

Product Liability

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This Article surveys developments in Georgia product liability law between June 1, 2010 and May 31, 2011.¹ It covers noteworthy cases decided during this period by the Georgia appellate courts, the United States Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the United States district courts located in Georgia.

I. FAILURE TO WARN

To prevail on a failure to warn claim, a plaintiff must come forward with evidence that: (1) the defendant knew or reasonably should have known that there is a danger that may arise from the intended use of the product; (2) a reasonable user of the product would be unaware of the danger; and (3) the defendant failed to exercise reasonable care in informing the user about the danger.² “Whether a duty to warn exists . . . depends upon foreseeability of the use in question, the type of danger involved, and the foreseeability of the user’s knowledge of the danger.”³

In *Kelley v. Hedwin Corp.*,⁴ a hospital clinical engineer sued the manufacturer of a five-gallon collapsible plastic cube. At this hospital,

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1. For analysis of Georgia product liability law during the prior survey period, see Franklin P. Brannen, Jr. & Jacob E. Daly, *Product Liability, Annual Survey of Georgia Law*, 62 MERCER L. REV. 243 (2010).

2. *Chrysler Corp. v. Batten*, 264 Ga. 723, 724, 450 S.E.2d 208, 211 (1994); *Carmical v. Bell Helicopter Textron, Inc.*, 117 F.3d 490, 495-96 (11th Cir. 1997).

3. *Giordano v. Ford Motor Co.*, 165 Ga. App. 644, 645, 299 S.E.2d 897, 899 (1983).

4. 308 Ga. App. 509, 707 S.E.2d 895 (2011).

the container was used to store and dispense embalming fluid containing formaldehyde. One evening, the plaintiff received a call that liquid had spilled from the container onto the floor. Although the plaintiff was aware that the spilled liquid contained formaldehyde and the hospital's environmental services group had refused to clean up the liquid, he proceeded to clean without a mask or protective gear. Unsurprisingly, the plaintiff experienced shortness of breath and coughing.⁵

The plaintiff filed a lawsuit against the manufacturer of the container contending that the manufacturer should have warned that the gravity-fed spigot in the container could cause a large spill if the spigot were uncapped.⁶ The trial court granted the manufacturer's motion for summary judgment, and the Georgia Court of Appeals affirmed, emphasizing that, under Georgia law, "there is no duty resting upon a manufacturer or seller to warn of a product-connected danger which is obvious or generally known."⁷ Here, the court of appeals concluded that it is common knowledge that opening a container and turning it on its side will allow the contents to spill.⁸ A manufacturer has no duty to warn a consumer about information that is known to a reasonable person.⁹

*R&R Insulation Services, Inc. v. Royal Indemnity Co.*¹⁰ arose from a fire at a chicken processing plant owned by Wayne Farms. Wayne Farms and its insurance subrogors filed suit against Crane Company, the manufacturer of fiberglass panels that were used as interior finish materials at the chicken plant, contending that Crane failed to properly warn regarding the installation of fiberglass panels using nylon rivets, instead of metal rivets. At the close of discovery, Crane moved for summary judgment on the failure to warn claim, but the trial court denied the motion.¹¹

Crane's first argument on appeal was that it did not owe a duty to warn Wayne Farms because Crane did not have any knowledge of the alleged defect.¹² But the Georgia Court of Appeals held that the instructions Crane provided to customers recommended using nylon rivets or non-corroding fasteners to install the fiberglass panels at issue, and it was a question of fact for the jury to decide whether Crane

5. *Id.* at 509-10, 707 S.E.2d at 897.

6. *Id.* at 510, 707 S.E.2d at 897-98.

7. *Id.* at 510-11, 707 S.E.2d at 897-98 (internal quotation marks omitted).

8. *Id.* at 511, 707 S.E.2d at 898.

9. *Id.*

10. 307 Ga. App. 419, 705 S.E.2d 223 (2010).

11. *Id.* at 419-20, 705 S.E.2d at 228-29.

12. *Id.* at 428, 705 S.E.2d at 233.

breached a duty through its recommendation to end users and whether any breach was the proximate cause of Wayne Farms' damages.¹³

Next, Crane argued that Wayne Farms should be considered a sophisticated user because Wayne Farms had previously used the fiberglass panels.¹⁴ But the court of appeals emphasized that, because this issue was being considered at the summary judgment stage, questions of fact remained regarding the extent of Wayne Farms' knowledge that would determine whether Wayne Farms was a sophisticated user.¹⁵

Then Crane argued the open and obvious defense—specifically, that it is common knowledge that plastic will melt or burn when exposed to flames.¹⁶ The court of appeals disagreed.¹⁷ Because there was evidence in the record that certain types of fiberglass panels are made with different levels of fire retardant, it is not obvious from looking at the panel whether it will burn rapidly and in the manner that Wayne Farms alleged it burned.¹⁸

Finally, Crane contended that Wayne Farms failed to come forward with evidence that any alleged failure to warn by Crane was the proximate cause of Wayne Farms' damages.¹⁹ In affirming the denial of summary judgment on this issue, the court of appeals referred to expert testimony from Wayne Farms' expert witnesses linking the fiberglass panels to the spread of the fire.²⁰ In addition, to the extent that Crane claimed that Wayne Farms did not directly rely on any recommendations from Crane and thus there was no proximate cause to support the failure to warn claim, the court of appeals cited again the recommendations that Crane provided to consumers regarding the installation of the fiberglass panels.²¹

In *Rivers v. H.S. Beauty Queen, Inc.*,²² the plaintiff sustained burns to her face and chest while using a scented-oil burner when she attempted to extinguish the flame in the burner by blowing on the flame. Instead of putting out the burner, the flame grew larger and exploded in the plaintiff's face causing second-degree burns. The plaintiff brought a lawsuit against the seller of the burner claiming, in part, that the

13. *Id.*

14. *Id.* at 428, 705 S.E.2d at 233-34.

15. *Id.* at 428, 705 S.E.2d at 234.

16. *Id.* at 429, 705 S.E.2d at 234.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 429, 705 S.E.2d at 234-35.

21. *Id.* at 429-30, 705 S.E.2d at 235.

22. 306 Ga. App. 866, 703 S.E.2d 416 (2010).

seller failed to warn her regarding foreseeable dangers associated with using the burner. After discovery, the trial court granted the manufacturer's motion for summary judgment.²³

On appeal, the Georgia Court of Appeals affirmed the grant of summary judgment to the seller on the failure to warn claim because the seller had no independent duty to communicate warnings that the plaintiff already had received.²⁴ While the seller had sold the burner without including any instructions or warnings from the manufacturer, the oil that was used in the burner was accompanied by written warnings including a warning not to allow the oil to contact an open flame.²⁵ In her deposition, the plaintiff admitted that she had read this warning before using the burner.²⁶ In addition, the court emphasized that "the danger of receiving a burn from the open flame of a candle is an obvious danger for which there is no duty to warn."²⁷

In *Kersey v. Dolgencorp LLC*,²⁸ the plaintiff, who had severe diabetic neuropathy, brought a lawsuit against Dolgencorp LLC, the manufacturer of a rub cream analgesic similar to Ben-Gay® or Icy Hot®. A few times in May 2008, the plaintiff applied some of the rub cream to her feet and then put on her shoes and socks. At the end of the month, the plaintiff developed ulcers on her feet.²⁹ The plaintiff sued the manufacturer of the rub cream alleging, in part, that the manufacturer "knew or certainly had reason to know that the subject Muscle Rub was likely to be dangerous for the intended use of irritating the skin, dilating blood vessels and increasing local blood flow in high-risk diabetic persons."³⁰ At the close of discovery, the manufacturer moved for summary judgment.³¹

The United States District Court for the Northern District of Georgia granted the manufacturer's motion on the failure to warn claim because it had no knowledge that diabetic users of the cream were susceptible to injury.³² All of the evidence in the record confirmed that the manufacturer had never received a complaint of any injury related to consumers' use of the cream after manufacturing more than eight million tubes of the cream, and there were no reports in the medical or scientific

23. *Id.* at 866-67, 703 S.E.2d at 416-17.

24. *Id.* at 869-70, 703 S.E.2d at 419.

25. *Id.* at 869, 703 S.E.2d at 419.

26. *Id.* at 867, 703 S.E.2d at 417.

27. *Id.* at 869-70, 703 S.E.2d at 419.

28. No. 1:09-CV-898-RWS, 2011 WL 1670886 (N.D. Ga. May 3, 2011).

29. *Id.* at *1.

30. *Id.* at *6 (internal quotation marks omitted).

