

Superior Court of New Jersey
Appellate Division
Docket No. A-003542-07T2

PATRICIO E. PAREDES and
LAURA A. PAREDES,

Plaintiffs-Appellants,

v.

Civil action

FORD MOTOR COMPANY, a
Delaware Corporation, and
CONDIT FORD, a New Jersey
Corporation,

On appeal from a final order
of no cause of action entered
in the Superior Court of New Jersey,
Law Division, Middlesex County,
Docket No. MID-L-4952-03

Defendants-Respondents.

AND

Sat below: Honorable Edward J.
Ryan, J.S.C. and a jury

FORD MOTOR COMPANY,

Third-Party Plaintiff,

v.

THOMAS A. VIVIAN,

Third-Party Defendant.

**Brief of Plaintiffs-Appellants
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Preliminary Statement

This is a design defect case. Plaintiffs' 2000 Ford Explorer rolled over during an emergency avoidance maneuver on the highway. We present one issue for determination:

Under established product liability law, the jury must assess the question of design defect at the time the product was placed on the market. A plaintiff's particular conduct or use of the product later, such as when he's injured, or a manufacturer's warning about product risk, is not relevant to determining design defect.

During trial, Ford argued not simply that the Explorer's design was adequate, but that Mr. Paredes – not any design defect – caused the vehicle to roll over because Mr. Paredes "overcorrected" his steering during the avoidance maneuver, and Ford had warned Mr. Paredes about the vehicle's rollover risk through a "sunvisor warning."

Shouldn't the trial court have heeded plaintiffs' objections and told the jury that this evidence and argument by Ford was – at the very least – *not relevant* to determining the threshold question of design defect?

We respectfully submit that the answer is yes, and that the absence of these critical cautionary and limiting instructions from the charge below warrants reversal and remand for a new trial on plaintiffs' design defect claim.

Procedural History¹

Plaintiffs sued Ford in 2003. They alleged strict liability, negligence, and other causes arising from the Explorer's allegedly defective design and propensity to roll over during foreseeable avoidance maneuvers. (A1-10).

Ford denied the allegations and asserted, as its First Affirmative Defense, that Mr. Paredes "was guilty of contributory negligence in failing to exercise due and proper care under the existing circumstances and conditions." (A14-15). Ford also asserted a third-party complaint against Thomas Vivian, the driver of the Volvo who'd initiated the accident, but Ford ultimately consented to release Vivian from this claim, (A17-18) (the case was also consolidated with an action by State Farm Insurance Company for insurance benefits paid, A11-12).

¹ References to the transcripts are as follows:

1T May 30, 2007 (pretrial hearing)
2T January 14, 2008 (pretrial hearing)
3T January 22, 2008 (trial)
4T January 23, 2008 (trial)
5T January 24, 2008 (trial)
6T January 25, 2008 (trial)
7T January 28, 2008 (trial)
8T January 29, 2008 (trial)
9T January 30, 2008 (trial)
10T January 31, 2008 (trial)
11T February 4, 2008 (trial)
12T February 5, 2008 (trial)
13T February 6, 2008 (trial)
14T February 7, 2008 (jury charges and verdict).

The parties conducted extensive discovery over the next few years until January 2008, when trial was held before the Honorable Edward Ryan and a jury on whether the Explorer was defectively designed. The jury returned a verdict stating that the Explorer's design was not defective, (A43-44), so the court entered an Order of No Cause of Action on February 22, 2008. (A45).

On March 24, 2008, plaintiffs filed a Notice of Appeal with this Court. (A46-47). Their appeal now follows.

Statement of Facts

The Accident and Injuries

On August 24, 2001, Mr. Paredes and his wife Laura were traveling westbound on Route 78 to pick up their seven-year-old son. Mr. Paredes was driving the couple's 2000 Ford Explorer, which they'd purchased months before from a New Jersey Ford dealership. (9T46:10-25; A1-2).

The Paredes were traveling in the left lane between 55 and 68 miles per hour. Two cars began passing on the right. As the first car finished passing, however, the second car – a silver Volvo (driven by third-party defendant Vivian) – suddenly whipped right in front of the Paredes' car. (3T37:10-38:10; 3T40:10-41:25; 3T46:1-10; 3T67:1-10; 9T48:15-25; 9T229:1-25).

Mr. Paredes applied the Explorer's breaks and turned the wheel left to avoid smashing into the back of the Volvo. The Explorer careened toward the concrete divider. So Mr. Paredes turned the Explorer's wheel right toward the highway, then left again toward the roadway's center, attempting to gain back control of the vehicle. (3T41:1-25; 3T63:1-64:25). As Mrs. Paredes later testified (Mr. Paredes could not recall the accident because of his injuries), when her husband braked and steered away from the Volvo, the Explorer "just lost control."

Q. Can you describe any further for the jury what do you mean by lost control; what was it like?

A. Well, normally, you would put on a brake and then a person would go and you would just go. Our car didn't do that. My husband put on the brake and our car started to swerve. I remember my husband trying to get control of the car.

