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HOW MUCH IS AN EMPLOYMENT DISCRIMINATION CASE REALLY WORTH?

By:

Judy Farrington Aust

On its face, a case of employment discrimination may appear inscrutable in terms of potential exposure. Indeed, there are many variables at play in the evaluation of such cases, and it is helpful to consider how the differences might figure into overall value.

The facts or the "story" of the case typically provide the first impression (and often a lasting one), triggering thoughts such as, "what was he thinking?" or "Ouch!" The nature and severity of the offense are a good place to start an analysis of potential exposure. How much of an impact does the story make? Was a well-loved senior employee summarily sacked without warning? Was a female employee demoted after complaining she was cornered in the coffee room by a lecherous supervisor? Did the employer terminate a difficult employee who refused to conform to reasonable company policy?

Bear in mind that if the case proceeds all the way to trial, the story is as far as some jurors will ever get in their analysis of the case. Particularly egregious facts need to be afforded significant weight as evaluation begins. On the other hand, a complaint of wrongful termination alongside a well-documented history of employee misconduct or nonperformance may set the stage for a determination that the case presents only modest, if any exposure beyond the cost of defense. But this is not the end of the analysis . . .

The next consideration looks to the employer. A credible complaint against a small, locally owned business presumably would yield a lower overall verdict than the same or similar charges against a huge international corporation. Jurors tend to afford more deference to a hometown enterprise. Moreover, in Title VII cases, the size of the employment base (number of employees) has a bearing on the number at which compensatory damages are capped. For employers with up to 100 employees, compensatory damages are limited to $50,000. As the number of employees increases, the cap on damages gets higher, up to $300,000 for employers with a work base of 500 or more. The damages cap applies only to compensatory damages, however, which include future pecuniary loss, emotional pain and suffering, mental anguish, loss of enjoyment of life and other non-financial losses. Back pay, interest on back pay and front pay are not subject to the cap.

When defending an employer, documentation is everything. If the employer has maintained thorough and current personnel records, supportive evidence should be readily available to defense counsel. Without such documentation, however, a fact-finder is likely to presume that the employee's version of the facts accurately represents what happened. For example, a defense premised on the employee's routine failure to perform tasks essential to the job sounds disingenuous if performance reviews continually indicate he met the employer's expectations. In most instances, the absence of documentary evidence to support a defense will shift the burden of proof to the employer. If the theory of defense cannot be proven convincingly through other means, the plaintiff is virtually guaranteed a recovery and the case assumes a higher value.

A claim of discrimination may have significantly higher verdict potential if it is accompanied by a charge of retaliation or protected activity discrimination. A series of recent decisions from the U.S. Supreme Court, beginning with Burlington Northern & Santa Fe Railway Co. v. White, have expanded access to retaliation damages for plaintiffs who have not suffered actual economic loss and those seeking recovery under the ADA, the ADEA, FMLA, § 1981, § 1983 and beyond. As a result, the workplace reprisal (retaliation) claim may be more formidable than the underlying discrimination charge. A claim of retaliation, if it is supported by any credible evidence at all, will have significant bearing on any careful analysis of exposure.

What are the actual damages? Among the potential monetary damages awarded in an action for employment discrimination are back pay, front pay, lost future earnings, punitive damages, emotional distress damages and attorney fees. Back pay is represented by the amount of lost wages accruing between the date of the discriminatory act and the date of judgment. The longer it takes to get to final judgment, the longer the meter ticks on these damages, along with interest. Any evaluation of a discrimination claim should keep an eye on lost wages as they will continue to accrue during the course of litigation.

Front pay damages are intended to compensate the employee for that period until she is reinstated or paid in a non-discriminatory way. If reinstatement is not possible, front pay provides compensation instead of reinstatement. Front pay is notoriously difficult to predict, because it may appear open-ended and it is not subject to the statutory cap for Title VII damages.

Lost future earnings refer to the amount that a plaintiff's future earning potential is diminished as a result of harm to his reputation. These are considered compensatory damages and are not exclusive of front pay. It is noteworthy that damages for lost future earnings may be awarded even if the plaintiff still works for the defendant employer or has been reinstated, if he can show it is more difficult to seek new employment in the future as a result of a reputational injury stemming from discrimination.

Emotional distress damages may apply in certain cases. Such claims usually include medical expenses for treatment of both physical and mental complaints. If the plaintiff does not rely on expert testimony to establish physical or emotional injury, damages may still be awarded, but the amount will be limited.

Punitive damages come into play when the employer's conduct has been so shocking as to justify sanctions beyond compensatory damages. If punitive damages are sought, the plaintiff must establish egregious conduct on the part of the employer, but conscious, purposeful discrimination has been found to warrant such damages.

While punitive damages claims under Title VII are capped at the same amounts awarded for compensatory damages, punitive awards under state law in many states are not subject to caps. Excessive jury awards of punitive damages are frequently reduced by the trial courts as violative of due process. Nevertheless, pleas for punitive damages should be taken very seriously and calculated into any overall evaluation of the case.

In the final analysis, evaluation of employment-related claims, despite their apparent complexity, can be fairly accurately conducted when all these factors are considered. All facts, including a frank examination of those that are unfavorable, are essential to any assessment of exposure. There are certainly many variables, but both sides of the litigation are faced with the same challenges when called on to assign a number value to a case. The side with the greater understanding of the facts, law and available damages will almost always have the advantage.

CASE NOTES

Georgia Liability

A parent corporation is entitled to tort immunity under the exclusive remedy doctrine if it can establish "alter ego"

Coker v. Great American Ins. Co., 290 Ga. App. 342, 659 S.E.2d 625 (2008)

While working for the Mayo Company, Coker amputated most of his fingers using a hydraulic shearing machine, entitling him to workers' compensation benefits.

Mayo's workers' compensation insurer, American National Fire Insurance Company., was a wholly owned underwriting subsidiary of Great American Insurance Company. Mayo essentially paid insurance premiums (through the subsidiary) to Great American, and Great American was obligated to pay the claimant's benefits.

