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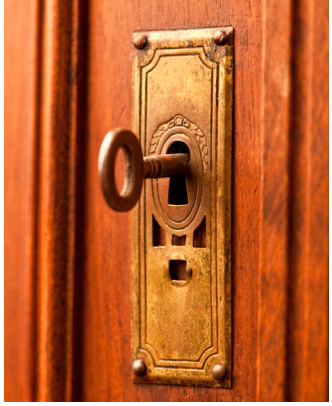

The Tort Report

An Update on Liability Issues

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Negligent Security Claims: Proximate Cause Isn't *Always* a Jury Question

By: Meghan E. Pieler

In a negligent security action a plaintiff typically relies heavily on notice of prior criminal activity and responsive measures taken by an apartment complex in order to prove a breach of the duty of care. Presentation of this evidence, regardless of other facts, usually prevents a finding of summary judgment for the apartment complex as proximate cause is so often successfully argued to be a "question of fact for the jury."

However, a recent Georgia case reiterates that in order to survive summary judgment in a negligent security claim, proof of proximate cause is still an essential element, and expert testimony may be required in order to prove it. In *George v. Hercules Real Estate Servs.*, 339 Ga. App. 843 (2016), the Georgia Court of Appeals affirmed the trial court's grant of summary judgment to an apartment management company in a negligent security case. There, the plaintiff ("George") filed a premises liability action against his apartment management company ("Hercules") after he was shot by unknown assailants as they attempted to forcibly enter his apartment. The facts presented in discovery showed that George's apartment had already been burglarized once before the incident giving rise to this lawsuit, and that in response to the prior burglary, Hercules repaired George's damaged front door. When it did so, Hercules also installed a metal burglar guard, which made the door more secure, but also made the dead bolt more difficult to lock. George testified he still did not feel safe in the complex and began keeping a shotgun near his door for safety.

During the early morning hours of July 27, 2011, approximately one month after the prior burglary, an unknown individual knocked on George's front door. Although George was not expecting any visitors, he opened his door slightly, at which time multiple unknown individuals attempted to force their way into the apartment. George tried to force the door shut again, but he was unable to secure the dead bolt. Eventually, he grabbed his shotgun, fired at the intruders, and the intruders fired back, shooting George four times.

George brought the instant action against Hercules claiming that Hercules was not only negligent in its implementation of security measures for the apartment complex, but that it also failed to keep its tenants safe from foreseeable criminal activity. While Hercules acknowledged it was aware of criminal activity in the complex, Hercules presented evidence that as part of a $7 million dollar renovation it increased its security measures by employing more security guards, adding a more secure entry gate, landscaping, and working with residents and the local police to increase community awareness. Hercules also pointed to the lack of any testimony in the record that any additional security measures could have prevented George from being shot after voluntarily opening his door to a stranger after midnight. In response, George presented evidence that Hercules's onsite manager requested additional security from its corporate office because the tenants were "at the mercy of criminal activity on the property," but that Hercules denied the property manager's request.

The Court of Appeals was not swayed by George's evidence and affirmed the trial court's ruling that his evidence was insufficient to create a question of fact on whether any act or omission of Hercules caused George's injuries. Of note, the Court of Appeals indicated that a request for increased security measures "simply does not provide evidence that Hercules proximately caused the injuries sustained by George when he was shot after voluntarily opening his door to an unknown person after midnight." Although not an express finding in the decision, the decision seems to suggest that without some expert testimony or other specific evidence that an increase in security would have prevented the crime in question, summary judgment may be appropriate. As this case demonstrates, a plaintiff must show the apartment's actions or inactions proximately caused his or her injury. Merely pointing to criminal activity and purported insufficient security, without more, does not create an issue of fact without evidence of proximate cause. ■

Bad Facts Do Not Always Make Bad Law: Course and Scope Still Matter

By: Jonathan J. Kandel

At their core, all theories of vicarious liability are based on the idea that one party has the right to control the conduct of another and, therefore, should be responsible for the latter's negligent conduct. While vicarious liability is based on the right to control, the ability to control is (in reality) a fiction. For example, an employer does not really have the ability to control how its employee drives a vehicle owned by the employer, even if the employee is operating within the course and scope of his employment. Likewise, a parent has limited control over a child's driving once the child is permitted to drive on his own. Nonetheless, the primary test for vicarious liability is based on the right to control. The concept of right to control is expressed in various short-hands, such as "course and scope." Most are familiar with the principle that an employer (generally) is not liable for torts committed by its employees unless the employee was acting within the course and scope of his employment.

