id.*

19. 269 Ga. App. 891, 605 S.E.2d 384 (2004).

20. *Id.* at 891, 605 S.E.2d at 386.

21. *Id.* at 894, 605 S.E.2d at 388.

22. *Id.* at 892-94, 605 S.E.2d at 386-88. For a discussion of the plaintiff's failure to warn claims, see *infra* Part II.B.

23. 269 Ga. App. at 894, 605 S.E.2d at 388.

24. *Id.*

25. *Id.*

While the courts in *Tomlinson* and *Boyce* granted summary judgment in favor of product sellers, the Georgia Court of Appeals recently permitted a plaintiff to survive summary judgment because there was some evidence that the product seller also had significant input in the manufacture of the product. In *Buchan v. Lawrence Metal Products, Inc.*,²⁶ the plaintiff brought suit for injuries he sustained when the vinyl, retractable tape on a crowd-control barrier detached from a metal post and struck him on the arm. The plaintiff's claims were based on theories of negligence and strict liability. The defendant, Lawrence Metal Products, Inc. ("Lawrence Metal"), moved for summary judgment on the plaintiff's strict liability claims, asserting that there was no evidence that it manufactured the Tensabarrier crowd-control system. According to Lawrence Metal, the retractable tape cassettes used in the system were designed and manufactured by another company, and Lawrence Metal merely produced the metal posts in which the cassettes were inserted. The trial court granted Lawrence Metal's motion, finding that Lawrence Metal could not be held liable on theories of negligence or strict liability because it was merely a seller of the product. The trial court concluded that Lawrence Metal was not a manufacturer, despite the fact that Lawrence Metal manufactured the metal posts and labeled, marketed, and sold the crowd-control system.²⁷

The Georgia Court of Appeals re-evaluated the evidence and reversed the trial court's ruling.²⁸ While the court of appeals recognized that Lawrence Metal did not have a role in the design or production of the retractable tape cassette, the court concluded that Lawrence Metal had an active role in the production, design, and assembly of the overall system.²⁹ The court was persuaded by the fact that the system consists of both the cassettes and the posts, the system cannot function without the posts, and the plaintiff alleged that the system—and not just the tape cassette—was defective.³⁰ "Considering its role as assembler of the crowd-control system and sole designer and producer of the component intended to hold the retractable tape in place, there is evidence that Lawrence Metal had significant input into the manufacture of the crowd-control system."³¹ Because Lawrence Metal func-

26. 270 Ga. App. 517, 607 S.E.2d 153 (2004).

27. *Id.* at 517-18, 607 S.E.2d at 154.

28. *Id.* at 522, 607 S.E.2d at 157.

29. *Id.* at 521, 607 S.E.2d at 156-57.

30. *Id.*

31. *Id.*, 607 S.E.2d at 157.

tioned as both a manufacturer and a product seller, "it [was] not entitled to the protections afforded a mere product seller."³²

B. Recall Evidence

While evidence of a product recall may be admissible to show that a defect was present when the product left the manufacturer, it does not relieve a plaintiff from proving that the alleged defect proximately caused his or her injuries.³³ "Strict liability is imposed for injuries which are the proximate result of product defects, not for the manufacture of defective products. Unless the manufacturer's defective product can be shown to be the proximate cause of the injuries, there can be no recovery."³⁴

In *Cadwell v. General Motors Corp.*,³⁵ the plaintiff brought a product liability suit for injuries she sustained when she lost control of her 1995 Chevrolet Blazer and struck a telephone pole. The plaintiff claimed, among other things, that defects in the vehicle's braking system proximately caused her injuries, and she sought damages under theories of strict liability and negligence. Although the plaintiff retained an expert to offer opinions regarding these alleged defects, the district court excluded the expert's opinions because they did not meet the *Daubert* standards for relevancy, reliability, and admissibility.³⁶ Without an expert to support her allegations, the plaintiff relied solely upon evidence of the recall of a component found within the braking system of 1995 Chevrolet Blazers.³⁷

Recognizing that the plaintiff had very little evidence to support her theories of liability, General Motors moved for summary judgment on the plaintiff's strict liability and negligence claims.³⁸ The district court granted General Motors's motion, observing that "[a] recall letter alone is insufficient to create a jury issue regarding a product defect."³⁹ While the court agreed that the 1995 Chevrolet Blazer was within the population of vehicles subject to a recall because of problems associated

32. *Id.* at 520, 607 S.E.2d at 156.

33. *Rose v. Figgie Int'l, Inc.*, 229 Ga. App. 848, 854-55, 495 S.E.2d 77, 84 (1997).

34. *Talley v. City Tank Corp.*, 158 Ga. App. 130, 135, 279 S.E.2d 264, 269 (1981).

35. No. 5:04-CV-72(WDO), 2006 U.S. Dist. LEXIS 4437 (M.D. Ga. Jan. 25, 2006).

36. *Id.* at *2-3. For a discussion of the expert witness issues in this case, see *infra* Part IV.A.

37. *Id.* at *1, *8-9.

38. *Id.* at *9.

39. *Id.* at *8.

with a malfunctioning switch, the court concluded that summary judgment was warranted because the “[p]laintiff presented no evidence that the accident was caused by a defect in the vehicle’s braking system that was present when the truck left GM’s control.”⁴⁰ The court made a similar finding on the plaintiff’s negligent design claims, observing that summary judgment was also warranted on these claims because the “[p]laintiff failed to present evidence that her vehicle had any type of design defect or that any such defect was the proximate cause of her accident.”⁴¹

II. FAILURE TO WARN

A. General

A manufacturer who has reason to anticipate that its product has the potential for doing harm when used for a particular purpose “may be required to give adequate warning of the danger.”⁴² The manufacturer’s duty to warn depends upon a number of factors, including the “foreseeability of the use in question, the type of danger involved, and the foreseeability of the user’s knowledge of the danger.”⁴³ If the manufacturer has a duty to warn, the manufacturer may breach the duty by (1) failing to adequately warn of the product’s potential risks; or (2) failing to adequately communicate the warning to the user.⁴⁴ Failure to adequately communicate a warning generally requires an evaluation of the location and presentation of the warning, including the color, font size, and use of symbols to draw attention to the warning.⁴⁵

In addition to establishing a duty to warn and a breach on the part of the manufacturer, the plaintiff must also establish that the breach proximately caused the plaintiff’s injuries. In cases premised upon the content or sufficiency of a warning, the plaintiff’s failure to actually read the instructions or warning may prevent the plaintiff from recovering.⁴⁶

40. *Id.* at *9.

41. *Id.* at *11.

42. *Wright v. Case Corp.*, No. 1:03-CV-1618-JEC, 2006 U.S. Dist. LEXIS 7683, at *26 (N.D. Ga. Feb. 1, 2006) (quoting *Battersby v. Boyer*, 241 Ga. App. 115, 117, 526 S.E.2d 159, 162 (1999)).

43. *Id.* (citing *Wilson Foods Corp. v. Turner*, 218 Ga. App. 74, 75, 460 S.E.2d 532, 534 (1995)).

44. *Wilson Foods*, 218 Ga. App. at 75, 460 S.E.2d at 534.

45. *Id.*

46. *Powell v. Harsco Corp.*, 209 Ga. App. 348, 350, 432 S.E.2d 608, 610 (1993).

However, if the plaintiff contends that the manufacturer failed to adequately communicate the warning, the plaintiff's failure to read a warning does not bar recovery.⁴⁷ In fact, in cases challenging the location and presentation of the warning, the plaintiff's failure to read the warnings may actually be circumstantial evidence of the inadequacy of the warning.⁴⁸

The Georgia Court of Appeals recently examined the effect that a plaintiff's failure to read a warning can have on failure to warn claims. In *Camden Oil Co. v. Jackson*,⁴⁹ the plaintiff sued an oil company and a truck bed manufacturer for severe burns he sustained while filling a portable container with gasoline. The plaintiff contended that the defendants failed to adequately warn him of the risks associated with filling a portable container with gasoline at a self-service pump. The record revealed that a warning located near the self-service pump stated, among other things: "Portable containers must be placed on the ground prior to filling to avoid explosion or fire from static electricity."⁵⁰ At the time the plaintiff sustained his injuries, the portable container he was filling was sitting in the bed of his truck—not on the ground.⁵¹

During his deposition, the plaintiff acknowledged that he did not see or read this warning. Given this admission, the oil company moved for summary judgment on the plaintiff's claim that (1) the content of the warning was inadequate; and (2) the oil company's efforts to communicate the warning were inadequate.⁵² The trial court denied the defendant's motion and the oil company appealed.⁵³ After reviewing the evidence, the Georgia Court of Appeals determined that summary judgment was warranted with respect to the plaintiff's contention that the warning posted next to the pump was inadequate.⁵⁴ The court observed that "a jury should not be allowed to consider the adequacy of the contents of the warning as a basis for imposing liability" on the oil company when the plaintiff did not read the warning.⁵⁵ Because the plaintiff did not read the warning, the court concluded that the warning

47. *Wilson Foods*, 218 Ga. App. at 75, 460 S.E.2d at 534.

48. *Id.*

49. 270 Ga. App. 837, 609 S.E.2d 356 (2004).

50. *Id.* at 839, 609 S.E.2d at 358.

51. *Id.* at 838, 609 S.E.2d at 358.

52. *Id.* at 839-40, 609 S.E.2d at 358-59.

53. *Id.* at 838, 609 S.E.2d at 357.

54. *Id.* at 839, 609 S.E.2d at 358.

55. *Id.* at 840, 609 S.E.2d at 359.

could not possibly have been the proximate cause of his injuries.⁵⁶ Thus, the court of appeals reversed this portion of the trial court's ruling.⁵⁷

With respect to the plaintiff's remaining claims regarding the adequacy of the oil company's efforts to communicate the warning, the court of appeals affirmed the trial court's denial of summary judgment.⁵⁸ The court of appeals concluded that material issues of fact remained regarding whether the oil company adequately communicated the dangers involved with filling a portable container with gasoline.⁵⁹ While the warning at issue was located on a column in full view of the customers at the gasoline pump, the court determined that the jury must determine whether the manufacturer was "negligent in failing to place a warning in such a position, color and size print or to use symbols which would call the user's attention to the warning or cause the user to be more likely to read the label and warning than not."⁶⁰

The court also rejected the oil company's assertion that the plaintiff's failure to read the warning constituted contributory negligence as a matter of law.⁶¹ According to the court, if the jury could conclude that the oil company insufficiently communicated the warning regarding portable containers, it could also conclude that the plaintiff "did not fail to exercise ordinary care for his own safety when he did not notice and then read the posted warning."⁶²

The Northern District of Georgia also had occasion to examine the sufficiency of a plaintiff's failure to warn claim during the survey period. In *Wright v. Case Corp.*,⁶³ the plaintiff sustained serious injuries after he parked and prepared to exit a loader he was using to perform a landscaping job. The plaintiff asserted that he raised the seat bar on the loader in an effort to engage the operator presence system, a system that locks the controls of the operator's bucket and engages the parking brake. As the plaintiff was sliding out of the loader, the loader moved, and the plaintiff was struck on the back of the head by a protective cage surrounding the loader. The plaintiff filed suit alleging, among other

56. *Id.*, 609 S.E.2d at 358-59.

57. *Id.*, 609 S.E.2d at 359.

58. *Id.*

59. *Id.* at 841, 609 S.E.2d at 359.

60. *Id.* (quoting *Battersby*, 241 Ga. App. at 118, 527 S.E.2d at 163).

61. *Id.* at 842-43, 609 S.E.2d at 360-61.

62. *Id.* at 843, 609 S.E.2d at 361.

63. No. 1:03-CV-1618-JEC, 2006 U.S. Dist. LEXIS 7683 (N.D. Ga. Feb. 1, 2006).

things, that the manufacturer failed to warn of the dangers associated with the loader, specifically that the loader could still move after the operator raised the seat bar.⁶⁴

The manufacturer of the loader moved for summary judgment on the plaintiff's failure to warn claim, asserting that the plaintiff could not support his claim because his expert had been excluded by the district court.⁶⁵ The district court denied the manufacturer's motion, observing that there was "some evidence in the record to support [the] plaintiff's failure to warn claim" even without the expert testimony.⁶⁶ The court was persuaded by the fact that the both the instructional postings on the loader and the operator's manual stated that the parking brake is engaged when the seat bar is raised.⁶⁷ "Thus, it is a question of fact whether the ordinary operator should have appreciated the danger that the loader was subject to move when the seat bar was raised."⁶⁸

B. Duties of Entities Other Than Manufacturers

Manufacturers are not the only entities subject to failure to warn claims. Product sellers, for instance, may have a duty to warn of dangers "when the seller knows, or should know, the particular use of the product and risks from such use."⁶⁹ However, the product seller's duty is generally limited to those circumstances in which the "seller is aware of a danger either not communicated by the manufacturer's warning or substantively different from the dangers the manufacturer has included in a warning label."⁷⁰ Similarly, a product seller generally does not have a duty to discover hidden defects in a product. However, if the seller inspects or tests its product, it has assumed a duty to exercise ordinary care in making its investigation and can be liable if it negligently fails to discover the defect.⁷¹

64. *Id.* at *2-4.

65. *Id.* at *25-26. For a discussion of the expert witness issues in this case, see *infra* Part IV.A.

66. *Id.* at *28.

67. *Id.*

68. *Id.*

69. *Boyce v. Gregory Poole Equip. Co.*, 269 Ga. App. 891, 897, 605 S.E.2d 384, 390 (2004).

70. *Id.* at 896, 605 S.E.2d at 389-90 (quoting *Farmer v. Brannan Auto Parts*, 231 Ga. App. 353, 355, 498 S.E.2d 583, 585 (1998)).

