

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSE PINEDA : CIVIL ACTION
 :
 v. :
 :
 FORD MOTOR COMPANY : NO. 04-3359

ORDER AND OPINION

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE

DATE: November 15, 2006

In this diversity products liability case, plaintiff Jose Pineda, a Ford mechanic, was injured when the glass broke on the rear liftgate of a vehicle manufactured by Defendant Ford Motor Company. He has offered the expert testimony of Craig D. Clauser, P.E. Ford has filed a motion *in limine* and for summary judgment seeking to exclude Mr. Clauser's testimony based on its failure to meet the criteria set forth in Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993). A Daubert hearing was held in this case on September 28, 2006. For the reasons that follow, I will grant Ford's motion *in limine* and reserve my opinion on the summary judgment portion of the motion, pending further submissions from the parties.

I. Factual and Procedural Background

On July 18, 2002, Pineda replaced the liftgate cylinders and ball-stud brackets on a 2002 Ford Explorer belonging to Daniel Beck. Complaint at ¶¶ 7-8. Later in the afternoon he began to replace the hinges that connected the liftgate glass to the liftgate. Pineda Deposition, attached as Exhibit B to Ford's Motion, at 81.

According to Pineda:

It was right after lunch, somewhere around 1:00, when I finished to install the hinge on the left side and moved to the right side. I got the book because it was no information related to the torque specs on the hinge, so I got the book, torqued the hinge to the specs of the book, then put the nut on the body side. When I finished torquing the nut on the body side, I hear a click and felt like the glass was

exploding. I closed my eyes and I felt something hit my leg.

Id.

On July 16, 2004, Pineda filed this action against Ford. In it, he alleged that the 2002 Explorer was designed and/or manufactured defectively, specifically criticizing: (a) the design of the rear liftgate and glass; (b) the fabrication of the glass; (c) alleged excessive torque and pressure placed on the glass when the liftgate was opened or closed. Complaint at ¶ 15. Pineda also alleged a failure to warn. Id. at Count II.

In discovery, Pineda produced a report authored by Craig D. Clauser, an engineer with experience in materials analysis and systems failure analysis. Clauser C.V. Plaintiff's Exhibit A at the Daubert Hearing.

In his report, Clauser opined: "This incident occurred because the liftgate glass design was defective in that it was only marginally able to resist fracture in its intended service and the pertinent manual and bulletins lacked adequate instructions and warnings." Clauser Report, Plaintiff's Exhibit B, at the Daubert Hearing. He also wrote: "It should be noted that the manual does not provide tightening torque values for the hinge to glass connection. Also, the manual does not provide a sequence for connecting the brackets and hinge to the glass and liftgate. Both the sequence and torque level have the potential of changing the stress state in the liftgate glass."

Id.

After receiving this report, Ford filed a motion *in limine*, seeking to exclude Clauser's testimony. Subsequently, Clauser provided a supplemental report, dated July 11, 2006. Clauser Letter of July 11, 2006, at Plaintiff's Exhibit B. In it, he defended his analysis methods, and further explained the design flaws he found. Id.

In the supplemental report, Clauser also expanded on his opinion that the Ford manual was defective for (a) not providing a specific instruction for hinge replacement; (b) where it discussed hinge replacement, not emphasizing the importance of aligning the glass before tightening the hinges; and (b) failing to emphasize the importance of removing the window struts and leaving them off until the hinges were torqued in place. Id. In so opining, Clauser relied upon the Hierarchy of Safeguarding, a safety engineering principle providing that “if a hazard can not be designed out of a system or guarded against, warnings and instructions must be provided to protect the user.” Id.

This Court scheduled a Daubert hearing, which took place on September 28, 2006. At the hearing, counsel for Pineda explained that Pineda was dropping his claim of a design defect in the vehicle itself, and going forward only on the claim that the instruction manual was defective. Hearing Transcript at 7-8. As to that argument, Clauser took the stand and pointed out that – as he mentioned in his supplemental report – the 2002 Workshop Manual for the Ford Explorer Mountaineer did not provide specific directions for hinge replacement. Plaintiff’s Exhibit F; Hearing Transcript at 48.

