

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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In re: BRIDGESTONE/FIRESTONE, INC.,)
TIRES PRODUCTS LIABILITY) Master File No. IP 00-9373-C-B/S
LITIGATION) MDL No. 1373
_____) (centralized before Hon. Sarah Evans
) Barker, Judge)
THIS ORDER RELATES TO:)
)
MARTIN B. ZACHARY and JEAN) Individual Case No. IP 01-5298-C-B/S
ZACHARY as parents of JESSE MATT)
ZACHARY, and MARTIN B. ZACHARY)
as Administrator of the Estate of JESSE)
MATT ZACHARY)
Plaintiffs,)
v.)
)
BRIDGESTONE/FIRESTONE, INC. and)
FORD MOTOR COMPANY)
Defendants.)

**ENTRY GRANTING FIRESTONE’S MOTION TO EXCLUDE EXPERT
TESTIMONY OF ALLEN EBERHARDT AND GRANTING FIRESTONE’S MOTION
FOR SUMMARY JUDGMENT**

Jesse Matt Zachary was killed in an automobile accident while riding as a passenger in a 1999 Ford Explorer, manufactured by Ford Motor Company (“Ford”), equipped with tires manufactured by Bridgestone/Firestone, Inc. (“Firestone”), and driven by Zachary’s friend, Matthew Stalonis. Plaintiffs filed suit against Ford and Firestone, seeking compensatory and punitive damages based on a variety of tort and breach of warranty claims. Firestone moved for summary judgment as to all of Plaintiffs’ claims. Plaintiffs

conceded summary judgment on four of the claims, and this entry addresses the remaining claims. For the reasons explained in detail below, we GRANT Firestone's Motion to Exclude the expert testimony of Dr. Allen Eberhardt,¹ and we GRANT Firestone's Motion for Summary Judgment.

Factual Background

At approximately 11 p.m. on February 26, 1999, Matthew Stanalonis and Jesse Zachary were traveling in a Ford Explorer (equipped with Firestone Wilderness AT tires)² on Town Center Road in Kennesaw, Georgia. Def.'s Statement of Undisputed Facts ¶¶ 1,5. Town Center Road has a posted speed limit of 35 miles per hour. Id. ¶ 8; Pls.' Resp. to Def.'s Statement of Undisputed Facts ¶ 8. Road construction was being completed on either side of the roadway, and at least one witness to the scene observed that loose gravel was present on the roadway. Def.'s Statement of Undisputed Facts ¶ 14. Plaintiffs concede that the Stanalonis vehicle was traveling in excess of the posted speed limit. Id. ¶ 10; Pls.' Resp. to Def.'s Statement of Undisputed Facts ¶ 10. Eyewitness accounts indicate that when Stanalonis swerved to avoid another vehicle, his vehicle began to skid sideways and then roll over. Def.'s Statement of Undisputed Facts ¶¶ 36, 44. Before rolling over, the

¹ Ford also has filed a Motion to Strike the expert testimony of Dr. Eberhardt. We need not and do not address the issues raised in that motion.

² The parties agree that Firestone conducts testing in accordance with Federal Motor Vehicle Safety Standard 109 ("FMVSS 109"), and that FMVSS does not specify or require a unique test for dynamic, high-speed bead unseating resistance. Pl.'s Resp. to Def.'s Statement of Undisputed Facts ¶¶ 61-62.

vehicle began to “fishtail,” swerving side to side, until it eventually began yawing. Id. ¶ 27.

The parties agree that, at some point in the course of the accident, a tire on the Stanalonis vehicle “debeaded,” that is, it pushed away from the rim on which it was seated; the parties also agree that this alleged tire failure played no part in the initial loss of control. Id. ¶¶ 29, 46. Thomas Langley, Plaintiffs’ proffered expert in accident reconstruction, estimated that the Stanalonis vehicle was traveling at a speed of 60-65 miles per hour before Stanalonis lost control of the vehicle. Id. ¶ 26.

In the course of the vehicle rollover, Jesse Zachary was ejected from the vehicle and thrown into the westbound lane of Town Center Road, and later died from the blunt head trauma he suffered in the accident. Complaint ¶13. Matthew Stanalonis was subsequently charged with vehicular homicide, and, on September 25, 2000, pleaded guilty to those charges. Def.’s Statement of Undisputed Facts ¶¶ 63-64. Plaintiffs filed suit against Ford and Firestone on February 23, 2001. The tire at issue in this case has not been made available for inspection, because on June 6, 2001, Plaintiffs relinquished control over it, along with the Explorer, pursuant to the Ford recall. Pls.’ Resp. to Defs.’ Statement of Undisputed Facts ¶¶ 2-3.

