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Ford Motor Co. v. Trejo, 133 Nev. Adv. Op. 68 (Sept. 27, 2017)

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TORT LAW: STRICT LIABILITY DESIGN DEFECT

Summary

The Court declined to adopt the risk-utility analysis. The consumer-expectation test is the appropriate standard for strict products liability claims in Nevada, and the risk-utility analysis is inappropriate because it inserts aspects of negligence into the test and unfairly burdens plaintiffs.

Background

The Ford Excursion

Upon the release of the Excursion, Ford claimed to have used similar design mechanisms for the Excursion as it did on the Super Duty pickup trucks, but Ford did admit that no physical tests had been performed at the time. Examinations were eventually performed in 2002 and the Excursion failed to meet Ford's guidelines with regards to the strength-to-weight ratio of the roof for vehicles weighing less than 8,500 pounds. The guidelines require this ratio to be at least 1.725 pounds but the Excursion fell short of that requirement at 1.25 pounds and fell to a drastic 0.79 pounds if the windows broke. The gross vehicle weight of the Excursion rated 8,600 pounds and Ford did not have internal guidelines for vehicles weighing over 8,500 pounds. Nevertheless, Ford did not issue any recalls or warn dealerships that the roof on the early Excursions was weak.

The Trejo's Accident

On December 16, 2009, Teresa Trejo, a Las Vegas resident, was driving a 2000 Ford Excursion with a trailer attached. Her husband, Rafael, in the passenger seat. A lane changed caused the Excursion to roll over. After rolling, the Excursion came to rest on its roof. Teresa exited the vehicle. Rafael was alive at that time, but unable to move or escape. A couple stopped to assist, and they removed Rafael from the vehicle. Rafael was pronounced dead at the scene.

Trejo's Suit Against Ford

Trejo filed a suit against Ford for design defect of the Excursion's roof under both strict products liability and common law negligence, but only the strict products liability was considered at trial. During jury instructions, Ford asked the district court to present instructions in accord with the risk-utility test as established in the Third Restatement. Nevada has not adopted the risk-utility test in design defect claims, though, so the district court gave stock jury instructions for the consumer-expectation test. The jury returned a special verdict in favor Trejo, finding that the roof on the 2000 Ford Excursion was, in fact, defective and that the roof design defect was the proximate cause of Rafael's death. After the district court denied Ford's motions for judgment as a matter of law or for a new trial, Ford appealed.

¹ By Jeff Chronister.

Discussion

Products Liability in Nevada

On appeal, Ford argued that the district court should have utilized the risk-utility analysis instead of the consumer-expectations test and erred by not giving the risk-utility jury instruction. Ford also asserted that regardless of the test used for strict product liability, Trejo did not sufficiently prove that the defected roof was a proximate cause of Rafael's death. The Nevada Supreme Court affirmed the district court's decision and denied the use of the risk-utility analysis. *Ginnis v. Mapes Hotel Corp* instructs that a plaintiff must generally prove that the product "fail[s] to perform in the manner reasonably to be expected in light of its nature and intended function and [is] more dangerous than would be contemplated by the ordinary user having the ordinary knowledge available in the community."² It is fundamentally unfair to plaintiffs to raise the burden of proof in these strict product liability cases and if the plaintiffs actually do have a reasonable alternative design, then the plaintiffs should be able to use that alternative design to bolster their case and not to satisfy a higher threshold of liability. Trejo presented sufficient evidence to prove the Excursion's roof was defective under the consumer-expectations test and demonstrated causation.

By affirming the district court's decision, the Court reinforced the public policy that manufacturers should be held liable for defective products in the market. Since *Ginnis*, the Court has recognized three categories of strict tort liability claims: 1) manufacturing defects,³ 2) design defects,⁴ and 3) the failure to warn.⁵ Within the realm of strict product liability, an alternative design is only one aspect to be considered when determining product defect.⁶ While evidence of a safer alternative would bolster a claim of defect, this alternative must ultimately be commercially feasible at the time of manufacture.⁷

The Restatement (Third) of Torts risk-utility analysis

Despite Nevada's extensive history of applying the consumer-expectations test for strict product liability, Ford requested that the Court use the risk-utility test in this case. Under the risk-utility analysis, a product is defective in design when the foreseeable risk of harm could have been lessened or avoided altogether by the adoption of a reasonable alternative design and when the absence of this alternative design would render the product not reasonably safe.⁸

² *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408, 413, 470 P.2d 135, 138 (1970). This is the most controlling of precedent cited by the court as the consumer-expectation test was officially endorsed through this case in Nevada.

³ *Krause Inc. v. Little*, 117 Nev. 929, 937-38, 34 P.3d 566, 571-72 (2001).

⁴ *Robinson v. G.G.C., Inc.*, 107 Nev. 135, 138-39, 808 P.2d 522, 524 (1991).

⁵ *Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 190-91, 209 P.3d 271, 274 (2009).

⁶ *McCourt v. J.C. Penney Co.*, 103 Nev. 101, 104, 734 P.2d 696, 698 (1987).

⁷ *Fyssakis v. Knight Equip. Corp.*, 108 Nev. 212, 214, 826 P.2d 570, 572 (1992).

