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Jablonski v. Ford: Is the Illinois Supreme Court crafting a new approach to duty analysis and proof in negligent-product-design cases?

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A gradual shift in how Illinois courts are deciding cases involving negligent-product-design claims appears to be evolving following the Illinois Supreme Court's recent ruling in *Jablonski et al. v. Ford Motor Co.,* 2011 IL110096 (Ill. 2011).

Reversing a $43 million jury verdict for the plaintiffs, the court held in an opinion authored by Justice Theis that under a negligent-product-design claim the "risk-utility" test with a higher burden of proof controlled, which the plaintiffs failed to meet. The ruling seems on its surface to dispense with the more intuitive and less rigorous "consumer expectation" test, which earlier cases have folded into the risk-utility test.

In practice, however, it looks as if the Illinois Supreme Court applied language out of its 2008 *Mikolajczyk v. Ford Motor Co.* decision in which the court warned that a plaintiff who fails to rebut evidence introduced by the defendant proper to the risk-utility analysis runs the risk of an adverse ruling.

Perhaps most astonishing of all is that the *Jablonski* court reviewed the actual evidence itself, overturning the jury's and the appellate court's findings and ruling as a matter of law that the evidence failed to meet the threshold required for mere *submission* to a jury. This emerging line of Illinois cases bodes ill for plaintiffs seeking damages due to design defect and negligent product design in products liability cases.

Background

On July 7, 2003, Dora and John Jablonski were driving home on I-270 in Madison County, Illinois, and had come to a stop in traffic while passing through a construction zone. A distracted driver did not see the stopped traffic and rear-ended the Jablonski's Lincoln Town Car with her Chevrolet Lumina at a rate of speed between 56 and 65 mph. The force of the collision crushed the fuel tank and a heavy wrench lying in the trunk punctured the fuel tank, causing the Town Car to explode. As a result, John was killed and Dora suffered extensive injuries and burns, including permanent disfigurement.

Dora and her son, John Jr., proceeded with claims against Ford after reaching settlement with the driver. The plaintiffs' claims at the time of trial alleged that when the 1993 Town Car was designed and manufactured – and thereafter – Ford had a legal duty of ordinary care to ensure the car was not unreasonably dangerous and defective.

Plaintiffs alleged Ford was negligent and strictly liable in at least one of the following ways: 1) by outfitting the Town Car with a vertical, behind-the-axle ("aft-of-axle") fuel tank; 2) failing to shield the aft-of-axle tank; and 3) failing to warn consumers of the risk of fuel tank puncture by trunk contents. Additionally, plaintiffs asserted that Ford's conduct was "wilful and wanton," alleging Ford knew at the time of design and manufacture of the Town Car of multiple deaths and/or serious injuries in 416 accidents involving aft-of-axle vehicles prior to 1993, but none were Town Cars or other cars with a similar design. Plaintiffs further alleged Ford knew of the heightened risk of fire-related injuries in its aft-of-axle vehicles and the need for shields and kits necessary to protect drivers from such catastrophic events.

In support, plaintiffs submitted testimony of Ford engineers, independent experts, a major peer-reviewed research study on fuel-tank positioning partially funded by Ford, rear-end collision reports, and Ford internal memos showing Ford's knowledge of fire hazards associated with aft-of-axle fuel tanks and a proposed design over the rear axle that would be "high enough in the trunk to essentially preclude rupture from in-trunk articles during an accident." A critical piece of evidence disclosed that between 1997 and 2003, eleven incidents prior to the Jablonski accident involving a similar "panther" model with an aft-of-axle fuel tank, the Victoria Police Interceptor, sustained puncture of the fuel tank by trunk contents in high-speed rear-end collisions involving police officers.

Ford's primary defense was that its conduct in constructing a vertically-oriented, aft-of-axle fuel tank was reasonable because this was the best location for that type of vehicle and design, and moving it would have compromised other desirable elements. In support of this, Ford submitted evidence that it met or exceeded all relevant federal and internal safety standards with regard to fuel integrity and crash-testing and that the puncture of the fuel tank by a pipe wrench was so unique and unforeseeable that no manufacturer could have anticipated or designed against its occurrence.

Ford introduced evidence that 99.9993% of all Town Cars produced from 1992 to 2001 never had fatal rear-end collisions with fire and that the over-the-axle design was unworkable. Critical to this ruling, Ford also introduced evidence that moving the location of the gas tank would necessitate an entire redesign of the automobile, incurring new risks of equal or even greater magnitude, including tank rupture from other parts of the car as well as fuel-fed filler pipe fires. This evidence was never rebutted.

