

NOT FOR PUBLICATION WITHOUT THE  
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-5578-07T3

MELISSA M. VOGEL,

Plaintiff-Appellant,

v.

JOSEPH FERNANDES,

Defendant,

and

GENERAL MOTORS CORPORATION, t/a  
CHEVROLET/GEO TRACKER,

Defendant-Respondent.

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ADMINISTRATOR AD PROSEQUENDUM  
OF THE ESTATE OF ERIC VOGEL,  
DECEASED, ADMINISTRATOR AD  
PROSEQUENDUM OF THE ESTATE OF  
LAURANA VOGEL, DECEASED, and  
GREGORY VOGEL, By His Guardian  
Ad Litem, and Individually,

Plaintiffs-Appellants,

v.

MELISSA M. VOGEL, JOSEPH  
FERNANDES,

Defendants,

and

GENERAL MOTORS CORPORATION,  
t/a CHEVROLET/GEO TRACKER,

Defendants-Respondents.

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Argued February 26, 2013 - Decided July 19, 2013

Before Judges Alvarez, Waugh and St. John.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Docket Nos. L-2562-04 and L-2565-04.

Timothy E. Burke argued the cause for appellants (Garrity, Graham, Murphy, Garfoalo & Flinn, attorneys; Mr. Burke, of counsel and on the briefs).

James N. Tracy argued the cause for respondent (Tansey, Tracy & Convery, attorneys; Mr. Tracy, of counsel and on the brief).

PER CURIAM

In this consolidated proceeding, plaintiffs appeal the trial court's June 13, 2008 denial of their motion for a new trial, filed after the jury's no cause of action verdict against defendant General Motors Corporation (GM). We affirm.

I

On May 28, 2004, plaintiff Daniel Vogel,<sup>1</sup> Administrator ad Prosequendum of the Estates of Eric Vogel and Laurana Vogel, and Guardian Ad Litem for Gregory Vogel, filed a complaint against defendants Melissa Vogel, Joseph Fernandes, and GM, asserting a negligence claim against Melissa and Fernandes and a products liability claim against GM. On June 9, 2004, Melissa filed a

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<sup>1</sup> We refer to the Vogels by their first names to avoid confusion.

separate complaint against Fernandes and GM alleging the same causes of action.

The matter was tried in April 2008. On April 29, 2008, Daniel agreed to accept Melissa's \$30,000 automobile insurance policy in settlement of the negligence claim against her. That same day all plaintiffs voluntarily dismissed their claims against Fernandes. On May 1, 2008, the jury returned the no cause verdict as to GM. Plaintiffs' motion for a new trial was denied by the trial court on June 13, 2008.

Plaintiffs filed a notice of appeal on July 24, 2008. Plaintiffs' appeal was dismissed without prejudice on July 30, 2009, after GM filed for bankruptcy. The appeal was reinstated on October 6, 2011.

## II

The following is a summary of the extensive trial record and exhibits. The accident at issue occurred on June 14, 2002, while Melissa was driving the family's 1994 two-door, soft-top Geo Tracker. Her husband Eric was seated in the front passenger seat; their children, eight-year-old Laurana and six-year-old Gregory, were seated in the rear. Laurana was in the left rear passenger seat, Gregory in the right rear passenger seat. As the Tracker was proceeding southbound on a two-lane road in Manalapan Township, Fernandes was proceeding northbound in his

1996 Ford F-150 pick-up truck. He was traveling at approximately thirty-five to forty miles per hour, at or below the legal speed limit. Fernandes noticed the Tracker coming towards him in the other lane when suddenly it turned sharply in front of him "like a slot car racer," at an approximate ninety-degree angle. He slammed on his brakes, and attempted to turn his truck to the right, but the vehicles collided seconds later. The two vehicles literally locked together from the force of the collision.

At trial, the descriptions given by those who arrived to assist at the accident varied somewhat. When Patrolman Kevin McIntosh of the Manalapan Township Police Department arrived at the scene, all the victims were unconscious and, according to his recollection, wearing their seatbelts. Derek Wagner, an EMT with the Englishtown-Manalapan First Aid Squad, recalled that when he arrived, Eric had "some level of consciousness." Eric was moaning, while Melissa was alert. Laurana was wearing some type of seatbelt, which Wagner had to cut in order to remove her, but he was uncertain whether it was a shoulder harness or a lap belt. The child was slumped over, blue, had no pulse or respiration, and was unresponsive to CPR. Wagner could not recall any details about Gregory's condition.

Detective Matt Trembow briefly interviewed Melissa, who could not remember why she crossed the double yellow lines. He observed that Eric, who was unresponsive, was not wearing a seatbelt. Rescue workers employed the jaws of life in order to extricate Eric's feet from the Tracker's floor area while a local fire department used a winch to separate the F-150 from the Tracker.