In preparation for this litigation, Plaintiffs retained the services of Dr. Allen Eberhardt, a proffered expert in tire mechanics and tire failure analysis. Dr. Eberhardt developed his own testing model to determine the inflation level and lateral force at which the Wilderness AT tires would debeat. This testing method differs in certain respects from

the more widely utilized Federal Motor Vehicle Safety Standards (“FMVSS”) “Bead Push Off” testing model, in that it employs a wooden fixture or “shoe,” shaped differently from and lacking the curvature along the axis of the tire of the three-dimensional aluminum fixture used in the FMVSS test. Eberhardt Depo. at 60-61, 121-23; Aff. of James D. Gardener ¶ 8. Dr. Eberhardt used this method to test the effect of applying lateral force to a single Wilderness AT tire (not one of those from the Stanalonis vehicle) at varying inflation levels. Dr. Eberhardt’s result in the single trial demonstrated that when the subject tire was inflated to 26 pounds per square inch (“PSI”) and exposed to a certain lateral force, the tire would debead more readily than when the same tire was inflated to 32 PSI. Aff. of Allen C. Eberhardt, App. F. Based on these results, Dr. Eberhardt concluded that the underinflation of a tire on the Stanalonis vehicle caused the tire to debead when exposed to the lateral force of the sideways skid, and subsequently caused the Explorer to trip and roll.³

Motion to Exclude Expert Testimony

³ The parties agree that other factors that can potentially cause a tire to debead include contact with other objects and the exertion of extreme lateral force on the tire following a loss of control. Def.’s Statement of Undisputed Facts ¶ 56. In addition, tire failure may be caused by a variety of conditions other than defect or underinflation, including “impact damage; road hazard damage and/or punctures from nails or other objects; improper tire inflation or other servicing ...; mounting damage; improper vehicle alignment; improper rim components; and operator driving habits.” *Id.* ¶ 52.

Defendant Firestone moves to exclude the affidavit and any expert testimony by Plaintiffs' proffered expert, Dr. Allen C. Eberhardt. Dr. Eberhardt concludes in his affidavit that the underinflation of a Wilderness AT tire led to the debadment of that tire when the vehicle entered a sideways yaw, causing the vehicle to trip and roll. Dr. Eberhardt bases this conclusion on tests he designed and conducted on a single Wilderness AT tire, not one of the tires with which the Stanalonis vehicle was actually equipped. Firestone contends that Dr. Eberhardt's expert testimony does not satisfy the criteria for admissibility under Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

The Federal Rules of Evidence provide that, if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence and determine the facts in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of opinion or otherwise. Fed. R. Evid. 702; see also U.S. v. Conn, 297 F.3d 548, 555 (7th Cir. 2002). Under the Daubert framework, the court must engage in a two-part analysis. Chapman v. Maytag Corp., 297 F.3d 682, 686 (7th Cir. 2002). First, it must determine whether the expert is qualified and will testify to reliable scientific knowledge. The reliability of scientific knowledge is assessed in relation to a non-exclusive list of factors: 1) whether a theory or technique can be or has been tested; 2) whether a theory or technique has been subjected to peer review and publication; 3) the known and potential rate of error; and 4) the "general acceptance" of the theory or technique. Id., citing Daubert, 509 U.S. at 593-94. Second, after a preliminary

assessment of the scientific validity of the evidence to be offered, the court must determine whether the testimony will assist the trier of fact in understanding the evidence or deciding a fact at issue. Masters v. Hesston Corp., 291 F.3d 985, 991 (7th Cir. 2002). If an expert's testimony is not based on reliable scientific knowledge, or if it is based on such knowledge but fails to relate to any material facts, then it is not useful and, therefore, not relevant. The proponent of the evidence bears the burden of establishing its admissibility by a preponderance of the evidence. Daubert, 509 U.S. 579 (1993); Kumho Tire Co., Ltd., v. Carmichael, 526 U.S. 137 (1999).