71. *Id.* at 896-97, 605 S.E.2d at 389-90.

In *Boyce v. Gregory Poole Equipment Co.*,⁷² the plaintiffs brought a wrongful death action arising out of the injuries Robyn Embry sustained while operating a forklift that was distributed and sold by Gregory Poole. The plaintiffs filed strict liability and negligence claims against Gregory Poole, asserting, among other things, that Gregory Poole was aware of the rear guard, knew it was a desirable safety device, and breached its duty to warn its customers of the dangers associated with operating the forklift without it. Because the manufacturer of the forklift did not provide any warning labels or warnings regarding the danger of other forklifts entering the operator's compartment, the plaintiffs asserted that Gregory Poole should have warned the purchaser about the forklift and described optional safety equipment. Additionally, the plaintiffs maintained that Gregory Poole had investigated the product's expected use and advised Embry's employer, Ecolab, regarding the type of equipment and safety devices that should be used in its business. Because Ecolab relied upon the superior knowledge of Gregory Poole, the plaintiffs maintained that Gregory Poole also assumed a duty to warn Ecolab of any patent defects with the product. Finally, the plaintiff contended that Gregory Poole may have intentionally withheld information regarding the rear-guard door in an effort to avoid potential failure to warn claims resulting from similar accidents.⁷³

To support these allegations, the plaintiffs provided evidence that Gregory Poole made an extensive investigation of the forklift in 1994, nearly four years before Embry was killed while operating the forklift. The plaintiffs also submitted evidence that Ecolab requested information from Gregory Poole regarding the safety of the forklift as early as 1996, soon after another Ecolab employee was injured on the forklift.⁷⁴ Despite this evidence, the trial court granted Gregory Poole's motion for summary judgment on the plaintiffs' failure to warn claims.⁷⁵ The Georgia Court of Appeals reversed the trial court's ruling, observing that the independent investigation and inquiry by Gregory Poole created a jury question regarding whether Gregory Poole had a duty to advise of the existence of the rear-guard door and the risk of not using the guard.⁷⁶

72. 269 Ga. App. 891, 605 S.E.2d 384 (2004).

73. *Id.* at 894, 896-97, 605 S.E.2d at 388-90.

74. *Id.* at 892-93, 605 S.E.2d at 387.

75. *Id.* at 894, 605 S.E.2d at 388.

76. *Id.* at 897, 605 S.E.2d at 390.

While product sellers may have a duty to warn of potential defects with a product, the Georgia Court of Appeals in *Chamblin v. K-Mart Corp.*⁷⁷ recently determined that a pharmacist does not have a heightened duty to warn consumers of every possible side effect of a drug.⁷⁸ There, the plaintiff filled a prescription at a pharmacy in the defendant's store. According to the plaintiff, the pharmacist did not provide warnings as to potential side effects of the drug, and the plaintiff thereafter suffered an extremely rare allergic reaction. The plaintiff filed suit against the store, alleging that the failure to warn of potential side effects of the drug was a violation of the standard of care for pharmacists. The plaintiff asserted that the store had a duty to warn her of all potential side effects based upon regulations of the Georgia State Board of Pharmacy, which require pharmacists to counsel patients about their medication. The trial court disagreed with the plaintiff's assertion and granted the defendant's motion for summary judgment on this claim.⁷⁹

The Georgia Court of Appeals affirmed the trial court's ruling, determining that the plaintiff had not established that the store had a heightened duty to warn of potential side effects.⁸⁰ While the regulations of the Board of Pharmacy require pharmacists to offer counseling to their customers, the court observed that the topics are determined by the pharmacists and *may* include common side or adverse effects.⁸¹ As a result, the court determined that the regulations do not impose a duty on a pharmacist to identify every remote possible side effect, such as the rare allergic reaction that the plaintiff suffered.⁸²

In *Talton v. Arnall Golden Gregory LLP*,⁸³ the Georgia Court of Appeals examined whether a legally cognizable duty can be established when there is absolutely no privity between the plaintiff and the defendant.⁸⁴ In *Talton* the plaintiff brought a negligence action for injuries resulting from contaminated cadaver tissue that was inserted in his knee during outpatient surgery. In addition to suing CryoLife, Inc.—the company that purchased, processed, packaged, and distributed

77. 272 Ga. App. 240, 612 S.E.2d 25 (2005).

78. *Id.* at 242, 612 S.E.2d at 27.

79. *Id.* at 240-42, 612 S.E.2d at 26-27.

80. *Id.* at 245, 612 S.E.2d at 29.

81. *Id.* at 242, 612 S.E.2d at 27.

82. *Id.*

83. 276 Ga. App. 21, 622 S.E.2d 589 (2005).

84. *Id.* at 23, 622 S.E.2d at 591.

the cadaver tissue to hospitals for use in implants—the plaintiff also brought suit against CryoLife’s outside attorney and the attorney’s law firm, Arnall Golden Gregory LLP (collectively, “AGG”). The plaintiff alleged that AGG negligently recommended and prepared an inadequate warning label for the cadaver tissue with knowledge that third parties would ultimately rely upon the information contained in the label.⁸⁵

AGG filed a motion to dismiss the plaintiff’s failure to warn claim, asserting, among other things, that (1) it had no duty as a matter of law to warn non-clients of the risks associated with the tissue; (2) it could not control whether its client actually relied upon their advice; (3) it could not control the information their client ultimately included in the warning; (4) the plaintiff never had the opportunity to review or rely upon the warning label; and (5) the plaintiff’s physician was responsible for informing plaintiff of the risks of using the cadaver tissue.⁸⁶ The trial court granted AGG’s motion and the plaintiff appealed.⁸⁷ The Georgia Court of Appeals affirmed the trial court’s ruling, rejecting the three different theories the plaintiff offered to support his claim that AGG had a duty to warn of the risks associated with the CryoLife cadaver tissue.⁸⁸

First, the court rejected the plaintiff’s assertion that AGG’s duty to warn was premised upon the fact that it was reasonably foreseeable that third parties would rely upon the information AGG provided during the course of its representation of CryoLife.⁸⁹ The court of appeals rejected this theory outright, determining that the plaintiff “failed to demonstrate that AGG ever intended for its advice to be disclosed to or relied upon by third parties.”⁹⁰ The court observed that the information AGG provided to CryoLife was confidential and intended solely for the consideration and use by CryoLife.⁹¹ The court further observed that AGG had no control over whether CryoLife actually followed its advice.⁹²

The court also rejected the plaintiff’s claim that “AGG owed a duty to him under section 324A of the Restatement [of Torts], which addresses

85. *Id.* at 22, 622 S.E.2d at 590-91.

86. *Id.* at 23, 622 S.E.2d at 591.

87. *Id.*

88. *Id.* at 27, 622 S.E.2d at 593.

89. *Id.* at 23-24, 622 S.E.2d at 591-92.

90. *Id.* at 25, 622 S.E.2d at 592.

91. *Id.*

92. *Id.*

the liability to third parties when one undertakes to perform another's duty."⁹³ The plaintiff offered very little evidence to support this theory, and the court concluded that the handful of cases upon which the plaintiff relied were distinguishable because there was absolutely no evidence that "AGG participated in the procurement, processing, or distribution of the infected tissue."⁹⁴

Finally, the court rejected the plaintiff's assertion that the court should find that a duty existed based upon public policy.⁹⁵ According to the plaintiff, public policy demands that "an attorney be held accountable when the attorney gives confidential advice to a client and the client later acts in a manner that harms a third party, regardless of whether the client's actions were consistent with the attorney's advice."⁹⁶ The court declined to adopt such a rule because it would "expose attorneys to potentially unlimited liability to third persons who were never their clients and who had no basis upon which to reasonably rely on the attorneys' confidential advice to their clients."⁹⁷

III. PROXIMATE CAUSE

Proof that a manufacturer's product proximately caused the plaintiff's injuries is an essential element of all product liability claims, whether the plaintiff is proceeding under a strict liability or negligence theory.⁹⁸ Without a showing of proximate cause, there can be no recovery.⁹⁹ Liability is imposed for injuries that proximately result from the use of a defective product, not for the mere manufacture of a defective product.¹⁰⁰ Trial courts often struggle to define proximate cause, particularly when instructing a jury. The Georgia Court of Appeals has described this dilemma as follows:

"Although many legal scholars have attempted to lay down a single standard to determine proximate causation, . . . no satisfactory universal formula has emerged. Instead, proximate cause is always to

93. *Id.* at 26, 622 S.E.2d at 593.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 26-27, 622 S.E.2d at 593.

98. *See, e.g.*, O.C.G.A. § 51-1-11(b)(1) (2000); *Steinberg v. SICA S.P.A.*, No. 7:04-CV-22(HL), 2006 U.S. Dist. LEXIS 12947, at *11 (M.D. Ga. Mar. 10, 2006); *Hoffman v. AC&S, Inc.*, 248 Ga. App. 608, 610, 548 S.E.2d 379, 382 (2001).

99. *Hoffman*, 248 Ga. App. at 610, 548 S.E.2d at 382.

100. *Steinberg*, 2006 U.S. Dist. LEXIS 12947, at *14.

be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent. The best use that can be made of the authorities on proximate cause is merely to furnish illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other."¹⁰¹

Although the concept of proximate cause eludes precise definition, a well-established principle of Georgia law provides that in cases involving the negligence of multiple tortfeasors, the negligence of each tortfeasor must be a contributing factor in the plaintiff's injury to be considered a proximate cause of it:

Where the injury is the result of the concurring negligence of two or more parties, they may be sued jointly or severally. All may be sued jointly, notwithstanding different degrees of care may be owed by the different defendants. . . .

It is well settled that an action may be maintained against two joint tort-feasors whose negligence contributes to produce an injury, even though the same obligations do not rest upon each with respect to the person injured. It is sufficient to support a recovery if the negligence of both be a contributing cause, even though one owes to the person injured a higher degree of care, and even though there be differing degrees of negligence by each.¹⁰²

Because, as this principle recognizes, there may be more than one proximate cause of an injury, the term "proximate cause" is not synonymous with the term "dominant cause."¹⁰³

During the survey period, the Georgia Supreme Court again considered the definition of proximate cause. In *John Crane, Inc. v. Jones*,¹⁰⁴ the plaintiff's decedent filed a complaint against several manufacturers of asbestos products alleging that he contracted mesothelioma because of occupational exposure to asbestos dust from their products. After the decedent died the following year, the plaintiff amended the complaint to add claims for wrongful death and loss of consortium. All the defendants except John Crane either were dismissed or filed for bankruptcy

101. *John Crane, Inc. v. Jones*, 262 Ga. App. 531, 533, 586 S.E.2d 26, 29 (2003) (quoting *Atlanta Obstetrics & Gynecology Group, P.A. v. Coleman*, 260 Ga. 569, 569-70, 398 S.E.2d 16, 17 (1990)).

102. *Gooch v. Georgia Marble Co.*, 151 Ga. 462, 463-64, 107 S.E. 47, 48 (1921) (internal quotation marks omitted).

103. *Thompson v. Thompson*, 278 Ga. 752, 753-54, 605 S.E.2d 30, 31-32 (2004).

104. 278 Ga. 747, 604 S.E.2d 822 (2004).

prior to trial.¹⁰⁵ The plaintiff and John Crane proceeded to trial, and the trial court instructed the jury as follows with respect to proximate cause:

Proximate cause requires a showing by the plaintiff that the defendant's negligence was a factor in bringing about the loss. Where several negligent acts may have produced plaintiff's injury, to be considered the proximate cause an individual defendant's tortious conduct must constitute a contributing factor in bringing about the plaintiff's damages. Now, to hold an individual defendant liable, the plaintiff must introduce sufficient evidence to allow a jury to find that more than likely, their exposure to a particular defendant's product was a factor in producing their injuries.¹⁰⁶

John Crane agreed with this instruction except for the omission of the word "substantial" before "contributing factor."¹⁰⁷ The jury returned a verdict against John Crane for \$1,975,000.¹⁰⁸ The trial court denied John Crane's motions for judgment notwithstanding the verdict and for a new trial, and John Crane appealed to the Georgia Court of Appeals.¹⁰⁹ The court of appeals affirmed.¹¹⁰

The Georgia Supreme Court framed the issue on which it granted certiorari as follows: "Where separate tortious acts allegedly committed by multiple defendants may have combined to produce the plaintiff's injury, must each individual tortfeasor's conduct constitute a 'substantial' contributing factor in the injury in order to be considered a proximate cause thereof?"¹¹¹ John Crane argued that the trial court and the court of appeals erred because "the 'substantial factor' formulation is consistent with Georgia law, has been widely accepted throughout the country, and is justified by public policy considerations."¹¹² The supreme court held each of these arguments to be "unavailing."¹¹³

First, requiring a tortfeasor's contribution to the plaintiff's injury to be substantial would be contrary to, not consistent with, longstanding

105. *Id.* at 747-48, 604 S.E.2d at 823.

106. *Id.* at 748 n.1, 604 S.E.2d at 824 n.1.

107. *Id.* at 748, 604 S.E.2d 824.

108. *Id.*, 604 S.E.2d at 823.

109. *Id.*

110. *Id.* at 748 & n.1, 604 S.E.2d at 823-24 & n.1.

111. *Id.* at 747, 604 S.E.2d at 823.

112. *Id.* at 748, 604 S.E.2d at 824.

