Mercer Law Review

Volume 67
Number 1 *Annual Survey of Georgia Law*

Article 13

12-2015

Product Liability

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This Article surveys developments in Georgia product liability law between June 1, 2013 and May 31, 2015.[1] It covers noteworthy cases decided during this period by the Georgia Court of Appeals, the United States Court of Appeals for the Eleventh Circuit, and the United States district courts located in Georgia.

I. ELEMENTS OF PRODUCT LIABILITY CLAIMS

A. *Definition of Manufacturer*

Georgia product liability law limits strict liability to the manufacturer of the product at issue.[2] Non-manufacturers in the sales chain may only be found liable under a negligence or breach of warranty theory. Defining whether a defendant is or is not a manufacturer, therefore, is a critical issue in many product liability cases. In *Williamson v. Walmart Stores, Inc.*,[3] the United States District Court for the Middle

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1. For an analysis of Georgia product liability law during the prior survey period, see Franklin P. Brannen, Jr., *Product Liability, Annual Survey of Georgia Law*, 65 MERCER L. REV. 221 (2013).

2. O.C.G.A. § 51-1-11(b)(1) (2000 & Supp. 2015).

3. No. 3:14-CV-97 (CDL), 2015 U.S. Dist. LEXIS 45657 (M.D. Ga. Apr. 8, 2015).

District of Georgia addressed the definition of "manufacturer."[4] The plaintiff in *Williamson* was injured when the plastic gas container she was holding near a fire exploded. The plaintiff filed product liability claims against several entities, including the alleged manufacturer of the product. The manufacturer filed a motion to dismiss on personal jurisdiction grounds.[5] The court considered the issue of whether the complaint sufficiently alleged that the purported manufacturer actually designed the container such that jurisdictional discovery was warranted.[6] The court noted that Georgia law considers both the manufacturer and designer of a product to be deemed the manufacturer for the purposes of strict liability.[7] The court found that the complaint sufficiently alleged the defendant was a manufacturer based on the allegation that it designed the container.[8] The court concluded, therefore, that the plaintiff was entitled to jurisdictional discovery.[9]

B. Causation

Proximate cause is an essential element of any product liability claim.[10] This requirement applies regardless of the type of defect the plaintiff alleges (such as a design defect or manufacturing defect) or the theory of recovery (namely, strict liability or negligence). Any break in the chain of causation precludes the plaintiff's recovery. In *Weaver v. PACCAR, Inc.*,[11] the United States District Court for the Southern District of Georgia examined the oft-litigated issue of intervening causes.[12] In that case, the plaintiff was severely injured when the truck-tractor he was servicing ran over his legs. The plaintiff was working underneath the truck, attempting to locate an air leak in the brake line. After finding the apparent location of the leak, the driver cranked the truck to build the air pressure in the line to confirm the plaintiff had found the leak. The driver forgot, however, that he had left the brakes released and the truck in gear. When he cranked the truck, it moved forward and ran over the plaintiff's legs. The plaintiff sued the manufacturer of the truck, claiming the truck was defectively designed

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4. *Id.* at *9-10.
5. *Id.* at *1-2, *4, *6.
6. *Id.* at *9-11.
7. *Id.* at *10.
8. *Id.* at *15-16.
9. *Id.* at *13.
10. *See* Powell v. Harsco Corp., 209 Ga. App. 348, 350, 433 S.E.2d 608, 610 (1993).
11. 52 F. Supp. 3d 1342 (S.D. Ga. 2014), *aff'd*, 2015 U.S. App. LEXIS 9798 (11th Cir. June 11, 2015).
12. *Id.* at 1347.

because it did not have a "neutral safety switch" that would prevent the truck from starting when not in neutral.[13]