Roger Malone, another paramedic, noted that Eric was "making noises but not really making any sense." Natalie Ann Martin-Shepherd, a paramedic, testified that Eric was speaking with her "pretty much the entire time until he was removed," answered her questions, and complained of abdominal and pelvic pain. Others on the scene, however, recalled that Eric was unresponsive. As he was driven to the Jersey Shore University Medical Center (Jersey Shore), he became combative but not lucid.

After removing Eric, rescue workers next extricated Gregory, whose feet were also jammed in the floor of the Tracker. Martin-Shepherd confirmed that he was wearing his seatbelt. Gregory had bruising on the right side of his head and a severe injury to his right leg, and was later diagnosed with tearing of the frontal and temporal lobes of his brain.

Melissa sustained multiple fractures of her lumbar spine and pelvis, a laceration to her spleen, and a concussion. Although she was discharged from the hospital on June 19, 2002, she used a walker until sometime in August. Melissa has no memory of anything occurring between the time she and her family left home in the Tracker and her hospitalization. She recalled that when Laurana was younger, she would place the shoulder portion of her lap belt behind her back.

Eric and Laurana both died from their injuries. Eric's inferior vena cava, located on the right side of his body, was lacerated at the point where it passed through the diaphragm. He hemorrhaged on both sides of his diaphragm, his liver was lacerated on the right side, his pancreas was injured, and his spleen required immediate surgical removal. Eric also had two lacerations on his right lower temple, abrasions and lacerations on the right side of his chest, abrasions on his right arm and foot, and bruising on his right buttock. He suffered an injury to his brain, resulting in bleeding and swelling, in addition to fracturing four left-side ribs.

According to Karabi Sinha, a pathologist with the Monmouth County Medical Examiner's Office, Eric died from multiple traumatic injuries. The injury to the vena cava alone, if untreated, would have resulted in death.

Sinha testified that Laurana had an approximate one-inch-round abrasion on the right side of her forehead. Her neck was fractured at C-1 and C-2 with a partial transection of her spinal cord. The neck fracture was "telescopic," at the base of her skull, with protrusion of fragments of her C-1 and C-2 vertebrae. The base of her skull was also extensively fractured with related brain hemorrhage. Her brain had diffuse edema with laceration to the ventral aspect of the right temporal and occipital regions. Laurana's cause of death was severe head and neck injuries.

Officer Sean MacBean, a senior investigator for the Department's traffic bureau, examined the scene for purposes of accident reconstruction. When he arrived, the F-150 had been pulled back a few feet away from the Tracker. It left skid marks that were straight but angled towards the shoulder of the road, but no tire marks. MacBean opined that Melissa had probably taken her foot off the gas pedal before the collision, but had not applied her brakes. Melissa's seat belt was cut, while Eric's seat belt was wedged in the wreckage, meaning it had not been worn. According to MacBean, nothing mechanical caused the crash and no defects in the road contributed to the accident.

Plaintiff's expert, Byron Bloch, testified regarding alternative design features he contended would have made the Geo Tracker crashworthy. He opined that the 2300-pound, 60-inch Tracker should have been designed to safely accommodate a crash involving a much larger or "mismatched" vehicle such as Fernandes's 4300-pound Ford F-150 pick-up truck. Bloch attributed the F-150's intrusion into the Tracker to a maximum depth of nearly twenty-seven inches, measured at the Tracker's passenger door window sill, to design deficiencies. In his opinion, had the Tracker design been crashworthy, all members of the Vogel family would have survived.

The six defects which Bloch said could have been easily remedied, were as follows: (1) the Tracker's frame was too far inboard; (2) the Tracker's hollow rocker section should have been reinforced with either an internal steel baffle or injectable urethane foam; (3) the door beams were inadequate and required a connection with an equivalent structure running the remaining length of each side of the Tracker in order to function as a unit; (4) hole cut-outs in both rear quarter panels, located next to the rear passenger seats, weakened the panel and allowed deep penetration by the F150; (5) an additional beam in the rear quarter panel would have strengthened the sides of the vehicle; and (6) the Tracker

lacked energy-absorbing padding on the interior surfaces of the roof side rail and the B pillar, which would have helped reduce head and chest trauma.

Bloch contended his alternative design modifications would have deflected the F-150 from overriding the Tracker. During his testimony, however, he conceded that he did not know the actual strength of the steel comprising the tubular door beams, and that he did not measure the exact depth of the irregular intrusion at the right rear quarter panel. Furthermore, he did not consult the Department of Transportation's extensive data base of accidents in order to assess the relative severity of this one.

