

## When Do Post-Sale Duties to Warn and Recall Arise in Georgia?

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### I. Introduction

In Georgia, product manufacturers and sellers are required in certain instances to provide users and other consumers with post-sale warnings of dangers associated with the use of their products. Georgia law, however, does not clearly define when and under what circumstances such a duty arises. Moreover, while Georgia law does not recognize a common law duty to recall a product, it will impose obligations for effectuating a recall when one is instituted either voluntarily or as required by federal law. This article discusses cases dealing with these issues, many of which are from other states, to inform product manufacturers and sellers of the factors that can trigger post-sale duties so they can take appropriate steps to prevent or limit their liability for post-sale injuries and defend a product liability suit raising a post-sale failure to warn claim or a negligent recall claim.

As every product manufacturer and seller is aware, they have a duty to adequately warn when they have reason to anticipate danger may result from a particular use of their products. Designing, manufacturing and selling safe and non-defective products, however, may not be enough where a post-sale duty arises. Even if the product is state-of-the-art, satisfying every industry and government standard at the time of sale,

product liability claims brought years or even decades after sale may raise post-sale claims. Georgia law on these issues is not particularly well-developed. This article focuses on Georgia cases where available, but supplements this discussion with cases from other jurisdictions. The applicability of these other cases in Georgia is not clear, and practitioners should be cautious when trying to apply their rulings here

## II. Post-Sale Duty to Warn

### A. Duties of Manufacturers<sup>1</sup>

Georgia law imposes a continuing duty upon product manufacturers to warn users of a known or reasonably foreseeable danger arising from a product after its sale or distribution.<sup>2</sup> This is because “[t]he manufacturer is in the best position to either discover or learn of dangerous product defects and to determine how to correct such defects through remediation. The manufacturer has superior knowledge of such defects and the ability to find them, because notice of the defects comes to the manufacturer through product testing, quality control, product complaints, product liability suits, warranty suits, government-imposed recalls, and industry experience.”<sup>3</sup>

The post-sale duty to warn arises when a manufacturer has actual or constructive post-sale knowledge that a product involves a danger to users.<sup>4</sup> The duty to warn may arise with the manufacturer’s acquisition of knowledge long after the date of the first sale of the product.<sup>5</sup> In fact, a negligent-failure-to-warn claim may arise from a manufacturer’s post-sale knowledge acquired months, years, or even decades after the date of the first sale of the product.<sup>6</sup> A manufacturer’s new-found knowledge can derive either from

accidents or complaints indicating that a product is more dangerous than previously believed or from advances in the state of the art.<sup>7</sup>

### 1. Knowledge Derived from Accidents

In *Hunter v. Werner Co.*,<sup>8</sup> the plaintiff was injured when a fiberglass ladder he was using snapped suddenly, causing him to fall to the ground.<sup>9</sup> The ladder was manufactured in 1978, and the plaintiff’s injury occurred in 1996.<sup>10</sup> The evidence showed the ladder’s manufacturer, prior to 1996, had knowledge of three other injury claims from fiberglass ladders fracturing in a similar manner to that giving rise to the plaintiff’s accident.<sup>11</sup> In addition, the manufacturer’s technical manual for the ladder showed the manufacturer knew fiberglass ladders could be damaged if they were not properly transported.<sup>12</sup> Yet, the manufacturer never issued any warning to users that its fiberglass ladder should be handled and maintained with greater care than wooden or aluminum ladders or that it could be damaged by being dropped.<sup>13</sup> For these reasons, the court reversed a grant of summary judgment for the manufacturer on the plaintiff’s negligent-failure-to-warn claim.<sup>14</sup>

In addition, in *Watkins v. Ford Motor Co.*,<sup>15</sup> the court reversed a grant of summary judgment for Ford, finding Ford was liable for failing to warn consumers about the dangerous propensity of its Bronco II to roll over. Two years after the production of the plaintiff’s 1986 Bronco II, Ford’s statisticians reported to management that the Bronco II had a rollover fatality rate 3½ times that of a standard utility vehicle, and tests done that same year showed the Bronco II tipped at speeds at which other similar vehicles remained stable.<sup>16</sup> Five years

after the sale of the Bronco II at issue, the National Highway Traffic Safety Administration (“NHTSA”) published the results of five different stability tests on fifty-seven vehicles, and the Bronco II rated worst overall.<sup>17</sup> Ford did not issue post-sale warnings to consumers regarding the stability problems in the Bronco II.<sup>18</sup> The court thus found issues of fact remained for trial as to Ford’s post-sale duty to warn of the dangerous propensities of the Bronco II.<sup>19</sup>

## **2. Knowledge Derived from Advances in State of the Art**

While there appear to be no Georgia cases addressing the specific issue, it is generally recognized that there is no duty for manufacturers to warn all foreseeable users about advances in state of the art or of a better design that was not available when the product entered the stream of commerce. This is because “safety technology with regard to mass-produced items is continually evolving, and a rule requiring a continuing duty to warn might discourage manufacturers from developing safer products.”<sup>20</sup> A manufacturer would have no incentive to improve its products if making safer products exposed manufacturers to liability for products they already sold.<sup>21</sup> Therefore, when deciding cases involving a manufacturer’s alleged post-sale knowledge of a product hazard, courts should first determine whether the post-sale knowledge is a product of merely staying current with technological or design advances in the industry (which should not give rise to a post-sale duty to warn) or was obtained through reports of injuries or customer complaints (which may give rise to such a duty, as shown above).

## **3. Manufacturer’s Duty Is Nondelegable**

One federal court in Georgia held that a manufacturer cannot delegate to a third party the manufacturer’s duty to warn of a defect or danger, at least where a plaintiff proceeds under a strict liability theory.<sup>22</sup> In *White v. W.G.M. Safety Corp.*,<sup>23</sup> the plaintiff was a sandblaster and painter. He became permanently disabled with silicosis caused by exposure to silica dust while sandblasting.<sup>24</sup> He sued the manufacturers and sellers of sandblasting protective equipment used at his place of employment for failing to warn him of dangers arising from the use of their respiratory equipment.<sup>25</sup> The defendants argued they had no duty to warn because the plaintiff’s employer was responsible by law for training the plaintiff in the proper use and maintenance of respirator protection and to monitoring the adequacy of respiratory protective equipment.<sup>26</sup> The court rejected the defendants’ argument on a strict liability theory, finding that “[t]he manufacturer cannot delegate to such a third party the duty to warn of a defect or danger.”<sup>27</sup> The court recognized, however, that no Georgia state court had specifically addressed this issue or reached this conclusion. As to a negligence theory, the court held that, even though the plaintiff’s employer had a legal duty to warn the plaintiff, the imposition of this duty did not provide an absolute defense to the manufacturer. Rather, the question was whether the employer’s intervening failure to warn became the sole proximate cause of the plaintiff’s injury.