Elsewhere in the manual, in a section pertaining to the removal and installation of the liftgate window glass, the manual provided what Clauser agreed would be a safe sequence for replacing the liftgate hinges, with the “hydraulic glass supports” or window struts, disconnected while the hinges were removed and replaced. Manual at 504-11-45 to 46; Hearing Transcript at 55. The problem with this instruction, Clauser explained, is that the sequence was not emphasized as a safety issue: “it just happened to be the sequence.” Hearing Transcript at 55. The replacement section simply read: “to install, reverse the removal procedure.” Manual at

504-11-46. In sum, as I expressed it to Clauser: “it doesn’t say warning, don’t do it the other way or bad things will happen?” Hearing Transcript at 55. Clauser agreed: “Right, exactly.” Id.

Thus, Clauser opined at the hearing, as he had in his supplemental report, that the Ford 2002 Explorer Mountaineer Manual was defective for (a) failing to provide an instruction for hinge replacement; and (b) failing to warn that proper hinge removal sequence was imperative to avoid shattering glass. Id. at 59.

Clauser conceded, however, that he was in no way a warnings expert. Id. at 65. He was able to offer his opinion solely “from an engineering standpoint.” When asked on cross-examination, however, whether he could offer an opinion as to “what a warning should say, what the text should be, print, size”, etc., he responded that he could not. Id.

Clauser testified:

I don’t put myself out as an expert on exactly what the wording should be, and what the likelihood somebody is going to follow it, but the warning cautions you that you don’t – it makes an instruction important, if it says follow this or something bad is going to happen, and the instruction just tells you how you should do something.

...

Well, I want – I want instructions, and as I said before, there are a number of different ways you could do it. Just give me one of them that meets the engineering requirements of not putting excessive stresses in it, that’s okay with me.

Id. at 64-65.

Referring to the language provided in a 2004 Ford Safety Recall instruction, (Plaintiff’s Exhibit I), Clauser further testified: “I don’t know that I’ve given the specific instructions. I’ve – I believe that the current Ford instructions are fine. I believe there are other ways to do it.” Id.

In response to questioning upon cross-examination, Clauser conceded that he had not compared the 2002 shop manual to any other manuals for manufacturers other than Ford, nor had he read peer-reviewed papers on the subject of warnings for window replacement or hinge replacement. Id. at 97-98. Moreover, he had not performed any studies or experiments to confirm his opinion that the glass in this case shattered because of the stresses placed upon it, as he described them. Id. at 90-92, 97.

II. Legal Standards

The criteria for the admission of expert testimony is set forth in FRE 702, which reads:

If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Thus, to be admissible, an expert's opinion must have a reasonable basis in the knowledge and experience of the relevant discipline. Kuhmo Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 149 (1999); Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). A trial court ruling upon a challenge to expert testimony must engage in a two-step inquiry. First, the proffered expert must be qualified to express an expert opinion; secondly, the opinion must be reliable. In re TMI Litigation, 193 F.3d 613, 663 (3d Cir. 1999).

In deciding whether an expert opinion is reliable, a trial court undertakes a flexible approach, considering such factors as (a) whether a theory or technique can be, and has been, tested; (b) whether it has been subjected to peer review and publication; (c) whether, in respect to a particular technique, there is a high known or potential rate of error and whether there are standards controlling the technique's operation, and (d) whether the theory or technique enjoys

general acceptance within a relevant scientific community. Kuhmo at 526 U.S. 149-150; Daubert at 509 U.S. 592-594.

The District Court for the District of New Jersey has discussed the problem of adapting Daubert for use in areas other than science, such as engineering. Milanowicz v. The Raymond Corporation, 148 F. Supp.2d 525 (D.N.J. 2001). It has identified the following indicia of reliability: (1) adherence to any federal design and performance standards; (2) adherence to standards set by independent standards organizations; (3) relevant literature, which could include general design manuals or industry-specific journals; (4) conformance with industry practice; (5) product design and accident history; (6) charts and diagrams; (7) scientific testing; (8) the feasibility of the expert's suggested modification, and (9) the risk-utility of a suggested modification. Id. at 533-535.

As a general rule, the party offering the expert testimony has the burden of establishing its admissibility by a preponderance of the evidence. Ferris v. Pennsylvania Federation Brotherhood of Maintenance of Way Employees, 153 F. Supp.2d 736, 741 (E.D. Pa. 2001).

III. Discussion

I will not permit Clauser to testify as to defects in the 2002 Ford Explorer Mountaineer shop manual. Although there are no strict guidelines specifying what makes an individual an acceptable "warnings expert," courts in this Circuit ruling in products liability cases have carefully adhered to the Kumho and Daubert requirements of (a) appropriate professional qualifications and (b) accepted methodology. Clauser has neither.