On his website, Bloch described the stiff frame rails sitting right behind the F-150's bumper as acting as "battering rams," recommending that large SUVs and pick-up trucks incorporate more crushable front structures. The F-150 in this case did not have a blocker beam which would have lowered the frontal contact points.

Bloch had neither an engineering degree nor formal education in the field of automotive safety. After having enrolled in an engineering program at the first college he attended, he was placed on academic probation for failing a number of engineering courses; Bloch held a bachelor of arts

degree from the University of California at the Los Angeles College of Applied Arts. He had never been involved in automotive design and was the sole employee and owner of a litigation consulting business. Bloch was retained almost exclusively by plaintiffs engaged in lawsuits against vehicle manufacturers. While testifying, he was unable to identify Newton's three basic laws of physics.

Defendant's crash-worthiness expert, Joseph Rice, a mechanical engineer employed as an automotive safety consultant, held a master's of science and doctorate degree in mechanics. He had taught engineering courses, and worked at GM between 1978 and 2000. While Rice worked at Fisher Body, a division of GM, he was a member of a side impact task force charged with studying the effect of side impacts on a vehicle's side structures. Rice retired from GM in 2000 from the "Engineering Analysis" Division, serving as one of two managers during his last five years.

Rice opined that the alternative designs proposed by Bloch would not have reduced the magnitude of the deformation of the Tracker's structures under the circumstances of this very severe accident, giving contrary testimony on each point. He was of the view that the baffle design proposed by Bloch was incapable of attachment inside the rocker. The polyurethane foam Bloch

suggested to stiffen the rocker had several drawbacks, including that when burned, it emitted dangerous chlorine gas, thereby preventing structural repairs that required welding. Rice said that the Tracker's steel rocker simply did not need reinforcement because, although hollow, it had considerable strength allowing for the off-road use expected of a small SUV. Extending the frame outboard would not have changed the outcome of this collision because the Ford F-150 would have still have overridden the Tracker frame.

Rice also testified that nearly all door beams in current vehicles employ a tubular design, as opposed to Bloch's suggested guardrail design, because they had, among other things, greater strength. Since the vehicles in this accident were virtually co-linear at point of impact, the structure of the door beam would have made little difference in any event. Rice disputed whether Bloch's proposed cutout redesign would add strength to the Tracker's rear quarter panels or lessen the impact of the accident, and he did not agree that additional padding would have effectively reduced crash forces as severe as those generated in this accident.

Dr. Ali Sadegh, plaintiffs' expert in biomechanics and mechanical engineering, said that when the Tracker veered left, Eric's body and head moved to the right. At the moment of

impact, the Tracker's passenger door began to deform, pushing in against Eric's rib cage and internal organs, causing his seat to move almost fifteen inches to the left. He opined that Eric's fatal abdominal injuries were caused by the door striking and crushing him, and occurred after the F-150's intrusion into the Tracker reached six to seven inches in depth. Eric fractured his left ribs when he came into contact with Melissa's body or seat. According to Sadegh, if the Tracker's door and frame had been stiffer, there would have been less intrusion and Eric would not have been fatally injured. He also opined that he would have suffered the same injuries even if he had been wearing his seatbelt.

Sadegh testified that Laurana's body also went to the right, but because she was not wearing the shoulder portion of her seatbelt, moved slightly forward and to her right. As a result, her head came into contact with a hard object, most likely Eric's seat. Notwithstanding this contact, Sadegh said that Laurana's neck injury was a flexion, and not a compression injury. He asserted that if there had been less intrusion, Laurana would have sustained only a closed head injury rather than a broken neck. Sadegh conceded that initially he did not think that Laurana had struck anything because he failed to note that she had a contusion on her forehead. At his deposition, he

stated that Laurana likely struck Melissa's seat. He claimed that even if Laurana had been wearing her shoulder harness, it would have slid off and been ineffective.

Sadegh opined that Gregory's head moved to the right when the Tracker veered left and that he sustained injury when he came into contact with the intruding right side of the vehicle. His leg was injured when it was caught between crushed metal. If there had been less intrusion, Gregory would have merely sustained contusions to his leg and a minimal head injury.

Sadegh also testified that Melissa survived the accident because Eric was between her and the intruding F-150. Her body also moved towards the right and sustained injury when it came into contact with Eric and his seat. If the Tracker's door and frame had been stronger, there would have been less intrusion and less contact, and Melissa would not have fractured her spine and pelvis.