Coker sued Great American in tort. The trial court granted Great American's motion for summary judgment, finding it contractually obligated to provide the claimant with workers' compensation benefits, and therefore immune from suit.

Coker appealed, arguing that Great American, which had hired a safety inspection company, was a third-party tortfeasor and not entitled to immunity.

The Court of Appeals disagreed and rejected Coker's contention that Great American and the inspection company were similarly situated. "[T]he workers' compensation insurer," noted the Court, "is considered to be the alter ego of the actual employer for purposes of immunity...".

The record showed Great American, like many other insurers, issued some policies through wholly owned underwriting subsidiaries. American National had no employees, officers or directors of its own. Through a pooling agreement, American National ceded back to Great American all of its rights, obligations, and liabilities under the workers' compensation policy at issue. Additionally, at least one Great American employee inspected Mayo's premises in connection with the policy. Hence, Great American asserted that it was entitled to immunity against suit as American National's alter ego. The Court of Appeals agreed.

If an insurer can prove it is the alter ego of the actual workers' comp insurer, it can share in the employer's immunity under the exclusive remedy of workers' compensation

The exclusive remedy provision bars an employee from bringing a tort claim against a co-employee

McLeod v. Blase, 290 Ga. App. 337, 659 S.E.2d 727 (2008)

Roshown McLeod played professional basketball for the Atlanta Hawks. In 2000 he was treated for a playing injury byWalter Blase, the Hawks' athletic trainer.

McLeod filed a lawsuit which alleged that Dr. Blase negligently treated his injury and made it permanent, preventing him from playing professional basketball again.

Blase moved for summary judgment, arguing that McLeod's action was barred by the exclusive remedy doctrine, which generally bars a tort claim by an employee against his employer related to a work injury. The exclusive remedy doctrine does not prevent an employee from suing a third-party tortfeasor, however. The State Court granted the Motion.

On appeal, McLeod argued that a judicially created exception to the exclusive remedy doctrine allows an employee who is injured by another employee's professional negligence to bring a professional malpractice action against that employee. Downey v. Bexley, 253 Ga. 125, 317 S.E.2d 523 (1984) and Davis v. Stover, 258 Ga. 156, 366 S.E.2d 670 (1988).

The Court rejected McLeod's argument. In doing so, the Court noted the general rule that an injured employee cannot bring a claim against a co-employee in tort. The Court further recognized that the holdings in Downey and Davis only supported a claim for medical malpractice against a company physician, which Blase, an athletic trainer, was not.

The Court declined to expand the exception allowing a claim against a company physician to other professionals like Blase and said that by doing so they would "substantially restrict the scope of the exclusive remedy provision of the Act."

While a lawsuit may be permitted against a company physician for professional malpractice, the Court of Appeals declined to allow this against other professionals

New change in Georgia Uninsured/Underinsured Motorist Coverage

O.C.G.A. § 33-7-11(b)(1)(D)(ii) (effective January 1, 2009)

Beginning January 1, 2009, Georgia will begin recognizing two general types of underinsured motorist (UM) coverage. The two types are (1) reduction or "limits-to- limits" coverage and (2) excess or "limits-to-damages" coverage.

This change is applicable to policies issued, delivered or renewed on or after January 1, 2009 and an insurer must offer both of these options to its insureds when providing coverage.

Reduction coverage provides UM benefits to an injured insured only when the insured's UM coverage is greater than the at-

fault driver's liability coverage. The UM coverage acts as a supplement to the extent the UM coverage exceeds the tortfeasor's liability coverage. The available UM coverage is reduced by the amount of recovery from the tortfeasor's liability coverage. This is commonly referred to as liability coverage set-off. Prior to the new statute change, Georgia strictly followed this reduction rule.

Excess coverage provides UM benefits to an injured insured any time the tortfeasor's liability coverage is less than the amount of the insured's actual damages. The injured insured is entitled to recover UM coverage benefits equal to the difference between his actual damages and the tortfeasor's liability coverage up to the full limits of the UM coverage.

The main difference is there is no reduction or set-off by the amount of the tortfeasor's liability coverage. Excess coverage acts as a supplement. In short, where excess coverage is involved, the traditional liability set-off rule is not applicable.

The UM statute continues to provide coverage to an "uninsured motor vehicle" in substantially the same manner. A tortfeasor is considered an underinsured motorist where the insured's UM coverage exceeds the tortfeasors available liability coverage. It follows that an injured insured cannot recover under the UM provisions of his/her insurance policy if the tortfeasor has liability insurance equal to or greater than the UM coverage limits.

Additionally, the injured insured must first exhaust the tortfeasor's available liability coverage before either "excess" or "reduction" can be implicated.

It is important in analyzing exposure under a UM policy to determine what type of coverage the insured has. Whether the insured has reduction or excess coverage will determine the amount of available limits and eventual exposure.

The new statute provides for two types of UM coverage, reduction and excess.

Georgia litigants may not contact treating physicians for the opposing party about any aspect of patient health without complying with HIPAA

Moreland v Austin, _ Ga _, 2008 WL 4762052 (November 3, 2008)

Plaintiff filed a medical malpractice lawsuit after her husband's death. After obtaining the decedent's medical records, counsel for the doctor defendant attempted to make ex parte contact with three physicians who had treated the decedent prior to the defendant doctor, to discuss his cardiopulmonary status and prognosis.

Plaintiff moved for an injunction against the defense attorneys, and the trial court granted the motion. The court ruled that the lawyers could meet with and question the doctors only if they gave notice and allowed the plaintiff's attorneys to attend. Defendant appealed, and the Georgia Court of Appeals reversed. The Georgia Supreme Court granted certiorari to the court of appeals to review the decision.

The Georgia Supreme Court held unanimously that HIPAA, the federal statute which, among other things, mandates privacy for records of medical treatment, precludes informal contact with treating physicians by the opposing party in litigation under the Georgia Civil Practice Act.