⁸ Restatement (Third) of Torts: Prods. Liab. § 2(b) (Am Law Inst. 1998).

The risk-utility analysis may be more efficient when considering more complicated or technical designs as average consumers do not have viable expectations for the performance of complex products in unknown situations. If applied, the judge would give the jury objective factors to consider when challenging a manufacturer's design. Many jurisdictions have adopted this test for design defect claims, and others have adopted a hybrid form in which the risk-utility analysis is only used for complex products.

Ford asked that the Court join these jurisdictions by adopting the risk-utility test which would better allow a jury to consider complex products and designs in which consumer-expectations are unclear or unworkable. This standard would provide the jury with concrete frameworks. Despite these positive rationales, the Court held that these advantages are "largely overstated" and requiring proof of a reasonable alternative design is in opposition to Nevada's consumer-expectation jurisprudence.

The consumer-expectation test provides sufficient framework to analyze complex or technical products

Despite Ford's arguments, a lay jury is sufficiently capable under the consumer-expectations standard to determine if a product performs in a reasonably expected manner. The Court found that juries are often called upon to make decisions after considering complex facts and litigation types. The complexities of strict product liability claims are no more complicated than those encountered in other areas of law. No evidence suggests the jury was inadequate to hear this case. Here, Ford argued that the Trejos lacked any specific expectation as to the strength of the Excursion's roof when purchasing the vehicle. The Court, however, concluded that Trejo actually did provide sufficient evidence that the strength of the roof was less than what a reasonable consumer would expect.

Additionally, the consumer-expectation test itself is a sufficient framework to analyze complex claims. Though not required under the consumer-expectation test, proof of a reasonable alternative design is the most efficient method for a plaintiff to prove a product was unreasonably dangerous. Thus, factors associated with the risk-utility analysis are admissible for consideration, and evidence related to instructions and warning also remain relevant to prove reasonable consumer expectations.

The risk-utility approach presents tangible disadvantages

Rather than focusing on the product itself as done in the consumer-expectation test, the risk-utility analysis looks to the manufacturer's foreseeable risk of harm. This method looks past the product and instead inserts a negligence analysis into the equation. This contradicts Nevada jurisprudence because the Court has focused on the defective product rather than the manufacturer's negligence. Ultimately, adopting the risk-utility analysis and requiring a reasonable alternative design is counterintuitive in that the risk-utility analysis espouses a negligence aspect yet the risk-utility test imposes a higher standard than a regular negligence

claim. In that sense, the negligence claim is the antithesis of the strict product liability claim because the traditional negligence claim requires a lower standard of proof than the risk-utility analysis by not necessitating the reasonable alternative design. This presents further issues.

First, the reasonable alternative design requirement presents a further barrier for plaintiffs as they would have to retain expert witnesses even in cases in which the jurors could infer design defects without the expert testimony. That would be economically infeasible for plaintiffs. Similarly, the reasonable alternative design itself will make a case economically impossible as plaintiffs would have to pay experts for these designs. Ultimately, the risk-utility analysis shifts the focus away from the defective product to the negligence of the manufacturer.

Second, there is not always an apparent reasonable alternative design. Because of that, plaintiffs are likely to bring outlandish designs to the court that are not reasonable. That would impose an undue burden on plaintiffs as many may not bring their claims before the court due to no reasonable alternative design even though the product is defective.

Public policy favors retention of the consumer-expectation test

The Court was not persuaded that the risk-utility analysis is a better framework for design defect claims. As stated, the risk-utility test inserts negligence standards into these claims, which is in contrast to the public policy advocating for strict liability in general. The reasonable alternative design requirement would be an unfair burden to plaintiffs. The consumer-expectation test continues to be the proper framework for strict product liability claims and the district court was appropriate to not give the jury instruction on the risk-utility test.

The verdict is supported by sufficient evidence

Ford argued that the jury's verdict was inappropriate because it was not supported by sufficient evidence. According to Ford, Trejo's biomechanical expert lacked factual foundation and the district court should not have permitted the coroner who performed Rafael's autopsy to testify as a nonretained expert. The Court disagreed and denied Ford's motion for a new trial or motion for judgment as a matter of law.

Conclusion

The Court declined to use the risk-utility approach and holds that these claims will continue to be tried under the consumer-expectation test, which more fully satisfies the policy rationales resulting from the theory of strict products liability. It was appropriate for the judge to issue the jury instructions relating to the consumer-expectation test. And, Trejo produced sufficient evidence to show that the defective roof was a proximate cause of Rafael's death. The Court affirmed the district court's judgment and the jury's verdict.

PICKERING, J., dissenting:

The Court erred by not giving the risk-utility jury instructions. Nevada does not require that a design defect case be determined solely on consumer-expectation. By not instructing the jury on alternative design, the Court failed to give the jurors the proper framework to make a decision. A risk-utility analysis should not be used as a replacement to the consumer-expectation test, but a hybrid form of both would be most efficient. The jury should receive an instruction on both the consumer-expectation test and the reasonable alternative design.

By affirming the district court's decision, the Nevada Supreme Court effectively places Nevada into a minority of jurisdictions that relies solely on the consumer-expectations standard. Nevada should reconsider this ruling and respect that the feasible alternative design plays an important role in these design defect cases.