The defendant moved for summary judgment, arguing that any defect was not the proximate cause of the plaintiff's injuries. Specifically, the defendant argued the driver's negligence in starting the truck while in gear and without the brake engaged was an intervening cause that broke the chain of causation.[14] The court agreed.[15] The court found that the driver's negligence was the proximate cause of plaintiff's injuries, and that his negligence was not reasonably foreseeable.[16] The court then engaged in an extensive analysis of the foreseeability issue.[17] The court concluded the defendant would have expected the driver to be trained in the operation of large trucks, and it was reasonable for the defendant to presume the driver would operate the vehicle in accordance with applicable rules and regulations.[18] The court emphasized that the driver was trained and appreciated the risk of cranking the truck while it was in gear without the brake engaged, stating that his negligence "was not born out of ignorance, but absent-mindedness."[19] The court concluded that "[d]efendant-manufacturers may be expected to foresee negligence born of ignorance, but they are not expected to foresee negligence from distraction, inattentiveness, or absent-mindedness."[20]

In *Thurmon v. A.W. Chesterton, Inc.*,[21] the United States District Court for the Northern District of Georgia addressed the "bare metal defense" in asbestos product liability cases.[22] The plaintiffs alleged their decedent died from mesothelioma as a result of exposure to asbestos in valves, gaskets, and packing used in the paper mill where the decedent had worked for thirty-one years. The defendant manufactured the valve and its original gaskets and packing. The gaskets and packing, however, were regularly replaced due to normal wear and tear. The plaintiffs alleged the decedent was exposed to asbestos fibers that were released during the replacement of those valve components. However, the plaintiffs did not present any evidence showing the

13. *Id.* at 1344, 1345.
14. *Id.* at 1347.
15. *Id.* at 1349.
16. *Id.*
17. *Id.* at 1348-49.
18. *Id.* at 1349.
19. *Id.* at 1350.
20. *Id.*
21. 61 F. Supp. 3d 1280 (N.D. Ga. 2014).
22. *Id.* at 1283.

defendant manufactured the replacement parts.[23] The issue the court addressed on summary judgment was whether the "bare metal defense" barred plaintiffs' claims—that is, whether the defendant-manufacturer of the valve can be liable for asbestos-containing component parts used with its bare metal product if it did not manufacture those component parts.[24]

Despite noting the absence of Georgia case law unequivocally recognizing the bare metal defense, the district court concluded that the defense applied.[25] In doing so, the court relied upon the Georgia Court of Appeals holding in *Toole v. Georgia-Pacific, LLC*,[26] which the court found to be an "implicit endorsement of the bare metal defense."[27] The holding was rooted in Georgia law's requirement that a plaintiff show that his or her injury was proximately caused by a defect that existed in the defendant's product at the time it was sold.[28]

> Put another way, if a plaintiff cannot establish that the asbestos-containing packing and gaskets added post-sale to a defendant's bare metal product were also manufactured by that defendant, the plaintiff fails to show proximate causation and, at the same time, succumbs to a defendant's bare metal defense, which is available because the defendant cannot point to asbestos exposure stemming directly from one of the defendant's products.[29]

Applying this principle, the court granted the defendant's motion for summary judgment based on the lack of evidence that it manufactured the replacement parts used in the valve.[30]

In *Roberts v. Tractor Supply Co.*,[31] the United States District Court for the Northern District of Georgia addressed the pleading requirements for a product defect claim.[32] The plaintiff filed negligence and strict liability claims against the manufacturer of a tree stand. The plaintiff specifically alleged the tree stand was defective because the

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23. *Id.* at 1282.

24. *Id.* at 1282, 1284 ("[T]he bare metal defense stands for the proposition that a manufacturer is 'not liable for injuries caused by asbestos products, such as insulation, gaskets, and packing, that were incorporated into their products or used as replacement parts, but which they did not manufacture or distribute.'" (internal quotes) (quoting Conner v. Alfa Laval, Inc., 842 F. Supp. 2d 971, 793 (E.D. Pa. 2012)).

25. *Id.* at 1284, 1286-87.

26. No. A10A2179, 2011 Ga. App. LEXIS 810 (Jan. 19, 2011).

27. *Thurmon*, 61 F. Supp. 3d at 1285.

28. *Id.*

29. *Id.*

30. *Id.* at 1286-87.