### **B. Duties of Non-Manufacturer Sellers**

Unlike a manufacturer, a product distributor or seller generally has no post-sale duty to warn.<sup>28</sup> In *Corbin v. Farmex, Inc.*,<sup>29</sup> for example, the plaintiff motorist was injured when a trailer became

unhitched from its tractor and collided with her automobile. The trailer's hitch pin was manufactured by a corporation whose assets Farmex subsequently purchased.<sup>30</sup> After the asset purchase, Farmex introduced a specific hitch pin into the stream of commerce in its capacity as a wholesale vendor to a distributor in Georgia.<sup>31</sup> The plaintiff argued Farmex was liable for its own negligence in failing to warn of foreseeable dangers from reasonable use of the hitch pin.<sup>32</sup> The court held there was no evidence Farmex knew or should have known of any defect in the hitch pin, which Farmex did not manufacture, nor was there any prior claim that a failure of the hitch pin resulted in property damage or personal injury.<sup>33</sup> Thus, the danger was unforeseeable as a matter of law, and Farmex could not be held liable for failure to warn.<sup>34</sup>

On the other hand, a seller's actual knowledge of its customer's expected use of a product and of injuries to its customer's employees while using the product can give rise to the seller's post-sale duty to warn of the dangerous nature of the product. In *Boyce v. Gregory Poole Equip. Co.*,<sup>35</sup> the plaintiff's decedent was an employee of EcoLab in 1998 when he was fatally injured while operating a stand-up forklift that had an open back and sides.<sup>36</sup> EcoLab had no prior experience with stand-up forklifts, so the seller made fifteen to twenty visits to EcoLab to determine the plant's configuration, use, and options needed before EcoLab purchased the forklifts from the seller in 1994.<sup>37</sup> In 1995, the manufacturer and many of its dealers recommended that rear guard-doors be included on its stand-up forklifts as an important safety feature.<sup>38</sup> In 1996, an employee of EcoLab was injured using one of the stand-up forklifts without a rear guard-door, after which EcoLab contacted

the seller to inquire whether there were safety devices to prevent such an injury occurring in the future.<sup>39</sup> The seller provided EcoLab with written materials stating the rear guard-doors were dangerous and should not be used, and EcoLab consequently elected not to purchase the rear guard-door for its forklifts.<sup>40</sup> After the plaintiff's decedent was injured in 1998, the plaintiff sued the seller for failing to warn of the dangerous nature of the stand-up forklifts.<sup>41</sup> The court denied summary judgment to the seller, finding issues of fact existed as to the seller's failure to advise EcoLab at the point of sale in 1994 of the availability of a rear guard-door as a safety device and its failure to warn EcoLab of the inherent danger of using a stand-up forklift without a rear guard-door in close proximity to other regular forklifts, given the seller's detailed investigation into the expected use of forklifts at EcoLab's plant.<sup>42</sup> The court further found issues of fact existed as to the seller's post-sale failure to warn in 1996, when it learned of the injury to EcoLab's first injured employee and after EcoLab requested information about how to prevent such injuries in the future.<sup>43</sup>

### **C. Corporate Successors' Post-Sale Duty to Warn**

Corporations that acquire the assets of other corporations are liable for harm caused by defective products sold by predecessors only in limited circumstances, generally where the successor knows or reasonably should know the product poses a substantial risk of harm.<sup>44</sup> In *Silver v. Bad Boy Enterprises LLC*,<sup>45</sup> for instance, the court held the successor corporation that took over manufacturing operations for *new* models of four-wheel utility vehicles did not assume any duty to warn previous customers regarding hazards in its

predecessor's vehicles that the successor did not manufacture or sell.<sup>46</sup> Such "open-ended liability" cannot be imposed upon the successor corporation for vehicles it "never manufactured, never sold, and never assumed liability for in [its] purchase of [the predecessor's] assets."<sup>47</sup>

#### **D. Factors Determining Whether a Post-Sale Duty to Warn Exists**

There is no bright-line rule or set of factors to which Georgia courts will look in determining whether a manufacturer or seller had sufficient knowledge of a product danger to give rise to its post-sale duty to warn. In one oft-cited case, the Supreme Court of Kansas attempted to provide some guidance by holding a case-by-case analysis should include examination of such factors as:

(1) the nature of the harm that may result from use without notice, (2) the likelihood that harm will occur (Does future continuing use of the product create a significant risk of serious harm which can be lessened if a post-sale warning is given?), (3) how many persons are affected, (4) the economic burden on the manufacturer of identifying and contacting current product users (Does the manufacturer have an ongoing relationship with the purchaser or other knowledge of the identity of the owner of the product which provides a practical way of providing a post-sale warning?), (5) the nature of the industry, (6) the type of product involved, (7) the number of units

manufactured or sold, and (8) steps taken other than giving of notice to correct the problem.<sup>48</sup>

New York's highest court similarly held that a post-sale duty to warn of dangers associated with the use of a product "will generally arise where a defect or danger is revealed by user operation and brought to the attention of the manufacturer; the existence and scope of such a duty are generally fact-specific."<sup>49</sup> Although there are no set guidelines to determine at what point a manufacturer will be deemed to know or reasonably should know its product poses a substantial risk of harm, a review of case law from other jurisdictions reveals certain general themes. Whether a Georgia court would apply these same factors is not known.

#### **E. Manufacturer's Actual Knowledge of Other Accidents**

Other states have found a manufacturer can have a duty to warn users of product-related dangers if the manufacturer has actual knowledge of a sufficient number of other substantially similar accidents involving the product.<sup>50</sup> In *Esparza v. Skyreach Equip., Inc.*,<sup>51</sup> for instance, a manlift tipped over, causing the plaintiff to fall fifty feet and suffer severe injuries. The accident occurred because of the failure of circuit cards in the manlift's electrical system, something that had happened three years previously. Given the manufacturer's awareness of the problem from the prior incident, the seriousness of the danger presented by the manlift raising workers up to 110 feet above the ground, the electrical system being the only means of preventing the manlift tipping over, and the relative ease with which the manufacturer could have issued warnings to replace the electrical

system's old circuit cards with new ones to avoid such dangers, the manufacturer could be liable for failing to issue such warnings.<sup>52</sup>

In addition, in *Lovick v. Wil-Rich*,<sup>53</sup> in the ten years before the plaintiff's accident, Wil-Rich received nine reports that wings of its cultivators had fallen and injured the operators. Five years before the plaintiff's accident, Wil-Rich began to affix a warning label to its cultivators to caution operators of the danger of going under the wing to remove pins. One year after the plaintiff's accident, Wil-Rich began a campaign to notify owners of its cultivators of the danger of falling wings. The plaintiff produced evidence that a competitor of Wil-Rich instituted a safety program ten years earlier for its similarly designed cultivator, which included efforts to locate cultivator owners and retrofit existing cultivators with a wing safety latch and an upgraded warning label. Wil-Rich knew of its competitor's post-sale warning program in 1987, but did not institute its own post-sale warning program until 1994. The court held Wil-Rich's knowledge of numerous similar accidents involving its cultivators, and its knowledge that other manufacturers of similar cultivators were taking steps to warn users of the dangers, made it liable for failing to institute an adequate post-sale warning campaign.<sup>54</sup>

Once a manufacturer learns of other accidents involving its product, therefore, it might not be sufficient merely to add new warning labels to unsold products or to redesign the product. When a post-sale duty to warn arises, the manufacturer must take reasonable steps to notify identifiable existing users of the danger. What constitutes reasonable notice under the circumstances is generally a question of

fact for the jury, although the scope of this analysis in Georgia is unclear.<sup>55</sup> In *Novak v. Navistar Int'l Transp. Corp.*,<sup>56</sup> for instance, the manufacturer's post-sale knowledge of the danger in the gear selector in its farm tractor was proven by evidence the manufacturer, years after the sale of the tractor at issue, started to make a replacement part kit that eliminated the hazard associated with the gear selector. After the design change, however, the manufacturer made no effort to recall the old tractors or to inform owners or dealers of the problem. The court held that the manufacturer's production of the replacement kit gave rise to its duty to warn users of the tractors of the potential danger that could result from their continued use of the original mechanism.<sup>57</sup>

#### **F. Size of the Market and Number of Units Sold**

Even if the manufacturer has knowledge of other accidents sufficient to give rise to its post-sale duty to warn, the Restatement (Third) states that a manufacturer has a duty to provide a post-sale warning only if users of its product can be identified and if a warning can be effectively communicated to them.<sup>58</sup> Importantly, the post-sale duty to warn of a manufacturer of common consumer goods will differ greatly from the duty of a manufacturer of products sold in a small, specialized market in which customers are more easily identifiable.

