The South Carolina Supreme Court Provides Clarity and Direction in Four Significant Product Liability Cases

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Introduction

In an unprecedented quartet of cases issued in the last nine months, the South Carolina Supreme Court has shed much needed light into the murkiness that had been South Carolina product liability law. For the last thirty years while product liability law has been evolving through court decisions and legislative enactments, the South Carolina appellate courts have been inconsistent or generally silent – until now.[1] In Watson v. Ford[2], Branham v. Ford[3], Sapp v. Ford[4], and Priester v. Cromer[5], the state's highest court has issued rulings on a number of key legal issues pertinent to automotive product liability litigation. These include an explication of the standards for the admissibility of expert testimony, "other similar incidents," post-manufacture evidence, as well as an express finding that proof of a feasible, alternative design is an essential element of a design defect claim. The Court also gave instructions limiting evidence admissible to support a claim of punitive damages, important to ensuring due process protections for out-of-state defendants, as well as reinstated the economic loss rule and held that FMVSS 205 preempts a conflicting state law action. Lastly, on September 13, 2010 the South Carolina Supreme Court issued an opinion denying plaintiffs' motion for rehearing and clarifying its holding in Watson to state that Ford was entitled to a defense verdict due to the complete absence of evidence of defect; not a new trial as plaintiff sought.

Before addressing the recent holdings and their significance in the landscape of South Carolina law, we must commend Ford and its counsel for its willingness to try these difficult cases and risk large verdicts so that the S.C. Appellate Court could have its say on several important issues. As a result, we have for the first time in South Carolina a reliable body of case law to guide the trial courts and the Bar in the litigation of complex product liability cases.

The Cases

In Watson v. Ford, a 17-year-old unbelted plaintiff claimed that she lost control of her 1995 Ford Explorer after it suddenly accelerated off an exit ramp onto the freeway while in cruise control

[1] The South Carolina legislature adopted Section 402A of the Restatement Second of Torts and the accompanying comments in 1974. The Legislature has declined to pass any additional statutes related to product liability law until 2005 when the Joint Tortfeasors Act was enacted.
[2] ___S.E.2d ___, 2010 WL 916109 (S.C. Sup. Ct. March 15, 2010).
[3] ___S.E.2d ____, 2010 WL 3219499 (S.C. Sup. Ct. August 16, 2010).
[4] 386 S.C. 143, 687 S.E.2d 47 (2009).
[5] ___S.E.2d___, 2010 WL 2990978 (S.C. Sup. Ct. August 9, 2010).

mode. Plaintiff, represented by The Bell Legal Group, alleged that electromagnetic interference (EMI) caused her cruise control system to malfunction, resulting in the accident. In support of her claims, Plaintiff offered the expert testimony of Dr. Antony Anderson and Bill Williams, both of whom purportedly have been retained to espouse a virtually identical EMI theory in the pending Toyota UA litigation. Over Ford's objections, the trial court allowed Dr. Anderson to opine that EMI can interfere with the speed control component of a cruise control system and cause a vehicle to suddenly and uncontrollably accelerate. He further testified that Ford could have employed a feasible alternative design to prevent EMI. Specifically, he opined that Ford could have used "twisted pair wiring" to prevent EMI from passing between the wires. According to Anderson, had Ford used the twisted pair wiring, the Watson accident would not have occurred. Plaintiff also offered the testimony of Bill Williams as an expert in "cruise control diagnosis."

In addition to the aforementioned expert testimony, Plaintiff relied upon "other similar incidents" as evidence of a defect in the cruise control system of the Explorer. Plaintiff presented three fact witnesses, all of whom testified that their Ford Explorers experienced sudden acceleration without driver input. Plaintiff also introduced an internal Ford email, noting 35 other incidents in Great Britain where a Ford Explorer allegedly suddenly accelerated without cause. The jury rendered a verdict of $15 million in compensatory damages for the plaintiff, who was a quadriplegic as a result of the accident; and $3 million for the wrongful death of a rear seat passenger.

