FILED
United States Court of Appeals
Tenth Circuit

October 30, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MISTY YOUNGBERG, individually and as personal representative of the Estate of Kristopher Youngberg, deceased; TIFFANY WALDROP, individually and as guardian of Christopher Waldrop; CHRISTOPHER WALDROP, by and through his guardian Tiffany Waldrop; SEAN CONNELL; CHRISTIE CONNELL; KEVIN COFFMAN; HEIDI COFFMAN; WILLIAM OVERSHINER; LAUREN PADGETT,

Plaintiffs - Appellants,

v.

GENERAL MOTORS LLC,

Defendant - Appellee.

No. 22-7047
(D.C. No. 6:20-CV-00339-JWB)
(E.D. Okla.)

ORDER AND JUDGMENT*

Before **MATHESON**, **EBEL**, and **CARSON**, Circuit Judges.

Sean Connell was driving a 2013 General Motors ("GM") Chevrolet Express 15-Passenger Van (the "van") on Interstate 40 in Oklahoma, with passengers

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Kristopher Youngberg, Christopher Waldrop, Kevin Coffman, and William Overshiner. The van crashed into the rear of a dump truck, killing Mr. Youngberg and injuring the others.

The van's occupants and their spouses (collectively "Appellants") sued GM in federal court alleging products liability and negligence under Oklahoma law. They alleged the van was defective because it was not equipped with forward collision warning ("FCW") or automatic emergency braking ("AEB") systems and because GM failed to warn that the van lacked these systems. The district court granted summary judgment for GM, holding Appellants "failed to cite evidence sufficient for a jury to find that the 2013 GM Van was unreasonably dangerous at the time it left GM's possession" as required for a products liability claim under Oklahoma law. App., Vol. 5 at 158. The district court also said Appellants' failure to show the van was defective precluded their negligence claim. Appellants appealed.

Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

A. *Factual History*[1]

1. The Crash

On October 5, 2018, Mr. Connell, Mr. Youngberg, Mr. Waldrop, Mr. Coffman, and Mr. Overshiner—Nuclear Materials Couriers for the National Nuclear Security

[1] On appeal from summary judgment, "we examine the record and all reasonable inferences that might be drawn from it in the light most favorable to the non-moving

Administration ("NNSA")—were returning from a work assignment in Arkansas in a van provided by the General Services Administration ("GSA").

While traveling westbound on Interstate 40 near Okemah, Oklahoma, the men encountered a construction zone with a reduced speed limit of 55 miles per hour and a closed right lane. The right lane reopened, and a dump truck ahead of the van shifted into the right lane. When Mr. Connell attempted to pass it using the left lane, the dump truck attempted an illegal U-turn and moved into the left lane. Mr. Connell tried to brake and swerve, but he crashed into the rear of the dump truck. The van caught fire. As previously noted, Mr. Youngberg was killed, and the other occupants were injured.

The Oklahoma Highway Patrol and the NNSA investigated the crash and determined the dump truck driver was at fault. The dump truck driver was charged with negligent homicide and incarcerated. The NNSA concluded the van was traveling between 75 and 80 miles per hour when it crashed and that unauthorized munitions in the van contributed to the fire.

2. **FCW, AEB, and ESC**

This case concerns vehicle safety technologies FCW, AEB, and electronic stability control ("ESC"). FCW systems provide visual, audible, or haptic alerts when the driver approaches another vehicle too quickly. AEB systems automatically

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party." *Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052, 1058 (10th Cir. 2009) (quotations omitted). We present this factual history accordingly.

apply braking if the system discerns an impending collision with a vehicle directly ahead. Finally, ESC systems automatically apply braking to avoid over- and under-steering when a vehicle loses traction and risks rolling over.

GM released its first FCW system in 2004 and its first AEB system in 2013.[2] App., Vol. 4 at 34; App., Vol. 1 at 162. In 2013—the van's model year and the year it was purchased—less than 6 percent of vehicles from all manufacturers were equipped with FCW and less than 3 percent with AEB. App., Vol. 1 at 155. In the same year, no large passenger van included FCW or AEB. App., Vol. 4 at 91, 96. By contrast, GM first introduced ESC in its 15-passenger vans in 2004. Rev. App., Redacted Vol. 1 at 139. ESC has been federally mandated in nearly all vehicles manufactured after September 1, 2011. 49 C.F.R. § 571.126 (requiring ESC in all vehicles weighing 10,000 pounds or less).