For instance, ordinarily courts refuse to impose a continuing duty to warn on manufacturers of common, mass-produced products, reasoning that such a duty would be unduly burdensome, if not impossible, and would create disincentives to develop safer products.<sup>59</sup> Other courts clarify that mass production and wide distribution of a product may

limit the manufacturer's duty, but do not defeat the duty's existence altogether. In *Hollingsworth & Vose Co. v. Connor*,<sup>60</sup> the court acknowledged it would be unreasonable to require the maker of a "mass-produced, widely distributed product to track down every purchaser and user," but held "it may be appropriate in certain cases to require a manufacturer to take reasonable steps under the circumstances to widely disseminate notice of the danger."<sup>61</sup> When dealing with mass-produced consumer products, for which direct communication to users might not be feasible, "reasonable notice under the circumstances" might require the manufacturer to provide public notices in newspapers or magazines.<sup>62</sup>

A post-sale duty to warn might exist, however, where the manufacturer of a mass-produced consumer product has actual knowledge of the identity of the current owner of the product. *Dixon v. Jacobsen Mfg. Co.*,<sup>63</sup> involved a snow-thrasher made in 1965 that the plaintiff's father purchased in 1986 at a garage sale. After buying it, he telephoned the manufacturer to request information about it, and the manufacturer sent him the 1965 owner's and parts manuals. The plaintiff contended more recent manuals had warnings about a hidden hazard that were more explicit than warnings in the 1965 manual. Reversing a judgment for the manufacturer, the court noted that in cases in which courts had been reluctant to impose post-sale duties to warn the courts had been concerned about the burden on manufacturers to find out the identity of current owners. "No such policy consideration exists where the owner is known."<sup>64</sup>

On the other hand, a relatively narrow market for a product will make identifying its ultimate users less burdensome. The court in *Jones v. Bowie*

*Indus., Inc.*,<sup>65</sup> noted that the manufacturer's hydromulchers were specialized machines with a limited number of users, so that advertisements in trade publications could have effectively contacted or warned users. The manufacturer also kept a list of hydromulcher parts customers, yet made no effort to send warnings to them. Similarly, the Pennsylvania Supreme Court in *Walton v. Avco Corp.*,<sup>66</sup> held a helicopter manufacturer liable for post-sale failure to warn of a defect in an engine, finding that, since helicopters are not mass-produced or mass-marketed products that can be impossible to track or difficult to locate, the manufacturer could have communicated a warning through companies that service helicopters. *Patton v. Hutchinson Wil-Rich Mfg.*<sup>67</sup> involved a cultivator sold in 1977 that the plaintiff was repairing when he was injured in 1990. In finding the manufacturer had a duty to warn, the Kansas Supreme Court noted the manufacturer had evidence of similar accidents involving its cultivator as early as 1983 and had sold its product through an established network of retailers that would have made it relatively easy to notify them and their customers of dangers in the cultivator that it discovered after the sale.<sup>68</sup>

### G. Frequency and Severity of Injuries

According to the Restatement, a manufacturer has no post-sale duty to warn of product-related accidents that occur infrequently and are not likely to cause substantial harm.<sup>69</sup> On the other hand, in *Jones v. Bowie Indus., Inc.*,<sup>70</sup> a few years after Bowie first manufactured and distributed its hydromulchers, it became aware that workers were using their feet to force mulch into the opening and were suffering severe injuries as a

result. The court held that, despite the relative infrequency of severe accidents involving the hydromulcher, infrequent, severe accidents can still cause substantial harm and will suffice to impose a post-sale duty to warn on the manufacturer.<sup>71</sup>

In Georgia, whether a manufacturer has a post-sale duty to warn of dangers related to its product, therefore, will depend on where the particular facts fall along the spectrum of liability, the assessment of which is highly fact-intensive. At one end of the spectrum, the manufacturer of a highly specialized product sold in a narrow market through few distributors that has actual knowledge of many serious injuries resulting to users of the product likely will have a duty to warn users of the dangers related to its product. At the other end of the spectrum, the manufacturer of a mass-produced consumer product that has caused few and relatively minor injuries likely will have no duty to warn. What is certain is that courts will look to whether the manufacturer acted reasonably under the circumstances. The cases cited above will certainly inform, but by no means control, the resolution of these issues in Georgia.

### **III. No Duty to Warn of Open and Obvious Dangers or Dangers of Which the Plaintiff Was Already Aware**

A post-sale duty to warn should not exist if the danger was open and obvious, because manufacturers and sellers have no duty to warn of a product-connected danger that is obvious or generally known.<sup>72</sup> The same rule applies where the user knows or should know of the danger or should in using the product discover the danger.<sup>73</sup> In *Liriano v. Hobart Corp.*,<sup>74</sup> for instance, the court held the manufacturer had no duty to

warn against post-sale product modifications (here, the removal of safety guards from meat grinding equipment) the danger of which was obvious through general knowledge, observation or common sense. The court held that a manufacturer's warning would have been superfluous given the injured party's actual knowledge of the specific hazard that caused the injury.<sup>75</sup>

In *Habecker v. Clark Equip. Co.*,<sup>76</sup> a forklift operator was killed when he was thrown out of the forklift's cab and crushed beneath the machine. The plaintiffs argued that when the manufacturer began making new forklifts and retrofitting older models with restraining devices, it should have warned users of its older machines they may not be as safe without such devices. The court rejected the argument, pointing out that the absence of restraints was an open and obvious, patent danger against which the manufacturer had no duty to warn.<sup>77</sup>

## **IV. Evidence of Manufacturer's Post-Sale Knowledge of Danger**

### **A. Substantially Similar Occurrences**

A plaintiff might attempt to introduce evidence of previous accidents involving a product as proof of the manufacturer's knowledge of a product danger to support a post-sale duty to warn claim. To admit other accidents, the plaintiff must show they are substantially similar to the accident involved in the lawsuit. In Georgia, "[s]imilar acts or omissions on other and different occasions are not generally admissible to prove like acts or omissions at a different time or place. However, in product liability cases, an exception to the general rule has developed, and in some cases evidence of other substantially similar incidents involving the product is admissible and



relevant to the issues of notice of a defect and punitive damages.”<sup>78</sup> “In order to show substantial similarity, the plaintiff must come forward with evidence (1) that the products involved in the other incidents and the present incident shared a common design and manufacturing process; (2) that the products suffered from a common defect; and (3) that any common defects shared the same causation.”<sup>79</sup> In *Ford Motor Co. v. Reese*,<sup>80</sup> the other incidents introduced by the plaintiff all involved a Ford vehicle with a seatback with the same design as the Ford Tempo seatback at issue that similarly collapsed backward in rear impact collisions.<sup>81</sup> The court held the other incidents met the substantial similarity test and were admissible to show Ford had knowledge or notice of the alleged seat defect such that it had a duty to issue post-sale warnings.<sup>82</sup>