Because the right to control is a legal fiction, plaintiffs often attempt to expand its scope, especially when a "deep pocket" litigant may possibly be vicariously liable for another's conduct. A recent case from the Court of Appeals of Georgia, however, reiterates that "course and scope" still matters.

In *Corrugated Replacements, Inc. v. Johnson*, No. A16A1835 (Ga. Ct. App. Feb. 23, 2017), a sixteen-year-old was driving a vehicle under the influence of drugs and alcohol when he collided with the back of a van carrying a family. The accident killed one child and severely injured other members of the family. The vehicle being driven by the sixteen-year-old was owned by a corporation, of which his father was a shareholder as well as the CEO. The family sued the sixteen-year-old, his father, and the corporation that owned the vehicle, seeking to hold the father and the corporation vicariously liable for the conduct of the sixteen-year-old. The lawsuit further sought uncapped punitive damages against all three defendants based on the sixteen-year-old's intoxication at the time of the accident. The corporation moved for summary judgment based on the undisputed fact that the sixteen-year-old was not within the course and scope of his intermittent employment with his father's corporation at the time of the accident. Despite admitting that the sixteen-year-old was not within the course and scope of his employment with the corporation, the plaintiffs sought to hold the corporation vicariously liable, invoking a joint venture theory as well as a theory of reverse veil piercing. According to the plaintiffs, the sixteen-year-old, the father, and the corporation were engaged in a "joint venture" to purchase and use the vehicle to satisfy the vehicular needs of the family and the company. The plaintiffs also argued that if their claims for vicarious liability against the corporation failed, they were left without an adequate remedy at law, which they contended allowed them to hold the corporation liable under a reverse veil piercing theory.

The Court of Appeals disagreed. First, it reiterated an employer is vicariously liable under respondeat superior only when the employee is acting within the course and scope of his employment. The Court noted that although Georgia law uses a burden-shifting framework to analyze respondeat superior claims when an employee is driving his employer's vehicle at the time of the accident, because the plaintiffs admitted the sixteen-year-old was on a purely personal mission and not within the course and scope of his employment, the corporation was entitled to summary judgment on claims for respondeat superior.

Second, the Court explained that a joint venture arises when two or more parties combine their property, labor, or both, in a joint undertaking for profit, with rights of mutual control. Because joint venture is a theory of vicarious liability, where each party is liable for the conduct of the other parties to the venture, the Court emphasized that joint venture liability requires "the right to exercise *mutual* control." In this case, the Court of Appeals concluded that "the critical element of mutual control [wa]s still missing." The Court explained that, while there was evidence the father and the corporation could control the sixteen-year-old's use of the vehicle, there was no evidence that the sixteen-year-old had any right, express or implied, to direct or control use of the vehicle by his father or the corporation. The Court stated, "without the right of each member to direct and control the conduct of the other, there is no joint venture."

Third, the Court summarily dismissed plaintiffs' claim for reverse veil piercing, noting that it is not a viable claim under Georgia law. The Court rejected the plaintiffs' argument that an exception to the rule prohibiting reverse veil-piercing claims exists because plaintiffs did not have an adequate remedy at law since their vicarious liability claims against the corporation failed.

Finally, the court held that plaintiffs' claims for uncapped punitive damages against the father and the corporation failed as a matter of law. Plaintiffs sought uncapped punitive damages based on the sixteen-year-old's alleged intoxication. The Georgia punitive damages statute allows for uncapped punitive damages when, among other things, the defendant committed the tort while under the influence of alcohol or unlawful drugs. *See* O.C.G.A. § 51-12-5.1(f). The Court explained the statute is clear that an active tortfeasor is the defendant acting under the influence of alcohol. Therefore, uncapped punitive damages are not available against an alleged vicariously liable party.