Q. Did you actually see him struggling with the car?

A. Yeah. I saw him struggling. I could see -- again, I'm not a driver, but I'm in the car long enough with my husband to know his moves. And I just saw him moving the car and it wasn't going where it should.

[9T49:1-51:1-5]

"I just remember swerving and then I just remember the car flipping." The Explorer rolled over three to four times and came to rest on its roof in the grassy median of the highway. (9T49:1-51:1-5; 3T41:1-25; 3T63:1-64:25).

Mr. Paredes was medivaced by helicopter to a trauma center. He had skull fractures on both sides of his head, respiratory failure, and life-threatening brain injuries. Bleeding in his brain affected his ability to move and speak, and his thought process, attention, and memory. (8T46:10-22; 8T62:1-70:25; 8T77:20-81:10; 9T60:1-25).

He spent four weeks in the hospital then three weeks in rehabilitation. When he came home and insisted on returning to his career and a "normal" family life, he had

a seizure, caused by a cyst that formed on his brain and requiring additional surgery. (9T64:5-15). Mrs. Paredes became the head of household while caring for the couple's young son and her now disabled husband. The son was afraid to leave his father to go to school (finding his dad on the floor once). (9T112:10-113:25).

Seven years have passed since the accident. Mr. Paredes remains permanently injured with little chance for improvement. (8T83:1-25). He has no employability. He has anger and personality issues. He cannot enjoy or perform many activities he did before. He often cannot recall things he'd taken for granted, like his son's birthday, or where he's headed. (9T109:1-110:20; 8T173:20-174:10; 9T65:1-68:1; 8T58:1-59:20; 8T173:20-175:1; 8T112:1-113:25; 8T155:1-158:25; 8T164:1-166:25; 9T29:10-25).

The Primary Issue at Trial

Ford did not dispute that the Explorer rolled over during the avoidance maneuver, or the unfortunate extent of Mr. Paredes' resulting injuries. Rather, the disputed issue at trial was whether Ford was responsible for the accident because of a design defect with the Explorer when it was placed on the market.

Plaintiffs contended that Ford should have designed the Explorer "lower and wider," with smaller tires and

wheels and electronic stability control. (5T47:15-25; 6T196:10-199:25; 5T50:15-51:10; 6T142:1-25; 6T217:2-222:25). Plaintiffs' experts told the jury that the Explorer improperly "tipped" (began lifting off the ground) during avoidance maneuver tests. (4T29:1-25; 4T31:20-37:25 (p.m. session); 7T202:1-208:25). The vehicle should slide out, not roll, during these maneuvers, (5T16:1-18:20), as similar vehicles did, (5T49:15-51:25).

Ford knew about this alternative "lower and wider" design, plaintiffs contended, but Ford dropped the design after the National Transportation Safety Board eliminated a proposed "rollover propensity rule." (5T53:3-55:25). The Explorer as designed did not have adequate stability and rollover protection. Ford simply designed "rollover tests" – largely simulated on computers – that made the Explorer *appear* safe. (7T141:1-25). The alternative design would have given the Explorer better on-road stability and would have prevented rollover during foreseeable avoidance maneuvers like the one at issue. (5T62:15-63:25).

Ford denied plaintiffs' contentions and criticized their expert opinions as "a litigation standard." (13T31:1-20). Ford's experts told the jury that Ford used adequate "resistance to rollover" guidelines, (10T28:10-25), and "J-turn" tests and other assessments, (10T57:5-25;

10T59:1-68:25), to ensure "reasonable and appropriate" rollover safety, (10T116:1-25; 11T15:10-16:20). A lower and wider design or stability control would not have made the vehicle safer, and not using this design did not make the Explorer defective, Ford argued. (11T31:1-15).

But Ford went further than this. Beyond arguing that the Explorer's design was appropriate, Ford told the jury that Mr. Paredes – not Ford – was responsible for the rollover accident because Mr. Paredes (1) knew about the Explorer's rollover risk from a "sunvisor" warning in the vehicle, and – most significantly – (2) had "overcorrected" his steering during the emergency avoidance maneuver in question. This "overcorrected" steering – not any design defect with the vehicle – caused the rollover to occur, Ford and its experts told the jury.

For example, Robert Pascarella, Ford's expert in automotive dynamics and design, (10T11:10-22), told the jury that the owner's manual warned owners like Mr. Paredes that "[sports] utility vehicles . . . have a significant high roll-over rate than other types of vehicles." (10T15:1-17:15). Ford's counsel cross-examined Mr. Paredes about whether he understood he was buying an "SUV" and not a passenger car, (9T119:1-25), and showed Mr. Paredes the sunvisor warning in the Explorer that stated, "Higher

Rollover Risk. Avoid Abrupt Maneuvers and Excessive Speed." (9T119:10-25). Mr. Paredes admitted he may have seen this warning, but he never understood that the vehicle would roll over during highway turns like the one he had to make: "No. . . . If I knew that, I would not buy that car." (9T117:20-25).

