

FYI: C. Williams

9/7/05



FROM:

Presiding Judge Blackburn

TO:

C. Luffin

Re Electronic filing
signatures.

Attached is a copy of
the order I prepared in
the granted application for
your info. I have dis-
cussed this with several
judges & with Bill Martin.
I believe we need a
rule change because of
decisions we have render-
ed, to authorize such
signatures as described in
our order. I will not be
here for the bar meeting
but J. Johnson has agreed to
handle. Include certification of local
rules permitting electronic signature.
cc: J. Johnson, Bill Martin, Chuck [unclear]

FYI RE ELECTRONIC FILING

Court of Appeals of the State of Georgia

ATLANTA,

The Court of Appeals hereby passes the following order:

A06I0016. ELIXIR INDUSTRIES, INC. et al. v. WITT et al.

The Interlocutory Application received in the above-docketed matter does not contain an order or judgment signed by the trial judge and filed with the clerk. Rather, the application includes an order which was electronically signed and filed below under the provisions of the Georgia Electronic Records Act (OCGA § 10-12-1 et seq.) as implemented by the State Court of Fulton County. This Court will accept for filing with the application a copy of the order accepted by the lower court pursuant to OCGA § 10-12-1 et seq. and local rules.

Upon consideration of the Application for Interlocutory Appeal, it is ordered that it be hereby GRANTED. The Appellant may file a Notice of Appeal within 10 days of the date of this order. The Clerk of the State Court of Fulton County is directed to include a copy of this order in the record transmitted to the Court of Appeals.

*Court of Appeals of the State of Georgia
Clerk's Office, Atlanta*

*I certify that the above is a true extract from
the minutes of the Court of Appeals of Georgia.*

*Witness my signature and the seal of said court
hereto affixed the day and year last above written.*

....., Clerk.

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Upon consideration of the Application for Interlocutory Appeal, it is ordered that it be hereby GRANTED. The Appellant may file a Notice of Appeal within 10 days of the date of this order. The Clerk of the State Court of Fulton County is directed to include a copy of this order in the record transmitted to the Court of Appeals.

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Clerk's Office, Atlanta*

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cc: J. Johnson, Bill Martin, Chuck [initials]



Court of Appeals

Memorandum on Application for Interlocutory Appeal

To: Judge Mikell and Judge Adams

From: Presiding Judge Blackburn (Christensen) *AAB*

Style: A06I0016. ELIXIR INDUSTRIES ET AL. v. STEPHEN WITT ET AL..

Date: September 7, 2005

Judgment type:	Grant of request for finding of prima-facie showing of impairment
Lower court:	State Court of Fulton County, Judge Henry M. Newkirk
Short number:	98-002
Docketed:	August 29, 2005
Response:	September 8, 2005
Order Due:	SEPTEMBER 28, 2005
Recommendation:	GRANT

Defendant Elixir Industries, Inc. seeks an interlocutory review of the order granting the plaintiff's request for a finding that plaintiff had made a prima-facie showing of physical impairment satisfying the requirements of newly-enacted OCGA § 51-14-3 (b).

Background: The action underlying this application is a personal injury suit in which plaintiff Stephen Witt, individually and as executor of the estate of Joann Witt (deceased from mesothelioma), alleges that Joann Witt was exposed to asbestos manufactured or distributed by the various defendants named in this action. Witt requested that the trial court find that Witt had satisfied the requirements of newly-enacted OCGA § 51-14-3 (b), which requires a plaintiff to make a prima-facie showing of physical impairment with respect to an asbestos claim. Over defendants' objections, the trial court granted the request, which led to Elixir filing this application.

Discussion: Enacted in 2005, OCGA § 51-14-3 (b) requires that a plaintiff in an asbestos-claim case establish “prima-facie evidence of physical impairment resulting from a medical condition for which exposure to asbestos or silica was a substantial contributing factor,” which means:

That a board certified pathologist has made a diagnosis of pleural or peritoneal mesothelioma, or a diagnosis of cancer demonstrated by a medical report showing the diagnosis as a primary cancer, and has signed a report certifying to a reasonable degree of medical certainty that exposure to asbestos was a substantial contributing factor to the diagnosed cancer and that it was not more probably the result of causes other than the asbestos exposure revealed by the exposed person’s employment and medical histories.

OCGA § 51-14-2 (15) (A).

Here, the plaintiff’s board-certified pathologist made only a diagnosis of mesothelioma. The pathologist did not sign a report that exposure to asbestos was a substantial contributing factor to the cancer. Plaintiff argued successfully to the trial court that such a report is required only when the pathologist makes a diagnosis of a primary cancer other than mesothelioma. Elixir countered that such a report regarding causation is required both when the pathologist makes a diagnosis of mesothelioma and when the pathologist makes a diagnosis of another type of primary cancer.

In other words, the trial court has interpreted the language of OCGA § 15-14-2 (15) (A) as requiring the plaintiff to show either (i) that she has mesothelioma, or (ii) that she has another type of cancer in which exposure to asbestos was a substantial contributing factor. In short, the trial court has found that a showing of mesothelioma, without a showing of cause, will suffice as prima-facie evidence of physical impairment.

