

# COUNTERPOINT

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## PRODUCT LIABILITY UPDATE

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### SUBSEQUENT REMEDIAL MEASURES TAKEN BY A NON-PARTY ARE NOT PRECLUDED BY F.R.E 407

*Diehl v. Blaw-Knox*, 360 F.3d 426 (3d Cir. 2004)

In *Diehl v. Blaw-Knox*, 360 F.3d 426 (3d Cir. 2004), a unanimous panel reversed a jury verdict in favor of the defendant. The narrow issue involved was the admissibility of subsequent remedial measures taken by a non-party and Federal Rule of Evidence 407. The plaintiff, a construction worker, was injured when his leg was caught in a machine known as a road widener. He claimed that the machine was defective because it: (1) lacked an enclosure on the rear wheels; (2) had an inaudible back-up alarm that was located on the front of the machine; and (3) lacked proper warnings. After the accident, Diehl's employer installed a rear bumper/guard to enclose the rear tires, relocated the back-up alarm to the rear of the machine, and placed warning signs on it. *Id.* at 428-429.

Blaw-Knox, the manufacturer, filed a motion *in limine* to exclude testimony by the employer's mechanic who would have testified that these changes were made to prevent similar accidents. The District Court granted the motion *in limine* and denied plaintiff's motion to reconsider. The District Court relied on F.R.E. 407 and, alternatively, F.R.E. 403. In short, the District Court concluded that "Rule 407 by its terms is not limited to remedial activities taken by the defendant." *Id.* at 429. Alternatively, it concluded that admitting the mechanic's testimony regarding repairs made in 1999 would confuse the jury because the issue was whether or not the road widener was safe for its intended use when sold in 1970. *Id.*

The Third Circuit reversed and ordered a new trial relying on cases from five other circuits holding that non-party remedial measures are not covered by Federal Rule of Evidence 407. It rejected the District Judge's interpretation that emphasized that Rule 407 contained no exception for subsequent remedial measures by a non-party. Instead, the Third Circuit focused on the Advisory Committee's note that said that the rule "incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault." *Id.* at 430. The Third Circuit rationalized that the conventional doctrine in the Third Circuit did not exclude evidence of subsequent remedial measures by non-parties and supported its rationale by stressing that the Advisory Committee's reference to "an admission of fault" logically must refer to parties and not non-parties who cannot be responsible. *Id.*

Similarly, the Third Circuit found that a jury would not be confused by the "redesign" of the machine by the non-party employer and that the evidence is "probative of whether the road widener lacked a feature reasonably necessary to make the machine safe for its intended use, and because its relevance was not outweighed by other dangers . . ." *Id.* at 433. It found no support in the record for the District Court's contrary conclusion and, therefore, determined that it abused its discretion in excluding the employer's redesign. The feasibility of the remedial measures in question was not an issue. The court's explanation of the relevancy of the excluded evidence was tied to the dueling experts presented by the parties who argued the merits of a proposal to make the machine safer.

The court defined the issue explicitly, "First and foremost, the sole issue decided

by the jury was the road widener's defectiveness, and evidence of IA (the employer) redesign creates a permissible inference that the machine was defective." *Id.* To buttress this analysis, the court opined that the fact that the machine was redesigned by its owner to prevent "the very accident that is the subject of this lawsuit" tends to rebut the testimony of the defendant's expert and does so "with greater effectiveness than the theoretical testimony of Diehl's expert." *Id.*

For the defense practitioner, what a first glance might be considered to be a narrow evidentiary ruling, really amounts to a fundamental problem in how to present the case. While couched in practical terms, the Third Circuit's opinion does not provide a full explanation for the practical considerations that it deems to be self-evident. It does not explain why a redesign by an employer creates a permissible inference that the machine was not defective. There is no mention in the opinion on whether the employer's "redesigns" were tested, nor is there a comparison of "redesigns" to accident statistics. It arguably elevates a well-intentioned "shade tree" mechanic's modifications to the same level as government regulations and industry standards without any peer review or proof that the "design" is an effective safety device or proof that its absence was a cause of the accident.

The Third Circuit's interpretation of Rule 407 is an effort to give it a practical meaning. The court seems impressed that the employer and its mechanic were able to design a safety feature that the manufacturer did not include. It also seemed troubled that Blaw-Knox apparently redesigned the machine itself 13 years after the manufacture of the particular road widener involved in the case. In dictum, the Third Circuit instructed

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the District Court that evidence of Blaw-Knox redesigning the road widener to fully enclose the rear tires is not a subsequent remedial measure because the change occurred before the plaintiff's accident. It tempered that instruction by noting that the evidence still must satisfy Rule 401 (definition of relevant evidence) and Rule 403 (exclusion of relevant evidence on grounds of prejudice, confusion or waste of time). Perhaps this dictum is tacit recognition of the difficulty in drawing a line on a manufacturer's sale "duty to retrofit" and complicated recall issues.