The HIPAA privacy scheme dictates that a healthcare provider may release information in a judicial proceeding by court order, or in

response to a subpoena or discovery requests or "other lawful process." Information may also be provided if the patient provides an appropriate written release for the information; it is not released simply because the patient places his medical status at issue by filing a lawsuit alleging personal injury. The key protections afforded by the Privacy Rule of HIPAA is adequate notice to the patient, and opportunity to move for a protective order to prohibit or restrict the release of the information.

The Court's analysis hinged on its determination that this scheme is more restrictive than Georgia law, which allowed for ex parte or informal contact, at the physician's discretion. Therefore, the Court decided that HIPAA preempts Georgia state law and prohibits ex parte contacts concerning the patient's health information (but not for such mundane things as scheduling a deposition).

The HIPAA scheme does include penalties against healthcare providers who violate the Privacy Rule, but not against lawyers and litigants. Therefore, the Court held that a trial court has inherent power to regulate this type of discovery or litigation conduct through the Civil Practice Act. The Court left open which of the remedies of Rule 37 might apply to a particular situation, but held the trial court was within its discretion in allowing the interviews to go forward, with notice to the plaintiff's counsel and opportunity for those counsel to be present.

Georgia Workers' Compensation

1989 Amendment to the death benefits statute held unconstitutional

Sherman Concrete Pipe Co. et al. v. Chinn, 283 Ga. 468, 660 S.E.2d 368 (2008)

Chinn's husband was killed while he was working in1990 and Mrs. Chinn began receiving death benefits.

In 1988, prior to Mr. Chinn's death, O.C.G.A. § 34-9-13(e) stated: "The dependency of a spouse and a partial dependent shall terminate at age 65 or after payment of 400 weeks of benefits, whichever is greater." [Emphasis added.]

However, in 1989 the Code was amended and at the time of Mr. Chinn's death, the Code stated: "The dependency of a spouse and a partial dependent shall terminate at age 65 or after payment of 400 weeks of benefits, whichever occurs first." [Emphasis added.]

After Chinn had received death benefits for approximately 13 years, the insurer suspended benefits, contending that she had received more than the 400 weeks to which she was entitled under the version of O.C.G.A. § 34-9-13(e) that was in effect at the time of her husband's death in 1990.

Mrs. Chinn filed a motion for reinstatement, contending that the 1989 Amendment to O.C.G.A. § 34-9-13(e) was unconstitutional. Her contention was that the Amendment effected a substantive change in her entitlement to benefits, while the title of the Statute suggested that it was merely created to correct typographical, stylistic, capitalization, and punctuation errors and omissions. She argued that the title did not put the Legislature on notice that the Act contained major substantive changes in the law.

The Supreme Court ruled in Mrs. Chinn's favor, stating that the title of the Act suggested that its purpose was to correct certain "housekeeping" issues, but the Act actually "contains a significant substantive alteration of O.C.G.A. § 34-9-13(e), which greatly limits the availability of workers' compensation benefits to

surviving spouses. The substantive change does not properly relate to the main object of the legislation or its title in a way that would place Legislators on notice of the change." Thus, the 1989 Amendment was ruled unconstitutional and Mrs. Chinn was entitled to benefits as provided by the law prior to the 1989 Amendment.

The Workers' Compensation Board, rather than the Health Records Act, regulates medical photocopying charges in workers' compensation proceedings

Smart Document Solutions, LLC v. Hall, 290 Ga. App. 483, 659 S.E.2d 838 (2008)

Smart Document Solutions provides photocopying services, including medical records in workers' compensation claims. The Health Records Act (O.C.G.A. § 31-33-3(a)) provides a general fee schedule for medical record photocopying. However, the State Board of Workers' Compensation also has a photocopying fee schedule, where the permissible charges are lower. Smart Documents filed a lawsuit challenging the Board's authority to alter the statutorily-set fees.

The trial court granted a motion to dismiss, noting that the HRA exempts "records requested in order to make or complete an application for a disability benefits program," from its general photocopying fee structure.

The vendor appealed, and centered its argument on the proper construction of this clause. It argued that workers' compensation proceedings are not part of a "disability benefits program" for which potential recipients "apply."

The court of appeals agreed that the workers' compensation scheme is a disability benefits program. However, it found the Legislature intended to provide "benefits to workers afflicted by a total or partial disability." The court next found that claimants do, in fact, file an application for benefits. The workers' compensation system provides procedures for dispute resolution, noted the Court, necessarily anticipating that "benefit claims will be filed by employees, controverted by employers, and ultimately resolved . . ."

Finally, the Court held that, under O.C.G.A. § 34-9-205, the Board has the authority to set service fees, such as photocopying fees, in workers' compensation proceedings. *See*, *Smart Professional Photocopy Corp. v. Dixon*, 216 Ga. App. 825, 827 (1995). Finding that the legislature did not intend to deprive the Board of its authority over photocopying fees, it upheld the trial court's dismissal of Smart Documents's claim.

The Georgia State Board of Workers' Compensation has legal authority to set photocopying fees for medical records used in workers' comp proceedings.

Georgia
Product Liability

(The following was previously published in the quarterly newsletter of the Georgia Defense Lawyers Association)

This past year provided some interesting cases, examining such things as class actions, the learned intermediary rule, and breach of warranty claims.

1. Class Actions - Motion to Dismiss

A federal district court in the Northern District of Georgia recently considered whether certain claims asserted in a products liability class action lawsuit were subject to dismissal prior to class certification. In denying most of the defendants' motion, the court stressed that a complaint may survive a motion to dismiss for failure to state a claim even where it is highly unlikely that a plaintiff would be able to prove those facts or ultimately recover.

Facts: Hundreds became sick after eating peanut butter manufactured at the defendant's plant in Sylvester, Georgia, that became contaminated with Salmonella. Several individual lawsuits and class actions followed against the defendant peanut butter manufacturer. The plaintiffs subsequently filed a Master Complaint seeking to represent a proposed class of purchasers and a proposed class of persons with personal injuries and the defendant filed a motion to dismiss.