As discussed above, Clauser has freely admitted that he is not qualified as a warnings expert, and that he does not purport to be one. He maintains that he is entitled to testify as an

engineer that the manual was defective. However, it is clear from the relevant caselaw that even where an expert is a properly qualified engineer, he cannot testify that warnings or instructions were inadequate unless he can demonstrate indicia of reliability specific to warnings and instructions.

In Milanowicz, supra, the plaintiff injured his hand while adjusting the forks on a lift truck manufactured by the defendant. 148 F. Supp. 2d at 526. One of his engineering experts, Paul R. Stephens, opined that defendant had not provided adequate instructions regarding a safe adjustment procedure or adequate warnings regarding the risk of an improper procedure. Id. at 541. Thus, Stephens' opinion was essentially identical in nature to the testimony offered by Clauser regarding Ford's manual.

In deciding the defendant's motion for summary judgment, however, the court ruled that Stephens' testimony in this regard would not be admissible. The court criticized Stephens for failing to explain how the defendant's manual violated ANSI and other industry standards; not having written a proposed alternative warning or set of instructions; and not having compared the defendant's material with any produced by other manufacturers of similar equipment. Id. Stephens also failed to test the effectiveness of any proposed instructions or warnings. When asked: "Have you performed any type of testing upon operators or focus groups to see whether or not the warnings which you have conceptualized would actually convey sufficient and appropriate information to people to do the fork adjustment procedure at issue here?" he responded: "No." Id.

The Milanowicz court quoted the Court of Appeals for the Eighth Circuit in stating that “an expert’s failure to design and test a proposed warning and inability to point to contrary industry practice renders the reliability of his testimony extremely questionable.” Id., citing Jaurequi v. Carter Mfg. Co., 173 F.3d 1076, 1084 (8th Cir. 1999).

Similarly, in Willis v. Besam Automated Entrance Systems, Inc., Civ. A. No. 04-913, 2005 WL 2902494 (E.D. Pa. Nov. 3, 2005), a certified Professional Engineer like Clauser was precluded from offering testimony on the need for a warning on a revolving door. Like Stephens – and Clauser – this expert, Ronald J. Panunto, P.E., could not “create or design a specific warning sign that he believe[d] would be appropriate or effective.” 2005 WL 2902494 at *9.

The court added:

Moreover, Panunto lacks the requisite qualifications to testify regarding appropriate warnings for an automatic revolving door. His testimony and his curriculum vitae reveal no expertise on this subject. Panunto’s lack of qualifications in this area seriously undermines the reliability of any testimony that he might offer. His testimony regarding warnings does not pass muster under the Federal Rules of Evidence and Daubert.

Id.

Thus, although the experts in Milanowicz and Willis were adequately qualified as engineers, they were still expected to base their opinions regarding the need for warnings and/or instruction on more than their generalized experience. The same is true of Clauser. And, like those experts, Clauser is unable to do this.

Indeed, Clauser’s evidence suffers from the same weaknesses in methodology as those of the Milanowicz and Willis experts. Clauser has explicitly declined to offer proposed alternative language for a warning. He has certainly not tested the effectiveness of either Ford’s allegedly defective warning, or any possible alternative.

Neither has Clauser compared the criticized Ford manual language to the language provided by any other manufacturer. Pineda argues that Clauser may compare the language to warning language provided by Ford itself, in its 2004 Safety Recall instruction, which, as noted above, Clauser believed was “fine.” See Plaintiff’s Exhibit I. However, he is prevented from doing this by Federal Rule of Evidence 407. Rule 407 precludes the admission of evidence of subsequent remedial measures to prove, among other things, “a need for a warning or instruction.”¹

Also instructive with regard to methodology is Mause v. Global Household Brands, Inc., Civ. A. No. 01-4313, 2003 WL 2241600 (E.D. Pa. Oct. 20, 2003), a case involving injuries allegedly caused by the use of a cleaning product. Here, the warnings expert was a human factors psychologist, rather than a design expert. 2003 WL 2241600 at *4. Nevertheless, his testimony was excluded on the basis of unreliable methodology for the same reasons as were listed by the Milanowicz and Willis courts. The expert, Dr. Cunitz, “did not survey any other consumers or otherwise test” his assertion as to the need for a warning; he did not look at the warning labels of other, similar products; when asked at his deposition, he could not propose language for an adequate warning label. Id. at ** 5-6.

