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## Product Liability

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# Product Liability: A Two-Year Survey

by Franklin P. Brannen, Jr.\*

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## I. INTRODUCTION

This Article surveys developments in Georgia product liability law between June 1, 2017 and May 31, 2019.<sup>1</sup> It covers noteworthy cases decided during this period by the Georgia Supreme Court, Georgia Court of Appeals, and the United States district courts located in Georgia.

## II. PRODUCT LIABILITY CLAIMS

### A. *Design Defect*

In Georgia cases where a plaintiff claims that a manufacturer negligently designed its products, courts use the “risk–utility analysis” to determine whether a manufacturer is liable for a plaintiff’s injuries.<sup>2</sup> This test

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1. For an analysis of Georgia product liability law during the prior survey period, see Franklin P. Brannen, Jr., P. Michael Freed, Kristen S. Cawley & Marcus Strong, *Product Liability, Annual Survey of Georgia Law*, 69 MERCER L. REV. 231 (2017).

2. *Banks v. ICI Ams., Inc.*, 264 Ga. 732, 734, 450 S.E.2d 671, 673 (1994).

incorporates the concept of “reasonableness,” i.e., whether the manufacturer acted reasonably in choosing a particular product design, given the probability and seriousness of the risk posed by the design, the usefulness of the product in that condition, and the burden on the manufacturer to take the necessary steps to eliminate the risk.<sup>3</sup>

The trier of fact, “in determining whether a product was defectively designed, . . . may consider evidence establishing that at the time the product was manufactured, an alternative design would have made the product safer . . . was a marketable reality and technologically feasible.”<sup>4</sup>

In *Sheffield v. Conair Corp.*,<sup>5</sup> the plaintiff filed suit against “Conair Corporation, alleging that a Conair model heating pad used by” the plaintiff caused a mattress fire that ultimately resulted in her house burning down.<sup>6</sup> The plaintiff asserted “that Conair manufactured and sold the subject heating pad in a defective and unreasonably dangerous condition” because the pad reached such a high temperature it ignited the plaintiff’s mattress and lacked safety mechanisms to limit the temperature of the pad.<sup>7</sup> The defendant moved “for summary judgment, which the trial court granted.”<sup>8</sup> On appeal, the plaintiff argued that “the trial court erred because genuine issues of material fact exist[ed]” regarding the elements of her claims.<sup>9</sup>

In analyzing the plaintiff’s design defect claim, the Georgia Court of Appeals cited to the Georgia Supreme Court’s adoption of “the ‘risk–utility analysis,’ which requires a trier of fact to ‘balanc[e] the risks inherent in a product design against the utility of the product . . . designed’ to determine whether a design is defective.”<sup>10</sup> A trier of fact analyzes “whether the manufacturer acted reasonably in choosing a particular . . . design, given the probability and seriousness of the risk,” the usefulness of the product, and the burden on the manufacturer to eliminate that risk.<sup>11</sup> Further, when engaging in this analysis, the trier of fact looks at several factors, including but not limited to:

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3. *Id.*

4. *Id.* at 736, 450 S.E.2d at 674–75.

5. 348 Ga. App. 6, 821 S.E.2d 93 (2018).

6. *Id.* at 6, 821 S.E.2d at 94.

7. *Id.* at 8, 821 S.E.2d at 95.

8. *Id.* at 6, 821 S.E.2d at 94.

9. *Id.* at 6–7, 821 S.E.2d at 94.

10. *Id.* at 9, 821 S.E.2d at 96 (quoting *Banks*, 264 Ga. at 735, 450 S.E.2d at 674).

11. *Id.*

[T]he usefulness of the product; the gravity and severity of the danger posed by the design; the likelihood of that danger; the avoidability of the danger, i.e., the user's knowledge of the product, publicity surrounding the danger, or the efficacy of warnings, as well as common knowledge and the expectation of danger, and the user's ability to avoid danger; the state of the art at the time the product is manufactured; the manufacturer's ability to eliminate the danger without impairing the product's usefulness or making it too expensive; and the feasibility of spreading the loss in the price or by purchasing insurance.<sup>12</sup>

In conducting this analysis, the court determined at the outset that apart from the fire itself, the plaintiff failed to put forth any evidence with which to analyze any of the above risk–utility factors.<sup>13</sup> The court held that the plaintiff failed to produce any evidence sufficient to create a genuine issue of fact as to the existence of a defective or unreasonably safe condition in the heating pad.<sup>14</sup> This failure was fatal to the plaintiff's claims of negligence and strict liability, and the court affirmed the trial court's grant of summary judgment.<sup>15</sup>

In *Woods v. A.R.E. Accessories*,<sup>16</sup> the Georgia Court of Appeals reiterated a different aspect of design defect claims: a manufacturer's duty to design against harm caused by an unforeseeable product use or misuse.<sup>17</sup>

The plaintiff brought a product liability action against the manufacturer of a pickup truck cap, asserting claims of strict liability and negligence on the basis that the truck cap was defectively designed. The plaintiff alleged he suffered a head injury at his place of employment when the rear hatchback door on a work pickup truck cap fell on his head as he stood behind the truck bed under the raised door. After the trial court granted summary judgment in favor of the manufacturer, the plaintiff appealed.<sup>18</sup>

Applying Georgia law on design defect claims, the court of appeals conducted the risk–utility analysis to determine whether the defendant carried its burden to show “an absence of any evidence that [the]

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12. *Id.* (quoting *Dean v. Toyota Indus. Equip. Mfg.*, 246 Ga. App. 255, 259, 540 S.E.2d 233, 237 (2000)).