31. *Id.*

32. *Id.*

literature regarding adverse reaction by diabetics who used this rub cream.³³ In addition, the court noted that the plaintiff also had a problem establishing proximate cause.³⁴ The plaintiff had ulcer issues with her feet from her diabetes before and after using the cream.³⁵ The court implied that the plaintiff likely misused the product because she had used the product for about a year and only had an issue after she applied the cream to her feet and then put on her socks and shoes, which is contrary to a provided warning not to bandage the applied area.³⁶

In *Lockman v. S.R. Smith, LLC*,³⁷ the plaintiff sustained a broken neck after jumping off of a diving board at his parents' home. The plaintiff claimed that S.R. Smith, the manufacturer of the diving board, was liable because it failed to provide adequate warning labels on the diving board. During his deposition, the plaintiff testified that he was twenty-eight years old when he sustained his injury, and he knew others who had been injured by striking their heads after diving into a pool from a diving board. Furthermore, the plaintiff had read warnings on diving boards that warned swimmers to dive with arms extended, and he had successfully dived into his parents' pool previously without any incident. The United States District Court for the Northern District of Georgia granted summary judgment for S.R. Smith because it had not breached any duty owed to the plaintiff regarding the warnings that accompanied the diving board.³⁸

On appeal, the United States Court of Appeals for the Eleventh Circuit affirmed the decision of the district court because "[u]nder Georgia law, 'there is no duty on the seller to warn the user or consumer of a . . . danger that [he] should recognize.'"³⁹ Here, the appellate court found that the plaintiff's testimony established that he was familiar with the pool and the dangers associated with using a diving board.⁴⁰ Accordingly, any failure by S.R. Smith to provide additional warnings was not the proximate cause of the plaintiff's injury.⁴¹

33. *Id.*

34. *Id.* at *6 n.1.

35. *Id.*

36. *Id.*

37. 405 F. App'x 471 (11th Cir. 2010) (per curiam).

38. *Id.* at 472-73.

39. *Id.* at 473 (second alteration in original) (quoting *Boyce v. Gregory Poole Equip. Co.*, 269 Ga. App. 891, 895, 605 S.E.2d 384, 388 (2004)).

40. *Id.*

41. *Id.*

II. EVIDENTIARY ISSUES

A. *Expert Testimony*

Almost seven years ago, Georgia adopted the standard from *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁴² for assessing the admissibility of testimony from expert witnesses in civil actions.⁴³ While the Georgia appellate courts have provided guidance regarding the application of the *Daubert* standard in other types of lawsuits, there have been few *Daubert* opinions from the Georgia appellate courts in product liability cases.⁴⁴ Without state appellate court guidance, practitioners and judges must rely on decisions from the federal courts as persuasive authority.⁴⁵ The following case from a district court in the Eleventh Circuit offers recent guidance on *Daubert* issues in product liability cases.

The limits that *Daubert* places on novel expert theory were addressed in *Sumner v. Biomet, Inc.*,⁴⁶ a lawsuit in which the plaintiff underwent surgery involving the placement of a metal-on-metal hip joint prosthesis in her right hip. Over the next few months, multiple x-rays of the plaintiff's surgically repaired hip revealed metal debris floating in the area of the implant. To remedy this issue, the plaintiff's doctor decided to replace the original prosthesis with a new one. The plaintiff filed a lawsuit against the manufacturer of the prosthetic hip joint alleging that the prosthetic device was defectively manufactured, and that the manufacturer failed to warn about the defect.⁴⁷

The plaintiff's expert witness, Rex McLellan, who has a doctorate in metallurgy, served as the primary source of proof for her claim that the prosthetic was defectively manufactured. In his initial expert report, Dr.

42. 509 U.S. 579 (1993).

43. S. 3, § 7, 148th Gen. Assem., Reg. Sess., 2005 Ga. Laws 1, 8 (codified as amended at O.C.G.A. § 24-9-67.1 (2010)).

44. See, e.g., *Condra v. Atlanta Orthopaedic Grp., P.C.*, 285 Ga. 667, 670-71, 681 S.E.2d 152, 155 (2009) (applying *Daubert* in medical malpractice action); *Mays v. Ellis*, 283 Ga. App. 195, 199 & n.3, 641 S.E.2d 201, 204 & n.3 (2007) (discussing application of *Daubert* in medical malpractice claim); *Cotten v. Phillips*, 280 Ga. App. 280, 286-87, 633 S.E.2d 655, 659-60 (2006) (applying *Daubert* in malpractice case).

45. To interpret the application of Georgia's *Daubert* statute, courts may seek guidance from the decisions of the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), and other federal court interpretations of these decisions. O.C.G.A. § 24-9-67.1(f).

46. No. 7:08-CV-98(HL), 2010 WL 4736320 (M.D. Ga. Nov. 16, 2010).

47. *Id.* at *1.

McLellan indicated that there were areas of chemical inhomogeneity on the surface of the ball of the prosthesis that caused particles to shed off of the prosthesis and that this chemical inhomogeneity resulted from improper manufacturing. Through a supplemental expert report and two depositions, Dr. McLellan's opinion wavered regarding which metals caused the inhomogenous surface, but he essentially maintained his theory that the loose particles were ejected from the prosthesis because of inhomogeneities in the metal used to make the ball of the prosthesis.⁴⁸

After discovery, the manufacturer moved to exclude the testimony of Dr. McClellan, and the United States District Court for the Middle District of Georgia considered whether Dr. McLellan's particle-ejection theory satisfied the mandates of Federal Rule of Evidence 702⁴⁹ and *Daubert*.⁵⁰ First, the court found that Dr. McLellan had not tested his theory or shown that his theory was capable of being tested.⁵¹ Next, the court concluded that the plaintiff failed to show that Dr. McLellan's theory had been the subject of publication and peer review.⁵² Then, the court highlighted that the plaintiff was unable to show a rate of error for Dr. McLellan's theory.⁵³ Finally, the court concluded that Dr. McLellan's particle-ejection theory had not been accepted in the proper scientific community.⁵⁴ The court based this conclusion on the fact that no one in the world, other than Dr. McLellan, had ever expressed the opinion that inhomogeneity in the surface metals could result in the ejection of metal fragments.⁵⁵ In addition, Dr. McLellan had developed this theory solely as part of his work in this case.⁵⁶ While the development of an opinion solely for purposes of litigation is not sufficient to make the opinion unreliable, the failure to show the use of the theory by anyone else outside the current litigation weighs heavily toward a conclusion that the theory is unreliable.⁵⁷ Accordingly, the district court excluded Dr. McLellan's testimony because his particle-ejection

48. *Id.* at *1-2.

49. FED. R. EVID. 702.

50. *Sumner*, 2010 WL 4736320, at *2.

51. *Id.* at *4.

52. *Id.*

53. *Id.* at *5.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1318 (9th Cir. 1995)).

theory was the product of unreliable methodology that did not satisfy the requirements of Rule 702.⁵⁸

B. Spoliation

Spoliation is “the destruction or failure to preserve evidence that is necessary to contemplated or pending litigation.”⁵⁹ Georgia courts consider the following factors when determining whether spoliation of evidence requires dismissal of the plaintiff’s claims:

- (1) whether the defendant was prejudiced as a result of the destruction of the evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the plaintiff acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence was not excluded.⁶⁰

Sanctions for the spoliation of evidence can range from an adverse jury instruction,⁶¹ to exclusion of expert witnesses, and ultimately, dismissal of the plaintiff’s claims.⁶²

In *R&R Insulation Services, Inc. v. Royal Indemnity Co.*,⁶³ Crane Industries, the manufacturer of fiberglass panels, sought the ultimate penalty of dismissal for the plaintiff Wayne Farms’ spoliation of parts of a chicken processing plant that were affected by a fire for which Wayne Farms sought to recover damages from Crane. Wayne Farms investigated the fire and provided notice to eight parties of their opportunity to inspect the damaged parts of the processing plant. But Crane was not provided notice until after Wayne Farms had repaired the part of the plant where the fire originated.⁶⁴

Because the trial court did not specify the basis for why it had denied Crane’s motion for sanctions—whether Wayne Farms had not spoliated evidence or whether the conduct of Wayne Farms did not warrant the sanction of dismissal—the Georgia Court of Appeals had to review the voluminous record and reassess each issue.⁶⁵ Wayne Farms argued that there was no spoliation of evidence because there was no dispute regarding the location of the origin of the fire, and the items that Wayne

58. *Id.* at *6.

59. *Bridgestone/Firestone N. Am. Tire, LLC v. Campbell*, 258 Ga. App. 767, 768, 574 S.E.2d 923, 926 (2002).

60. *Id.* at 768-69, 574 S.E.2d at 926.

61. *Id.* at 771, 574 S.E.2d at 927-28.

62. *Id.* at 768, 574 S.E.2d at 926.

63. 307 Ga. App. 419, 705 S.E.2d 223 (2010). For an additional discussion of this case, see *supra* notes 10-21 and accompanying text.

64. *R&R Insulation*, 307 Ga. App. at 435, 705 S.E.2d at 238.