Ford continued this theme with Michael Holcomb – Ford's accident reconstruction expert and Ford's first witness below. Holcomb said the scientific evidence "demonstrated" that Mr. Paredes had "overcorrected" his steering on the day in question and that this "overcorrection" – not any design defect – caused the vehicle to roll over. (9T184:1-25). Plaintiffs objected to Holcomb's testimony, arguing that Holcomb couldn't even quantify what "overcorrected" steering was, but the court permitted the testimony, without cautionary instructions, after a Rule 104 hearing. (9T144:1-167:25).

So Holcomb told the jury there were "at least three" significant steers by Mr. Paredes that caused the rollover:

The left to avoid the presence of the Volvo or the threat, whatever that was, the left toward the median and then the right in the median to try to bring the vehicle back more or less toward the travel lanes. And then after a fairly long time of holding that, that steer, then the vehicle got pointed back into the travel lanes and then there was a correction, hard correction back to the left again and that was the third.

[9T216:3-15]

Holcomb explained that "overcorrecting" steering means not "taking advantage" of "the normal driver's skill":

Correcting means you change the steering wheel angle, you change the steering wheel position, you change your steering. If you change it too much for the conditions, that's over correction. If I'm doing something and I change it too much, my first reaction is to say, Uh-oh, that's too much, oh, what do I need to do. In other words, if you just throw a big correction in immediately, you haven't taken advantage of the normal driver's skill to try to correct it.

[9T230:20-231:10]

Ford's counsel asked how Holcomb had "determined" that "overcorrection" was involved in Mr. Paredes' accident, and Holcomb said the tire marks demonstrated it:

Frankly, it doesn't matter whether it is an Explorer or a Buick. The tire marks tell me, Wow, he held the steering way too long for this circumstance because halfway through this, he could have straightened out and pulled over and stop and regained his composure.

[emphasis added]

Plaintiffs' counsel objected again, but the court permitted Holcomb's testimony to continue. (9T232:10-233:15). Holcomb finished his direct examination by telling the jury that in his expert opinion "over correction was clearly involved in the last two marks and very likely involved in the first," (9T233:20-234:5),

continuing this focus on Mr. Paredes' conduct on cross-examination:

Q. . . . what do you recommend we, as a driver, do when someone whips in front of us and slams on their brakes and we're going to hit them, what should we do?

A. Hit your brakes.

Q. Shouldn't we hit our brakes or turn or both enough to avoid that direct collision with that vehicle? Shouldn't we do that?

A. Well, you should hit the brakes.

Q. Just hit the brakes and go right into him?

A. Hit the brakes and not go into him.

[9T258:20-259:15]

Q. So would it be your recommendation that we instead of making an accident avoidance maneuver just run somebody over?

A. Have you been listening? No. I said, Hit the brakes and don't hit him. If, in fact, he is still coming at you sideways, then you need to steer out of the path.

[9T261:1-9]

Holcomb had no "problem" with a driver "swerving away from people not to hit them," but the "facts" showed that Mr. Paredes used too much steering:

A. You might not have to swerve very much is what I mean.

Q. You have to have the facts to make judgment decisions about someone's conduct, don't you, sir?

A. Well, you do need facts and there are quite a few here.

Q. You cannot quantify this alleged over correction at any point in this, can you?

A. Not as to a number, but as to the facts.

[9T262:1-25]

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Q. The facts, these facts you just told counsel you judge his conduct on was he left yaw marks and skid marks; is that correct, sir?

A. Yaw marks and scrapes.

Q. You[r] testimony to this jury would be if we get in an accident avoidance maneuver to try and keep from running somebody over and we leave yaw marks or skid marks, we're wrong we over corrected, is that, correct, sir?

A. No, not if you don't crash.

Q. That's what you just told us, wasn't it?

A. Not if you don't crash. If you can control your swerve to avoid just by straightening out the wheel and driving down the road, then we won't ever hear about it.

Q. Where there is a skid mark or a yaw mark and we have a crash, we are at fault and we over corrected, as far as you're concerned? Is that correct?

A. The specific -

Q. Isn't that what you just told us?

*

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*

A. This specif -- no, this specific set of marks is clearly the source of over correction from swerve and then not finding neutral direction.

[9T274:9-275:16]

This theme continued with Donald Tandy, Ford's vehicle design and testing and accident reconstruction expert, (11T14:1-20). He also told the jury that what caused the Explorer to roll over was not any design defect (Tandy said the vehicle's design was fine) but "a combination of steering maneuvers" by Mr. Paredes:

Q. And, in your opinion, to a reasonable degree of engineering certainty, what caused the Explorer to roll over in this accident?

A. Well, it's a combination of steering maneuvers. There's a response due to the braking due to the initial steer. And then we have the yaw marks coming back on the road. And then finally yaw marks heading off and the vehicle is leaning in one direction and thrown over in the other direction.