13. *Id.* at 10, 821 S.E.2d at 96.

14. *Id.* at 10, 821 S.E.2d at 97.

15. *Id.* at 10–11, 821 S.E.2d at 97.

16. 345 Ga. App. 887, 815 S.E.2d 205 (2018).

17. *Id.* at 887, 815 S.E.2d at 208.

18. *Id.* at 887, 815 S.E.2d at 207.

product as designed [was] defective.”<sup>19</sup> The court determined that the “reasonableness” test, specifically whether the defendant failed to adopt a reasonable alternative design, applied in this action.<sup>20</sup> The reasonableness test at the heart of the risk–utility analysis imposes liability for a design defect only where the manufacturer failed to adopt a reasonable alternative design that would have reduced foreseeable risks of harm posed by the product.<sup>21</sup>

The undisputed facts in *Woods* showed that the truck cap door fell due to a detached gas strut, which was damaged by the plaintiff’s employer’s consistent use of a custom truck bed. The plaintiff provided no evidence to support his claim that the misuse of the truck bed and truck cap was foreseeable to the manufacturer.<sup>22</sup>

Because the record demonstrated that the truck cap fell because of the plaintiff’s employer’s unforeseeable misuse and the plaintiff failed to demonstrate otherwise, the court of appeals affirmed the trial court’s ruling of summary judgment in favor of the defendant.<sup>23</sup>

### *B. Manufacturing Defect*

In Georgia, a manufacturing defect is identified as “a deviation from some objective standard or a departure from the manufacturer’s specifications established for the creation of the product.”<sup>24</sup> A plaintiff cannot put forth a mere allegation that a product malfunctioned to create an issue of disputed material fact as to whether a manufacturing defect existed when a product left the defendant manufacturer’s control. Expert testimony is sometimes necessary to make this showing, but Georgia courts do not always require the plaintiff to produce expert testimony.<sup>25</sup>

In *O’Shea v. Zimmer Biomet Holdings, Inc.*,<sup>26</sup> the United States District Court for the Northern District of Georgia reiterated that the existence of a manufacturing defect in a product liability case may be inferred from circumstantial evidence.<sup>27</sup> The plaintiff in *O’Shea*

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19. *Id.* at 890, 815 S.E.2d at 210 (emphasis omitted) (quoting *CertainTeed Corp. v. Fletcher*, 300 Ga. 327, 329, 794 S.E.2d 641, 644 (2016)).

20. *Id.* at 890, 815 S.E.2d at 210 (quoting *Jones v. NordicTrack, Inc.*, 274 Ga. 115, 118, 550 S.E.2d 101, 103 (2001)).

21. *Id.* at 890, 815 S.E.2d at 209 (citing *Jones*, 274 Ga. at 118, 550 S.E.2d at 103).

22. *Id.* at 892, 815 S.E.2d at 211.

23. *Id.* at 893, 815 S.E.2d at 212.

24. *Jones v. Amazing Products, Inc.*, 231 F. Supp. 2d 1228, 1236 (N.D. Ga. 2002).

25. *Williams v. Mast Biosurgery USA, Inc.*, 644 F.3d 1312, 1319 (11th Cir. 2011).

26. 342 F. Supp. 3d 1354 (N.D. Ga. 2018).

27. *Id.* at 1363.

experienced knee pain seven years after having his knee replaced, and during diagnosis surgery, discovered the knee implant was broken. The plaintiff then filed claims of design defect, manufacturing defect, and failure-to-warn claims against the manufacturers of the implant for injuries suffered from the device. The defendant moved for summary judgment and argued that the plaintiff failed to provide expert testimony showing that the implant did not function as intended, but merely relied on circumstantial evidence that the implant did not function as long as intended.<sup>28</sup> Among other evidence, the plaintiff presented a complaint-handling form regarding this incident from the defendants that affirmatively stated the device malfunctioned or failed to perform as intended and no other conditions contributed to its failure.<sup>29</sup> The court held that this admission from the defendants created a genuine issue of material fact as to whether the plaintiff's knee implant suffered a manufacturing defect.<sup>30</sup>

Because the plaintiff was able to produce evidence through an internal complaint-handling form that the device did not operate as intended, the district court denied the defendants' motion for summary judgment on the plaintiff's manufacturing-defect claim.<sup>31</sup>

### III. ELEMENTS

#### *A. Duty of Seller*

One of the essential elements in product liability actions claiming negligence is the existence of a legal duty. To succeed on a negligence claim, a plaintiff must show the existence of a legal duty, the breach of that duty, and a causal connection between the alleged conduct and the plaintiff's injury.<sup>32</sup>

In *Sheats v. Kroger Co.*,<sup>33</sup> the plaintiff asserted a claim of ordinary negligence against Kroger after a grocery store trip where several glass bottles fell from the bottom of a cardboard package she lifted from a shelf and broke on the floor, resulting in an injury to the plaintiff's foot. The defendant moved for summary judgment on the plaintiff's negligence claim, and asserted that plaintiff failed to show any record evidence that the package failure was foreseeable to the grocery store.