Specifically, the defendant moved to dismiss the plaintiffs' claims for unjust enrichment (on the grounds that (1) no *direct* benefit was conferred to the purchasers of the peanut butter and (2) an express contract governing the underlying transaction precluded a claim for unjust enrichment), attorney's fees (because attorney's fees are not warranted under any common law theory of action), personal injury (since several plaintiffs were from states where negligence and strict liability claims are preempted by statute) and economic losses to the purchaser class (on the grounds that a majority of jurisdictions do not allow suits in tort for a loss of the benefit of the bargain.)

Held: The district court denied defendant's motion to dismiss as to all claims except one. First, the court held that the laws of other states, in addition to Georgia law, would be critical to a final adjudication. It then denied defendants' motion on the unjust enrichment claims because a sufficiently direct benefit *was* conferred to the manufacturer by the purchasers of the contaminated peanut butter to satisfy most states' rules for bringing an action for unjust enrichment *and* because, even though a manufacturer's warranty extended to the purchasers, the warranty did not constitute an *express* contract such that would preclude a claim for unjust enrichment in most states. The court also denied defendant's motion as to the claim for attorney's fees because the court hearing the case has the power to establish an "equitable common fund" from which attorney's fees could be awarded *even where there is no statutory basis for recovery of attorneys' fees*.

The motion was denied as to the personal injury claims on the grounds that a state's decision to create a statutory action for negligence does not preclude recovery for actions grounded in products liability. Finally, with respect to economic loss by the purchaser class, the court granted the defendants' motion, but only to the extent any of the purchaser plaintiffs sought recovery for *economic* losses through *tort*.

In re ConAgra Peanut Butter Products Liability Litigation, slip copy, 2008 WL 2132233 (N.D.Ga. 2008).

2. Brand Mfgr Liability for Generic Drug Labeling

A district court judge in Atlanta considered whether or not a brand prescription drug manufacturer may be held liable for the alleged mislabeling of the generic version of the drug by another manufacturer.

Facts: Plaintiff alleged that her serious neurological injuries were an adverse reaction to the generic equivalent of the brand drug Reglan. She sued both the generic and the brand manufacturer of the drug. Her theory against the brand manufacturer was that it knew or should have known that the generic drug manufacturer would necessarily rely on information the brand manufacturer was required to submit to the FDA, which it was also required to update as needed.

Held: Judge Thrash granted the Reglan manufacturer's motion to dismiss. In order to prevail in products liability action based in strict liability or negligence, a plaintiff must first establish that the allegedly defective product was actually manufactured or supplied by the defendant. The court noted "the dearth of authority holding one manufacturer liable for another's product" and announced that it was joining "with other courts nationwide in rejecting the claim that the manufacturer of the branded product is liable for misrepresentation in the labeling of the generic product."

As to misrepresentation, while the court acknowledged that the original drug manufacturer has a duty to update product information to the FDA, it does not have a legal duty to ensure that the generic brand's label is also accurate, particularly since the generic manufacturer could alter its own label with FDA approval. The court also dismissed plaintiff's concealment claim, which under Georgia law, requires that a direct inquiry must first be made to the defendant. Finally, the court held that Georgia's statutory scheme for implied warranties does not contemplate holding one liable for another manufacturer's product.

Swicegood v. Pliva, Inc., 543 F.Supp.2d 1351 (N.D.Ga. 2008).

3. Warranty Disclaimer

A federal district court judge in Valdosta considered strict liability, negligence and breach of warranty claims in the context of diseased bell pepper seeds sold to the Plaintiff farms, which caused infection of its crops. The affected farms sued both the manufacturer and distributor of the infected seeds.

Facts: Gibbs Patrick Farms purchased bell pepper seeds manufactured by Syngenta from distributor Clifton. The seeds were sold to GPF with a disclaimer of warranty by Syngenta for seed borne diseases. GPF never read this disclaimer. After GPF planted the seeds, several nearby crops developed an infectious disease, resulting in a significant loss. After it was determined that the likely source of the blight was the Syngenta Stilleto seeds, GPF sued Syngenta for the resulting loss under theories of strict liability and negligent manufacture, and also sued Clifton for breach of warranty.

Held: Judge Lawson ruled that GPF could not maintain its strict liability action against Syngenta because Georgia law only allows strict liability claims when they are brought by natural persons. GPF's negligent manufacturing claim against Syngenta was dismissed because the *only* count of GPF's Complaint asserted against Syngenta was titled "PATRICK FARMS CLAIMS FOR STRICT LIABILITY AGAINST SYNGENTA." This count did not contain any mention of duty, breach, negligence or a specific negligent act. Consequently, the court held that GPF's Complaint failed to provide Syngenta with adequate notice, even under Georgia's broad notice pleading rules, that it was also defending a cause of action for negligence. Finally, with respect to GPF's breach of warranty claim against Clifton, the court held that Syngenta's disclaimer was inapplicable as to the distributor. Rather, Georgia law requires the distributor to provide an additional disclaimer, separate from the manufacturer's disclaimer, in order to avoid liability resulting from breach of warranty.

Since the Syngenta disclaimer was made specifically on its own behalf and did not by its own provisions extend to sellers, it did not protect Clifton. Additionally, the court held that even if a disclaimer or limitation of liability protecting Clifton had been made a part of the contract, it would still be unconscionable under Georgia law. This is because in a similar case (Mullis v. Speight Seed Farms, Inc., 234 Ga. App. 27, 505 S.E.2d 818 (1999)), the Georgia Court of Appeals held that the provisions of a similar disclaimer were unconscionable under analogous circumstances where the plaintiff was a farmer and not a professional seed merchant; the seed purchase occurred over the phone during a discussion involving only seed variety and price; the seed company did not negotiate warranty provisions with its customers; the

plaintiff was not in a positions to negotiate more favorable terms or test the product before the purchase; and the plaintiff was not aware of the disclaimer or limitation of remedies. All factors demonstrated *procedural* unconscionability (in the making of a contract) and all were present in the case at bar. In response to Clifton's assertion that other courts have upheld comparable disclaimers under similar facts, the court stated that, "unconscionability analysis is largely a matter of policy. A Georgia appellate court has spoken on this very issue and it is not this Court's position to alter the policy that the state of Georgia, through its judicial branch, has set for itself."

