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When the Workplace Equals Home, the Beach, or Somewhere Other than the Office

Telecommuting's Effect on Workers' Compensation Claims

By: Lynn Blasingame Olmert and T. Evan Beauchamp

Telecommuting has been defined as an employment relationship in which the employee is permitted to work from a location away from the traditional worksite.[1] The exact numbers of employees who "telework" is not clear, but some commentators estimate that up to 40% of the American workforce spends some part of the work week laboring from home.[2] This employment arrangement has many perks, including increased employee morale and productivity as well as savings in overhead expenses for employers.[3]

Unfortunately, teleworking raises thorny workers' compensation issues for risk managers and insurance professionals. While teleworkers tend to be "white collar" employees, who are generally less likely to make workers' compensation claims,[4] the exposure for "telework-related" injuries still exists. Consider the slip and fall on the way to the coffee pot in the kitchen: is it compensable? Naturally, there may be serious questions of fact in these scenarios.[5] But, injuries at home are less likely to be witnessed or promptly reported.[6] Even then, assuming that an injury occurred, questions may arise as to the medical relationship between the claimed work injury and the employee's actual medical condition.[7] In contrast, injuries that take place in traditional workplaces tend to be quickly reported and easier to document. These injuries are more likely to have witnesses, and an investigation may be conducted, if need be, for more questionable claims.

Continued on next page

Consider the slip and fall on the way to the coffee pot in the kitchen.

Is it compensable?

Proving the Injury was Telework-Related

There is no specific statutory provisions in Georgia that govern whether a telecommuting injury is work-related. Rather, the same general rule applies in all scenarios. First, the injury must occur "in the course of employment." This phrase has been interpreted to address the physical location of the injury and the time it occurred. Injuries that occur during work hours at an appropriate location meet this criterion. The second requirement is that the injury "arises out of the employment." This language requires a causal connection between the employee's job duties and the injury. If an injury does not meet both of these requirements, then the person is engaged in purely personal activities and the injury is not compensable.[8]

What makes telework injuries particularly troublesome is the blurring of lines between the employee's personal activities and performance of job duties. Injuries are generally compensable when occasioned by some risk unique to the particular employment or incidental to the employment. Injuries caused by risks personal to the employee (such as a personal attack) will not be compensable when the employee is not furthering a purpose of the employer.

This "gray area" of injuries was addressed in the 2004 case of *Amedisys Home Health, Inc. v. Howard*.[9] In *Howard*, an employee was a 24-hour on-call field nurse who fell in her driveway at home, injuring her ankle. She was carrying patient reports to be completed the following morning, a newspaper, her cell phone, a pager and a pizza for dinner. The employer argued the accident did not arise out of or in the course of the employee's employment because she was going inside her home to have dinner, a personal pursuit. The case reached the Court of Appeals, which held that the injury *was* work-related because it was reasonably incident to her employment because the nurse was bringing time-sensitive work papers and equipment into her home. The fact that she was also carrying pizza did not mean that she was not on the job.

Are *employers* to be held liable for the actions of Fido?

The Oregon Court of Appeals says, "Yes."

In another case, a 2010 administrative law judge's decision demonstrates that employees must meet their burden of proving the injury arose out of and in the course of employment. An employee assigned to work from home alleged that she injured her neck while moving a printer. She reported the injury the next day and was ultimately diagnosed with a cervical disc protrusion. The employee alleged that she was packing the printer to move to a different office. The administrative law judge ruled that the injury was not work-related. Significantly, the employee failed to report the injury the day it occurred despite being in email communication with human resources that same day. In addition, the "office move" had not even been scheduled at the time she was allegedly lifting her printer. This case is a good example of how teleworking cases can be fact-dependent and may give rise to different decisions.

Looking to Other Jurisdictions for Precedent

Case law in Georgia on "telework-related" injuries is limited. As a result, courts have looked to other jurisdictions for guidance on teleworking cases. Many other states have begun to consider and decide telecommuting workers' compensation claims, including:

In Minnesota, the Workers' Compensation Court of Appeals awarded compensation to a sales representative who fell down a flight of stairs in his home on his way to the kitchen for coffee. The employee had stepped away from his computer, where he was working on a sales report. The Court reasoned that it made no difference whether the injury occurred in the employee's home kitchen as opposed to the coffee room at the employer's workplace.[10]

In Utah, a court held that a district sales manager's severe neck injury (and resulting quadriplegia) was work-related when he slipped and fell on the ice in his driveway while trying to spread salt to clear the way for the mailman. Critically, the employee had loaded his car in preparation to make a business trip and was waiting on a particular work-related package from the mailman before he could leave. The Court found that the employee's salt-spreading was "reasonably incidental" to his work for the employer even though he could have salted the driveway "for his own non-job related purposes . . ."[11]

In a particularly bizarre case, the Oregon Court of Appeals held compensable a decorator's right distal radius fracture that she suffered when she tripped over her dog while switching out fabrics from her van, a work-related task. The employer argued that tripping over the dog was a continuous risk of the employee's home environment, over which the employer had no control. However, the Court

found it irrelevant that the employer had no control over the dog risk in the employee's home, as the employer had required the employee to work from a home work environment, thereby assuming responsibility for injuries caused by risks in the home environment. [12]

If working from home is not *required*, California says the claim is *not* compensable.