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28. *Id.* at 1357–59.

29. *Id.* at 1362.

30. *Id.*

31. *Id.* at 1363.

32. *Wilcher v. Redding Swainsboro Ford Lincoln Mercury, Inc.*, 321 Ga. App. 563, 565–66, 743 S.E.2d 27, 30 (2013).

33. 342 Ga. App. 723, 805 S.E.2d 121 (2017).

The trial court granted the defendant's motion for summary judgment, and the plaintiff appealed.<sup>34</sup>

On appeal, the plaintiff argued that a material issue of fact remained with respect to whether the package at issue was defective and the defendant maintained an unsafe package display.<sup>35</sup> The court assessed the evidence the plaintiff presented in support of her negligence claim and determined summary judgment for the defendant was appropriate.<sup>36</sup> While "retailers owe consumers a duty to supply goods packed by reliable manufacturers . . . without imperfections that may be discovered by" the dealers in such products, the court reiterated that retailers who are not manufacturers have no obligation to test an item purchased and sold in the usual course and trade.<sup>37</sup> Where a retailer lacks knowledge of any danger and nothing calls its attention to such danger, the retailer is not negligent in failing to exercise care to determine its existence.<sup>38</sup>

The court held that the plaintiff failed to present evidence showing that the defendant had any information that would have put it on notice of the package failure.<sup>39</sup> Additionally, the defendant presented evidence that any issues with the package were not evident when the display shelf was stocked and the staff did not observe issues in other similar packages.<sup>40</sup> The court held that absent any record evidence that the defendant grocery store should have been on notice of a potential package failure, there was no basis for concluding the defendant owed a duty, or breached any duty, it owed to the plaintiff.<sup>41</sup> On this basis, the court affirmed the judgment of the trial court granting summary judgment to the defendant.<sup>42</sup>

### *B. Causation*

Proximate cause is an essential element of any product liability claim.<sup>43</sup> This requirement applies regardless of the type of defect the

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34. *Id.* at 724–25, 805 S.E.2d at 125–26.

35. *Id.* at 731, 805 S.E.2d at 129.

36. *Id.* at 732, 805 S.E.2d at 130.

37. *Id.* at 731, 805 S.E.2d at 130.

38. *Id.*

39. *Id.* at 732, 805 S.E.2d at 130.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Powell v. Harsco Corp.*, 209 Ga. App. 348, 350, 433 S.E.2d 608, 610 (1993).

plaintiff alleges (such as a design defect or manufacturing defect) or the theory of recovery (such as strict liability or negligence).<sup>44</sup>

In *Sheffield*, the Georgia Court of Appeals discussed this causation element and the burden on plaintiffs to properly demonstrate it.<sup>45</sup> After reviewing the record before them, the court determined that the record evidence only allowed for an inference that the heating pad caused the fire.<sup>46</sup> But this inference did not extend to the cause of the fire being the result of a design defect.<sup>47</sup> Testimony from the responding fire chief that he could not say “whether it was more likely than not that a failure of the heating pad caused the ignition” of the fire was persuasive, and the court of appeals affirmed the trial court’s grant of summary judgment to Conair.<sup>48</sup>

The Georgia Supreme Court in *Patterson v. Kevon, LLC*<sup>49</sup> further addressed the issue of proximate cause in food poisoning cases. The plaintiffs asserted claims of negligence, violation of the Georgia Food Act,<sup>50</sup> and product liability claims, specifically alleging that the food at a wedding rehearsal dinner was defective and negligently prepared by the defendant. The defendant barbecue caterer moved for summary judgment, asserting that the plaintiffs could not show that their alleged food poisoning was proximately caused by the defendant’s food, as the plaintiffs consumed other food not prepared by defendant at the rehearsal dinner and the reception the following day. The trial court granted summary judgment because the plaintiffs could not exclude every other reasonable hypothesis for the cause of their illness, a ruling affirmed by the Georgia Court of Appeals.<sup>51</sup>

The Georgia Supreme Court determined that, after “[a]n examination of the evidence presented by the parties,” summary judgment was not appropriate.<sup>52</sup> The court concluded that the defendant’s arguments were not supported by direct evidence, but rather “circumstantial evidence of the absence of a causal link between its food and the plaintiff’s illness.”<sup>53</sup> While the defendant presented circumstantial evidence in opposition, the plaintiff could contradict the defendant’s assertions to

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44. *Id.*

45. 348 Ga. App. at 10, 821 S.E.2d at 97.

46. *Id.*

47. *Id.* at 10–11, 821 S.E.2d at 97.

48. *Id.* at 12, 821 S.E.2d at 98.

49. 304 Ga. 232, 818 S.E.2d 575 (2018).

50. O.C.G.A. §§ 26-2-1–26-2-441 (2019).

51. *Patterson*, 304 Ga. at 233–34, 818 S.E.2d at 576–77.