On appeal, the South Carolina Supreme Court reversed the jury's verdict and entered judgment in favor of Ford. The Court held that the trial court erroneously admitted the expert testimony of both Williams and Armstrong, and that the "other incidents" evidence should have been excluded as well. The Court conducted a lengthy analysis of the requirements of South Carolina Rule 702. Such an extensive discussion of the admissibility standard for expert testimony is especially significant in this State, which had never adopted the Frye test, and expressly rejected Daubert. The dearth of case law interpreting Rule 702 has significantly hampered product manufacturers in South Carolina, who were without the support of Daubert and its progeny to argue for the exclusion of unqualified experts offering pseudo-science. The practical result of this has been the virtual certainty that any expert testimony would be admitted.

With regards to Williams, the Court found that he should not have been qualified as an expert in cruise control diagnosis because he had "no knowledge, skill, experience, training or education specifically related to cruise control systems." Williams' experience in braking and other automotive systems was deemed inadequate. This strict interpretation of the qualification prong of Rule 702 appears to close the door to "jack of all trades" or marginable qualified experts. Similarly, it requires defendants to scrutinize their experts' qualifications carefully to insure that

the expert has knowledge, skill, experience, training or education related to the specific component or system at issue.[6]

As to Dr. Anderson's testimony, the Court concluded that both his alternative design theory and his EMI theory should not have been admitted. Addressing the alternative design theory first, the Court found, as with Williams, Dr. Anderson failed to meet the qualification prong of Rule 702. Focusing again on the particular system at issue, the appellate court cited Anderson's lack of experience in the automotive industry, his lack of knowledge of cruise control systems, and the fact that he had no design experience as to any component of a cruise control system. The Court also found that Dr. Anderson's alternative design opinion lacked the requisite scientific reliability, thus failing the second prong of Rule 702. He failed to present any evidence to support his claim that his "twisted wire" design would have prevented the accident in this case, or that the alternative design could be incorporated into Ford's existing cruise control system. The Court also noted that lack of any alternative model comparison or demonstration of the economic feasibility of his design.

With regard to his qualifications to testify about EMI theory, the Court reluctantly "assumed" that Dr. Anderson, an electrical engineer, was qualified to opine as to the theory. However, the opinions offered were deemed unreliable and thus inadmissible. Specifically, the Court for the first time identified those critical factors to be considered when determining whether an expert opinion satisfies the requisite reliability standards in South Carolina: testing, publication, and general acceptance in the scientific community. Here, Dr. Anderson admitted that it was not possible to test for EMI and that he had not published any articles on EMI theory. Finally, while the Court expressly held general acceptance in the scientific community is not a requirement for admissibility, it noted that Anderson's EMI causation theory has been rejected time and time again by the scientific community and various courts, and that this weighed heavily in favor of its exclusion. Identifying the general acceptance factor as a non-prerequisite to admissibility strongly suggests that testing and publication may indeed be requirements for admissibility. The type of "testing" required will certainly be an issue litigated in future cases.

Watson is important because, for the first time, a South Carolina appellate court drew a clear distinction between the qualification and the scientific reliability requirements of Rule 702, holding that merely qualifying as an expert does not automatically render one's opinions admissible. Rather, the trial court must conduct a separate scrutiny of the opinions offered; otherwise, opinions based upon nothing more than the *ipse dixit* of the expert will be improperly admitted, as occurred in Watson. After Watson, an engineering degree is no longer a free pass to testifying regarding a product defect.

Finally, the appellate court significantly advanced the law related to the admissibility (or inadmissibility) of "other similar incidents." The appellate court adopted the following factors that a court should consider when admitting evidence of other incidents to support a claim that the present accident was caused by the same defect: (1) the products are similar; (2) the

[6] The Court ultimately concluded that Ford was not prejudiced by the admission of Williams' testimony; however, the finding that he was not qualified and the rationale supporting his disqualification is instructive.

alleged defect is similar; (3) causation related to the defect in the other incidents; and (4) exclusion of all reasonable secondary explanations for the cause of the other incidents. Applying these factors, the Court held that the evidence should have been excluded. The products were not "similar" because the Explorers involved in the other incidents were not the same model year as the subject vehicle and because they all occurred in Britain, the driver seat was on the right hand side of the vehicle. Plaintiff also failed to prove the existence of any defect in the other Explorers or that any defect caused the alleged incidents. Absent expert testimony on this issue that, among other things, rules out other reasonable explanations for the alleged event, the evidence has been held to be improper.