Corrugated Replacements, Inc. v. Johnson is a good reminder that vicarious liability still requires control or, in other words, course and scope. It is also an example that bad (tragic) facts do not always make bad law. ■

Georgia Supreme Court Clarifies Duty Owed by Manufacturers to Third-Parties in "Take-Home Exposure Claims"

By: Ashley N. Pruitt

CertainTeed Corp. v. Fletcher

On November 30, 2016, the Georgia Supreme Court in *CertainTeed Corp v. Fletcher*, 300 Ga. 327 (2016), confirmed that manufacturers do not have a duty to warn all third parties in "take-home exposure" cases, but also affirmed that eliminating the duty to warn does not shield manufacturers from third-party design-defect claims.

Forbes v. Smith: Can a Criminal Statute of Limitations Extend the Civil Statute of Limitations?

By: Donovan D. Potter

Under O.C.G.A. § 9-3-99, the limitations period for a personal injury claim (arising out of the circumstances related to the alleged crime) shall be tolled from the date of the commission of the crime or act giving rise to the personal injury until the prosecution of such crime or act has become final or terminated, provided that such time does not exceed six years.

This statute essentially permits a plaintiff, who has a claim arising from a criminal act (whether felony or misdemeanor) to file suit up to six years after the cause of action accrues, as long as the prosecution of the underlying crime is not terminated. Under current Georgia law, traffic citations constitute "crimes" under O.C.G.A. § 9-3-99, which has the effect of tolling the relevant statute of limitations for a civil action that arises from automobile accidents resulting in a traffic citation for the at fault driver. *Beneke v. Parker*, 285 Ga. 733, 684 S.E.2d 243 (2009).

In August 2016, the Georgia Court of Appeals clarified the extent of this law and held that that the two-year statute of limitations for personal injuries arising from a car accident is tolled only until the prosecution of a defendant for a traffic offense was terminated, regardless of whether the citation could still be prosecuted in the future. *Forbes v. Smith*, 338 Ga. App. 546 (2016).

In *Forbes v. Smith*, Barbara Forbes sued Cynthia Smith for injuries she suffered as a result of a car accident that occurred on July 5, 2013. As a result of the accident, Smith was issued a traffic citation for failure to yield. The criminal prosecution of Smith was dismissed on technical grounds on August 6, 2013, but with notice to Smith that the prosecution could be reinstituted at any time within the next two (2) years, *i.e.*, until July 5, 2015. Forbes did not file her lawsuit until September 15, 2015, more than two years after the accident. The trial court dismissed Forbes' suit on the grounds that it was filed after the applicable two-year statute of limitation. The Court of Appeals agreed that although O.C.G.A. § 9-3-99 did toll the statute of limitations, there was a limitation on the tolling period for the criminal citation in question. As such, it affirmed the dismissal of Forbes' suit for her failure to comply with the two-year statute of limitations, despite her contention that her cause of action survived the limitations period due to O.C.G.A. § 9-3-99.

On appeal, Forbes argued the limitations period was tolled under O.C.G.A. § 9-3-99 and did not begin to run until July 5, 2015, because Smith was charged with a crime arising out of the automobile accident and the prosecution of Smith's traffic ticket did not technically "terminate" until the criminal charge could no longer be prosecuted. The Court of Appeals held the issuance of the traffic ticket to Smith on July 5, 2013, commenced the prosecution of the criminal charge. The Court of Appeals further held that because Smith's charges were dismissed on August 6, 2013, but never later reinstituted by the responding officer, the August 6, 2013 dismissal acted as a "termination" of the charges. Therefore, Forbes' lawsuit, which was filed on September 15, 2015, was barred, as the statute of limitations began running on August 7, 2013, and ended on August 7, 2015, one month before the lawsuit was filed. The Court of Appeals found that under the facts of this case, there was no merit to Forbes' argument that the personal injury statute of limitations period was tolled until the expiration date for prosecution of the criminal citation.