In what should be a reassuring case for employers, the Supreme Court of California found a claim to be non-compensable where a professor who regularly graded papers at home in the evening was killed in a motor vehicle accident while carrying student papers home. However, the Court's holding was based on the fact that the professor was *not required*, as a condition of his employment, to work from home, leaving open an avenue for successful claims where the injured employee is *required* to work from home.

Best Practices for Handling Teleworking-Related Claims

With the recent rise in popularity of telecommuting, claims for "telework-related" injuries should correspondingly increase. Employers can take measures now to minimize exposure to future telecommuting workers' compensation claims.

First, employees should sign a telecommuting agreement that governs, among other things:

- the hours for work and for breaks, the job duties the employee is to perform, and
- the specific room (or rooms) in which the work is to be performed (to prevent injuries in other parts of the house from being claimed as work-related).

An agreement of this sort that expressly excludes some particular injury-causing activity from the employment may persuade the court on the issue of whether an injury truly arose out of the employment.[13]

Second, employers should develop a plan and policy for keeping the home workplace safe. This may be of particular concern, as the national trend in workers' compensation decisions holds the employer responsible for injury-causing breaches in workplace safety, be they in the home environment or the traditional workplace.

Third, employers should develop a policy for the immediate reporting of telecommuting injuries, and at the outset of the claim, should promptly undertake a thorough investigation to verify:

- the time of the injury (during normal working hours?),
- the location of the injury (a place designated in the telecommuting agreement as a workplace?), and
- the mechanism of the injury.

By quickly taking the employee's recorded or written statement, the employer can safeguard itself from any subsequent "revisions" in the Claimant's description of the injury or the body parts affected.

Fourth, employers should stay in regular written communication with telecommuting employees (fax and email). If needed, the employer can then create a paper trail that may be useful evidence when dealing with false claims.

Last, and as a matter of common sense, the privilege of teleworking should be reserved for appropriate employees.

Resources

1. Paul M. Ostroff, Telecommuting: The Legal Landscape and Best Practices for Employers, HUMAN RESOURCES, (Winter 2008), at 69.

2.Paul D. Hooper, Telecommuting and Workers' Compensation, CID MANAGEMENT, (2012), http://www.cidmcorp.com/wp-content/uploads/2012/10/Telecomuting-and-Workers-Compesnation-CID-Management-White-Paper.pdf.

3. Hooper, supra note 2, at 4.

4. Warren, McVeigh & Griffin, Inc., telecommuting and Its Impact on Workers Compensation and Safety (Part I of 2), THE JOURNAL OF WORKERS' COMPENSATION, 1-2 (2002), available at http://www.riskvue.com/articles/ww/ww0202.htm.

5. Ken Winter, Legal Issues Abound in World of Telecommuting Including: Workers' Compensation, Tax Issues, and Compliance with ADA and OSHA Regulations, VDOT, (Sept. 2007), at 3.

6. Hooper, supra note 2, at 6.

7. David B. Torrey, Telecommuter Injuries and Compensability Under Workers' Compensation Acts, Workers' Comp. Ins. Org. (May 2006),at 2.

8. Gen. Accident Fire & Life Assurance Corp. v. Prescott, 80 Ga. App. 421 (Ga. Ct. App. 1949).

9. Amedisys Home Health, Inc. v. Howard, 269 Ga. App. 656 (Ga. Ct. App. 2004).

10. Munson v. Wilmar/Interline Brands, W.C.C.A (Minn. 2008).

11. AE Clevite, Inc. v. Labor Comm'n, 996 P.2d 1072 (Utah Ct. App. 2000).

12. Sandberg v. JC Penney Co., 260 P.2d 495 (Or. Ct. App. 2011).

13. Torrey, supra note 6, at 6.

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The Good, The Bad & The Unpublished

Appellate Court Decisions Shed New Light on Construction Litigation Issues

By: J. Patrick Norris

South Carolina courts are notoriously conservative when it comes to applying the statute of limitations for defendants in construction defect actions. The general rule is that the statute is not triggered until the plaintiff knows—or should know—he has a potential claim against some party. Because contractor and design professional defendants typically find it difficult to get dismissed from cases on statute of limitations grounds, it is significant when South Carolina's appellate courts render decisions affirming such dismissals.

