2014 PA Super 8

JOSEPH AND APRIL PARR, HUSBAND AND WIFE, INDIVIDUALLY AND AS PARENTS AND NATURAL GUARDIANS OF SAMANTHA PARR, Appellants v. FORD MOTOR COMPANY, MCCAFFERTY FORD SALES, INC. D/B/A MCCAFFERTY AUTO GROUP, MCCAFFERTY FORD OF MECHANICSBURG, INC., AND MCCAFFERTY FORD COMPANY, Appellees	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2793 EDA 2012

Appeal from the Judgment Entered August 31, 2012
In the Court of Common Pleas of Philadelphia County
Civil Division at No.: 002893, December Term, 2009.

BEFORE: SHOGAN, J., WECHT, J., and COLVILLE, J.*

CONCURRING AND DISSENTING OPINION BY WECHT, J.: **FILED JANUARY 15, 2014**

I join the learned majority's disposition of the first issue presented by Joseph and April Parr (the "Parrs"), confirming the admissibility of evidence regarding "diving" and "torso augmentation" that Ford Motor Company ("Ford") introduced in attempting to establish a non-"roof crush" theory of causation for April and Samantha's injuries. However, I disagree with the majority's rulings regarding the Parrs' other evidentiary issues. Indeed, I

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* Judge Colville did not participate in the decision of this case.

depart from the majority on these issues precisely because the evidence in question was appropriate at a minimum to impeach Ford's witnesses' rejection of the roof crush theory upon which the Parrs' suit rested. Consequently, I respectfully dissent.

I disagree with the majority's rejection of the Parrs' second issue. Therein, the Parrs challenge the trial court's grant of Ford's motion *in limine* to exclude any post-2001 (*i.e.*, the year of manufacture of the Parrs' vehicle) evidence of relevant factual findings or regulatory actions by the National Highway Traffic Safety Administration ("NHTSA") that address the validity of Ford's diving and torso augmentation theory of causation. It is clear from our case law that post-manufacture evidence may be admissible when it pertains to the subject vehicle. ***See Blumer v. Ford Motor Co.***, 20 A.3d 1222, 1230-31 (Pa. Super. 2011) (finding admissible accident reports involving alleged similar defects that occurred after the date of manufacture of the subject vehicle).

I agree with the Parrs that such evidence may be admissible for purposes of impeaching Ford's experts regarding their unqualified testimony that roof crush does not cause injuries arising from roll-over accidents. ***See*** Notes of Testimony ("N.T."), 3/7/2012 (afternoon), at 121; Brief for the Parrs at 30, 38 (citing Pa.R.E. 607(b) ("The credibility of a witness may be impeached by any evidence relevant to that issue . . . .")). As well, I agree with the Parrs that such evidence is admissible for purposes of setting forth the basis for the Parrs' experts' opinions. ***See*** Brief for the Parrs at 39;

Pa.R.E. 705 (requiring the disclosure of the facts or data underlying an expert's opinion). Notably, the Parrs' epidemiological expert, Michael Freeman, was permitted to testify to post-2001 studies and data compilations, ***see, e.g.***, N.T., 3/8/2012 (afternoon), at 49-56 (Parrs' expert testifying regarding reliance on a National Automotive Sampling System Crash-Worthiness Data System encompassing data after 2001). The admissibility of materials considered by an expert witness in formulating his or her opinion is well-established in this Commonwealth, and enshrined by rule. ***See*** Pa.R.E. 705.

Moreover, I disagree with the majority that the trial court's exclusion of these post-2001 studies, reports, and rule-making, if erroneous, was harmless even if it was in error. ***See*** Maj. Op. at 22 (citing ***Winschel v. Jain***, 925 A.2d 782 (Pa. Super. 2007)); ***accord Majdic v. Cincinnati Mach. Co.***, 537 A.2d 334, 341 (Pa. Super. 1988). While it is true that the Parrs emphasized the utility of this evidence in establishing causation, and the jury did not reach the question of causation based upon its determinations regarding the absence of a defect, ***see*** Maj. Op. at 22, there is no question in my mind that the impeachment value of this evidence could well have influenced the jury generally regarding the case. To be sure, the jury might properly have been instructed not to consider evidence of Ford's non-compliance with federal regulatory standards not yet in place in 2001 as indicative of a product defect, ***see*** Pa.R.E. 105 (permitting the admission of evidence for one purpose while precluding its use for another). That

approach was not taken. The Ford expert testimony that the excluded evidence would have been used to impeach necessarily would have reflected on the credibility of the testifying experts' opinions generally, which inextricably intertwined issues of product defect and causation.