Sadegh maintained that Bloch's design modifications would have limited the injuries to the Vogel family, although he acknowledged that he reached his conclusions before Bloch rendered his report. At deposition, he said he had not analyzed the difference in injuries taking account Bloch's alternative design. Nonetheless, at trial Sadegh asserted that foam padding would have greatly reduced Eric's thoracic trauma, citing the

same two National Highway Traffic Safety Administration (NHTSA) tests described by Bloch. This contrasted with his deposition testimony, in which he stated that more padding would not have made much of a difference because the intrusion was so severe. Sadegh also confirmed that the F-150 did not strike the door beam directly, but hit the door steel instead.

GM proffered an expert in the design and performance of belt restraint systems, David Peruski, a mechanical engineer. Based upon the striations (load marks) on their belts and the fact that they were cut by rescuers, he concluded that both Melissa and Gregory were wearing their seatbelts. Eric, however, was not wearing his, as evidenced by the fact that after the accident it was found deformed and in the stowed position. The police also concluded that Eric was not wearing his seatbelt.

Peruski believed that Laurana was lap-belted, but not shoulder-belted. The location and angle of the striations on her belt, as well as the fact that the webbing was bunched in the rear on the latch plate, indicated that the shoulder portion was behind her back. Additionally, her lap belt was four or five inches too loose for a person of her size. Peruski insisted that Laurana's seat belt was not cut and that Wagner's recollection was mistaken on this point.

Steven Bailo, also a mechanical engineer, was GM's expert in accident reconstruction. He opined that the accident happened in two seconds or less. The Tracker was traveling in a southbound direction, a little bit downhill, when it suddenly yawed to the left and began sliding with its right side leading toward the F-150. It was traveling in a different direction than it was pointed. The F-150 braked and swerved slightly to the right. The Tracker was eight or nine degrees past ninety degrees (which would have been broadside) when the two vehicles collided. The Tracker was moving at seventeen miles per hour and the F-150 at thirty miles per hour for a closing speed of forty-seven miles per hour at the moment the two vehicles first touched. Because the centers of gravity of the two vehicles were in line, the Tracker was not deflected but was picked up and pushed back by the F-150.

Bailo classified this as a co-linear collision, i.e., one in which the two vehicles were traveling on the same line, and noted that co-linear collisions were generally frontal. Side impact collisions, such as those that occur in intersections, usually involve both vehicles moving forward on different lines, which creates a chance of deflection. Bailo characterized this crash as unique for that reason.

Bailo asserted that this accident was different from and much more severe than two crashes documented in tests conducted by the NHTSA in 1993. The May 1993 test had utilized a stationary 1991 Geo Tracker and a moving deformable barrier weighing only 3570 pounds, traveling at 33.8 miles per hour at a 27 degree angle. The change in velocity (delta-v) in that test was only 18.8 miles per hour. The October 1993 test was very similar, and also resulted in a delta-v of 18.8 miles per hour. The parties stipulated that the Tracker's delta-v as a result of this accident was 25 to 29 miles per hour. A delta-v of 25 to 29 is much more severe than a delta-v of 18.8 because the energy of a crash increases with a square to velocity.

GM also presented a biomechanical engineer, Dr. Catherine Corrigan, who testified that the delta-v in this case was in the top one percent of all side impact collisions in terms of severity. The higher the delta-v, the higher the forces moving the occupants of a vehicle. This accident was as much as three times as severe in terms of an energy calculation as the crash test performed by the NHTSA in May 1993. The occupants of this vehicle were initially pulled to the right and forward when the Tracker suddenly turned left.

Corrigan testified that Eric, a "near side" victim, was pressed against the door panel at the moment of impact. The

crash forces and ensuing internal tension caused his vena cava to tear and injured his other organs. These crash force injuries occurred before Eric was moved inside the Tracker by the F-150 deforming the side of the vehicle. Padding on the right passenger door would not have prevented Eric's abdominal injuries because it would not have been able to slow the acceleration. In Corrigan's opinion, Eric would not have been protected from these acceleration injuries by wearing his seatbelt as the acceleration caused his injuries.

Laurana's injuries, in Corrigan's opinion, were not the result of flexion as Sadegh concluded. Her brain injury resulted from her head striking Eric's seat, which would not have occurred had she been properly belted.

Corrigan did not consider Gregory's brain injuries to have been preventable, as his head struck either the side of the Tracker or the support mechanism for the soft top. Even if the Tracker had not deformed, his body would have accelerated to the left, causing his head to strike a vehicle structure to the right. His skull was not fractured; he suffered a brain injury from the shift inside his skull because of acceleration forces, which additional padding to the car's interior would not have prevented.

Corrigan also testified that Melissa's fractures were caused both by acceleration and a compression or pinching mechanism where her body interacted with that of her husband. Corrigan further noted stiffening of the side structure of the Tracker might have prevented Melissa's compression injuries, but not those she experienced due to acceleration.

