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DAILY REPORT

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Ford takes $13 million verdict to Ga. high court

FIRST DAY OF TERM also highlighted by death-row appeal on mental retardation finding

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ARGUMENTS OVER A death-row inmate's mental capacity and a $13 million judgment against Ford Motor Co. highlighted the opening of the September term of the Supreme Court of Georgia.

To be sure, the justices' decision on Ford's arguments that a judge went too far issuing discovery sanctions do not carry the life-and-death gravity as in the case of James Randall Rogers, whose lawyers are challenging a jury verdict finding him not mentally retarded and therefore eligible to be executed.

But as in a death penalty case in which defense lawyers pull out all the stops, the lawyers for Ford have gone to great lengths to get what they want—keeping a set of crash test results out of the hands of the plaintiffs' lawyers.

When Athens-Clarke County State Court Judge N. Kent Lawrence insisted Ford hand the documents over, Ford tried several avenues to get the ruling overturned before trial, including bringing a mandamus action against the judge. Nothing worked, and Ford still refused to turn over the documents despite a serious sanction—pronouncements by the judge to the jury making key factual findings adverse to Ford.

Now that it's been hit with a multi-million dollar verdict, Ford had its chance to have an appellate court decide whether Lawrence was right.

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Plaintiffs' lawyer Jim Butler argued that it was for the trial judge, not Ford, to decide whether the plaintiff was entitled to crash test documents that the carmaker said were its attorneys' work product.

Ford's appellate lawyer, Chilton D. Varner of King & Spalding, told the justices that the documents in question are attorney work product and that Lawrence abused his discretion in ruling that an exception to work product protection meant Ford had to turn the test documents over.

"The court will not find a case in the Georgia case book that justified what Judge Lawrence did here," Varner argued.

A lawyer for plaintiff Artumus Gibson disputed Varner's contention that the plaintiffs' lawyers hadn't made the requisite showing of need for the documents. "Ford says in their briefs that we didn't need them," said Columbus lawyer James E. Butler Jr. "That's not for Ford to decide …

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Judge Lawrence was the judge. He had the discretion."

At issue was a February 1999 crash in which, according to an appellate brief filed by Ford, Anne Marie Gibson was traveling through Clarke County on a well traveled highway when she brought her 1985 Mercury Marquis to a stop to make a left turn. William Burns slammed his Toyota truck into the rear of the Marquis.

The force of the impact lifted Gibson's car several feet into the air and propelled it into a spin into oncoming traffic, according to Ford's brief. Another truck also hit Gibson, and the Marquis caught fire. Bystanders were able to pull Gibson from the car, but she died at the scene, leaving behind three children under the age of 6.

Gibson's widower filed suit against Ford, which manufactured the Marquis, Burns and the hitch manufacturer, Draw-Tite, in 2000. As shown by briefs and Monday's arguments, the plaintiff's theory is that Ford's design made the fuel tank too vulnerable, and that Draw-Tite's design involved dangerous bolts that punctured the tank, resulting in the fire. The plaintiff also alleges defects in the Marquis' seat backs and doors, saying they led Gibson to fall back into the flames and be trapped in the burning car.

Early on in the litigation, according to a plaintiff's brief, Butler's team began asking for Ford's rear crash testing of bumper tank designs and seat back performance. After several court orders, Lawrence issued an April 2004 order determining that certain of Ford's crash tests of bumper tank designs constituted work product but that plaintiffs had a substantial need for them and couldn't get them any other way.

Getting help from Sutherland Asbill & Brennan as appellate counsel, Ford sued Lawrence in mandamus; a visiting senior judge, Bernard J. Mulherin Sr., found Lawrence didn't abuse his discretion. The state Supreme Court would affirm that ruling in April 2005, saying Ford's remedy was in an appeal, not mandamus.

In August 2004, when Ford still wouldn't produce the documents, Lawrence issued another order. He declined to grant the plaintiff a default judgment but ruled that if Ford didn't produce the documents four facts would be considered established for purposes of trial: that Ford had defectively designed the fuel system and seats on Gibson's car; that those aspects of the car were susceptible to failure in rear impact collisions; that Ford's actions in connection with the design, manufacture and sale of the car met the exception to the state statute of repose on the plaintiff's claims; and that Ford had failed to adequately warn Gibson of the car's dangers.

Ford tried to appeal, but the Court of Appeals dismissed the appeal. The case proceeded to a five-week trial beginning on Nov. 14, 2005, with McGuireWoods and McKenna Long & Aldridge representing Ford. The jury awarded the plaintiff $13 million, limiting Burns' liability to $5,000.

McGuireWoods touted the jury verdict on its Web site as a "victory" for Ford, according to Butler, because the verdict could have been much worse. But Ford and Draw-Tite appealed to the Georgia Court of Appeals, which transferred the case to the Supreme Court, leading to Monday's arguments.

The discovery sanction is not the only issue in the appeals. Draw-Tite, represented by William R. Johnson of Moore Ingram Johnson & Steele in Marietta, complained for one that it shouldn't have been lumped in with Ford for purposes of allocating damages given evidence that Gibson would have escaped the flames if the doors hadn't jammed and her seat hadn't fallen back.

Varner took the opposite tack at the start of her argument. "Without the hitch the plaintiff's experts and investigating officers determined that there would have been no fire … and Mrs. Gibson would not have died."

But the arguments largely focused on the Ford discovery sanction. Varner told justices that Ford had produced to the plaintiff hundreds of crash test reports and documents on 51 similar incidents. (Ford explained in an appellate brief that the documents Ford refused to produce to the plaintiff despite Lawrence's order related to tests done at the direction of Ford's attorneys in the defense of other lawsuits—as distinct from the vehicle development tests that were produced.)

"Plaintiff had volumes of information about what Ford knew," Varner argued Monday.

Prodded by Justice George H. Carley, Varner acknowledged that Lawrence was able to review the documents in camera before ordering their production. And she said the justices could review them, as well.

"The court can see for itself that they don't relate to the performance of this vehicle in this accident," she said.

Butler countered that if his team had gotten all the crash test documents, it would be talking about a $100 million verdict.

"The point of what Ford was doing was to keep those crash tests from us," he argued. Ford knew that if it produced the crash tests they would face a punitive damages award, said Butler, noting that Ford's lawyers had claimed victory after the verdict.

And he said all of the crash tests at issue involved "Fox platform" vehicles like the Marquis and were done at Ford's car development office.

"It doesn't matter what name is put on the rear of a vehicle after the paint is dried," argued Butler.

The Gibson cases at the Supreme Court are *Ford Motor Co. v. Gibson*, Nos. S07A1365 and S07X1389, and *Draw-Tite v. Gibson*, Nos. S07A1367 and S07X1368.

While the justices were relatively quiet during the Ford argument, asking a few factual questions and nudging the lawyers along in their arguments, a rather lively exchange ensued in the first argument of the morning. In his representation of death row inmate Rogers in *Rogers v. State*, No. S07P1210, Ralph I. Knowles Jr., of Doffermyre Shields Canfield Knowles & Devine, is challenging the standard by which the state determines that mentally challenged persons are fit to be executed.

Chief Assistant District Attorney Martha Pass Jacobs of the Rome Judicial Circuit argued in defense of the Floyd County jury determination that Rogers is not mentally retarded under the law. In the midst of her argument, she explained that even if a defendant has an IQ score below 70, he still must prove other factors before being found to be mentally retarded.

"That's a pretty rigid rule," interjected Presiding Justice Carol W. Hunstein.

Responded Jacobs, "That's the rule of law." DR