[11T160:20-161:8]

* * *

Q. What scientific evidence, what engineering evidence supports a claim in this case that Mr. Paredes over-corrected when he avoided colliding with another vehicle and the barrier and avoided causing possible other accidents, what engineering basis is there for this claim of over-correction in this accident?

A. Well, you mentioned a couple parts of the crash. Let's back up. As far as when he's looking to avoid the other vehicle, there's no

evidence there. In terms of the yaws coming from one direction into the other direction, that's evidence of a very large steer and, by definition, an over-correction.

[11T168:15-169:10]

Precisely what the "correct" amount of steering to avoid rollover Tandy didn't know, but it "would have been less and probably timed different" than what Mr. Paredes used, Tandy told the jury. (11T169:1-10). The court gave no cautionary or limiting instructions of any kind when Ford presented this evidence.

Objections, Summations, and Jury Charges

At the close of evidence, plaintiffs moved for a directed verdict on Ford's comparative negligence defense (which Ford had raised as its First Affirmative Defense in its Answer, see A14-15) and a "direction to the jury not to consider Mr. Paredes's negligence," which Ford had argued throughout the trial. The trial court replied that Ford had not requested a comparative negligence instruction for the final charges. (12T180:5-25).

Ford's counsel confirmed this, (12T180:5-25), but insisted that Ford still had the right to argue to the jury that Mr. Paredes had "overcorrected" his steering and that this, not any design defect with the vehicle, caused the rollover. "Mr. Holcomb testified this is a situation of

over correction. Mr. Tandy touched on this, as well, when he testified about it on direct, also; that's where the issue is and that's for the jury to decide." (12T181:7-16; 12T182:7-15). The court postponed any decisions until the next day. (12T182:15-24).

Plaintiffs' counsel also addressed the "sunvisor" warning evidence that Ford had presented, arguing that this evidence was also irrelevant to the issues before the jury and that the court should also instruct the jury to "disregard" this evidence. (12T186:10-187:5). Again, Ford's counsel objected, however, arguing that the sunvisor evidence showed that "Ford, in fact, did alert the consumer and particularly Mr. Paredes that this is a different kind of vehicle, that there is a rollover risk with it and that's part of the overall process in evaluating this vehicle." (12T187:15-24). The court postponed a decision on this issue until the next day as well. (12T188:1-5).

When the next day arrived, plaintiffs' counsel immediately raised his "very serious" and continuing concern with the "overcorrection" evidence and argument that Ford had presented throughout the two-week trial:

MR. DENNEY: Judge, I still have a very serious concern I would like to express to the Court. I'm not sure how to deal with it.

We have heard so much evidence about comparative negligence in this case. Nothing in this instructions addresses with the jury and your direction of counsel doesn't address to the jury the argument I believe they'll make, and the jury will walk out of here thinking they have to decide this, whether the plaintiff over-corrected. And I think that there either needs to be direction of counsel to stay away from that and not discuss it and/or you need to tell the jury there is not a comparative claim in this case and explain to them in brief what that means, that they may not consider the driver's conduct in determining those issues. Because they're going to be very confused, otherwise, because it is sort of a trick by the defendant to drop the comparative claim and then want to talk about all the evidence on that.

. . . And I think the jury needs direction or they're going to be very confused on all that. I think they can talk about whether the vehicle performed properly in this event, but when they talk about the driver over-correcting, that is a different thing. That is that comparative claim that they dropped and that's exactly what *Green*² addresses. And the Court needs to give this jury some direction on that or they're going to be very confused.

(13T15:21-17:4; 13T15:18-21:10).³

² *Green v. General Motors*, 310 N.J. Super. 507 (App. Div.), certif. denied, 156 N.J. 381 (1998).

³ Model Charge 5.40I(B) (which at the time was designated as Model Charge 5.34G), which was part of the requests to charge that plaintiffs submitted to the court before trial began, was entitled "Limiting Instruction Where Comparative Negligence is not Applicable – Plaintiff's Conduct May Only Be Considered on Issue of Proximate Cause" and appeared to address this concern. (A19-21, A33-34).

But Ford's counsel argued that "overcorrection" was simply one of the "core issues" the jury had to determine in deciding plaintiffs' design defect claim:

MR. CONROY: Judge, the issue of over-correction is the issue that Mr. Holcomb testified to at length. After the Court heard what his proposed testimony was on that, the jury heard the testimony about what the meaning of these tire marks mean, that the physical evidence of the tire marks doing what they did is evidence that he over-corrected.

Plaintiff may disagree with that, but the short answer is there's testimony in the record that that's what he did. That explains the tire marks. That in over-correcting this vehicle as he did, he placed the vehicle in a situation, consider it exceeded it, was put into a condition where it exceeded the vehicle's design capacity and that's why it rolled over. That's one of the core issues in this case.