52. *Id.* at 236, 818 S.E.2d at 579.

53. *Id.* at 236–37, 818 S.E.2d at 579.



survive summary judgment.<sup>54</sup> The court held that plaintiffs in food poisoning cases have no duty to prove a “special element” of causation and show that the only reasonable hypothesis for their illness was the acts or omissions of the defendant.<sup>55</sup> Where neither party presented expert testimony but the plaintiff presented more than general allegations of illness, the court held that the plaintiff could still demonstrate evidence of proximate cause.<sup>56</sup>

Even though the plaintiff only presented circumstantial evidence, because the defendant’s circumstantial evidence failed to rebut it, the court held that summary judgment was not appropriate and reversed the trial court’s ruling.<sup>57</sup>

#### IV. DEFENSES

##### A. Statute of Limitations

A defendant may move to bar a plaintiff’s claims that are brought beyond the applicable statute of limitations prescribed by Georgia law.<sup>58</sup> In Georgia, the plaintiff alleging an injury to the person must bring the action within two years after the right of action accrues.<sup>59</sup>

The plaintiffs in *Collett v. Olympus Optical Co.*<sup>60</sup> alleged that one of the plaintiffs became ill after contracting human immunodeficiency virus (HIV) from a colonoscope improperly disinfected with a disinfectant manufactured by the defendant. The defendant manufacturer moved to dismiss the complaint, arguing that the plaintiffs’ claims were barred by the applicable statute of limitations.<sup>61</sup> The defendant asserted that the plaintiffs’ action accrued when the plaintiffs first tested positive for HIV, but the plaintiffs argued that their claims did not accrue until years later when they learned that one plaintiff may have contracted HIV from an infected colonoscope.<sup>62</sup>

In its analysis, the court reviewed the “discovery rule that applies in certain tort cases.”<sup>63</sup> Specifically, the “cause of action does not accrue so as to cause the statute of limitations to run until a plaintiff discovers or

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54. *Id.* at 237, 818 S.E.2d at 579.

55. *Id.* at 234–35, 238, 818 S.E.2d at 577, 579.

56. *Id.* at 238–40, 818 S.E.2d at 580–81.

57. *Id.* at 240, 818 S.E.2d at 581.

58. O.C.G.A. § 9-3-33 (2019).

59. *Id.*

60. No. 318-CV-66 (CDL), 2018 U.S. Dist. LEXIS 208463 (M.D. Ga. Dec. 11, 2018).

61. *Id.* at \*1–2.

62. *Id.* at \*7–8.

63. *Id.* at \*8.

with reasonable diligence should have discovered that he was injured.”<sup>64</sup> Further, a cause of action will not accrue “until the plaintiff knew or through the exercise of reasonable diligence should have discovered the causal connection between the injury and the alleged negligent conduct of the defendant.”<sup>65</sup>

In *Collett*, the plaintiff alleged he “did not suffer an injury until he contracted HIV” after his colonoscopy, and he and the other plaintiff “were not able to discover a causal connection between the HIV” and the colonoscopy until years later despite reasonable diligence.<sup>66</sup> Based on these circumstances, the court found that the discovery rule applied.<sup>67</sup>

The court ultimately held that the underlying action involved a bodily injury that developed over time, and that the plaintiffs’ cause of action “did not accrue until they discovered ‘or with reasonable diligence should have discovered that [they were] injured’ and that there was a ‘causal connection between the injury and alleged negligent conduct of the defendant.’”<sup>68</sup> For these reasons, the plaintiffs’ actions were brought within the applicable statute of limitations.<sup>69</sup>

## V. SPOILIATION

Spoilation is a discovery sanction imposed at a trial court’s discretion when a party destroys or fails to preserve evidence “that is relevant to ‘contemplated or pending litigation.’”<sup>70</sup> The severity of the sanction depends on the spoliating party’s culpability. In severe instances, sanctions can result in a jury instruction of a rebuttable presumption that the evidence was adverse to the spoliating party’s interests, the entry of a default judgement, or case dismissal.<sup>71</sup> Georgia courts have emphasized that “severe sanctions for spoliation are reserved for ‘exceptional cases’” where a party lost or destroyed material evidence either intentionally or in bad faith, resulting in incurable prejudice to the opposing party.<sup>72</sup> Before a spoliation sanction may be imposed, the

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64. *Id.* (emphasis omitted) (quoting *Ballew v. A.H. Robins Co.*, 688 F.2d 1325, 1327 (11th Cir. 1982)).

65. *Id.* (citing *Ballew*, 688 F.2d at 1325).

66. *Id.* at \*12.

67. *Id.*

68. *Id.* (quoting *Ballew*, 688 F.2d at 1327).

69. *Id.* at \*14.

70. *Phillips v. Harmon*, 297 Ga. 386, 393, 774 S.E.2d 596, 603 (2015) (quoting *Silman v. Assocs. Bellemeade*, 286 Ga. 27, 28, 685 S.E.2d 277, 278 (2009)).

71. *Cooper Tire & Rubber Co. v. Koch*, 303 Ga. 336, 339, 812 S.E.2d 256, 261 (2018).

