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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3542-07T2

PATRICIO E. PAREDES and  
LAURA A. PAREDES,

Plaintiffs-Appellants,

v.

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

Defendants-Respondents

AND

FORD MOTOR COMPANY,

Third-Party Plaintiff,

v.

THOMAS A. VIVIAN,

Third-Party Defendant.

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Argued November 13, 2008 – Decided December 10, 2008

Before Judges Parrillo, Lihotz and Messano.

On appeal from the Superior Court of New Jersey, Law  
Division, Middlesex County, Docket No. L-4952-03.

Michael Confusione argued the cause for appellants  
(Hegge & Confusione, LLC, attorneys; Mr. Confusione,  
of counsel and on the brief).

Thomas M. Hinchey argued the cause for respondent Ford Motor Company (Campbell Campbell Edwards & Conroy, P.C., attorneys; William J. Conroy, Mr. Hinchey and Katherine A. Wang, of counsel; Ms. Wang, on the brief).

PER CURIAM

In this design defect products liability case, plaintiffs Patricio and Laura Paredes appeal from a final judgment following a jury verdict of no-cause of action in favor of defendant Ford Motor Company (Ford or defendant). For the following reasons, we reverse.

On August 24, 2001, plaintiffs' 2000 Ford Explorer, which they had purchased only months before, rolled over three times after Patricio, the driver, engaged in emergency maneuvers to avoid another vehicle. Moments before, while traveling westbound in the left lane of Route 78, with his wife Laura in the passenger seat, Patricio observed two cars passing on the right. Immediately after the first car passed, the second car, a silver Volvo driven by Thomas Vivian, changed lanes in front of plaintiffs' vehicle and braked.

Because neither of the Paredes' could recall the details of what happened next, Ford's accident reconstruction expert, Michael Holcomb, opined, based on the Explorer's tire marks on the highway, that Patricio braked and performed three steering maneuvers. He first steered the Explorer to the left, causing

the vehicle to veer toward the median. To compensate, he then steered to the right, causing the vehicle to re-enter the left lane and slide at an angle for approximately 250 feet. He next steered back to the left, causing the vehicle to slide sideways for another 50 feet, at which point it raised off the ground, rolled over three times, and came to rest on its roof in the grassy median on Route 78.

As a result of the accident, Patricio suffered skull fractures, respiratory failure, and traumatic brain injuries. After several weeks in the hospital, he spent another three weeks in acute rehabilitation. He claims his injuries are permanent and have affected his ability to concentrate and recall.<sup>1</sup>

Plaintiffs sued defendant in strict products liability, alleging that the 2000 Ford Explorer was defectively designed.<sup>2</sup> Defendant answered and asserted contributory negligence as an

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<sup>1</sup> Plaintiff Laura Paredes sues per quod.

<sup>2</sup> Plaintiffs also alleged negligence, civil conspiracy and violations of the Consumer Fraud Act, N.J.S.A. 56:8-1 to -184, but these claims against Ford were eventually withdrawn. In addition to Ford, plaintiffs also sued the Ford dealership where they purchased the vehicle, Condit Ford, which claim they voluntarily dismissed prior to trial as did Ford with respect to its third-party claim against Thomas Vivian. Consequently, the case proceeded to trial against Ford on the design defect claim alone.

affirmative defense, but later abandoned that defense.<sup>3</sup> At the ensuing trial, plaintiffs' expert opined that the 2000 Ford Explorer was defectively designed because it rolled over during a foreseeable emergency avoidance maneuver, and that the Explorer should have been equipped with electronic stability control (ESC) and designed with smaller wheels and a wider wheel base to lower its center of gravity. Defendant's experts, on the other hand, claimed that ESC would not prevent a vehicle from rolling over but merely "reduce[s] side slip," and that the design and development of the Explorer was "consistent with the industry" and resulted in a vehicle with "good handling characteristics," "steering characteristics," and "a high resistance to roll-over." Defendant also proffered evidence of the Explorer's sun visor warning, which advised the driver of a Sport-Utility Vehicle's (SUV) rollover risk. Evidence of the sun visor warning was admitted not only to impeach Patricio, who claimed he did not know that SUVs had a higher rollover risk than cars, but also to demonstrate that Ford had not ignored inherent SUV rollover risks in designing the Explorer, as plaintiffs alleged.