65. *Id.* at 436, 705 S.E.2d at 239.

Farms had replaced were only relevant to that issue.⁶⁶ But the appellate court disagreed and concluded that Wayne Farms had destroyed critical evidence because Crane actually disputed where and how the fire started.⁶⁷ While there was photographic and video evidence of the fire scene before repair, the court of appeals emphasized that “[a]lthough the existence of photographs may mitigate the loss [of evidence], they are no substitute for the actual evidence.”⁶⁸ Because Wayne Farms had disposed of the burned components without allowing Crane an opportunity to inspect the evidence, the court of appeals concluded that Wayne Farms had spoliated evidence.⁶⁹

Next, the court of appeals considered whether the trial court had appropriately refused to grant the requested sanction of dismissal of the claims against Crane.⁷⁰ When assessing whether sanctions are appropriate for spoliation of evidence, a trial court has a wide range of options to remedy the spoliation: from evidentiary presumptions to the ultimate sanction of dismissal.⁷¹ Here, Crane had only sought dismissal of the action and no lesser sanction.⁷² The court of appeals held that the trial court did not abuse its discretion in refusing to dismiss the action against Crane because “[d]ismissal is usually reserved for cases involving malicious destruction of evidence, which does not appear to be the case here.”⁷³ In addition, the ability of Crane to present a defense had not been so diminished as to be impossible or improbable.⁷⁴

This decision shows practitioners that in cases in which there is not strong evidence of malice regarding the destruction of the evidence, the aggrieved party should seek both dismissal and a lesser sanction so that the choice for the trial court does not become an all-or-nothing proposition in which the aggrieved party receives no relief.

III. DEFENSES

A. Preemption

The Supremacy Clause of the United States Constitution provides that federal law is “the supreme Law of the Land . . . any Thing in the

66. *Id.* at 437, 705 S.E.2d at 240.

67. *Id.* at 437-38, 705 S.E.2d at 240.

68. *Id.* at 438, 705 S.E.2d at 240 (internal quotation marks omitted).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 438-39, 705 S.E.2d at 241.

Constitution or Laws of any State to the Contrary notwithstanding.”⁷⁵ Thus, state laws that conflict with federal law are “without effect.”⁷⁶ A state law conflicts with a federal law “if it interferes with the methods by which the federal statute was designed to reach [its] goal,” even if both the federal law and the state law have the same goal.⁷⁷ Although preemption issues are typically analyzed in connection with a federal statute, a federal regulation may have the same preemptive effect as a federal statute.⁷⁸ State laws subject to preemption include not only state statutes and regulations, but also tort duties imposed by state common law and enforced by lawsuits.⁷⁹

“The critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law.”⁸⁰ In fact, Congress’s purpose in enacting the federal law is the “ultimate touchstone” of the preemption analysis.⁸¹ Congress may manifest its intent to preempt state law in three ways:

First, Congress can define explicitly the extent to which its enactments pre-empt state law. Pre-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts’ task is an easy one.

Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, or where an Act of Congress touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. . . .

75. U.S. CONST. art. VI, cl. 2.

76. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

77. *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987).

78. *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 369 (1986) (holding that “a federal agency acting within the scope of its congressionally delegated authority may [also] pre-empt state regulation”); *see also* *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 154 (1982) (noting that a “narrow focus on Congress’ intent to supersede state law [is] misdirected” when a state law is claimed to be preempted by a federal agency’s regulation).

79. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993); *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 521-22 (1992); *see also* *San Diego Bldg. Trades Council, Millmen’s Union, Local 2020 v. Garmon*, 359 U.S. 236, 247 (1959) (“The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.”).

80. *Louisiana Pub. Serv. Comm’n*, 476 U.S. at 369.

81. *Retail Clerks Int’l Ass’n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963).

Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.⁸²

Although Congress's purpose is important, there is a presumption that Congress did not intend to preempt state law, especially when it "has legislated . . . in a field which the States have traditionally occupied."⁸³ Because "the regulation of health and safety matters is primarily, and historically, a matter of local concern,"⁸⁴ state law regulating these matters is preempted only if Congress's intent to do so is "clear and manifest."⁸⁵ Thus, when faced with two or more plausible interpretations of a federal law, this presumption imposes on courts "a duty to accept the reading that disfavors pre-emption."⁸⁶

During the survey period, the United States Supreme Court decided one case involving express preemption and one case involving implied preemption, and it came to opposite conclusions in each case. The express preemption case involved the National Childhood Vaccine Injury Act of 1986, and the implied preemption case involved Federal Motor Vehicle Safety Standard 208.

1. National Childhood Vaccine Injury Act of 1986. Previous articles have discussed the National Childhood Vaccine Injury Act of 1986 (Vaccine Act),⁸⁷ the National Vaccine Injury Compensation Program that it created, its preemption clause, and how various federal and state courts have interpreted the scope of its preemption clause.⁸⁸ Before the survey period, the Georgia Supreme Court held in *American*

82. *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990) (citations, punctuation, and internal quotation marks omitted).

83. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal quotation marks omitted).

84. *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 719 (1985).

85. *Id.* at 715 (internal quotation marks omitted); *see also Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) ("So we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.").

86. *Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 449 (2005).

87. 42 U.S.C. §§ 300aa-1 to -34 (2006).

88. Franklin P. Brannen, Jr. & Jacob E. Daly, *Product Liability, Annual Survey of Georgia Law*, 61 MERCER L. REV. 267, 278-81 (2009) [hereinafter Brannen & Daly, 2009 *Annual Survey*]; Franklin P. Brannen, Jr. & Jacob E. Daly, *Product Liability, Annual Survey of Georgia Law*, 60 MERCER L. REV. 303, 328-32 (2008).

*Home Products Corp. v. Ferrari*⁸⁹ that the Vaccine Act does not preempt all state-law claims for design defect.⁹⁰ All other courts that considered the issue, except for the Georgia Court of Appeals in *Ferrari*,⁹¹ held that the Vaccine Act preempts at least some of these claims.⁹² This split in authority came to a head in *Bruesewitz v. Wyeth, Inc.*,⁹³ when the United States Court of Appeals for the Third Circuit rejected the Georgia Supreme Court's analysis in *Ferrari* and held that the Vaccine Act preempts at least some, if not all, design defect claims.⁹⁴ Both the vaccine manufacturers in *Bruesewitz* and the plaintiffs in *Ferrari* filed a petition for writ of certiorari with the United States Supreme Court,⁹⁵ and the Court granted the petition in *Bruesewitz*.⁹⁶

The Supreme Court resolved the issue in favor of the vaccine manufacturers in *Bruesewitz v. Wyeth LLC*.⁹⁷ The case involved a child whose pediatrician administered doses of a vaccine for diphtheria, tetanus, and pertussis according to the childhood immunization schedule recommended by the Centers for Disease Control. Within twenty-four hours of the child's six-month vaccination, she began experiencing seizures. She experienced more than a hundred seizures during the following month, and she was eventually diagnosed with residual seizure disorder and developmental delay. The child's parents filed a claim in the United States Court of Federal Claims, as required by the Vaccine Act, and a special master ruled against them. They then filed a lawsuit against the manufacturer of the vaccine in a Pennsylvania state court,

89. 284 Ga. 384, 668 S.E.2d 236 (2008).

90. *Id.* at 393, 668 S.E.2d at 242.

91. *Ferrari v. Am. Home Prods. Corp.*, 286 Ga. App. 305, 312, 650 S.E.2d 585, 590 (2007).

92. *Bruesewitz v. Wyeth, Inc.*, 508 F. Supp. 2d 430, 445-46 (E.D. Pa. 2007); *Sykes v. Glaxo-SmithKline*, 484 F. Supp. 2d 289, 303 (E.D. Pa. 2007); *Blackmon v. Am. Home Prods. Corp.*, 328 F. Supp. 2d 659, 664-66 (S.D. Tex. 2004); *Militrano v. Lederle Labs.*, 810 N.Y.S.2d 506, 509 (N.Y. App. Div. 2006). One other state court sided with the Georgia Supreme Court's opinion in *Ferrari*, but that court issued its opinion only a month and a half before the United States Supreme Court decided *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068 (2011). *Wright v. Aventis Pasteur, Inc.*, 14 A.3d 850, 880 (Pa. Super. Ct. 2011) (holding that Congress's intent regarding the preemptive scope of the Vaccine Act is not clear from the text, structure, purpose, or legislative history and that, consequently, preemption decisions must be made on a case-by-case basis).

93. 561 F.3d 233 (3d Cir. 2009).

94. *Id.* at 245-46, 251-52.

95. *Bruesewitz v. Wyeth Inc.*, 561 F.3d 233 (3d Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3082 (U.S. Aug. 4, 2009) (No. 09-152); *Am. Home Prods. Corp. v. Ferrari*, 284 Ga. 384, 668 S.E.2d 236 (2008), *petition for cert. filed*, 77 U.S.L.W. 3531 (U.S. Mar. 5, 2009) (No. 08-1120).