72. *Id.* at 343, 812 S.E.2d at 263.

court must find that the allegedly-spoliating party breached their duty to preserve the evidence.<sup>73</sup>

The duty to preserve arises when litigation is either pending or reasonably foreseeable from the perspective of the party in control of the evidence at issue.<sup>74</sup> “Put another way, the duty arises when the alleged spoliator ‘actually or reasonably should have anticipated litigation.’”<sup>75</sup> Once litigation is pending, foreseeability is typically easy to discern and the issue turns on the opposing party’s opportunity to inspect; therefore, most courts are faced with resolving whether litigation was reasonably foreseeable.<sup>76</sup> In *Phillips v. Harmon*, the Georgia Supreme Court provided the following non-exhaustive list of considerations when determining whether litigation was reasonably foreseeable to the spoliating party: (1) type and extent of injury; (2) extent that fault for injury is evident; (3) possible financial exposure if found liable; (4) “the relationship and course of conduct between the parties, including past litigation or threatened litigation;” (5) “and the frequency [that] litigation occurs.”<sup>77</sup>

In *Sheats v. Kroger Co.*, the plaintiff was injured after picking up a cardboard box containing several glass bottles. The bottom fell out of the box, causing at least one glass bottle to fall on her foot and the rest to shatter on the ground around her. The plaintiff initially refused to turn over the cardboard box to a Kroger employee because she wanted to keep it as evidence, but eventually handed it over because she was promised it would be kept for the same purpose. The plaintiff then informed the store manager that she was going to the hospital for her injuries.<sup>78</sup> The manager then filled out Kroger’s customary three-page “Customer Incident Report & Investigation Check List” that contained the following statement on each page: “This report is being prepared in anticipation of litigation under the direction of legal counsel. It is confidential and is not to be released to any person unless approved by legal counsel and authorized by a member of Kroger management with such authority.”<sup>79</sup> Once the form was complete and the manager had inspected the package, it was recorded for inventory purposes as “lost” due to breakage and discarded.<sup>80</sup>

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73. *Id.* at 339, 812 S.E.2d at 261.

74. *Id.*

75. *Id.* (quoting *Phillips*, 297 Ga. at 397, 774 S.E.2d at 605).

76. *Id.* at 340, 812 S.E.2d at 261.

77. *Id.* at 341, 812 S.E.2d at 261.

78. *Sheats*, 342 Ga. App. at 724, 805 S.E.2d at 125.

79. *Id.*

80. *Id.* at 725, 805 S.E.2d at 126.

After filing suit, the plaintiff filed a motion for spoliation sanctions because the package was discarded before she had an opportunity to inspect it. The trial court denied her motion, reasoning that she failed to notify Kroger that she was contemplating litigation before the package was discarded.<sup>81</sup> The plaintiff then successfully appealed the denial of her motion, and the court of appeals vacated the trial court's ruling because it "was based on the legally incorrect premise that Kroger's duty to preserve the evidence required actual notice of litigation from Sheats" and remanded the case for reconsideration by the trial court.<sup>82</sup> Because the trial court again denied the plaintiff's motion, she appealed on the grounds that a proper application of the *Phillips* factors demanded a finding that Kroger had constructive notice that litigation was reasonably foreseeable.<sup>83</sup>

After weighing the five *Phillips* factors and the confidentiality statement imprinted on the incident report, the court of appeals held there was no clear error in the trial court's decision to again deny the plaintiff's motion for spoliation sanctions.<sup>84</sup> First, the type and extent of the plaintiff's "injury 'did not seem to be extensive' as it was 'limited to her big toe.'"<sup>85</sup> Second, the manager's affidavit stated there was no liquid on the shelf containing the cardboard package that would have affected the durability of the package and no adjacent packages had similar problems.<sup>86</sup> Accordingly, the evidence supported Kroger's argument that it "need not reasonably have anticipated being found at fault for [her] injury."<sup>87</sup> Third, Kroger was only aware of minimal financial exposure given the plaintiff's initial \$2,500 in medical costs and \$200 in lost wages. It was not until after the package was discarded that Kroger learned that the plaintiff suffered a blood clot in her toe that required surgery, her toenail failed to grow back, and she continued experiencing pain for months.<sup>88</sup> Fourth, it was undisputed that there was no course of conduct between the parties, including no past or threatened litigation.<sup>89</sup> Fifth, the manager's affidavit stated that he had not previously seen a package failure for this product, which the

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81. *Id.*

82. *Id.* at 725–26, 805 S.E.2d at 126 (quoting *Sheats*, 336 Ga. App. at 311, 784 S.E.2d at 446).

83. *Id.* at 726, 805 S.E.2d at 126.

84. *Id.*

85. *Id.* at 727, 805 S.E.2d at 127.

86. *Id.* at 728, 805 S.E.2d at 128.

87. *Id.*

88. *Id.* at 729, 805 S.E.2d at 128.