Inasmuch as the jury was allowed to consider Ford's experts' testimony on issues of defect, impeachment evidence regarding their testimony reasonably could have influenced the jury's findings on that question. Thus, it is not sufficient simply to note that the jury did not reach the question of causation: Had the jury found Fords' experts incredible on questions of causation, it might well have found them incredible on questions pertaining to product defect. This would have necessitated a response on the question of causation, as to which the post-2001 documents in question would then have been relevant and admissible. Consequently, I must dissent from the majority's ruling on this issue.[1]

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[1] The majority notes that the Parrs do not specify when they preserved their objection as to the exclusion of each of the documents they enumerate in their brief to this Court. Maj. Op. at 17-18. However, inasmuch as the trial court did not limit its ruling, but rather excluded out of hand all post-2001 reports independently of the reason for which they would be admitted or of their content, I do not believe the Parrs' failure to specify each document they would have introduced before the trial court, or their failure to indicate to this Court when they did so, would constitute waiver or demand the limitation on the reviewability of this issue that the majority imposes. But even if this limitation were proper, my disagreement with the majority applies at least to those NHTSA rule-making documents as to which the majority found that the Parrs' challenge duly was preserved.

I also disagree with the majority's ruling against the Parrs on their third issue. Therein, the Parrs contend that the trial court erred in excluding statistical evidence pertaining to fatality rates and other accident-related data compiled in the reports of various public and private organizations. Brief for the Parrs at 40-53. The majority rejects this issue on the basis that the Parrs failed to meet Pennsylvania's "substantial similarity" test, because the studies in question did not adequately specify the nature of the accidents analyzed such that the court or the jury could discern which of the accidents were relevant to the case *sub judice*. Maj. Op. at 23-28; ***see generally Majdic***, 537 A.2d at 340 (holding circumstantial evidence of similar accidents admissible in products liability action, provided they occurred "under the same or similar circumstances").

I believe that the majority's ruling reflects an application of the substantial similarity test more stringent than is warranted under the circumstances of this case. While the test is established in Pennsylvania law, we have never held that it requires a perfect one-to-one correlation, and our application of the test typically has varied considerably according to the circumstances of the case and the purposes for which the evidence is proffered. ***See, e.g., Blumer***, 20 A.3d at 1229 (quoting ***Bitler v. A.O. Smith Corp.***, 400 F.3d 1227. 1239 (10th Cir. 2004)) ("Determining whether and to what extent proffered evidence of prior accidents involves substantially[] similar circumstances will depend on the underlying theory of the case advanced by the plaintiffs."); ***DiFrancesco v. Excam, Inc.***, 642

A.2d 529, (Pa. Super. 1994) (upholding the admission of evidence of similar design defects in other products as substantially similar to product at issue); ***Majdic***, 537 A.2d at 341 (admitting prior accident evidence when the product in question had various applications and prior accidents had occurred in applications different than the case at bar); ***see also DiFrischia v. N.Y Cent. R. Co.***, 307 F.2d 473 (3d Cir. 1962) (upholding the admission of other-accident evidence at the subject rail crossing, even though the accidents in question were not shown to be like the one in question, but were shown to have taken place at night, as had the subject accident).