113. *Id.*

Georgia law.¹¹⁴ Because Georgia law contemplates different degrees of concurrent negligence among multiple tortfeasors, there has never been a requirement that any single tortfeasor's negligence substantially contribute to the plaintiff's injury before liability will be found.¹¹⁵ Second, although some jurisdictions have adopted the substantial factor formulation of proximate cause, at least in asbestos cases, there are "very real problems" with that standard, such as the difficulty in defining the term "substantial factor" and the danger that it will become a "separate and independent hurdle that the plaintiff will have to overcome in addition to the standard elements of a claim of negligence."¹¹⁶

Finally, John Crane's public policy argument was that "refusing to embrace the 'substantial contributing factor' formulation will subject every defendant in asbestos actions to joint and several liability for injuries caused by others' conduct, and will encourage an increase in asbestos cases, thus creating administrative problems for the judicial system."¹¹⁷ The supreme court dismissed John Crane's concerns, noting that "asbestos litigation is not new, and the absence of a 'substantial contributing factor' formulation has not led to the proliferation of such lawsuits, nor is it likely to do so," especially in light of the requirement that an asbestos plaintiff must prove that he or she was exposed to the defendant's asbestos-containing product.¹¹⁸ Accordingly, the supreme court answered the question on which it granted certiorari in the negative and therefore affirmed the decision of the court of appeals.¹¹⁹

IV. EVIDENTIARY ISSUES

A. *Expert Testimony*

On February 16, 2005, Georgia Governor Sonny Perdue signed into law Senate Bill 3, a package of tort reform legislation that dramatically altered the admissibility standard for expert witness testimony in civil

114. *Id.*

115. *Id.*

116. *Id.* at 751, 604 S.E.2d at 825-26.

117. *Id.*, 604 S.E.2d at 826.

118. *Id.*

119. *Id.* at 747, 604 S.E.2d at 823.

cases in Georgia state courts.¹²⁰ The new statute adopts the admissibility criteria from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹²¹ and its progeny (*General Electric v. Joiner*¹²² and *Kumho Tire Co. Ltd. v. Carmichael*¹²³) through the following subsection:

If scientific, technical, or other specialized knowledge will assist the trier of fact in any cause of action to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if:

- (1) The testimony is based upon sufficient facts or data which are or will be admitted into evidence at the hearing or trial;
- (2) The testimony is the product of reliable principles and methods; and
- (3) The witness has applied the principles and methods reliably to the facts of the case.¹²⁴

The code section reinforces the adoption of *Daubert* by explicitly allowing Georgia courts to seek guidance from the decisions of the United States Supreme Court in *Daubert*, *Joiner*, *Kumho Tire*, and other federal court interpretations of these decisions.¹²⁵

In the first Georgia appellate court review of this new evidentiary standard, *Moran v. Kia Motors America, Inc.*,¹²⁶ the Georgia Court of Appeals affirmed the exclusion of testimony from the plaintiff's expert witness regarding the diminished value of the plaintiff's car.¹²⁷ The plaintiff in this case claimed that the windows in her new car did not operate correctly when she drove the car home on the date of purchase. Moran complained about additional problems with the windows a total of four times in the next six months and eventually filed a breach of warranty claim against Kia. At trial, she offered testimony from an expert witness to prove the diminished value of her car. The expert, who had never inspected the car, used repair records, Kelley's Blue Book, and a formula that he had derived to calculate the diminished value of the

120. Ga. S.B. 3, § 7, Reg. Sess. (2005) (codified at O.C.G.A. § 24-9-67.1 (Supp. 2006)). The admission of expert testimony in criminal cases remains governed by O.C.G.A. section 24-9-67 (Supp. 2006).

121. 509 U.S. 579 (1993).

122. 522 U.S. 136 (1997).

123. 526 U.S. 137 (1999).

124. O.C.G.A. § 24-9-67.1(b).

125. *Id.* § 24-9-67.1(f).

126. 276 Ga. App. 96, 622 S.E.2d 439 (2005).

127. *Id.* at 98, 622 S.E.2d at 441.

vehicle.¹²⁸ But the trial court found that the expert witness did not use a reliable methodology and had not reliably applied the methodology to the facts of the case as required by O.C.G.A. sections 24-9-67.1(b)(2) and (3).¹²⁹ The court of appeals affirmed the exclusion of this testimony, holding that there was no evidence that the methodology of the plaintiff's expert witness (1) was widely used in the automotive field; (2) had a known rate of error; or (3) had been subject to any peer review.¹³⁰

What impact does the adoption of the *Daubert* standard have on lawsuits in Georgia state courts? This same expert had been permitted to offer similar testimony in the previous trial of the same matter that had taken place before the Georgia legislature adopted the *Daubert* standard.¹³¹ On retrial, with the new evidentiary standard, the expert witness was excluded, and the defendant was granted a directed verdict, which was later affirmed on appeal.¹³²

It is important to note that the court of appeals was assessing whether the *Daubert* standard was appropriately applied to the testimony of the plaintiff's expert witness—not whether any constitutional provision invalidated the application of the *Daubert* principles.¹³³ Given the relative zeal with which tort reform issues have been litigated at the trial court level, it is only a matter of time before additional appellate decisions will offer perspective on this new evidentiary standard in Georgia state courts.

Because O.C.G.A. section 24-9-67.1 permits the trial courts to use federal court decisions for guidance in their *Daubert* analyses, it is important for Georgia practitioners to stay abreast of *Daubert* opinions from federal courts.¹³⁴ Three opinions from Georgia federal district courts within the survey period show how exacting the *Daubert* standard can be.

128. *Id.* at 97-98, 622 S.E.2d at 440-41.

129. *Id.* at 98, 622 S.E.2d at 441; O.C.G.A. §§ 24-9-67.1(b)(2), (3).

130. *Moran*, 276 Ga. App. at 98, 622 S.E.2d at 441.

131. A transcript of the previous trial testimony from the plaintiff's expert witness is on file with Mercer Law Review.

132. *Moran*, 276 Ga. App. at 96, 622 S.E.2d at 439.

133. *Id.*

134. Internet websites, including www.daubertontheweb.com (last visited Sept. 27, 2006) and its related blog, which can be found at www.daubertontheweb.com/blog702.html (last visited Sept. 27, 2006), offer the practitioner a quick way of keeping up with the latest Rule 702 and *Daubert* developments.

One recent decision, *Cadwell v. General Motors Corp.*,¹³⁵ involved testimony from a GM-trained mechanic who opined that an air bag system should have deployed in a single vehicle accident involving a Chevrolet Blazer. In response to the *Daubert* challenge, the plaintiff contended that the experience of the mechanic in the automotive repair field and the certification from his GM training were sufficient to opine whether the air bag should have deployed.¹³⁶

But the trial court found that the expert met none of the *Daubert* criteria.¹³⁷ The expert could not answer engineering and design questions regarding the air bag system, nor could he answer questions regarding the injuries sustained by the plaintiff.¹³⁸ The trial court concluded that the expert witness did not understand the relevant physics principles, had never reviewed any literature on air bag systems, had not performed any diagnostic testing of the subject vehicle, did not know how air bag sensors work, did not know how to interpret data from the air bag computer, had never been an expert witness before, and had no medical training.¹³⁹ Because the expert had only general opinions and no specific expert knowledge in the area of air bag system engineering, the trial court excluded his testimony.¹⁴⁰

In *Wright v. Case Corp.*,¹⁴¹ the defendant moved, pursuant to Rule 702¹⁴² and *Daubert*, to exclude the testimony of the plaintiff's expert witness, who offered testimony that the loader used by the plaintiff was defective. The plaintiff responded that this witness was qualified because the expert was a licensed mechanical engineer.¹⁴³ But the trial court disagreed.¹⁴⁴ Because the expert lacked knowledge regarding the type of loader at issue (for example, he was not familiar with the mechanics of the loader until he was retained in this lawsuit), his engineering certification was of little value when assessing his qualifica-

135. No. 5:04-CV-72(WDO), 2005 U.S. Dist. LEXIS 25574 (M.D. Ga. Oct. 27, 2005).

136. *Id.* at *1, *5.

137. *Id.* at *7.

138. *Id.* at *6.

139. *Id.* at *8.

140. *Id.* at *9. With the exclusion of the testimony from the plaintiff's expert witness, GM was entitled to summary judgment. *Cadwell v. General Motors Corp.*, No. 5:04-CV-72(WDO), 2006 U.S. Dist. LEXIS 4437 (M.D. Ga. Jan. 25, 2006). For a discussion of the grant of summary judgment in this case, see *supra* Part I.B.

141. No. 1:03-CV-1618-JEC, 2006 U.S. Dist. LEXIS 7683 (N.D. Ga. Feb. 1, 2006).

142. FED. R. EVID. 702.

143. *Id.* at *8.

144. *Id.* at *9.

tion to testify as an expert witness.¹⁴⁵ The court emphasized that because the expert lacked critical knowledge regarding the design and function of the loader, the expert's engineering degree must have been of little value in providing relevant knowledge; thus, the fact that the expert had an engineering degree was not an important factor in the *Daubert* analysis.¹⁴⁶

Similarly, the trial court found that the expert witness had not followed a reliable methodology in reaching his engineering conclusions.¹⁴⁷ The witness had performed no testing of his alternative designs, was unaware of any literature that discussed the merits of his alternative designs, and could not identify any other models that incorporated his alternative designs.¹⁴⁸ The witness admitted that he merely was providing "concepts" regarding how the loader could be improved.¹⁴⁹ But the trial court emphasized that "*Daubert's* reliability prong requires more than 'conceptualizing possibilities.'"¹⁵⁰ Because the testimony of the expert witness did not satisfy the *Daubert* criteria, the court excluded the testimony.¹⁵¹

Treating physicians also must comply with the requirements of *Daubert* before offering opinion testimony. In *Leathers v. Pfizer, Inc.*,¹⁵² the trial court excluded the testimony of a treating physician who had been offered to provide causation evidence linking the plaintiff's ingestion of Lipitor, a medicine commonly proscribed to reduce cholesterol, to the plaintiff's muscle pain.¹⁵³

145. *Id.* at *8-10.

146. *Id.*

147. *Id.* at *11-13.

148. *Id.* at *14.

149. *Id.* at *13-14.

150. *Id.* at *14 (quoting *McGee v. Evenflo Co.*, No. 5:02-CV-259(CAR), 2003 U.S. Dist. LEXIS 25039, at *24 (M.D. Ga. Dec. 11, 2003)).

151. *Id.* at *16-17. Without the testimony, the defendant was entitled to summary judgment on the design defect claim. *Id.* at *25. The court denied summary judgment on the failure to warn claim because the defendant failed to offer any specific argument regarding the failure to warn claim. *Id.* at *25-29. Thus, the defendant did not meet its burden under *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), of showing that it was entitled to summary judgment on this claim. *Wright*, 2006 U.S. Dist. LEXIS 7683, at *27-28. In addition, the court found evidence in the record through testimony from the defendant's expert witness and from the plaintiff that provided material facts to support the failure to warn claim. *Id.* at *28-29.

152. 233 F.R.D. 687 (N.D. Ga. 2006).

153. *Id.* at 689-90.

The first issue raised by the plaintiff in response to the *Daubert* challenge was whether the standards apply to testimony from treating physicians.¹⁵⁴ The plaintiff contended that because the expert witness had personal knowledge of his treatment of the plaintiff, Rule 702 and *Daubert* should not apply.¹⁵⁵ Because the proffered testimony from this physician related to causation, the trial court readily found his testimony to be within the realm of scientific knowledge.¹⁵⁶ The physician's status as a "treater" with factual knowledge of the plaintiff's physical condition did not allow the expert witness to escape the confines of the *Daubert* standards.¹⁵⁷

Although the expert witness admitted he was not an expert in muscle pain, the trial court, while noting its skepticism about his qualifications, found that the expert was adequately qualified, in part because of the liberal standard that is applied to qualifying expert witnesses.¹⁵⁸ The court questioned whether the physician's background as a clinical practitioner was sufficient qualification to opine about general causation—which generally requires epidemiological or toxicological testimony.¹⁵⁹ The court ultimately excluded the testimony of the expert because the reports and articles offered by the witness failed to support his opinion on general causation.¹⁶⁰

While these decisions from Georgia district courts may be persuasive because of their geographical proximity, the statutory language invites the use of all federal court cases. Thus, many other opinions may be relevant based on the type of case and the nature of the proffered testimony.

B. Other Incidents

Given the persuasive power of other incident evidence, the admission of evidence of allegedly similar incidents is a common battleground in product liability trials. To balance the prejudicial impact of this evidence with the probative value of truly similar events, the Georgia

154. *Id.* at 693.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* at 694. It is interesting to note that the trial court provided no citation for the proposition that the qualifications of an expert witness should be assessed in a liberal manner.

159. *Id.* (citing *Siharath v. Sandoz Pharm. Corp.*, 131 F. Supp. 2d 1347, 1363 (N.D. Ga. 2001)).

160. *Id.* at 695-96.