Conversely, defendants can seek to introduce evidence of the *absence* of other accidents in defense of a post-sale failure to warn case. In cases involving mass produced consumer products, for instance, a defendant can introduce evidence that thousands of persons used the item and none was injured.<sup>83</sup> In any case, evidence of repeated use by others without incident of the specific item that injured the plaintiff, under substantially similar circumstances, can be relevant to show the absence of a duty to warn.<sup>84</sup>

### **B. Subsequent Remedial Measures**

If a manufacturer issues a post-sale warning or recall notice, a plaintiff might seek to introduce evidence of such post-sale remedial measures as proof of the products’ defect or of the manufacturer’s awareness of the defects or danger.<sup>85</sup> A “subsequent remedial measure” can take many different forms and may include product design

changes,<sup>86</sup> warning bulletins,<sup>87</sup> and recall letters.<sup>88</sup> In Georgia, evidence of subsequent remedial measures is governed by O.C.G.A. § 24-4-407, which provides:

In civil proceedings, when, after an injury or harm, remedial measures are taken to make such injury or harm less likely to recur, evidence of the remedial measures shall not be admissible to prove negligence or culpable conduct but may be admissible to prove product liability under subsection (b) or (c) of Code Section 51-1-11. The provisions of this Code section shall not require the exclusion of evidence of remedial measures when offered for impeachment or for another purpose, including, but not limited to, proving ownership, control, or feasibility of precautionary measures, if controverted.

Whether such evidence is admissible in a particular action depends initially on whether the plaintiff’s claim is based in negligence or strict liability. Evidence of subsequent remedial measures is generally inadmissible in a negligence action for the purpose of showing the defendant recognizes and admits its potential liability.<sup>89</sup> There are several instances in which evidence of subsequent remedial measures is admissible in a negligence action, however, “such as when the subsequent repair, change, or modification tends to prove some fact of the case on trial (other than belated awareness of negligence, of course), to show contemporary knowledge

of the defect, causation, a rebuttal of a contention that it was impossible for the accident to happen in the manner claimed, and so on.”<sup>90</sup> Such evidence may also be admitted where the feasibility of repair or modification is an issue.<sup>91</sup> Evidence of subsequent remedial measures is admissible, however, in strict liability actions.<sup>92</sup> In many actions the plaintiff will assert both negligence and strict liability claims. Thus, the jury must be carefully instructed as to the proper use and limits of evidence of subsequent remedial measures so the jury does not consider such evidence on the issue of the manufacturer’s negligence.<sup>93</sup>

Even if evidence of subsequent remedial measures is admissible, the plaintiff must first establish its relevance by showing through independent evidence that the product involved in causing his injury is the same product covered by the remedial measure. In the absence of such a foundation, the evidence is irrelevant and inadmissible. In *Rose v. Figgie Int’l, Inc.*,<sup>94</sup> the plaintiff sought to introduce into evidence the defendant’s notice recalling its fire extinguisher to establish the existence of a defect in her extinguisher, which had been destroyed in the explosion that caused the plaintiff’s injuries. The court admitted the evidence on the condition the plaintiff first proved, through circumstantial evidence, that her extinguisher had the same defect as the recalled extinguishers.<sup>95</sup> In *Cadwell v. General Motors Corp.*,<sup>96</sup> on the other hand, the court rejected the plaintiff’s attempt to introduce the manufacturer’s recall letter relating to its Chevy Blazer, because the plaintiff’s argument was merely that “IF her vehicle had this malfunction it COULD HAVE caused her collision.”<sup>97</sup> The recall letter was not relevant in the absence of other evidence that her Blazer had the same defect as that covered by the recall letter, that her

accident was caused by that defect, and that the defect was present in her Blazer when it left the manufacturer’s control.<sup>98</sup>

## V. Duty to Recall

Unlike the continuing duty to warn of a danger arising from a product after its sale or distribution, “absent special circumstances, no common law duty exists under Georgia law requiring a manufacturer to recall a product after the product has left the manufacturer’s control. ... [A] manufacturer’s duty to implement alternative safer designs is limited to the time the product is manufactured, not months or years later when technology or knowledge may have changed. Any other rule would render a manufacturer a perpetual insurer of the safety of its products, contrary to established Georgia law.”<sup>99</sup> The continuing nature of the post-sale duty to warn was expressly sanctioned by the General Assembly in O.C.G.A. § 51-1-11(c).<sup>100</sup> “As such, when the General Assembly intends for Georgia law to impose a continuing duty upon product manufacturers, it knows how to do so, and we must presume that its failure to [impose a continuing duty to recall] was a matter of considered choice.”<sup>101</sup>

The court in *Ford Motor Co. v. Reese* addressed the “special circumstances” that might trigger a manufacturer’s duty to recall. First, if a manufacturer chooses to recall a product voluntarily, Georgia law imposes a duty upon the manufacturer to exercise ordinary care in conducting the recall campaign.<sup>102</sup> For instance, in *Silver v. Bad Boy Enterprises LLC*,<sup>103</sup> the plaintiffs’ thirteen-year-old daughter was driving a four-wheel vehicle when it suddenly accelerated, tipped over and seriously injured her leg.<sup>104</sup> Prior to her accident, the vehicle had been subject to three voluntary recalls by the manufacturer for

unintended acceleration.<sup>105</sup> Although the owner of the vehicle had purchased it directly from the defendants' factory, there was no evidence he ever received a recall notice or that one was ever sent to him.<sup>106</sup> The court thus denied the defendants' motion for summary judgment as to the plaintiffs' failure to recall claim, finding there was evidence the defendants undertook a voluntary duty to conduct a recall program related to the vehicle but failed to exercise ordinary care in conducting the recall program.<sup>107</sup>

Second, a duty to recall will arise where a federal or state statute or governmental agency requires the manufacturer to recall the product.<sup>108</sup> In fact, "[i]ssues relating to product recalls are best evaluated by governmental agencies capable of gathering adequate data regarding the ramifications of such undertakings."<sup>109</sup> In one oft-cited case, the Supreme Court of Michigan held, "the duty to repair or recall is more properly a consideration for administrative agencies and the [l]egislature who are better able to weigh the benefits and costs involved in locating, recalling, and retrofitting products, as well as other economic factors affecting businesses and consumers. Courts have traditionally not been suited to consider the economic effect of such repair or recall campaigns."<sup>110</sup> "[W]hen appropriate, i.e., when the protection of vital interests was deemed necessary, policymakers have explicitly delegated such authority to administrative agencies. ... [I]n the appropriate case, failure to follow a recall order mandated by statute and agency might provide the basis for a duty to recall in a negligence action."<sup>111</sup> "Cases that have imposed a duty to repair or recall have been few and have primarily been reserved for extraordinary cases, i.e., airplane safety, in which the potential

danger is severe and widespread" and in which manufacturers can easily locate previously sold products.<sup>112</sup>

Important public policy concerns show why there is no continuing duty to recall upon manufacturers in Georgia.