31. No. 1:14-CV-02332-RWS, 2015 U.S. Dist. LEXIS 53257 (N.D. Ga. Apr. 23, 2015).

32. *Id.* at *5.

necessary straps and assembly instructions were not permanently attached to the stand. As a result, the plaintiff attempted to assemble and mount the tree stand without instructions, which were not included with the stand because he bought the floor model. The manufacturer filed a motion to dismiss, arguing the plaintiff's complaint failed to adequately allege a product defect that proximately caused the plaintiff's injuries.[33]

For the product defect issue, the manufacturer argued that the plaintiff's assembly of the tree stand without instructions was an abnormal handling of the product that precluded the plaintiff's product defect claim. The manufacturer also argued that it could not be liable because the plaintiff's injuries resulted from an open and obvious danger.[34] The district court rejected both arguments.[35] First, the court found the plaintiff's injuries occurred while he was attempting to mount the tree stand, which was the intended purpose of the product.[36] The court concluded that the plaintiff's factual allegations were sufficient to infer the manufacturer reasonably anticipated that danger.[37] Because the plaintiff alleged he was not provided assembly instructions, the court similarly found it was unable to determine that the plaintiff's injuries resulted from an open and obvious danger on a motion to dismiss.[38] For those reasons, the court concluded the plaintiff sufficiently pled a product defect.[39]

The court also found the plaintiff's complaint sufficiently alleged the required element of proximate causation.[40] First, the court found that the plaintiff's allegations that it was foreseeable the product would be sold outside its original packaging without the assembly instructions, and that the product typically required assembly when sold, were sufficient to satisfy the plaintiff's burden to allege facts that "plausibly state the proximate cause element" of a product liability claim.[41] Second, the court rejected the manufacturer's argument that the plaintiff's assembly of the tree stand without the instructions and the retailer's sale of the product without the instructions and necessary components were intervening causes.[42] The court relied on the

33. *Id.* at *1-3, *4.
34. *Id.* at *6-7.
35. *Id.* at *5-10.
36. *Id.* at *6.
37. *Id.* at *7.
38. *Id.*
39. *Id.*
40. *Id.* at *8.
41. *Id.*
42. *Id.* at *9-10.

principle that proximate cause issues are generally left for the jury to decide.[43]

In *Fouch v. Bicknell Supply Co.*,[44] the Georgia Court of Appeals addressed what proximate cause evidence a plaintiff must provide to survive summary judgment in a toxic tort product liability case.[45] The plaintiff in *Fouch* was diagnosed with silicosis from overexposure to silica during his eleven years working as a sandblaster. The trial court granted summary judgment to the defendants, finding that the plaintiff did not establish proximate causation because he failed to present evidence showing the exact amount of exposure to silica he experienced while using the defendants' products.[46]

The court of appeals reversed, noting that "[i]n cases involving toxic chemicals, a plaintiff must offer proof of general causation – that exposure to a substance is capable of causing a particular injury or disease – and proof of specific causation – that exposure to a substance under the circumstances of the case contributed to his illness or disease."[47] However, the court continued that a plaintiff does not need to show the specific concentration level to which he was exposed.[48] Instead, the court explained, "[I]n toxic tort cases, proof of causation generally requires reliable expert testimony which is based, at the least, on the determination that there was a *reasonable probability* that the negligence caused the injury."[49] Applying this standard, the appellate court held that the trial court erred in requiring the plaintiff to prove he was exposed to a specific threshold level of silica.[50] Therefore, the plaintiff presented sufficient proof to survive summary judgment because he presented some expert evidence of specific causation.[51]

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43. *Id.* at *9.

44. 326 Ga. App. 863, 756 S.E.2d 682 (2014), *reconsideration denied* (Apr. 8, 2014), *cert. denied*, 2014 Ga. LEXIS 601 (2014), *cert. denied*, 2014 Ga. LEXIS 605 (2014), *cert. denied*, 2014 Ga. LEXIS 613 (2014).

45. *Id.* at 871, 756 S.E.2d at 689.

46. *Id.* at 863, 864, 756 S.E.2d at 684.

47. *Id.* at 868, 756 S.E.2d at 687.

48. *Id.*

49. *Id.* at 869, 756 S.E.2d at 687 (italics in original) (quoting Rodrigues v. Georgia-Pacific Corp., 290 Ga. App. 442, 444, 661 S.E.2d 141, 144 (2008)) (internal quotations omitted).

50. *Id.* at 869, 756 S.E.2d at 688.