Supreme Court has required that other acts or omissions must be substantially similar to the defect alleged, adopting the following stringent standard for admissibility:

In products liability cases, the "rule of substantial similarity" prohibits the admission into evidence of other transactions, occurrences, or claims unless the proponent first shows that there is a "substantial similarity" between the other transactions, occurrences, or claims and the claim at issue in the litigation. The showing of substantial similarity must include a showing of similarity as to causation. Before admitting proffered evidence of other transactions in products liability cases, the trial court must satisfy itself that the rule of substantial similarity has been met.¹⁶¹

The recent cases in this area show the importance of the trial court's review of similar incident evidence. For example, in *Stovall v. Daimler-Chrysler Motors Corp.*,¹⁶² an automotive product liability action involving a claim that a Jeep was defective because it suddenly accelerated after being shifted into gear, the Georgia Court of Appeals affirmed the exclusion of thirteen other incidents of alleged sudden acceleration.¹⁶³ At the hearing on DaimlerChrysler's motion in limine to exclude evidence of these other incidents, the plaintiff's expert witness testified that in his opinion, the thirteen other incidents were substantially similar to the plaintiff's claim.¹⁶⁴ But the expert witness admitted that there were many different potential causes of sudden acceleration and that he had reached no opinion regarding the failure mode in the thirteen other incidents of alleged sudden acceleration.¹⁶⁵ Because the plaintiff could not show that the other incidents were caused by a defect similar to the defect alleged by the plaintiff in this case, the court of appeals affirmed the exclusion of this evidence.¹⁶⁶

In *Colp v. Ford Motor Co.*,¹⁶⁷ an automotive product liability case involving allegations of a defective door latch, the plaintiff raised three issues on appeal regarding the exclusion of other incident evidence: (1) whether the trial court used the wrong standard; (2) whether the trial

161. *Cooper Tire & Rubber Co. v. Crosby*, 273 Ga. 454, 455, 543 S.E.2d 21, 23-24 (2001).

162. 270 Ga. App. 791, 608 S.E.2d 245 (2004).

163. *Id.* at 791-92, 608 S.E.2d at 246-47.

164. *Id.* at 793, 608 S.E.2d at 247.

165. *Id.*, 608 S.E.2d at 247-48.

166. *Id.*

167. 279 Ga. App. 280, 630 S.E.2d 886 (2006).

court improperly resolved disputed issues of fact; and (3) whether the trial court abused its discretion in excluding the other incident evidence.¹⁶⁸ In a motion in limine, Ford sought to exclude evidence regarding thirty-seven other incidents that the plaintiff contended were evidence of defect or at a minimum put Ford on notice of problems with the door latch.¹⁶⁹ The trial court granted Ford's motion and excluded all of the other incident evidence, finding that the plaintiff had not shown a common design or common causation between the other incidents and the matter at issue in the lawsuit.¹⁷⁰

What is the Similarity Standard? On appeal, the plaintiff questioned whether the trial court had used the appropriate standard in its exclusion of the other incident evidence, focusing on language from the trial court's order that referred to the admissibility standard as being a high "hurdle" to cross.¹⁷¹ The court of appeals distinguished the substantial similarity test from the much broader general admissibility standard for relevant evidence and concluded that the plaintiff had taken the quoted statement out of context because the trial court repeatedly referred to substantial similarity—not some other evidentiary burden—throughout its order.¹⁷²

Can the Trial Court Resolve Disputed Issues of Fact? The plaintiff complained that the trial court should not have resolved issues of fact when analyzing the admissibility of the other incident evidence.¹⁷³ But the court of appeals clearly held that to apply the substantial similarity rule, "the trial court must necessarily conduct a factual inquiry into whether the proponent's proffered incidents share a common design, common defect, and common causation with the alleged design defect at issue."¹⁷⁴

Does Plaintiff's Allegation of Defect Control the Similarity Analysis? Finally, the plaintiff contended that the trial court should have analyzed similarity through the prism of the plaintiff's theory of defect—specifically, that there should have been a positive latch at the leading edge of the door.¹⁷⁵ Thus, other differences in design and the

168. *Id.* at 283-85, 630 S.E.2d at 888-89.

169. *Id.* at 282-83, 630 S.E.2d at 888.

170. *Id.*

171. *Id.* at 283, 630 S.E.2d at 889.

172. *Id.* at 283-84, 630 S.E.2d at 889.

173. *Id.* at 284, 630 S.E.2d at 889.

174. *Id.*

175. *Id.* at 285, 630 S.E.2d at 890.

accident scenario would not be relevant to the evidentiary analysis. Put simply, what the trial court should examine is whether the design in the other incidents failed to have a positive latch at the leading edge of the door.¹⁷⁶ But the court of appeals approved the reasoning of the trial court, which concluded that the plaintiff could not define the defect so broadly such that all other incidents by definition became substantially similar and, thus, admissible.¹⁷⁷

C. Spoliation

Spoliation is “the destruction or failure to preserve evidence that is necessary to contemplated or pending litigation.”¹⁷⁸ Georgia courts consider the following factors when determining whether spoliation of evidence requires dismissal of a plaintiff’s claims: (1) whether the defendant was prejudiced as a result of the destruction of the evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the plaintiff acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence was not excluded.¹⁷⁹ Sanctions for the spoliation of evidence can range from an adverse jury instruction, to exclusion of expert witnesses, and ultimately, to dismissal of the plaintiff’s claims.¹⁸⁰

The Eleventh Circuit addressed the issue of spoliation in *Flury v. DaimlerChrysler Corp.*,¹⁸¹ an automotive product liability claim arising from the failure of an air bag system to deploy in an accident involving a 1996 Dodge truck.¹⁸² After the accident, the plaintiff’s counsel sent DaimlerChrysler a letter notifying it of the claim. In response, DaimlerChrysler inquired about the location of the truck so that it could perform an inspection. Although the truck was initially stored at the home of the plaintiff’s parents and subsequently was sold by the insurer for salvage, the plaintiff’s counsel never informed DaimlerChrysler of the location of the truck or its impending salvage. After the truck was sold for salvage, its whereabouts were unknown.¹⁸³

176. *Id.*

177. *Id.* at 285-86, 630 S.E.2d at 890.

178. *Bridgestone/Firestone N. Am. Tire LLC v. Campbell*, 258 Ga. App. 767, 768, 574 S.E.2d 923, 926 (2002).

179. *Id.* at 768-69, 574 S.E.2d at 926.

180. *Id.*

181. 427 F.3d 939 (11th Cir. 2005).

182. *Id.* at 940.

183. *Id.* at 941-42.

In analyzing a summary judgment motion based on spoliation, the trial court balanced the culpability of the parties and found that dismissal of the lawsuit was too severe a sanction because Daimler-Chrysler had a responsibility to follow-up regarding the location of the truck.¹⁸⁴ Instead, at trial, the court offered a jury instruction regarding the alleged spoliation of evidence, allowing the jury to decide whether any presumption was appropriate.¹⁸⁵ By awarding the plaintiff a verdict of \$250,000, the jury apparently found that either the plaintiff had offered an opportunity to inspect or that the plaintiff had rebutted the presumption that the vehicle was defective.¹⁸⁶

The Eleventh Circuit reached a dramatically different result.¹⁸⁷ Although there is a split among the jurisdictions regarding whether state or federal law governs the imposition of sanctions in a diversity lawsuit, the Eleventh Circuit concluded that federal law applied because it was an evidentiary issue.¹⁸⁸ Because the Eleventh Circuit had not addressed the issue of spoliation sanctions before, it looked to Georgia law for the potential factors.¹⁸⁹

While recognizing that dismissal of the plaintiff's lawsuit was the most severe sanction, the Eleventh Circuit focused on the following facts mandating this result: (1) the plaintiff knew the location and condition of the truck for a long period of time after the accident; (2) the plaintiff knew that the defendant wanted to inspect and examine the truck; and (3) the plaintiff allowed the truck to be destroyed.¹⁹⁰ The court further indicated that even without the letter from the defendant requesting an opportunity to inspect the truck, the plaintiff should have known the truck was evidence that was integral to the prosecution of this product liability action.¹⁹¹

Flury highlights the critical importance of preserving evidence in product liability matters—because of the spoliated evidence, a favorable six-figure verdict for the plaintiff was reversed and judgment was rendered for the defendant. But defense counsel also should remain vigilant. Although the spoliator in *Flury* was a plaintiff, the principles

184. *Id.* at 942.

185. *Id.* at 943 & n.9.

186. *Id.* at 943.

187. *Id.* at 944.

188. *Id.*

189. *Id.*

190. *Id.* at 944-45.

191. *Id.* at 945-46.

should apply equally to defendants who obtain custody and control of critical evidence.

V. DEFENSES

A. *Product Misuse or Alteration*

A plaintiff's misuse or alteration of a product can be a complete defense to a product liability claim if the misuse or alteration caused the injury.¹⁹² In addition, misuse or alteration is a defense only if it was not reasonably foreseeable to the manufacturer.¹⁹³ This defense is founded on the principle that "[a] manufacturer has the absolute right to have his strict liability for injuries adjudged on the basis of the design of his own marketed product and not that of someone else."¹⁹⁴ Moreover, strict liability cannot be imposed on a manufacturer unless "the product 'is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.'"¹⁹⁵

Although misuse or alteration is considered an independent defense, it may also provide the basis for a defense based on the absence of proximate cause (or other defenses, such as assumption of the risk or comparative negligence). If the degree of misuse or alteration is great, such that the original design has been destroyed and an essentially different product has been created, a manufacturer will not be liable for injuries caused by the product because "those injuries cannot be traced to or be the proximate result of the manufacturer's original design which

192. *Center Chem. Co. v. Parzini*, 234 Ga. 868, 869, 218 S.E.2d 580, 582 (1975) ("If the injury results from abnormal handling . . . the seller is not liable."); *Chicago Hardware & Fixture Co. v. Letterman*, 236 Ga. App. 21, 23-24, 510 S.E.2d 875, 878 (1999) ("As a defense to a product liability claim, the defendant may show that plaintiff's misuse of the product caused the injury.").

193. *Thornton v. E.I. DuPont De Nemours & Co.*, 22 F.3d 284, 288 (11th Cir. 1994) ("Product misuse is defined as use of a product in a manner that could not reasonably be foreseen by the defendant."); *Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 335, 319 S.E.2d 470, 476 (1984) ("It is true that when the use to which a product was being put at the time of injury is not that originally intended by the manufacturer, liability of the manufacturer depends initially upon the foreseeability of that particular use.").

194. *Talley v. City Tank Corp.*, 158 Ga. App. 130, 135, 279 S.E.2d 264, 269 (1981). This principle is codified in Georgia's product liability statute, which provides that a manufacturer is strictly liable only if the condition of the property "when sold" is the proximate cause of the plaintiff's injuries. O.C.G.A. § 51-1-11(b)(1) (2000).

195. *Talley*, 158 Ga. App. at 135, 279 S.E.2d at 269 (quoting RESTATEMENT (SECOND) OF TORTS § 402A (1965)).

did not exist at the time of injury.¹⁹⁶ If, however, the degree of misuse or alteration is only slight, a jury will have to determine whether the misuse or alteration caused the injuries.¹⁹⁷ The Georgia Court of Appeals has explained this distinction as follows:

In some cases it may be a jury question as to whether the product's original design has been merely slightly or somewhat modified. In such cases, the jury must determine whether the original manufacturer's design was defective and, if so, whether the proximate cause of the injuries sustained was the original defective design or the subsequent modification. However, where, as here, the evidence is uncontroverted that the original design of the manufacturer's product has been totally eliminated and replaced so that the only similarity between the old and the new is the mere basic function to be performed, no such issue remains.¹⁹⁸

One case decided during the survey period involved an issue of whether a plaintiff's alleged misuse of a product proximately caused his injuries. In *Sanders v. Lull International, Inc.*,¹⁹⁹ the plaintiff was working on a platform that had been attached to a forklift and raised approximately thirty feet above the ground. When the operator attempted to change the tilt of the forklift, the forklift shifted quickly to the right and tipped over, which in turn caused the plaintiff to fall from the platform and sustain injuries.²⁰⁰ The manufacturer had placed a warning on the forklift that stated, "This machine is not equipped to lift personnel. Never use this machine as a work platform."²⁰¹ The owner's manual, however, stated as follows: "Lull strongly recommends that you DO NOT use the rough terrain forklift as a personnel lift. It is designed for material handling ONLY. If personnel MUST be lifted, lift only in accordance with ASME/ANSI B56.6 19922, Para. 5.15 and with a properly designed work platform."²⁰² Finally, a spokesman for the manufacturer who also designed the forklift testified that it was acceptable to use the work platform in the manner in which the plaintiff was using it when he fell.²⁰³ The district court granted the manufactu-

196. *Id.*

197. *Id.*

198. *Id.*

199. 411 F.3d 1266 (11th Cir. 2005).

200. *Id.* at 1268.

201. *Id.* at 1269.

202. *Id.*

203. *Id.*

rer's motion for summary judgment, holding that the plaintiff's misuse of the forklift (according to the warning affixed to the forklift) negated the element of proximate cause and that the risk of violating that warning was open and obvious.²⁰⁴

On appeal, the manufacturer acknowledged that using the forklift to lift personnel was foreseeable, but it argued that its warnings were sufficient to warn users that such use constituted misuse.²⁰⁵ Although the manufacturer warned against using the forklift to lift personnel, the evidence also indicated that "using a specially designed work platform to lift personnel was both a foreseeable and permissible use of the forklift."²⁰⁶ Thus, there was "significant evidence to suggest that it was reasonable to think that the warning affixed to the machine was inapplicable when the forklift was equipped with a work platform specially designed for lifting personnel."²⁰⁷ Accordingly, the Eleventh Circuit reversed and remanded because it found that "a reasonable juror could come to the conclusion that [the plaintiff's] use of the forklift did not constitute misuse such that it would preclude liability."²⁰⁸

B. *Learned Intermediary Doctrine*

Generally, a manufacturer owes a duty to foreseeable users of its product to warn about foreseeable dangers in the product.²⁰⁹ The learned intermediary doctrine, which is an exception to this general rule that applies in the healthcare context, provides a defense to manufacturers of prescription drugs and medical devices against claims for failure to warn.²¹⁰ The Georgia Supreme Court has described the learned intermediary doctrine as follows:

Under the learned intermediary doctrine, the manufacturer of a prescription drug or medical device does not have a duty to warn the patient of the dangers involved with the product, but instead has a duty to warn the patient's doctor, who acts as a learned intermediary between the patient and the manufacturer. The rationale for the

204. *Id.*

205. *Id.* at 1270.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Moore v. ECI Mgmt.*, 246 Ga. App. 601, 606, 542 S.E.2d 115, 120-21 (2000). For a more detailed discussion of this general rule, see *supra* Part II.