3. **The Van**

The GSA purchased the full-size, 15-passenger van in February 2013 and received it two months later. GM did not offer FCW or AEB systems on the 2013 model, and the GSA did not request them. The van included an ESC system and met or exceeded all other applicable Federal Motor Vehicle Safety Standards.

[2] GM's first FCW system was released in one 2004 model year Cadillac. GM then integrated FCW in one 2005 Cadillac and one 2006 Cadillac. In 2012, GM began to offer FCW systems in two 2012 Chevrolet sport utility vehicles. In 2013, GM offered an FCW system alongside its first AEB system on three 2013 Cadillac sedans. In sum, GM offered FCW in eight vehicle models and AEB in three vehicle models in 2013. App., Vol. 4 at 34.

B. ***Procedural History***

Appellants filed this diversity jurisdiction suit in the Eastern District of Oklahoma, claiming GM was liable under Oklahoma law for products liability and negligence. They alleged the van was defective because (1) it was not equipped with FCW or AEB systems and (2) GM did not adequately warn consumers about the risks of operating the van without those systems. GM moved for summary judgment, arguing (1) the absence of FCW and AEB did not make the van unreasonably dangerous as required for Appellants to recover under Oklahoma law and (2) GM had no duty to warn of the obvious risk of rear-end collisions.

The district court granted summary judgment for GM. It held Appellants did not establish the van was unreasonably dangerous as designed because they "fail[ed] to support the allegation that the van's characteristics made it dangerous to an extent beyond the contemplation of an ordinary user." App., Vol. 5 at 158. It rejected Appellants' claim that GM was required to warn consumers about the absence of AEB and FCW systems, holding GM had no duty to warn of the risk of rear-end collisions because "the danger . . . would have been apparent to an ordinary user in 2013." *Id.* at 161.

The district court also rejected Appellants' negligence claim because it was "based entirely on GM's alleged legal duties with respect to a defect," and Appellants failed to show the van was defective. *Id.* at 162.[3] Appellants timely appealed.

II. DISCUSSION

On appeal, Appellants challenge the district court's grant of summary judgment on their products liability claim. They also argue negligence per se. We affirm summary judgment for GM on the products liability claim and conclude that Appellants failed to plead and thereby waived a negligence per se claim.[4]

A. *Standard of Review, Summary Judgment, and the* Erie *Doctrine*

"We review a district court's grant of summary judgment de novo, using the same standard applied by the district court pursuant to Fed. R. Civ. P. 56(a)." *Cillo v. City of Greenwood Vill.*, 739 F.3d 451, 461 (10th Cir. 2013). We affirm a grant of summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[T]he dispute about a material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby,*

[3] The district court rejected Appellants' claim for punitive damages, noting an award of punitive damages depended on the success of Appellants' products liability and negligence claims.

[4] Appellants do not raise common law negligence on appeal, so we do not address it. *See Bronson v. Swensen*, 500 F.3d 1099, 1104 (10th Cir. 2007). Appellants argue that if we "reverse[] the summary judgment . . . , [we] should also reverse summary judgment on punitive damages." Aplt. Br. at 23 n.36. Because we affirm the grant of summary judgment, we do not address punitive damages.

Inc., 477 U.S. 242, 248 (1986). We "view facts in the light most favorable to the non-mov[ants] . . . , resolving all factual disputes and reasonable inferences in their favor." *Cillo*, 739 F.3d at 461 (quotations omitted).

"In a diversity case . . . , the *Erie* doctrine requires federal courts to apply federal procedural law and state substantive law." *Banner Bank v. Smith*, 30 F.4th 1232, 1238 (10th Cir. 2022); *see Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). As the parties agree, Oklahoma substantive law governs this case. "[O]ur duty is simply to ascertain and apply the state law." *Gerson v. Logan River Acad.*, 20 F.4th 1263, 1277 (10th Cir. 2021) (quotations omitted). We review the district court's interpretation of state law de novo. *Genzer v. James River Ins. Co.*, 934 F.3d 1156, 1164 (10th Cir. 2019).

B. ***Products Liability***

Appellants allege the van was defective due to a dangerous design and inadequate warnings. To recover for products liability under Oklahoma law, a plaintiff must show a defective product is less safe than would be expected by the ordinary consumer. Because Appellants fail to do so, we affirm the grant of summary judgment.

1. **Legal Background**

To establish products liability under Oklahoma law, a plaintiff must prove "[(1)] the product was the cause of the injury, [(2)] the product was defective when it left the control of the manufacturer, and [(3)] the defect made the product unreasonably dangerous." *Johnson v. Ford Motor Co.*, 45 P.3d 86, 91 n.12 (Okla.