In March 2014, the Court of Appeals affirmed summary judgment for the contractor and architect defendants arising out of a condominium conversion project. The court found that the plaintiff HOA was on notice of potential claims by virtue of a forensic expert's report that had been issued to the plaintiff six years prior to the filing of the lawsuit. That report outlined specific construction deficiencies in one of the three buildings at the complex, including problems with windows and stucco.

Although the Court issued its decision as an unpublished opinion, this case is nonetheless significant for contractors and design professionals because it offers them a favorable interpretation of when the statute of limitations should be triggered. Despite the fact that the original forensic report addressed only one of the three buildings, and the fact that the cladding and window components at issue were different materials in that building versus the other two, the Court concluded that the plaintiff was put on "inquiry notice" of problems with the other two buildings and had the obligation to investigate. Thus, the statute of limitations as to all three buildings was triggered with the plaintiff's receipt of the forensic report on the first building. While technically this decision represents simply an application of existing law, it is encouraging for those of us on the defense side of construction litigation in that it signifies a potential shift in how "statute of limitations" cases have traditionally been viewed and construed against the defendants in these actions in South Carolina.

While the news is good for contractors on the statute of limitations front, the Court of Appeals issued another recent opinion which takes a hard line against contractors who are not properly licensed. In that case, a subcontractor sued the general contractor for breach of contract after the subcontractor performed work and did not get paid. The Court of Appeals affirmed the lower court's dismissal of the lawsuit, holding that the subcontractor lacked proper standing to sue based on the fact that the subcontractor did not have a residential builder's license at the time the contract was executed. Per the court, because the subcontractor did not have the proper license when it entered into the contract, it could not later enforce that contract.

While this decision was also issued as an unpublished opinion, it begs the question as to how far this logic might reach and the implications for contractors as a result. For example, does this ruling apply to quasi-contract actions where no written contract exists? Could it extend to bar a contractor's indemnity/derivative claims in a large construction defect action? Those in the construction litigation realm will find it worthwhile to monitor developments regarding these issues.

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Carlock Copeland In the Community

Pictured: Tyler Winton, Suzanne Hogg, Kristen Thompson and Robert Hawk @ the Bocce Bash.

The Charleston Office supported the South Carolina Special Olympics by participating in their 14th Annual Bocce Bash. It was an incredible affair pitting 128 highly-skilled bocce teams from across the state in one all-day fight to the finish for the yearly bragging rights of Charleston's best bocce team.

Lead by **Kristen Thompson** and joined by **Tyler Winton, Suzanne Hogg** and **Robert Hawk**, Team CCS played their way to a solid 33rd place finish. While that is impressive, the Special Olympics were the real winners, taking home more than $65,000 in donations.

Interlocutory Order Lifting Stay Not Immediately Appealable

By: John L. Bunyan and Tyler J. Wetzel

Plaintiff A v. Schair No. 12-16542, 2014 WL 902744 (11th Cir. Mar. 7, 2014)

The Eleventh Circuit held that an interlocutory order lifting a stay of a civil action against defendants facing criminal charges in a foreign jurisdiction did not present an important issue warranting appellate review under the collateral-order doctrine.

The plaintiffs alleged that defendants Richard Schair and his company had violated the criminal provisions of the Victims of Trafficking and Violence Protection Act of 2000[1] by orchestrating a sex-tourism company in Brazil. The defendants moved for a mandatory stay under 18 U.S.C. § 1595(b) because of related criminal investigations in both the United States and Brazil. The district court granted the motion, finding that the pending U.S. investigation mandated entry of a stay.

But the district court later granted the plaintiffs' motion to lift the stay, finding that the U.S. investigation had ended and that the Act did not mandate a stay due to the pending criminal prosecution in Brazil. The defendants appealed the district court's order granting the motion to lift the stay.

The Eleventh Circuit dismissed the interlocutory appeal for lack of appellate jurisdiction. The court first noted that the defendants did not seek to appeal the order under 28 U.S.C. § 1292(b) and, just like "the usual rule" that the denial of a motion to stay is not a final decision under 28 U.S.C. § 1291, the order lifting the stay was not a final decision.

Next, the court determined that the order could not meet the "stringent" requirements to be appealed under the collateral-order doctrine because it did not resolve an "important issue" completely separate from the merits. In particular, the order did not involve a sufficiently "important issue" because an important right, usually involving a substantial public interest, was not at stake. The court rejected the defendants' argument that the order involved an important issue because lifting the stay would probably require defendant Schair to assert his Fifth Amendment right against self-incrimination due to the pending Brazilian criminal case. The act's mandatory-stay provision was designed to avoid civil actions hindering U.S. criminal prosecutions, not to help a defendant delay a U.S. civil action. Further, every person who committed a crime that also gave rise to a civil action necessarily had to decide whether to invoke the right against self-incrimination. Finally, it would unduly delay actions under the act and burden appellate courts to permit parties to undertake piecemeal appeals every time a court lifted a section 1595(b) stay.