Branham v. Ford

Branham v. Ford arose out of a single-vehicle rollover of a 1987 Bronco II 4x2 that resulted in the ejection of an unbelted child in the rear seat. Plaintiffs filed suit, alleging that there was a defect in the vehicle suspension and handling system and the seatbelt sleeve. The case was tried in Hampton County, South Carolina, previously identified the American Tort Reform Association as one of the nation's "judicial hellholes."[7] The resulting verdict, $16 million in compensatory damages, and $15 million in punitive damages, was the largest award entered against any automobile manufacturer in 2006.

On appeal, the South Carolina Supreme Court cited numerous errors and has remanded the case for a new trial. In what may be the most noteworthy exposition of South Carolina product liability law in decades, the Supreme Court expressly held that a product may only be shown to be defective and unreasonably dangerous in a design defect case by way of a risk-utility test, which, by its very nature, requires a showing of a reasonable alternative design. Citing Section 2(b) of the Restatement (Third) of Torts and the commentary of Professor David G. Owen of the University of South Carolina[8] with approval, the Court held that:

> In sum, in a product liability design defect action, the plaintiff must present evidence of a reasonable alternative design. The plaintiff will be required to point to a design flaw in the product and show how his alternative design would have prevented the product from being unreasonably dangerous. This presentation of an alternative design must include consideration of the costs, safety and functionality associated with the alternative design.

Referring to a long line of state court decisions, the Court noted that the rule announced was not new, but was consistent with "the approach the trial and appellate courts in this state have been following." While we agree with the Court that the only rational way to read the earlier decisions is to conclude that a showing of feasible alternative design is required, experience tells us that the trial courts in this state have not been adhering to this rule. To the contrary, while most plaintiffs pre-Watson presented evidence of a feasible alternative design as part of their case, many trial courts would refuse to instruct the jury that such a showing was an essential element of the plaintiff's case, finding that it was an "open question" under South Carolina law. Branham clarifies this fundamental element of product liability law.

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[7] The first trial was declared a mistrial when, in response to inquiries raised by counsel for Ford and by the trial judge, several jurors acknowledged that they or a family member had previously been represented by plaintiffs' counsel or others in their law firms.

[8] David G. Owen, *Toward a Proper Test for Design Defectiveness: "Micro-Balancing" Costs and Benefits*, 75 Tex. L. Rev. 1661 (1997).

In another clarification of the elements of a design defect claim, the Court held that there is no separate "failure to test" claim apart from the duty to design and manufacture a product that is not defective and unreasonably dangerous. At trial, the lower court granted Ford's motion for directed verdict on the strict liability claim related to the alleged design defect in the seatbelt sleeve. The trial court allowed a "negligent failure to test" claim to proceed to the jury. The appellate court, noting that strict liability and negligence are not mutually exclusive theories of recovery, held that if the basis of the dismissal of one claim rests on a common element of the companion claim, the companion claim must also be dismissed.

The Branham court also addressed several important evidentiary issues that arise in almost every product liability case. With regard to post-distribution evidence, while the appellate court noted the presence of evidence from which the jury could find a defect in the Bronco II's suspension system, the Court concluded that Ford was prejudiced by "Branham's unrelenting pursuit of post-distribution evidence on the issue of liability." The Court defined "post-distribution evidence" as "facts neither known nor available at the time of distribution." Again, citing the comments to Section 2 of the Restatement (Third) of Torts, the Court stated that "When assessing liability in a design defect claim against a manufacturer, the judgment and ultimate decision for the manufacturer must be evaluated based on what was known or 'reasonably attainable' at the time of manufacture." While the subject vehicle was manufactured in 1986, Plaintiff was allowed to introduce rollover studies, a film, and other internal documents created in 1989 to show the Bronco's propensity to rollover. The Court held that such post-distribution evidence would be inadmissible on retrial, because a manufacturer's design and manufacturing decisions should be assessed on evidence available at the time of design and manufacture, not increased knowledge gained after that time. The Court also specifically held that Plaintiff could not circumvent the bar on post-manufacture evidence by characterizing it as "other incident" evidence.