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<sup>3</sup> In fact, prior to trial, Ford submitted a request for a comparative fault charge, but at the close of evidence, withdrew that request.

Much of the expert testimony at trial focused on Patricio's conduct at the wheel. Evidence of his steering maneuvers was admitted as relevant to the issue of proximate causation. In this regard, the defense was that Patricio "overcorrected" his steering inputs and that this conduct was a substantial factor in causing the Ford Explorer to roll over. To this end, defense expert Michael Holcomb testified extensively about Patricio's response maneuvers, concluding that "[t]he tire marks tell me, Wow, he held the steering way too long for this circumstance because halfway through this, he could have straightened out," "[t]hat over correction was clearly involved," and that "[y]ou might not have to swerve very much is what I mean." Another Ford expert, Donald Tandy, testified that "a combination of steering maneuvers" amounting to "overcorrection" caused the rollover. In closing arguments, Ford's counsel emphasized this theme, commenting about plaintiff's second steering input, "I submit to you, ladies and gentlemen, that that simply is not a reasonable avoidance maneuver."

Although evidence of plaintiff's steering maneuvers was admitted as relevant to the issue of proximate causation, the trial judge never gave a limiting instruction that the jury could not consider such evidence on the issue of whether the Ford Explorer was defectively designed. This, despite the fact

that pre-trial, plaintiffs requested Model Jury Charge 5.40I be given, which instructs the jury, among other things, not to consider a plaintiff's conduct when deciding whether the product was defective. Again, at the close of evidence, plaintiffs' counsel expressly requested "that the jury be instructed not to consider Mr. Paredes' negligence," but the trial judge refused the request, stating that the charge would include no reference to plaintiff's conduct whatsoever, although counsel for both parties would be permitted to refer to it in closing arguments.

Prior to jury deliberations, the court reviewed with the parties a verdict sheet containing interrogatories. Once again, plaintiffs objected to the charge as formulated:

[Y]ou 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. . . . 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 [v. General Motors Corp.], 310 N.J. Super. 507 (App. Div.), certif. denied, 156 N.J. 381 (1998)] addresses. And the Court needs to give this jury some direction on that or they're going to be very confused.

. . . .

Your honor, the Green case quotes, "Once the defendant has a duty to protect persons from the consequences of their own foreseeable faulty conduct, it makes no sense to deny recovery because of the nature of the plaintiff's conduct."

Although acknowledging there was "substantial testimony concerning the manner in which the vehicle reacts based on steering," the trial judge responded that he was "satisfied that [the evidence] is a pertinent part of the determination of liability in this case." Thereafter, the court charged the jury without a limiting instruction. Regarding the requisite duties and burdens of proof in design defect cases, the court gave the following charge:

[T]he plaintiff Paredes has the burden of proof establishing his right to the relief requested. On the other hand, Ford has the burden of proving each and every element of any defense asserted.

. . . .

The defendant Ford Motor Company as a manufacturer of a product has a duty to make a product that is reasonably safe. In this charge when I refer to a reasonably safe product I mean a product that is reasonably fit, suitable, and safe for its intended or reasonably foreseeable uses. Defendant Ford owes that duty to direct users of the vehicle, to reasonably foreseeable users of the vehicle, an [sic] to those who may reasonably may be expected to come into contact with it.

Defendant Ford is liable only if plaintiff proves that the vehicle causing harm was not

reasonably safe for its intended or reasonably foreseeable uses.