"...the order did not involve a sufficiently 'important issue' because an important right, usually involving a substantial public interest, was not at stake."

The Eleventh Circuit's opinion provides further proof of the substantial burden facing appellants hoping to satisfy the collateral-order doctrine. In summarizing its conclusion that the appellants failed to meet the narrow doctrine's requirements, the Eleventh Circuit noted that its decision was "consistent with [its] charge to keep a tight rein on the types of orders appealable under the collateral order doctrine" and that it was "bound" to maintain respect for the final-judgment rule.

While the collateral-order doctrine provides a basis to appeal interlocutory orders, appellants should probably not expect to meet its requirements and should examine other procedural options, such as certification under section 1292(b).

This article was originally written and printed in the 3.17.14 Issue of the American Bar Association's Appellate Practice Newsletter.

Resources

1. (18 U.S.C. § 1591, et seq., as amended by Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875).

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Legal Liability and Insurance Coverage in a Social Media World

By: George B. Green, Jr.

If you have not noticed, taxi cab and limo service providers are facing stiff competition. Uber, Lyft (pink mustachioed vehicles) and the newer Hailo are transportation network companies that match passengers and drivers together via a smartphone application. Both Uber and Lyft have enjoyed resounding success across the country by providing quicker service to those in need of transportation; they also serve suburban areas that historically did not enjoy access to such services.

Naturally, however, with success comes detractors and intense probing from outsiders. The most recent hot topic on the table for these self-proclaimed tech companies is that of legal liability and insurance coverage. If an Uber or Lyft driver gets into an accident, who is liable? The driver alone, or both the driver and the company? In a traditional employee-employer relationship, if an employee is in the course and scope of his employment, and his negligence results in bodily injury or property damage, then the employer is vicariously liable for the employee's actions.

Uber and Lyft officials, however, maintain that drivers are not their employees; but rather, are independent contractors. As independent contractors, the drivers are solely liable for property damage and bodily injury caused while transporting passengers or while driving in search of passengers.

The companies claim that they do not have influence over the drivers or the cars they operate; rather, they merely control the application that facilitates the connection between passengers and drivers, and thus are not liable for the negligence of the driver.

In evaluating whether an individual is working as an employee or independent contractor, courts examine several factors: (1) the extent of control the employer exercises over the work; (2) whether the worker is engaged in a distinct occupation or business; (3) whether or not the work performed is usually done under the direction of the employer; (4) the skill required in the particular occupation; (5) whether the employer supplies the tools and the place of work for the one employed; (6) the length of time the person is employed; (7) the method of payment, whether by time or by the job; (8) whether or not the work to be performed is a part of the regular business of the employer; (9) whether or not the parties believe they are creating an agency relationship; and (10) whether the employer is or is not in business.[1]

As Uber and similar app-based companies continue to grow, accidents will occur, and courts across the country will be evaluating the legal liability for not only the drivers, but the app-based companies. In fact, California will likely put this conundrum to the test soon, due to an accident that occurred in San Francisco on New Year's Eve where a six-year-old girl was killed by an Uber driver as she walked through a crosswalk.

Other states, including Georgia, are attempting to address the problem through legislation. This year, Representative Alan Howell from Hartwell introduced HB907 which would implement several stringent restrictions and regulations on companies like Uber and Lyft to bring them more in line with the Atlanta taxi and limo industry. Most notably, the bill would require drivers to obtain commercial liability insurance, which would at least ensure a significant minimum liability insurance threshold for Uber and Lyft drivers. Irrespective of these efforts, this question of legal liability and insurance liability coverage will spawn intense legal discourse in the coming months and years.

Resources

1. Moss v. Cent. of Ga. R. Co., 135 Ga. App. 904, 906, 219 S.E.2d 593, 596 (1975).

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Upcoming Events

June 12 SC Engineering Conference
Carlock Copeland's Mike Ethridge and Hanover's Anthony Carolei will co-present "Risk Management During Contract Negotiations" at this industry conference offering up to 15.5 pdhs in a variety of engineering disciplines. Register now at www.scengineeringconference.org.

June 17 General Liability and Workers' Compensation Seminar for Claims Professionals
Join us for our sixth annual complimentary seminar for claims professionals at Turner Field. The day includes approximately four hours of continuing education, including ethics, led by industry professionals and Carlock Copeland attorneys, followed by dinner, cocktails and an Atlanta Braves vs. Philadelphia Phillies game. Register now at www.ccsrsvp.com.