210. *Presto v. Sandoz Pharm. Corp.*, 226 Ga. App. 547, 548-49, 487 S.E.2d 70, 73 (1997).

doctrine is that the treating physician is in a better position to warn the patient than the manufacturer, in that the decision to employ prescription medication [or medical devices] involves professional assessment of medical risks in light of the physician's knowledge of a patient's particular need and susceptibilities.²¹¹

The Georgia appellate courts have applied the learned intermediary doctrine in a variety of contexts, but its applicability to pharmacists and pharmaceutical sales representatives was uncertain prior to the survey period.

1. Pharmacists. In *Walker v. Jack Eckerd Corp.*,²¹² the Georgia Court of Appeals considered whether the learned intermediary doctrine applies to pharmacists. After reviewing cases on this issue from other jurisdictions, the court set forth the rule as follows:

A pharmacist . . . owes the customer the highest degree of prudence, thoughtfulness, and diligence. However, a pharmacist has no duty to warn the customer or notify the physician that the drug is being prescribed in dangerous amounts, that the customer is being over medicated, or that the various drugs in their prescribed quantities could cause adverse reactions to the customer. It is the duty of the prescribing physician to know the characteristics of the drug he is prescribing, to know how much of the drug he can give his patient, to elicit from the patient what other drugs the patient is taking, to properly prescribe various combinations of drugs, to warn the patient of any dangers associated with taking the drug, to monitor the patient's dependence on the drug, and to tell the patient when and how to take the drug. Further, it is the duty of the patient to notify the physician of the other drugs the patient is taking. Finally, it is the duty of the drug manufacturer to notify the physician of any adverse effects or other precautions that must be taken in administering the drug. Placing these duties to warn on the pharmacist would only serve to compel the pharmacist to second guess every prescription a doctor orders in an attempt to escape liability.²¹³

211. *McCombs v. Synthes (U.S.A.)*, 277 Ga. 252, 253, 587 S.E.2d 594, 595 (2003) (brackets in original) (internal quotation marks omitted).

212. 209 Ga. App. 517, 434 S.E.2d 63 (1993) (en banc).

213. *Id.* at 522, 434 S.E.2d at 67-68 (internal quotation marks omitted). For a comprehensive analysis of the application of the learned intermediary doctrine to pharmacists, see David J. Marchitelli, Annotation, *Liability of Pharmacist Who Accurately Fills Prescription for Harm Resulting to User*, 44 A.L.R.5th 393 (1996).

Because the plaintiff's claims in *Walker* accrued before the January 1, 1993 effective date of the rules promulgated by the Georgia State Board of Pharmacy relating to new drug review and patient counseling, the court held that "this case is not intended to serve as controlling precedent for cases involving pharmacists' duties arising after January 1, 1993."²¹⁴

It took twelve years, but the issue of whether the learned intermediary doctrine applies to pharmacists finally reached the Georgia Court of Appeals again in 2005. In *Chamblin v. K-Mart Corp.*,²¹⁵ the plaintiff's orthopedic surgeon gave her two sample bottles of Daypro, a nonsteroidal anti-inflammatory drug, after she complained about pain in her knee and shoulder. The plaintiff alleged that her surgeon did not explain, and that she did not inquire about, the potential side effects of Daypro. After taking Daypro for about a week, the plaintiff began experiencing headaches, dry and itchy eyes, and flu-like symptoms. During an appointment with her surgeon two days later, the plaintiff did not mention the symptoms she was experiencing, and he gave her a prescription for Daypro. The plaintiff continued taking the Daypro samples for a few more days, at which time she filled the Daypro prescription at a K-Mart pharmacy. The plaintiff had no questions or concerns when she picked up the prescription, and she did not ask to speak with the pharmacist. The pharmacist did not recall the plaintiff, but he testified in his deposition that his usual practice was to counsel all customers and that a drug synopsis is included with all prescriptions dispensed at the K-Mart pharmacy. The day after filling the prescription, the plaintiff developed blisters in her mouth and had difficulty breathing. She went to the emergency room at South Georgia Medical Center and later to another doctor, who diagnosed her with Stevens-Johnson syndrome, which is a rare extreme allergic reaction to medication.²¹⁶

The plaintiff sued the pharmacy, alleging that the pharmacist failed to warn her about the potential side effects of Daypro, including Stevens-Johnson syndrome. She did not allege that the pharmacist improperly filled the prescription, provided incorrect instructions, or gave Daypro in an incorrect strength or quantity. The plaintiff's expert testified that any drug could cause Stevens-Johnson syndrome and that the odds of

214. *Walker*, 209 Ga. App. at 523, 434 S.E.2d at 69.

215. 272 Ga. App. 240, 612 S.E.2d 25 (2005).

216. *Id.* at 241, 612 S.E.2d at 26.

Daypro causing Stevens-Johnson syndrome are less than one in a million. The plaintiff's expert also testified that he does not warn his own patients about the possibility of Daypro causing Stevens-Johnson syndrome and that there was no reason for the plaintiff's surgeon to expect her to develop it. Finally, the plaintiff's expert testified that there was no way to determine whether the Daypro samples or prescription caused Stevens-Johnson syndrome in the plaintiff. The trial court granted the pharmacy's motion for summary judgment on the ground that the learned intermediary barred the plaintiff's claim.²¹⁷

The Georgia Court of Appeals acknowledged its decision in *Walker* and noted that "[t]he narrow issue of a pharmacist's duty to warn a customer of a drug's potential side effects has not been addressed by this Court or by our Supreme Court since the [Georgia State Board of Pharmacy] rules were established."²¹⁸ As it did in *Walker*, the court reviewed decisions on this issue from other jurisdictions and observed that "[a] number of other jurisdictions have declined to impose on pharmacists a duty to warn of potential adverse side effects."²¹⁹ Relying on a particularly analogous case from Texas, which also involved regulations governing the responsibilities of pharmacists, the court held that the rationale for applying the learned intermediary doctrine to a drug manufacturer applies equally to a pharmacist:

"[The Georgia State Board of Pharmacy rules] cannot be reasonably read to impose a legal duty to warn patients of the adverse effects of prescription drugs. The imposition of a generalized duty to warn would unnecessarily interfere with the relationship between physician and patient by compelling pharmacists seeking to escape liability to question the propriety of every prescription they fill. Furthermore, a patient faced with an overwhelming number of warnings from his or her pharmacist may decide not to take a medication prescribed by a physician, who has greater access to and knowledge of the patient's complete medical history and current condition than the pharmacist."²²⁰

Accordingly, the court affirmed the trial court's ruling that the learned intermediary doctrine applies to pharmacists and held that the

217. *Id.*

218. *Id.* at 243, 612 S.E.2d at 28.

219. *Id.* at 244, 612 S.E.2d at 28.

220. *Id.* (quoting *Morgan v. Wal-Mart Stores*, 30 S.W.3d 455, 467 (Tex. App. 2000)).

pharmacy did not have a duty to warn the plaintiff about every potential side effect of Daypro.²²¹

2. Pharmaceutical Sales Representatives. Prior to the survey period, neither the Georgia appellate courts nor the federal courts in Georgia had confronted the issue of whether the learned intermediary doctrine applies to pharmaceutical sales representatives. Courts in other jurisdictions, however, had decided that the learned intermediary doctrine does apply to pharmaceutical sales representatives.²²² This issue is important because a common strategy employed by plaintiffs in pharmaceutical product liability cases is to sue the (presumably nondiverse) sales representative(s) who detailed the drug at issue to plaintiff's physicians in an effort to destroy diversity jurisdiction and thereby prevent removal to federal court. This issue arose in this specific context in one case decided by the Middle District of Georgia during the survey period.

In *Catlett v. Wyeth, Inc.*,²²³ the plaintiffs alleged that they developed valvular heart disease as a result of taking a combination of diet drugs—fenfluramine, dexfenfluramine, and phentermine—commonly known as “Fen-Phen.”²²⁴ The plaintiffs sued the manufacturer of Fen-Phen and six sales representatives whose job was to promote Fen-Phen at doctors' offices. The sales representatives, all of whom were Georgia residents, were not involved in the design, manufacture, testing, or labeling of Fen-Phen, nor did they play any role in the regulatory approval process. They provided samples of Fen-Phen to the plaintiffs' doctors, but they did not distribute Fen-Phen directly to the plaintiffs. Finally, the sales representatives did not participate in the development of the promotional materials that they gave to the plaintiffs' doctors. Nevertheless, the plaintiffs alleged that the sales representatives failed to adequately warn their doctors about the alleged dangers associated with Fen-Phen. The defendants removed the case to federal court on the basis of diversity jurisdiction, and the plaintiffs filed a motion to remand. The defendants opposed the motion on the ground that the

221. *Id.* at 244-45, 612 S.E.2d at 28-29.

222. *See, e.g., In re Rezulin Prods. Liab. Litig.*, 133 F. Supp. 2d 272, 282 (S.D.N.Y. 2001) (“If pharmaceutical sales representatives handling prescription drugs have any duty to warn anyone of dangers of their products, the duty is to warn the physicians to whom they promote the product. In any case, they have no duty to warn patients.”).

223. 379 F. Supp. 2d 1374 (M.D. Ga. 2004).

224. *Id.* at 1375.

nondiverse sales representatives were fraudulently joined to defeat diversity jurisdiction.²²⁵

After reviewing similar cases decided by the Georgia appellate courts and federal courts applying Georgia law, the district court concluded that "Georgia courts would find the 'learned intermediary rule' encompasses any fraud, fraudulent concealment, misrepresentation, failure to warn or breach of warranty claims related to the sale and use of prescription drugs" and that, therefore, "pharmaceutical companies have a duty to warn *only* the physicians who will be prescribing the drug to their patients."²²⁶ Because the duty to warn runs from the manufacturer of the drug to plaintiff's doctor, "[t]here is no basis for a claim against a sales representative under the learned intermediary doctrine."²²⁷ Finally, the district court explained that "[a]lthough the manufacturers employ the sales representatives to be one source of [information about the safety and proper use of their drugs], the manufacturers are the ones who are ultimately responsible and thus liable under Georgia law for any alleged failure to provide information related to prescription drugs."²²⁸ Accordingly, the district court denied the plaintiffs' motion to remand and dismissed the claims against the sales representatives.²²⁹

C. Preemption

Because product liability cases often involve goods that are heavily regulated by the federal government, the doctrine of federal preemption can be a potent defense. This doctrine derives from the Supremacy Clause of the United States Constitution, which provides as follows:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.²³⁰

225. *Id.*

226. *Id.* at 1381.

227. *Id.*

228. *Id.*

229. *Id.* at 1382.

230. U.S. CONST. art. VI, cl. 2.

Essentially, this clause means that “state law that conflicts with federal law is ‘without effect.’”²³¹ A state law conflicts with (that is, stands as an obstacle to the full implementation of) a federal law “if it interferes with the methods by which the federal statute was designed to reach [its] goal,” even if both the federal law and the state law have the same goal.²³² In this context, the term “state law” is not limited to statutes and regulations; it also includes common-law liability because “[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.”²³³ “The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law.”²³⁴ Congress may manifest its intent to preempt state law “by express language in a congressional enactment [i.e., express preemption], by implication from the depth and breadth of a congressional scheme that occupies the legislative field [i.e., field preemption], or by implication because of a conflict with a congressional enactment [i.e., implied or conflict preemption].”²³⁵ Because preemption is a matter of congressional intent, whether a state’s regulation of a particular product is preempted depends upon the nature of the federal regulation of that product.²³⁶

For example, the federal government and many states regulate the use, sale, and labeling of pesticides and other similar products. Under the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”),²³⁷ pesticides that are distributed or sold in the United States must be registered with the Environmental Protection Agency (“EPA”) unless exempted.²³⁸ A manufacturer that wishes to register a pesticide must

231. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)).

232. *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987).

233. *San Diego Bldg. Trades Council, Millmen’s Union, Local 2020 v. Garmon*, 359 U.S. 236, 247 (1959).

234. *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 369 (1986). “Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation.” *Id.* Thus, preemption is not always strictly a question of congressional intent. *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 154 (1982) (noting that a “narrow focus on Congress’ intent to supersede state law [is] misdirected” when a state law is claimed to be preempted by a federal regulation).

235. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (citations omitted).

236. *Id.*

237. 7 U.S.C. §§ 136-136y (2000 & Supp. IV 2004).

238. *Id.* § 136a(a).

submit a registration statement to the EPA that includes the proposed label and supporting data.²³⁹ The EPA will register a pesticide if it determines that the pesticide is efficacious, the labeling and other materials submitted comply with FIFRA, and the pesticide will not cause unreasonable adverse effects on the environment.²⁴⁰ Although FIFRA establishes a comprehensive regulatory scheme for the federal government, it nevertheless contemplates a role for the states in pesticide regulation. In general, FIFRA provides that "[a] State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by [FIFRA]."²⁴¹ FIFRA also includes a preemption clause for states that supplement FIFRA's regulations: "Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA]."²⁴²

Prior to the survey period, both the Georgia appellate courts and the Eleventh Circuit had ruled on the preemptive effect of FIFRA on product liability claims brought under state law. In *Papas v. Upjohn Co.*,²⁴³ the plaintiff alleged that he suffered health problems because of pesticides to which he was exposed while working for a humane society. The pesticide, which was registered by the EPA under FIFRA, was for ridding dogs of fleas, ticks, and other pests. All of the plaintiff's claims were based on alleged inadequate labeling with respect to the dangers associated with exposure to the pesticide.²⁴⁴ The manufacturer of the pesticide moved for summary judgment on the ground that the plaintiff's claims were preempted by FIFRA, and the district court granted the motion.²⁴⁵

After reviewing the regulatory scheme established by FIFRA, including the preemption clause, the Eleventh Circuit conceded that it was uncertain as to whether FIFRA expressly preempted the plaintiff's claims.²⁴⁶ As for whether preemption could be inferred from FIFRA

239. *Id.* §§ 136a(c)(1), (2).