At the close of evidence, Ford renewed its motion for a directed verdict on all counts. Plaintiffs, who had brought products liability claims sounding in both strict liability and negligent design, then voluntarily dismissed their strict liability claims with prejudice, inviting a motion for mistrial by Ford, which alleged substantial evidence was presented and admitted under the guise of relevancy for purposes of strict liability. The circuit court denied the motion for mistrial and for directed verdict.

After the 11-day trial the jury returned its verdict in favor of plaintiffs for $43 million including punitive damages. On appeal the appellate court affirmed the judgment, and the Illinois Supreme Court granted Ford's petition for leave to appeal.

The Supreme Court's Analysis

Duty of Care and the Risk-Utility Test

The issue on appeal was to clarify the duty analysis in a negligent-product-design case generally and specifically to address the application of the risk-utility test in determining the duty of care. Products liability claims based in negligence, such as negligent design, derive from fundamental precepts of common law negligence. *Calles v. Scripto-Tokai Corp.,* 224 Ill.2d 247, 270 (2007). A plaintiff must establish existence of a duty, a breach of that duty, an injury proximately caused by that breach, and damages. *Heastie v. Roberts,* 226 Ill.2d 515, 556 (2007).

As set forth at the outset by the court in its review, quoting *Calles,* "the key question in a negligent-design case is whether the manufacturer exercised reasonable care in designing the product." In determining if the manufacturer's conduct was reasonable, the question becomes whether the manufacturer should have foreseen, in exercising ordinary care, that the design would be hazardous to someone. For a harm to be foreseeable, the plaintiff must prove that the manufacturer actually knew or should have known at the time of manufacture of the risk posed by the product's design.

Calles; *Sobczak v. General Motors Corp.*, 373 Ill.App.3d 910, 923 (2007).

The court then cited § 291 of the Restatement (Second) of Torts for the long-standing notion that the determination of whether a manufacturer exercised reasonable care in its product design embraces a "balancing of the risks inherent in the product design with the utility of benefit derived from the product." This is the risk-utility test. "[T]he risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done." While many and varied factors comprise the test, the two primary factors are 1) the availability of feasible alternate designs at the time of manufacture, and 2) that the design used did not conform to industry standards, authoritative voluntary organizations, or criteria set forth in regulations.

The distinction between the risk-utility test and the more intuitive, less rigorous "consumer expectation" test also employed in the duty analysis of these cases is clear, as Theis herself cited in *Salerno v. Innovative Surveillance Tech, Inc.*, 402 Ill.App.3d 490, 497 (1st Dist. 2010) before her appointment to the Supreme Court. The consumer expectation test requires the plaintiff to establish that the product is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." This test merely requires that the product is more dangerous than contemplated by the consumer, whereas the risk-utility test also requires that the extent of the danger outweighs the benefits of the challenged design.

The *Jablonski* court cites *Calles* for the rule of law that risk-utility balancing "remains operative in determining whether a defendant's conduct is reasonable in a negligent-design case." The *Calles* court held that the appellate court erred in holding that the risk-utility test did not apply to negligent-product-design claims. *Jablonski,* however, seems to go a step further in not considering the consumer expectation test at all. In fact, the test is never used in the opinion for any determination of duty whatsoever. A closer reading of the opinion and a key passage in the court's 2008 *Mikolajczyk v. Ford Motor Co.* ruling, however, reveals a more subtle explanation for this omission.

Mikolajczyk and Unrebutted Defendant Evidence

The Illinois Supreme Court has already been using the risk-utility test to cannibalize the consumer expectation test in products liability litigation involving design defect in strict liability. In 2008 the court held the following regarding the relationship between the two tests in *Mikolajczyk v. Ford Motor Co.,* another case where the decedent's vehicle was struck by another car from behind, killing the driver:

> In sum, we hold that both the consumer-expectation test and the risk-utility test may be utilized in a strict liability design defect case to prove that the product is "unreasonably dangerous ". . . *When both tests are employed, consumer expectation is to be treated as one factor in the multifactor risk-utility analysis*

(Emphasis added).