June 19 SC Annual Design Professional Seminar
Join Kent Stair and Paul Sperry at the Charleston Place Hotel in Charleston, SC for this annual event offering four pdhs for architects and engineers. Register now at www.ccsrsvp.com.

August 25-27 Georgia State Board of Workers' Compensation Annual Education Conference
Visit us at Booth #58 at this annual conference to be held at the Hyatt Regency in downtown Atlanta. For more information on the conference, visit the Georgia SBWC website at sbwc.georgia.gov.

September 11 Insurance Coverage & Bad Faith Seminar for Claims Professionals
This Firm-hosted complimentary seminar, to be held at the Atlanta Botanical Gardens, will include approximately five hours of continuing education, a private reception and full access to the gardens. Pre-register at www.ccsrsvp.com.

October 22-24 Trucking Industry Defense Association Annual Industry Seminar
Gary Lovell will present "Expert Hiring, When and Why" at this event to be held in Las Vegas. Register now at www.tida.org.

Publications & Presentations

Did you know that Carlock Copeland attorneys frequently write and present on topics for a variety of clients, organizations and publications? To request a presentation or article for your organization, contact Michelle Fry at mfry@carlockcopeland.com.

- Gary Lovell discussed how a comparative negligence case may result in a victory for the proponents of the tort reform apportionment of damages in the article, "**Drunken Driver's Parents Can Press Claim**" from the March 27, 2014 issue of The Daily Report.

- Pete Werdesheim served on one of four panels at the ICLE Georgia "**Professional & Ethical Dilemmas in Litigation**" seminar in March. The panels consisted of appellate judges, trial court judges, lawyers from the Office of the General Counsel of the State Bar of Georgia, and experienced litigation attorneys.

- Doug MacKelcan presented the "**ABC's of HOA Board Leadership**" which focused on the fiduciary duties and obligations of non-profit HOA Board Leadership at the SC Community Associations Institute education seminar.

- Kent Stair and Paul Sperry presented "**Litigation & Defending Civil & Structural Design Professionals**" at the American Society of Civil Engineers (ASCE) Joint GA/SC Event: The Augusta Founding Fathers Conference.

- Mandi Dudgeon spoke to the University of South Carolina School of Law's Advanced Legal Profession class on **malpractice trends and risk management**.

- Kent Stair and Greg Wheeler presented at the 2014 Architect & Engineer Seminar "**Risk Management: Lessons Learned the Past 25 Years**" hosted by Professional Liability Brokers Insurance Office of America.

- "**The Assignment of Legal Malpractice Claims**" was written by Andrew Countryman for the Winter 2014 issue of the Professional Liability Defense Quarterly.

- The April 11, 2014 Fulton County Daily Report featured a case being defended by Joe Kingma and Brian Spitler in an article entitled "**Client Sues Accountant Who Suggested Thieving Lawyer.**"

*Please visit **www.CarlockCopeland.com** for additional events, publications and presentations.*

Firm News & Notes

CARLOCK, COPELAND & STAIR ATTORNEYS SELECTED FOR TOP TIER OF SUPER LAWYERS®

Carlock, Copeland & Stair congratulates partners Thomas S. Carlock, who was selected for inclusion on the Top 10 list, and Johannes S. Kingma, who was selected for inclusion on the Top 100 list in Georgia Super Lawyers® for 2014. The lists recognize attorneys who received the highest point totals in the Georgia Super Lawyers® selection process.

Only five percent of the lawyers in the state are named by Super Lawyers. The lawyers who received the highest point totals in the Georgia nomination are also recognized in the Super Lawyers Top 10 & Top 100 Lists. The selections for this esteemed list are made by the research team at Super Lawyers, which is a service of Thomson Reuters. Each year, the research team at Super Lawyers undertakes a rigorous multi-phase selection process that includes a statewide survey of lawyers, independent evaluation of candidates by the attorney-led research staff, a peer review of candidates by practice area, and a good-standing and disciplinary check.

Thomas S. Carlock has practiced in the civil trial arena in Georgia for forty-eight years and during that time has tried over 500 jury trials. Throughout his career, Tom has handled medical malpractice cases, catastrophic injury cases including wrongful death cases, coverage disputes, and every other type of civil lawsuit imaginable. He has tried, to verdict, in excess of 75 wrongful death cases and more than 150 catastrophic injury cases.

Johannes S. Kingma has represented hundreds of accountants and lawyers in cases alleging malpractice, racketeering, securities fraud, breach of fiduciary duty, and breach of contract. He has represented directors and officers in claims involving finance, real estate, and corporate governance. Joe has particular experience in real estate issues including: RESPA, TILA, title insurance, real estate fraud, and secured lending.