In this case the plaintiff Paredes claims that the vehicle was not reasonably safe for its intended purpose because the vehicle was designed in a defective manner. The plaintiff claims that the vehicle was defectively designed because it did not employ a reasonably safer design. To establish their claim of design defect the plaintiffs must prove by the greater weight of the credible evidence that the produce [sic] was designed in a defective manner. A designed defect existed - risk of harm posed by the vehicle could have been reduced or avoided by the adoption of a reasonable safer design and the omission of the alternative design renders the product not reasonably safe.

. . . .

The question for you to decide is whether assuming the defendant knew the dangers of the product it was nevertheless reasonably careful in the manner in which it designed the product.

. . . .

The last requirement for holding the defendant liable is that the defect, whatever you find it to be, must have been a proximate cause of the rollover accident. By proximate cause it is meant that the defect in the product was a substantial factor which singly [sic] when in combination with another cause part - the rollover accident.

Plaintiff need not prove that the rollover accident which occurred could have been anticipated so long as it was within the realm of foreseeability that some harm could result from the defect in question. If the

product in question, however, does not add to the risk of the occurrence of the particular rollover accident and - was not a contributing factor in the happening of the rollover accident, then plaintiff has failed to establish that a particular product defect was a proximate cause of the rollover accident.

After concluding the charge, the court then gave the jurors the following "verdict sheet" to assist them in their deliberations:

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?
2. 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?
3. a. What amount of money would fairly and reasonably compensate Plaintiff, Patricio Paredes for his disability, impairment, loss of enjoyment of life, and pain and suffering as a proximate cause of the accident?  
  
b. What amount of money would fairly and reasonably compensate Plaintiff, Patricio Paredes for the following:
  - i. Past wages
  - ii. Future wages
- c. What amount of money would fairly and reasonably compensate Plaintiff, Laura Paredes for her loss of her husband's services, society and consortium as a proximate cause of the accident?

As noted, the jury returned a verdict in favor of Ford, finding that the Explorer was not defectively designed.

On appeal, plaintiffs maintain that the failure to limit the jury's use of evidence of Patricio's conduct allowed them to impermissibly consider that the Explorer was not defective because plaintiff could have avoided the danger by exercising due care. In other words, absent a limiting instruction, there was a very real possibility of the jury considering evidence of conduct when determining the issue of design defect, given that such proof pervaded the trial. Defendant counters that plaintiffs failed to preserve the issue for appeal because they did not voice a proper objection below, and that, in any event, the jury instruction was neither misleading nor confusing.

A design defect is defined by the Products Liability Act, N.J.S.A. 2A:58C-1 to -11, as something that renders a product not reasonably fit, suitable or safe for its intended purpose. N.J.S.A. 2A:58C-2. A design defect is further defined as a danger inherent in a product that has been manufactured as intended when that danger, as a public policy matter, is greater than can be justified by the product's utility. See Cepeda v. Cumberland Eng'g Co., Inc., 76 N.J. 152, 173 (1978), overruled on other grounds by Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 177 (1979); Suter, supra, 81 N.J. at 172-73; Johansen

v. Makita USA, Inc., 128 N.J. 86, 95 (1992); Jurado v. Western Gear Works, 131 N.J. 375, 385 (1993). In other words, when a product is manufactured as intended but the design renders the product unsafe, the first element of a design defect case exists. See Cepeda, supra, 76 N.J. at 169, 172, 179; Suter, supra, 81 N.J. at 170-71, 174-76. Thus, not only must the defect have existed when the product left the hands of the manufacturer, but the defect must have caused injury to a reasonably foreseeable user. Jurado, supra, 131 N.J. at 385.