96. *Bruesewitz v. Wyeth, Inc.*, 130 S. Ct. 1734 (2010).

97. 131 S. Ct. 1068 (2011). Justice Kagan recused herself from the case.

alleging that the vaccine caused their daughter's disabilities because it was defectively designed. Following removal, the United States District Court for the Eastern District of Pennsylvania held that the plaintiffs' claims were preempted by the Vaccine Act. As noted above, the Third Circuit affirmed.⁹⁸

The Supreme Court affirmed the Third Circuit's judgment and held that the Vaccine Act "preempts all design-defect claims against vaccine manufacturers brought by plaintiffs who seek compensation for injury or death caused by vaccine side effects."⁹⁹ Because the question of preemption was a matter of statutory interpretation, the Court began its analysis with the text of the preemption clause,¹⁰⁰ which provides as follows:

No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death associated with the administration of a vaccine after October 1, 1988, if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings.¹⁰¹

The key issue was how to define the word "unavoidable" and the "even though" clause that follows it.¹⁰² The word and the following clause do not have independent meanings; rather, "[t]he 'even though' clause clarifies the word that precedes it. It delineates the preventative measures that a vaccine manufacturer *must* have taken for a side-effect to be considered 'unavoidable' under the statute."¹⁰³ Thus, if a vaccine is properly manufactured and labeled, any remaining side effects are considered unavoidable.¹⁰⁴ This "suggests that the *design* of the vaccine is a given, not subject to question in the tort action."¹⁰⁵ A vaccine could always be designed to remove or neutralize its harmful ingredient, and so harmful side effects are always avoidable in that sense, but the Court rejected this interpretation because it would render the word "unavoidable" meaningless.¹⁰⁶ The unavoidability of the side effects must be evaluated "*with respect to the particular design,*" not with

98. *Id.* at 1074-75.

99. *Id.* at 1082.

100. *Id.* at 1075.

101. 42 U.S.C. § 300aa-22(b)(1).

102. *Bruesewitz*, 131 S. Ct. at 1075.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

respect to alternative designs that might have been feasible.¹⁰⁷ The Court also found textual support for its holding in the preemption clause's explicit reference to two of the three traditional theories of product liability—defective manufacture and inadequate labeling—but complete silence about defective design.¹⁰⁸ “It seems that the statute fails to mention design-defect liability ‘by deliberate choice, not inadvertence.’”¹⁰⁹

The Court next considered the structure of the Vaccine Act in particular and of vaccine regulation in general and concluded that this reinforces what the text of the preemption clause already suggests.¹¹⁰ The license that a manufacturer receives when its vaccine is approved outlines how the vaccine must be manufactured and specifies the instructions and warnings that must accompany the vaccine when it is distributed.¹¹¹ In addition, the Food and Drug Administration (FDA) “pervasively regulate[s] the manufacturing process, down to the requirements for plumbing and ventilation systems at each manufacturing facility.”¹¹² In contrast, the Vaccine Act and the FDA's regulations provide no guidance about how vaccines should be designed and what criteria are to be used in determining whether a vaccine is safe and effective.¹¹³ Although the Court was quick to say that the absence of guidance on these issues alone does not suggest preemption, it found in this instance that “the lack of guidance for design defects combined with the extensive guidance for the two grounds of liability specifically mentioned in the [Vaccine] Act strongly suggests that design defects were not mentioned because they are not a basis for liability.”¹¹⁴

Moreover, tort liability for a design defect is not necessary because the Vaccine Act provides other mechanisms for achieving the goals of imposing such liability.¹¹⁵ One goal is to compensate people who are injured because of a defect in the design of a product, and the Vaccine Act creates a “generous compensation scheme” to fulfill this goal.¹¹⁶ The other goal is to promote improvements in the design of a product, and the Vaccine Act contains numerous means of improving the design

107. *Id.* at 1075-76.

108. *Id.* at 1076.

109. *Id.* (quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003)).

110. *Id.* at 1078-79.

111. *Id.* at 1079.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

of vaccines.¹¹⁷ This structure “reflects a sensible choice to leave complex epidemiological judgments about vaccine design to the FDA and the National Vaccine Program rather than juries.”¹¹⁸ Finally, the Vaccine Act contains a structural quid pro quo that is indicative of preemption for design-defect claims: the vaccine manufacturers fund the compensation program from their sales, and in exchange they avoid costly litigation and the uncertainty of jury verdicts.¹¹⁹ Because “design-defect allegations are the most speculative and difficult type of products liability claim to litigate,” the Court doubted that Congress intended to tax the vaccine manufacturers while at the same time leaving them exposed to such uncertain potential liability for design defects.¹²⁰

Justice Breyer agreed with the majority’s textual argument, but because he considered the textual question to be close, he wrote separately to express his view of the legislative history, the purpose of the Vaccine Act, and the position of the Department of Health and Human Services (HHS).¹²¹ According to Justice Breyer’s reading of the legislative history, Congress intended to allow state-law tort claims based on improper manufacturing and labeling and to funnel other claims, including design-defect claims, to the no-fault compensation system created by the Vaccine Act.¹²² This conclusion is reinforced by the overall purpose of the Vaccine Act, which is to protect the lives of children “in part by ending ‘the instability and unpredictability of the childhood vaccine market.’”¹²³ Because of state-law tort lawsuits, many vaccine manufacturers in the early 1980s had withdrawn from the market or were “question[ing] their continued participation in the vaccine market,” and Congress determined that the loss of vaccine manufacturers could create a public health hazard by increasing the

117. *Id.* at 1079-80. These means include (1) the Vaccine Act’s directive to the Secretary of Health and Human Services to promote the development of childhood vaccines that have few and less serious side effects; (2) the creation of a program charged with preventing infectious diseases and side effects, establishing priorities for federal vaccine research, and coordinating federal vaccine safety and efficacy testing; (3) requiring vaccine manufacturers and healthcare providers to report adverse side effects; (4) monitoring vaccine safety through a collaboration with managed-care organizations; and (5) the possibility that the FDA may revoke the license for a vaccine if it determines that the vaccine is not safe. *Id.*

118. *Id.* at 1080.

119. *Id.*

120. *Id.*

121. *Id.* at 1082-83 (Breyer, J., concurring).

122. *Id.* at 1083.

123. *Id.* (quoting H.R. REP. NO. 99-908, at 7 (1986), reprinted in 1986 U.S.C.C.A.N. 6344, 6348).

amount of unimmunized children and thereby increasing the frequency of preventable diseases.¹²⁴ In light of the overall purpose of the Vaccine Act, Justice Breyer found that “read[ing] the pre-emption clause as preserving design-defect suits seems anomalous.”¹²⁵

Under the Vaccine Act, HHS determines whether “a vaccine is safe enough to be licensed and which licensed vaccines” (and associated injuries) should be included in the no-fault compensation program, and a special master in the program determines whether a person has sustained a compensable injury and, if not, whether the vaccine nevertheless caused the person’s injury.¹²⁶ “To allow a jury in effect to second-guess those determinations is to substitute less expert for more expert judgment, thereby threatening manufacturers with liability (indeed, strict liability) in instances where any conflict between experts and nonexperts is likely to be particularly severe—instances where Congress intended the contrary.”¹²⁷ Justice Breyer was unable to reconcile these potential conflicts and tort liability for design defect with Congress’s intent of protecting vaccine manufacturers from liability and involving experts in making compensation decisions.¹²⁸ Finally, Justice Breyer gave significant weight to the view of HHS, which was that allowing design-defect claims could precipitate the same crisis that caused Congress to enact the Vaccine Act in the first place because (1) HHS better understands immunization policy and the potential impact of state-law tort claims, and (2) numerous public health organizations supported HHS’s view.¹²⁹

Justice Sotomayor, joined by Justice Ginsburg, dissented because she believed the majority ignored important language in the preemption clause, misconstrued the legislative history, and disturbed the careful balance reflected in the Vaccine Act between compensating children injured by vaccines and stabilizing the childhood vaccine market.¹³⁰ According to her view of the text, structure, and legislative history of the Vaccine Act, state-law tort claims against vaccine manufacturers are preempted only if “the vaccine was properly manufactured and labeled, and . . . the side effects stemming from the vaccine’s design could not have been prevented by a feasible alternative design that would have eliminated the adverse side effects without compromising the vaccine’s

124. *Id.* at 1084.

125. *Id.* at 1085.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 1085-86.