This is a case of first impression regarding this newly-enacted statute. It would appear that the trial court’s interpretation of the statute is wrong, since the placement of commas would lead to the interpretation that causation must be shown in all cases, including mesothelioma cases. Indeed, OCGA § 51-14-3 specifically refers to the evidence as showing

a “physical impairment resulting from a medical condition for which exposure to asbestos or silica was a substantial contributing factor” (and not all mesothelioma is necessarily caused by asbestos exposure).

In any case, because our disposition of this matter could possibly result in the dismissal of this case without trial, and because our opinion would certainly establish needed precedent for future cases, I recommend that we GRANT the application.

Furthermore, please be aware that some concern initially arose because the trial court’s order was signed electronically, as allowed by the local practice and procedure of Fulton State Court under OCGA § 10-12-4. To clarify that such signatures do not invalidate the appeal process (when allowed by the court in which they occur), I have added a paragraph to the order to that effect.



Court of Appeals

Memorandum

To: Presiding Judge Blackburn

From: Dirk

Subject: Electronic signatures - Application No. A06I0016. Elixir Industries v. Witt.

Date: September 6, 2005

I agree with Chuck that we will be creating enormous problems if we begin to deem electronic signatures of trial judges as invalid even though the local trial court has elected to accept electronic signatures as valid. Under this scenario, electronic signatures on orders will create binding orders unless those orders are appealed, in which case the orders are suddenly deemed null and void by our Court. A more reasonable approach would be to recognize electronic signatures on court orders as valid where the local court accepts same. That does not mean we accept electronic signatures as valid on Court of Appeals filings, but we should not retroactively invalidate trial court orders that have been properly signed (electronically) under the local practice and rules of the trial court. I recommend that Chuck consider the application on its merits.



Court of Appeals

Memorandum

To: Bill Martin
From: Chuck Williams
Subject: Electronic filing
Date: September 1, 2005

Based on our recent conversation, I have drafted an order which refuses to accept the electronic signatures now being seen on orders and judgments sent up from trial courts, such as State Court of Fulton County, which are attempting to implement electronic filing under the Georgia Electronic Records and Signatures Act, OCGA § 10-12-1 et seq. The order may be a little different than you anticipated since we had assumed that appeals could be filed and then the absence of a handwritten signature remedied thereafter. But since the appeal must be taken from, and cannot begin prior to a valid appealable order, that idea is probably incorrect. On the actual example used for the order, an interlocutory application, there are also limitations arising from the time constraints of OCGA § 5-6-34(b), so I drafted the order to dismiss as premature. This language might need to be altered for direct appeals.

Now, I have to say that I am concerned about whether this order is really the best way

to handle this. I think I recall you telling me that the approach with respect to electronic filing we discussed is based on past directions from then Chief Judge Smith. Therefore, I can only suggest that the matter be revisited, and probably better sooner than later.

I am thinking that even though OCGA § 10-12-4 (i) (1) would appear to give this Court authority to avoid operating under the electronic filing statute, the apparent choice may be an illusion where the lower courts are moving forward and accepting the electronic filings. This is a practical matter, and perhaps it may be intended that the choice of each lower court to use electronic filing is controlling, that is, the adequacy of the document to be determined according to the choice of the court in which it is filed. At the very least I foresee some type of confusion, for example, where the electronically filed judgment is viewed as valid and enforceable at the local level but disregarded as a nullity by this court.

Another source of confusion may arise if this court adopts a position inconsistent with Supreme Court practices. Since I don't know how they are dealing with this problem, I can't comment further on this point.

Anyway, these are the concerns that I found in working on this. There are conflicting views within Central Staff and several would endorse the order as drafted.

Procedure when moving a case from one month to another for oral arguments:

When a case is rescheduled, at the direction of the Court, we must go to the MOTION SCREEN of the case being rescheduled and docket the court action. We must also change the DOCKET SCREEN to show the date of argument.

Each time we run a report to see how many cases that have a oral argument request and the status of these motions, we must change the Cal M/Y date on the DOCKET SCREEN or the case will not appear on the report.

When we run the calendar for a specific month this change on the Cal M/Y date must show the month and year that the case is being argued or it will not appear on the calendar. If a case has originally been put on the September calendar and rescheduled to October it will need to have 10/05 for the Cal M/Y date.

After we run the calendar then it is necessary to go back to the DOCKET SCREEN and change the Cal M/Y date back to the month it was originally docketed for. Weeks will pass between these times that these actions need to be done so therefore, in the past we have had problems in keeping up with the changes to be made.

The Cal M/Y date is very important so that the cases appear in the correct place on the distress list.

These are some of the cases that have been rescheduled in recent months:

A05A1237 moved from June to July
A05A0262 moved form January to April
A05A0687 moved from March to April
A05A1121 moved from May to June
A05A1129 moved from May to June
A05A1174 moved from May to June
A05A1175 moved from May to June
A05A1151 moved from May to June
A05A1584 moved from September to October
A05A2157 moved from October to November

I am aware of this problem and have made myself a system in which to try and keep up with the changes. I hope there will not be anymore cases overlooked in making all the changes necessary.