Because the cost of locating, recalling, and replacing mass-marketed products can be enormous and will likely be passed on to consumers in the form of higher prices, the recall power should not be exercised without extensive consideration of its economic impact. Courts, however, are constituted to define individual cases, and their inquiries are confined to the particular facts and arguments in the cases before them. Decisions to expand a manufacturer's post-sale duty beyond making reasonable efforts to warn product users about newly discovered dangers should be left to administrative agencies, which are better able to weigh the costs and benefits of such action.<sup>113</sup>

Generally, any recall duty, to the extent one exists, is the manufacturer's obligation and not that of a subsequent seller.<sup>114</sup> A seller generally has no duty to issue a recall warning and to remediate a dangerous known defect in design, because it has a duty only to warn of dangers actually or constructively known at the time of sale.<sup>115</sup> Again, although a seller is not obligated to conduct a recall program, once it undertakes to do so, it has a duty to exercise ordinary care in

carrying out the recall.<sup>116</sup> In *Blossman Gas Co. v. Williams*, for example, the thermostat on the plaintiffs' water heater had been the subject of a recall in which the manufacturer mailed a notice to dealers nationwide requesting them to provide their customer lists so the manufacturer could notify owners about the defective thermostats.<sup>117</sup> The defendant dealer, after receiving the manufacturer's notice, requested the manufacturer to provide it with copies of the recall notice and stated it would send a copy of the notice to each of its customers in their bills.<sup>118</sup> The manufacturer sent the dealer copies of the recall notice, but the dealer never sent them to its customers.<sup>119</sup> The court affirmed a jury verdict for the plaintiffs, finding that, because the dealer had voluntarily agreed to notify its customers of a product recall and to mail the notices the manufacturer provided, the dealer's failure to perform its voluntarily assumed task was negligence.<sup>120</sup> "Although the dealer is not obligated to conduct the recall program, once it undertakes to do so a duty devolves upon the dealer to exercise ordinary care, ...."<sup>121</sup>

## VI. Apportionment of Liability

Product liability cases may involve more than one potentially liable party, as the conduct of others besides the manufacturer may be a contributing cause of the plaintiff's injury.<sup>122</sup> O.C.G.A. § 51-12-33(b) requires the trier of fact to apportion the award of damages in any tort action among all persons who are liable according to the percentage of fault of each person for the plaintiff's injuries, regardless of whether they are parties to the suit and even when the plaintiff bears no fault, and including parties who have settled with the plaintiff.<sup>123</sup> When apportionment is required, the defendants have no right of contribution, and

apportioned damages are not subject to the rule of joint and several liability.<sup>124</sup>

Because O.C.G.A. § 51-12-33(b) reduces a defendant's liability exposure if it can show allocation of liability to other responsible persons is appropriate, defendants in products liability actions have an incentive "to bring in as many parties and non-parties as feasible among whom fault can be apportioned."<sup>125</sup> "A defendant's ability to avail itself of this strategy[, however,] is limited by its ability to prove that the co-defendants and non-parties are at least partially liable to the plaintiff."<sup>126</sup> This places the named defendant in the unusual position of having to prove a products liability case against another potentially liable person.

Questions of causation and apportionment of damages are uniquely for the trier of fact. In *Ontario Sewing Mach. Co., Ltd. v. Smith*,<sup>127</sup> the Georgia Supreme Court recognized that "the failure of a manufacturer's customer to comply with a reasonable recall program instituted by the manufacturer may constitute an intervening act sufficient to break any connection between a wrongful act by the manufacturer and the injured party and thus may be sufficient to become the sole proximate cause of the injuries in question."<sup>128</sup> But whether the manufacturer's conduct with respect to its recall was the proximate cause of the plaintiff's injuries is an issue for the jury to resolve, as are questions regarding the reasonableness of the recall (which was very general) and the foreseeability of whether the plaintiff's employer would comply with it (where the manufacturer knew the employer was not heeding its warning and that workers were still using the machine).<sup>129</sup> Thus, it was for the jury to decide whether the proximate cause of the plaintiff's injury was solely the acts of the manufacturer, or solely the acts of the

employer, or a combination of those acts.<sup>130</sup>

## **VII. Conclusion**

Georgia courts recognize the practical limitations on their ability to expand post-sale duties of product manufacturers and sellers, believing legislative and administrative bodies are best suited to determine what post-sale duties, if any, a manufacturer has beyond issuing adequate warnings.<sup>131</sup> Georgia law nevertheless does impose upon manufacturers, and to a lesser extent sellers, certain continuing duties to make reasonable efforts to warn product users about newly discovered dangers under appropriate circumstances. What are “reasonable efforts” under the circumstances of each case is a highly fact-specific inquiry and dependent upon a number of factors that have not yet been clearly articulated in Georgia. Product manufacturers and sellers accordingly should remain informed of changes in this area of the law and should be aware they may have continuing duties to warn their customers long after the products have been designed, manufactured, sold and left their control.

## End Notes

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<sup>1</sup> Georgia case law follows several of the principles set forth in the Restatement (Third) of Torts, Products Liability, and courts might look to that treatise for guidance, but Georgia has not expressly adopted Sections 10 (post-sale failure to warn), 11 (failure to recall) or 13 (successor's post-sale failure to warn) of the Restatement (Third). See *Ford Motor Co. v. Reese*, 300 Ga. App. 82, 86, 684 S.E.2d 279, 284 (2009) (citing for support Restatement (Third) of Torts, Products Liability § 11 as not recognizing a common law claim for negligent failure to recall except in limited circumstances).

<sup>2</sup> See *Reese*, 300 Ga. App. at 85, 684 S.E.2d at 284; *Smith v. Ontario Sewing Mach. Co., Ltd.*, 249 Ga. App. 364, 367, 548 S.E.2d 89, 94 (2001) (physical precedent).

<sup>3</sup> *Ontario Sewing Mach. Co.*, 249 Ga. App. at 368, 548 S.E.2d at 95 (citing *Chrysler Corp. v. Batten*, 264 Ga. 723, 724, 450 S.E.2d 208, 211 (1994); *Love v. Whirlpool Corp.*, 264 Ga. 701, 704, 449 S.E.2d 602, 606 (1994); *Mack Trucks v. Conkle*, 263 Ga. 539, 544, 436 S.E.2d 635, 640 (1993); *DeLoach v. Rovema Corp.*, 241 Ga. App. 802, 804, 527 S.E.2d 882, 883 (2000); *Bishop v. Farhat*, 227 Ga. App. 201, 206, 489 S.E.2d 323, 328 (1997)).

<sup>4</sup> See *Chrysler Corp. v. Batten*, 264 Ga. 723, 724, 450 S.E.2d 208, 211 (1994) (“[T]he duty to warn arises whenever the manufacturer knows or reasonably should know of the danger arising from the use of its product.”).

<sup>5</sup> See *Batten*, 264 Ga. at 727, 450 S.E.2d at 213.