27 CARLOCK COPELAND ATTORNEYS SELECTED FOR GEORGIA SUPER LAWYERS® AND RISING STARS®

Carlock, Copeland & Stair is proud to announce that 27 of our lawyers have been selected for inclusion on the Super Lawyers® and Rising Stars lists for 2014. Only five percent of the lawyers in a state are named by Super Lawyers.

Rising Stars is a listing of exceptional lawyers who are 40 years of age or under, or who have been practicing for 10 years or less, and have attained a high degree of peer recognition and professional achievement. Only 2.5 percent of the total lawyers in a state are honored on the Rising Stars list.

Super Lawyers


Thomas S. Carlock (GA)


Wade K. Copeland (GA)


Kent T. Stair (GA & SC)


Douglas W. Smith (GA)


David F. Root (GA)


W. Dan McGrew, III (GA)


Johannes S. Kingma (GA)


D. Gary Lovell, Jr. (GA)


Gregory H. Wheeler (GA)


Eric J. Frisch (GA)

Rising Stars Georgia


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Peter Werdesheim


Heather H. Miller


Ryan B. Wilhelm


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Brent A. Meyer


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Rising Stars South Carolina


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Michael B. McCall


Laura P. Paton


Paul E. Sperry


Lee C. Weatherly

Design Defects - Layering Assumption of the Risk and Misuse of Product Defenses

By William Newcomb and Joseph Hoffman

Personal injury lawsuits involving alleged defectively designed products – especially construction and industrial equipment – often arise from the consumer's use of the product in a manner not intended by the manufacturer. In such cases, it is critical that the manufacturer avail itself of the two similar defenses of assumption of the risk and misuse of product.

The "assumption of the risk" defense bars product liability claims against the manufacturer if the plaintiff was aware of the danger posed by the product but nevertheless knowingly and voluntarily exposed them self to the risks of using it. The "misuse of product" defense can insulate manufacturers from liability if the plaintiff uses the product in a manner the manufacturer could not have foreseen. Layering these defenses can shift some of the focus away from alleged flaws in the product and towards the plaintiff's own negligent conduct.

Although the two defenses are similar, the Georgia Court of Appeals recently affirmed a jury verdict for the defendant manufacturer after the trial court judge gave separate pattern jury charges (the statements of the law that guide jurors' decision-making) on assumption of the risk and misuse of product. While acknowledging that the misuse of product charge provides "additional explanation about the subjective knowledge required for an assumption of the risk defense," the Court held that "[w]hen there is any evidence, however slight, upon a particular issue it is not error for the court to charge the law in relation to the issue." Thus, the Court recognized that the misuse of product defense is an extension of the general assumption of the risk defense. The obvious benefit of having a trial judge to charge the jury on both of these affirmative defenses is that the jury will be instructed twice to consider whether the plaintiff's claims should be barred because of their own conduct.

The Georgia Civil Practice Act does not specifically list assumption of the risk and misuse of product as affirmative defenses. This means that the defendant is not required to list the defenses in the answer under O.C.G.A. §9-11-8. However, we believe a prudent lawyer will 1) put the plaintiff on notice that the manufacturer believes these defenses are applicable early in the litigation and 2) list the defense in the pre-trial order as one that the manufacturer intends to assert at trial and will be requesting the corresponding jury charges.

Resources

1. Georgia Suggested Pattern Jury Instructions, Vol. I: Civil Case § 62.710 (5th ed. 2013).

2. Georgia Suggested Pattern Jury Instructions, Vol. I: Civil Case § 62.681 (5th ed. 2013).

3. Garner v. Rite Aid of Georgia, Inc., 265 Ga.App. 737 (2004) (affirming summary judgment after plaintiff died from inhalation of butane fumes from lighter because the plaintiff knew of the risks associated with misusing the product and nonetheless assumed those risks ultimately causing her death).

4. Lee v. CNH America, LLC, 322 Ga.App. 766 (2013).

5. Id. at 771 (emphasis in original).

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OVERSTREET INVITED TO JOIN INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL

David Overstreet has been invited to join the International Association of Defense Counsel. The exclusive network of IADC members represent the largest corporations around the world, including the majority of companies listed in the Fortune 500.

MACKELCAN TO SERVE ON COUNCIL

We are pleased to announce that attorney Doug MacKelcan has been appointed to serve on the Community Association Institute (CAI) Tri-Counties Regional Advisory Council.

WETMORE AND DANIEL RECEIVE AV PREEMINENT RATING

Congratulations to Sarah Wetmore and Jack Daniel for receiving an AV Preeminent Rating from Martindale-Hubbell. Martindale-Hubbell® Peer Review Ratings™ reflect a combination of achieving a Very High General Ethical Standards rating and a Legal Ability numerical rating.