¹Counsel for Pineda argued at the Daubert hearing that the Rule 407 stricture was not a hard and fast rule under Pennsylvania law, pointing to Duchess v. Langston Corporation, 564 Pa. 529 (2001). Since the Federal Rules of Evidence apply in this diversity action, however, Duchess is irrelevant. Even if it did apply, Duchess would not help Pineda. There, the Pennsylvania Supreme Court approved the application of a 407-like rule in products liability cases, although it decided that the trial court in that particular case had not considered whether the evidence Duchess sought to introduce was admissible to establish the feasibility of a proposed alternative design, or to impeach the defendant’s argument that the alternate was not practicable. 564 Pa. at 560. These are not issues in this case.

The Mause opinion also highlights another weakness in Clauser's testimony. The Honorable Mary A. McLaughlin, ruling in Mausser, criticized Dr. Cunitz's assumption that the plaintiff's injury was caused by a certain chemical in the cleaning product manufactured by defendant. Id. at *6. She wrote:

Several courts have ruled that a warnings expert needs to provide some evidence, rather than merely an assumption, of a causal link in order to substantiate their opinions. In [Allen v. IBM, 1997 U.S. Dist. LEXIS 8016, *aff'd* 1999 U.S. App. LEXIS 3286 (3d Cir. 1999)], the District Court of New Jersey found that there was an insufficient link between the evidence of injuries occurring after use of the defendants' keyboards and the assumptions made by Dr. Cunitz. The court excluded his testimony because he could not address any design defect or causal association between the keyboard and injury. Allen, 1997 U.S. Dist LEXIS at *130, *134. See also Scheck v. IBM, 1996 U.S. Dist. LEXIS 17486, at *75 (D.N.J. 1996) (excluding a warnings expert for similar reasons). In a District of Maryland case, the court excluded a warnings expert because he assumed, without providing any evidence, that a powdered bleach product caused the plaintiff's injuries. Higgins v. Diversey Corp., 998 F. Supp. 598, 604 (D. MD. 1997).

Id.

Clauser testified at some length at the Daubert hearing on his opinion as to what flaws in Ford's procedure caused the liftgate glass to shatter. However, it has been clear since Ford's motion *in limine* was filed that Clauser has done no testing on the actual vehicle, on an alternative vehicle, in simulated conditions, or even in a comparison to the liftgate design of other vehicles, to substantiate his opinion in this regard. Transcript at 90-93; Clauser Deposition, attached as Exhibit G to Ford's Motion, at 136-143, 167-70.

Mause and the cases cited in it suggest that, despite the strict liability nature of a products liability case, a warning defect cannot be shown without any evidence as to whether it warned of something that actually caused the plaintiff's injury. Pineda has not come forward with expert testimony as to what caused the liftgate glass to break. Under the Mause logic, therefore, his

opinion as to the lack of proper warning and instruction regarding the hinge replacement procedure is essentially meaningless.

IV. Conclusion

In accordance with the above opinion, I will grant Ford's motion in part, precluding Craig Clauser from offering testimony at trial. The summary judgment portion of the motion will be set in abeyance for now. As I indicated at the end of the Daubert hearing, Pineda will be permitted to submit an additional response addressing the issue of whether he can go forward without expert testimony. Ford will also have a chance to reply to this filing.

ORDER

AND NOW, this 15th day of November, 2006, it is hereby ORDERED that Defendant Ford Motor Company's Motion to Exclude the Testimony of Craig Clauser and Motion for Summary Judgment, filed in this case as Document No. 14, is GRANTED IN PART, as to the motion *in limine*, in that the testimony of Plaintiff's expert, Craig D. Clauser, P.E., will be excluded from trial, and it is further

ORDERED that my decision on the summary judgment portion of this motion is HELD IN ABEYANCE awaiting Plaintiff's filing, within two weeks of the date of this Order, of an additional response addressing the issue of whether he can withstand summary judgment without expert testimony, with a courtesy copy delivered to Chambers; Defendant may reply to this response within ten days of the date of its submission.

BY THE COURT:

/s/Jacob P. Hart

JACOB P. HART
UNITED STATES MAGISTRATE JUDGE