[13T17:5-22]

Plaintiffs' counsel told the court that Ford's position was a "trick" - to present expert testimony and argue for two weeks about how Mr. Paredes had "overcorrected" his steering and caused the rollover and then withdraw its request for a comparative negligence charge or any instructions that clarified how the jury could consider Ford's evidence and argument:

[Plaintiffs' Counsel] Now, it is a trick to this jury to let Mr. Conroy talk about this over-correction and blame this driver and not have that issue in front of them. It is a trick they play all the time, and they do that because they

know jurors are reluctant to blame people for something that their own experts can't quantify.

It is not over-correction. It is simply steering. None of the defense experts could quantify for this Court what over-correction would be.

[13T18:20-19:10]

Without cautionary or limiting instructions, counsel stressed, the jury was "going to consider [the evidence] regardless." (13T19:16-20). But the court disregarded plaintiffs' objections, ruling that the evidence "is certainly a relevant point" in the case. "I'm satisfied that it is a pertinent part of the determination of the liability in the case. I will permit comment by both sides as to the steering as it may relate to the happening and proximate cause of the accident." (13T20:15-21:10).

The court ruled similarly on the sunvisor evidence, stating that it was "admissible" and could be considered by the jury in deliberating plaintiffs' design defect claim:

As to the sunvisor warning, during the course of the trial the jury was permitted to hear testimony regarding the warning label that was affixed to the driver's side sunvisor in the Ford Explorer. The Court finds this testimony to be admissible, as it is more probative than prejudicial, and will allow the jury to consider properly the issues of witness credibility.

Additionally, the Court finds that the sunvisor warning addresses issues of vehicle design operation and proximate cause of the accident and the injuries and, therefore, the sunvisor warning

may be discussed by the attorneys in their closing arguments.

[13T4:20-5:11]

With the court's rulings in hand, Ford's counsel returned to these themes once again in summation, reminding the jury about the sunvisor warning that Mr. Paredes saw:

Ford provided with this truck, as required by Federal law for all SUVs, a warning on the sunvisor, and you have seen that warning. It talks about the risk of roll-over with these kinds of vehicles. You have seen the information that we showed you in the owner's guide that explains why the risk of roll-over is different for a truck like this, because of its higher center of gravity, because of its off-road capability. And it is expressly said that it is not going to perform like a passenger car will.

[13T33:2-13]

Ford's counsel reiterated the expert testimony and evidence that Mr. Paredes had "overcorrected" his steering and caused the rollover:

What happened in this accident? Mr. Paredes was confronted with an emergency situation. A car cut in front of him. He had to react to it. We know that he steered to the left. We know that he braked. There's evidence that the vehicle traveling ahead of him also braked. But what we know is that Mr. Paredes steered to the left to avoid the car in front of him and he did that successfully. The first steer input was a successful avoidance maneuver away from this Volvo in front of him. Now he's headed towards the concrete barrier.

Mr. Paredes puts in a second steer input. This one to the right. This was a significant steering input. [A] steering input significant

enough that it resulted in tire marks being left by the left side of his vehicle as he's turning it to the right. The turn was put in and it was held in. The vehicle slid close to 250 feet, with the steer being held into the right. And it's traveling, it started, the accident sequence, in the order of 70 miles an hour.

When this second steer input is put in, the vehicle is traveling just over 60 miles an hour. It is sliding at some angle sideways to the roadway 60 miles an hour, and it still hasn't rolled over. It still hasn't lifted any tires.

Mr. Paredes then put a third steer input in and snapped the vehicle back the other way. He steered it this time, a third steer is back to the left. That snapped the back end of the vehicle around. It slid an additional distance. We know there is at least 50 feet of tire marks that are measured as a result of this third steer. And the vehicle rolls over on-road.

So what we have happening is that the vehicle, in essence, slid close to a football field sideways at some angle in which time it was rapidly steered twice, causing the vehicle to change directions very quickly. And at the end of the tire marks, the vehicle rolled over. That these forces that the vehicle saw in this event were significant, they were extraordinary, and they overcame the inherent stability of this vehicle as the vehicle was rocking back and forth on the suspension as it is changing directions as Mr. Tandy explained to you.

Again, we submit that a safely designed vehicle, this can happen to it when these forces became great enough. And that's what happened here.

[13T41:2-43:8]

The court then charged the jury. The charges did not mention the overcorrected steering or sunvisor warning evidence. (A37-42). Plaintiffs' counsel noted his prior

objections. Ford had no objection to the charge.

(14T50:10-21).

The jury began deliberating the two questions on the verdict sheet: (1) "Has the plaintiff established by a preponderance of the evidence that the Explorer vehicle was not reasonably safe for its intended purpose because of a design defect?"; and (2), if yes, "Has the plaintiff established by a preponderance of the evidence that the design defect of the Explorer vehicle was a proximate cause of Plaintiff's injuries?" (A43-44).

The case had taken two weeks to try. The jury returned a verdict in about two hours, answering "no" to the first question. (A43-44).