Here, the evidence suggests that Dr. Eberhardt's knowledge, training, skill and experience qualify him to testify as an expert on the issues for which his testimony has been offered. His graduate degrees from North Carolina State University in mechanical engineering were accomplished by dissertations on tires – specifically noise reduction and vibration of heavy duty truck tires. Aff of Allen C. Eberhardt ¶ 2. Starting in the mid-1970s, Dr. Eberhardt began conducting tire failure analyses, in many cases on Firestone Wilderness AT tires like the ones at issue in this case. Id. ¶ 6. In 1988-89, Dr. Eberhardt published multiple peer-reviewed or technical articles relating to tire mechanics, inflation, and pavement contacts. Id., App. A. In recent years, he attests to having conducted numerous tire failure analyses on behalf of Nationwide Insurance Company, many of which involved Wilderness AT tires mounted on Ford Explorers. Id. ¶ 7. These analyses typically involve issues of construction, design, maintenance, inflation, deflection, load, and stress –

issues similar to those involved in the present case. Id.

Difficulties arise, however, in determining the reliability of Dr. Eberhardt's testing methodology. Firestone contends, and Plaintiffs do not dispute, that in preparation for this litigation, Dr. Eberhardt developed his own unique testing model to determine the force at which the Wilderness AT tires would debead. This testing method differs in certain respects from the more widely utilized FMVSS "Bead Push Off" testing model, in that as we have mentioned previously Dr. Eberhardt's model employs a wooden "shoe," shaped differently from and lacking the curvature along the axis of the tire of the three-dimensional aluminum fixture used in the FMVSS test. Eberhardt Depo. at 60-6, 121-23; Aff. of James D. Gardener ¶ 8. Plaintiffs offer no explanation for these design differences, nor any evidence to confirm or refute the role— if any— of such differences in the testing process. Plaintiffs provide no evidence to suggest that Dr. Eberhardt's alternate method is generally accepted within the industry. His results were based on a test of only one Wilderness AT tire — a used tire, not one of the tires on the Stanalonis vehicle — in conditions not designed to approximate those of the accident in this case. Aff. of Allen C. Eberhardt ¶ 17; Eberhardt Depo. at 130. There is no indication from Plaintiffs' filings that Dr. Eberhardt's testing method has been subjected to any form of peer review. Plaintiffs do not provide any error rate for the testing, suggesting that such a rate has not been determined. While none of these factors conclusively establishes the reliability of a particular testing methodology, together such deficiencies raise significant concerns that must be addressed if Plaintiffs

are to carry their burden on this issue.

Plaintiffs contend that Dr. Eberhardt's testing methods rely on fundamental, well accepted physical principles and, therefore, should not be called into question. This argument misses the point of the Daubert inquiry. Our focus rests not on the scientific principles Dr. Eberhardt seeks to prove or those responsible for his results, but the manner in which he attempts to illustrate them and the reliability of his methods. The burden rests on Plaintiffs, as the proponents of this testimony, to establish such reliability by a preponderance of the evidence. Given the lack of evidence offered by Plaintiffs to address any of the criteria for reliability, we must conclude that Plaintiffs have not met their burden. Accordingly, the Motion to Strike Dr. Eberhardt's testimony as an expert witness is GRANTED.

Motion for Summary Judgment

Firestone moves for summary judgment as to all ten of Plaintiffs' claims. Federal Rule of Civil Procedure 56(c) provides that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." A genuine issue of material fact exists if there is sufficient evidence for a reasonable jury to return a verdict in favor of the non-moving party on the particular issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242,

248 (1986); Bellaver v. Quanex Corp., 200 F.3d 485, 492 (7th Cir. 2000) (citation omitted). The court must “construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party. Liberty Lobby, Inc., 477 U.S. at 255; Del Raso v. U.S., 244 F.3d 567, 570 (7th Cir. 2001). However, the nonmovant “may not simply rest on his pleadings, but must demonstrate by specific evidence that there is a genuine issue of triable fact.” Colip v. Clare, 26 F.3d 712, 714 (7th Cir. 1994) (citation omitted). A “mere scintilla of evidence in support of the plaintiff’s position will be insufficient” to avoid summary judgment. Liberty Lobby, Inc., 477 U.S. at 252.

Plaintiffs bring 10 state law claims against Defendants Ford and Firestone: negligent design; negligent manufacturing; negligent testing and inspection; negligent failure to warn; products liability; breach of express warranty; breach of warranty of merchantability; breach of warranty of fitness for particular purpose; false advertising; and conspiracy. Plaintiffs conceded in their Brief in Opposition to Firestone’s Motion for Summary Judgment that summary judgment is appropriate as to their claims for breach of express warranty, breach of warranty of merchantability, breach of warranty of fitness for particular purpose, and false advertising. Accordingly, we GRANT Firestone’s Motion for Summary Judgment on these claims. As to the remaining claims, Defendants assert, and Plaintiffs do not dispute, that Georgia law governs. Therefore, we will analyze these claims under the applicable principles of Georgia’s substantive law.