89. *Id.*

court concluded was sufficient evidence to determine that there was little, if any, frequency of similar litigation.<sup>90</sup> And finally, the court determined the confidentiality statement indicating the incident report was prepared in anticipation of litigation was not dispositive.<sup>91</sup> By producing that report in discovery, Kroger effectively demonstrated that it was prepared in the regular course of business rather than as privileged work product.<sup>92</sup> The court rejected the plaintiff's argument that Kroger should be held to the statement because such a strict application "would require courts to ignore the *Phillips* [c]ourt's instruction that multiple factors may be considered in determining whether litigation was reasonably foreseeable."<sup>93</sup> In balancing the *Phillips* factors and incident report, the court determined that the pre-printed language on the incident report did not outweigh the factors favoring Kroger.<sup>94</sup> Thus, the court held that Kroger's routine incident investigation was insufficient to put them on notice that litigation was reasonably foreseeable.<sup>95</sup>

In *Cooper Tire & Rubber Company v. Koch*,<sup>96</sup> the Georgia Supreme Court was asked to determine the proper "legal standard for when a plaintiff's duty to preserve evidence begins," because previous decisions only focused on the defendant's duty.<sup>97</sup> On April 24, 2012, Mr. Koch was traveling on Interstate 16 when the tread on his left rear tire detached, causing his vehicle to swerve out of control and strike a guardrail. About a month and a half later, Mr. Koch died from his severe injuries, and his wife eventually brought a product liability action for damages against Cooper Tire & Rubber Company. Between the time of the accident and Mr. Koch's death, the plaintiff spoke to the owner of the wrecker service, Mr. Brown, and explained to him that she could not afford the daily storage fee she was being charged for her husband's totaled vehicle. The plaintiff agreed to transfer the title to Mr. Brown in lieu of paying the daily storage charge and instructed Mr. Brown to save the tires at some point prior to transferring the title. Mr. Brown only saved the sidewall portion of the tire that attached to the rim, and

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90. *Id.* at 729, 805 S.E.2d at 128–29.

91. *Id.* at 729–30, 805 S.E.2d at 129.

92. *Id.* at 730, 805 S.E.2d at 129.

93. *Id.*

94. *Id.*

95. *Id.*

96. 303 Ga. 336, 812 S.E.2d 256 (2018).

97. *Id.* at 336, 812 S.E.2d at 258.

the remainder of the tires and vehicle were scrapped. By the time the plaintiff retained counsel, the evidence had already been destroyed.<sup>98</sup>

The Georgia Supreme Court answered the question presented by stating that “the duty is defined the same for plaintiffs and defendants, and regardless of whether the party is an individual, corporation, government, or other entity.”<sup>99</sup> The difference between the duty imposed on the plaintiff and defendant, however, lies in the practical application for the circumstances of each case.<sup>100</sup> Thus, “the duty often will not arise at the same moment for the plaintiff and the defendant, because of their differing circumstances.”<sup>101</sup> The court expounded upon the *Phillips* factors, explaining that those factors may not be appropriate in every case, and consideration should also be given to the spoliating party’s sophistication and experience in litigation.<sup>102</sup> Thus, trial courts should exercise their duly authorized broad discretion when evaluating if litigation was reasonably foreseeable, for both plaintiffs and defendants.<sup>103</sup>

Turning to the instant case, the supreme court ruled there was no error in the trial court’s determination that the plaintiff was not yet under a duty to preserve the tires that were destroyed by the wrecker service.<sup>104</sup> The plaintiff’s husband did not give a reason to preserve the tires, much less specify that a defect could potentially be used in future litigation.<sup>105</sup> The court also reasoned that the plaintiff’s legitimate reasons—the vehicle was totaled and had no collision insurance; the plaintiff was not investigating the crash at the time; counsel had yet to be contacted; no mention of contemplated litigation had been made; and the focus was on Mr. Koch’s health—all factored into their decision.<sup>106</sup> Cooper Tire argued that spoliation prejudiced its ability to defend against the plaintiff’s claims; however, that argument was rejected because the plaintiff was also prejudiced as the party with the burden of proof.<sup>107</sup> Though no sanctions were imposed, the court explained that

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98. *Id.* at 336–37, 337 n.2, 812 S.E.2d 258–59, 259 n.2.

99. *Id.* at 340, 812 S.E.2d at 261.

100. *Id.*

101. *Id.*

102. *Id.* at 342, 812 S.E.2d at 262.

103. *Id.* at 342, 812 S.E.2d at 263.

104. *Id.* at 343, 812 S.E.2d at 263.

105. *Id.* at 344, 812 S.E.2d at 264.

106. *Id.* at 345, 812 S.E.2d at 264.

107. *Id.* at 346, 812 S.E.2d at 265.

Cooper Tire would still be permitted to present the circumstances of the tire's destruction as a part of their defense at trial.<sup>108</sup>

#### VI. EXPERT TESTIMONY—THE *DAUBERT* STANDARD

A “*Daubert* motion” is an attempt to exclude the testimony of expert witnesses. The name comes from the landmark United States Supreme Court case, *Daubert v. Merrell Dow Pharmaceuticals*,<sup>109</sup> where the Supreme Court instructed trial courts to act in “a gatekeeping role” to ensure that proposed expert testimony was relevant and reliable.<sup>110</sup> In 2005, the legislature codified the *Daubert* standard into Georgia law, permitting state courts to rely on federal opinions that interpreted and applied this evidentiary standard.<sup>111</sup> O.C.G.A. § 24-7-702<sup>112</sup> governs the admissibility of expert testimony and provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to 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; (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 which have been or will be admitted into evidence before the trier of fact.<sup>113</sup>

To fulfill its gatekeeper obligations, the trial court must take into consideration three distinct aspects of an expert's testimony: “(a) the qualifications of the expert; (b) the reliability of the testimony; and (c) the relevance of the testimony.”<sup>114</sup> Generally, when reliability is at issue,

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108. *Id.* at 347, 812 S.E.2d at 266.

109. 509 U.S. 579 (1993).

110. *Id.* at 597.

111. Ga. S. Bill 3, Reg. Sess., 2005 Ga. Laws 1, § 7(f) (codified at O.C.G.A. § 24-7-702 (2019)). O.C.G.A. § 24-7-702(f) permits Georgia courts to draw from the opinions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.

O.C.G.A. § 24-7-702(f) (2019).

112. O.C.G.A. § 24-7-702 (2019).

113. O.C.G.A. § 24-7-702(b) (2019).

114. *Cash v. LG Elecs, Inc.*, 342 Ga. App. 735, 737, 804 S.E.2d 713, 715 (2017) (citing *Scapa Dryer Fabrics, Inc. v. Knight*, 299 Ga. 286, 289, 788 S.E.2d 421, 424 (2016)).

[r]eliability is examined through consideration of many factors, including whether a theory or technique can be tested, whether it has been subjected to peer review and publication, the known or potential rate of error for the theory or technique, the general degree of acceptance in the relevant scientific or professional community, and the expert's range of experience and training.<sup>115</sup>

These reliability factors are “flexible” considerations and not an exhaustive list.<sup>116</sup> The fact that the trial court may view an expert's opinion as not “particularly strong” is insufficient to exclude an expert that is otherwise sufficient. That is an issue for the jury to consider because it goes to weight, not admissibility.<sup>117</sup>

In *Cash v. LG Electronics, Inc.*,<sup>118</sup> the plaintiff was alerted one morning by her son that the living room television was on fire. Her house eventually burned to the ground, killing her husband and son. The fire department was unable to determine the origin of the fire and could only point to the “vicinity of the entertainment center” as the source.<sup>119</sup> As a result, the plaintiff filed a product liability action and hired a causation expert who attempted to recreate the subject incident.<sup>120</sup> The expert “opined that an internal component in the television's power supply board failed due to a manufacturing defect or mechanical damage, triggering a chain reaction that caused a fire.”<sup>121</sup> Focusing solely on the reliability of the expert's testimony, the trial court granted LG's *Daubert* motion on the grounds that the expert's methods were unreliable and testimony was not based on sufficient facts and data.<sup>122</sup>

The Georgia Court of Appeals later upheld the trial court's decision, also only focusing on the reliability of the expert's testimony.<sup>123</sup> The court pinpointed the expert's problematic methodology, noting that courts should not “admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the

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115. *HNTB Ga., Inc. v. Hamilton-King*, 287 Ga. 641, 642, 697 S.E.2d 770, 772–73 (2010).

116. *Cash*, 342 Ga. App. at 737, 804 S.E.2d at 715.

117. *Id.* at 737, 804 S.E.2d at 715–16.

118. 342 Ga. App. 735, 804 S.E.2d 713 (2017).

119. *Id.* at 736, 804 S.E.2d at 714.

120. *Id.* at 735–36, 804 S.E.2d at 714–15.

121. *Id.* at 736, 804 S.E.2d at 715.

122. *Id.* at 735–37, 804 S.E.2d at 714–15.

123. *Id.* at 737, 804 S.E.2d at 715.



opinion proffered.”<sup>124</sup> The expert’s principles and methodology involved a protocol to reverse-engineer the fire’s origin. Yet, he repeatedly manipulated each stage of the process to prove his hypothesis. At each phase, his experiment failed to produce his desired result, and he was only able to progress through the experiment by forcing the results. Unsurprisingly, the expert was unable to establish that his methodology had been peer-reviewed, previously used by anyone, had otherwise been generally accepted by the scientific community, and could not name any publication that supported his methodology.<sup>125</sup> Thus, the court of appeals affirmed the trial court’s finding that the expert’s unreliable methodology was inconsistent with the *Daubert* standard.<sup>126</sup>

In *Vazquez v. Raymond Corp.*,<sup>127</sup> the plaintiff brought a product liability action to recover for injuries he sustained as a warehouse worker while operating a forklift. Specifically, the plaintiff asserted design defect and manufacturing defect claims against Raymond.<sup>128</sup> The defendant filed two *Daubert* motions with different results worth discussing: one to exclude Dr. Hunt’s testimony because they contended he lacked necessary qualifications and his opinions were unreliable, and the second to exclude Mr. Berry’s testimony because he “lack[ed] the appropriate qualifications and industry experience to render opinions on forklift design;” his opinions were not supported by reliable scientific methodology; and “his opinions [were] almost universally rejected by the . . . scientific community.”<sup>129</sup>

The court found that Dr. Hunt’s educational and professional background rendered him generally qualified to testify as a warnings and human factors expert.<sup>130</sup> The problem, however, was his lack of qualifications to opine as to design defects related to forklifts. The record indicated that Dr. Hunt had no training, education, or experience in forklift design or any similar products: he had never designed any forklift or individual forklift component, had not previously worked with or for forklift manufacturers, and had done no independent work related to forklift design.<sup>131</sup> Thus, the court found he

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124. *Id.* at 737, 804 S.E.2d at 716 (quoting *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

125. *Id.* at 739–40, 804 S.E.2d at 716–17.