Gibbs Patrick Farms, Inc. v. Syngenta Seeds, Inc., slip copy, 2008 WL 822522 (M.D.Ga. 2008).

4. Subrogation – Strict Liability, Negligence

Plaintiffs often blur the distinctions between various causes of action in litigation against product manufacturers and sellers. A court in the Northern District of Georgia recently granted summary judgment to the manufacturer and seller of components of a fire sprinkler system, in a case involving a number of causes of action.

Facts: In 2006 a fire sprinkler system accidentally discharged, causing damage to a middle school building in Cobb County. The next year a property insurer brought an action against the defendants as subrogee of the general construction contractor (which apparently had to pay the claim itself). Defendants moved for summary judgment.

Held: Judge Thrash ruled that the defendants were entitled to summary judgment under the facts of this "freak accident" in which an HVAC controller allowed the heat to rise until the sprinkler triggered. First, analyzing the content rather than the labels of the allegations, the Court held that Plaintiff was asserting what amounted to strict liability claims, which could not be brought by an insurance company or its subrogee, since strict liability claims can only be maintained by "natural persons" under Georgia law. As to design and negligent manufacturing claims, the Court held that Plaintiff had not come forward with sufficient evidence to prove these claims against the manufacturer. As to the installer, the Court held that because there was no evidence that the system was "defective," the installer could not be held liable for failing to fix it. The Court also held that there was no evidence of foreseeability or of legal duty to Plaintiff.

ACE Fire Underwriters Insurance Company v. ALC Controls, et al., slip copy, 2008 WL 2229121 (N.D.Ga. 2008).

5. Learned Intermediary – Proximate Cause

A district court judge ruled that a pharmaceutical company was not liable for failure to warn of an alleged risk of emergent suicidality, even though the FDA required all manufacturers to use stronger warnings, after the date of a decedent's use of an antidepressant drug.

Facts: Plaintiff sued Eli Lilly and Company, maker of Prozac, alleging that it was responsible for her husband's death by suicide. The husband saw a psychiatrist in 2003 for anxiety. The doctor prescribed Prozac and advised him to return in one month, but less than two weeks later the patient committed suicide. The opinion quotes at length from the doctor's testimony concerning his examination and treatment plan that led him to prescribe Prozac for the decedent. The doctor was aware of the risks and benefits of Prozac, including controversy over emergent suicidality that led the FDA to add a requirement in 2005 that manufacturers of all antidepressants in the same class as Prozac add a black box warning about the concerns.

Lilly argued that the learned intermediary rule barred the failure to warn claims, and that Plaintiff could not prove that a different warning was the proximate cause of her husband's death, since the doctor testified it would not change his prescription analysis, and in his judgment the decedent did not show signs of being suicidal when he examined him. Plaintiff argued that the warning given at the time of the prescription provided no warning about suicide and that she was entitled to a "heeding presumption" – that as a matter of law, the doctor would not have prescribed Prozac had the different warning been given.

Held: Manufacturers in product liability litigation are often faced with evidence of changed circumstances over time, sometimes amounting to subsequent remedial measures. In this case Judge Forrester begins his analysis with an interesting observation that "Defendant does not defend the adequacy of the warnings on Prozac in 2003 [.]" However, based on the learned intermediary doctrine and the testimony of the prescribing physician that he would have still prescribed this drug to this patient with the symptoms he had at the time, even if the black box warning had been given, the defendant was entitled to judgment as a matter of law. The Court declined to recognize any legal duty to warn a patient directly. The Court analyzed various trends concerning heeding presumptions and decided to accept the Defendant's concession that the 2003 warnings were inadequate, but decided that the prescribing physician's testimony rebutted the presumption, so that Plaintiff could not prove proximate cause. The Court found that Plaintiff had conceded lack of privity to support her warranty claim, and denied as moot a motion to strike the expert report of the Plaintiff expert.

Porter v Eli Lilly and Company, slip copy, 2008 WL 544739 (N.D.Ga 2008).

6. Medical Device – Proof of Defect – Duty to Warn

The Southern District of Georgia was the venue for litigation involving a medical device which allegedly malfunctioned. A district court analyzed a variety of claims against the manufacturer of the device.

Facts: Defendant manufactured an implantable spinal stimulator, and Plaintiff suffered from chronic spine pain, so an Atlanta neurosurgeon recommended the device for Plaintiff and eventually implanted it within her body. Plaintiff began to obtain some relief from pain, but also to complain that the device was causing her other problems. She said that every hour it caused her to feel an "on/off" sensation, and that it took too long to charge the batteries. Neither the doctor nor a representative of the company could determine what was wrong. Eventually the doctor did a second surgery to replace the internal batteries; but the problems persisted. Another surgeon did a third surgery to replace the entire unit; the problems continued, along with a new one: a jolting sensation. Plaintiff sued the manufacturer in tort, claiming the device was defective, and in contract, claiming the company representative had made promises to pay medical bills arising from the complications, but had paid the surgeon's fee for the third procedure only. The defendant moved for summary judgment on the grounds that Plaintiff had no evidence of defect, and that any statements by the representative were gratuitous, but did not create a legal duty to pay.

Held: Judge Alaimo partially granted and partially denied the motion. The Court held that failure to determine a specific defect is not fatal to strict liability claims, when there was admissible expert testimony that the device did not function as intended. The Court also held that while the defendant may have proof that the device was not defective and that the complaints were caused by some medical condition peculiar to the plaintiff, Plaintiff's experts produced contrary testimony, creating issues of fact on strict liability and negligent design.