130. *Id.* at 1086 (Sotomayor, J., dissenting).

cost and utility.”¹³¹ This obviously would require a case-by-case assessment of whether design-defect claims are preempted, and Justice Sotomayor argued that this approach strikes a more appropriate balance between compensating children who are injured by a vaccine and protecting manufacturers to ensure a stable and predictable market.¹³² The majority’s view, on the other hand, “leaves a regulatory vacuum in which no one ensures that vaccine manufacturers adequately take account of scientific and technological advancements when designing or distributing their products.”¹³³ Because “[t]he normal competitive forces that spur innovation and improvements to existing product lines in other markets . . . operate with less force in the vaccine market,” Justice Sotomayor apparently believes that vaccine manufacturers will not improve their vaccines without “the traditional incentive and deterrence functions served by state tort liability.”¹³⁴

Six days after issuing its decision in *Bruesewitz*, the Supreme Court granted the vaccine manufacturers’ petition for writ of certiorari in *Ferrari*, vacated the judgment of the Georgia Supreme Court, and remanded the case for further consideration in light of *Bruesewitz*.¹³⁵ On remand, the Georgia Supreme Court reversed the judgment of the Georgia Court of Appeals and remanded the case for further proceedings consistent with *Bruesewitz*.¹³⁶ Justice Nahmias concurred specially to emphasize that *Bruesewitz* conclusively determined the preemptive scope of the Vaccine Act and leaves no room for an argument that certain design-defect claims may not be preempted.¹³⁷

2. Federal Motor Vehicle Safety Standards. Pursuant to the National Traffic and Motor Vehicle Safety Act of 1966 (NTMVSA),¹³⁸ the National Highway Traffic Safety Administration has promulgated the Federal Motor Vehicle Safety Standards (FMVSS)¹³⁹ to further the NTMVSA’s purpose of “reduc[ing] traffic accidents and deaths and injuries resulting from traffic accidents.”¹⁴⁰ FMVSS 208 governs “performance requirements for the protection of vehicle occupants in

131. *Id.* at 1093.

132. *Id.* at 1099.

133. *Id.* at 1086.

134. *Id.* at 1098.

135. *Am. Home Prods. Corp. v. Ferrari*, 131 S. Ct. 1567, 1567 (2011).

136. *Am. Home Prods. Corp. v. Ferrari*, 289 Ga. 184, 184, 710 S.E.2d 771, 772 (2011).

137. *Id.* at 185, 710 S.E.2d at 772 (Nahmias, J., concurring specially).

138. 15 U.S.C. §§ 1381-1431 (repealed 1994). Congress repealed the Act in 1994 and recodified it at 49 U.S.C. §§ 30101-30170 (2006).

139. 49 C.F.R. pt. 571 (2010).

140. 49 U.S.C. § 30101.

crashes”¹⁴¹ and its purpose is “to reduce the number of deaths of vehicle occupants, and the severity of injuries, by specifying . . . equipment requirements for active and passive restraint systems.”¹⁴² The type of restraint system required depends on the type of vehicle and date of manufacture.¹⁴³ In *Geier v. American Honda Motor Co.*,¹⁴⁴ the United States Supreme Court held that when FMVSS 208 allows the manufacturer to choose a restraint system from among several options, and the manufacturer selects one of those options for a vehicle, a state-law tort claim premised on a duty to implement a different restraint system conflicts with and is preempted by FMVSS 208.¹⁴⁵ However, as the Georgia Court of Appeals has held, FMVSS 208 does not preempt a state-law tort claim based on an allegation that the design utilized by the manufacturer was defective.¹⁴⁶

FMVSS 208 once again came before the Supreme Court during the survey period in *Williamson v. Mazda Motor of America, Inc.*,¹⁴⁷ which the Court decided the day after it decided *Bruesewitz*. In *Williamson*, the Williamson family was traveling in a 1993 Mazda minivan when they were involved in a head-on collision with another vehicle. Thanh Williamson, who was sitting in a rear aisle seat, was wearing a lap-only belt, while Delbert and Alexa Williamson were wearing lap-and-shoulder belts. Thanh died as a result of the collision, but Delbert and Alexa survived. Delbert, Alexa, and Thanh’s estate sued Mazda in a California state court, alleging that Mazda should have installed lap-and-shoulder belts on the rear aisle seat where Thanh was sitting and that Thanh died because of the absence of such a belt. The version of FMVSS 208 at issue required automobile manufacturers to install lap-and-shoulder belts on seats next to a vehicle’s doors or frames but permitted them to choose between lap-and-shoulder belts or lap-only belts for rear inner seats—that is, middle seats or aisle seats in minivans. Based on this choice allowed by FMVSS 208 and the rule from *Geier*, the trial court and the California Court of Appeals held that the plaintiffs’ claims were preempted. Noting that other federal and state appellate courts had decided this issue the same as the California courts in this case, the Supreme Court granted certiorari to determine whether FMVSS 208

141. 49 C.F.R. § 571.208.S1.

142. *Id.* § 571.208.S2.

143. *Id.* § 571.208.S4.

144. 529 U.S. 861 (2000).

145. *Id.* at 878, 881.

146. *Parks v. Hyundai Motor Am., Inc.*, 294 Ga. App. 112, 114, 668 S.E.2d 554, 556-57 (2008).

147. 131 S. Ct. 1131 (2011). As in *Bruesewitz*, Justice Kagan recused herself from the case.

preempts a state-law tort claim that, if successful, would deprive automobile manufacturers of the choice between lap-and-shoulder belts or lap-only belts for rear inner seats by imposing liability on those who chose the lap-only belt option.¹⁴⁸

The Supreme Court began its analysis by reviewing its decision in *Geier*.¹⁴⁹ The Court noted that the choice under FMVSS 208 at issue in *Geier* was among passive restraint systems; the options available to manufacturers included airbags and automatic belts.¹⁵⁰ The plaintiffs in *Geier* alleged that the manufacturer was liable for not installing airbags, but the Court held that this claim was impliedly preempted because it conflicted with “a significant federal regulatory objective, namely, the maintenance of manufacturer choice.”¹⁵¹ After considering the history of the regulation of passive restraint systems by the Department of Transportation (DOT) and its contemporaneous explanation of the regulation when it was promulgated, as well as the Solicitor General’s current (at the time *Geier* was being litigated) understanding of the regulation, the Court determined that “manufacturer choice was an important regulatory objective.”¹⁵²

The Court acknowledged that this case was similar to *Geier* in that the manufacturer was given a choice of belt systems and that a state-law tort claim would restrict that choice.¹⁵³ The difference was that the choice of belt systems in this case was not a significant regulatory objective like the choice of passive restraint systems in *Geier*.¹⁵⁴ To assess DOT’s objective in giving manufacturers a choice of belt systems, the Court examined the same factors that it considered in *Geier*.¹⁵⁵ The history of the regulation of belt systems showed that, in 1984, DOT rejected a regulation that would have required lap-and-shoulder belts to be installed in all rear seats.¹⁵⁶ By 1989, which was when the version of FMVSS 208 at issue in this case was promulgated, DOT was convinced that lap-and-shoulder belts would increase safety and that passengers would use them; the most important reason why it did not require them was because it thought such a requirement would not be cost-effective.¹⁵⁷ By contrast, DOT had safety concerns about requiring

148. *Id.* at 1134-35.

149. *Id.* at 1135-37.

150. *Id.* at 1135.

151. *Id.* at 1135-36.

152. *Id.* at 1136-37.

153. *Id.* at 1137.

154. *Id.*

155. *Id.* at 1136-40.

156. *Id.* at 1137.

157. *Id.* at 1137-39.

airbags and worried that consumers would not accept them and would not replace them when necessary.¹⁵⁸ Further, unlike *Geier*, the Solicitor General's view was that FMVSS 208 did not preempt a state-law tort claim based on an automobile manufacturer's decision not to install lap-and-shoulder belts for rear inner seats.¹⁵⁹ Thus, the same considerations that lead the Court to find preemption in *Geier* indicated the contrary in this case.¹⁶⁰ Allowing automobile manufacturers to choose whether to install lap-and-shoulder belts for rear inner seats was not a significant objective of FMVSS 208, and so the Court held that the plaintiffs' claim was not preempted.¹⁶¹

Although the judgment in *Williamson* was unanimous, two Justices penned concurring opinions. Justice Sotomayor concurred with the judgment and the Court's reasoning, but she wrote separately "to emphasize the Court's rejection of an overreading of *Geier*."¹⁶² In her view, too many courts had interpreted *Geier* to mean that a state-law tort claim is preempted whenever a manufacturer is permitted to choose among options and the claim is based on the manufacturer's choice of one of those options.¹⁶³ To the contrary, a regulation that gives manufacturers a choice among options is not sufficient, standing alone, to preempt a state-law tort claim: "courts should only find pre-emption where evidence exists that an agency has a regulatory objective—*e.g.*, obtaining a mix of passive restraint mechanisms, as in *Geier*—whose achievement depends on manufacturers having a choice between options."¹⁶⁴ Justice Thomas concurred with the judgment, but not the Court's reasoning.¹⁶⁵ Instead, he would have decided the case solely on the basis of the savings clause in the NTMVSA,¹⁶⁶ which provides that "[c]ompliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law."¹⁶⁷ He criticized the Court's "purposes-and-objectives" preemption analysis as "wholly illegitimate" because "[i]t instructs courts to pre-empt state laws based on judges' 'conceptions of a policy which Congress has not

158. *Id.* at 1137.