### III

On appeal, plaintiffs raise the following points of error for our consideration:

#### POINT ONE

THE TRIAL COURT COMMITTED PLAIN ERROR IN CHARGING THE JURY AND GIVING A SPECIAL INTERROGATORY THAT REQUIRED THE JURY TO TAKE "THE CIRCUMSTANCES OF THE SUBJECT ACCIDENT" INTO CONSIDERATION WHEN DETERMINING WHETHER THERE EXISTED A DESIGN DEFECT IN THE 1994 GEO TRACKER

1. The Law on Crashworthiness
2. GM's Defense in This Case
3. The Jury Charge and Special Interrogatory

#### POINT TWO

THE TRIAL JUDGE ERRED IN DENYING PLAINTIFFS' MOTION FOR A NEW TRIAL

#### POINT THREE

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DISMISSING PLAINTIFF MELISSA VOGEL'S CLAIM FOR EMOTIONAL DAMAGE UNDER PORTEE v. JAFFEE

Plaintiffs contend the trial court committed plain error in its charge and in submitting to the jury a special interrogatory

requiring them to consider the circumstances of the accident as the context for determining crashworthiness. Based on this argument, plaintiffs assert that the trial court erred in denying its motion for a new trial.

Plaintiffs did not object to the jury charge during the several jury charge conferences, nor did they object to the language of the special interrogatories. Therefore in order for us to reverse the jury's verdict, we would have to find that the court's instruction was one which possessed a clear capacity to bring about an unjust result. See Fitzgerald v. Stanley Roberts, Inc., 186 N.J. 286, 318 (2006).

A proper jury charge is essential to a fair trial. Campos v. Firestone Tire & Rubber Co., 98 N.J. 198, 210 (1984). A trial court's instructions to the jury must correctly state the applicable law in understandable language and clearly indicate how the jury should apply it to the facts. McDonough v. Jorda, 214 N.J. Super. 338, 346 (App. Div. 1986), certif. denied, 110 N.J. 302 (1988), cert. denied sub nom. Jorda v. City of New Brunswick, 489 U.S. 1065, 109 S. Ct. 1338, 103 L. Ed. 2d 908 (1989). When reversible error in a jury charge is alleged, we review the charge in its entirety to determine its overall effect and measure its sufficiency by whether the jurors, in light of all of the facts, would be confused or misled. Bd. of

Educ. v. Hoek, 38 N.J. 213, 228 (1962); Moich v. Passaic Terminal and Transp. Co., 82 N.J. Super. 353, 370 (App. Div.), certif. denied, 41 N.J. 600 (1964). Even where a charge is deemed erroneous in some regard, it will nonetheless be upheld if it was not capable of producing an unjust result. Fisch v. Bellshot, 135 N.J. 374, 392 (1994). Likewise, incorrect jury interrogatories are also grounds for reversal only if they are misleading, confusing or ambiguous. Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 418 (1997).

Under Rule 4:49-1(a), a trial court must grant a motion for a new trial "if, having given due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it clearly and convincingly appears that there was a miscarriage of justice." We adhere essentially to the same standard when reviewing a trial court's action on a new trial motion. Dolson v. Anastasia, 55 N.J. 2, 7 (1969). We defer to the trial court's feel of the case as to matters such as the demeanor and credibility of witnesses, but otherwise independently review the record in order to determine the justness of the result. Carrino v. Novotny, 78 N.J. 355, 360-61 (1979); Baxter v. Fairmont Food Co., 74 N.J. 588, 597-98 (1977). "An appellate court may overturn a jury verdict 'only if [that] verdict is so far contrary to the weight of the evidence as to give rise to

the inescapable conclusion of mistake, passion, prejudice, or partiality.'" Kassick v. Milwaukee Elec. Tool Corp., 120 N.J. 130, 134 (1990) (quoting Wytupeck v. City of Camden, 25 N.J. 450, 466 (1957)) (alteration in original); accord JMB Enters. v. Atl. Emp'rs Ins. Co., 228 N.J. Super. 610, 616 (App. Div. 1988).

"'Crashworthiness' is defined as the ability of a motor vehicle to protect its passengers from enhanced injuries after a collision." Poliseno v. Gen. Motors Corp., 328 N.J. Super. 41, 51 (App. Div.), certif. denied, 165 N.J. 138 (2000). A manufacturer must include accidents among the "intended" uses of its product, Barris v. Bob's Drag Chutes & Safety Equip., Inc., 685 F.2d 94, 100 (3d Cir. 1982), and has a legal duty to design and manufacture a reasonably crashworthy product. Poliseno, supra, 328 N.J. Super. at 51. "Strict liability is imposed on a manufacturer for injuries sustained in an accident involving a design . . . defect that enhanced the injuries, but did not cause the accident." Id. at 52. The manufacturer is liable only for enhanced injuries, i.e., injuries that would not have occurred absent the alleged defect. Ibid. The crashworthiness doctrine is also referred to as the "second collision" doctrine, the accident itself being the "first collision." Ibid.

