COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 97-1641

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

DANIEL L. PAYNE, CAROL PAYNE AND VILAS PAYNE,

PLAINTIFFS-RESPONDENTS,

V.

FORD MOTOR COMPANY,

DEFENDANT-APPELLANT,

SENTRY INSURANCE, A MUTUAL COMPANY, AND TIME INSURANCE COMPANY,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Dane County: MARK A. FRANKEL, Judge. *Affirmed.*

Before Dykman, P.J., Eich and Roggensack, JJ.

PER CURIAM. Ford Motor Company appeals from a judgment awarding Daniel Payne $12 million on his personal injury claim, and his parents $75,000 on their derivative claims. Ford contends that it was entitled to judgment notwithstanding the verdict because the Paynes failed to prove an essential element of their claim. Ford also contends that the verdict failed to address a material issue, that Payne received an excessive pain and suffering award, and that it was entitled to a new trial on all issues in the interest of justice. We reject those contentions, and affirm.

Payne was a passenger in a Ford car driven by Daniel Daugherty, a newly licensed sixteen-year-old. Daugherty lost control while driving recklessly on a rural road and the car flipped over. Payne suffered a catastrophic, paralyzing injury when his head collided with the roof, which collapsed on the front passenger side on impact with the ground. The roof did not collapse where the other two persons in the car were sitting, and neither suffered any injuries.

Payne and his parents subsequently sued Daugherty and his insurer, their own underinsured motorists carrier, and Ford. They allege that Ford's negligent roof design was a substantial cause of Payne's injuries, and brought claims in negligence and strict liability.

Ford cross-claimed against Daugherty. However, it dismissed the claim after Daugherty's insurer agreed to pay its policy limits to Ford if the Paynes recovered against Ford.

At trial the parties presented conflicting evidence as to whether the roof collapse caused Payne's injury. Experts also disputed whether Ford negligently designed a defective roof. It is undisputed that a stronger roof could have been designed and installed, and in fact stronger roofs were used in other

Ford models. There was no direct evidence submitted that a stronger roof would have prevented Payne's injury.

At the conclusion of evidence, Ford sought a verdict question apportioning the negligence between itself, Daugherty and Payne. The trial court denied that request, reasoning that the boys' contributory negligence was not material to the essential question, which was whether the roof collapse enhanced Payne's injury. The court also concluded that Ford's settlement with Daugherty was a waiver of the issue, and that the jury's answer to such a question would not affect the outcome.

The jury subsequently returned a verdict finding that (1) Ford was negligent in its roof design; (2) the negligence was a cause of Payne's enhanced injury; (3) the roof left Ford's possession in an unreasonably dangerous and defective condition; (4) the defective condition caused the enhanced injury; (5) Ford's negligent and defective roof caused one-hundred percent of Payne's injuries and the accident itself caused none; and (6) Payne's award for past and future pain, suffering and disability should be $8.3 million.

In motions after verdict, Ford argued, among other things, that Payne could not recover without proof that a reasonable alternative design would have prevented his injuries, that the verdict should have required the jury to assess Daugherty's and Payne's negligence, that the $8.3 million award was excessive, and that Ford should receive a new trial in the interest of justice. Ford bases this appeal on the trial court's refusal to grant relief on these grounds.

Payne did not have to prove that a reasonable alternative design would have prevented his injury. Ford asks this court to hold that strict liability

claims in Wisconsin require such proof, as they do in many other states.[1] However, Payne received jury verdicts in his favor on both his negligence and strict liability claims. Even if the strict liability claim was dismissed for the reason argued by Ford, Payne would still recover under his negligence claim.

Furthermore, Wisconsin law does not now require other design proof in strict liability cases.

> [A]lthough evidence of an alternative safer design may be relevant and admissible in a products liability case, our state's strict products liability rule does not mandate such evidence. A product may be defective and unreasonably dangerous even though there are no alternative, safer designs available.... The question is not whether any other manufacturer has produced a safer design, but whether the specific product in question is defective and unreasonably dangerous.

Sumnicht v. Toyota Motor Sales, 121 Wis.2d 338, 370-71, 360 N.W.2d 2, 16-17 (1984). Contrary to Ford's contention, this is not dicta, but a binding statement of the law. Payne was entitled to rely on it in presenting his case, and Ford waived its challenge to that law by raising the issue for the first time after the trial when Payne no longer had the chance to prove the additional element. At present, a strict liability claim in Wisconsin requires proof that the product was in defective condition when it left the seller's possession or control, that it was unreasonably dangerous to the user, that it caused the plaintiff's injury, that the seller regularly sells the product, and that it reached the user without a substantial change in its condition. ***Glassey v. Continental Ins. Co.***, 176 Wis.2d 587, 599, 500 N.W.2d 295, 300 (1993). Ford does not challenge the sufficiency of Payne's evidence on these elements.

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[1] *See* RESTATEMENT (THIRD) OF TORTS (1997), § 2(b) and accompanying comments.

The trial court properly refused a verdict question on Payne's and Daugherty's negligence. Section 805.12(1), STATS., provides that the verdict shall only address material issues of ultimate fact. The negligence of Payne, if any, and Daugherty, only pertained to the initial accident. There was no evidence that either did anything to enhance the injury caused by the roof collapse. Because the jury attributed all of Payne's damages to that collapse, responsibility for the underlying accident was simply not material, just as the trial court ruled. With or without the desired question, Ford would have been found one-hundred percent liable.

The $8.3 million pain and suffering verdict was not excessive. In reviewing this issue we view the evidence in the light most favorable to the verdict. ***Fahrenberg v. Tengel***, 96 Wis.2d 211, 231, 291 N.W.2d 516, 525 (1980). "[A]ll that the court can do is see that the jury approximates a sane estimate, or, as it is sometimes said, see that the results attained do not shock the judicial conscience." ***Id.*** at 236, 291 N.W.2d at 527 (quoted source omitted). Here, Payne was fifteen when he suffered his paralyzing injury. As a result of it, he is confined to a wheelchair for the rest of his life, with little or no feeling or function below his upper chest. The resulting limitations and their overwhelmingly negative impact on his enjoyment of life and physical and mental well being are fully documented in his brief. Ford does not contest what it concedes are the "horrible ways that the accident changed Payne's life." It contends only that the award is excessive because it so greatly exceeds the award in what Ford portrays as comparable cases. However, comparisons, while perhaps relevant at times, do not determine the result when reviewing claimed excessive verdicts. ***Krause v. Milwaukee Mutual Ins. Co.***, 44 Wis.2d 590, 613, 172 N.W.2d 181, 192 (1969).

Each case is decided on its own facts, and Payne's award, although high, does not shock our judicial conscience given the devastating results of his injury.

Ford is not entitled to a new trial in the interest of justice. We may reverse and order a new trial if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried. Section 752.35, STATS. Ford does not qualify for a new trial on either ground. The causation, negligence and strict liability questions were fully tried, and we do not conclude that the result was a miscarriage of justice.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.