Products Liability Law Daily Wrap Up, DESIGN AND MANUFACTURING DEFECTS—MOTOR VEHICLE EQUIPMENT—D. Nev.: Damage award to driver injured when airbag did not deploy upheld, (Sept. 18, 2015)

Products Liability Law Daily Wrap Up

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By John W. Scanlan, J.D.

A $3 million damage award to a Dodge Neon driver who sustained who was partially paralyzed after an accident during which her airbag did not deploy was upheld by the U.S. District Court for the District of Nevada, which denied TRW's motions for judgment as a matter of law and for a new trial because the evidence was sufficient to support the jury's verdict. The original $3.35 million award by the jury was reduced by a $675,000 offset to TRW to reflect settlements with other parties, and the driver also received over $350,000 in interest and over $37,000 in costs (*Thompson v. TRW Automotive, Inc.*, September 17, 2015, Dorsey, J.).

Background. In 2007, Nicole Thompson was driving a 1998 Dodge Neon when another vehicle swerved into the lane and hit the side of her car, causing it to veer off the road into a road construction zone, hitting first a curb and finally a large power pole. Neither the driver-side nor the passenger-side airbags deployed. In addition to back injuries, Thompson sustained a carotid artery dissection and a stroke, leaving her with partial right-side paralysis. In separate litigation, she brought suit against the at-fault driver and the road construction company working on the road where the accident occurred; these claims were settled in 2007 and 2008. She filed the present suit in Nevada state court (later removed to federal court), alleging claims for claims for negligence, gross negligence, negligence per se, and product defect against TRW Automotive US LLC (TRW), the designer and manufacturer of the airbag system, and Autoliv Safety Technology, Inc., and Autoliv ASP, Inc. (collectively, Autoliv), the manufacturer of the seatbelts. She also settled all claims with Autoliv, and by the time of trial, TRW was the only remaining defendant, against whom there was only one claim for strict products liability for TRW's air bag electronic control module (AECM).

Thompson's counsel stated before to trial that Thompson would attempt to prove her claim under the consumer expectation test, but TRW argued that the court should instead apply the risk-utility test. Disagreeing with both parties, the district found that under Nevada law, strict liability applies when the product "(1) 'failed to perform in the manner reasonably to be expected in light of its nature and intended function' and (2) 'was more dangerous than would be contemplated by the ordinary user having the ordinary knowledge available in the community.'" At trial, TRW's theory was that the airbag was not defective because it performed as designed: one of the impacts before the final impact with the pole could have pushed the driver out of position and left her too close to the airbag for it to deploy safely. TRW twice moved unsuccessfully for judgment as a matter of law. The jury found in favor of Thompson and awarded her $3.35 million in damages for various past and future pain and suffering and disability, past and future medical expenses, past and future lost earnings, and in future non-medical expenses.

Thompson asked for $104,380.63 in costs, to which TRW objected. Thompson moved to amend the judgment to include pre- and post-judgment interest, and TRW moved for an offset for money Thompson received from settlements with the at-fault driver, the road construction company, and Autoliv. TRW also renewed its motion for judgment as a matter of law and in the alternative moved for a new trial.

Causation. The district court found that substantial factor causation was the proper test to determine TRW's liability and that there was sufficient evidence to support the jury's verdict. TRW argued that the jury should have been given instructions for but-for causation rather than substantial factor causation because the parties' theories of the case were mutually exclusive. In *Wyeth v. Rowatt*, the Nevada Supreme Court stated that but-for causation instructions are given when each party argued its own theory of causation, the theories were presented as mutually exclusive, and the cause of the injury could be only one of those theories, and the

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substantial factor causation instructions are given when an injury may have had two causes, either of which would have been sufficient operating alone to cause the injury. The district court observed that the facts of this case, which involved not only the AECM but also the seatbelt, the sun visor, and the steering wheel, complicated the causation theories beyond those discussed in *Wyett*, and concluded that the substantial factor test was appropriate.

