Current Trends In The Post-Banks Era: An Update On Design Defect Law In Georgia

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In 1994, the face of Georgia product liability law was dramatically altered by the seminal case, Banks v. ICI Americas, Inc., 264 Ga. 732, 450 S.E.2d 671. Since that time, the Courts have been extending Banks, hewing closely to its general theme that no single factor should be dispositive in a product liability case.

In the past year and a half, the Georgia courts have made two especially important extensions to Banks. First, both the Court of Appeals and the Supreme Court ruled that the "open and obvious danger rule" is no longer viable in Georgia. Second, the Court of Appeals ruled that a plaintiff does not have to present evidence of a safer alternative design in order to avoid a dispositive ruling from the court. This paper will discuss both of these important decisions, and also will summarize other cases issued in the area of product liability during the last year.

I. The Open And Obvious Danger Rule

Under prior Georgia law, a product liability plaintiff could not recover when the danger posed by the product was "open and obvious." In Bodymasters Sports Indus., Inc. v. Wimberly, 232 Ga. App. 170, 501 S.E.2d 556 (1998), the Court of Appeals had to decide whether the "open

and obvious danger" doctrine still can bar a case in the post-Banks era. The plaintiff in Bodymasters was injured while using an exercise machine that she apparently used with some regularity in the course of her workouts. During one exercise session, the plaintiff sustained a severe knee injury when she was unable to hold the weight of a 200-pound leg press. She sued the manufacturer of the exercise machine, claiming, in part, that the machine was defectively designed because it did not have a "dead man" lock or similar safety device to prevent the weights from forcing the user's knees into her chest.

The manufacturer argued that the plaintiff should not be allowed to recover because the fact the machine had no safety device was open and obvious. The Georgia Court of Appeals disagreed. Pointing to the risk-utility test adopted in Banks, the Court in Bodymasters explained:

> Prior to Banks, Georgia courts held that an injured party could not recover in a design defect case where the defect was open and obvious.
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> Although Banks did not expressly address the open and obvious doctrine, the clear import of the decision is that no one factor absolutely controls the analysis as to whether a product is defective. Indeed, Banks identifies "the user's knowledge of the product," "common knowledge and the expectation of danger," and "the user's ability to avoid danger" as several factors to be included in the analysis, without indicating that any of such factors is control-ling. Accordingly, it is clear that under Banks, the open and obvious nature of the danger is but one factor to be considered in determining whether a product is defective.

232 Ga. App. at 171-72, 501 S.E.2d at 559.

In rejecting the rule that an open and obvious danger bars suit, Bodymasters reinforces the Banks notion that courts should allow juries to consider a wide array of evidence under the risk-utility theory. Additionally, Bodymasters illustrates the fact that ultimately the Banks decision

favors trials over summary judgment: summary judgment should not be granted simply because the plaintiff fails to produce evidence of some single factor.

Less than a month after the Court of Appeals handed down the Bodymasters opinion, the Georgia Supreme Court dealt the final blow to any notion that the open and obvious danger rule still could bar design defect cases in Georgia. In Ogletree v. Navistar Int'l Transp. Corp., 269 Ga. 443, 500 S.E.2d 570 (1998), the Court upheld the reasoning of the Bodymasters decision, stating: "[O]ur holding in Banks was an implicit rejection of the obvious danger rule." 269 Ga. at 445, 500 S.E.2d at 571.[1]

In Ogletree, the plaintiff's husband was killed when the owner of a truck manufactured by the defendant backed up over him. As part of the plaintiff's design defect theory, she argued that the defendant should have installed an audible back-up alarm on the truck.

The defendant urged that the absence of an audible back-up alarm was an open and obvious danger. The Georgia Supreme Court conclusively rejected the defense as a bar to liability, holding that:

> [T]he risk-utility factors which were explicitly mentioned in Banks encompass the degree to which the danger in the product is open and obvious . . . . This consideration of the patency of a particular defect as but one of many factors in determining the reasonableness of design decisions is consistent with the foreign cases which have abandoned or rejected the obvious danger rule.

269 Ga. at 444, 500 S.E.2d at 571 (citations omitted). The Court concluded: "[t]he open and obvious nature of the danger in a product is logically only one of many factors which affect the product's risk and, therefore, making that single factor dispositive is not consistent with this Court's mandate in Banks that the product's risk must be weighed against its utility." Id., 269 Ga. at 445, 500 S.E.2d at 572. See also Ziegler v. Clowhite Co., 507 S.E.2d 182, 184 (1998) (citing Ogletree and Bodymasters in reversing trial court's grant of summary judgment based upon open and obvious defense).[2]

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[1] The Court reserved the question of whether the open and obvious danger rule would bar suit in a "failure to warn" case, noting that "[m]ost jurisdictions do retain the rule in 'failure to warn' cases." 269 Ga. at 446, 500 S.E.2d at 572.