240. *Id.* § 136a(c)(5). The EPA is authorized to waive the data requirements relating to efficacy, "in which event the [EPA] may register the pesticide without determining that the pesticide's composition is such as to warrant proposed claims of efficacy." *Id.*

241. *Id.* § 136v(a).

242. *Id.* § 136v(b).

243. 926 F.2d 1019 (11th Cir. 1991) (per curiam).

244. *Id.* at 1020.

245. *Id.* at 1020-21.

246. *Id.* at 1024.

and its implementing regulations, the Eleventh Circuit held that "FIFRA impliedly preempts state common law tort suits against manufacturers of EPA-registered pesticides *to the extent that* such actions are based on claims of inadequate labeling."²⁴⁷ The plaintiff petitioned the United States Supreme Court for a writ of certiorari, and the Court granted the petition, vacated the Eleventh Circuit's judgment, and remanded the case to the Eleventh Circuit for further consideration in light of its decision in *Cipollone v. Liggett Group, Inc.*²⁴⁸ In *Cipollone* the Court examined the preemption clauses in the Federal Cigarette Labeling and Advertising Act²⁴⁹ and the Public Health Cigarette Smoking Act,²⁵⁰ and the Court instructed federal courts to consider express preemption first if there is a preemption clause in the relevant statute:

When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation. Such reasoning is a variant of the familiar principle of *expression unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.²⁵¹

On remand, and in accordance with *Cipollone*, the Eleventh Circuit examined the preemption clause in FIFRA to determine whether it expressly preempted the plaintiff's claims.²⁵² The Eleventh Circuit held, "To the extent that state law actions for damages depend upon a showing that a pesticide manufacturer's 'labeling or packaging' failed to meet a standard 'in addition to or different from' FIFRA requirements, section 136v pre-empts the claims."²⁵³ Thus, state-law claims are preempted by FIFRA if they require a showing that the labeling or packaging "'should have included additional, or more clearly stated, warnings.'"²⁵⁴ For example, claims based on allegedly inadequate

247. *Id.* at 1026.

248. *Papas v. Zoecon Corp.*, 505 U.S. 1215 (1992).

249. Pub. L. No. 89-92, § 5, 79 Stat. 282, 283 (1965) (codified as amended at 15 U.S.C. § 1334 (2000)).

250. Pub. L. No. 91-222, § 2, 84 Stat. 87, 88 (1970) (codified at 15 U.S.C. § 1334 (2000)).

251. *Cipollone*, 505 U.S. at 517 (citations and internal quotation marks omitted).

252. *Papas v. Upjohn Co.*, 985 F.2d 516, 517 (11th Cir. 1993) (per curiam) ("*Papas II*").

253. *Id.* at 518 (quoting 7 U.S.C. § 136v(b)).

254. *Id.* (quoting *Cipollone*, 505 U.S. at 524).

point-of-sale signs, consumer notices, or other informational materials, are preempted because they “necessarily challenge the adequacy of the warnings provided on the product’s labeling or packaging” and therefore imply that the labeling or packaging failed to warn the user.²⁵⁵ Because the inclusion of EPA-approved warnings on the label or packaging of a pesticide satisfies the manufacturer’s duty to warn, such claims are preempted.²⁵⁶

Less than a year after the Eleventh Circuit’s decision in *Papas II*, the Georgia appellate courts entered the thicket of FIFRA preemption. In *ICI Americas, Inc. v. Banks*,²⁵⁷ a product liability case brought by the parents of a nine-year-old boy who died after ingesting rat poison that was registered by the EPA under FIFRA, the plaintiffs alleged that the manufacturer of the rat poison was liable in negligence and strict liability on the grounds that the rat poison was unreasonably dangerous to children and the rat poison was inadequately labeled.²⁵⁸ Relying on the Eleventh Circuit’s decision in *Papas II*, the Georgia Court of Appeals held that the “plaintiffs’ product design claims are ultimately grounded in the issue of adequate warning, and the warning issue is pre-empted by federal law under FIFRA.”²⁵⁹ The Georgia Supreme Court summarily affirmed the opinion of the court of appeals.²⁶⁰

During the survey period, both the United States Supreme Court and the Eleventh Circuit weighed in on this issue. In *Oken v. Monsanto Co.*,²⁶¹ the plaintiff bought two bags of an insecticide from a Home Depot store in Florida because he had an ant problem in his yard. The plaintiff read the warning label and then proceeded to spread both bags on his lawn using a two-wheeled spreader. As he spread the insecticide, he was exposed to a mist of powder discharged by the spreader. Shortly thereafter, the plaintiff suffered a reaction and had to be hospitalized for extensive treatment.

In a Florida state court, the plaintiff sued the manufacturer of the insecticide, the manufacturer of the active ingredient in the insecticide, and the seller of the insecticide, alleging that they were liable in negligence and strict liability for designing, manufacturing, and/or

255. *Id.* at 519.

256. *Id.*

257. 211 Ga. App. 523, 440 S.E.2d 38 (1993) (en banc).

258. *Id.* at 523, 440 S.E.2d at 40.

259. *Id.* at 527, 440 S.E.2d at 43.

260. *Banks v. ICI Americas, Inc.*, 264 Ga. 732, 737-38, 450 S.E.2d 671, 676 (1994).

261. 371 F.3d 1312 (11th Cir. 2004) (per curiam).

selling an unreasonably dangerous product. The defendants removed the case to the Southern District of Florida and, following discovery, filed a motion for summary judgment on the ground that the plaintiff's claims were preempted by FIFRA. Finding that the case was indistinguishable from and therefore controlled by *Papas II*, the district court granted the defendants' motion.²⁶²

On appeal, the Eleventh Circuit agreed with the district court's conclusion that the case was controlled by *Papas II*.²⁶³ Because the plaintiff argued that he would not have used the insecticide, and therefore would not have been injured if the warning label had adequately warned him about the potential dangers, the Eleventh Circuit observed that "[t]he adequacy of the [insecticide's] warning label is at the heart of this case."²⁶⁴ Under *Papas II*, therefore, the plaintiff's claims were preempted by FIFRA.²⁶⁵

Seven months later, the United States Supreme Court issued its decision in *Bates v. AgroSciences LLC*.²⁶⁶ In that case, twenty-nine peanut farmers from western Texas had purchased and used a pesticide named Strongarm on their crops during the 2000 growing season. The label for Strongarm, which had been approved by the EPA in early 2000 pursuant to its authority under FIFRA, indicated that it was recommended for use in all areas where peanuts are grown. Soil in western Texas typically has a pH level (referring to the acidity of the soil) of 7.2 or higher, and when the farmers applied Strongarm to their crops, it both damaged their crops and failed to control the growth of weeds. The farmers reported the problem to the manufacturer, and the manufacturer dispatched an expert to examine the damaged crops. Apparently, peanut farmers in New Mexico and Oklahoma experienced similar problems.²⁶⁷

The farmers' negotiations with the manufacturer were unsuccessful, so they notified the manufacturer of their intent to sue as required by the Texas Deceptive Trade Practices-Consumer Protection Act.²⁶⁸ The

262. *Id.* at 1314. Although *Oken* involved the substantive law of Florida, it is included here because the doctrine of preemption is not dependent on any state's substantive law. Thus, *Oken's* precedential value will be the same in Florida and Georgia.

263. *Id.* at 1314-15.

264. *Id.* at 1314.

265. *Id.* at 1314-15. In addition, the Eleventh Circuit rejected the plaintiff's argument that *Papas II* should be overruled. *Id.* at 1315.

266. 544 U.S. 431 (2005).

267. *Id.* at 434-35.

268. Tex. Bus. & Com. Code §§ 17.41 to 17.63 (2006).

manufacturer responded by filing an action for declaratory judgment in the Northern District of Texas, arguing that the farmers' anticipated claims were preempted by FIFRA. The farmers asserted counterclaims for product liability (based on both strict liability and negligence), fraud, breach of warranty, and violation of the Texas Deceptive Trade Practices-Consumer Protection Act. Among other things, the farmers alleged that the manufacturer knew, or should have known, that Strongarm would damage peanuts grown in soils with a pH level of 7.0 or higher.²⁶⁹

The district court granted the manufacturer's motion for summary judgment, finding that one claim was barred based on substantive state law and that the remainder were preempted by FIFRA. The Fifth Circuit affirmed on the ground that FIFRA preempts any state-law claim on which success would induce the manufacturer to change the label. Success on the farmers' claims would necessarily induce the manufacturer of Strongarm to change the label, and so the Fifth Circuit held that all of the farmers' claims were preempted.²⁷⁰

Because the federal circuit courts and several state supreme courts had issued conflicting decisions on the issue of whether FIFRA preempts state-law tort claims, the United States Supreme Court granted certiorari to resolve the conflict.²⁷¹ After extensively reviewing the legislative history of FIFRA and the historical interpretation of its preemption clause, the Court noted that the states have a supplementary role with respect to pesticide labeling because Congress did not intend to occupy the field when it enacted FIFRA.²⁷² The Court described the states' supplemental role under FIFRA as follows:

As part of their supplementary role, States have ample authority to review pesticide labels to ensure that they comply with both federal and state labeling requirements. Nothing in the text of FIFRA would prevent a State from making the violation of a federal labeling or packaging requirement a state offense, thereby imposing its own sanctions on pesticide manufacturers who violate federal law. The imposition of state sanctions for violating state rules that merely

269. 544 U.S. at 435-36. Before the 2001 growing season, the EPA approved a supplemental label for Strongarm for use only in New Mexico, Oklahoma, and Texas. *Id.* at 435. That label warned users not to apply Strongarm to soils having a pH level of 7.2 or higher. *Id.*

270. *Id.* at 436.

271. *Id.* at 436-37.

272. *Id.* at 437-42.

duplicate federal requirements is equally consistent with the text of § 136v.²⁷³

Turning to FIFRA's preemption clause, the Court first looked to the plain language of the clause to determine its coverage.²⁷⁴ By its own terms, the preemption clause applies only to "Such State," which refers to states that regulate the sale or use of pesticides registered by the EPA within the framework of FIFRA.²⁷⁵ Because Texas is such a state, the Court held that the preemption clause applies to this case.²⁷⁶ As for the type of state activity that is covered, the preemption clause applies only to "requirements," which the Court interpreted to "reach[] beyond positive enactments, such as statutes and regulations, to embrace common-law duties."²⁷⁷ The Court rejected the Fifth Circuit's expansive interpretation, which included events that induce a pesticide manufacturer to change its label as requirements covered by the preemption clause.²⁷⁸

In rejecting the Fifth Circuit's inducement test as "unquestionably overbroad," the Court described a "requirement" as "a rule of law that must be obeyed; an event, such as a jury verdict, that merely motivates an optional decision is not a requirement."²⁷⁹ To determine whether a "requirement" is involved, the elements of the common-law duty at issue must be examined.²⁸⁰ Speculation as to whether a manufacturer will take any particular action in response to a jury verdict is irrelevant, especially because a manufacturer could conduct a cost-benefit analysis that causes it to ignore an adverse jury verdict.²⁸¹ Under the Fifth Circuit's inducement test, however, FIFRA would preempt a state-law claim based on an alleged design defect because such a claim, if successful, likely would induce a manufacturer to change its label to reflect changes required to correct the defective design.²⁸² Classifying

273. *Id.* at 442.

274. *Id.* at 442-43.

275. *Id.* at 443.

276. *Id.* Georgia is also covered by the preemption clause because it regulates the sale and use of pesticides. See Georgia Pesticide Control Act of 1976, O.C.G.A. §§ 2-7-50 to -73 (2000); Georgia Pesticide Use and Application Act of 1976, O.C.G.A. §§ 2-7-90 to -114 (2000).

277. *Bates*, 544 U.S. at 443.

278. *Id.*

279. *Id.* at 445.

280. *Id.*

281. *Id.*

282. *Id.* at 445-46.

such a change as a labeling requirement would be anomalous.²⁸³ Thus, the Court concluded that “[i]t is highly unlikely that Congress endeavored to draw a line between the type of indirect pressure caused by a State’s power to impose sales and use restrictions and the even more attenuated pressure exerted by common-law suits.”²⁸⁴

The Court considered the scope of preemption under FIFRA.²⁸⁵ “For a particular state rule to be pre-empted, it must satisfy two conditions. First, it must be a requirement ‘for labeling or packaging’ Second, it must impose a labeling or packaging requirement that is ‘in addition to or different from those required under [FIFRA].’”²⁸⁶ With respect to the first condition, the Court held that “claims for defective design, defective manufacture, negligent testing, and breach of express warranty are not pre-empted.”²⁸⁷ The Court explained:

Rules that require manufacturers to design reasonably safe products, to use due care in conducting appropriate testing of their products, to market products free of manufacturing defects, and to honor their express warranties or other contractual commitments plainly do not qualify as requirements for “labeling or packaging.” None of these common-law rules requires that manufacturers label or package their products in any particular way.²⁸⁸

Claims for fraud and negligent failure to warn, however, are preempted because those claims “are premised on common-law rules that qualify as ‘requirements for labeling or packaging’” insofar as they “set a standard for a product’s labeling that the [product’s] label is alleged to have violated by containing false statements and inadequate warnings.”²⁸⁹

With respect to the second condition for FIFRA preemption, the Court held that “a state-law labeling requirement is not pre-empted by [the preemption clause] if it is equivalent to, and fully consistent with, FIFRA’s misbranding provisions.”²⁹⁰ The farmers argued that claims

283. *Id.* at 446.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.* at 444.

