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Three recent automotive product liability decisions help position defendants in challenging expert testimony on crashworthiness claims, attorneys Ted Mayer, Robb Patryk and David Shimonov say. Among the key lessons from those rulings: A plaintiff's use of a well-qualified expert is no longer a significant guarantee for survival of a *Daubert* or summary judgment challenge, no matter how plausible the opinions may appear on their surface; and an expert deposition is a critical tool in crafting a challenge on reliability.

Recent Developments on Attacking the Reliability Of Plaintiffs' Experts in Automotive Crashworthiness Cases



BY TED MAYER, ROBB PATRYK, AND DAVID SHIMONOV

While much of automotive product liability litigation remains focused on alleged defects which are the purported cause-in-fact of the accident at issue, there is also a still-developing, favorable body of law that is positioning defendants to fend off secondary or standalone claims regarding the ''crashworthiness'' of the vehicle. Such claims are often related to the performance, or alleged failure, of safety devices designed to lessen the effects of the crash, e.g., airbags and seatbelts. We examine here three recent decisions that potentially position defendants to challenge expert testimony related to these claims.

Ted Mayer is managing partner of Hughes Hubbard & Reed, Robb Patryk is co-chair of the firm's Product Liability & Toxic Tort group, and David Shimonov is an associate. All are based in the New York office.

The crashworthiness doctrine, also known as the second-collision doctrine, is a long-standing principle of product liability jurisprudence. The doctrine imposes liability on a manufacturer whose vehicle did not cause the accident at issue, but whose design instead somehow *enhanced* the injuries that otherwise would have occurred from the accident. Enhanced injuries are those caused by the alleged defect, above and beyond those which would otherwise have been sustained absent the defect. The older, and not entirely discarded, view is that an automobile manufacturer should not be

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responsible for enhanced injuries because involvement in a collision is outside the manufacturer's intended use of the product. The courts in most jurisdictions, however, have applied the crashworthiness doctrine on the rationale that accidents are reasonably foreseeable, and that manufacturers accordingly have a duty to anticipate them and to minimize their consequences in the design process. The doctrine has been applied to elements of a vehicle's structural integrity, interior design, safety devices, and other alleged defects that enhance rather than cause the injury.

To state a prima facie crashworthiness claim, most jurisdictions require that a plaintiff establish the following elements:

(1) a defect in design,

(2) an alternative, safer, and practicable design existed at the time of design that could have been used instead,

(3) proof of those injuries, if any, that the plaintiff would have suffered had the alternative design been utilized, and

(4) proof of those injuries that are attributable to the defective design.

The courts likewise are uniform in requiring plaintiffs to meet this burden with expert testimony, and a trio of recent decisions underscore that a well-targeted defense attack on the reliability and admissibility of the proffered expert opinions can shut down these claims at the summary judgment stage.

In *Rupert v. Ford Motor Co.*, 640 F. App'x 205 (3d Cir. 2016), the Third Circuit provides a roadmap for launching an effective attack on automotive expert opinion reliability. There, the Ruperts were driving their 1993 Ford pick-up truck when another driver crossed the center line and struck the front area of the Rupert vehicle at a high rate of speed. A third vehicle, traveling behind the Ruperts, crashed into the Ruperts' truck, causing a fire to occur post-impact. Mrs. Rupert asserted, among other claims, a crashworthiness claim against defendant Ford, alleging that the passenger compartment of the Rupert vehicle was ''excessively crushed'' as a result of the accident, entrapping Mr. Rupert and enhancing the injuries he otherwise would have sustained. In support of her claim, the plaintiff offered Byron Bloch as a design defect/crashworthiness expert.

Hard Line on Expert Reliability

Ford challenged Mr. Bloch's qualifications as an expert as well as the reliability of his opinions. Among other things, Ford argued that Mr. Bloch was not a licensed engineer and was therefore not qualified to serve as an expert. The district court, however, disagreed, finding that Mr. Bloch was qualified to testify as an expert in the area of automobile safety, design, and crashworthiness, despite his lack of a formal engineering degree or license, because he had over 40 years of automobile safety design experience and had observed and analyzed vehicle crash tests on multiple occasions. The court explained that in order to qualify as an expert, a witness need only possess ''specialized expertise.'' *Rupert v. Ford Motor Co.*, No. 12–331, 2015 BL 45908 (W.D. Pa. Feb. 23, 2015).

But the court took a much harder line on the issue of reliability. The court explained that the touchstone of a reliability analysis is the assessment of the *methodology* employed by the expert, not simply a cursory review of the ultimate *conclusions*. A testifying expert must specifically identify the scientific, technical or specialized knowledge relied upon as well as the reliability of ''the process or technique the expert used in formulating the opinion . . . .''

In examining the reliability issue in *Rupert*, the district court found that three of the expert's five opinions were sufficiently reliable because they related to general precepts about automobile safety and design, the specific design features of the Rupert vehicle, the availability of alternative designs, and the general benefits of those alternative designs, all of which naturally flowed from Mr. Bloch's past experience in the field of automotive safety. The remaining two opinions, however, relating to what injuries Mr. Rupert would have suffered had his vehicle been differently designed, and what injuries were attributable to the defective design, were deemed inadmissible because Mr. Bloch was unable to articulate his bases for these conclusions. The court explained that Mr. Bloch had failed to provide a testable, reliable foundation to support his conclusions: He had not conducted any testing, hypothetical calculations, or actual replications and had relied solely on his background and intuition. The inadmissibility of those two opinions—regarding what injuries, if any, the plaintiff would have suffered had a safer design been used, and what injuries are attributable to the defective design—rendered plaintiff unable to meet his crashworthiness burden, and the Third Circuit ultimately affirmed the district court's grant of summary judgment in favor of the manufacturer.