126. *Id.* at 740, 742, 804 S.E.2d at 717–18.

127. No. 2:17-CV-20-RWS, 2019 U.S. Dist. LEXIS 5355 (N.D. Ga. Jan. 11, 2019).

128. *Id.* at \*1–3.

129. *Id.* at \*4, \*10.

130. *Id.* at \*6.

131. *Id.* at \*6–7.

was unqualified to provide an opinion on forklift design defects and accident reconstruction connected therewith.<sup>132</sup>

In contrast, the court found Mr. Berry was qualified to offer the opinions he reached.<sup>133</sup> Mr. Berry's background included undergraduate and graduate degrees in mechanical engineering, more than two hundred forklift injury investigations, reviews of thousands of accident reports from various forklift manufacturers, state agencies, and the Occupational Safety and Health Administration, and previous research and analysis that was the subject of peer-reviewed papers he personally presented to the American Society of Mechanical Engineers.<sup>134</sup>

In *Anderson v. FCA U.S., LLC*,<sup>135</sup> the plaintiff lost control of his Jeep Wrangler and hit a rock wall, causing the vehicle to become airborne and ultimately roll onto the driver's side. The driver later passed away from his injuries, and his parents brought suit on his behalf asserting several product liability claims, namely that the Jeep's fuel tank was inadequately guarded. The defendant moved for summary judgment on the grounds that the plaintiffs' design expert, Mr. Hannemann, should be excluded, thus eliminating the evidence necessary for the plaintiffs to carry the case. The plaintiffs similarly filed a *Daubert* motion to preclude the defendant's accident reconstruction expert, Mr. Toomey, from testifying about specific data.<sup>136</sup>

The court partially denied the defendant's motion and permitted Mr. Hannemann to provide testimony regarding his defective design theory.<sup>137</sup> Mr. Hannemann's theory opined that the Jeep's skid plate, which protected the fuel tank, was defectively designed because it did not completely cover the fuel tank and left it susceptible to puncture. The defendant argued that his opinion was unreliable because he had not tested his opinion and his testimony was no more than speculation and *ipse dixit*.<sup>138</sup> Reviewing applicable case law, the court noted that it is not surprising to see a design expert's opinion that was not tested in

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132. *Id.* at \*7.

133. *Id.* at \*10–11.

134. *Id.* at \*11.

135. No. 5:16-CV-558 (MTT), 2019 U.S. Dist. LEXIS 27158 (M.D. Ga. Feb. 21, 2019).

136. *Id.* at \*2–5. The Jeep was designed and manufactured by Daimler Chrysler Corporation who, along with twenty-four of its affiliates, filed for voluntary Chapter 11 Bankruptcy. “In the bankruptcy case, Chrysler entered into a court-approved master transaction agreement (MTA), in which FCA purchased substantially all of the debtors’ assets and assumed certain of their liabilities,” including product liability claims. *Id.* at \*2–3.

137. *Id.* at \*14.

138. *Id.* at \*10–12; *see also Cash*, 324 Ga. App. at 737, 804 S.E.2d at 716 for a discussion of *ipse dixit*.

practice because, like experience-based experts, there is no requirement to do so.<sup>139</sup> The court explained that some expert testimony does not fit squarely within *Daubert's* standards; thus, experience and knowledge may provide a sufficient basis to form an opinion.<sup>140</sup> After reviewing Hannemann's nearly thirty years of experience in seemingly all aspects of vehicle design and safety analysis, the court concluded that he should be permitted to testify regarding his design theory.<sup>141</sup> As for the defendant's *ipse dixit* argument, the court rejected it on the grounds that Hannemann's opinion was backed by experience and not some "believe it solely because I said it" foundation.<sup>142</sup>

Turning to the defendant's accident reconstruction expert, Toomey, the court granted the plaintiffs' *Daubert* motion to exclude Toomey's testimony regarding certain data because it was unreliable.<sup>143</sup> According to Toomey's opinion, he relied on data from National Automotive Sampling System/Crashworthiness (NASS) to opine that the subject incident was "more severe than ninety-nine percent of all frontal impact crashes."<sup>144</sup> The court found that the NASS data was not used to support any of Toomey's opinions, and the defendant acknowledged the NASS data was simply to "put in perspective the impact" at their motion hearing.<sup>145</sup> Because Toomey did not use the data for its appropriate purpose, that testimony was excluded as irrelevant to any legitimate issue.<sup>146</sup>

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139. *Anderson*, 2019 U.S. Dist. LEXIS 27158, at \*12.

140. *Id.* at \*12–13.

141. *Id.* at \*13–14.

142. *Id.* at \*14.

143. *Id.* at \*17–18.

144. *Id.* at \*14–15.

145. *Id.* at \*17.

146. *Id.*