51. *Id.* at 871, 756 S.E.2d at 689.

II. CLAIMS

A. *Failure to Warn*

In Georgia, a seller's duty to warn may be breached "by (1) failing to adequately communicate the warning to the ultimate user or (2) failing to provide an adequate warning of the product's potential risks."[52] A failure to communicate a warning can involve issues like the "location and presentation of the warning."[53] The failure to adequately warn, by contrast, depends upon the substance of the warning.[54] Proximate cause is an indispensable element for both warning defect claims.[55]

The plaintiff in *Grieco v. Tecumseh Products Co.*[56] was injured while repairing a compressor unit that was manufactured by the defendant. After replacing parts on the compressor, the plaintiff initiated power to the compressor. When the compressor ignited, it blew out flames, causing the plaintiff to suffer burns to his hair, shoulder, and arm. The label on the compressor warned of burns from thermal venting. However, despite affirmatively observing the warning, the plaintiff neglected to read it. The plaintiff filed suit, alleging product liability and breach of warranty claims. The defendant moved for summary judgment on the failure to warn claim, contending the plaintiff's failure to read the warning should bar this claim.[57]

In denying the defendant's motion, the United States District Court for the Southern District of Georgia recognized that the "[f]ailure to read a warning does not bar recovery when the plaintiff is challenging the adequacy" of a manufacturer's or seller's communication of a product's dangers.[58] The court found that the "failure to read the warning may be circumstantial evidence of the inadequacy of the warning."[59] The court concluded that a warning label's position, color, size, and print are factual matters for the jury to consider in determining whether a defendant failed to adequately communicate the product's dangers.[60]

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52. Wilson Foods Corp. v. Turner, 218 Ga. App. 74, 75, 460 S.E.2d 532, 534 (1995) (quoting Thorton v. E.I. DuPont De Nemours & Co., 22 F.3d 284, 289 (11th Cir. 1994)).

53. *Id.* at 75, 460 S.E.2d at 534.

54. *Id.*

55. *See id.*

56. No. 4:12-cv-195, 2013 U.S. Dist. LEXIS 152405 (S.D. Ga. Oct. 23, 2013).

57. *Id.* at *2, *12.

58. *Id.* at *12 (quoting Camden Oil Co. v. Jackson, 270 Ga. App. 837, 840, 609 S.E.2d 356, 359 (2004)).

59. *Id.* at *13 (quoting *Jackson*, 270 Ga. App. at 840, 609 S.E.2d at 259).

60. *Id.*

B. *Failure to Recall*

"Georgia common law does not impose a continuing duty upon manufacturers to recall their products" unless "special circumstances" exist.[61] Special circumstances exist when a manufacturer chooses to voluntarily recall a product or if a "statute or governmental agency requires the manufacturer to recall the product."[62]

In *Williamson v. Walmart Stores, Inc.*,[63] the plaintiff was seriously injured from an explosion of a plastic gas container that was designed without a flame arrestor. The plaintiff alleged the absence of a flame arrestor made the plastic gas container defective and the defendants negligently failed to recall or retrofit the gas container. In addition, the plaintiff claimed the defendants should have reported prior adverse incidents regarding the plastic gas container to the United States Consumer Product Safety Commission (CPSC). The plaintiff alleged that if the defendants had reported these incidents, the CPSC would have required a recall of the plastic gas container.[64] Nonetheless, the court found that because the plaintiff failed to allege any statute or governmental agency required the defendants to recall or retrofit the gas container, the plaintiff failed to show special circumstances existed.[65] Without a showing of special circumstances, the court dismissed the plaintiff's failure to recall or retrofit claim.[66]

C. *Breach of Warranty*

Georgia's Uniform Commercial Code creates an implied warranty of merchantability that goods will be fit for the ordinary purposes for which the goods are used.[67] However, because Georgia has adopted the risk-utility test when assessing strict liability defect allegations, finding a product is defectively designed does not necessarily give rise to a breach of implied warranty of merchantability claim.[68]

The plaintiff in *Grieco v. Tecumseh Products Co.*[69] was injured while repairing a compressor unit that was manufactured by the defendant.