<sup>6</sup> See *Johnson v. Ford Motor Co.*, 281 Ga. App. 166, 173, 637 S.E.2d 202, 207 (2006); *Hunter v. Werner Co.*, 258 Ga. App. 379, 383, 574 S.E.2d 426, 431 (2002). O.C.G.A. § 51-1-11(b)(2) and (c) bar product liability actions based on strict liability and negligence after ten years from the date of the first sale of the product that causes the alleged injury. Negligent failure to warn claims, however, are expressly excluded from Georgia's ten-year statute of repose. See *Batten*, 264 Ga. at 727, 450 S.E.2d at 213; O.C.G.A. § 51-1-11(c). The statutory language recognizes the possibility that a manufacturer might not discover a danger or defect in its product, triggering its duty to warn, until after the statute of repose runs, and allows a plaintiff to bring a post-sale failure to warn claim after the statute expires. See *Batten*, 264 Ga. at 727, 450 S.E.2d at 213; *Hunter*, 258 Ga. App. at 383-84, 574 S.E.2d at 431.

<sup>7</sup> See *Ontario Sewing Mach. Co.*, 249 Ga. App. at 368, 548 S.E.2d at 95.

<sup>8</sup> *Hunter v. Werner Co.*, 258 Ga. App. 379, 574 S.E.2d 426 (2002).

<sup>9</sup> See *id.* at 379, 574 S.E.2d at 428.

<sup>10</sup> See *id.* at 380, 574 S.E.2d at 428.

<sup>11</sup> See *id.* at 385, 574 S.E.2d at 432.

<sup>12</sup> See *id.*, 574 S.E.2d at 432.

<sup>13</sup> See *id.*, 574 S.E.2d at 432.

<sup>14</sup> See *id.*, 574 S.E.2d at 432.

<sup>15</sup> *Watkins v. Ford Motor Co.*, 190 F.3d 1213 (11th Cir. 1999).

<sup>16</sup> See *id.* at 1219.

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*

<sup>19</sup> See *id.*

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<sup>20</sup> TIMOTHY E. TRAVERS & ROBERT D. HURSH, *AMERICAN LAW OF PRODUCTS LIABILITY* § 32:75 (3d ed. 1987) (citing *Carrizales v. Rheem Mfg. Co., Inc.*, 226 Ill. App. 3d 20, 168 Ill. Dec. 169, 589 N.E.2d 569 (1st Dist. 1991)); *see also* *Wilson v. United States Elevator Corp.*, 972 P.2d 235 (Ariz. Ct. App. 1998) (holding a manufacturer of elevator had no continuing duty to notify known purchasers of technological advancements in door-closing mechanisms).

<sup>21</sup> *See* Douglas R. Richmond, *Expanding Products Liability: Manufacturers' Post-Sale Duties to Warn, Retrofit, and Recall*, 36 IDAHO L. REV. 7, 22 (1999) (citing *Kozlowski v. John E. Smith's Sons Co.*, 275 N.W.2d 915, 923-24 (Wis. 1979)); Edward J. Higgins, *Gone but Not Forgotten: Manufacturers' Post-Sale Duties to Warn or Recall*, MICH. B.J., June 1999, at 570, 572.

<sup>22</sup> *See* *White v. W.G.M. Safety Corp.*, 707 F. Supp. 544, 546-47 (S.D. Ga. 1988), *aff'd*, 891 F.2d 906 (11th Cir. 1989).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 545.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 545-46.

<sup>27</sup> *Id.* at 547.

<sup>28</sup> *See* *DeLoach v. Rovema Corp.*, 241 Ga. App. 802, 804–05, 527 S.E.2d 882, 883–84 (2000) (warning that case law “should not be read as erecting a post-sale duty to warn on the part of either a product seller or its successor”); *Bishop v. Farhat*, 227 Ga. App. 201, 206, 489 S.E.2d 323, 328 (1997) (stating distributor “could be held liable for negligent failure to warn only if, at the time of the sale, it had ‘actual or constructive knowledge’ that its product created a danger for the consumer”).

<sup>29</sup> *Corbin v. Farmex, Inc.*, 227 Ga. App. 620, 490 S.E.2d 395 (1997), *rev'd on other grounds*, 269 Ga. 548, 501 S.E.2d 802 (1998).

<sup>30</sup> *Id.* at 620, 490 S.E.2d at 397.

<sup>31</sup> *Id.*, 490 S.E.2d at 397.

<sup>32</sup> *Id.* at 623, 490 S.E.2d at 399.

<sup>33</sup> *Id.*, 490 S.E.2d at 399.

<sup>34</sup> *Id.*, 490 S.E.2d at 399.

<sup>35</sup> *Boyce v. Gregory Poole Equip. Co.*, 269 Ga. App. 891, 605 S.E.2d 384 (2004).

<sup>36</sup> *Id.* at 891, 605 S.E.2d at 386.

<sup>37</sup> *Id.* at 892, 605 S.E.2d at 387.

<sup>38</sup> *Id.*, 605 S.E.2d at 387.

<sup>39</sup> *Id.*, 605 S.E.2d at 387.

<sup>40</sup> *Id.* at 892-93, 605 S.E.2d at 387.

<sup>41</sup> *Id.* at 894, 605 S.E.2d at 388.

<sup>42</sup> *Id.*, 605 S.E.2d at 388.

<sup>43</sup> *Id.* at 897, 605 S.E.2d at 390.

<sup>44</sup> *See* *DeLoach v. Rovema Corp.*, 241 Ga. App. 802, 803, 527 S.E.2d 882, 883 (2000).

<sup>45</sup> *Silver v. BAD BOY ENTERPRISES LLC*, 907 F. Supp. 2d 1351 (M.D. Ga. 2012).

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<sup>46</sup> *Id.* at 1358-59.

<sup>47</sup> *Id.* at 1358.

<sup>48</sup> *Id.*, *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 253 Kan. 741, 761-62, 861 P.2d 1299, 1314-15 (1993).

<sup>49</sup> *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 240, 700 N.E.2d 303, 307 (1998) (citing *Kriz v. Schum*, 75 N.Y.2d 25, 35-36 (1989) (upholding plaintiff's claim based on a post-sale failure to warn); *Haran v. Union Carbide Corp.*, 68 N.Y.2d 710, 712 (1986) (no notice to manufacturer of a danger or defect in the product); *Cover v. Cohen*, 61 N.Y.2d 261, 274-77 (1984) (technical service bulletin issued by manufacturer and sent to vendor 13 months after delivery relevant and admissible)).

<sup>50</sup> *See, e.g., Unified School Dist. No. 490, Butler County v. Celotex Corp.*, 6 Kan. App. 2d 346, 629 P.2d 196 (1981) (evidence of other product-related failures occurring after sale in question is admissible to show manufacturer's knowledge of defects that gives rise to duty to warn); *see also Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988) (continuing post-sale duty to warn existed where manufacturer knew of 134 incidents with serious injury or death as result); *Cover v. Cohen*, 61 N.Y.2d 261, 473 N.Y.S.2d 378 (1984) (post-sale duty to warn appears to be function of degree of danger problem involves and number of instances reported).

<sup>51</sup> *Esparza v. Skyreach Equip., Inc.*, 103 Wash. App. 916, 15 P.3d 188 (2000).

<sup>52</sup> *Id.* at 935-36, 15 P.3d at 199.