159. *Id.* at 1139.

160. *Id.*

161. *Id.* at 1139-40.

162. *Id.* at 1140 (Sotomayor, J., concurring).

163. *Id.*

164. *Id.*

165. *Id.* at 1141 (Thomas, J., concurring in the judgment).

166. *Id.* at 1141-42.

167. 49 U.S.C. § 30103(e).

expressed and which is not plainly to be inferred from the legislation which it has enacted.”¹⁶⁸

B. Statute of Repose

Because many product liability claims do not accrue until years after exposure to or use of the allegedly defective product, the statute of repose is an important defense for manufacturers. Unlike a statute of limitations, which does not begin to run until the cause of action accrues,¹⁶⁹ “[a] statute of ultimate repose delineates a time period in which a right may accrue. If the injury occurs outside that period, it is not actionable.”¹⁷⁰ In other words, “a statute of limitations operates only on an existing cause of action, while a statute of repose may operate to extinguish or abolish a potential cause of action prior to its existence.”¹⁷¹ Thus, a statute of repose stands as a substantial obstacle for plaintiffs because it can bar an action even before an injury occurs and before the statute of limitations begins to run.¹⁷² Similarly, a statute of repose can effectively shorten the period of limitations if the cause of action accrues with less time remaining in the period of repose than in the period of limitations.¹⁷³ For example, a cause of action that accrues one month before the period of repose expires will be barred if a lawsuit is not filed within that month, even if there is a two-year limitations period applicable to the cause of action.¹⁷⁴

168. 131 S. Ct. at 1142 (Thomas, J., concurring in the judgment) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 75 (1941) (Stone, J., dissenting)).

169. *See, e.g.*, O.C.G.A. § 9-3-33 (2007) (providing that claims for personal injuries must be brought within two years after the cause of action accrues).

170. *Hill v. Fordham*, 186 Ga. App. 354, 357, 367 S.E.2d 128, 131 (1988); *see also* *Gwinnett Place Assocs., L.P. v. Pharr Eng'g, Inc.*, 215 Ga. App. 53, 54 n.2, 449 S.E.2d 889, 890 n.2 (1994) (“A statute of ultimate repose limits absolutely the time during which a party may bring an action, regardless of when the cause of action accrues. It is distinguished from a statute of limitation, which is a procedural rule delineating a time period measured from the accrual of the right of action during which a party must bring an action.”).

171. CHARLES R. ADAMS III, *GEORGIA LAW OF TORTS* § 25-9, at 534 (2010-2011 ed.).

172. *Hatcher v. Allied Prods. Corp.*, 256 Ga. 100, 101, 344 S.E.2d 418, 420 (1986) (*per curiam*) (holding that the statute of repose bars a claim filed outside the repose period regardless of when the injury occurred), *superseded by statute on other grounds*, O.C.G.A. § 51-1-11(c) (Supp. 2011); *Hanna v. McWilliams*, 213 Ga. App. 648, 651, 446 S.E.2d 741, 744 (1994) (*en banc*) (“Moreover, the eight-year repose limit applies regardless of when the injury occurs or, indeed, whether a cause of action has accrued at all prior to the expiration of the period.”).

173. *Hatcher*, 256 Ga. at 101, 344 S.E.2d at 420.

174. *Id.* (Gregory, J., dissenting) (“If someone is injured by the use of personal property on the last day, or very near the end, of the ten year period commencing with the date of first sale, there is a great likelihood the injured person would have no opportunity to file

Georgia's statute of repose for product liability claims is no different; it "stands as an unyielding barrier to a plaintiff's right of action."¹⁷⁵ As the Georgia Supreme Court has noted:

This amounts to a recognition that the legislature may conclude that the time may arrive when past transgressions are no longer actionable. The long history of such conclusions emphasizes their rationality. From the biblical time of the Year of Jubilee to the present day, policymakers have exercised the right to "wipe the slate clean" after a fixed period of time. In doing this, there is the clear distinction between a statute of limitation "barring" an action, and a statute of repose providing for the abolition of a cause of action after the passage of the time provided.¹⁷⁶

The statute bars strict liability claims brought more than ten years after "the date of the first sale for use or consumption of the personal property causing or otherwise bringing about the injury."¹⁷⁷ The statute similarly bars negligence claims, except those based on injuries or damages arising out of (1) negligence in manufacturing a product that causes disease or birth defects; (2) conduct that "manifests a willful, reckless, or wanton disregard for life or property"; and (3) a negligent failure to warn.¹⁷⁸ The Georgia General Assembly's purpose in enacting the statute was to eliminate stale claims and remedy problems in the insurance industry generated by open-ended liability of manufacturers.¹⁷⁹

Although the effects and consequences of the statute are clear, determining when the repose period begins to run has bedeviled the courts and has generated much litigation. This would be an easy question if the repose period began to run upon the first sale of the product, but the first sale is not always the triggering event. Instead, the repose period begins to run upon the "first sale *for use or consumption*" of the product.¹⁸⁰ This could be the first sale, but it might also be several sales into the life of the product, depending on the nature of

suit within the ten year period.").

175. *Wright v. Robinson*, 262 Ga. 844, 845, 426 S.E.2d 870, 871 (1993).

176. *Craven v. Lowndes Cnty. Hosp. Auth.*, 263 Ga. 657, 660, 437 S.E.2d 308, 310 (1993).

177. O.C.G.A. § 51-1-11(b)(2) (Supp. 2011).

178. *Id.* § 51-1-11(c).

179. *Love v. Whirlpool Corp.*, 264 Ga. 701, 703, 449 S.E.2d 602, 605 (1994); *Chrysler Corp. v. Batten*, 264 Ga. 723, 725, 450 S.E.2d 208, 212 (1994); *see also Hill*, 186 Ga. App. at 357, 367 S.E.2d at 131 ("These limitations on liability for injuries occurring after a certain period are based upon reasonable expectations about the useful life of a building or a manufactured product.").

180. O.C.G.A. § 51-1-11(b)(2) (emphasis added).

the product and how it is brought to market. Unfortunately, the statute does not define this key phrase, and the Georgia Supreme Court and the Georgia Court of Appeals have struggled to provide a clear definition.

In *Pafford v. Biomet*,¹⁸¹ the plaintiff sued the alleged manufacturers of a metal plate that broke several months after it had been installed in his back and allegedly caused him to become disabled.¹⁸² The evidence showed that the plate was sold to the hospital where the plaintiff's surgery was performed between 1972 and some unknown time in 1980.¹⁸³ The plaintiff underwent surgery to have the plate installed in 1988, and he filed his lawsuit in 1990.¹⁸⁴ Thus, there was no conclusive evidence that the plaintiff filed his lawsuit within the ten-year repose period. The defendants argued that the repose period began to run when the hospital bought the plate, which was almost certainly more than ten years before the plaintiff filed his lawsuit. The plaintiff argued that the repose period began to run when the hospital sold the plate to him so that it could be installed in his back, which was only about two years before he filed his lawsuit.¹⁸⁵ The Georgia Supreme Court held that, "by purchasing the plate for mere static retention in its inventory, the Hospital was not functioning as an active 'user or consumer' thereof, but only as 'a dealer or any other person' through whom the plate would ultimately be sold for its intended purpose of placement in the back of a patient."¹⁸⁶ This meant that "[t]he 'first sale for use or consumption' did not occur until [the plate] was removed from the Hospital's inventory and sold to [the plaintiff] for its actual intended purpose of placement in his back."¹⁸⁷

Twelve years later, the Georgia Court of Appeals addressed this same issue in *Johnson v. Ford Motor Co.*¹⁸⁸ In December 1998, the plaintiff's house and vehicles were damaged by a fire that started in her neighbors' vehicle while it was parked in a carport and spread to her house. The plaintiff contended that the fire was caused by a faulty speed-control deactivation switch that was manufactured by Texas Instruments and installed by Ford when the vehicle was assembled on August 5, 1992. In June or July 1992, Texas Instruments sold the switch to Ford but shipped it to another company so that it could be

181. 264 Ga. 540, 448 S.E.2d 347 (1994).

182. *Id.* at 540-41, 448 S.E.2d at 348.

183. *Pafford v. Biomet*, 210 Ga. App. 486, 487, 436 S.E.2d 504, 506 (1993).

184. *Pafford*, 264 Ga. at 540-41, 448 S.E.2d at 348.

185. *Id.* at 541-42, 448 S.E.2d at 348.

186. *Id.* at 542, 448 S.E.2d at 349.