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61. Ford Motor Co. v. Reese, 300 Ga. App. 82, 85, 87, 684 S.E.2d 279, 283-85 (2009).
62. *Id.* at 85 n.2, 684 S.E.2d at 283 n.2.
63. No. 3:14-CV-97 (CDL), 2015 U.S. Dist. LEXIS 45657 (M.D. Ga. Apr. 8, 2015).
64. *Id.* at *1, *8-9, *16.
65. *Id.* at *17.
66. *Id.*
67. *See* O.C.G.A. § 11-2-314 (2002).
68. *See* Banks v. ICI Ams., Inc., 264 Ga. 732, 735, 450 S.E.2d 671, 674 (1994); *see also* J. KENNARD NEAL, GEORGIA PRODUCTS LIABILITY LAW § 4:4 (4th ed. 2012).
69. No. 4:12-cv-195, 2013 U.S. Dist. LEXIS 152405 (S.D. Ga. Oct. 23, 2013).

After replacing parts on the compressor, the plaintiff initiated power to the compressor, and the compressor ignited and blew out flames, which caused the plaintiff to suffer burns to his hair, shoulder, and arm. The plaintiff filed suit, contending the defendant breached (1) the implied warranty of merchantability; (2) the implied warranty of fitness for a particular purpose; and (3) the product's express warranty. The defendant moved for summary judgment on the plaintiff's breach of warranty claims.[70] In support of his implied warranty of merchantability claim, the plaintiff cited a Florida case arising under the Death on the High Seas Act[71] and federal admiralty law. Because this authority was not from a Georgia appellate court, the case was not binding on the federal district court sitting in diversity, and the plaintiff offered no evidence demonstrating the compressor was unfit for use.[72] Without any evidence to support the claim, the court granted summary judgment to the defendant on the plaintiff's implied warranty of merchantability claim.[73]

Next, the court examined the plaintiff's implied warranty of fitness for a particular purpose claim.[74] For breach of a fitness for a particular purpose claim, the court explained that a plaintiff must prove: (1) the buyer had a particular purpose for the goods; (2) the seller knew of the buyer's particular purpose; (3) the buyer relied on the seller's skill and judgment to provide a suitable good; and (4) the seller had reason to know of the buyer's reliance on the seller.[75] The defendant argued the absence of a defect demonstrated the compressor was fit for its particular purpose, thereby showing summary judgment was proper.[76] In rejecting this argument, the court emphasized that "unfit" means unable to fulfill the particular purpose, regardless of a defect being present.[77] Thus, the court denied the defendant's motion for summary judgment on the plaintiff's implied warranty of fitness for a particular purpose claim.[78]

Finally, the court reaffirmed that an express warranty is made when a seller makes an affirmation of fact or promise related to the goods and the affirmation or promise becomes part of the basis for the bargain.[79]

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70. *Id.* at *2, *15.
71. 46 U.S.C. §§ 30301 to 30308 (2012).
72. *Grieco*, 2013 U.S. Dist. LEXIS 152405, at *9, *16.
73. *Id.* at *16.
74. *Id.*
75. *Id.* at *16-17.
76. *Id.* at *17.
77. *Id.*
78. *Id.*
79. *Id.*

The plaintiff alleged the defendant breached an express warranty because the defendant assured the plaintiff the compressor would work.[80] Because the plaintiff provided no additional evidence supporting this allegation, the court granted summary judgment on the plaintiff's express warranty claim.[81]

III. DEFENSES

A. *Assumption of Risk*

Prevailing on an assumption of the risk defense requires a defendant to show the plaintiff (1) had actual knowledge of the danger posed by the product; (2) understood and appreciated the risks of the defect; and (3) knowingly and voluntarily exposed himself to such a risk.[82]

In *Lee v. CNH America, LLC,*[83] a tractor owner's wife brought a product liability suit against a tractor manufacturer on behalf of her husband's estate. The plaintiff's husband was found crushed behind the tractor's rear with its engine running. The tractor contained a "lift-o-matic" feature that allowed the operator to raise or lower an attached farming implement. The switch for the tractor's lift-o-matic feature was located on the right side of the operator's seat. The tractor also contained a knob that adjusted the height to which the implement would raise when the lift-o-matic button was in the "fast raise" position. To adjust the present height, the operator must exit the operator's seat and go behind the tractor in between the tractor and the implement. If the height limit adjustment knob was loosened while the tractor was running and the lift-o-matic switch was in the "fast raise" position, the implement instantly rose to its full height.[84]