The next element of the definition invokes public policy matters. Analysis of the danger posed by the product first examines either (i) the reasonable expectations of the consumer; or (ii) a list of factors that balances the risk posed by the product against its utility within the marketplace, the ultimate question being whether, under all the circumstances, the manufacturer was reasonable in marketing the product as designed. See Suter, supra, 81 N.J. at 171-72; Cepeda, supra, 76 N.J. at 172; Johansen, supra, 128 N.J. at 95. These "risk/utility" factors are: the usefulness and desirability of the product; the likelihood that it would cause injury (and the seriousness of the injury); the availability of a safer substitute product or design; the manufacturer's ability to eliminate the danger without impairing the usefulness of the

product or making it too expensive; the user's ability to avoid the danger by the exercise of care; the user's likely awareness of the danger; and the feasibility, on the part of the manufacturer, of spreading the loss through the price of the product or by carrying liability insurance. Cepeda, supra, 76 N.J. at 174; Suter, supra, 81 N.J. at 171-72. The risk/utility analysis is an objective test that focuses on the product and the class of users, not on the conduct of the particular plaintiff with regard to the product. Johansen, supra, 128 N.J. at 100.

In this regard, "[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" because product safety can only be judged in the context of the average consumer. Id. at 95, 101. "[T]he post-marketing conduct of one plaintiff cannot inform that determination." Id. at 101. "A design defect does not come into being at the time of an accident." Green v. General Motors Corp., 310 N.J. Super. 507, 516 (App. Div.), certif. denied, 156 N.J. 381 (1998). "Rather, it occurs when a defective product is placed into the stream of commerce." Ibid. "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." Johansen, supra, 128 N.J. at 101.

In Johansen, the plaintiff filed a products liability action against the manufacturer of a miter saw that injured him. Id. at 90. The Court held that the trial judge's failure to instruct the jury that it could not consider the plaintiff's negligent operation of the saw in determining whether the saw had been defective was reversible error:

The danger that the jury might improperly focus on plaintiff's behavior in deciding the issue of product defect was especially acute in this case. Throughout the trial, defendants emphasized plaintiff's conduct in operating the saw . . . . Defendants maintained that plaintiff could have avoided injury by using due care or "common sense." Thus, the jury should have been instructed not to consider evidence concerning plaintiff's lack of care in deciding the question of design defect.

[Id. at 102].

The holding of Johansen has been consistently applied. In Congiusti v. Ingersoll-Rand Co., 306 N.J. Super. 126, 129 (App. Div. 1997), the defendant contended that the sole cause of the accident was the plaintiff's negligent decision to operate the drilling machine from a ninety degree position. On appeal from

a jury verdict in favor of the manufacturer, we found that in a products liability action, such evidence was admissible to prove causation, but that "[w]here this is so . . . there must be strict jury instructions regarding the jury's use of evidence of plaintiff's fault." Id. at 134-35.

In Dixon v. Jacobsen Mfg. Co., 270 N.J. Super. 569, 589-90 (App. Div.), certif. denied, 136 N.J. 295 (1994), a warning defect case, the defendant contended that the trial court's ruling to exclude relevant evidence bearing on the issue of adequacy of warnings was harmless in light of evidence of plaintiff's conduct. We rejected that argument, holding that defendant could not rely on plaintiff's conduct on the issue of defect, and further that the jury should have been specifically instructed that plaintiff's conduct was not relevant in its determination of whether defendant acted reasonably" in providing the information that it did in response to plaintiff's request for "any information" pertaining to the product. Id. at 588. We held that "[s]uch an instruction is 'essential' to a fair trial." Ibid.

Likewise, in McGarvey v. G.I. Joe Septic Serv., Inc., 293 N.J. Super. 129, 146 (App. Div.), certif. denied, 147 N.J. 263 (1996), we found that the plaintiff's conduct was irrelevant to the analysis of whether the chassis was a defective product. We

held that "[i]n a strict liability case, when the consumer's conduct is admissible on some issues but not others, a limiting instruction that this conduct 'not be considered in the context of the risk-utility analysis is essential.'" Ibid. (quoting Johansen, supra, 128 N.J. at 101).