The Court noted that the learned intermediary doctrine requires that a reasonable warning be given to the prescribing physician. On the facts of this case, including evidence that Defendant was aware of the on/off problem, and the implanting doctor's testimony that he was not, the Court found issues of fact precluding summary judgment. As to the warnings about a jolting sensation, the Court found that a warning was given and so granted summary judgment.

As to breach of warranty, the Court gives some analysis of Georgia law that written notice is a condition precedent, but based on disputes whether the express warranty was presented or the implied warranty modified, it denied summary judgment. (Note: The opinion does not discuss previous decisions that a patient who receives an implantable medical device lacks standing to sue for breach of warranty, *Gowen v. Cady*, 189 Ga. App. 473, 476, 376 S.E.2d 390, 393 (1988)).
The breach of contract claims arose from conversations and correspondence between Plaintiff and the sales representative, and from a specific letter from the Defendant promising to pay certain expenses. The Court found that the elements of a contract were not present as to the representative, and granted summary judgment on that ground. However, as to the claims about the letter, the Court permitted Plaintiff to

proceed. The defense that Plaintiff had no damages because her insurance paid for what Defendant did not was rejected, because she could proceed to obtain nominal damages if she proved breach. The Court also rejected Defendant's arguments that the letter was an inadmissible offer of compromise, and permitted Plaintiff's claims for attorney's fees and punitive damages to proceed, noting evidence that the Defendant stood to profit if the original doctor implanted its devices.

Trickett v. Advanced Neuromodulation Systems, Inc., slip copy, 2008 WL 505344, (S.D.Ga. 2008).

7. Statute of Repose -Discovery Sanctions -Component Mfgr

The Georgia Supreme Court upheld a trial verdict entered jointly against an automobile manufacturer, and the manufacturer of a trailer hitch component. The opinion highlights the difficulties of appealing from rulings involving discovery sanctions, and the risks and uncertainty of being a joint defendant.

Fact: Plaintiff was killed in 1999 when someone drove at high speed into the back of her 1985 Mercury Marquis. Viewed in light most favorable to plaintiff, the force of the collision thrust two sharp bolts attaching a trailer hitch into the rear fuel tank of her automobile, causing gasoline to leak and burn. She also alleged that her seat back collapsed and her doors jammed shut. Because the statute of repose O.C.G.A. § 51-1-11 applied to bar strict liability claims, Plaintiff alleged failure to warn and reckless and wanton behavior against the defendants. The trailer hitch component manufacturer obtained partial summary judgment on the reckless and wanton exception and punitive damages, but the warnings claim proceeded to trial.

During discovery Plaintiff sought discovery of manufacturer documents concerning rear crash fuel tank integrity testing, and crash tests regarding seat back performance. According to the Supreme Court, Ford refused to produce certain crash test documents related to prior litigation, claiming they were attorney work product. The trial court determined after an in camera review that the documents should be produced; Ford declined and invited the court to hold it in contempt from which it could appeal. Instead, the court sanctioned Ford by precluding it from contesting certain facts at trial, essentially establishing its liability.

At trial, the jury found jointly against Ford and the trailer hitch manufacturer jointly and severally, awarding large compensatory damages. The jury did not award punitive damages against Ford. The jury found for Plaintiff against the driver who ran into decedent, but on the basis of the product liability claims, apportioned only minimal damages.

Held: The Georgia Supreme Court invoked its abuse of discretion standard in discovery matters and refused to overturn the ruling on the allegedly privileged test documents. It also found that the trial court did not abuse its discretion when "the court could have imposed the ultimate sanction of default but instead opted for the lesser sanction of issue preclusion." (Note: It appears the distinction was without much difference, given the near total deprivation of Ford's defenses to liability. But it could be more prejudicial to a defendant to try a case without defenses, as opposed to trying a case on damages only).

The component manufacturer argued that the trial court erred in refusing to apply Georgia's new expert statute to exclude the testimony of Plaintiff's expert witness. The trial court held that application of O.C.G.A. § 24-9-67.1 would be unconstitutional; the Supreme Court vacated this ruling, but it held that the statute did not retroactively affect the Plaintiff because it was invoked too late (after a pretrial order had been entered) to affect the Plaintiff in the first place.

Ford Motor Co v Gibson, __ Ga. __, 659 S.E.2d 346 (2008).

The year 2008 was a busy one for Georgia products liability, and 2009 promises a continuing assault by plaintiffs on traditional notions of manufacturer liability. GMLJ will continue to represent insureds against this assault.

South Carolina Workers' Compensation

Mere transportation of a tool of the trade does not create an exception to the "going and coming" rule

Whitworth v. WindowWorld, Inc., 377 S.C. 637, 661 S.E.2d 333 (S.C. 2008)

Whitworth was employed by WindowWorld as an installer. To do his work he required a "breaker," a large piece of equipment transported from site to site. The company breaker was unavailable, so he used his brother's breaker, which he had been storing in his garage. Whitworth had an auto accident on the way to the site, towing the breaker behind his truck.

The single commissioner denied benefits, holding that the accident occurred while Claimant was on the way to work and that Claimant failed to show the accident fell within an exception to the "going and coming" rule. The full commission and circuit court affirmed. The Court of Appeals reversed and held that the injuries fell within the "duty or task exception" to the "going and coming" rule.

Under the "going and coming" rule, an employee going to or coming from the place where his work is to be performed is not engaged in performing any service growing out of and incidental to his employment. There are several exceptions to the rule, including the duty or task exception and the required vehicle exception. Under the duty or task exception, the employee may receive benefits where the employee, on his way to or from his work, is charged with some duty or task in connection with his employment. However, the mere transportation of a tool of the trade, not owned by the employer, does not necessarily transform an event into a work-related duty or task. The required vehicle exception applies when an employer requires an employee, as part of the employee's job, to bring his own car for use during the workday.

The South Carolina Supreme Court reversed the Court of Appeals and held that the Claimant did not prove that either the duty or task exception or the required vehicle exception applied under the facts of the case.