Before the tractor was delivered, the husband read the instruction manual. The manual stated the engine needed to be turned off before implements could be raised or lowered, and the implement would raise to its highest position if the engine is on. Upon delivery of the tractor, the husband received extensive instruction on raising and lowering the implements. The defendant argued that because the danger was obvious, the husband read the manual, and the husband received extensive instruction on adjusting implement height, the husband assumed the risk.[85]

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80. *Id.* at *17-18.
81. *Id.* at *18.
82. *See* Vaughn v. Pleasent, 266 Ga. 862, 864, 471 S.E.2d 866, 868 (1996).
83. 322 Ga. App. 766, 746 S.E.2d 243 (2013).
84. *Id.* at 766, 767, 746 S.E.2d at 244-45.
85. *Id.* at 767-68, 771, 746 S.E.2d at 245-46, 247-48.

At trial, based on this evidence, the court gave the pattern jury charge on assumption of the risk. After an adverse verdict, the plaintiff appealed and contended this charge was improper because the plaintiff's decedent had no subjective knowledge of the risk.[86] The Georgia Court of Appeals affirmed the trial court's decision, holding there was sufficient evidence to create an issue for the jury to resolve.[87]

In *Puckett v. Plastics Group, Inc.*,[88] the plaintiff attempted to kindle a fire in the early morning of January 10, 2010 by splashing gasoline on an existing flame. The fire grew unexpectedly large, causing the plaintiff to sustain severe burns. The plaintiff filed suit against the manufacturer of the gas can, alleging the container was defectively designed because it did not include a flame arrestor to prevent the vapors from igniting. After discovery, the defendant filed a motion for summary judgment on all of the plaintiff's claims. The district court accepted the following facts as true: (1) the gas can did not include a flame arrestor; (2) the gas can's side contained a warning on exploding vapors; (3) the warning was embossed on the side of the gas can, but the text was the same color as the gas can; (4) the plaintiff did not read the warning but was aware gasoline is flammable and that splashing gasoline on a fire was dangerous; and (5) the plaintiff was not aware the vapors inside the gas can could explode in the manner they did. Based on these accepted facts, the district court granted the defendant's motion for summary judgment regarding assumption of the risk, The court found the plaintiff accepted the risk and danger associated with pouring gasoline on an open flame and the danger of splashing gasoline on an open fire is open and obvious.[89]

On appeal, the plaintiff argued, even though he was aware of potentially being burned while pouring gasoline on an open flame, he was not aware of the "drastically greater and qualitatively different" risk that the gas could explode.[90] The United States Court of Appeals for the Eleventh Circuit noted Georgia law does not, however, recognize the distinction the plaintiff attempted to create between knowledge of the danger and knowledge of the precise series of events that might lead to the injury.[91] Because the plaintiff was aware gasoline ignites when exposed to a flame, as demonstrated by his intentional conduct of standing back from the fire to avoid singeing his eyebrows, the court

86. *Id.* at 771, 746 S.E.2d at 247.
87. *Id.* at 771-72, 746 S.E.2d at 248.
88. 561 F. App'x 865 (11th Cir. 2014).
89. *Id.* at 866-67.
90. *Id.* at 868.
91. *Id.*

concluded the plaintiff assumed the risk of his actions and affirmed the grant of summary judgment for the defendant.[92]

B. Product Misuse

The Georgia Pattern Jury Instruction outlines the contours of the product misuse defense as follows:

> A product that is safe if used in a normal manner is not ordinarily a defective product. If a person uses a product in an abnormal manner and is injured because of such abnormal use, the manufacturer is not liable for such injury. However, if the manufacturer had reason to anticipate or foresee that the product might be used in this abnormal manner and that such use might result in injury and, knowing these facts, failed to give adequate warning against using the product in this manner, then the manufacturer may be held liable for the resulting injury.[93]

Frequent issues relating to this defense are whether a particular use of a product is "abnormal" and whether the manufacturer should have anticipated this abnormal use.