2002) (citing *Kirkland v. Gen. Motors Corp.*, 521 P.2d 1353, 1363 (Okla. 1974)). The parties do not contest the first element on appeal, and the district court did not address it. In granting summary judgment, the district court considered the second and third elements.

a. *Product defect*

A product defect that satisfies the second element "can stem from either a dangerous design or an inadequate warning about the product's dangers." *Braswell v. Cincinnati Inc.*, 731 F.3d 1081, 1085 (10th Cir. 2013). The product's design renders it defective when the product is not "safe for normal handling and consumption" in accordance with the expectations of the ordinary consumer. *Duane v. Okla. Gas & Elec. Co.*, 833 P.2d 284, 286 (Okla. 1992). Failure to warn renders a product defective when the manufacturer knew or should have known of "potential dangers which may occur from the use of the product," *McKee v. Moore*, 648 P.2d 21, 23 (Okla. 1982), and those dangers are not "obvious" to consumers, *Berry v. Eckhardt Porsche Audi, Inc.*, 578 P.2d 1195, 1196 (Okla. 1978).[5]

[5] It is unclear whether a product must have a design defect to trigger the duty to warn or whether the failure to warn can independently constitute a defect under the second element. *Compare Dixon v. Outboard Marine Corp.*, 481 P.2d 151, 157 (Okla. 1970) ("We have seen that there is no defect in the cart so there is no reason to warn of a non existent defect."), *with Smith v. U.S. Gypsum Co.*, 612 P.2d 251, 254 (Okla. 1980) ("[W]here a manufacturer has reason to anticipate danger may result from the use of his product and the product fails to contain adequate warning of such danger, the product is sold in a defective condition."). *See also Yeaman v. Hillerich & Bradsby Co.*, 570 F. App'x 728, 740 (10th Cir. 2014) (unpublished) (cited for persuasive value under Fed. R. App. P. 32.1; 10th Cir. R. 32.1) (recognizing "inconsistency in Oklahoma law regarding the failure to warn").

b. *Unreasonably dangerous*

To meet the third element for products liability, a plaintiff must satisfy Oklahoma's "consumer expectation test" to show the product is unreasonably dangerous. *Lamke v. Futorian Corp.*, 709 P.2d 684, 686 (Okla. 1985). Under this test, the product must be "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." *Kirkland*, 521 P.2d at 1362-63 (quotations omitted). The "ordinary consumer" is a consumer with the experience or skill of the product's "foreseeable user." *Woods v. Fruehauf Trailer Corp.*, 765 P.2d 770, 774 (Okla. 1988).

2. **Analysis**

Regardless of whether the product has a design defect or failure-to-warn defect, a plaintiff claiming products liability must show the product is unreasonably dangerous under Oklahoma's consumer expectation test. *See Lamke*, 709 P.2d at 686 ("That the product be rendered 'unreasonably dangerous' by the defect is an essential requirement for pleading a cause of action in Manufacturers' Products Liability." (citation omitted)). Thus, "the proper question here is whether the evidence established that the failure to so equip or to warn regarding use of the [van] rendered it less safe than expected by one who would foreseeably be using the [van] for a foreseeable purpose." *Woods*, 765 P.2d at 774. We consider the expectations of the ordinary consumer in 2013—the year the van "left the manufacturer's possession and control." *Kirkland*, 521 P.2d at 1363.

Although "most cases treat design defects and inadequate warnings as merely different methods of proof for the same products liability claim," *Braswell*, 731 F.3d at 1092 n.3, we discuss Appellants' design defect and failure-to-warn arguments separately in line with the parties' briefing and the district court's summary judgment order.

a. *Design defect*

On appeal, Appellants argue the van was unreasonably dangerous due to two design defects: (1) the presence of an ESC system and (2) the absence of FCW and AEB systems.

i. ESC system

Appellants argue the van was unreasonably dangerous because "the ESC system increases stopping times and distances." Aplt. Br. at 19. Appellants waived this argument by failing to raise it before the district court or argue plain error on appeal.

"To properly raise an argument below, a litigant must present the argument with sufficient clarity and specificity." *Simpson v. Carpenter*, 912 F.3d 542, 565 (10th Cir. 2018) (quotations omitted). "Vague, arguable references to a point in the district court proceedings do not preserve the issue on appeal because such perfunctory presentation deprives the trial court of its opportunity to consider and rule on an issue in any detail." *Id.* (quotations and alterations omitted).