For the following reasons, plaintiffs now respectfully request that this Court reverse the decision below and remand this matter for a new trial on their design defect claim.

Argument

Even if all of Ford's "overcorrected" steering and "sunvisor warning" evidence was admissible at trial, the trial court committed harmful error by not charging the jury on the limited purpose for which they could consider this evidence when deliberating plaintiffs' design defect claim (raised below).⁴

A. Standard of Review

A trial court must instruct the jury on "the applicable legal principles and how they are to be applied in light of the parties' contentions and the evidence produced in the case." Where evidence is relevant for only a limited purpose, the jury must be told this. Johansen v. Makita USA, Inc., 128 N.J. 86, 99-100 (1992); Viscik v. Fowler Equipment Co., 173 N.J. 1, 18 (2002); see D'Aries v. Schell, 274 N.J. Super. 349, 361-62 (App. Div. 1994) ("purpose of a limiting instruction is to assure that evidence will not be improperly applied beyond the specified purpose by the jury").

The appellate court should examine the whole charge not isolated mistakes. But where a party requests an

⁴ See A19-21 (plaintiffs' initial requests to charge including Model Charge 5.34G (currently Model Charge 5.40I (renumbered); (12T180:5-25; 13T15:15-21:10; 12T186:10-187:5) (plaintiffs' objections to continuing argument and lack of instruction to disregard "overcorrected" steering and "sunvisor warning" arguments by Ford); (14T50:10-21)(plaintiffs' continuing objection to lack of cautionary and limiting instructions in court's final charge).

instruction that is not covered by some part of the charge, and the omitted instruction concerns a matter that is material to the jury's determination of the case, reversal is warranted. Charge errors are "poor candidates for rehabilitation" and "are ordinarily presumed to be reversible error." Das v. Thani, 171 N.J. 518, 527 (2002).

B. The "overcorrected" steering error

Even if all of Ford's "overcorrected" steering evidence was admissible, the trial court at least should have charged the jury that this evidence was not relevant to the first design defect question the jury had to determine, and was relevant (at most) to the second proximate cause question only to decide if plaintiff was the "sole cause" of the accident.

In Johansen, our Supreme Court emphasized that these limiting instructions are "necessary" whenever evidence of the plaintiff's conduct or use of the product is introduced at trial because, "[i]n determining a manufacturer's liability for an allegedly defective product, the inquiry should focus on the condition of the product, not the plaintiff's use of care in operating the product." Whether the product's design is defective is an objective test focusing on the product's condition when marketed and the

"hypothetical, average user." "[T]he post-marketing conduct of one plaintiff cannot inform that determination. Evidence of . . . plaintiff's use of care in the operation of the [product] [is] irrelevant to the risk-utility analysis." 128 N.J. at 100-03.

Thus, "an instruction that the plaintiff's conduct not be considered in the context of the risk-utility analysis is essential" whenever such evidence is introduced to "clarify" its limited relevance and caution the jury not to consider the evidence in determining the threshold design defect question:

Without it, a jury might find that a product, although improperly designed, is not defective because the plaintiff could have avoided the danger posed by the product through the exercise of due care. Put differently, a jury not properly instructed might inadvertently compare a plaintiff's and defendant's fault in determining whether a product is defectively designed. Such a comparison would dilute the limitations that we have imposed on the assertion of the comparative-negligence defense in strict-liability-design-defect litigation.

[Id. at 101]

Even if product misuse is alleged, the product is still defective if the misuse was objectively foreseeable. And again, even where the facts permit a jury to find truly unforeseeable misuse, the jury must be specifically instructed on these legal principles. Id. at 95; see

Jurado v. Western Gear Works, 131 N.J. 375, 385-86, 389 (1993); Brown v. United States Stove Co., 98 N.J. 155, 168-69 (1984); Model Charge 5.40G on "Product Misuse or Alteration" ("misuse" instruction warranted only if jury can conclude that product use not reasonably foreseeable).

A similar analysis governs the second proximate cause determination in a design defect case. Evidence of the plaintiffs' conduct is relevant not to the question of proximate cause generally, but only in a limited way: to decide if the plaintiff, not the product's design defect (which the jury must determine first before proximate cause), was the "sole cause" of the accident. Johansen, 128 N.J. at 102-03. Likewise, a comparative fault charge (i.e., that plaintiff was at fault for the accident) is not a defense to a design defect claim and may not be charged unless the facts show that the plaintiff "voluntarily and unreasonably proceeded to encounter a known danger" with the product "and that such action was a proximate cause of the accident." And even where the facts permit the jury to reach this conclusion, the court, again, must instruct the jury on these strict liability principles. Id. at 94-98; Model Charge 5.40J (Ford did not raise unforeseeable misuse below and abandoned its initial request for a comparative fault charge, see 12T180:5-25).