This case is a reminder to consider and monitor underlying criminal cases and the respective dates of commencement and termination of prosecution of those criminal cases as it may impact the typical two-year statute of limitations for personal injury claims. ■

In *CertainTeed*, Fletcher was diagnosed with mesothelioma, which she attributed to years of laundering her father's work clothing. Fletcher sued Appellant CertainTeed Corporation, who manufactured the water pipes with which her father had worked, and which contained asbestos. Fletcher averred she was exposed to asbestos fibers from her father's contaminated clothes, and that this exposure caused her mesothelioma. Fletcher's Complaint included claims for failure to warn and negligent design. CertainTeed filed a motion for summary judgment on all plaintiff's claims, which the trial court granted. However, the Georgia Court of Appeals reversed the trial court's decision on both claims, finding that a jury question existed as to whether CertainTeed had a duty to warn Fletcher of the risk of asbestos, and whether its product had been defectively designed. Upon petition for certiorari by CertainTeed, the Supreme Court granted review of the case.

The Supreme Court reversed the decision of the Court of Appeals with respect to the failure to warn claim, holding that CertainTeed did not owe a duty to warn Fletcher of asbestos exposure from its pipes. Key to the Court's decision was its consideration of public policy concerns and the "social consequences" of making manufacturers responsible for warning all individuals in Fletcher's position, whether family members or members of the general public, who may have been exposed to "asbestos-laden" clothing. In its reasoning, the Court determined that imposing such a duty on manufacturers would be unreasonable and the scope of such warnings would be "endless." *Id.* at 331.

Fletcher argued that a warning label on the pipe could have allowed her father to mitigate dangers posed by asbestos. The Supreme Court rejected this position and reasoned that a warning on the pipe would not have been distributed or available to third parties such as Fletcher. Further, the Court reasoned that Fletcher's analysis shifted the burden to warn from the manufacturer to the product-user. The Court refused to extrapolate a duty based on the specific facts in this case which would ultimately impose a duty with respect to an infinite number of potential plaintiffs, while also providing no possibility of compliance by the manufacturers. Merely because a warning label may have been effective in Fletcher's case, such fact did not prove that a warning label would be effective in all cases. The Court instead considered a broader application of the rule, finding that "[imposing] a duty that either cannot feasibly be implemented or, even if implemented, would have no practical effect, would be poor public policy." *Id.* at 330.

In contrast, the Supreme Court agreed with the Court of Appeals with respect to Fletcher's claims for defective design, holding that, in order to prevail on a motion for summary judgment, CertainTeed had to prove that there was an absence of any evidence that its product was defectively designed. In its reasoning, the Court rejected CertainTeed's argument that an earlier decision by the Supreme Court, *CSX Trans v. Williams,* 278 Ga. 888 (2005), barred Plaintiff's claims in this case. *CSX* was a case of first impression regarding third-party "clothing exposure claims." In that case, the Georgia Supreme Court, answering a certified question from the Eleventh Circuit Court of Appeals, held that Georgia law does not impose any duty on an employer to a third-party who comes into contact with its employee's asbestos-tainted work clothing at locations away from the workplace. *Id* at 892.

However, in *CertainTeed,* the Court disagreed that *CSX* governed CertainTeed's defense. *CSX* involved the duty owed to a third-party in an employer-employee relationship, whereas the claim in *CertainTeed* involved the duty of a manufacturer in the design of its product. The Court held that Fletcher's defective design claim is governed by the risk-utility test adopted by the Court in *Banks v. ICI Americas, Inc.,* 264 Ga. 732 (1994), and not the decision in *CSX*. Quoting *Banks*, the Court stated, "[the] trier of fact may consider evidence establishing that at the time the product was manufactured, an alternative design would have made the product safer than the original design." 264 Ga. at 734. In drawing its conclusion, the Court held that the appropriate analysis for the design-defect claim was whether the manufacturer defectively designed the product under the risk-utility analysis.

The Supreme Court's ruling in *CertainTeed* provides some necessary clarification and boundaries for the duties owed by manufacturers to third-parties in asbestos cases. However, because of the asbestos-specific facts of this case, it is unclear whether the holdings could have a wider application to manufacturers of other products, or if they will be limited to manufacturers of asbestos-containing products.

Events

Webinar: 2017 GA WC Case Law and Legislative Update
May 10, 2017
1:00 - 2:00 pm EST

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The Tort Report is edited by Joe Angersola, Alicia Timm and Drew Timmons. If you have any comments or suggestions for our next newsletter, please email joseph.angersola@swiftcurrie.com, alicia.timm@swiftcurrie.com or drew.timmons@swiftcurrie.com.