<sup>53</sup> *Lovick v. Wil-Rich*, 588 N.W.2d 688 (Iowa 1999).

<sup>54</sup> *Id.* at 695-96.

<sup>55</sup> *See Hollingsworth & Vose Co. v. Connor*, 136 Md. App. 91, 121, 764 A.2d 318, 334 (2000); *see also Crowston v. Goodyear Tire & Rubber Co.*, 521 N.W.2d 401, 407-08 (N.D. 1994) (“[S]imply because a product is mass produced and widely distributed does not totally absolve a manufacturer of a post-sale duty to warn”).

<sup>56</sup> *Novak v. Navistar Intern. Transp. Co.*, 46 F.3d 844 (8th Cir. 1995).

<sup>57</sup> *Id.* at 850.

<sup>58</sup> *See* RESTATEMENT (THIRD) OF TORTS, PRODUCTS LIABILITY § 10(b).

<sup>59</sup> *See Quist v. Sunbeam Prods., Inc.*, No. 08-5261, 2010 WL 1665254, \*5 (D. Minn. Apr. 22, 2010) (“[I]t would be unreasonable to expect” that a manufacturer of products like heating pads that are mass-produced and widely distributed “could adequately trace the owners of their products, who often purchase anonymously, without registration from pharmacies and discount stores”); *Habecker v. Clark Equip. Co.*, 797 F. Supp. 381, 388 (M.D. Pa. 1992) (forklifts are common equipment found in any business that has a loading dock or a warehouse; it would be unreasonable to extend to manufacturers of such “common business appliances” a duty to give post-sale warnings of product improvements); *Carrizales v. Rheem Mfg. Co.*, 226 Ill. App. 3d 20, 589 N.E.2d 569 (1991) (refusing to find manufacturer had duty to warn of water heaters’ tendency to catch fire).

<sup>60</sup> *Hollingsworth v. Connor*, 136 Md. App. 91, 764 A.2d 318 (2000).

<sup>61</sup> *Id.* at 120-21, 764 A.2d at 334.

<sup>62</sup> RESTATEMENT (THIRD) OF TORTS, PRODUCTS LIABILITY § 10, cmt. g (“When direct communication is not feasible, it may be necessary to utilize the public media to disseminate information regarding risks of substantial harm.”).

<sup>63</sup> *Dixon v. Jacobsen Mfg. Co.*, 270 N.J. Super. 569, 637 A.2d 915 (App. Div. 1994).

<sup>64</sup> *Id.* at 586, 637 A.2d at 923.



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- <sup>65</sup> *Jones v. Bowie Indus., Inc.*, 282 P.3d 316, 336 (Alaska 2012).
- <sup>66</sup> *Walton v. Avco Corp.*, 530 Pa. 568, 610 A.2d 454 (1992).
- <sup>67</sup> *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 253 Kan. 741, 861 P.2d 1299 (1993).
- <sup>68</sup> *Id.* at 749, 861 P.2d at 1307.
- <sup>69</sup> See Restatement (Third) of Torts, Products Liability § 10, cmt. d.
- <sup>70</sup> *Jones v. Bowie Indus., Inc.*, 282 P.3d 316 (Alaska 2012).
- <sup>71</sup> *Id.* at 335; see also *Rekab, Inc. v. Frank Hrubetz & Co., Inc.*, 261 Md. 141, 274 A.D.2d 107 (Md. App. 1971) (duty to warn arose where only 3 items sold, but where there was very high degree of danger to life).
- <sup>72</sup> See *Kelley v. Hedwin Corp.*, 308 Ga. App. 509, 707 S.E.2d 895 (2011); *Vickery v. Waste Mgmt. of Ga., Inc.*, 249 Ga. App. 659, 549 S.E.2d 482 (2001); *Fluidmaster, Inc. v. Severinsen*, 238 Ga. App. 755, 520 S.E.2d 253 (1999).
- <sup>73</sup> See *Boyce v. Gregory Poole Equip. Co.*, 269 Ga. App. 891, 605 S.E.2d 384 (2004); *Moore v. ECI Mgmt.*, 246 Ga. App. 601, 542 S.E.2d 115 (2000).
- <sup>74</sup> *Liriano v. Hobart Co.*, 92 N.Y.2d 232 (1998).
- <sup>75</sup> *Id.* at 241.
- <sup>76</sup> *Habecker v. Clark Equip. Co.*, 797 F. Supp. 381 (M.D. Pa. 1992).
- <sup>77</sup> *Id.* at 387-88.
- <sup>78</sup> *Stovall v. DaimlerChrysler Motors Corp.*, 270 Ga. App. 791, 792-93, 608 S.E.2d 245, 247 (2004) (citations and punctuation omitted).
- <sup>79</sup> *Ford Motor Co. v. Reese*, 300 Ga. App. 82, 89-90, 684 S.E.2d 279, 286 (2009).
- <sup>80</sup> *Ford Motor Co. v. Reese*, 300 Ga. App. 82, 684 S.E.2d 279 (2009).
- <sup>81</sup> *Id.* at 90, 684 S.E.2d at 287.
- <sup>82</sup> *Id.*, 684 S.E.2d at 287.
- <sup>83</sup> See *Kempf v. Zotos Corp.*, 24 N.Y.S.2d 485, 486 (2d Dept. 1941) (involving hair perming solution).
- <sup>84</sup> See *Emerson Elec. Co. v. Garcia*, 623 So. 2d 523 (Fla. DCA 3d Dist. 1993); *Nash v Stanley Magic Door*, 863 S.W.2d 677 (Mo. App. 1993); *Rosen v. Salem Truck Leasing, Inc.*, 108 A.D.2d 907, 485 N.Y.S.2d 793 (2d Dept. 1985).
- <sup>85</sup> See, e.g., *Dixon v. Jacobsen Mfg. Co.*, 637 A.2d 915, 924-25 (N.J. Super. Ct. App. Div. 1994).
- <sup>86</sup> *General Motors Corp. v. Moseley*, 213 Ga. App. 875, 881, 447 S.E.2d 302, 309 (1994), abrogated on other grounds by *Webster v. Boyett*, 269 Ga. 191, 496 S.E.2d 459 (1998).
- <sup>87</sup> *Lawhon v. Ayres Corp.*, 67 Ark. App. 66, 72, 992 S.W.2d 162, 166 (1999) (subsequent service bulletin excluded where only purpose was to show culpability of defendant).
- <sup>88</sup> *Rose v. Figgie Intern., Inc.*, 229 Ga. App. 848, 854, 495 S.E.2d 77, 84 (1997).
- <sup>89</sup> See *Henson v. Georgia-Pacific Corp.*, 289 Ga. App. 777, 781, 658 S.E.2d 391, 396 (2008); *Department of Transp. v. Cannady*, 270 Ga. 427, 428, 511 S.E.2d 173, 174 (1999); *General Motors Corp. v. Moseley*, 213 Ga. App. 875, 881, 447 S.E.2d 302, 309 (1994).
- <sup>90</sup> *Chastain v. Fuqua Indus.*, 156 Ga. App. 719, 722, 275 S.E.2d 679, 682 (1980).