A. Negligence and products liability claims

Defendant moves for summary judgment as to Plaintiffs' negligence and strict liability claims based on the contention that Plaintiffs cannot produce evidence tending to establish that an alleged tire defect⁴ was a proximate cause of the accident in which Jesse Zachary was killed. It is well-settled under Georgia law that claims arising under either a strict liability or negligence theory require proof of proximate cause. Timmons v. Ford Motor Co., 982 F. Supp. 1475, 1480 (S.D. Ga. 1997), citing Lamb by Shepard v. Sears, Roebuck & Co., 1 F.3d 1184 (11th Cir. 1993). Moreover, as Plaintiffs correctly note, Georgia law recognizes that there may be more than one proximate cause of an injury. Lindsey v. Navistar Intern. Transp. Corp., 150 F.3d 1307, 1317 (11th Cir. 1998); Glisson v. Freeman, 532 S.E.2d 442, 455 (Ga. Ct. App. 2000). However, "there can be more than one proximate cause only 'if the original negligent actor reasonably could have anticipated or foreseen the intervening act and its consequences.'" Timmons, 982 F. Supp. at 1480, quoting Perry v. Lyons, 183 S.E.2d 467 (Ga. Ct. App. 1971). In the area of product liability, a manufacturer can only be held liable where it knows of the probable

⁴ Firestone misinterprets Plaintiffs' argument regarding an alleged "defect" in the Wilderness AT tire. At least as phrased in their brief in opposition to summary judgment, Plaintiffs do not contend that the tire suffered from an actual design or manufacturing defect, or that its performance was inconsistent with that of a perfectly designed or manufactured tire. Plaintiffs argue instead that Firestone's inflation recommendation of 26 PSI and delivery of the tire at that inflation level constitutes a defect, rendering the tire unreasonably dangerous for ordinary use. This is a well-established, though perhaps less obvious, type of product liability claim under Georgia law. Banks v. ICI Americas, Inc., 450 S.E.2d 671 (Ga. 1994).

consequences to its product in a given situation. Timmons, 982 F. Supp. at 1481.

Typically, such proximate cause determinations are left to a jury unless reasonable minds could not differ on the conclusion. Id., citing Smith v Commercial Transp., Inc., 470 S.E.2d 446 (Ga. Ct. App. 1996).

In addition to proving proximate cause, a plaintiff bringing a negligence or product liability claim must prove that the defendant's negligence was the cause in fact of the injury. See, e.g., Tittle v. Corso, 569 S.E.2d 873, 878 (Ga. Ct. App. 2002); English v. Crenshaw Supply Co., 387 S.E.2d 628, 361 (Ga. Ct. App. 1989). "A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to [grant judgment] for the defendant." Rampell v. Williams, 457 S.E.2d 224, 226 (Ga. Ct. App. 1995), quoting Anneewakee, Inc. v. Hall, 396 S.E.2d 9 (Ga. Ct. App. 1990).

The parties each cite Timmons in support of their respective positions. There, a drunk driver crashed head-on into a Ford Explorer carrying five occupants. 982 F. Supp. at 1477. Experts estimated that the closing speed of the two vehicles was 130 miles per hour. Id. As a result of the collision, the vehicle's engine was pushed into the passenger compartment. Id. Although the fuel tank properly shut off at the time of impact, a fire ensued, killing four of the five occupants of the vehicle. Id. Plaintiffs brought suit against Ford, alleging that the deaths resulted from defects in the fuel and seat systems of the Ford Explorer.

In weighing Ford's Motion for Summary Judgment, the court in Timmons discussed at length the legal standards for proximate cause applicable to such a products liability/negligence action. Specifically, the court acknowledged the possibility that more than one proximate cause may exist for a given injury, and but qualified that "[a]lthough collisions are foreseeable, ...the same is not necessarily true for their consequences," and "for a manufacturer to be liable for a defective product, it must have knowledge of the probable consequences to its product in a given situation." Id. at 1481. The court further noted that evidence of Ford's compliance with FMVSS requirements, while not sufficient to conclusively establish whether Ford had knowledge of the probable consequences to its product, was instructive on the issue. Id. Because the FMVSS regulations did not require crash testing at such high speeds as involved in the accident, and because Plaintiffs had not provided any evidence indicating that Ford had knowledge of the consequences of high-speed collisions on its fuel and seating systems, the court found that Plaintiff had not provided evidence from which a reasonable jury could find that the alleged defect was the proximate cause of the accident and granted summary judgment in favor of Ford.

