

## 10th Circ. Won't Restore Fatal Crash Suit Against Polaris

By Emily Field

*Law360, New York (December 23, 2015, 9:41 PM ET)* -- The Tenth Circuit on Wednesday refused to revive a liability suit against Polaris brought by the family of a man who died in an off-roading accident, saying the lower court didn't err in refusing to let them amend their allegations and add evidence after the deadline.

The appeals panel, in a published opinion, upheld a Utah federal judge's decision granting summary judgment in favor of Polaris Industries Inc. The judge had found that the family hadn't shown enough proof that the vehicle was defective when it was sold and that Viri Lane Birch, killed in a 2012 accident, had altered the vehicle's rollover protective feature.

The appeals panel found that the district court properly denied the family's motion to amend their complaint, saying that they offered no explanation why they waited four months after the vehicle at issue was disassembled and nearly a year after the deadline to amend their pleadings.

"Appellants argue they should be given leave to amend because Polaris stymied their attempts to obtain discovery," the panel said. "But the citations and specific allegations they provide in support of this accusation are in most cases vague, confusing, conclusory and unsupported by record evidence."

Because the district court had properly denied the family's motion to amend, the appeals panel said Polaris' motion for summary judgement turned on the allegations in the unamended complaint.

The panel upheld U.S. District Judge Robert J. Shelby's conclusion that there was no dispute that the vehicle didn't have an injury-causing defect when it was sold.

"Because there is no record evidence to suggest Mr. Birch's unmodified 2011 RZR contained a defect that caused his death, any injury-causing defect did not exist at the time the 2011 RZR was sold," the panel said. "Appellants therefore could not prevail under Utah products liability law."

In April, Judge Shelby found that Birch had altered the vehicle's rollover protective feature by adding "an incompatible aftermarket cab frame purchased from an unidentified seller," adding that the frame was not designed for that vehicle and did not properly fit it, according to Ryan Nilsen of Bowman and Brooke LLP, counsel for Polaris, at the time.

The family had argued that the replacement cab frame at issue was built by Polaris and had been

installed by a "Polaris-certified" mechanic.

Birch's family sued Polaris in July 2013, claiming that the vehicle's rollover-protective structure was defective and dangerous. They claimed in particular that the Polaris vehicle's 2008 cab frame, or roll cage, was defective because it was made of "cheaper cold-rolled steel" that was not strong enough, and that Polaris knew about this alleged defect.

They claimed also that Polaris then changed the cage in 2011 by using "thicker, hardened" steel bars, and that it has hidden from the public that it implemented such changes to strengthen the cage, according to their response to Polaris' motion for summary judgment.

Polaris had argued that the crash resulted because the replacement cab frame had been installed by "grinding off" a safety feature, modifying the vehicle in a way that Polaris didn't sell it, according to documents filed by Polaris.

"We are pleased that the Court of Appeals affirmed the district court's decision dismissing this case on summary judgment," Nilsen told Law360 on Wednesday.

Representatives for the family didn't immediately respond to requests for comment Wednesday.

The Birch family is represented by Richard L. Denney, Lydia JoAnn Barrett and Jason Robinson of Denney & Barrett PC and Brad H. Bearnson of Bearnson & Caldwell LLC.

Polaris is represented by Paul G. Cereghini, Ryan L. Nilsen and Nathan J. Marcusen of Bowman and Brooke LLP.

The case is Birch et al. v. Polaris Industries Inc., case number 15-4066, in the U.S. Court of Appeals for the Tenth Circuit.

--Editing by Aaron Pelc.

---

All Content © 2003-2015, Portfolio Media, Inc.