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- <sup>91</sup> See O.C.G.A. § 24-4-407; *Wittenberg v. 450 Capitol Assoc.*, 207 Ga. App. 260, 262, 427 S.E.2d 547, 550 (1993).
- <sup>92</sup> See *General Motors Corp. v. Moseley*, 213 Ga. App. 875, 882, 447 S.E.2d 302, 310 (1994).
- <sup>93</sup> See *John Crane, Inc. v. Jones*, 262 Ga. App. 531, 536 n.23, 586 S.E.2d 26, 31 n.23 (2003) *aff'd*, 278 Ga. 747, 604 S.E.2d 822 (2004).
- <sup>94</sup> *Rose v. Figgie Intern., Inc.*, 229 Ga. App. 848, 495 S.E.2d 77 (1997).
- <sup>95</sup> *Id.* at 854, 495 S.E.2d at 84.
- <sup>96</sup> *Cadwell v. General Motors Corp.*, No. 5:04-CV-72(WDO), 2006 WL 208858 (M.D. Ga. Jan. 25, 2006).
- <sup>97</sup> See 2006 WL 208858 at \*3 (emphasis in original).
- <sup>98</sup> See *id.*; see also *Uniroyal Goodrich Tire Co. v. Ford*, 218 Ga. App. 248, 258-59, 461 S.E.2d 877, 887 (1995) (recall not admitted because concerned a different tire).
- <sup>99</sup> *Ford Motor Co. v. Reese*, 300 Ga. App. 82, 85, 684 S.E.2d 279, 283-84 (2009) (internal citations and footnote omitted).
- <sup>100</sup> *Id.*, 684 S.E.2d at 284.
- <sup>101</sup> *Id.*, 684 S.E.2d at 284 (citation and punctuation omitted.)
- <sup>102</sup> *Id.* at 85 n.2, 684 S.E.2d at 283 n.2 (citing *Ontario Sewing Mach. Co., Ltd. v. Smith*, 275 Ga. 683, 686 n.8, 572 S.E.2d 533, 535 n.8 (2002); *Blossman Gas Co. v. Williams*, 189 Ga. App. 195, 198, 375 S.E.2d 117, 120 (1988); RESTATEMENT (THIRD) OF TORTS, PRODUCTS LIABILITY § 11(a)(2)).
- <sup>103</sup> *Silver v. BAD BOY ENTERPRISES LLC*, 907 F. Supp. 2d 1351 (M.D. Ga. 2012).
- <sup>104</sup> *Id.* at 1353.
- <sup>105</sup> *Id.* at 1354-55.
- <sup>106</sup> *Id.* at 1355.
- <sup>107</sup> *Id.* at 1357.
- <sup>108</sup> See *Ford Motor Co. v. Reese*, 300 Ga. App. 82, 85, 684 S.E.2d 279, 284-85 (2009) (citing RESTATEMENT (THIRD) OF TORTS, PRODUCTS LIABILITY § 11(a)(1)).
- <sup>109</sup> RESTATEMENT (THIRD) OF TORTS, PRODUCTS LIABILITY §11, cmt. a.
- <sup>110</sup> *Gregory v. Cincinnati Inc.*, 450 Mich. 1, 22-23, 538 N.W.2d 325, 334 (1995) (internal punctuation and citation omitted).
- <sup>111</sup> *Id.* at 23-24 & n.32, 538 N.W.2d at 334 & n.32 (citing Consumer Product Safety Act, 15 U.S.C. § 2064 (Consumer Product Safety Commission); National Traffic and Motor Vehicle Safety Act, 15 U.S.C. § 1414 (now repealed) (Secretary of Transportation); The Food, Drug, and Cosmetic Act, 21 U.S.C. 360ll (Secretary of Health and Human Services); 21 U.S.C. § 360h (Secretary of Health and Human Services)).
- <sup>112</sup> See *Id.* at 24-25, 538 N.W.2d at 334-35; *Bell Helicopter Co. v. Bradshaw*, 594 S.W.2d 519, 531-32 (Tex. Ct. App. 1979). Georgia law is consistent with the RESTATEMENT (THIRD) OF TORTS, PRODUCTS LIABILITY § 11.
- <sup>113</sup> *Ford Motor Co. v. Reese*, 300 Ga. App. 82, 87, 684 S.E.2d 279, 285 (2009) (quoting Victor Schwartz, *The Post-Sale Duty to Warn: Two Unfortunate Forks in the Road to a Reasonable Doctrine*, 58 N.Y.U. L. REV. 892, 901 (1983)).

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<sup>114</sup> See *DeLoach v. Rovema Corp.*, 241 Ga. App. 802, 804, 527 S.E.2d 882, 883 (2000); *Blossman Gas Co. v. Williams*, 189 Ga. App. 195, 198, 375 S.E.2d 117, 120 (1988).

<sup>115</sup> See *DeLoach*, 241 Ga. App. at 804, 527 S.E.2d at 883; *Bishop v. Farhat*, 227 Ga. App. 201, 206, 489 S.E.2d 323, 328 (1997).

<sup>116</sup> See *Blossman Gas Co.*, 189 Ga. App. at 199, 375 S.E.2d at 121.

<sup>117</sup> *Id.* at 196, 375 S.E.2d at 118.

<sup>118</sup> *Id.*, 375 S.E.2d at 119.

<sup>119</sup> *Id.*, 375 S.E.2d at 119.

<sup>120</sup> *Id.* at 197, 375 S.E.2d at 119.

<sup>121</sup> *Id.* at 198, 375 S.E.2d at 120.

<sup>122</sup> See *Liebherr-Am., Inc. v. McCollum*, 43 So. 3d 65, 68 (Fla. Dist. Ct. App. 2010) (reversing jury's apportionment of ten percent of liability for longshoreman's death to seller/servicer of mobile crane that ran over her two years after sale for lack of evidence seller/servicer was on notice of alleged failure of crane's warning horn; any duty to warn was that of either allegedly negligent crane operator or owner of property on which accident occurred).

<sup>123</sup> See *Cavalier Convenience v. Sarvis*, 305 Ga. App. 141, 145, 699 S.E.2d 104, 107 (2010); *McReynolds v. Krebs*, 307 Ga. App. 330, 333, 705 S.E.2d 214, 217 (2010).

<sup>124</sup> See O.C.G.A. § 51-12-33(b) ("Damages apportioned by the trier of fact as provided in this Code section shall be the liability of each person against whom they are awarded, shall not be a joint liability among the persons liable, and shall not be subject to any right of contribution."); *McReynolds*, 307 Ga. App. at 334, 705 S.E.2d at 217.

<sup>125</sup> Thomas A. Eaton, *Who Owes How Much? Developments in Apportionment and Joint and Several Liability Under O.C.G.A. § 51-12-33*, 64 MERCER L. REV. 15, 30 (2012).

<sup>126</sup> *Id.*

<sup>127</sup> *Ontario Sewing Machine Co. Ltd. v. Smith*, 275 Ga. 683, 686, 572 S.E.2d 533, 535 (2002).

<sup>128</sup> *Id.* at 686, 572 S.E.2d at 535.

<sup>129</sup> *Id.* at 687, 572 S.E.2d at 536.

<sup>130</sup> *Id.*, 572 S.E.2d at 536.

<sup>131</sup> See *Ford Motor Co. v. Reese*, 300 Ga. App. 82, 87, 684 S.E.2d 279, 285 (2009).