289. *Id.* at 446.

290. *Id.* at 447. “To survive pre-emption, the state-law requirement need not be phrased in the *identical* language as its corresponding FIFRA requirement; indeed, it would be surprising if a common-law requirement used the same phraseology as FIFRA.” *Id.* at 454.

based on fraud and negligent failure to warn are not preempted because the state-law duties corresponding to those claims are equivalent to FIFRA's prohibitions on false or misleading statements in pesticide labels and inadequate instructions or warnings.²⁹¹ The Court agreed with the farmers to the extent that the preemptive effect of FIFRA's preemption clause does not depend on whether state law explicitly incorporates FIFRA's standards as elements of a claim, but it deferred a decision on whether the state-law duties corresponding to claims for fraud and negligent failure to warn are equivalent to FIFRA's misbranding standards.²⁹² The Court explained its view of the "parallel requirements" contemplated by FIFRA's preemption clause as follows:

[A] state cause of action that seeks to enforce a federal requirement does not impose a requirement that is different from, or in addition to, requirements under federal law. To be sure, the threat of a damages remedy will give manufacturers an additional cause to comply, but the requirements imposed on them under state and federal law do not differ. [The preemption clause] does not preclude States from imposing different or additional *remedies*, but only different or additional *requirements*. Accordingly, although FIFRA does not provide a federal remedy to farmers and others who are injured as a result of a manufacturer's violation of FIFRA's labeling requirements, nothing in [the preemption clause] precludes States from providing such a remedy.²⁹³

After rejecting various policy-based arguments asserted by the manufacturer, the Court summarized its holding as follows:

In sum, under our interpretation, [FIFRA's preemption clause] retains a narrow, but still important, role. In the main, it pre-empts competing state labeling standards—imagine 50 different labeling regimes prescribing the color, font size, and wording of warnings—that

291. *Id.* at 447.

292. *Id.* The Court left this decision for the Fifth Circuit to consider in the first instance because the issue was not sufficiently briefed by the parties. *Id.* at 453. To aid the Fifth Circuit in deciding this issue, the Court "emphasize[d] that a state-law labeling requirement must in fact be equivalent to a requirement under FIFRA in order to survive pre-emption." *Id.* For example, if the falsity element of a state-law claim for fraud is defined more broadly than FIFRA's prohibition on false or misleading statements in pesticide labels, then that claim would be preempted to the extent of the difference. *Id.* Similarly, a state-law claim for failure to warn based on the alleged inadequacy of the word "CAUTION," as opposed to the word "DANGER," would be preempted if the federal regulations mandated the use of the word "CAUTION" for a particular pesticide. *Id.*

293. *Id.* at 448 (citation and internal quotation marks omitted).

would create significant inefficiencies for manufacturers. The provision also pre-empts any statutory or common-law rule that would impose a labeling requirement that diverges from those set out in FIFRA and its implementing regulations. It does not, however, pre-empt any state rules that are fully consistent with federal requirements.²⁹⁴

Following its decision in *Bates*, the United States Supreme Court granted the plaintiff's petition for a writ of certiorari in *Oken*, vacated the Eleventh Circuit's judgment, and remanded the case to the Eleventh Circuit for further consideration in light of its decision in *Bates*.²⁹⁵ On remand, the Eleventh Circuit remanded the case to the district court for further consideration in light of the Supreme Court's decision in *Bates*.²⁹⁶ Because the Eleventh Circuit and district court decisions in *Oken* were based on *Papas II*, on remand the district court will have to decide whether *Papas II* is consistent with *Bates*. There is no doubt that the preemptive effect of FIFRA's preemption clause is quite narrow after *Bates*,²⁹⁷ and *Papas II* appears to be consistent with that narrow scope insofar as it finds that state-law claims are preempted only to the extent that such claims are based on inadequate labeling or packaging.²⁹⁸ Thus, *Papas II* appears to leave room for state-law claims that do not relate to labeling or packaging requirements, as *Bates* requires.²⁹⁹ *Oken*, however, appears to go beyond *Bates* and *Papas II* by holding that all of the plaintiff's negligence and strict liability claims are preempted, even to the extent that they are not based on inadequate labeling.³⁰⁰ If that is true, the district court in *Oken* will have to re-evaluate its application of *Papas II* to the facts of its case.

294. *Id.* at 452.

295. *Oken v. Monsanto Co.*, 544 U.S. 1012 (2005).

296. *Oken v. Monsanto Co.*, 419 F.3d 1312 (11th Cir. 2005) (per curiam).

297. *Bates*, 544 U.S. at 452 (holding that FIFRA's preemption clause "retains a narrow, but still important, role").

298. *Papas II*, 985 F.2d at 520.

299. *Bates*, 544 U.S. at 444 (holding that FIFRA does not preempt state-law claims for defective design, defective manufacture, negligent testing, and breach of express warranty).

300. *Oken*, 371 F.3d at 1314-15. Similarly, the decision by the Georgia Court of Appeals in *Banks*, though based on *Papas II*, appears to be overly broad because it is contrary to *Bates* insofar as it held that the plaintiffs' claim for design defect was preempted by FIFRA. *Banks*, 211 Ga. App. at 527, 440 S.E.2d at 43.

VI. DAMAGES

A. *Proof of Injury*

Whether brought in strict liability or negligence, the general rule is that a plaintiff cannot maintain a product liability claim without proof of a physical injury or damage to property other than the allegedly defective product.³⁰¹ This is commonly referred to as the economic loss rule. "The Georgia economic loss rule in essence prevents recovery in tort when a defective product has resulted in the loss of the value or use of the thing sold, or the cost of repairing it. Such economic losses are not recoverable under strict liability or negligence theories."³⁰² Instead, a claim based on a purely economic loss must be brought under a breach of warranty theory.³⁰³

In many product liability cases, it is obvious whether the plaintiff sustained a physical injury that is cognizable under tort law. For example, a person who is paralyzed as a result of an automobile collision caused by a defect in the automobile's design has undoubtedly suffered a cognizable physical injury. But in other cases, such as those involving exposure to toxic substances, whether the plaintiff has suffered a cognizable physical injury is a more difficult question. Is mere exposure to a toxic substance a cognizable physical injury, or is a subsequent physiological manifestation of symptoms or effects required? This is an important question because exposure to a toxic substance does not necessarily or immediately cause a physiological response in the person exposed; sometimes the person exposed suffers nothing more than an increased risk of contracting a disease or condition in the future. Unfortunately, the Georgia appellate courts have not provided much guidance on this question.

301. O.C.G.A. § 51-1-11(b)(1) (2000); O.C.G.A. § 51-12-4 (2000); *Vulcan Materials Co. v. Driltech, Inc.*, 251 Ga. 383, 384-87, 306 S.E.2d 253, 254-57 (1983); *Busbee v. Chrysler Corp.*, 240 Ga. App. 664, 666, 524 S.E.2d 539, 541 (1999). There are two exceptions to this general rule, one for accident and one for misrepresentation. *Vulcan*, 251 Ga. at 384-87, 306 S.E.2d at 254-57 (adopting the accident exception); *Robert & Co. Assocs. v. Rhodes-Haverty P'ship*, 250 Ga. 680, 681, 300 S.E.2d 503, 504 (1983) (adopting the misrepresentation exception).

302. *Busbee*, 240 Ga. App. at 666, 524 S.E.2d at 541 (citation and internal quotation marks omitted).

303. *Vulcan*, 251 Ga. at 386-87, 306 S.E.2d at 256.

In the one case addressing this question, *Boyd v. Orkin Exterminating Co.*,³⁰⁴ a family of two adults and five children was exposed to toxic chemicals when the defendant applied a termiticide to their house beginning in 1977. The termiticide consisted of chlordane and heptachlor, which the United States Environmental Protection Agency had previously characterized as a "serious human cancer risk."³⁰⁵ For two years, the defendant applied the termiticide to the plaintiffs' house every month. A strong odor permeated the house following those treatments, and the children complained about headaches and nausea during that time. In 1982 a representative of the Georgia Department of Agriculture ("GDA") inspected the plaintiffs' house and found no evidence that the termiticide was misapplied or that any termite extermination standards as of 1977 were violated. Later that same year, a private chemical consulting firm tested air samples from the plaintiffs' house and found no presence of either chlordane or heptachlor.

In 1985 another representative of the GDA tested air samples from the plaintiffs' house and found evidence of chlordane but not heptachlor. Because chlordane was widely used at that time in household pesticides, the GDA determined that the presence of chlordane in the plaintiffs' house was not necessarily the result of the defendant's termiticide treatments and that no regulatory action against the defendant was warranted. Later in 1985, air and wipe samples taken from the heating registers in the plaintiffs' house tested positive for both chlordane and heptachlor. And in 1986, wood and soil samples taken from the property tested positive for both chlordane and heptachlor. Because of these test results, as well as the continuing odor, the plaintiffs moved out of their house in 1986. Medical tests performed on the children in 1986 and 1987 showed significantly elevated levels of heptachlor epoxide, a metabolite of heptachlor, in their bloodstreams, but they had not developed any actual health problems that were attributable to their exposure to chlordane and heptachlor.³⁰⁶

The plaintiffs sued for negligent misapplication of the termiticide in their house. The trial court entered summary judgment for the defendant with respect to the parents' claims on the ground that they were barred by the statute of limitations. With respect to the children's claims, the trial court entered summary judgment for the defendant to

304. 191 Ga. App. 38, 381 S.E.2d 295 (1989), *overruled on other grounds*, *Hanna v. McWilliams*, 213 Ga. App. 648, 446 S.E.2d 741 (1994) (en banc).

305. *Id.* at 38, 381 S.E.2d at 296.

306. *Id.* at 38-40, 381 S.E.2d at 296-97.

the extent that the damages were based on an increased risk of contracting cancer. The case went to trial on the children's remaining claims, but the trial court directed a verdict for the defendant.³⁰⁷

The court of appeals affirmed on the ground that "there was no evidence that the [children] had sustained any specific injury as a result of [the defendant's] conduct."³⁰⁸ Explaining that the children had unremarkable medical histories, normal or average health, and normal results on organ function tests, the court held that the presence of heptachlor metabolites in the children's bloodstreams did not constitute a cognizable physical injury because there was no evidence of any actual disease, pain, or impairment.³⁰⁹ The court also held that the children could not recover for an increased risk of contracting cancer because they had not established to a reasonable medical certainty that they would actually contract cancer in the future; this standard was not satisfied by testimony that the children would require monitoring in the future to determine whether any health problems they developed were caused by their exposure to chlordane and heptachlor.³¹⁰

The issue of what constitutes a cognizable physical injury arose in one case decided by the Northern District of Georgia during the survey period. In *Parker v. Brush Wellman, Inc.*,³¹¹ the plaintiffs alleged that they were exposed to products containing beryllium manufactured or used by the defendants at the Lockheed Martin Corporation facility in Marietta. The plaintiffs either worked at the Lockheed facility or lived with family members who worked there and carried beryllium residue home on their skin, clothes, and belongings. The plaintiffs alleged that exposure to beryllium can cause subclinical, cellular, and subcellular damage; acute and chronic lung disease; dermatologic disease; and cancer. The plaintiffs also alleged that all of them had sustained and would in the future sustain subclinical, cellular, and subcellular damage and that some of them had sustained acute and chronic lung disease, dermatologic disease, and chronic beryllium disease. Further, the plaintiffs alleged that they had a substantially increased risk of contracting a catastrophic latent disease, such as chronic beryllium

307. *Id.* at 38, 381 S.E.2d at 296.

308. *Id.* at 40, 381 S.E.2d at 297. The court of appeals also affirmed the trial court's ruling that the parents' claims were barred by the statute of limitations. *Id.* at 41, 381 S.E.2d at 298-99.

309. *Id.* at 40, 381 S.E.2d at 297-98.

310. *Id.* at 40-41, 381 S.E.2d at 298.

311. 377 F. Supp. 2d 1290 (N.D. Ga. 2005).

disease and cancer, and that they had suffered from and would in the future suffer from fear, anxiety, and emotional distress because of their injuries and the possibility of contracting a beryllium-related disease. The plaintiffs brought claims for strict liability, negligence, fraudulent concealment, and civil conspiracy, and defendants moved to dismiss on the ground that the harms alleged in the complaint did not constitute cognizable physical injuries as a matter of Georgia tort law.³¹²

The threshold issue faced by the district court was whether subclinical, cellular, and subcellular damage caused by exposure to beryllium is a physical injury that will sustain a recovery in tort, regardless of the theory of liability.³¹³ Noting that subclinical, cellular, and subcellular damage is characterized by an absence of contemporaneous physiological manifestations of symptoms or effects, the district court held that such damage is not a cognizable physical injury under Georgia tort law.³¹⁴ The district court relied on *Boyd* as the only applicable precedent from the Georgia appellate courts on this issue but noted that it would have reached the same conclusion even without *Boyd's* guidance.³¹⁵ Although it noted that other courts throughout the country have recognized physical conditions without physiological manifestations of symptoms or effects as actionable injuries, the district court refused to "tak[e] Georgia law in a new and controversial direction that neither th[e] State's legislature nor judiciary has indicated is appropriate."³¹⁶ Accordingly, the district court granted the defendants' motion to dismiss to the extent that the plaintiffs' claims were based on subclinical, cellular, or subcellular damage.³¹⁷ Because the complaint did not differentiate between the plaintiffs who had sustained only subclinical, cellular, or subcellular damage and the plaintiffs who had sustained cognizable physical injuries, the district court ordered the plaintiffs to amend the complaint to specify the nature of the injuries sustained by each plaintiff.³¹⁸

Turning to the plaintiffs' claims that they were at an increased risk for contracting a beryllium-related disease and that they had suffered and

312. *Id.* at 1292-93. For a more thorough treatment of beryllium litigation, see Robin Miller, Annotation, *Recovery for Exposure to Beryllium*, 16 A.L.R.6th 143 (2006).