187. *Id.* at 543, 448 S.E.2d at 349.

188. 281 Ga. App. 166, 637 S.E.2d 202 (2006).

installed into a proportional valve. That company shipped the proportional valve to Ford for installation in the vehicle that the plaintiff's neighbors eventually purchased on July 23, 1993. Texas Instruments and Ford argued that the "first sale for use or consumption" of the switch occurred when the vehicle was assembled on August 5, 1992, which meant that the ten-year repose period would have expired on August 5, 2002. The plaintiff, on the other hand, argued that the first sale for use or consumption did not occur until her neighbors purchased the vehicle on July 23, 1993, which meant that the ten-year repose period would have expired on July 23, 2003. Because the plaintiff filed her complaint after August 5, 2002 and before July 23, 2003,¹⁸⁹ determining which event triggered the repose period was critical.¹⁹⁰ As the court of appeals read *Pafford*, the pertinent question was "whether . . . the 'actual intended purpose' of the switch was not realized until the car was sold to the consumer."¹⁹¹ Unlike the plate in *Pafford*, which the hospital bought from the manufacturer only for static retention in its inventory until it was sold to a patient, "the switch in question was not retained as part of Ford's inventory but was placed immediately into another component and then incorporated into the [vehicle] on the assembly line."¹⁹² Thus, "when the car was driven off the assembly line, the [switch] had been actively placed in use, was in fact being used, and did not require purchase from the end user or consumer to be used for its 'intended purpose.'"¹⁹³ This meant that Ford was a user or consumer of the switch because the switch was capable of being used for its intended purpose as soon as Ford installed it in the vehicle and the vehicle became operable, whereas the hospital in *Pafford* was not a user or consumer of the plate because the plate could not be used for its intended purpose until it was inserted into a patient's body.¹⁹⁴ Under this rationale, the event triggering the ten-year repose period was Ford's assembly of the vehicle on August 5, 1992, and so the repose period expired on August 5, 2002—before the plaintiff filed her complaint.¹⁹⁵

189. The opinion does not disclose the date when the plaintiff filed the complaint. Based on the parties' arguments and the likelihood that the plaintiff's claims were subject to a four-year limitations period, one can deduce that the plaintiff must have filed the complaint between August 5, 2002 and the four-year anniversary of the incident in December 2002.

190. *Id.* at 166-67, 637 S.E.2d at 203.

191. *Id.* at 170, 637 S.E.2d at 205.

192. *Id.*

193. *Id.*

194. *Id.* at 171, 637 S.E.2d at 205-06.

195. *Id.* at 171, 637 S.E.2d at 206.

Although in *Johnson* the court of appeals purported to distinguish *Pafford*, *Johnson* actually is inconsistent with *Pafford* insofar as it requires the repose period to begin running while the product is still in the manufacturer's possession and before it has been sold to the intended consumer. This inconsistency came to a head in *Campbell v. Altec Industries, Inc.*,¹⁹⁶ which was discussed in a prior survey.¹⁹⁷ In that case, the plaintiff was injured while operating a lower boom lift cylinder on a bucket truck. Georgia Power Company ordered the bucket truck from Altec Industries in March 1997. In early October 1997, Altec Industries purchased a lower boom lift cylinder from Texas Hydraulics, and the lower boom lift cylinder arrived at the Altec Industries facility in Missouri by October 10, 1997. Altec Industries installed the lower boom lift cylinder on the lift portion of the bucket truck by January 2, 1998, and, on January 14, 1998, it installed the lift portion of the bucket truck (with the lower boom lift cylinder attached) on a test chassis. After testing the lower boom lift cylinder several times with the test chassis, Altec Industries transported the lift portion of the bucket truck to its facility in Alabama. The lift portion of the bucket truck was installed on the permanent chassis of the bucket truck in March 1998, and the completed bucket truck was delivered to Georgia Power in April 1998.¹⁹⁸

The plaintiff filed his complaint on February 4, 2008, alleging that the lower boom lift cylinder was defective, and the defendants moved for partial summary judgment on the ground that the plaintiff's claims for design and manufacturing defects were barred by the statute of repose.¹⁹⁹ The United States District Court for the Northern District of Georgia agreed and held that the ten-year repose period began running on January 14, 1998, when Altec Industries installed the lift portion of the bucket truck (with the lower boom lift cylinder attached) on a test chassis.²⁰⁰ At that time, the district court reasoned, the lower boom lift cylinder had been placed into the stream of commerce and was able to be used for its intended purpose, and Altec Industries did not intend to hold it in inventory for a later sale.²⁰¹ Thus, the plaintiff filed his complaint three weeks too late.²⁰²

196. No. 1:08-CV-0810-JOF, 2009 WL 426472 (N.D. Ga. Feb. 19, 2009).

197. Brannen & Daly, *2009 Annual Survey*, *supra* note 88, at 294-96.

198. *Campbell*, 2009 WL 426472, at *1.

199. *Id.*

200. *Id.* at *3.

201. *Id.*

202. *Id.*

On appeal in *Campbell*, the Eleventh Circuit was unable to reconcile *Pafford* and *Johnson* because neither case definitely resolved whether the repose period began running (1) when the lower boom lift cylinder was completed or tested (January 1998); (2) when the bucket truck was completely assembled (March 1998); or (3) when the completed bucket truck was delivered to Georgia Power (April 1998).²⁰³ Consequently, the Eleventh Circuit certified the following question to the Georgia Supreme Court:

In a strict liability or negligence action, does the statute of repose in O.C.G.A. § 51-1-11 begin running when (1) a component part causing an injury is assembled or tested, (2) a finished product, which includes an injuring component part, is assembled, or (3) a finished product, which includes an injuring component part, is delivered to its initial purchaser?²⁰⁴

In answering the Eleventh Circuit's certified question, the Georgia Supreme Court held that "the statute of repose found in OCGA § 51-1-11(b)(2) begins to run when a finished product is sold as new to the intended consumer who is to receive the product, in this case, Georgia Power Company."²⁰⁵ Relying on *Pafford's* focus on the person who was ultimately intended to use the product rather than some intermediary middleman, the supreme court explained that "nothing in either the statute, or this Court's precedent, supports a conclusion that liability under OCGA § 51-1-11(b)(1) attaches while the product remains in the hands of the manufacturer, or that the statute of repose under OCGA § 51-1-11(b)(2) begins while the product is still in the hands of the manufacturer."²⁰⁶ In other words, "OCGA § 51-1-11(b)(2) refers to the sale of the finished product to the consumer who is intended to receive it as new."²⁰⁷ Because *Johnson* is inconsistent with this interpretation of the phrase "first sale for use or consumption," the Georgia Supreme Court overruled it.²⁰⁸

Under this interpretation, the ten-year repose period was not triggered until the completed bucket truck was delivered to Georgia Power in April 1998, which meant that the plaintiff had until April 2008 to file his complaint.²⁰⁹ Thus, the Eleventh Circuit held that the plaintiff timely

203. *Campbell v. Altec Indus., Inc.*, 605 F.3d 839, 842 (11th Cir. 2010) (per curiam).

204. *Id.*

205. *Campbell v. Altec Indus., Inc.*, 288 Ga. 535, 535, 707 S.E.2d 48, 48-49 (2011) (footnote omitted).

206. *Id.* at 539, 707 S.E.2d at 51.

207. *Id.*

208. *Id.*

209. *Campbell v. Altec Indus., Inc.*, 635 F.3d 1212, 1214 (11th Cir. 2011) (per curiam).

filed his complaint on February 4, 2008 and that, therefore, the district court erred in granting summary judgment for the defendants.²¹⁰

C. Assumption of the Risk

“The affirmative defense of assumption of the risk bars recovery when it is established that a plaintiff, without coercion of circumstances, chooses a course of action with full knowledge of its danger and while exercising a free choice as to whether to engage in the act or not.”²¹¹ In product liability cases, this defense bars both negligence claims and strict liability claims.²¹² To establish that a plaintiff assumed the risk, a defendant must show that “the plaintiff (1) had actual knowledge of the danger; (2) understood and appreciated the risks associated with such danger; and (3) voluntarily exposed himself to those risks.”²¹³ As this suggests, “the standard to be applied in assessing an assumption of the risk defense is a subjective one, geared to the particular plaintiff and his situation, rather than that of a reasonable person of ordinary prudence who appears in the completely separate defense of contributory negligence.”²¹⁴ Whether a plaintiff assumed the risk of injury is usually a question for the jury, but the issue may be determined as a matter of law if the evidence is plain, palpable, and undisputed.²¹⁵

To assume a risk, a plaintiff must have subjective knowledge of “the specific, particular risk of harm associated with the activity or condition that proximately causes injury.”²¹⁶ A comprehension of “general, non-specific risks that might be associated with such conditions or activities” will not suffice.²¹⁷ Because the standard is subjective, it necessarily incorporates the plaintiff’s capacity to recognize, understand, and appreciate a danger and to respond to the danger.²¹⁸ Thus, “there is no legal bar to applying assumption of the risk, as a matter of law, to the conduct of a child between [the ages of seven and fourteen],” as long

210. *Id.*

211. *Muldovan v. McEachern*, 271 Ga. 805, 807, 523 S.E.2d 566, 569 (1999) (internal quotation marks omitted).