A claimant does not have a unilateral right to select his treating physician

McKinney v. Kimberly Clark Corporation, 376 S.C. 636 (2008)

McKinney sought workers' compensation benefits for treatments to her neck, back, both shoulders and arms, legs, and psyche. Claimant alleged that her injuries occurred while she was driving a forklift, and her psychological injuries (severe depression) were the result of her pain and lack of mobility.

The single commissioner found that Claimant was entitled to medical treatment and ordered Kimberly Clark to pay for the treatment and select a treating physician.

Claimant requested that the appellate panel review the single commissioner's determination that Kimberly Clark should be

allowed to select the treating physician. The appellate panel affirmed the single commissioner, and the circuit court affirmed.

The South Carolina Court of Appeals affirmed the holding of the circuit court. A claimant does not have a unilateral right to select his treating physician. S.C. Code Ann. § 42-15-60 and § 42-9-10 establish the rights of the employer and the employee with regards to payment for treatments and ultimately gives great deference to the appellate panel.

Purely mental injuries are compensable if the injury arises from unusual or extraordinary conditions of employment

Doe v. South Carolina Dept. of Disabilities and Special Needs, 377 S.C. 346, 660 S.E.2d 260 *(2008)*

Claimant was a licensed practical nurse for the South Carolina Department of Disabilities and Special Needs. Her job duties included basic patient care and administering medications.

In 1997, the patient population in her ward changed from a generally passive group to a mix of passive and aggressive patients, resulting in an increase in noise and violence. That spring, Doe began suffering depression and was hospitalized for it in 1998. Her doctor opined that her depression was caused by the changes in her job situation. In 1998, Doe resigned due to inability to work and filed a claim for workers' compensation benefits, alleging a stress-related mental injury.

The single Commissioner denied the claim, holding that Claimant's depression was not caused by her work. The Appellate Panel affirmed the decision, but the Circuit Court judge held that the findings were unsupported by substantial evidence and reversed. The S.C. Court of Appeals reversed the circuit court's order and reinstated the Commission's ruling that Claimant was not entitled to benefits.

The South Carolina Supreme Court's review turned on whether there was substantial evidence to support the Commission's original decision.

Mental or nervous injuries are compensable if the emotional stimuli or stressors are incident to or arise from unusual or extraordinary conditions of employment. The standard for determining what constitutes an "unusual and extraordinary" condition is whether the work conditions at issue were unusual compared to the particular employee's normal strains. A history of pre-existing depression will not preclude workers' compensation benefits for a mental-mental injury.

The S.C. Supreme Court held that record testimony supported the finding that Claimant's work conditions at the time of her injury were unusual or extraordinary compared to the normal strains of her job. The Claimant presented evidence, in the form of her doctor's testimony, that her mental injury was causally related to the stresses of her job. Therefore, the supreme court reversed the court of appeals and remanded the case to the Commission to determine benefits for Claimant's mental-mental injury.

"The standard for determining what constitutes an "unusual and extraordinary" condition is whether the work conditions at issue were unusual compared to the particular employee's normal strains"

A claimant cannot recover workers' compensation benefits when he impermissibly deviates from the scope of his employment

Houston v. Deloach & Deloach, 378 S.C. 543, 663 S.E.2d 85 (S.C.App. 2008)

Houston was injured while riding as a passenger in a commercial dump truck owned by his employer, Deloach & Deloach. The driver Brown was a friend of the Claimant who had never driven a dump truck before. Deloach denied the claim on the grounds that Claimant was outside the scope of his employment at the time of his injury. There was conflicting testimony as to whether Claimant had permission to allow Brown to drive the truck.

The Commissioner found that Claimant suffered compensable injuries in the course and scope of his employment. A divided Appellate Panel denied the benefits, holding that the Claimant was not in the course and scope of his employment.

The circuit court affirmed the appellate panel's denial of benefits.

Brown appealed. The South Carolina Court of Appeals affirmed the order of the circuit court and held that the Claimant impermissibly deviated from his job duties by allowing Brown to drive the dump truck.

The Court of Appeals will affirm the decision of the appellate panel if supported by substantial evidence in the record. Substantial evidence is evidence which, viewing the record as a whole, would allow reasonable minds to reach the conclusion that the administrative agency reached in order to justify its action.

The findings of the appellate panel are presumed correct and will be set aside only if unsupported by substantial evidence.

For an injury to be "in the course of" the Claimant's employment, the injury must occur within the period of employment at a place where the employee reasonably may be in the performance of his duties and while fulfilling those duties or engaged in something incidental thereto.

The claim was denied because allowing a friend to drive, who had never driven a dump truck before, was a deviation from the course and scope of claimant's employment.

Dismissal without prejudice makes Employer a prevailing party

Palm Beach County School District v. Ferrer, 990 So.2d 13 (Fla. 1st DCA 2008)

Claimant filed seven petitions for benefits, and one day prior to the final merits hearing voluntarily dismissed all seven of them. The Employer/Carrier moved to tax costs against the claimant. The Judge of Compensation Claims denied the motion, finding that Claimant had not filed any petitions for benefits after she voluntarily dismissed her previous petitions so there was no adjudication on the merits and, therefore, the motion was premature. The JCC reasoned that Claimant was permitted to dismiss her petitions for benefits any time before the final hearing, and only after a second dismissal would the claims be deemed denied and Employer/Carrier entitled to recover its costs.

The Employer/Carrier appealed the order of the JCC denying its Motion to Tax Costs. The First District Court of Appeal reversed. A defendant generally becomes the prevailing party when a claimant dismisses an action. Whether the dismissal was taken with or without prejudice has no bearing on the result. Therefore, the Employer/Carrier was the prevailing party and was entitled to recover its reasonable costs

Litigants are on notice that costs are at issue in every claim

F.A. Richard and Associates v. Hernandez, 975 So.2d 1224 (Fla. 1st DCA 2008)

Claimant filed a petition for wage benefits and medical treatment. After a JCC entered an order denying the claim, the Employer filed a motion to tax costs. A second hearing was held in which the only evidence presented was the attachments to the Motion to Tax Costs. Claimant argued the unfairness of the assessment of costs for a good faith claim. Claimant did not raise a waiver argument or otherwise assert that the Employer/Carrier's failure to timely serve notice of its intent to seek costs barred the request.