Here, of course, no such limiting instruction was given to the jury. Defendant argues none was required and that Johansen and its progeny do not apply because "no comparative fault claim was involved in this case." We disagree. We do not view Johansen's holding as predicated on the defendant's pursuit of a comparative negligence claim, but rather on the extent to which evidence of the plaintiff's conduct pervaded the trial. Indeed, as the court explained in Johansen, "a preliminary ruling [barring the defendant's contributory negligence claim] would not have excluded evidence of plaintiff's carelessness that was relevant to the issue of causation." 128 N.J. at 98. In other words, regardless of the defendant's pursuit of the comparative negligence claim, evidence of the plaintiff's conduct that related to causation would have remained admissible. Ibid. The critical issue, however, was how that evidence was to be considered by the jury. And on that score, the Court held that "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." Id. at 102-03.

Here, evidence of plaintiff's conduct was equally substantial. Indeed, defendant's theme throughout trial stressed that plaintiff's steering maneuvers overwhelmed the design capacity of the 2000 Ford Explorer. Defendant's expert Holcomb testified extensively about plaintiff's response maneuvers, and another defense expert, Tandy, concluded that "a combination of steering maneuvers" amounted to "overcorrection." In closing arguments, defense counsel emphasized plaintiff's second steering input and remarked, "I submit to you, ladies and gentlemen, that that simply is not a reasonable avoidance maneuver." In fact, despite having abandoned its comparative negligence claim, the defense in summation plainly suggested that plaintiff was negligent.

Given the extent of this evidence, the need for a limiting instruction advising that such proof was irrelevant to the issue of design defect was particularly acute. See Johansen, supra, 128 N.J. at 102. Contrary to defendant's argument, there exists the very real danger, absent the limiting instruction, of jury confusion and that "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." Id. at 101.

Defendant nevertheless argues that plaintiff failed to preserve the issue by voicing a proper objection below. We disagree. Plaintiff's conduct both before and during trial was consistent with the requirements of Rule 1:7-2. In the first instance, pursuant to Rule 1:8-7, plaintiff submitted a request to charge Model Charge 5.40I(B) in advance of trial. Although this does not excuse a timely objection at trial, see Nesta v. Meyer, 100 N.J. Super. 434, 443-44 (App. Div. 1968), we view plaintiffs' counsel's reservations expressed at time of jury charge formulation to be more than adequate, albeit less than fully articulate. Indeed, counsel argued that the jury should be advised that there was no comparative fault claim and "what that means." In elaborating further, counsel cited and quoted Green, supra, wherein "plaintiff's [conduct] was a definite factor in bringing about the accident, and the jury was told specifically and carefully that it could consider plaintiff's [conduct]" solely in determining proximate cause. 310 N.J. Super. at 522. Given the exactitude of the argument advanced, we highly doubt the trial judge was unaware of the nature of plaintiff's objection before formulating the jury charge.

Even if no objection to the jury charge was made below, Rule 1:7-2, the issue is still cognizable here as plain error. R. 2:10-2; see also Johansen, supra, 128 N.J. at 102. Plain error, of course, is error of such a nature as to be clearly capable of producing an unjust result. R. 2:10-2. Viewing the jury charge in this case as a whole, as we must, Boryszewski v. Burke, 380 N.J. Super. 361, 374 (App. Div. 2005), certif. denied, 186 N.J. 242 (2006), we are satisfied that the omission of a limiting instruction informing of the proper and restricted use of evidence of plaintiff's conduct resulted in a jury charge that did not accurately convey the law, and was therefore likely to confuse and mislead the jury. As such, the erroneous jury charge was clearly capable of producing an unjust result, thereby prejudicing the substantial rights of plaintiffs.

Reversed and remanded.

I hereby certify that the foregoing  
is a true copy of the original on  
file in my office.

  
CLERK OF THE APPELLATE DIVISION