Our courts have consistently reversed verdicts for manufacturers whenever evidence of the plaintiff's conduct or use of the product is introduced at trial and these critical cautionary and limiting instructions are not provided to the jury. In Johansen, for example, the manufacturer presented expert testimony and argued at trial that the accident was caused not by any design defect with the power saw but "because plaintiff had accidentally placed his fingers directly in the path of the saw blade." The plaintiff could have avoided the accident by "propping up the unsupported end of the board." Id. at 91-92. The Supreme Court reversed because "the jury should have been instructed not to consider evidence concerning plaintiff's lack of care in deciding the question of design defect."

We hold that the trial court committed plain error in failing to instruct the jury on the limited purpose for which it could consider evidence of plaintiff's negligent operation of the saw. On this record, the absence of a limiting instruction clearly had the capacity to mislead the jury in its application of the risk-utility factors, particularly in view of the extent to which defendant's proofs emphasized plaintiff's lack of due care. The trial court should have instructed the jury, in accordance with its earlier ruling, that evidence of plaintiff's method of operating the saw was neither a defense to plaintiff's strict-products-liability claim nor relevant to the jury's application of the fifth factor of the risk-utility analysis.

[Id. at 102-03]

The proximate cause portion of the charge was erroneous too, the court held, because the charge "should have explained to the jury that although it could deny plaintiff recovery if it found he was entirely responsible for the accident, it could not deny plaintiff recovery if it found that the rotation of the wood attributable to the defective design of the saw was a partial cause of the accident and that plaintiff's failure to prop up the two-by-four, concededly a foreseeable use of the saw, was also a contributing cause." Id. at 102. Model Charge 5.40I (formerly Model Charge 5.34G, now renumbered) currently embodies this critical instruction required by Johansen:

B. Limiting Instruction Where Comparative Negligence is not Applicable – Plaintiff's Conduct May Only Be Considered on Issue of Proximate Cause (Approved 4/95)

You have heard evidence about how the (insert name of plaintiff) was using the (insert name of product). When you are deciding whether the (product) was defective, you are not permitted to consider the (plaintiff's) conduct.

If you find the (product) was defective, then you must decide whether the defect was a proximate cause of the accident. At this point, you may consider the (plaintiff's) conduct.

If you decide that the (product) defect was the only cause of the accident then you must find that that defect proximately caused the accident.

If you decide that the (product) defect was a partial or contributory cause, then you must also find that the (product) defect was a

proximate cause of the accident, even if the (plaintiff's) conduct was also a partial or contributory cause.

On the other hand, if you decide that the (plaintiff's) conduct was the only cause, then you must find that the (product) defect was not a proximate cause of the accident.

[A32-36]

We submit that the trial court made precisely this error below. The court failed to give Model Charge 5.40I or cautionary and limiting instructions of any sort that told the jury that Mr. Paredes' alleged "overcorrected" steering was *not* relevant to the first design defect determination the jury had to make and was relevant to the second proximate cause question only to decide if plaintiff was the "sole cause" of the accident. (A37-42).

As in Johansen, the "danger" in not providing these critical instructions was "especially acute" because Ford, like the manufacturer in Johansen, "emphasized plaintiff's conduct" and the manner in which he used the product (that he "overcorrected" the Explorer's steering) "[t]hroughout the trial" (as detailed in the Statement of Facts above). Omitting these limiting instructions left the jury free to "inadvertently compare a plaintiff's and defendant's fault in determining whether a product is defectively designed" – distorting the central strict liability determination the

jury was required to make. This charging error mandates reversal for a new trial in this case just as it did in Johansen and in several other cases where this same error was made. See, e.g.,

- Ladner v. Mercedes-Benz of N. Am., 266 N.J. Super. 481, 491-93 (App. Div. 1993), certif. denied, 135 N.J. 302 (1994)(failure to provide limiting instruction on use of plaintiff's conduct in determining design defect question is not harmless and warrants new trial; "Without that explanation, the jury was free to reason that plaintiff was a foreseeable user; the standard of care applied to her; she violated the standard; and she would not have been injured had she not done so: ergo, the [product's] design was not defective");
- Dixon v. Jacobsen Mfg. Co., 270 N.J. Super. 569, 590 (App. Div.), certif. denied, 136 N.J. 295 (1994)(reversing judgment for manufacturer because jury not instructed that plaintiff's conduct was irrelevant to question of product defect and was relevant only to proximate causation and/or comparative fault issue);

- Jurado v. Western Gear Works, 131 N.J. 375 (1993) (holding uncertainty about whether jury's answer to interrogatory referred to plaintiff's "misuse of product" undermined jury's finding of no product defect and warranted reversal);
- McGarvey v. Ford Motor Co., et al., 293 N.J. Super. 129, 144-47 (App. Div.), certif. denied, 147 N.J. 263 (1996) (jury instructions "misleading" and incorrect under Johansen because "jury did not receive clear instructions" on how it could consider evidence regarding driver's exercise of due care at time of accident);
- Lyons v. Caterpillar, Inc., 2005 WL 3358068, at *7-9 (App. Div. 2005), certif. denied, 186 N.J. 257 (2006)(attached to appendix as A49-58)("failing to provide a limiting instruction" on limited use of "evidence of the plaintiff's use of the 992D front end loader" "cannot be deemed harmless" under *Johansen*; "An instruction informing the jury that plaintiff's conduct was only relevant to the issue of proximate causation was 'essential to a fair trial' and requires remand");