The JCC denied the motion because the Employer/Carrier failed to assert their entitlement to costs on the pretrial stipulation, and Claimant was entitled to notice.

The First District Court of Appeals reversed. The Court held that it is universally true that costs are at issue, and it is unnecessary for litigants to assert a claim for costs in the pleadings. In light of the mandatory language in section 440.34(3), Florida Statutes (2005), all parties to workers' compensation cases are on notice that costs are at issue.

An oral agreement is binding on claimant with buyer's remorse, but a general release not made part of the agreement is not

Bonagura v. Depot, 991 So.2d 902 (Fla. 1st DCA 2008)

Claimant suffered a compensable injury. Her employer entered into an oral settlement agreement that Claimant would receive $50,000.00 for compensation and $5,750.00 for attorney fees. When the Employer/Servicing Agent sent the settlement papers, they included a general release. The claimant refused to sign the release and then filed additional petitions for benefits. The Employer/Servicing Agent sought enforcement of the settlement agreement.

The employer argued for a complete release of all claims, and claimant sought complete release from the agreement. The JCC denied claimant's petitions and ordered the parties to comply with the settlement agreement, including signing the general release, a condition not agreed to by claimant at the time the oral settlement took place.

Claimant appealed, and the First District Court of Appeal held that a valid, binding oral settlement agreement had been reached as to the offer and acceptance regarding the indemnity and attorney fees. However, a meeting of the minds did not take place as to the written release documents that was not part of the oral settlement negotiations, so the claimant did not have to sign the documents as provided by the Employer/Servicing Agent. The case was remanded for the JCC to redraft a written settlement agreement according to the limited scope of the oral agreement.

Only income reported as taxes qualifies as "wages" under Florida workers' compensation law

Fast Tract Framing, Inc. v. Caraballo, 33 Fla. L. Weekly D2189 (Fla. 1st DCA 2008)

Claimant suffered a compensable accident and filed a petition for benefits. The issue on appeal was the claimant's AWW. The Employer/Carrier argued at the merits hearing that claimant earned no wages as defined by section 440.02(28), Florida Statutes. Claimant was paid in cash and his employer did not withhold any federal taxes from claimant's income, and claimant never reported his income to the Internal Revenue Service.

The JCC found that based upon claimant's undisputed testimony, the claimant's AWW was $280.00 and awarded temporary disability benefits based upon that amount. The Employer/Carrier appealed and the First District Court of Appeal reversed, holding that the definition of wages contained in section 440.02 mandated the ruling. The statute was clear and unambiguous, and provided that "wages" include only the wages earned and reported for federal income tax purposes.

Florida Supreme Court clarifies standards for attorneys' fees determination

Murray v. Mariner Health, 33 Fla. L. Weekly S845 (Fla. 1st DCA 2008**)**

Claimant filed a petition for benefits which the Employer/Carrier denied. The JCC found that the claims were compensable and awarded benefits. Claimant sought attorney's fees from the Employer/Carrier as the prevailing party. The Employer/Carrier agreed claimant was entitled to fees, but disputed how to calculate the award.

The Employer argued the attorney fee should be based upon the percentages contained in 440.34(1). The claimant argued that the JCC should determine the attorney fee after considering the various factors articulated in *Lee Engineering Construction Co. v. Fellows*, 209 So.2d 454 (Fla. 1968).

At the hearing on the attorney fee amount, evidence was presented that the claimant's attorney worked approximately 80 hours on the case and the usual rate of pay in such cases was $200.00 per hour. Further, evidence showed that the attorney for the Employer/Carrier was paid $16,050 (135 hours at $125.00 an hour) in the unsuccessful effort to resist paying the awarded benefits. If the attorney fees were determined on the basis of the formula set out in subsection (1), claimant would be entitled to an attorney fee of $684.84 or about $8.11 per hour.

The JCC found that claimant expended 80 hours of reasonable and necessary time on the case, but that the fee award of subsection (3) was governed by the statutory formula of subsection (1). Therefore, the JCC entered an order awarding claimant an attorney fee of $684.84. Pursuant to claimant's request, the JCC addressed the *Lee Engineering* factors in the order and found that the skill required of the attorney was of the greatest magnitude, the customary charge in the region was $200.00, and the contingency of the compensation was high and militated in favor of an upward fee adjustment.

The claimant then appealed to the First District Court of Appeal arguing that the statute was unconstitutional and that the conflict in subsections (1) and (3) created an ambiguity.

The court affirmed, relying on its own prior cases rejecting the argument that the statute was unconstitutional.

The Florida Supreme Court accepted the appeal, and avoided the constitutional argument in its entirety. The Florida Supreme Court dealt with the issue in terms of statutory interpretation, noting that wherever possible, statutes should be construed in such a manner as to avoid an unconstitutional result. It was determined that an examination of the plain language of subsections 440.34(1) and (3) when read together created a statutory ambiguity. Subsection (1) provided that an attorney fee must adhere to the statutory formula and could not be exceeded. Subsection (3) authorizes reasonable attorney fees without any mention of the formula.

To address the ambiguity, the Court reviewed the relevant history of the attorney fee statute and then construed the statute based upon traditional rules of statutory construction. In the instant case, it was held that subsection (1) covered attorney fees generally, but was silent as to the attorney fees to which a claimant was entitled from an Employer/Carrier under the circumstances set forth in subsection (3). Therefore, the specific subsection (3) controlled over the general subsection (1), when subsection (3) was applicable.

Thus, claimant was held entitled to a reasonable attorney fee, for which the *Lee Engineering* case provided the standard. As the JCC had addressed the *Lee Engineering* factors in the order, the case was remanded to the JCC to enter an order awarding an attorney fee of $16,000.00.

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