The Parrs sought to introduce reports establishing elevated fatality rates in rollover crashes of Ford Excursions of the same generation as the Excursion at issue in this case, and roof strength analyses of the Excursion and comparable vehicles in general. The relevance of this evidence is difficult to dispute.[2] These reports reasonably and properly could have

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[2] Perplexingly, the majority adopts the view that those studies measuring fatality rates are immaterial because none of the occupants of the Excursion at the time of the instant accident died in the accident. Maj. Op. at 27. I believe that this is an unwarranted and entirely too narrow application of the substantial similarity test. It would be unreasonable to dispute that the injuries sustained by April and Samantha Parr were life-threatening, and might well have caused their deaths in a materially identical accident. Fatality rates in similar accidents involving the same vehicle surely are informative with regard to the safety of the vehicle in question, especially inasmuch as it seems very likely that rollover fatalities primarily occur at least in part as a consequence of severe head traumas, the likes of which were suffered by both April and Samantha Parr, even if those injuries ultimately were merely crippling rather than fatal.

informed a jury regarding the engineering of the 2001 Excursion's roof and pillars, and causation may have been inferred therefrom. To the extent that the studies were inapposite, this was a question of weight, not admissibility. ***Cf. Bolus v. United Penn Bank***, 525 A.2d 1215, 1226-27 (Pa. Super. 1987) (quoting ***Standard Pipeline Coating Co., Inc., v. Teslovich, Inc.***, 496 A.2d 840, 846 (Pa. Super. 1985)) (finding that "an expert appraisal of probabilities is permissible testimony," and the question of weight is for the jury); ***Emerick v. Carson***, 472 A.2d 1133, 1136 (Pa. Super. 1984) ("Appellants also claim that Dr. Monroe's testimony was so seriously flawed as to render it prejudicial to Appellants. This argument obviously goes to the weight to be accorded to Dr. Monroe's testimony by the jury and not to its admissibility . . . ."). Given a proper adversarial presentation, the jury would have been quite capable of considering the value of the reports in question. By its ruling, the learned trial court unwittingly usurped the jury's function in this regard, and thereby abused its discretion.

Finally, I agree with the Parrs that this evidence should have been admitted, at a minimum, for purposes of impeaching Ford's witnesses. Notably, Ford's experts were permitted to utilize post-2001 epidemiological studies to support Ford's diving and torso augmentation theory. The evidence that the Parrs were not allowed to admit was similar to, if contradictory of, the evidence provided by Ford's experts on causation. For the same reasons set forth above in connection with the Parrs' second issue,

I cannot conclude that the exclusion was harmless. Consequently, I cannot join the majority in its resolution of this issue, either.

I also cannot join the majority in its rejection of the Parrs' fourth issue. This issue concerns the alleged spoliation of important evidence by reason of the Parrs' failure to preserve the Excursion for study, despite their awareness, before signing title over to their insurer, that they intended to seek legal redress for injuries arising from the accident. In determining whether to provide an adverse inference jury instruction arising from spoliation of evidence, the court must consider the degree of fault of the party accused of destroying relevant evidence, the prejudice to the party seeking the instruction arising from the destruction of evidence, and whether the sanction chosen – in this case the adverse inference instruction, admittedly among the milder available sanctions – was adequate to protect the prejudiced party's rights and to deter similar conduct in the future. ***See Schroeder v. Dep't of Transp. of Penna.***, 710 A.2d 23, 27 (Pa. 1998).

The linchpin of Ford's defense was not rooted in the particular circumstances of the instant accident. Rather, with its diving and torso augmentation theory, Ford's position was that, because roof crush never is the cause of injury in roll-over accidents, the Parrs *per se* could not establish the Excursion's lack of crashworthiness. This theory would not have been augmented by an inspection of the subject vehicle, which had in any event been severely damaged by the "jaws of life" during the extraction of the vehicle's occupants.

In instructing the jury that it was free to conclude from the Parrs' failure to preserve the Excursion for purposes of litigation that there was wrongful intent or a deliberate effort to conceal evidence favorable to Ford, the trial court unquestionably enabled a circumstance in which the jury reasonably could have been prejudiced against the Parrs in its deliberations. Thus, the error in question was not harmless. I dissent from the majority's ruling on this issue, as well.

For the foregoing reasons, I would award a new trial to the Parrs, in which they would be free to introduce the evidence discussed above, and in which they would not be disadvantaged by an unwarranted adverse inference instruction. I respectfully dissent.