- Cf. Marino v. Sears, Roebuck & Co., 2006 WL 3903970, at *4 (App. Div. 2006)(attached to appendix as A59-65)(affirming verdict for manufacturer because cautionary/limiting Model Charge 5.34(G)(2) (now 5.40I(B)) given by trial judge "at the beginning of defendant's case immediately prior to" the relevant testimony and again during final charges; "the judge properly instructed the jury that plaintiff's conduct could not be used to determine whether the product was defective and, in order to find for defendants, it must find that plaintiff's conduct, not the defect, was the sole cause of the accident.")

The Court should reverse and remand this case for a new trial as well.

C. The "sunvisor warning" error

We question why the trial judge allowed this evidence in the first place. The issue at trial was design defect not defective warnings. The charges asked the jury to determine whether the Explorer should have incorporated the alternative "lower and wider" design, not more explicit warnings about rollover risk. (A39-41; 14T24:10-26:23).

Though Ford obviously criticized how Mr. Paredes steered the vehicle during the avoidance maneuver, Ford did not claim *unforeseeable* "misuse," and Ford dropped its comparative fault request. Indeed, this was completely foreseeable highway driving and a typical avoidance maneuver. No facts showed that plaintiff had "actual knowledge of the particular" risk of rolling over on the highway yet "knowingly and voluntarily" encountered the risk anyway. See, e.g., Model Charge 5.40J. This was not a case of Mr. Paredes doing "doughnuts" in a parking lot, or rolling the Explorer over while careening down a steep embankment during a joy ride. Perhaps the sunvisor warning might have been relevant to that kind of case. It was not relevant to this one.

But the Court need not decide that thorny evidentiary question here because even assuming the evidence was somehow relevant and admissible, the trial court again failed to charge the jury on the limited purpose for which they could consider it. At the very least, it was not relevant to determining the threshold question of whether the Explorer was defectively designed. Like the "overcorrected" steering error, the absence of limiting instructions permitted the jury to consider the sunvisor warning for any purpose they saw fit – including the

prohibited one noted above. This distorted the strict liability inquiry and denied a fair trial on plaintiffs' design defect claim, providing further ground for reversal.

The Court reversed on this error in Saldana v. Michael Weining, Inc., 337 N.J. Super. 35, 49 (App. Div. 2001).

There, the plaintiff alleged design defect, but the trial court permitted the manufacturer to introduce a "warning sticker" into evidence – then failed to instruct on how the jury could consider it. This was fundamental error, the Court held, because the warning was irrelevant to whether "the wood molding machine was . . . defectively designed." Echoing the bedrock strict liability principles Johansen summarized, the Court stressed, "[t]he manufacturer can use neither the obviousness of the product's danger nor the plaintiff's conduct as a shield to avoid liability for an otherwise defective product." Id. Introducing the warning without such instructions could not help but be harmful:

. . . the warning, improperly before the jury, loomed bigger than life, especially when viewed in the context of the prevailing issue which was limited to defective design. . . . it . . . permitted the jury, absent limiting instruction, to speculate as to its applicability, suggesting that its presence might be viewed as ameliorating the alleged defect concerning the design of the guard. . . . We conclude that the inclusion of the warning in the photograph, without . . . limiting instruction, was error and its introduction into evidence had the clear capacity to produce an unjust result.

[Id. at 49-50]

Lewis v. American Cyanamid Co., 155 N.J. 544 (1998)

stands for the same principles. There, the defendants also argued that the plaintiff's design-defect claim failed "because plaintiff did not obey the instruction on the foggers' label," "reenter[ing] his kitchen approximately one minute after activating the foggers." Id. at 563-64. Again, the Court held that this distorted the strict liability determination the jury had to make because the warning was not relevant to the design defect question:

Allowing such a warning to defeat a design-defect claim would not encourage manufacturers to place such warnings on their products. Indeed, it would frustrate the imposition of liability when a product's design fails to take into account an injured party's objectively foreseeable misuse of the product.

[Id. at 564 (citations omitted)]

We respectfully submit that these same fundamental errors are present in the jury charge here, warranting reversal and remand for a new trial on these same grounds.

Conclusion

The trial court's charges did not instruct the jury on the limited purpose for which they could consider Ford's "overcorrected" steering and "sunvisor warning" evidence. This distorted the threshold design defect question the jury had to decide. We respectfully request that the Court reverse the decision below, therefore, and remand this matter for a new trial on plaintiffs' design defect claim (with direction that the trial court provide the appropriate cautionary and limiting instructions should this evidence be reintroduced on retrial).

Respectfully submitted,

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