[2] At the time of the Ogletree opinion, two federal district courts had made contradictory rulings as to whether the open and obvious danger rule could bar a design defect

II. Reasonable Alternative Design

The Bodymasters case also dealt decisively with the issue of whether the plaintiff's failure to present evidence of a feasible and safer alternative design precluded recovery as a matter of law. Relying upon the multi-factor Banks approach, the Bodymasters court rejected the idea that alternative design evidence was a dispositive test of the merits of the case:

> Bodymasters argues that Wimberly presented no evidence that alternative design was possible or would have made the machine safer. However, although Banks identifies the existence of an alternative design as one factor affecting the risk-utility analysis, it does not indicate that such factor is controlling.

232 Ga. App. 170, 173, 501 S.E.2d 556, 560 (1998).

Bodymasters' two central decisions are consistent with each other and with the Banks ruling. All three rulings rest on two general and interrelated assumptions: (1) juries should decide product liability cases, not judges; and (2) product liability cases should be decided based on a wide assortment of evidence, not based on per se rules which consider only a single type of evidence.

III. Other Significant Decisions Issued in the Area of Georgia Product Liability Law, 1998 - 1999

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case in Georgia. Compare Raymond v. Amada Co., Ltd., 925 F. Supp. 1572 (N.D. Ga. 1996) (open and obvious danger rule is one factor under Banks) with Morris v. Clark Equip. Co., 904 F. Supp. 1379 (M.D. Ga. 1995) (open and obvious danger rule bars recovery). Ogletree resolved the conflict dispositively. Given that Banks is in its formative years in Georgia, Ogletree suggests that in order to avoid conflict with Georgia Supreme Court rulings, federal appellate courts should exercise their option to certify Banks-related questions to the Georgia Supreme Court. Trial courts do not have the option to certify questions, see Ga. S. Ct. R. 46, so until Banks is fleshed out, trial lawyers can expect more contradictory rulings from federal district courts.

In the past years courts have made a number of other important decisions that affect product liability cases in Georgia. This section will survey some of the key cases of 1998 and early 1999.

• **Chicago Hardware & Fixture Co. v. Letterman, 236 Ga. App. 21, 510 S.E.2d 875 (1999):**

Facts: Plaintiff purchased a tree stand and was injured when the turnbuckle (a component part of the stand) broke. Among other claims, Plaintiff brought a strict products liability claim alleging that the turnbuckle was unfit for use. Plaintiff lost the turnbuckle before adding the component manufac-turer to the lawsuit, however. The trial court denied the manufacturer's motion for summary judgment on spoliation grounds. Manufacturer appealed that and other rulings.

Key Points: Georgia continues to adhere to the principle that the destruction of an allegedly defective product is not per se fatal to a product liability action. The trial court must take into account a variety of factors, including the degree of fault attributable to the party accused of spoliation, in order to determine whether the opposing party has been irreparably prejudiced.

Result: The facts supported the trial court's ruling, and, therefore, the trial court did not commit reversible error by denying summary judgment, even though the record did not reveal affirmatively that the trial court evaluated all of the necessary factors in reaching its decision.

• **Rubin v. Cello Corp., 235 Ga. App. 250, 510 S.E.2d 541 (1998):**

Facts: Plaintiff slipped and fell in an area where a fellow employee had applied a cleaning solution manufactured by the Defendant. Plaintiff brought a products liability action claiming that the manufacturer should have added a colorant to its product to prevent such hazards. The Defendant raised the defenses of open and obvious danger and assumption of the risk.

Key Points: (1) Banks requires a multi-factor approach and no one factor is controlling. Accordingly, the open and obvious danger defense is but one factor among many for the jury to consider;

(2) Assumption of the risk is still a viable defense to a product liability action if the party asserting that defense demonstrates that the plaintiff had subjective knowledge of a particular and specific risk, understood and appreciated that risk, and voluntarily exposed himself to the risk.

Result: Trial court's grant of summary judgment reversed. A similar result was reached in Zeigler v. Clowhite Co., 234 Ga. App. 627, 507 S.E.2d 182

(1998) (reversing grant of summary judgment, in part based upon open and obvious danger rule).

- **Farmex Inc. v. Wainwright, 269 Ga. 548, 501 S.E.2d 802 (1998):**

Facts: Plaintiff sued the driver of a tractor-trailer rig and the rig's employer for injuries that occurred when a trailer became unhitched and struck Plaintiff's vehicle. Alleging that the trailer had become unhitched because of a defectively designed and manufactured hitch pin, Defendants brought a third-party suit against Farmex, Inc. Although Farmex had not manufactured or designed the hitch pin, it had acquired the entire hitch pin inventory of the company that had manufactured and designed it. After the acquisition, Farmex did not manufacture any hitch pins itself, but it did sell the hitch pins in its newly-acquired inventory.

Key Points: If a company is involved only in placing a product into the stream of commerce, and not in designing and manufacturing the product, it is a "product seller" under O.C.G.A. § 51-1-11(a), and not a "manufacturer" under O.C.G.A. § 51-1-11(b)(1).

Result: Farmex could not be sued under a strict liability theory because it was not a manufacturer.

- **Webster v. Boyett, 269 Ga. 191, 496 S.E.2d 459 (1998):**

Facts: In this personal injury case, the trial court bifurcated the trial along statutory lines, with only the question of the amount of punitives separated from all other issues.

Key Points: The Georgia Supreme Court rejected the suggestion by the Court of Appeals in General Motors Corp. v. Moseley, 213 Ga. App. 875, 447 S.E.2d 302 (1994), and succeeding cases, that trials should be trifurcated (i.e., divided into three separate phases or mini-trials). The Supreme Court held that only rarely

should a trial court ever trifurcate a case; most cases with a count for punitive damages should be bifurcated (divided into two phases). The Supreme Court also held that trial judges should have discretion as to the phase of trial in which to admit evidence of other similar acts.

Result: The trial court did not abuse its discretion in refusing to trifurcate by separating the issue of liability for punitive damages from the issue of liability for compensatory damages. The trial court also did not abuse its discretion in refusing to admit evidence of a prior DUI conviction during the first phase of the trial. The decision by the Court of Appeals, finding an abuse of discretion, therefore was reversed.

• **Lindsey v. Navistar Int'l Transp. Corp., 150 F.3d 1307 (11th Cir. 1998):**

Facts: In the most recent procedural manifestation of the case originally called Freightliner Corp. v. Myrick, 514 U.S. 280 (1995), the surviving spouse brought a claim for the defective design of a brake system on a tractor-trailer. The surviving spouse alleged that the defective design caused the vehicle to jackknife and collide into his wife's vehicle, ultimately killing his wife. The district court found in favor of Plaintiff after a bench trial.

Defendant appealed and argued, in part, that the district court failed to give proper weight to certain considerations under the Banks factors.

Key Points: The Eleventh Circuit confirms that Georgia design defect law requires a balancing of the risks and utilities of the chosen design and that there is no finite set of factors to be reviewed.

Result: The trial court properly evaluated the evidence and carefully considered and applied the Banks risk-utility test. The award of $5,000,000 for the intangible value of the life of the driver, a 30-year-old mother of two young sons, was affirmed.

- **Irving v. Mazda Motor Corp., 136 F.3d 764 (11th Cir. 1998):**

  Facts: Plaintiff brought design defect and failure to warn claims against a vehicle manufacturer alleging that the vehicle's restraint system was defectively designed because it had an automatic shoulder belt and a manual lap belt. The manufacturer argued that the design defect allegations were preempted by federal law, which expressly permitted such a restraint system. The manufacturer also claimed that the failure to warn theory was dependent upon that design defect allegation.

  Key Points: On appeal, the plaintiff argued that the defendant could have selected an automatic shoulder belt and manual lap belt system that was not defective, but that the particular system the manufacturer had selected was defective. The Eleventh Circuit refused to address that argument, stating that it had not been raised in the trial court. Instead, the Eleventh Circuit addressed the claim that any automatic shoulder belt and manual lap belt system was defective. The Court found the latter claim was impliedly preempted by federal law.

  Result: The claims for defective design were held to be preempted. Plaintiff also had a failure to warn claim, articulated as a claim that the belt system was defective without an appropriate warning. The Court stated that although not every failure to warn claim is linked to a defective design claim, here plaintiff's failure to warn claim was so linked. Since there was no defect about which to warn, the plaintiff's failure to warn claim was properly dismissed, too. For a review of recent jurisprudence addressing preemption in the context of the seat belt safety standard (FMVSS 208), see Drattel v. Toyota Motor Corp., 699 N.E.2d 376 (N.Y. 1998) (rejecting preemption and reviewing recent case law) and Geier v. American Honda Motor Co., Inc., 166 F.3d 1236 (D.C. 1999) (finding preemption and reviewing recent case law).

CONCLUSION

In a number of recent cases, Georgia's courts have continued to define the scope and contours of product liability law, particularly in light of the seminal Banks decision. Taken as a group, these cases show a trend toward allowing more evidence and fewer summary dispositions in product liability cases. This trend is in keeping with Banks, and is generally positive for trial lawyers and their clients.

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