A plaintiff claiming a motor vehicle design defect must prove under a risk-utility analysis that an alternate design

exists that is both technologically feasible and practical and that would have reduced or prevented his or her harm. Lewis v. Am. Cyanamid Co., 155 N.J. 544, 571 (1998); Diluzio-Gulino v. Daimler Chrysler Corp., 385 N.J. Super. 434, 438 (App. Div. 2006); Smith v. Keller Ladder Co., 275 N.J. Super. 280, 284 (1994). In order to meet the burden of proving a safer alternative design, a plaintiff must present expert opinion testimony, substantiated by empirical evidence, that "the number of lives saved (or injuries avoided) by adoption of [an] alternative design[] would be greater than the corresponding number of lives lost (or injuries sustained) as a result of such adoption.'" Diluzio-Gulino, supra, 385 N.J. Super. at 438-39 (quoting Crespo v. Chrysler Corp., 75 F. Supp. 2d 225, 229 (S.D.N.Y. 1999)).

"In 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." Johansen v. Makita USA, Inc., 128 N.J. 86, 95 (1992). The point at which a defective product is placed into the stream of commerce is when a design defect is created, not at the time of an accident, and the plaintiff's conduct or misconduct is irrelevant on defect issues. Green v. Gen. Motors Corp., 310 N.J. Super. 507, 516 (App. Div.), certif. denied, 156 N.J. 381

(1998); accord Poliseno, supra, 328 N.J. Super. at 57-58. Rather, the negligent or non-negligent circumstances of the first collision sometimes makes issues of the plaintiff's speed or other conduct relevant to the later apportionment defense that it was the first impact that caused some or all of the plaintiff's injuries, either before the second collision occurred or independently of the second collision. Green, supra, 310 N.J. Super. at 522; accord Poliseno, supra, 328 N.J. Super. at 59-60.

In this case, the trial court instructed the jury:

Defendant General Motors, as the manufacturer of . . . the Tracker, has a duty to make a product that is reasonably safe. That's the test. . . . Now 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 General Motors owes that duty to direct users of the product, to reasonably foreseeable users of the product and to those who may reasonably be expected to come into contact with it.

General Motors is liable only if the plaintiffs . . . prove that the Geo Tracker was not reasonably crashworthy. This is what they must prove by a preponderance of the credible evidence, which I've already defined for you.

So . . . let's go back . . . . So they've got to prove that the Geo Tracker was not reasonably crashworthy. Well, what does that crashworthiness mean? Well, I'm going to define that for you now. It has a

special meaning in the law[,] crashworthiness. Strict liability is imposed on the manufacturer for injuries sustained in an accident involving a design or manufacturing defect that enhanced the injuries the occupants suffered although the defect did not cause the accident. You'll hear a lot about these enhanced injuries throughout this charge. That's the key to this.

Enhanced injury refers to the degree by which a defect, which I've just defined for you, aggravates collision injuries beyond those that would have been sustained because of the impact or collision absent the defect. . . .

A manufacturer's liability is premised upon their legal duty to design and manufacture a reasonably crashworthy vehicle. . . . Crashworthiness is defined as the ability of a motor vehicle to protect its passengers from enhanced injuries or death after a collision. That's what crashworthiness is.

Some accidents or collisions, no matter who was at fault or who caused the accident, are a foreseeable part of the use of vehicles. Reasonably designed, properly functioning safety devices or designs may be required to make a vehicle crashworthy.

The plaintiff maintains that there were reasonably safer alternative designs that should have been used in this vehicle and make it crashworthy, specifically to make it crashworthy. Because here's what the plaintiffs allege. That the interior should have sufficient padding. Two, that the door beam should have a stronger design. Three, that the rocker should be reinforced. Four, that the frame should be more outboard. Five, that the B pillar and rear quarter panel cut outs should have been eliminated. Six, that the rear quarter panels should

have a beam. That's what the plaintiff contends.

The defendant maintains that the design of its Geo Tracker was reasonably crashworthy and that given the severity of the accident, none of the design alternatives proposed by plaintiff's experts would have changed the amount of deformation to the passenger side of the Geo Tracker or the injury outcome to the plaintiffs.

. . . .

. . . Now there has been evidence in this case concerning the government standards applicable to the automotive industry . . . . This may be considered by you in determining whether or not the Geo Tracker is crashworthy. But compliance with such standards is not conclusive of the Geo Tracker's crashworthiness. You must determine whether the vehicle as designed was or was not crashworthy based upon principles of reasonably safer alternative designs that I have already given to you.