313. *Parker*, 377 F. Supp. 2d at 1296.

314. *Id.*

315. *Id.* at 1296-98.

316. *Id.* at 1298.

317. *Id.* at 1299.

318. *Id.*

would continue to suffer fear, anxiety, and emotional distress because of that increased risk, the district court again relied on *Boyd* for the proposition that "no Georgia court has adopted a theory of liability premised on the mere 'increased risk' of suffering from a future disease or injury."³¹⁹ Because the plaintiffs conceded that an increased risk of contracting a disease in the future could not independently support a cause of action, the issue was whether the plaintiffs could recover for emotional distress as a result of their exposure to beryllium.³²⁰ A claim for negligent infliction of emotional distress requires proof of a physical impact, a physical injury caused by the physical impact, and emotional distress caused by the physical injury.³²¹ For those plaintiffs who had sustained subclinical, cellular, or subcellular damage only, the district court held that they could not recover for such emotional distress because they had not sustained a cognizable physical injury.³²²

As ordered by the district court, the plaintiffs amended their complaint to differentiate between those who had sustained only subclinical, cellular, or subcellular damage and those who had sustained cognizable physical injuries.³²³ In the amended complaint, the plaintiffs clung to their position that subclinical, cellular, or subcellular damage is a cognizable physical injury, but they also identified five individuals who had experienced physiological manifestations of their exposure to beryllium that were detected by a physical examination or a laboratory test.³²⁴ The defendants again moved to dismiss, arguing that the injuries alleged by these five individuals were nothing more than beryllium sensitization and that such sensitization was not a cognizable physical injury because it meant only that a beryllium-related injury might develop in the future.³²⁵ Because the parties submitted expert affidavits dealing with the effects of beryllium exposure, including beryllium sensitization, the district court converted the defendants' motion to dismiss into a motion for summary judgment.³²⁶

The experts disagreed on several points, such as whether beryllium sensitization is a normal response of the human body to beryllium

319. *Id.*

320. *Id.* at 1299-300.

321. *Id.* at 1300 (citing *Lee v. State Farm Mut. Ins. Co.*, 272 Ga. 583, 586, 533 S.E.2d 82, 85 (2000)).

322. *Id.*

323. *Parker v. Brush Wellman, Inc.*, 420 F. Supp. 2d 1355, 1356 (N.D. Ga. 2006).

324. *Id.* at 1356-57.

325. *Id.* at 1357.

326. *Id.*

exposure and whether a person with beryllium sensitization is likely to contract chronic beryllium disease, but the experts did not disagree on one critical point.³²⁷ The defendants' expert testified that beryllium sensitization is not an impairment, and the plaintiffs' expert did not contradict that conclusion.³²⁸ In fact, the plaintiffs' expert implicitly agreed with the defendants' expert on this point when she testified that beryllium sensitization is only a precursor to chronic beryllium disease and not a medically recognized disease itself.³²⁹ Based on this evidence, and again relying on *Boyd*, the district court held that "sensitivity to beryllium is not a condition that, to a 'reasonably medical certainty,' will result in disease."³³⁰ As a result, the district court further held that beryllium sensitization "does not, even according to [the plaintiffs' expert], constitute 'actual disease, pain, or impairment of some kind' within the meaning of *Boyd*."³³¹ Thus, the district court held that beryllium sensitization is not a cognizable physical injury under Georgia tort law.³³² To rise to the level of a cognizable physical injury, "something more than a detectible biochemical indicator is required. . . . [T]he would-be plaintiff must demonstrate a condition that is demonstrably adverse—e.g., a manifest impairment, an infection, some overt diminution in capacity, or other harmful change in their body's structure or function."³³³ Accordingly, the district court granted the defendants' motion and dismissed the case.³³⁴

The holdings in *Parker* represent an important limitation on lawsuits based on exposure to toxic substances. People are exposed to toxic substances every day, but the overall toxicity of a substance depends on its nature and the amount consumed. This is a fundamental tenet of toxicology known as "the dose makes the poison," meaning that "all chemical agents, including water, are harmful if consumed in large quantities, while even the most toxic substances are harmless in minute quantities."³³⁵ Thus, sometimes people are exposed to substances that

327. *Id.* at 1358-59.

328. *Id.* at 1359.

329. *Id.*

330. *Id.* at 1361 (quoting *Boyd*, 191 Ga. App. at 40, 381 S.E.2d at 298).

331. *Id.* (quoting *Boyd*, 191 Ga. App. at 40, 381 S.E.2d at 298).

332. *Id.*

333. *Id.* at 1360.

334. *Id.* at 1362.

335. *Mancuso v. Consol. Edison Co. of N.Y., Inc.*, 56 F. Supp. 2d 391, 403 (S.D.N.Y. 1999) (citing BERNARD D. GOLDSTEIN & MARY SUE HENIFIN, FEDERAL JUDICIAL CENTER, REFERENCE GUIDE ON TOXICOLOGY 185 (1994)), *vacated in part on other grounds*, 216 F.3d

generally are not considered toxic, such as water, but that actually are toxic if consumed in a sufficiently large quantity, and sometimes people are exposed to substances that are widely accepted as toxic, such as beryllium, but that are not actually toxic if consumed in a sufficiently small quantity. Clearly, it would be ludicrous to allow people who drink water to sue in tort on the ground that water can be toxic if it is consumed in a sufficiently large quantity.

Although there is some facial appeal to allowing people who are exposed to a substance that is commonly accepted as toxic to bring a tort claim even if they have not suffered any adverse effects from their exposure, the consequences of such a lenient rule are obvious. First, the courts would encounter great difficulty in determining how much exposure is sufficient. For example, would a person who inhales a cloud of automobile exhaust on a single occasion be entitled to sue the driver or manufacturer of the vehicle? Second, the litigation floodgates would be wide open if mere exposure constituted a physical injury upon which a tort claim could be based. The decisions in *Parker* recognize this and wisely require a plaintiff to present evidence of a physical injury beyond mere exposure to a toxic substance.

B. Medical Monitoring

Because we live in an industrial society, many people are exposed to toxic substances that significantly increase their risk of contracting a serious disease in the future. Traditionally, a plaintiff could not recover for such an increased risk because tort law required a present manifestation of injury before recovery could be had.³³⁶ This traditional requirement poses problems for people who have been exposed to toxic substances because the diseases caused by such substances often are latent. Rather than leaving these people without a remedy, and in an effort to close the gap between the modern realities of toxic torts and the traditional notion of a compensable injury, some courts have recognized a claim for medical monitoring, which allows a plaintiff to recover the costs of future medical examinations to detect—and hopefully prevent—the onset of a disease.³³⁷ In *In re Paoli Railroad Yard PCB*

1072 (2d Cir. 2000) (unpublished table decision).

336. See *supra* Part VI.A.

337. Allan L. Schwartz, Annotation, *Recovery of Damages for Expense of Medical Monitoring to Detect or Prevent Future Disease or Condition*, 17 A.L.R.5th 327 (1994). A claim for medical monitoring must be distinguished from a claim for increased risk of harm. A claim for medical monitoring seeks recovery for future medical care, whereas a

Litigation,³³⁸ for example, the Third Circuit held that recovery for medical monitoring is permissible upon proof of the following elements:

1. Plaintiff was significantly exposed to a proven hazardous substance through the negligent actions of the defendant.
2. As a proximate result of exposure, plaintiff suffers a significantly increased risk of contracting a serious latent disease.
3. That increased risk makes periodic diagnostic medical examinations reasonably necessary.
4. Monitoring and testing procedures exist which make the early detection and treatment of the disease possible and beneficial.³³⁹

No Georgia appellate court has recognized a claim for medical monitoring. In *Boyd v. Orkin Exterminating Co.*,³⁴⁰ a family of two adults and five children was exposed to toxic chemicals when the defendant applied a termiticide to their house over a period of a couple years. The children sought to recover for their alleged increased risk of developing cancer as a result of exposure to the termiticide.³⁴¹ The court of appeals held that the children could not recover for the alleged increased risk of cancer because all they had produced was "medical testimony that [they] would require monitoring in the future to determine whether they developed health problems due to their exposure to the chemicals."³⁴² While not directly rejecting the viability of a claim for medical monitoring, *Boyd* strongly suggests that such a claim cannot be maintained in Georgia.

claim for increased risk of harm seeks recovery for the anticipated future harm itself. Both claims involve a degree of speculation, but a claim for increased risk of harm is more speculative because there is no way of knowing with complete certainty whether the anticipated future harm will or will not occur.

338. 916 F.2d 829 (3d Cir. 1990).

339. *Id.* at 852. Some courts have refused to recognize a claim for medical monitoring if the plaintiff does not have a present physical injury. Schwartz, *supra* note 337, at § 4[a]. As the United States Supreme Court has observed, "the cases authorizing recovery for medical monitoring in the absence of physical injury do not endorse a full-blown, traditional tort law cause of action for lump-sum damages Rather, those courts . . . have suggested, or imposed, special limitations on that remedy." *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 440-41 (1997).

340. 191 Ga. App. 38, 381 S.E.2d 295 (1989), *overruled on other grounds*, *Hanna v. McWilliams*, 213 Ga. App. 648, 446 S.E.2d 741 (1994) (en banc).

341. *Id.* at 40, 381 S.E.2d at 298. For a more detailed discussion of *Boyd*, see *supra* Part VI.A.

342. 191 Ga. App. at 40-41, 381 S.E.2d at 298.

The viability of a claim for medical monitoring was at issue during the survey period in *Parker v. Brush Wellman, Inc.*³⁴³ The plaintiffs, alleging exposure to products containing beryllium manufactured or used by defendants at the Lockheed Martin Corporation facility in Marietta, sought the establishment of a medical monitoring fund to cover the expenses associated with diagnostic examinations to detect beryllium-related diseases that they might develop in the future because of their exposure.³⁴⁴ Although many courts have recognized a claim for medical monitoring, the district court noted that "no Georgia court has ever indicated an inclination to recognize such a remedy."³⁴⁵ Moreover, the district court noted that several other courts have recently refused to recognize such a claim and that "the remedy remains a controversial one."³⁴⁶ Characterizing a claim for medical monitoring as "a drastic and fundamental departure from traditional tort doctrine," the district court refused to "expand [Georgia] tort doctrine in novel directions absent clear state authority suggesting the propriety of such an extension."³⁴⁷ Accordingly, the district court held that Georgia law does not permit the establishment of a medical monitoring fund for people who have not sustained a cognizable tort injury.³⁴⁸

Medical monitoring remains controversial because it allows a plaintiff to recover despite the absence of a presently cognizable physical injury. The public policy reasons supporting recovery for medical monitoring, despite its conflict with traditional tort doctrine, have been described as follows:

Medical monitoring claims acknowledge that, in a toxic age, significant harm can be done to an individual by a tortfeasor, notwithstanding latent manifestation of that harm. Moreover, . . . recognizing this tort does not require courts to speculate about the probability of future injury. It merely requires courts to ascertain the probability that the far less costly remedy of medical supervision is appropriate. Allowing plaintiffs to recover the cost of this care deters irresponsible discharge

343. 377 F. Supp. 2d 1290 (N.D. Ga. 2005).

344. *Id.* at 1301-02. For a more detailed discussion of *Parker*, see *supra* Part VI.A.

345. 377 F. Supp. 2d at 1302. Interestingly, the district court did not cite *Boyd* in support of its decision.

346. *Id.*

347. *Id.* at 1302 & n.10 (footnote omitted).

348. *Id.* at 1302. The district court was quick to point out, however, that "nothing in this opinion should be read as foreclosing Plaintiffs who *have* suffered manifest physiological injury from recovering future medical expenses as an element of their total relief." *Id.*

of toxic chemicals by defendants and encourages plaintiffs to detect and treat their injuries as soon as possible. These are conventional goals of the tort system³⁴⁹

But there are also countervailing public policy concerns. As the United States Supreme Court has explained:

Moreover, tens of millions of individuals may have suffered exposure to substances that might justify some form of substance-exposure-related medical monitoring And that fact, along with uncertainty as to the amount of liability, could threaten both a "flood" of less important cases (potentially absorbing resources better left available to those more seriously harmed) and the systemic harms that can accompany "unlimited and unpredictable liability" (for example, vast testing liability adversely affecting the allocation of scarce medical resources).³⁵⁰

Thus, the decision to recognize a claim for medical monitoring requires careful balancing of these and other public policy considerations. This decision is best made by the General Assembly, or perhaps by the Georgia appellate courts, but it is not, as the district court in *Parker* recognized, a decision to be made by a federal court. Whether the General Assembly or the Georgia appellate courts act on this issue remains to be seen.

349. *Paoli*, 916 F.2d at 852.

350. *Buckley*, 521 U.S. at 442 (citation omitted).