The Amended Complaint did not mention ESC, let alone allege the ESC system rendered the van defective. Appellants first referenced ESC in the

introduction to their response to GM's motion for summary judgment, stating that the court should consider "the additional latent hazard of the ESC extending the stopping distance of the van." App., Vol. 5 at 9. Appellants did not develop their ESC argument further, mentioning ESC again only to allege that Mr. Connell activated the van's ESC system, which "extend[ed] its stopping distance—showing the need for the [van] to be equipped with FCW and AEB." *Id.* at 19. The district court's order mentioned ESC only once, in its summary of GM's existing safety technologies. *Id.* at 154.

Appellants did not plead their ESC argument, and their cursory references to ESC in response to GM's summary judgment motion did not adequately raise the issue before the district court. It was therefore forfeited. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1128 (10th Cir. 2011) ("[I]f [a] theory . . . wasn't raised before the district court, we usually hold it forfeited."). Forfeited arguments are ordinarily reviewable only under the plain-error standard. *Id.* But Appellants did not argue for the application of plain error on appeal, so their ESC argument is waived. *See McKissick v. Yuen*, 618 F.3d 1177, 1189 (10th Cir. 2010) ("[E]ven if [the appellants'] arguments were merely forfeited before the *district court*, [their] failure to explain in [their] opening appellate brief why this is so and how they survive the plain error standard waives the arguments in *this* court.").

ii. FCW and AEB systems

Second, Appellants allege the van was unreasonably dangerous because it lacked FCW and AEB systems. Aplt. Br. at 20-21. They contend that even if

consumers "would not have expected the van to have FCW or AEB," *id.* at 18, consumers "expected GM vehicles to be equipped with available and feasible safety features," *id.* at 11. They argue that FCW and AEB technologies were available when the van was manufactured, *id.* at 17, and that GM was aware of their feasibility and importance, *id.* at 9.

Appellants' argument mirrors the claim the Oklahoma Supreme Court rejected in *Lamke v. Futorian Corporation*. 709 P.2d 684 (Okla. 1985). In *Lamke*, the plaintiff dropped a cigarette that lit her couch on fire. *Id.* at 685. Claiming products liability, she alleged the cigarette was unreasonably dangerous because other cigarettes then available were treated with different materials and would not have caused the fire. *Id.* at 686.

Applying the consumer expectation test, the Oklahoma Supreme Court held that even if these allegations were true, they did not "establish that the[] cigarettes were more likely to cause the fire in question than might be anticipated by the ordinary consumer." *Id.* (emphasis removed). Noting "the plaintiff would hold the manufacturer responsible if his product [wa]s not as safe as some other product on the market," the court said "[t]hat is not the test in [products liability] cases." *Id.* Instead, "[o]nly when a defect in the product renders it less safe than expected by the ordinary consumer will the manufacturer be held responsible." *Id.*

Like the facts alleged in *Lamke*, the record here shows only that the van could have been made safer, not that the ordinary consumer would have expected it to be safer. Appellants' arguments on appeal lack merit.

First, they cite to marketplace data, arguing that it shows FCW and AEB systems were available in 2013. Aplt. Br. at 5-6. Both parties agree, however, that in 2013, less than 6 percent of vehicles had FCW, less than 3 percent had AEB, and no large passenger van had either. App., Vol. 1 at 155; App., Vol. 4 at 91, 96. The sparse installment of FCW and AEB systems favors GM. A reasonable jury could not infer that the ordinary consumer would expect a vehicle to have technology that was present in only a small fraction of vehicles.

Second, they reference two 2015 GM advertisements highlighting FCW and AEB to assert that "[c]onsumers would have [expected FCW and AEB] just two years earlier if GM had been more forthcoming." Aplt. Reply Br. at 3. But they do not explain how 2015 advertisements provide any information about what consumers would have expected in 2013.

Third, they present GM employee testimony "about GM's sophisticated knowledge and understanding" of FCW and AEB, Aplt. Br. at 4, and expert testimony about the value of these technologies, *id.* at 7-8, 17. But this evidence is not probative of the expectations of the "ordinary consumer . . . with the ordinary knowledge common to the community"—the consumer expectation test. *Kirkland*, 521 P.2d at 1362-63 (quotations omitted).

In sum, Appellants have not shown that the ordinary consumer in 2013 would have expected a 15-passenger van to be equipped with FCW and AEB systems or that

the van was less safe than the ordinary consumer would have expected.[6] Appellants thus fail to establish a genuine factual dispute over whether the van was unreasonably dangerous under Oklahoma's consumer expectation test. We affirm the district court's grant of summary judgment.

b. *Failure to warn*

Appellants allege the van was defective because GM failed to adequately warn consumers of (1) the presence of the ESC system and (2) the absence of FCW and AEB systems.

Appellants first argue GM had a duty to warn consumers that the ESC system increased the van's stopping time and distance. Aplt. Br. at 22. As explained previously, they waived this argument by failing to raise it before the district court or argue for plain error on appeal.

Appellants also argue the van was defective because GM failed to warn about the omission of FCW and AEB.[7] Aplt. Reply Br. at 12. They argue the ordinary user would have been unaware that GM possessed additional safety technologies—FCW

[6] Although one expert stated the van was dangerous and defective under Oklahoma's consumer expectation test, he later affirmed he did not think the ordinary consumer would have expected FCW or AEB in 2013. App., Vol. 2 at 179.

[7] We recently decided a case involving a failure-to-warn claim concerning FCW and AEB. *Butler v. Daimler Trucks N. Am., LLC*, 74 F.4th 1131 (10th Cir. 2023). We held that a truck manufacturer had no duty to warn of the absence of FCW and AEB because "the danger alleviated by FCW and AEB . . . was apparent." *Id.* at 1150. *Butler* applied Kansas law.

and AEB—that were not installed in the van, triggering GM's duty to warn. Aplt. Br. at 22.

Even if the absence of FCW and AEB systems gave rise to a duty to warn and the absence of a warning rendered the van defective, Appellants still must show the van was unreasonably dangerous under Oklahoma law. *See Lamke*, 709 P.2d at 685. For the reasons discussed above, Appellants have failed to show that the van was less safe than the ordinary consumer would expect and therefore cannot establish that the lack of any additional warnings rendered the van unreasonably dangerous.

C. ***Negligence Per Se***

Appellants argue the district court "failed to consider" a negligence per se claim, Aplt. Br. at 23, and that "summary judgment should be reversed . . . for that reason alone," *id.* at 24. But they waived any negligence per se claim by failing to plead it in their Amended Complaint, argue for it in district court, or argue plain error on appeal.

Appellants assert they pled negligence per se in paragraphs 66(f) and 66(g) of their Amended Complaint. These paragraphs read:

> 66. GM breached their duty of ordinary care, pleading in the alternative or collectively, by:
>
> . . .
>
> f. failing to provide the NHTSA [National Highway Traffic Safety Administration] with certain information following the discovery of a safety defect in the GM 15 Passenger Van, and failing to provide notice to the owner of the GM 15 Passenger Van as required by the Tread Act, 49 U.S.C. § 30166; and

> g. failing to timely investigate and recall, retrofit, and/or issue timely and adequate post-sale warnings after the [sic] GM was aware of the defects in the GM 15 Passenger Van, pursuant to 49 U.S.C.A § 30118(c).

App., Vol. 1 at 44-45.

Although adequate pleading "does not require detailed factual allegations, . . . it demands more than an unadorned . . . accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotations omitted). The Amended Complaint presented only conclusory statements that GM violated vehicle safety statutes without explaining whether these violations concerned FCW or AEB. And it did not address the other elements of negligence per se. *See Howard v. Zimmer, Inc.*, 299 P.3d 464, 467 (Okla. 2013) (holding a negligence per se claim requires a party to demonstrate a statutory violation, causation, and that the statute was designed to prevent that type of injury for that class of plaintiffs). By failing to "present the district court with the substance" of a negligence per se claim, Appellants did not adequately plead it. *Stender v. Archstone-Smith Operating Tr.*, 910 F.3d 1107, 1112 (10th Cir. 2018).

Appellants contend they were not required to argue negligence per se to the district court because GM did not move for summary judgment on negligence per se. Aplt. Reply Br. at 14. But GM can hardly be faulted for not requesting summary judgment on a claim that was not pled. And "[a]n issue is preserved for appeal if a party alerts the district court to the issue and seeks a ruling." *Somerlott v. Cherokee Nation Distribs., Inc.*, 686 F.3d 1144, 1150 (10th Cir. 2012) (quotations omitted). When an argument is raised for the first time on appeal, we review it only if the party

argues plain error. *Id.* at 1148. Because Appellants did not properly plead or argue negligence per se before the district court or argue plain error before this court, the issue is not preserved for appeal.

III. CONCLUSION

We affirm the district court's grant of summary judgment for GM.[8]

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

[8] We grant in part and deny in part Appellants' Motion to File Under Seal Portions of the Appendix. The Clerk of the Court shall accept the redacted/unsealed appendix volumes submitted by the parties on August 25, 2023. The original unredacted appendix volumes will remain under seal.