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Justices Let Stand $8.75 Mil. Products Liability Verdict

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The court issued a one-page order last Wednesday denying allocatur in Blumer v. Ford Motor Co.

In May 2011, the Superior Court had upheld the March 2009 verdict in Blumer, ruling that evidence of design changes and reports of prior incidents introduced by the plaintiff were, in fact, admissible to the jury.

Writing for a 2-1 majority, Judge Cheryl Lynn Allen ruled that evidence of design changes instituted by the defendant manufacturer in the case was correctly presented to the jury because the changes were developed before the date of the subject accident. Further, Allen ruled, the reports of prior incidents may have constituted inadmissible hearsay, but the defendants failed to object to the reports during trial and failed to request a limiting instruction to the jury, thus waiving their right to appeal on the issue.

"Although the admissibility of 'remedial measures' taken before an accident occurs appears to be a novel issue in Pennsylvania, our result is compelled by the plain language of Pa.R.E. 407," Allen ruled in Blumer . "The unambiguous and plain language of Pa.R.E. 407 only restricts the introduction of remedial measures that are made after the occurrence of the injury or harm. Therefore, measures that are predetermined before a particular accident occurs are not 'remedial measures' under Pa.R.E. 407 because the measures are not intended to address the particular accident that gave rise to the harm."

Judge Jacqueline O. Shogan, who filed a concurring and dissenting opinion in the case, agreed with the majority on the issue of the design change evidence. She departed from the majority, however, when it came to addressing the issue of the reports of prior incidents.

According to Shogan, the manufacturer in the case, Ford Motor Co., had filed a motion in limine to exclude evidence of other lawsuits and reports of prior incidents. The trial court ruled in its favor with regard to the lawsuits, but chose to address the admissibility of reports "as they come," Shogan wrote. Ford later requested a limiting jury instruction, which was ultimately not provided.

Those steps, Shogan wrote, were enough to preserve Ford's claims and constituted grounds to grant a new trial.

In Blumer , according to Allen, Joseph Blumer was crushed by his Ford F-350 tow truck when the parking brake broke.

An Allegheny County jury awarded Blumer's estate $8.75 million, plus delay damages, after the plaintiffs used the reports of prior incidents and evidence of design changes to argue that Ford Motor Co. knew as early as July 2000 that the parking brake system on Blumer's truck, which was used in all of its F-series vehicles between 1999 and 2004, was faulty.

Afterward, Ford sought a new trial, arguing that the court erred in its evidentiary rulings.

The majority, though, disagreed.

In beginning her analysis on the issue, Allen wrote that Pa.R.E. 407 allowed for evidence of design changes to be introduced into evidence in situations such as the one in Blumer.

"By its very language, Pa.R.E. 407 proscribes evidence of 'subsequent measures' taken by a defendant with regard to a product 'after an injury or harm,'" Allen wrote. "Here, the trial court concluded that Pa.R.E. 407 did not prohibit evidence of the design changes because the changes concerned alternative braking systems that were predetermined by appellant Ford prior to the accident at issue."

Allen cited case law from the U.S. Court of Appeals for the Third Circuit, the Hawaii Supreme Court and the North Dakota Supreme Court, all three of which have "identical" subsequent remedial measure rules.

Allen said that "courts interpreting these rules, as well the notes accompanying them, make it clear that changes in design that are devised prior to the accident at issue are not barred as a subsequent remedial measure."

And because Blumer's estate proceeded in part on a malfunction claim, it was entitled to use circumstantial evidence as a means of establishing a prima facie case, Allen wrote.

That ruling applied to the question of the admissibility of the prior incidents reports as well.

According to Allen, the trial court conducted an in camera review of those reports, ruling that 28 submitted by the plaintiffs were admissible. Allen ruled that 25 satisfied the "substantial similarity" test outlined by the Superior Court in the 2010 decision Lockley v. CSX Transportation.

The reports, Allen ruled, "need not detail the precise defect within the parking brake system in order to be admissible as substantial similarity evidence because plaintiff proceeded on a malfunction theory."

That being the case, Allen argued, Ford was still free to use cross-examination and other measures to argue the braking failure in Blumer was caused by something distinct.

Further, the judge ruled, the reports may have arguably been hearsay, but Ford was required to preserve its objection to the evidence in a different manner.

Ford, Allen wrote, had argued that it preserved the issue by filing a motion in limine prior to trial and by requesting the limiting jury instruction.

According to Allen, however, Pa.R.E. 103(a) was amended in 2001, requiring a party filing a motion in limine to preserve its issue for appeal by renewing its objection at trial if a court fails to "clearly and definitively rule on the motion."

The amendment is identical to that of the federal rules, Allen wrote, and again cited federal case law in support.

Finding guidance in that case law, Allen ruled that Ford did not preserve its appeal because it failed to make a hearsay objection at trial or base its request for a limiting instruction on hearsay.

"Here, appellants asserted a hearsay objection to the reports in a motion in limine, but the trial court deferred ruling on all motions related to the reports until trial," Allen ruled. "Appellants did not lodge a hearsay objection to the reports during trial, nor did they ask the trial court to issue a definitive ruling on their motion in limine. In addition, appellants did not request a limiting instruction on the ground that the reports constituted inadmissible hearsay. Rather, appellants requested a limiting instruction on the ground that the reports could only be offered to prove notice, and could not be used to establish causation and/or a defect because they were not substantially similar to the accident at issue."

Blumer's attorney, **Shanin Specter** of Kline & Specter, said the conclusion of this case is "heartening for the Blumer family."

Charles L. "Chip" Becker, also of Kline & Specter, handled the appeal in the case.

Counsel for the defendants, William J. Conroy of Campbell Campbell Edwards & Conroy in Wayne, Pa., could not be reached for comment at press time.