

## [Products Liability Law Daily Wrap Up, TOP STORY—MOTOR VEHICLE EQUIPMENT—D.S.C.: Other carmakers' use of superior safety algorithm enough to create issue against Ford, \(Jul. 12, 2016\)](#)

Products Liability Law Daily Wrap Up

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By Robert B. Barnett Jr., J.D.

In a defective airbag suit against Ford Motor Company, a deceased SUV driver's wife's contention that other car companies have used an algorithm different from the one Ford used to produce faster airbag deployment met the alternative design requirement of her design defect claims and sufficiently created a genuine issue of material fact on the issue, a South Carolina federal court has ruled. The standard was satisfied without the wife having to produce the actual algorithm because plaintiffs are not required to develop a full prototype of the alternative design (*Wickersham v. Ford Motor Co.*, July 9, 2016, Norton, D.).

**Background.** The SUV driver, who had a history of mental illness, was injured in a single-car accident when his 2010 Ford Escape hit a tree after a left turn. He sustained significant injuries, including the eventual the loss of one eye, and he suffered severe pain as a result of the accident. Seventeen months later, he committed suicide. His wife, alleging that failed airbags caused both the injuries and the suicide, filed suit in Louisiana federal district court against Ford Motor Company. She asserted claims both individually and as her husband's representative for negligence, strict liability, and breach of warranty. Ford filed a motion for summary judgment, making three arguments: (1) the wife's claims failed to show the existence of a feasible alternative design; (2) the suicide broke the causal chain in a wrongful death claim; and (3) punitive damages were inappropriate under these facts.

**Feasible alternative design.** Today's cars employ an algorithm to determine whether to deploy the airbag. The wife contended that the algorithm Ford used was too slow (146 millisecond response) and that Ford should have used instead an algorithm that would have produced a quicker airbag deployment (50 millisecond response), which would have saved her husband from his injuries. Ford argued that the wife's contention failed to qualify as a legitimate alternative design. The court disagreed, noting that algorithms with the 50-millisecond response were already in use by other car manufacturers, which suggested that such an algorithm was feasible from a standpoint of cost, safety, and functionality.

Ford also argued that the wife's alternative design was too conceptual because she never produced an actual algorithm to demonstrate her alternative design. However, requiring the wife to produce an actual prototype, the court said, would be to impose an evidentiary burden never contemplated. As long as the wife could identify a specific design approach implemented elsewhere in the industry and could explain how that approach would be implemented, she established a feasible alternative design.

**Suicide.** Although suicide typically breaks the proximate cause chain in a wrongful death action, South Carolina recognizes an exception if the decedent's suicide resulted from an uncontrollable impulse. In determining whether an uncontrollable impulse existed, the focus is on whether the defendant's actions could be considered to be the proximate cause of the suicide. The impulse does not have to be brought on by any specific mental condition in order to be considered uncontrollable. An affidavit from a psychiatric expert stated that the accident diminished the driver's ability to control his impulses and that the suicide occurred because of a lack of control. Along with the expert's deposition testimony, the affidavit established a genuine issue of material fact as to whether the suicide was caused by an uncontrollable impulse. Therefore, the court denied the manufacturer's motion for summary judgment as it related to the issue of proximate cause.

**Punitive damages.** Because punitive damages are available only if Ford’s conduct was reckless, willful, wanton, or malicious, Ford argued that all punitive damages claims should be dismissed because no evidence existed to show that it was reckless, willful, wanton, or malicious. The court disagreed. Evidence existed that the SUV manufacturer understood the risks of using its algorithm. If Ford knew that other carmakers were using a safer algorithm, and it delayed implementation knowing the risks, Ford could be found to have been reckless, willful, wanton, or malicious. The court also rejected Ford’s argument that the law imposing punitive damages was unconstitutionally vague. Ford should be aware that conscious disregard of unreasonable risks could subject it to punitive damages.

Consequently, the court found genuine issues of material fact on all three matters and denied Ford’s motion for summary judgment on insufficient alternative design, suicide as a breaker of proximate cause, and the insufficiency of punitive damages. The court, however, granted Ford’s motion for summary judgment on the wife’s failure to warn claim.

The case is No. [9:14-cv-0459-DCN](#).

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Companies: Ford Motor Co.

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