. . . .

. . . If you find that there were reasonable, safer alternative designs that should have been but were not used in this vehicle that would have improved the protection it gave its occupants against personal injury or death from a foreseeable motor vehicle accident, then you will have found this vehicle is [uncrashworthy], not [crashworthy].

. . . .

On the other hand, . . . [i]f you find that there were no reasonable alternative designs that would have improved the ability of this vehicle to protect [the] occupants in case of a side impact collision such as

this, then you will have found in favor of the defendant car manufacturer on the issue that it was indeed crashworthy.

You must remember in deciding this issue of crashworthiness, that your focus must not be on who or what caused the accident, the collision between the two vehicles. . . . Instead to evaluate the design issue properly you must focus your deliberations on how and why the occupants of the vehicle suffered enhanced injury or death in the collision and whether reasonable alternative safety measures would have lessened or decreased the likelihood of injury or death after a collision.

(emphasis added).

The verdict sheet contained a preliminary question. Because the jury responded "yes," none of the other questions were answered:

1) Was the structure of the Tracker reasonably crashworthy in the circumstances of the subject accident?

Yes \_\_\_\_ No \_\_\_\_ Vote \_\_\_\_\_

If "Yes" return your verdict, if "No" proceed to question #2.

(emphasis added).

As we have said, plaintiffs' counsel did not object to the charge, discussed at several charge conferences. No objection was made to the verdict sheet. During the charge, the judge presented to the jury a power point slide, approved by all counsel, summarizing the applicable principles of law.

Following the verdict, plaintiffs moved for a new trial, arguing for the first time that the trial court erred by directing the jury to consider crashworthiness "in the circumstances of the subject accident." At that juncture, no challenge was raised to the jury charge itself, only the verdict sheet. The trial court denied the motion for a new trial, ruling as follows:

The Court's decision is that giving due regard to the opportunity of the jury to pass upon the credibility of the witnesses, it does not convincingly or clearly appear that there was a miscarriage of justice under the law. In fact, I find it clearly and convincingly appears that there was not a miscarriage of justice under the law whatsoever. I was not surprised by the verdict, much less shocked.

. . . .

And I'm not going to summarize all the testimony. I'm just going to summarize two different testimonies because the jury had a right to believe whoever they wanted to believe. Mr. [Bloch] said, on behalf of the plaintiff, the Tracker was not sufficiently crashworthy. He had six different deficiencies.

Dr. Rice, on behalf of the defendant, said that Mr. [Bloch]'s design wouldn't have made any difference. It wouldn't have reduced the intrusion into the Tracker. Rice said that the design of the Tracker was reasonably crashworthy and there was nothing General Motors could have done to improve the Tracker in this accident, which brings me to the issue of the jury question on the verdict sheet, which of course, all

attorneys agreed was the proper question to ask.

One. Was the structure of the Tracker reasonably crashworthy in the circumstances of the subject accident? They said no by a vote of nine to one.

Now the phrase that's being harped upon by [plaintiffs' counsel], which he says he didn't see, although I gave this to him days before, "in the circumstances of the subject accident." And [defense counsel] is probably right, it's probably included in the word crashworthy and it probably wasn't even necessary.

. . . .

[In] Poliseno v. General Motors, . . . [the court indicated that] the jury should be instructed on legal principles in the context of the particular facts of the case and the principles of law. . . .

. . . .

I did exactly what Poliseno told me to do. I put the burden on the plaintiff with respect to the factual context, namely in the circumstances of the subject accident.

Plaintiffs contend that the accident was within the range of possible circumstances which should have been contemplated by a manufacturer in designing an automobile reasonably safe for its intended purpose. Therefore, plaintiffs take the position that the court's charge and the first interrogatory question should have required jurors to determine whether the vehicle was crashworthy, without reference to any context.

"The mere fact . . . that automobile collisions are . . . foreseeable is not sufficient in and of itself to create a duty on the part of the manufacturer to design its car to withstand such collisions under any circumstances." Dreisonstok v. Volkswagenwerk, A.G., 489 F.2d 1066, 1070 (4th Cir. 1974). If foreseeability of collision were the litmus test for establishing a duty on the part of the car manufacturer, the manufacturer would have an absolute obligation to design a crash-proof car. Ibid. Rather, liability for negligent design is imposed only when an unreasonable danger, i.e., risk of injury, is created. Id. at 1071. And the circumstances of the accident are a factor to be considered in determining whether the manufacturer used ordinary care in designing a car which did not involve unreasonable risk of injury to occupants. Id. at 1073.