BALAMS INVITED TO JOIN CLAIMS AND LITIGATION MANAGEMENT ALLIANCE

ReShea Balams has accepted a nomination to join the prestigious Claims and Litigation Management Alliance (CLM), an alliance of insurance companies, corporations, corporate counsel, litigation and risk managers, claims professionals and attorneys. Attorneys and law firms are extended premium membership by invitation only based on nominations from CLM Fellows, in-house claims professionals.

We're in this to win.

Defense Verdict in Toxic Tort

Charles M. McDaniel, Jr. and Broderick Harrell recently obtained a defense verdict in a toxic tort chemical exposure nuisance cause of action. Twenty-nine residents within three neighborhoods in East Point, Georgia, sued W.C. Meredith Co., Inc. in nuisance and trespass arising out of alleged emissions of toxic chemicals emanating from its telephone pole manufacturing operation. A total of 165 Plaintiffs disbursed among three separately filed lawsuits claimed that the alleged toxic emissions from Meredith's operation constituted a nuisance and trespass because odors and exposure to the chemicals from the operation allegedly interfered with their use and enjoyment of their property, including fear from exposure to pentachlorophenol ("penta"), a highly regulated chemical used to treat the wooden poles. In addition to monetary damages and injunctive relief, Plaintiffs sought recovery of their attorney's fees that they claimed to have exceeded $2 million and punitive damages.

After 10 days of trial, with over 40 witnesses, including four expert witnesses, the jury deliberated for only three and one-half hours before finding that the plant operation did not constitute a nuisance, nor did it constitute a trespass. Plaintiffs argued that their fear of exposure to a probable human carcinogen was reasonable because air testing demonstrated penta traveled into the neighborhood. However, expert testimony revealed that penta emissions were not detected in the most recent testing and several agencies investigated the complaints and no health risks were found. Moreover, cross examination of Plaintiffs revealed that some of the Plaintiffs were using the litigation to force the company out of business and not merely seeking implementation of air pollution controls as initially suggested.

Summary Judgment for Defendant in Deer Accident

Andy Countryman won a Motion for Summary Judgment in an accident case in the Williamsburg County, South Carolina Court of Common Pleas. The accident took place when a deer jumped in front of Defendant driver. Defendant's children were passengers and sued her for damages. The court determined based on the Motion that no evidence existed that Defendant was negligent and that the situation presented as a sudden emergency during which Defendant acted appropriately.

Injunction Halts Alleged Theft of Trade Secrets

Joe Hoffman, William Jones, and Joe Kingma obtained swift injunctive relief for a nationwide auto-dealer based on Georgia's Computer Systems Protection Act and Trade Secrets Act. The competitor had recently hired the client's former employees. After filing suit against the competitor and former employees, serving targeted written discovery and conducting forensic analysis, injunctive relief was secured and the case resolved.

Defense Verdict for Surgeon in Post-Op Wrongful Death

D. Gary Lovell, Jr. and Lee Weatherly obtained a defense verdict for a surgeon and his practice group, in a wrongful death medical malpractice case filed in Charleston County, South Carolina. In the two week trial, the plaintiff's estate claimed that the doctor failed to properly respond to post-operative complications, leading to their father's death. Nevertheless, the jury returned a unanimous verdict in favor of the physician.

Summary Judgment in Breach of Privacy Case

Wade Copeland and Lee Gutschenritter obtained summary judgment in favor of a physicians group arising out of allegations that it failed to properly monitor and prevent a nurse anesthetist from surreptitiously and illegally video taping the plaintiff while she was nude on the operating table. The evidence showed that the nurse anesthetist, who is now in prison serving a life sentence, had secretly recorded as many as a hundred patients during surgeries at various healthcare facilities throughout metro Atlanta by using a cell phone video camera hanging from a lanyard around his neck. The court granted summary judgment to the physicians group after concluding that the nurse anesthetist's illegal conduct was not foreseeable as a matter of law and that the plaintiff's expert's opinions that the physicians group had done anything wrong and violated the standard of care was not supported by any evidence.

Summary Judgment in Favor of Defendants in Dog Bite Case

Dave Root and Erica Parsons obtained summary judgment for a florist's shop in a tort case stemming from an alleged dog bite. Plaintiff claimed that two dogs belonging to the shop owner attacked him as he was walking by the shop. Within days of the attack, he returned to the shop and demanded payment from the shop owner for his purported injuries. The shop owner paid the plaintiff and obtained a full release. Nevertheless, the plaintiff filed suit to recover additional funds. Dave and Erica successfully argued that the previous payment and release constituted an accord and satisfaction, which precluded Plaintiff's claims. The court granted summary judgment for the defendants and dismissed plaintiff's claims with prejudice.