The reasoning in Timmons is instructive in the present case. Here, Plaintiffs concede that the rate of speed at which Matthew Staloni drove the Ford Explorer immediately prior to the accident was a proximate cause of the injuries suffered by Jesse Zachary. Plaintiffs contend, however, that a defectively inflated tire on the Staloni vehicle debaded and deflated, constituting a concurrent proximate cause of the rollover,

and that “Firestone could have reasonably anticipated that Explorers equipped with its tires would experience yaws at typical highway speeds.” Just as in Timmons, the circumstances of the accident in this case are not covered by specific FMVSS testing requirements. Absent Dr. Eberhardt’s expert opinion, however, which we earlier determined must be excluded under Daubert, Plaintiffs offer no evidence to indicate that Firestone knew or should have known that tires inflated to 26 PSI and exposed to the lateral forces of a sideways skid, as in this case, would affect the subject tire in the manner Plaintiffs allege.⁵

Moreover, while Plaintiffs contend that debearing caused the rollover and that underinflation increases the likelihood of debearing, they offer no evidence tending to establish that in this case the underinflation of the subject tire on the Staloniis vehicle in fact caused the tire to debeat, or to undermine the proposition that such debearing would have occurred regardless of the underinflation, as Firestone contends, because of the lateral forces exerted on the tire during the sideways skid. Plaintiffs’ lack of evidence on this point would require a jury to speculate and choose from among many possibilities regarding the cause in fact of the tire failure. Under Georgia law, such a lack of evidence is fatal to Plaintiffs’ claim. Accordingly, Firestone’s Motion for Summary Judgment is GRANTED as to Plaintiffs’ negligence and products liability claims.

B. Conspiracy claim

⁵ Plaintiffs’ only evidence in support of such a proposition came in Dr. Eberhardt’s expert testimony, which we excluded under the Daubert analysis explained earlier in this Entry.

Defendants move for summary judgment on Plaintiffs' conspiracy claim. To recover damages for civil conspiracy under Georgia law, a plaintiff must show that two or more persons, acting in concert, engaged in tortious conduct. Mustaqeem Graydon v. SunTrust Bank, — S.E.2d —, 2002 WL 31423576, at *5 (Ga. Ct. App. 2002), citing Savannah College of Art & Design, Inc. v. School of Visual Arts of Savannah, Inc., 464 S.E.2d 895 (Ga. Ct. App. 1995). "Absent the underlying tort, there can be no liability for civil conspiracy." Mustaqeem Graydon, — S.E.2d —, 2002 WL 31423576, at *5, quoting O'Neal v. Home Town Bank of Villa Rica, 514 S.E.2d 669 (Ga. Ct. App. 1999). Because Plaintiffs' tort claims against Firestone cannot withstand this Motion for Summary Judgment, the conspiracy claim must fail as well. Therefore, we GRANT summary judgment in favor of Firestone on this claim.

Conclusion

Firestone moved for summary judgment as to all Plaintiffs' claims. Plaintiffs conceded four of the claims for relief, leaving us to rule on the remaining six claims. For the reasons set forth in detail above, we find that 1) Plaintiffs have not offered sufficient evidence to establish the reliability of Dr. Allen Eberhardt's expert testimony; 2) Plaintiffs have failed to provide evidence from which a reasonable jury could conclude that any alleged tire defect was a proximate cause of the accident involving the Stanalonis vehicle;

3) Plaintiffs have not provided evidence from which a reasonable jury could infer that the tire suffered from the alleged defect was the cause in fact of Plaintiffs' injuries; and 4) because Plaintiffs have not properly supported their underlying tort claims, the accompanying conspiracy claim must also be dismissed. Accordingly, we GRANT Firestone's Motion to Exclude the expert testimony of Dr. Allen Eberhardt, and we GRANT summary judgment in favor of Firestone on all claims.

It is so ORDERED this _____ day of December, 2002.

SARAH EVANS BARKER, JUDGE
United States District Court
Southern District of Indiana

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