212. *Whirlpool Corp. v. Hurlbut*, 166 Ga. App. 95, 100-01, 303 S.E.2d 284, 288-89 (1983).

213. *Vaughn v. Pleasant*, 266 Ga. 862, 864, 471 S.E.2d 866, 868 (1996).

214. *Muldovan*, 271 Ga. at 808, 523 S.E.2d at 569 (punctuation and internal quotation marks omitted).

215. *Bodymasters Sports Indus., Inc. v. Wimberley*, 232 Ga. App. 170, 174, 501 S.E.2d 556, 560 (1998).

216. *Vaughn*, 266 Ga. at 864, 471 S.E.2d at 868.

217. *Id.*

218. *Spooner v. City of Camilla*, 256 Ga. App. 179, 181, 568 S.E.2d 109, 111 (2002).

as the elements of the defense are otherwise satisfied.²¹⁹ When assessing a child's knowledge, the same standard of subjectivity applies, and so generalizations about the knowledge children have of certain dangers and the propensity of children to exercise poor judgment "are not appropriate yardsticks for assessing [a particular child's] knowledge of the risk."²²⁰ That being said, the law presumes that certain dangers, such as the risk of falling from great heights, are generally understood and appreciated by children because they are so obvious:

[N]o danger is more commonly realized or risk appreciated, even by children, than that of falling; consciousness of the force of gravity results almost from animal instinct. Certainly a normal child of nearly [nine] years of age knows that if [he] steps or slips from a tree, a fence, or other elevated structure, [he] will fall to the ground and be hurt.²²¹

The Georgia Court of Appeals decided one case during the survey period involving a child's assumption of the risk. In *Kane v. Landscape Structures, Inc.*,²²² the plaintiffs' nine-year-old child, Steven, was injured when he fell while climbing on playground equipment at Mountain Park in Gwinnett County. The equipment, which was known as the "Infant Maze," was designed for children between the ages of eighteen months and three years and consisted of several vertical panels that were thirty-one inches in height and that had a variety of vertically and horizontally mounted handholds to help children maintain their balance while playing. The Infant Maze also included four posts on which a pitched roof was mounted. The pitched roof was seven feet in height at its peak. One day when Steven and his family were at Mountain Park, Steven and his thirteen-year-old brother went to the playground while their parents and sister watched a softball game. Steven climbed on top of one of the vertical panels, which was only one inch wide, and when he tried to climb onto the pitched roof from the panel, he slipped and fell onto the vertical panel below him. His parents

219. *Id.* at 182, 568 S.E.2d at 112 (internal quotation marks omitted). There are numerous cases holding that a young child assumed the risk of injury. *See, e.g.*, *Abee v. Stone Mountain Mem. Ass'n*, 252 Ga. 465, 466, 314 S.E.2d 444, 445 (1984) (holding that 11-year-old boy assumed the risk); *Rice v. Oaks Investors II*, 292 Ga. App. 692, 694, 666 S.E.2d 63, 65 (2008) (holding that 10-year-old girl assumed the risk).

220. *Garner v. Rite Aid of Ga., Inc.*, 265 Ga. App. 737, 742, 595 S.E.2d 582, 587 (2004) (physical precedent) (affirming the trial court's exclusion of a child and adolescent psychiatrist's testimony about general adolescent knowledge and behavior that was not tied to the specific children involved in the case).

221. *O'Neal v. Sikes*, 271 Ga. App. 391, 392, 609 S.E.2d 734, 735 (2005) (second, third, and fourth alterations in original) (internal quotation marks omitted).

222. 309 Ga. App. 14, 709 S.E.2d 876 (2011) (en banc).

sued the manufacturer of the Infant Maze, alleging that it was defectively designed and that it lacked appropriate warnings. The manufacturer moved for summary judgment on the ground that Steven assumed the risk of injury, and the trial court granted the motion.²²³

On appeal, the plaintiffs argued that Steven lacked actual knowledge of and did not appreciate the danger of falling onto a vertical panel while trying to climb onto the pitched roof.²²⁴ To the contrary, the evidence showed that Steven knew the Infant Maze was intended for younger children, knew the Infant Maze was not intended for climbing, and knew that his mother probably would not have approved of him climbing on the Infant Maze.²²⁵ In fact, his mother had previously warned him about the dangers of climbing on various objects, including structures shorter than the Infant Maze.²²⁶ There was nothing about the Infant Maze that gave Steven any reason to believe that he could not fall from it or that he would not be hurt if he fell.²²⁷ Further, the vertical panel on which he fell was open and visible, and its hardness was obvious to anyone who had climbed on top of it.²²⁸ Under these circumstances, the court of appeals held that the manufacturer was entitled to summary judgment because Steven sufficiently appreciated the obvious danger of falling from the Infant Maze.²²⁹

Relying on a case involving a nine-year-old child who was injured when she ran into the path of a truck, Judge Barnes dissented because she believed that Steven's knowledge of the danger associated with climbing on the Infant Maze was not specific enough.²³⁰ Judge Barnes focused on the "seemingly innocuous nature" of the Infant Maze, the placement of the horizontal handholds on the vertical panels, which violated certain guidelines of the Consumer Product Safety Commission and standards of the American Society for Testing and Materials, and the fact that Steven had not seen anyone else fall while climbing on the Infant Maze.²³¹ The majority rebutted Judge Barnes's reliance on the traffic case with the following observation: "Gravity, unlike traffic on a quiet street or driveway, is always present, and so, unlike a quiet street

223. *Id.* at 14-16, 709 S.E.2d at 877-79. The opinion of the court of appeals includes a photograph of the Infant Maze. *Id.* at 15, 709 S.E.2d at 878.

224. *Id.* at 17, 709 S.E.2d at 879.

225. *Id.* at 18-19, 709 S.E.2d at 880.

226. *Id.* at 18, 709 S.E.2d at 880.

227. *Id.* at 18-19, 709 S.E.2d at 880.

228. *Id.* at 19, 709 S.E.2d at 880.

229. *Id.* at 19, 709 S.E.2d at 880-81.

230. *Id.* at 23, 709 S.E.2d at 883 (Barnes, J., dissenting) (discussing *Atlanta Affordable Hous. Fund L.P. v. Brown*, 253 Ga. App. 286, 558 S.E.2d 827 (2002)).

231. *Id.* at 23 & n.9, 709 S.E.2d at 883 & n.9.

or driveway that only sometimes poses a danger to pedestrians of being struck by traffic, climbing something *always* poses a danger of falling from it.”²³² As to the seemingly innocuous appearance of the Infant Maze, the majority noted that “[p]layground equipment, of course, need not look like a deathtrap to suggest to a nine-year-old child that climbing it is a bad idea.”²³³ Similarly, the fact that Steven had not seen anyone else fall does not mean that he did not understand and appreciate the danger involved.²³⁴ As the majority explained, “[t]hat a child sees other children swim in a lake without drowning, play around fire without being burned, and climb to high places without falling does not make the obvious risk involved in such activities any less apparent.”²³⁵ Even if other children succeed in these activities, thereby causing the observing child to believe that the probability of being injured is less than it actually is, the analysis does not change because “assumption of the risk does not require an accurate assessment of the precise probability that a danger will be realized and an injury sustained, only an appreciation that the danger exists.”²³⁶

232. 309 Ga. App. at 20, 709 S.E.2d at 881 (majority opinion).

233. *Id.* at 19 n.2, 709 S.E.2d at 881 n.2.

234. *Id.* at 19 n.4, 709 S.E.2d at 881 n.4.

235. *Id.*

236. *Id.* The majority did not address Judge Barnes’s point about the improper placement of the horizontal handholds on the vertical panels. There does not appear to be any binding precedent on the issue, but there is no reason why a defendant’s noncompliance with government regulations or private industry standards should preclude it from asserting assumption of the risk as a defense. After all, even if such noncompliance were evidence of negligence per se, negligence per se is not liability per se. *R&R Insulation Servs., Inc. v. Royal Indem. Co.*, 307 Ga. App. 419, 425, 705 S.E.2d 223, 231 (2010). Further, an absence of negligence by the defendant is not an element of assumption of the risk; indeed, the whole point of assumption of the risk is that the plaintiff has in effect consented to the defendant’s negligence. *Muldovan*, 271 Ga. at 808, 523 S.E.2d at 569. In other words, the defendant’s noncompliance has nothing to do with the plaintiff’s knowledge of the danger involved.