Court of Appeals Affirms Summary Judgment for Insurer and Rules "Any Motor Vehicle" Means Exactly That

The Court of Appeals affirmed the trial court's grant of summary judgment, obtained by Fred Valz and Erica Parsons, in favor of an insurance company in a declaratory judgment action stemming from a 2011 auto accident. The plaintiff's sixteen year-old daughter was killed in the accident, which occurred after their daughter and other minors had allegedly been socializing and drinking at the home of the insureds. Plaintiff filed suit against the insureds, and the insureds sought coverage under their homeowner's policy issued. The insurance company, in turn, filed a declaratory judgment action seeking a judicial declaration that the homeowner's policy excluded coverage for damages arising from the use of any motor vehicle. The plaintiff argued that the exclusion applied only when the insured exercised control over the motor vehicle. However, the Court of Appeals and the trial court rejected this argument. Instead, the courts accepted Mr. Valz and Ms. Parsons' position that "any motor vehicle" was not limited to motor vehicles owned or operated by or under the control of the insured, but applied to motor vehicles owned or operated by any person. Accordingly, the Court of Appeals confirmed the trial court's grant of summary judgment in favor of the insurer and ruled as a matter of law that the insurer had no further duty to defend or indemnify the insureds in the underlying tort action.

District Court Rejects Claims Asserting a Bankruptcy Stay Violation Against Lawyer

Shannon Sprinkle successfully obtained a dismissal in federal court ending litigation that had been fought in multiple forums against multiple parties for more than a decade. Plaintiff's property was sold in a tax sale. Claims were filed challenging the tax sale, and during the course of the litigation, Plaintiff filed for bankruptcy. Litigation over the property and purported bankruptcy stay violations resulted in appeals that ultimately were heard by the Georgia Supreme Court.

While the state court action was on appeal, Plaintiff filed an action in federal court under the All Writs Act to enjoin the Georgia Supreme Court from hearing the appeal. That request was denied. The Georgia Supreme Court then considered the appeal, and as part of its ruling, found that there had been no violation of the automatic stay imposed by Plaintiff's bankruptcy proceeding.

The District Court found that the Georgia Supreme Court's holding that there was no violation of the automatic stay was binding, and it had no jurisdiction to hear the matter. The District Court held that the Georgia Supreme Court had concurrent subject matter jurisdiction over the questions relating to violation of the automatic stay, and thus, it would not review the Supreme Court's decision finding the stay had not been violated. The federal court therefore dismissed Plaintiff's action for lack of subject matter jurisdiction.

Defense Verdict for Physician in Post-op Infection Case

D. Gary Lovell, Jr., Lee Weatherly and Kristen Thompson obtained a defense verdict for a surgeon and his practice group, in a medical malpractice case filed in Richland County, South Carolina. In the trial, Plaintiff claimed that the doctor failed to properly monitor him after he had his appendix removed by another surgeon during an exploratory abdominal surgery. Plaintiff's small bowel was perforated during the procedure leading to an infection and eventually necessitating a number of corrective surgeries to repair the injury. Plaintiff claimed that if our client had properly monitored his post-operative condition, the injury could have been repaired before the severe infection occurred. Nevertheless, the jury determined that the doctor met the standard of care and returned a unanimous verdict in favor of the physician and his practice group.

Court of Appeals Affirms Summary Judgment for Architect in Construction Defect Action

Kent Stair, Paul Sperry, and Patrick Norris represented an architect in an action in Charleston County, South Carolina brought by the homeowner's association of a condominium complex. The court initially denied the architect's motion for summary judgment on statute of limitations grounds, holding that while the plaintiff was on notice of potential construction-related defects more than three years prior to filing the action, the plaintiff was not on notice of any design-related defects. However, following oral arguments on the architect's motion to reconsider the denial of summary judgment, the court ultimately agreed with the architect's position that the statute of limitations is an objective, rather than subjective, concept. The court reversed its original decision and granted summary judgment on all of the plaintiff's claims against the architect by order dated January 4, 2012, holding that the plaintiff had an opportunity to investigate the defects when originally brought to its attention. The plaintiff's failure to ascertain the particular cause of the defects--construction, design, or otherwise--did not toll the running of the statute of limitations. The South Carolina Court of Appeals affirmed this decision on March 27, 2014.

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Atlanta attorneys **Joe Kingma (#55)** and **Joe Hoffman (#22)** acheived victory on the courts (for the second year in a row) when they played for Team Jawbones in the annual Jawbones (JDs) vs. Sawbones (MDs) basketball game, a benefit for the Side By Side Brain Injury Clubhouse. This year's proceeds, nearly $50,000, go directly to providing lifelong support to Side by Side's members, individuals living with brain injury. Unique in Georgia, Side by Side is the only nonprofit organization dedicated to supporting people with brain injuries along their rehabilitative journeys.