Plaintiffs' burden here was not to present an alternate design that would have made the Tracker marginally safer in some generic side-impact collision, but rather to present an alternate design that would have reduced or prevented the harm in this accident. In its defense, GM argued both that the Tracker was crashworthy and that Bloch's alternative designs were either ineffective or misguided, and, above all, would not

have improved the performance of the Tracker in this uncommon and severe accident involving greatly mismatched vehicles.

Plaintiffs also argue, relying upon Green, that the severity or circumstances of the accident was only relevant to the issue of proximate cause. In Green, the plaintiff was speeding when he engaged in certain maneuvers to avoid a head-on collision. Green, supra, 310 N.J. Super. at 512-13. His car spun out of control, and his seatbelt forced him back into his seat so he was under the rear portion of the car's t-roof, which deformed downward onto the back of his head. He suffered a compression fracture of several of his cervical vertebrae, rendering him a quadriplegic. Id. at 513-14. On appeal, we affirmed the trial court's ruling that the plaintiff's speed was irrelevant on the issue of design defect. Id. at 520.

All the proofs presented by the parties confirmed that the "closing speed between plaintiff's vehicle and the school van of between forty-five and eighty-one miles per hour [was] well within the range reasonably to be expected in the design of the Camaro." Ibid. As we explained:

. . . the Camaro had to be designed, if feasible, to protect the integrity of the passenger compartment in an accident at a closing speed that could reasonably be anticipated by the manufacturer. If it was not, then the Camaro was defective, regardless of plaintiff's driving speed within such protectable limits. The speed

at which plaintiff was driving might theoretically have been greater than that at which plaintiff's reasonable alternative designs would have afforded protection, but such was not the testimony. If the speed was beyond the design limits, speed would have been a proper factor to determine proximate cause and a later apportionment of liability. Since the closing speed in this case was recognized to be well within the acknowledged design parameters, and the passenger compartment remained intact, with the exception of the deforming T-bar roof, the trial judge correctly ruled that speed was not a factor in determining whether the vehicle was defective.

Thus Green stands for the proposition that a plaintiff's negligence prior to the first collision may not be considered by the jury in resolving a design defect question. This was addressed by the court in this case, however, by its instruction that the jury not include among "the circumstances of the accident," Melissa's abrupt turn to the left into oncoming traffic, or the question of seatbelt usage.

In Green, speed was removed from consideration of the crashworthiness of the vehicle because the plaintiff had successfully demonstrated that the speed at which he was traveling was within the design parameters of the vehicle. Regardless of his speed, the injury would have occurred because of the faulty design of the car's t-roof. Id. at 514. It was the faulty design, not the first crash, that caused his injuries.

In this case, however, the jury was presented with substantial expert testimony that Bloch's alternative design would not have effectively altered the outcome of the accident because of the nature of the collision. The jury, as instructed, could have and should have considered such circumstances as the vehicle mismatch, the co-linear nature of the accident, the extremely high delta-v, and the absence of deflection. In fact, this was GM's defense, that no amount of safety engineering would have protected the Vogels because of the nature of the accident. "[T]he jury should be instructed on legal principles in the context of the particular facts of the case and the parties' contentions, rather than on abstract principles of law." Poliseno, supra, 328 N.J. Super. at 62

At trial, plaintiffs did not dispute that the accident was unusual and severe. This was in contrast to the circumstances in Green, where the speed at which the plaintiff was traveling was well within the design parameters of the vehicle, as was the nature of an accident. Because of the testimony by GM's experts that this accident was extraordinarily unusual and severe, and that Bloch's alternative design features would not have prevented the injuries, the question on the verdict sheet was also entirely proper. The jury accepted GM's defense that it was a collision outside the range reasonably expected in the

design of the vehicle because of the enumerated circumstances such as vehicle mismatch, the extremely high delta-v, and the like.

Furthermore, plaintiffs' arguments ignore the strictures of Poliseno. We repeat, juries in crashworthiness cases must be instructed not on abstractions, but on the "legal principles in the context of the particular facts of the case and the parties' contentions . . . ." Ibid. In his charge, the judge focused on the need for the jury to evaluate the crashworthiness of the vehicle in light of the expert testimony. As called for in Poliseno, the jury was directed to the relevant legal principles within the context of the particular facts of the case. The jury charge and special interrogatory were therefore not plain errors leading to an unjust result.

Because the verdict was not contrary to the weight of the evidence, neither do we believe that the motion for a new trial should have been granted. This jury charge correctly stated the applicable law, and clearly instructed the jury on applying the law to the facts as it found them to be. McDonough, supra, 214 N.J. Super. at 346.

#### IV

Because we affirm the jury's no cause of action verdict, we will not reach the question of emotional distress damages raised

by plaintiff as a third point of error pursuant to Portee v. Jaffee, 84 N.J. 88 (1980).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION