STATE OF MICHIGAN

COURT OF APPEALS

JERRY VAN EIZENGA, as Personal Representative of the Estate of Patricia Van Eizenga, Deceased,

Plaintiff-Appellee,

v

MICHAEL STRALEY AND KAREN STRALEY,

Defendants,

and

CHRYSLER CORPORATION,

Defendant/Appellant.

UNPUBLISHED
March 31, 1998

No. 198819
Kent Circuit Court
LC No. 92-78244 NI

Before: Smolenski, P.J., and Griffin and Bandstra, JJ.

PER CURIAM.

In this products liability action, defendant Chrysler Corporation appeals as of right a judgment in favor of plaintiff. We reverse.

I

This case stems from a fatal automobile accident that occurred in April of 1992 on US 131 in Grand Rapids. Michael and Karen Straley were driving their Jeep CJ-7, towing a small, empty, single-axle box trailer. Karen Straley, the driver, felt a jerk behind the CJ-7. She pulled over from the center lane of the three-lane expressway onto the left shoulder, thinking that the trailer had fallen off the hitch. Before the Jeep reached the left shoulder, the bumper and hitch assembly detached from the Jeep's frame. The trailer, with the bumper/hitch assembly still attached, dragged to a halt near the shoulder. It protruded about a foot into the left lane. One car behind the Jeep passed the trailer without incident. However, the plaintiff's decedent, Patricia Van Eizenga, was driving in the left lane of US 131. As she approached the trailer and slowed to avoid hitting it, she was rear-ended by another car. The collision

pushed Van Eizenga's car into the center lane of traffic, where she was struck broadside by a semi-tractor trailer and killed instantly.

The investigating police officer concluded that the left side of the Jeep CJ-7's rear frame, the rear cross member, had failed, causing the bumper to fall from the Jeep and drag along the pavement. Shortly thereafter, the right side of the rear cross member also failed, causing the bumper to fall off completely with the trailer still attached to it.

The history of this particular Jeep CJ-7 is central to the litigation. The Jeep in question was manufactured in 1985. In its original condition, the Jeep's rear frame cross member was equipped with small bumperettes and a drawbar for towing light trailers. The drawbar was attached with a total of eleven bolts to the rear cross member and the side rails of the frame. The bumperettes and drawbar were on the Jeep when defendant Chrysler's predecessor American Motors Corporation (AMC) sold it to a dealer in l985 and when the dealer sold the Jeep as a new vehicle. Two years later, the original purchaser traded in the Jeep at a dealership with the bumperettes and drawbar still intact. However, by the time James Mylenek purchased the Jeep in 1987, the drawbar and bumperettes had been removed.[1]

Mylenek testified that he asked the dealer to add a bumper on the rear of the Jeep. However, the dealer added a bumper on the front, not the rear, of the vehicle, and Mylenek never bothered to correct the alleged mistake. Instead of purchasing a bumper from a Jeep dealer or a commercial auto parts store, Mylenek went to a flea market and bought a sixty-five pound homemade bumper with an attached ball hitch. The unidentified seller allegedly told Mylenek that the bumper would fit a light truck or a Jeep. The bumper had two holes, one at each end. The Jeep's rear cross member had sixteen holes, most of which were positioned inside the frame and were intended to be used to attach bumperettes or a trailer hitch. The rear cross member also had two manufacturing holes, one at each end of the rear cross member. These manufacturing holes were not intended to be used to attach parts or equipment, but rather were necessary to the manufacturing, assembly, and stamping process. However, these manufacturing holes lined up with the holes in the homemade bumper. Mylenek attached the homemade bumper to the Jeep CJ-7, using only a nut and bolt in each of the two manufacturing holes.

Mylenek testified at trial that he had no intention of ever towing a trailer with the homemade bumper/hitch and that if he had wanted to tow, he would have gone to a authorized dealer to purchase a "certified" hitch to be installed on the Jeep. Mylenek sold the Jeep to the Straleys in 1990, with the homemade bumper still attached. Mylenek testified that he told Michael Straley that the Jeep was not to be used for towing. However, the Straleys used the ball hitch on the homemade bumper for occasional towing and were using it at the time of the accident which killed plaintiff's decedent.

Expert witnesses for both parties agreed at trial that because the bumper was attached to the Jeep only by means of the two manufacturing holes, use of the bumper to tow the trailer stressed and twisted the rear cross member of the Jeep. These stresses weakened and eventually fractured the metal of the cross member, thereby causing the homemade bumper to detach from the Jeep.

Plaintiff, as personal representative of his wife's estate, brought suit against several defendants, including defendant, Chrysler Corporation, as the successor in interest to AMC. Only the claims against Chrysler are involved in this appeal. Plaintiff pursued recovery against defendant Chrysler on the theories of failure to warn and defective design. Plaintiff argued that the Jeep's cross member "invited" the unsafe attachment of after-market bumpers and hitch assemblies. After denying defendant's motion for a directed verdict, the trial court submitted the case to the jury. The jury returned a verdict for plaintiff against defendant Chrysler, awarding $6,934,330 for past and future noneconomic losses, $177,860 in past economic losses, and $1,209,006 in future economic losses. Subsequently, the lower court denied defendant's posttrial motions and entered a judgment in favor of plaintiff consistent with the verdict.

II

In appealing the denial of its motion for judgment notwithstanding the verdict (JNOV), defendant argues that the evidence was legally insufficient to support plaintiff's claims. We agree and hold that the trial court erred in denying defendant's motion for JNOV.

In reviewing a motion for JNOV, the trial court must review the evidence and all legitimate inferences in a light most favorable to the nonmoving party and determine whether the facts presented preclude judgment for the nonmoving party as a matter of law. *Phinney v Perlmutter*, 222 Mich App 513, 524; 564 NW2d 532 (1997). If the evidence is such that reasonable people could differ, the question is for the jury and JNOV is improper. *Pontiac School Dist v Miller, Canfield Paddock & Stone*, 221 Mich App 602, 612; 563 NW2d 693 (1997); *Bordeaux v Celotex Corp*, 203 Mich App 158; 511 NW2d 899 (1993).

In Michigan, two theories will support a finding of negligent design. The first theory is based on the failure to warn and renders a product defective even if the design chosen does not render the product defective. *Gregory v Cincinnati Inc*, 450 Mich 1, 11; 538 NW2d 325 (1995). The failure to warn theory is, of course, based on negligence principles:

> [A] product can be defective in the kind of way that makes it unreasonably dangerous by failing to warn or failing adequately to warn about a risk or hazard related to the way a product is designed. . . . [A] claimant who seeks recovery on this basis must. . .prove that the manufacturer-designer was negligent. There will be no liability without a showing that the defendant designer knew or should have known in the exercise of ordinary care of the risk or hazard about which he failed to warn. Moreover, there will be no liability unless the manufacturer failed to take the precautions that a reasonable person would take in presenting the product to the public. [Prosser & Keaton, Torts, (5th ed), § 99, p 697.]

The threshold question is whether the manufacturer owes a duty to warn the claimant. *Trotter v Hamill Manufacturing Co*, 143 Mich App 593, 599; 372 NW2d 622 (1985). Duty is an issue of law and essentially "a question of whether the defendant is under any obligation for the benefit of the particular plaintiff," *Friedman v Dozorc*, 412 Mich 1, 22; 312 NW2d 585 (1981). Several variables

go to the heart of a court's determination of legal duty: foreseeability of the harm, degree of certainty of injury, closeness of connection between the conduct and injury, moral blame attached to the conduct, a policy of preventing future harm, and the burdens and consequences of imposing duty and the resulting liability for breach. *Buczkowski v McKay*, 441 Mich 96, 101, n 4; 490 NW2d 330 (1992); *Halbrook v Honda Motor Co Ltd*, 224 Mich App 437; 569 NW2d 836 (1997). The questions of duty and proximate cause are inextricably intertwined:

> [T]he question whether there is the requisite relationship, giving rise to a duty, and the question whether the cause is so significant and important to be regarded a proximate cause both depend in part on foreseeability – whether it is foreseeable that the actor's conduct may create a risk of harm to the victim and whether the result of that conduct and intervening causes were foreseeable. [*Moning v Alfono,* 400 Mich 425, 439; 254 NW2d 759 (1977).]

In this context, it is settled in Michigan that manufacturers have a duty to warn purchasers or users of dangers associated with the intended use or reasonably foreseeable misuse of their products. *Glittenberg v Doughboy Recreational Industries (On Rehearing),* 441 Mich 379, 385; 491 NW2d 208 (1992); *Allen v Owens-Corning Fiberglas Corp,* 225 Mich App 397, 406; 571 NW2d 530 (1997); *Portelli v I R Construction Products, Co, Inc*, 218 Mich App 591, 598-599; 554 NW2d 591 (1996); *Bordeaux*, *supra* at 167. However, manufacturers are not insurers that under all circumstances no injury will result from the use of their products. *Owens v Allis-Chalmers Corp,* 414 Mich 413, 432; 326 NW2d 372 (1982); *Halbrook, supra* at 441. The scope of the duty to warn is not unlimited:

> [T]he manufacturer or seller must (a) have actual or constructive knowledge of the claimed danger, (b) have "no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition," and (c) "fail to exercise reasonable care to inform [users] of its dangerous condition or of the facts which make it likely to be dangerous." [*Glittenberg, supra* at 389-390.]

As noted above, a manufacturer has a duty to warn of dangers associated with the intended uses or reasonably foreseeable misuses of its product. The converse of this proposition is that there exists no duty to warn if the particular use made of the product and the injuries sustained were not reasonably foreseeable by the manufacturer. *Mach v General Motors Corp,* 112 Mich App 158, 163; 315 NW2d 561 (1982). The crucial inquiries under this test "are whether the use made of the product was a common practice and whether the manufacturer was aware of that use." *Id.* Foreseeability of misuse may be inherent in the product or may be based on evidence that the manufacturer had knowledge of a particular type of misuse. *Portelli, supra* at 599. The unforeseeable post-sale modification of a product that is not unreasonably dangerous in its original design may negate a manufacturer's duty to warn of resultant dangers. *Trotter, supra*.[2]

In *Trotter,* the plaintiff's decedent was killed when the dune buggy in which he was a passenger turned over. Although the decedent had his seatbelt fastened, the seatbelt retractor came loose from the floor mounting during the accident. A wrongful death action was brought against the maker of the

seatbelt and the manufacturer of the vehicle out of which the seatbelt had been taken for use in the dune buggy. Plaintiff claimed that defendants had a duty to warn users regarding the dangers of reinstalling the seatbelts in other vehicles. On appeal, this Court upheld the trial court's decision granting summary disposition in favor of defendants on the ground that there was no duty to warn about the risks involved in the reinstallation of seatbelt assemblies. The *Trotter* Court, *supra* at 601-603, held that the modifications made by plaintiff's decedent were not reasonably foreseeable:

> [W]e believe that extending a manufacturer's duty to warn to situations in which it is notified that a third party has modified its product, after the product has left its possession and control and without consultation or participation in the modification by the manufacturer, would place an intolerable burden on the manufacturer. Such a rule would in effect make a manufacturer with notice of postsale modifications of its products an insurer of the success and safety of the modified products. It would be obliged not only to discover and warn of the foreseeable dangers inherent in the products it manufactures but also of those not of its creation – the altered products of which it has notice. *Rodriquez* [*v Besser Co*, 115 Ariz App 454; 565 P2d 1315 (1977)], *supra*, p 460.
>
> * * * *
>
> Manufacturers and sellers are still required to anticipate normal uses of products, and this duty extends to reasonably foreseeable misuses. However, if we were to require warnings in *this* case, such a rule could logically be extended to almost every component of an automobile. From a practical standpoint, it cannot be said that reinstallation of seatbelts is foreseeable. Seatbelt assemblies are standard equipment and are securely bolted to the floor. The duty to warn rests on foreseeability and a multitude of policy considerations. We are unable to impose a duty to warn under the facts of this case. To hold otherwise would be to impose an intolerable burden on manufacturers and sellers.

See, generally, *Piper v Bear Medical Systems, Inc*, 883 P2d 407 (Ariz, 1993); *Hines v Joy Manufacturing Co*, 850 F2d 1146 (CA 6, 1988); *Hill v General Motors Corp*, 637 SW2d 382 (Mo App, 1982); *Cox v General Motors Corp*, 514 SW2d 197 (Ken, 1974).

In the present case, we review the evidence in the light most favorable to plaintiff to determine whether a duty to warn exists under these particular circumstances. Plaintiff argues that, unlike the situation in *Trotte*r, *supra*, the Jeep CJ-7 at issue was not modified or misused, because its rear cross member remained the same throughout its years of ownership. However, this argument bears little credence in light of the undisputed fact that the Jeep, when it was originally manufactured and left the control of defendant's predecessor, was equipped with bumperettes and a drawbar. In this original condition, the Jeep was equipped safely for towing light loads. Thus, the character of the product was changed in a significant respect.

The evidence admitted at trial does indicate, as plaintiff contends, that the majority of Jeep CJ-7s in production were sold without bumpers or draw bars, leaving the rear cross member exposed. Further, nothing in the owner's manual described the purposes for the different holes in the rear cross member or advised buyers that the two outboard manufacturing holes were not to be used. Plaintiff's engineering expert testified that AMC's decision to sell their product in this manner allowed buyers to logically assume that the numerous holes in the rear cross member were intended for attaching different items. Such a conclusion by a Jeep CJ-7 owner, according to the expert, would be buttressed by the fact that the two outboard manufacturing holes were the most easily accessible. The expert testified that given the nature of the product (a "basic utility vehicle") and how it was marketed (to "adventuresome" people), it was likely that some Jeep CJ-7 users would remove factory-installed bumperettes and attach a wide variety of other "things" to the rear cross member. Consequently, Jeep CJ-7 users purportedly would not know, absent warnings or instructions, which holes were intended for attachment purposes. Chrysler's design experts acknowledged that it was foreseeable that Jeep CJ-7 users would attach a wide variety of aftermarket accessories to an exposed rear cross member.

However, as to the precise issue at hand – the attachment of a homemade bumper to the two outboard manufacturing holes – a thorough review of the record simply does not support the imposition of a duty to warn in this particular case. Plaintiff introduced the deposition testimony of a Chrysler engineer who testified that he was aware that consumers attached aftermarket bumpers to Jeep CJ-7s. However and significantly, the engineer added *that it was not foreseeable that people would use only the two manufacturing holes for attachment,* because Jeep provides bumpers to the customer which can be ordered with or after purchase.

Plaintiff's own engineering expert testified that the "aftermarket" usually does not connote homemade products, but items available for commercial sale through dealerships or automotive parts stores. Plaintiff's expert testified that other types of commercial bumpers commonly available are designed to be bolted in place *with at least eight bolts.* These commercial bumpers come with instructions for attachment. None of the expert witnesses were aware of any commercial bumpers or hitches that were designed to be attached only to the two outboard holes of a Jeep CJ-7. Indeed, *none of the experts had ever seen a commercially available bumper like the one used in the present case*. The bumper/hitch assembly in question did not look like any bumper manufactured or marketed by any commercial firm.

No evidence was introduced at trial that defendant or its predecessor knew, before the accident, that anyone was towing, or had ever towed, a trailer with a hitch attached only to the two outboard manufacturing holes on the Jeep CJ-7's rear cross member. In fact, *there was no evidence of any other similar installations of a bumper, homemade or otherwise, or any mishaps resulting from this method of attachment*. No evidence was submitted that there had ever been a single accident stemming from the fatigue fracture of a Jeep CJ-7 cross member, or that there had ever even been a report of fatigue failure. Moreover, the record is devoid of evidence indicating that the marketing of the product encouraged any consumers to attach homemade bumpers to a Jeep CJ-7, much less do so by using only the two manufacturing holes. Most significantly, there is no evidence that when this particular Jeep CJ-7 left the control of AMC in 1985, it was unsafe for towing. The Jeep in

its original condition, with drawbar and bumperettes, needed no modification in order to safely tow a trailer.

Under these particular circumstances, we conclude that the facts do not warrant the imposition of a duty to warn. A manufacturer has a duty to warn users of its product of, and to design the product to avoid, only those dangers that the manufacturer has actual or constructive knowledge of and that the manufacturer has no reason to believe users will realize. *Glittenberg, supra*. The concepts of duty and foreseeability would be unduly stretched by a conclusion that defendant should have reasonably foreseen and warned about the dangers of the design based on the events that transpired in this case. We choose to adhere to the principle set forth in *Trotter, supra*, that the reasonably unforeseen modification in design or misuse of a product, not unreasonably dangerous when it left the manufacturer's control, negates a manufacturer's duty to warn,[3] and that "to hold otherwise would be to impose an intolerable burden on manufacturers and sellers." *Trotter, supra* at 603.[4] As the Supreme Court noted in *Glittenberg, supra* at 388:

> If there were an obligation to warn against all injuries that conceivably might result from the use or misuse of a product, manufacturers would find it practically impossible to market their goods. [Noel, *Products defective because of inadequate directions or warnings,* 23 SW L J 256, 264 (1969).]

III

The second theory of negligent design, advanced by plaintiff at trial, questions whether the design chosen renders the product defective:

> In such a complaint, the focus of any duty begins with whether the product was defective when it left the manufacturer's control. . . .
>
> * * *
>
> [T]he dispositive focus is on the manufacturer's conduct, not just the product. . . . A conscious *decision* to design a product in a certain manner necessitates that the focus be on conduct rather than the product. Hence, the trier of fact must employ a risk-utility balancing test that considers alternative safer designs and the accompanying risk pared against the risk and utility of the design chosen "to determine whether. . . the manufacturer exercised reasonable care in making the design choices it made.". . . . Such an inquiry requires plaintiff to prove "that the manufacturer knew or should have known of the design's propensity for harm.". . . . In this context, the manufacturer's conduct is then tested for reasonableness. [*Gregory, supra* at 11-13.] [Emphasis in original].

See also, *Prentis v Yale Mfg Co,* 421 Mich 670; 365 NW2d 176 (1984).

The risk-utility test focuses on the quality of a manufacturer's decision in light of the prevailing standards and state of technology in existence at the time the product was designed. *Haberkorn v*

Chrysler Corp, 210 Mich App 354, 364; 533 NW2d 373 (1995). We apply this test to the present circumstances in the context of and using the standard applicable to defendant's JNOV motion.

Plaintiff's experts testified that the rear cross member was not an adequate mounting structure for the attachment of bumpers or hitches, that the numerous holes stamped in it were not of equal strength, and that the two manufacturing holes were the weakest of the lot. Plaintiff's experts further testified that AMC's decision to market and sell Jeep CJ-7's with the rear cross member exposed and placement of the manufacturing holes in the above-described manner made it foreseeable to a reasonable manufacturer that buyers would use those holes to attach various accessories, including bumpers. Consumers would purportedly not know which holes should be used for attachment purposes and would reasonably conclude that the two outboard holes were appropriate.

Plaintiff's experts testified the design choices created an unreasonable risk of foreseeable harm that could have been reduced if other design choices had been made. As an alternative design, one of plaintiff's experts stated that the manufacturing holes could have been moved to an inboard position (inside the rails). The experts testified that alternatively the manufacturing holes also could have been plugged so that Jeep CJ-7 users would realize that they were not intended to be used for attachments. Other possibilities were to install additional bracing or make the metal surrounding the manufacturing holes stronger in anticipation of their ultimate use by consumers. Plaintiff's experts testified that all of these alternatives were technologically feasible, could have been implemented at a minimal cost to the vehicle, and would have reduced the risk of hazard otherwise occasioned by defendant's existing design of the CJ-7 rear cross member.

However, the pivotal issue of foreseeability once again comes to the fore. As noted previously, there was no evidence that defendant or its predecessor knew, or should have known, that this particular Jeep CJ-7, or any other Jeep CJ-7, had ever been modified by attaching a bumper to only the two manufacturing holes on the rear cross member. There were no reported incidents of rear cross member metal fatigue failure which would or should have alerted defendant to a possible design defect. All evidence points to the fact that this one instance of failure of the rear cross member was unique, unusual, and not reasonably foreseeable.

Significantly, plaintiff's experts did not have an opinion on the adequacy of the materials or design of the factory-installed drawbar, bumperettes, or other aspects of the Jeep CJ-7 in its original unmodified condition. Instead, the gist of plaintiff's case regarding its design defect theory is reflected in one of plaintiff's expert's statements that,

> I do have an opinion, and that opinion is I do not believe that it was an adequate structure for mounting *that* bumper on *that* and that [sic] hitch. . . I do not believe there is any question but that *that* mounting procedure that was utilized is not adequate. [Emphasis added].

In other words, plaintiff maintains that the rear cross member design was allegedly defective only if this particular homemade bumper was attached only by the two outside manufacturing holes, and the homemade assembly was used for towing. However, we conclude that these unique and unusual

contingencies were not reasonably foreseeable and thus plaintiff failed to present sufficient evidence to support his cause of action based on the negligent design theories of failure to warn or design defect. Accordingly, the trial court erred in denying defendant's motion for JNOV. In view of our disposition, it is not necessary for us to rule on the additional issues raised by defendant.

Reversed and remanded for entry of judgment in favor of defendant. We do not retain jurisdiction.

/s/ Richard Allen Griffin
/s/ Richard A. Bandstra

[1] Plaintiff suggests that the drawbar and bumperettes were removed by the authorized Jeep dealership before it placed the Jeep for sale on its used car lot. However, the parties stipulated that the Jeep dealer was not an agent of Jeep, AMC, or Chrysler Corporation.

[2] This substantive rule is embodied in MCL 600.2947; MSA 27A.2947, which provided in 1992 when the accident occurred that:

> It shall be admissible as evidence in a products liability action that the cause of the death or injury to person or property was an alteration or modification of the product, or its application or use, made by a person other than and without specific directions from the defendant.

In 1995, the statute was amended to adopt the holdings of judicial decisions interpreting that section and now provides that a manufacturer is not liable for harm caused by the alteration or misuse of a product unless the alteration or misuse was "reasonably foreseeable." The amended statute provides that the questions whether there was an alteration or misuse of a product and foreseeability are "legal issues to be resolved by the court." MCL 600.2947(1) and (2); MSA 27A.2947(1) and (2). The amendment does not apply to this case except through the relevant court decisions on which the Legislature based the amendment.

[3] The imposition of liability may be appropriate if, unlike the present case, evidence is presented of the manufacturer's knowledge of unsafe use, or that unsafe use is foreseeable. See, e.g., *Shipman v Fontaine Truck Equipment Co*, 184 Mich App 706, 713; 459 NW2d 30 (1990).

[4] Defendant alternatively argues that liability should not be imposed in this case where the defect was created by an alteration in the product which amounts to an intervening, superseding cause. See, generally, *Toth v Yoder*, 749 F2d 1190 (CA 6, 1984); *Comstock v General Motors Corp*, 358 Mich 163, 179; 99 NW2d 627 (1959). However, we need not address this issue since no duty to warn, the threshold question, existed in the first place.