Similarly, in *Wilden v. Laury Transp., LLC*, No. 3:13-cv-784, 2016 BL 281184 (W.D. Ky. Aug. 29, 2016), plaintiffs brought a crashworthiness claim in the Western District of Kentucky against Great Dane Limited Partnership for failing to reasonably protect them when their car collided with Great Dane's trailer. Janice Wilden was driving a 1995 Chevrolet Lumina with her infant son in the back seat (''Plaintiffs''). A driver in a Great Dane truck-trailer allegedly failed to yield the right-of-way and crossed oncoming traffic to make a left turn onto the northbound side of a highway. The Plaintiffs' car crashed into and went underneath the trailer, pushing past the windshield (a type of collision known as an ''underride,'' in which a portion of a passenger vehicle slides under another vehicle, increasing the probability that death or injury will occur.). Plaintiffs relied on two experts, (Perry Ponder and Bruce Enz) to demonstrate the existence of a feasible alternative design to the trailer; they opined that a telescoping side guard, if installed, would have prevented the underride that occurred. Great Dane moved to exclude the expert testimony of Ponder and Enz alleging that their testimony should be excluded as unreliable under *Daubert*.

Exercising its discretionary ''gatekeeping'' role, the Western District focused on three factors in making its determination on reliability: 1) whether the expert's theory or technique can and has been tested, 2) whether the expert's proposal has been generally accepted by his or her peers, and 3) whether the testimony was prepared solely in furtherance of litigation. While their qualifications were unquestioned, Ponder and Enz both acknowledged that they had never designed nor built a telescoping side guard. They further conceded that the only testing that had been conducted was on a ''hypo-

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thetical'' side guard, not an actual one. Additionally, the experts presented no evidence to suggest that their proposed telescoping side guard had been accepted by their peers. Finally, the court noted that ''expert testimony prepared solely for purposes of litigation, as opposed to testimony flowing naturally from an expert's line of scientific research or technical work,'' is to be viewed with ''caution.'' Plaintiffs' expert opinions and evidence were insufficient to suggest that Ponder and Enz's proposed side guard existed prior to this litigation and, therefore, the court viewed their methodologies with suspicion and ultimately excluded the expert opinions as ''unreliable.'' Because the experts' opinions were inadmissible, the Plaintiffs were unable to carry their burden on the crashworthiness claim, and the court granted summary judgment in favor of Great Dane.

Finally, in *Houser v. Ford Motor Co.*, No. 709 MDA 2014, 2015 BL 119301 (Pa. Super. Ct. Apr. 21, 2015), decedent was driving a Ford Escort when she rear-ended a Jeep Cherokee that was stopped at a stop sign. The administrator of her estate sued Ford, alleging that as a result of the accident, the vehicle's driver-side airbag improperly deployed, causing a rupture in decedent's aortic arch, which led to her death. The administrator alleged that the Escort was defective because it lacked an appropriate number of sensors to allow for timely deployment of the airbag, and offered the following evidence to support his argument linking decedent's death to the defective sensors: the expert report of an engineer, the decedent's medical records and death certificate, the police report, the testimony from responding emergency officials, and the expert's crash investigation report. Ford countered, arguing that the administrator failed to provide an expert opinion showing that the alleged design defect in the Escort caused decedent's rupture in her aortic arch.

Causation Element of Crashworthiness Test Not Proved

The court agreed with Ford, ruling that the evidence presented failed to establish the causation element of the crashworthiness test. While the fact evidence presented described the accident and the cause of death, it failed specifically to attribute the injury to the alleged untimely deployment of the airbag. The reports plaintiff relied upon merely stated that the airbags expanded against the decedent's chest, which resulted in the laceration of the aorta, but they did not go on to provide a medical explanation as to *how* the impact ruptured the aorta. Without the requisite medical expert opinion or report, the evidence was insufficient to make out a prima facie crashworthiness case, and the court held that summary judgment was proper.

The lessons from these cases are clear for automotive defendants. Plaintiff's use of a well-known and well-qualified expert alone is no longer in many jurisdictions a significant guarantee for survival of a *Daubert* or summary judgment challenge, no matter how plausible the opinions may appear on their surface. Defendants must focus on the reliability, and underlying support, for *each element* of the opinion, and in particular, must tease out the methodology, or lack thereof, that the expert used in reaching his or her conclusions.

In jurisdictions which permit them, the expert deposition is the critical tool in crafting a challenge on reliability. It is essential that counsel nail down at deposition, among other things, the precise methodology allegedly used, the extent to which that methodology is generally accepted, all ''testing'' (or lack thereof) of the methodology and extant replication of the results, if any. In our experience, where a *Daubert* or *Frye* hearing is available, it is often beneficial to confront expert witnesses live on the absence of a reliability issue, and we urge defendants to consider requesting a hearing, especially where an expert has been difficult to pin down at deposition, and the court may benefit from seeing his or her evasiveness live.