Even more significantly for this case, the *Mikolajczyk* court set forth the following in response to the plaintiff's assertion that she was not required to choose the risk-utility test to prove her case:

> Plaintiff is correct that a product liability plaintiff is not required to utilize the risk-utility method of proof and does not have a "burden" of proving the existence of a feasible alternative design. She does, however, have the burden of proving that the product is unreasonably dangerous due to a design defect. *If, however, a product liability defendant introduces evidence that no feasible alternative design exists or that the design offers benefits that might outweigh its risks, the plaintiff who does not rebut such evidence with evidence of her own runs the risk that the trier of fact may resolve the issue against her*

(Emphasis added).

Proceeding with the risk-utility test, the *Jablonski* court found, quite contrary to the appellate court, that plaintiffs failed to meet their burden of proof. The court found that plaintiffs failed to produce evidence that Ford's conduct in its design of

the fuel system was unreasonable. Key to this conclusion was the lack of a feasible alternative design (including the over-the-axle design) and Ford's conformity with industry standards, the two primary factors in the risk-utility test for which Ford presented ample evidence in rebuttal of plaintiffs' assertions. Plaintiffs' failure to rebut Ford's evidence showing that no feasible alternate design existed is right out of the *Mikolajczyk* language cited above.

The court also states that Ford showed conformity with all federal fuel integrity standards, exceeding even its own internal 50-mph crash testing and that the aft-of-axle fuel tank location was accepted industry practice. Plaintiffs were therefore required to rebut those findings with evidence showing Ford's conduct was still unreasonable and failed to do so. And finally, Ford submitted evidence showing that the vertical, aft-of-axle fuel tank placement was the best location, and that moving it would require a redesign of the entire vehicle, subjecting it to a host of new risks of equal, or even greater, magnitude, including tank rupture from other parts of the car as well as fuel-fed filler pipe fires. This evidence clearly goes to the heart of the risk-utility test of balancing the design's harm against its benefits and was never rebutted.

As for the shielding, plaintiffs failed to present any design "proven out by crash testing." The court also found that plaintiffs failed to present evidence demonstrating that the risk was foreseeable and that the inherent risks in the design outweighed its benefits. Critical to these findings was that plaintiff's expert Mark Arndt was unable to present a single accident involving puncture of an aft-of-axle fuel tank from trunk contents in a Lincoln Town Car, only of similar vehicles used by police officers whose work made them more prone to high-speed rear-end collisions. Also key was that the research study of Derwyn Severy, heavily relied upon by plaintiffs, which opined that an "over-the-axle" location for the fuel tank would reduce risk of structural collapse and fuel tank rupture. However, not one of the vehicles tested in the study had an aft-of-axle fuel tank or was tested for trunk contents puncturing the fuel tank. The court reversed all rulings and awards, including duty to warn based on waiver and improper jury instructions.

Supreme Court's Review of Factual Evidence

This case is extraordinary in that the Illinois Supreme Court actually reviewed the factual evidence presented at trial, overturning the jury's findings and the appellate court's ruling based on insufficient evidence as a matter of law. Ford asserted it was entitled to a judgment notwithstanding the verdict because plaintiffs "failed to present sufficient evidence that [Ford] breached any recognized standard of care and, therefore, insufficient evidence to justify *submitting* any of their negligence claims to the jury." (Emphasis added). The standard of review for judgment notwithstanding the verdict requires that, after reviewing all the evidence most favorably toward the nonmovant, the evidence "so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill.2d 494, 510 (1967).

Therefore, the court explained, a motion for judgment *n.o.v.* essentially presents a question of law as to whether "a total failure or lack of evidence to prove any necessary element of the [plaintiff's] case" exists. After reviewing all the evidence most favorably toward plaintiffs, the court concluded that plaintiffs had indeed presented insufficient evidence from which a jury could conclude that Ford breached its duty of reasonable care by way of negligent design and reversed the rulings below as a matter of law.

Conclusion

The Supreme Court's transition from *Calles* to *Jablonski* suggests that in negligent-product-design claims specifically and in products liability litigation generally, the Illinois Supreme Court may not yet be restricting duty analysis solely to the risk-utility test but has incorporated the consumer expectation test as a factor into the risk-utility test. Moreover, even if the plaintiff chooses the consumer expectation test for its method of proof, if the defendant presents evidence appropriate to the risk-utility analysis, the burden will shift to the plaintiff to rebut that evidence or risk an adverse ruling by the trier of fact. ■

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