The Georgia Court of Appeals considered the application of this defense in *Lee v. CNH America, LLC*[94]—a product liability suit arising from an incident in which a man was found crushed between the back of a tractor and an implement attached to the tractor. The tractor contained a lift-o-matic feature, allowing the operator to flip a single switch to raise or lower an attached farming implement.[95]

At trial, the court permitted jury instructions on product misuse. After a verdict was returned in favor of the defendant-manufacturer, the plaintiff appealed, claiming her husband's use of the tractor was reasonably foreseeable to the manufacturer such that the product misuse defense did not apply.[96] The appellate court affirmed the trial court's decision to charge to the jury on the product misuse defense because there was some evidence to support the defense.[97] The court determined there was support for the defense from evidence that the plaintiff's husband was behind the tractor with the engine running, there were instructions on the tractor, the instruction manual instructed the operator to turn the engine off, and the plaintiff's husband had

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92. *Id.*

93. COUNCIL OF SUPERIOR COURT JUDGES OF GEORGIA, SUGGESTED PATTERN JURY INSTRUCTIONS, VOL. I: CIVIL CASES § 62.681 (5th ed. 2015).

94. 322 Ga. App. 766, 746 S.E.2d 243 (2013).

95. *Id.* at 766-67, 746 S.E.2d at 245.

96. *Id.* at 772-73, 746 S.E.2d at 248.

97. *Id.* at 773, 746 S.E.2d at 248.

received extensive training on the tractor's operation when the tractor was delivered.[98] The court emphasized that it was for the jury to decide whether the plaintiff's husband was using the tractor in an abnormal manner, whether his use was foreseeable to the manufacturer, and whether the manufacturer provided adequate warnings about the misuse.[99]

C. *Learned Intermediary*

In *Fouch v. Bicknell Supply Co.*,[100] the Georgia Court of Appeals addressed the learned intermediary rule.[101] The plaintiff in *Fouch* was diagnosed with silicosis from overexposure to silica during his eleven years working as a sandblaster. The plaintiff asserted strict liability design defect and negligent failure to warn claims against the defendants, alleging the defendants' non-air supplied hoods did not protect him from silica exposure. The plaintiff admitted he knew it was harmful to inhale the dust caused from sandblasting, and the respiratory equipment was necessary to protect against that danger.[102] The defendants argued the learned intermediary rule relieved them of any duty to warn of the dangers associated with their products.[103] The court articulated that rule as follows:

> Under the learned-intermediary rule, "where the product is vended to a particular group or profession, the manufacturer is not required to warn against risks *generally* known to such group or profession."[104] A similar rule "applies where it appears that the person using the product should know of the danger, or should in using the product discover the danger."[105]

The court held that although the plaintiff admitted to knowing the general risks associated with sandblasting, a factual question remained on whether he was aware of the specific risks of using the defendants'

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98. *Id.*

99. *Id.*

100. 326 Ga. App. 863, 756 S.E.2d 682 (2014), *reconsideration denied* (Apr. 8, 2014), *cert. denied*, 2014 Ga. LEXIS 601 (2014), *cert. denied*, 2014 Ga. LEXIS 605 (2014), *cert. denied*, 2014 Ga. LEXIS 613 (2014).

101. *Id.* at 873, 756 S.E.2d at 690-91.

102. *Id.* at 863-64, 865, 756 S.E.2d at 684, 685.

103. *Id.* at 873, 756 S.E.2d at 690.

104. *Id.* at 872, 756 S.E.2d at 690 (alterations omitted) (quoting Carter v. E.I. DuPont de Nemours & Co., 217 Ga. App. 139, 140, 456 S.E.2d 661, 662 (1992)).

105. *Id.* at 872, 756 S.E.2d at 690 (quoting R&R Insulation Servs. v. Royal Indem. Co., 307 Ga. App. 419, 428, 705 S.E.2d 223, 233 (2010)).

products.[106] The court looked specifically to reports indicating that small sandblasting companies, like the ones the plaintiff worked for, do not fully appreciate the danger of developing silicosis from sandblasting, and that they rely on manufacturers and suppliers of sandblasting products to provide adequate warnings.[107]

The learned intermediary rule was at issue again in *Brown v. Roche Laboratories, Inc.*[108] The plaintiff asserted product liability claims against the manufacturers of two prescription antibiotics, Bactrim and Rocephin, from which she suffered a life-threatening allergic reaction. The plaintiff had been prescribed Bactrim for a sinus infection. She returned to the doctor the next day with symptoms her doctor feared may have been from bacterial meningitis. The doctor administered two injections of Rocephin to treat those symptoms. The doctor was aware of the potential dangers of administering the Rocephin, but decided the benefits heavily outweighed the potential risks. The plaintiff was admitted to the hospital the next day and diagnosed with Stevens-Johnson Syndrome, a rare, life-threatening drug reaction.[109]

After filing suit, the plaintiff abandoned her claim against the Bactrim manufacturer, leaving the Rocephin manufacturer as the only defendant. On summary judgment, Rocephin argued, among other things, the plaintiff's failure to warn claim was barred by the learned intermediary rule.[110] The district court explained that one basis for a manufacturer to invoke the rule in a pharmaceutical product defect case is to show that the plaintiff's doctor had actual knowledge of the relevant risk and he or she would have taken the same course of action even with the warning the plaintiff claims the manufacturer should have provided.[111] The court found that the plaintiff's doctor's actual knowledge of the risk presented by Rocephin and his decision to administer it anyway precluded a finding of proximate causation under the learned intermediary rule.[112]

IV. SPOLIATION

"Spoliation refers to the destruction or failure to preserve evidence that is necessary to contemplated or pending litigation. Such conduct creates the presumption that the evidence would have been harmful to

106. *Id.*
107. *Id.* at 872-73, 756 S.E.2d at 690-91.
108. No. 1:06-cv-3074-JEC, 2013 U.S. Dist. LEXIS 79250 (N.D. Ga. June 6, 2013).
109. *Id.* at *1, *2, *2-3, *4.
110. *Id.* at *4, *14.
111. *Id.* at *21.
112. *Id.* at *22.

the spoliator."[113] The trial court has broad discretion to resolve spoliation issues, and its decision will be upheld absent abuse of discretion.[114]

In *Lee v. CNH America, LLC*,[115] the decedent sustained fatal injuries while trying to maintain his recently-purchased tractor. Although no one witnessed the incident that led to his death, circumstantial evidence indicated that the decedent likely was trying to adjust a height limit control feature on the tractor, which allowed for a lift arm to quickly raise or lower with the push of a single button. The plaintiff refused to allow the defendant to inspect the tractor two months after the incident but permitted her consultants to inspect and manipulate the tractor. By the time the plaintiff permitted the defendant's representatives to inspect the tractor after the lawsuit had been filed, critical parts had rusted, creating a condition that was likely not present at the time of the incident.[116]

The defendant tractor manufacturer's motion for summary judgment based on a spoliation claim was denied, but the trial court granted the defendant's request for a spoliation jury charge. On appeal from a defense verdict, the plaintiff contended it was error for the trial court to give the spoliation charge because there was no evidence that the plaintiff acted in bad faith when she allowed the tractor to rust before the defendant's representatives could inspect it.[117] The appellate court held it was appropriate for the trial court to charge the jury on the issue of spoliation because there was some evidence to support the charge.[118] In addition, spoliation sanctions may be appropriate even when the spoliator has not acted in bad faith.[119]

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113. Clayton Cnty. v. Austin-Powell, 321 Ga. App. 12, 16, 740 S.E.2d 831, 835 (2013) (quoting Baxley v. Hakier Indus., 282 Ga. 312, 313, 647 S.E.2d 29, 29 (2007)), *cert. denied*, 2013 Ga. LEXIS 683 (2013).

114. Kitchens v. Brusman, 303 Ga. App. 703, 705, 694 S.E.2d 667, 669 (2010).

115. 322 Ga. App. 766, 746 S.E.2d 243 (2013).

116. *Id.* at 766-67, 768-69, 746 S.E.2d at 244-45, 246.

117. *Id.* at 773, 774, 746 S.E.2d at 249.

118. *Id.* at 774, 746 S.E.2d at 249.

119. *Id.*