

# THE RELAXED STANDARD FOR ADMISSIBILITY OF EXPERT TESTIMONY IN FAILURE TO WARN PRODUCT LIABILITY CASES AFTER *PINEDA v. FORD MOTOR COMPANY*

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In March of this year, the Third Circuit reversed the district court's decision to preclude the plaintiff's engineering expert in *Pineda v. Ford Motor Company*, 520 F.3d 237 (3d Cir. 2008). The plaintiff was an automotive technician who contended that Ford Motor Company was liable for the injuries he suffered when the truck liftgate glass he was replacing shattered. Although the case began as a design defect and failure to warn case, the plaintiff withdrew the defect claim prior to the *Daubert* hearing. The plaintiff's engineering expert was precluded from testifying in support of the remaining failure to warn claim.

The *Pineda* case dealt with two important aspects of product liability law: (1) the standard for qualifying an expert to testify in support of a failure to warn theory; and, (2) the admissibility of evidence through an expert that would otherwise be inadmissible. The Third Circuit held that an engineer who admitted that he was "not a warnings expert" was nonetheless qualified to testify in support of a plaintiff's failure to warn theory based on his general qualifications as an engineer and his explanation that "'a warning and instructions' are 'solution[s]' to an engineering problem.'" It also held that an expert's use of key evidence that the district court found to be inadmissible as evidence of remedial measures under Federal Rule of Evidence 407, may be used as the sole basis of an expert's testimony, and can be presented to the jury if the expert was cross-examined about the basis of his opinions.

## Background of the Case and Preclusion of the Plaintiff's Expert

Jose Pineda sued Ford Motor Company in the U.S. District Court for the Eastern District of Pennsylvania alleging product liability under 402A based on defective design and failure to warn theories. Pineda was a trained auto technician. He was injured while repairing the liftgate on a 2002 Ford Explorer. Pineda was tightening a nut that connected the liftgate glass to the frame when the glass shattered and injured him. The deposition testimony established that

Pineda torqued the nut according to the specifications in the Explorer manual.

The plaintiff's expert was Craig Clauser, P.E. Clauser is an engineer by training. The district court held a *Daubert* hearing on Ford's challenge of Clauser's qualifications and reliability as an expert witness. Ford's challenge led the plaintiff to withdraw his defective-design claim, and proceed only on the failure to warn theory. At the *Daubert* hearing, Clauser testified that the Ford manual failed to warn of the hazards associated with a user's failure to follow the installation instructions for the liftgate glass. He also testified that the manual was defective because it did not provide instructions dedicated solely to the replacement of the liftgate hinge even though it did contain the proper procedure for replacing the liftgate glass as a whole.

Aside from his training and experience as an engineer, Clauser's opinion was based solely on his review of a 2004 Safety Recall Instruction ("SRI") that Ford issued two years after the *Pineda* accident. Clauser testified that the SRI included the proper safety warning and dedicated instructions for the replacement of the liftgate hinge that the manual lacked. He admitted that he did not perform any testing or inspections of the product. He also conceded that he was not a warnings expert, but he stated that he believed warnings were "a solution to an engineering problem."

The trial court precluded Clauser's testimony and later entered summary judgment in Ford's favor because Pineda could not prove his claims without an expert. Clauser was precluded because the court found that that he was not qualified as a warnings expert and that his methodology was not reliable. The court noted the fact that the only basis for Clauser's opinion, aside from his general experience with glass as an engineer, was the 2004 SRI which was inadmissible under Federal Rule of Evidence 407 which bars evidence of subsequent remedial measures. The court also ruled that Clauser was not qualified to offer an opinion as to the

sufficiency of the warnings. Finally, the court observed that, even if Clauser were allowed to testify that the warnings in the manual were insufficient, Pineda had no expert testimony about what actually caused the liftgate glass to break. Pineda appealed to the Third Circuit.

## The Third Circuit Decision

The Third Circuit reversed both the grant of summary judgment and the underlying order excluding Clauser's expert testimony. The Third Circuit concluded that Clauser's "formal qualifications are unassailable" after discussing at length Clauser's qualifications as an engineer. Clauser's expertise in the "stresses and other forces that might cause a material such as glass to fail" was sufficient to qualify him as an expert in support of the plaintiff's failure to warn theory. While Clauser could not testify about the appearance of the warning label, he was qualified to opine that the manual should have had an explicit warning that failure to install the glass properly was a safety issue because such a warning is a solution to an engineering problem.

As to the reliability of Clauser's testimony, the panel held that the SRI was a sufficient basis for Clauser's opinion under Federal Rule of Evidence 703. As Rule 703 allows experts to base their opinions on evidence that would not otherwise be admissible, the fact that the evidence could not stand on its own did not prevent Clauser from relying on it. The panel raised the issue itself for the first time during oral argument.

The Third Circuit held that Clauser could state his opinion to the jury without mentioning the 2004 SRI, but, if Ford cross-examined him on the basis for his opinion, the SRI "would become part of the record for the jury to consider." Thus, the key damaging and otherwise inadmissible piece of evidence would be before the jury if Ford mounted any attack on Clauser about the basis for his conclusions. Based on the SRI and Clauser's experience with glass, the Third Circuit found that the proffered testimony was sufficiently reliable to be

admissible, and reversed the trial court's preclusion order.

### Implications

*Pineda* has implications for the use of experts and how rulings excluding expert evidence will be reviewed. This decision presents a possible way to circumvent the exclusion of evidence. Federal Rule of Evidence 703 allows experts to base their opinions on evidence that would not otherwise be admissible so long as it is "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject." FED. R. EVID. 703. Whereas Rule 703 has traditionally been limited to the use of textbooks and other reference materials generally accepted in an expert's field, *Pineda* holds that an expert witness may rely on evidence that would not otherwise be admissible and is also specific to the facts of the case. This could set up a dynamic of using experts to propound opinions based on prejudicial and inadmissible evidence calculating that cross-examination will then allow the jury to hear the evidence. In *Pineda*, the defense was left with a choice between allowing Clauser to testify unchallenged or cross-examining him and having to address the SRI in front of the jury.

Second, *Pineda* sets a relatively low standard for satisfying the reliability requirement for experts in failure to warn cases. The Federal Rules of Evidence set out a three factor test to guide the trial court when deciding whether to allow expert testimony: "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and

(3) the witness has applied the principles and methods reliably to the facts of the case." FED. R. EVID. 702. This analysis essentially reduces to two concerns, qualification and reliability. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993).

In its opinion, the district court discussed at length the methodology and basis for Clauser's opinion, noting that Clauser did not offer testimony about the extent to which other manufacturers in the industry included warnings, did not test the defective warning, and did not offer any alternative warning aside from the inadmissible 2004 SRI. The district court followed the Eighth Circuit's holding in *Jaurequi v. Carter Mfg. Co.*, 173 F.3d 1076, 1084 (8th Cir. 1999) that "an expert's failure to design and test a proposed warning and inability to point to contrary industry practice renders the reliability of his testimony 'extremely questionable.'"<sup>1</sup>

The Third Circuit did not address *Jaurequi*. The panel held that "the District Court focused too narrowly on Clauser's failure either to offer proposed alternative language for a warning or to test the effectiveness of alternative warnings" because Clauser's background knowledge of the stresses affecting glass "allowed him to recognize that exerting a force on one area of the rear liftgate glass before exerting a force on another area of the glass could lead to its shattering." This background knowledge was sufficient for him to address the safety concerns and warnings needed by an automotive technician replacing auto glass.

The court held that the reliability of Clauser's testimony was bolstered by his reliance on the 2004 SRI. Thus, the *Pineda* court held that an engineering expert who had knowledge of the stress characteristics of glass generally did not have to address the practices of the automobile industry or the automotive repair industry, and did not have to test alternative warnings in a failure to warn case. Instead, such an expert can rely solely on his experience and evidence that is otherwise inadmissible as prejudicial evidence of subsequent repairs when testifying that the manufacturer should have including safety warnings in its instruction manual used by technicians. Given that Rule 702 already favors admissibility, it will be more difficult to persuade the appellate courts to uphold a decision precluding expert testimony in post-*Pineda* failure to warn cases.

*Pineda* makes it easier for product liability plaintiffs to get a failure to warn case to a jury without having to hire a separate warnings expert. Furthermore, by allowing an expert to rely solely on inadmissible evidence that goes to the heart of the case, the court set up a potential "Catch-22" situation forcing the defense to choose between allowing the plaintiff's expert to testify unscathed, or addressing damaging and prejudicial evidence in front of the jury.

### ENDNOTE

<sup>1</sup> The district court quoted the summary of the *Jaurequi* holding found in *Milanowicz v. Raymond Corp.*, 148 F. Supp. 2d 525, 541 (D.N.J. 2001).

