



March 18, 2008

**Georgia Supreme Court Upholds Constitutionality
of Statute Adopting *Daubert* as the Standard
for Expert Testimony in Civil Cases**

On March 10, 2008, the Georgia Supreme Court in a 5-2 decision upheld the constitutionality of the Georgia Legislature's adoption of the *Daubert* standard to govern expert testimony in all pending and future civil cases in Georgia. *See Mason v. Home Depot U.S.A., Inc.*, No. S07A1486 (Ga. Mar. 10, 2008). Georgia adopted the *Daubert* standard in 2005 as part of the Tort Reform Act, often referred to as Senate Bill 3 or "SB3." The decision in *Mason* is the first major ruling from Georgia's highest court addressing a variety of constitutional challenges leveled against the new requirements. For those who have long been concerned about the use of junk science in Georgia courtrooms, the Court's decision is an important victory.

The *Mason* case concerned allegations of personal injury resulting from the use of a floor covering product called Varathane®. In response to a motion for summary judgment, plaintiffs produced two experts who claimed that Varathane® exposure caused the alleged injury. The defendant challenged the testimony of those experts as unreliable under the new standard adopted in SB3, now codified at O.C.G.A. § 24-9-67.1(b).

Section 24-9-67.1(b) essentially follows the standard for expert testimony established by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and subsequent cases. Indeed, Section 24-9-67.1 explicitly authorizes Georgia courts to look to *Daubert* and its progeny for guidance. In particular, Section 24-9-67.1(b) requires: (1) that the expert testimony be based on sufficient facts or data; (2) that the testimony be the product of reliable principles and methods; and (3) that the witnesses have applied the principles and methods reliably to the facts of the case.

Mason was filed before SB3 was enacted. Once SB3 was enacted, defendants argued that its new evidentiary rules applied to

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all cases—including pending cases. The trial court agreed and ultimately struck plaintiffs' experts testimony because their opinions were unsupported by medical literature. Plaintiffs then sought, and were granted, interlocutory review. In its ruling, the Georgia Supreme Court rejected the plaintiffs' key challenges to the statute. In particular, the Court:

- rejected the contention that Section 24-9-67.1 violated equal protection because it only applies in civil cases, not criminal cases;
- rejected the claim that Section 24-9-67.1's statement of intent and reference to *Daubert* and its progeny constituted an unconstitutional delegation of legislative authority; and
- found that the statute could properly be applied retroactively to pending cases because the statute establishes an evidentiary or procedural rule, explaining that the rule against retroactivity applies only to statutes that change the substantive law.

It should be noted that the Court agreed with the trial court that two subsections of the statute were in conflict on whether an expert's opinion must be based solely on admissible evidence. The Court upheld the trial court's solution to the conflict, severing the language from subsection (b)(1) that could be construed to preclude an expert from relying on anything other than admissible evidence.

King & Spalding wrote and filed an *amicus* brief in defense of the trial court's decision and the constitutionality of Section 24-9-67.1 on behalf of The Coca-Cola Company; Delta Air Lines, Inc.; Georgia-Pacific LLC; Georgia Power Company; Mueller Water Products, Inc.; Newell Rubbermaid Inc.; Rollins, Inc.; and others.

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