Finally, the appellate court was highly critical of Plaintiff's closing arguments, concluding that they relied heavily on inadmissible evidence of "harm to others" and compensation of Ford executives, in violation of Ford's due process rights. Punishing Ford for hurting all Bronco II rollover victims was a central theme in counsel's closing argument. The Court held that such arguments were improper and could not withstand constitutional scrutiny. With regards to the financial data offered, the Court agreed that "the wealth of a defendant is a relevant factor in assessing punitive damages," and that a corporate defendant's net worth was a proper guide in assessing the "ability to pay" factor. However, counsel's disclosure of the salaries and stock option values of its highest executives "went far beyond the pale," introducing "an arbitrary factor" in the jury's consideration of punitive damages.

Priester v. Cromer

Priester v. Cromer is a window glazing preemption case. The unbelted 18-year-old plaintiff was ejected from the side window of a Ford F-150, following a night at the local strip club, during which plaintiff became intoxicated. The Plaintiff's estate filed suit, arguing that the truck was defective because the windows were made of tempered glass, allowing the ejection. The appellate court affirmed the trial court's summary judgment order, finding that the state law cause of action was barred on federal preemption grounds. The appellate court noted the split

in opinion among the jurisdictions, and concluded that FMVSS 205 preempts a lawsuit in which the sole allegation of defect was the selection of federally authorized tempered glass. To allow the suit to proceed "would stand as an obstacle to achieving the purposes and objectives of Regulation 205."

Sapp v. Ford

A review of recent product liability law would not be complete without a note on Sapp. In Sapp, the Supreme Court, overruling a prior decision, reinstituted the economic loss rule as a bar to tort claims in the absence of physical harm to "other property". The Sapp plaintiff brought negligence, strict liability, breach of warranty, and fraud claims against Ford after a fire resulted in damage to the plaintiff's vehicle only. The trial court granted the manufacturer summary judgment. The appellate court affirmed, holding that "imposing liability merely for the creation of risk when there are no actual damages drastically changes the fundamental elements of a tort action, makes any amount of damages entirely speculative, and holds the manufacturer as an insurer against all possible risk of harm." This is a significant retrenchment of a fundamental rule that had been whittled away by prior exceptions and inconsistent application.

Conclusions

Read together, Watson, Branham, and Priester send a signal to product liability lawyers practicing in South Carolina that many of the "rules" formerly given lip service will now be strictly enforced or the resulting verdicts – regardless of their size – will be reversed. These decisions go a long way to dispel the reputation of South Carolina as a "backwater" jurisdiction where "home-cooking" by local judges and plaintiff's lawyers prevent out of state corporate defendants from receiving a fair trial. Prior to these decisions, South Carolina courts had adamantly adhered to a strict interpretation of the Restatement (Second) of Torts and as a result, found itself in the minority or, at best, "implicitly" in the majority, on most product liability issues. Watson, Branham, and Priester clearly place South Carolina within the mainstream of product liability law.

Some questions, however, do remain. Because South Carolina judicially adopted comparative fault, but legislatively adopted Section 402A of the Restatement (Second) of Torts, the application of comparative fault as a defense to a strict liability claim remains an open issue. Similarly, the admissibility and effect of a plaintiff's fault or third party fault in causing an initial crash in a crashworthiness claim remains unaddressed. Finally, the trial courts and counsel await interpretation of the recently enacted Joint Tortfeasors Act, which arguably allows a non-party to be allocated a share of liability. While South Carolina has come a long way in articulating product liability in the last few months, there remain several issues that will require aggressive litigation in the future. The lawyers of Bowman and Brooke, led by the Columbia team, are eager to assist you in those battles. If you have any questions or comments about these recent decisions, please contact us at (803) 726-0020.