Thanks,
Mary Jo Stephens
September 19, 2005

V. PROCEDURE FOR HANDLING APPLICATIONS FOR INTERLOCUTORY APPEALS

- A. Interlocutory applications shall be granted on the vote of one judge; such applications will be circulated only if the judge to whom the application is assigned votes to deny it.
- B. Granted applications which come back to the Court via filing of a Notice of Appeal shall be assigned randomly by the Court's automated docketing system as any other direct appeal.
- C. The division may review a motion for reconsideration which is filed within ten days from the entry of the court order granting or denying the application for interlocutory appeal.
- D. The application shall be dismissed rather than denied when the court lacks jurisdiction (e.g., the application is untimely), ~~such as when an application is made and direct appeal is the proper procedure.~~
- E. Regarding the timeliness of the filing of an interlocutory appeal application, the filing date of the certificate of immediate review controls.

to the five (5) judges who do not initially vote on the case in order of seniority.
(Source: November 2000 Banc Meeting.)

Y. REBRIEFING

When Rule ~~23~~ 24 of the Rules of this Court is not complied with, any member of the panel may initiate through the assigned judge, a request for a corrected brief which shall comply with the Rule. Failure of the appellant to comply may result in dismissal of the appeal and/or the finding of appellant's attorney in contempt of Court. Failure of the appellee to comply may result in the non-consideration of appellee's brief and the finding of the appellee's attorney in contempt of this Court. If a rule complying brief is not submitted as ordered by the Court, the case may be dismissed. (Source: September 1999 Banc Meeting.)

Z. FORMAT

1. Opinion shall be double-spaced when the opinion goes to the clerk's office for mailing out. (Effective: All cases docketed on or after September 15, 1991; all other pending cases, January 1, 1992.)
2. Margins shall be justified.
3. If a drafter uses "held," only the "H" will be capitalized.
4. "In the Court of Appeals of Georgia" shall not be centered or capitalized. The Judge's name and the case name shall be capitalized.
5. When opinions are released, they will not bear the judge's personal number or the words "affirmed or reversed" at the top of the first page, but the court's short number will appear. The judge's personal number and "affirmed or reversed" will appear only for circulating purposes.
6. "In the Court of Appeals of Georgia" will appear from the left margin rather than centered.
7. Opinions, orders and all other internally generated documents which become part of the record in a case shall be on letter size (8-1/2" x 11") paper. *(Effective: All cases docketed on or after September 15, 1991, all other pending cases, January 1, 1992).

Bill Martin



Court of Appeals

Memorandum

To: Court of Appeals Judges and Staff

From: Jan R. Kelley *JR* Director of Fiscal Office

Subject: Change in State Mileage Rate

Date: September 19, 2005

As of September 10, 2005, the mileage reimbursement rate for state use of your personal vehicle has changed for 28 cents per mile to 48.5 cents. This rate should be used on travel reimbursement requests for mileage incurred after September 10, 2005, when our agency vehicle is unavailable for use.

Per the attached memorandum, if the agency allows use of a personal vehicle when an agency owned pool vehicle is available for use, then the reimbursement rate should be reduced to 28.5 cents per mile.



Fiscal Leadership for Georgia

200 Piedmont Avenue 1604 West Tower Atlanta, GA 30334 phone (404) 656-2133 fax (404) 463-5089

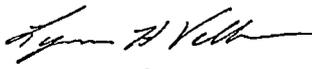
Sonny Perdue
Governor

Lynn H. Vellinga
State Accounting Officer

MEMORANDUM

Date: September 14, 2005

To: Agency Heads
Agency Fiscal Officers

From: Lynn H. Vellinga 
State Accounting Officer

Shelley C. Nickel, Director 
Office of Budget and Planning

Re: Statewide Travel Regulations

Statewide Travel Regulations – Mileage Reimbursement Amendment

The Legislature in Special session passed Senate Bill 1 EX tying the mileage reimbursement rate for use of a personal vehicle to the rate established by the United States General Services Administration pursuant to the Federal Travel Regulations Amendment 2005-01 as of July 1, 2005, or subsequently amended.

In accordance with O.C.G.A. Section 50-19-7, as amended, when use of a personal motor vehicle is determined to be the advantageous form of travel in the service of the state or any agency thereof, the rate of reimbursement is amended to 48.5 cents for state use mileage incurred after September 10, 2005.

If an agency allows use of a personal vehicle when an agency owned or DOAS motor pool vehicle is available for use, then the reimbursement rate should be reduced to 28.5 cents per mile. Agencies will be responsible for determining the appropriate reimbursement rate. Documentation relating to use of the appropriate rate should be retained for audit purposes.

LV:SN/sp

- c: John Watson, Chief of Staff
- Tommy Hills, Chief Financial Officer
- Jim Lientz, Chief Operating Officer
- Lonice Barrett, Director, Governor's Office of Implementation