The jury also had sufficient evidence of causation to conclude that the driver's injuries were caused by a defect in TRW's AECM that caused the airbag not to deploy. When viewed in the light most favorable to the driver, testimony from several experts for the driver "more than supported" the jury's conclusion that the airbag failure was a defect that caused her injuries. Although TRW pointed to additional testimony supporting its own causation theory, this testimony did not compel the court to reach a contrary conclusion.

Further, the seat belt did not sever the causal link between TRW's AECM and the driver's injuries. TRW argued that the driver's head and neck injuries were caused by the seatbelt, either by her failure to wear it or because it malfunctioned during the accident while she was wearing it. Her seatbelt expert opined that she was wearing the seatbelt during the accident, and family members testified that she had an "unwavering habit" of wearing a seatbelt. Further, while her seatbelt expert also testified that she would not have experienced hyperextension of her head and neck if the seatbelt retractor had not spooled out, the jury was not required to consider this evidence. This expert was an electro-mechanical engineer, not a medical doctor, and the jury could instead rely upon the testimony of her biomechanical expert, who stated that the seatbelt kept her in her seat and prevented her from hitting the steering wheel with a "killing force," along with other testimony, in determining that deployment of the airbag would have prevented her from moving forcefully forward and incurring head and neck injuries.

Design defect. There was sufficient evidence to find that the AECM was defective. TRW argued that the AECM performed exactly as it was designed to perform, but that was not the test under Nevada law. TRW's assertion that the court should have given a risk-utility instruction had been rejected previously, as had the driver's argument for the consumer expectation test. The district court found that the instruction that it gave was consistent with Nevada law and the state's pattern jury instructions. Neither of the parties' approaches was consistent with Nevada law, and TRW offered nothing to persuade the court that the state high court would adopt the risk-utility test. TRW was not prejudiced by the court's decision because it had all the flexibility it needed to present its evidence and arguments that the AECM was a state-of-the-art design and that its deployment suppression feature was not unreasonably dangerous.

TRW could not rely upon the component supplier defense because the evidence established that it was more than a mere component supplier. TRW made independent design decisions and established extensive control over the design of its product. In the opening statement, TRW's counsel said that it designed the AECM with a secret algorithm that it did not share with the auto maker, and TRW's airbag expert said that the AECM "controlled 100 percent" the decision to deploy or not deploy at that moment in this accident.

Damages. TRW had not demonstrated that the $3.35 million damage award was excessive. Although the jury was not asked to separately calculate the damages it was awarding for the artery dissection injuries and the lower back injuries, there was sufficient evidence of causation for the jury to find that TRW's AECM caused both sets of injuries. In addition, the jury awarded $965,000 for past medical expenses, which was more than $370,000 less than the medical bills the driver actually incurred, and the jury's overall award was less than half of the amount of damages calculated by the driver's economist expert.

Costs. However, while finding that the driver was entitled to costs, the court awarded her only about $37,000 instead of the more than $100,000 that she had requested. It disallowed nearly $23,000 in expert witness costs that she had incurred in the separate litigation because she could not recover those amounts from TRW. After TRW's objection to her request for over $37,000 in miscellaneous office copy charges, the driver reduced her request to about $1,400, and the court declined to reduce it further. It also disallowed about $4,600 of her requested $31,600 in transcript costs.

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Offsets. TRW was entitled to offset its liability by $675,000 for the aggregate settlement amounts the driver received from the at-fault driver, the construction company, and Autoliv. The driver asserted that the payment she received from the construction company for medical benefits was not part of the settlement and were for her knee injuries and surgery, for which she did not seek damages against TRW at trial. However, she offered no evidence that any part of this payment was earmarked for knee injuries, and the funds remain in her attorneys' trust fund account and have not been used at all. Characterizing this payment as being outside the settlement did not disentitle TRW to an offset because offsets are equitable in nature. Further, TRW was entitled to offset of the payment allocated to the driver's parents, as the driver stipulated as part of the Autoliv settlement that TRW would receive a setoff for the entire Autoliv settlement.

The case is No. 2:09-cv-1375-JAD-PAL.

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Companies: TRW Automotive US LLC

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