### TESTIMONY OF PLAINTIFF'S EXPERTS, THOUGH QUALIFIED, WAS PROPERLY LIMITED WHERE THEIR TESTIMONY WAS HELD TO BE UNRELIABLE

*Calhoun v. Yamaha Motor Corporation, U.S.A.*, 350 F.3d 316 (3d Cir. 2003)

In *Calhoun v. Yamaha Motor Corporation, U.S.A.*, 350 F.3d 316 (3d Cir. 2003), the Third Circuit affirmed the trial court's decision to limit the proposed testimony of plaintiffs' experts.

Plaintiff's decedent, Natalie Calhoun, was tragically killed while riding a Yamaha Wavejammer WJ500SG jet ski while on vacation with her friend, Melanie Fox, and Fox's family at the Palmas del Mar resort in Puerto Rico. Fox and Calhoun rented the jet ski from Samuel Roffe, a beach concessionaire at the resort. The jet ski carried a warning that the minimum recommended age for riding was fourteen. At the time of the accident, Calhoun was twelve, and Fox was thirteen.

Initially Roffe gave Fox ten minutes of instruction while Calhoun was present. After riding for 30 minutes, Fox stated that riding jet ski was "fun" and "easy". When it came time for Calhoun to ride, she was initially hesitant before deciding to ride. Roffe gave her the same instructions he had given Fox. When Roffe asked if Calhoun was the requisite fourteen years of age, she responded affirmatively.

Calhoun struggled with the jet ski and fell off while attempting to turn. Fox's mother, who was watching, urged Roffe to bring her back. Roffe rode out on another jet ski, but Calhoun had remounted and assured him that she was

okay. After restarting her jet ski, Calhoun traveled across the lagoon at high speed and crashed into an anchored boat, sustaining fatal head and neck injuries.

Calhoun's parents brought suit against Yamaha asserting several grounds for recovery, including strict liability, negligence, and breach of implied warranties of merchantability and fitness for a particular purpose. In addition to alleging inadequate warnings, plaintiffs' case focused on an alleged defect with the design of the jet ski's accelerating mechanism, which is referred to as a "squeeze finger throttle" and resembles the braking mechanism on a bicycle. After a protracted procedural history that included two prior appeals to the Third Circuit, and one to the U.S. Supreme Court, the case went to trial, where a jury returned a defense verdict.

The primary issue on appeal was the District Court's limitation of the testimony of three expert witnesses offered by the plaintiffs. After extensive Daubert hearings, the court allowed all three to testify, but limited the extent of their testimony. Under F.R.E. 702, the focus is on the "trilogy of restrictions on expert testimony: qualification, reliability, and fit." 350 F.3 at 321 (quoting *Schneider v. Fried*, 320 F.3d 396, 405 (3d Cir. 2003)). As explained by the court, the witness must be qualified as an expert, his testimony must be reliable, and his testimony must "fit," meaning it is "relevant for the purposes of the case and must assist the trier of fact." *Id.* Here, the appeal centered on whether the experts' testimony was reliable.

Plaintiffs offered Dr. Edward W. Karnes as a human factors expert who testified on the design of the throttle and the warnings on the jet ski. The District Court allowed Dr. Karnes to testify that because of the jet ski throttle's similarity to a bicycle brake, a child in a stress situation would naturally squeeze the mechanism in order to stop. Dr. Karnes was also allowed to testify on how to design an effective warning, and that the jet ski's warning deviated from proper criteria, which made it "unreasonably dangerous and defective, especially for youthful riders." *Id.* at 322. However the District Court precluded Dr. Karnes from testifying that as a "stress reaction," a person would have a tendency to clench her hand, which would inadvertently activate the throttle. The District

Court also refused to allow Karnes to testify that the warning on the jet ski should have restricted operators to those over sixteen years of age. *Id.*

Although Dr. Karnes was found to be qualified as an expert because of his extensive experience in general design and operations, the District Court found that his opinion regarding the tendency to clench hands as a "stress reaction" was speculative and unreliable since there was no literature confirming his theory and no demonstrative tests. The Third Circuit held that the District Court did not abuse its discretion in this regard. *Id.*

Despite Dr. Karnes' general knowledge in the fields of psychology and human factors engineering, the Third Circuit held that his opinion that the warnings should have restricted operators of the jet ski to age sixteen was properly precluded because he "did not have anything to say to support that number rather than a number higher or lower." *Id.*

Plaintiff's also offered Albert Bruton as an expert. Bruton had served 16 years as a lieutenant with San Diego's Marine Safety Services and had extensive experience with jet skis. He also had some limited experience designing warning signs for public use. Bruton had also conducted "aquatic related accident" investigations, but had no education in training in engineering, psychology or human factors.

Although Bruton was allowed to testify about various accelerating mechanisms on different brands of jet skis, he was not permitted to testify as to which kind might be safer. The Third Circuit held that the District Court did not abuse its discretion in limiting Bruton's testimony since he had no education or experience in the product design of jet skis or accelerating mechanisms. Nor did he provide any scientific, statistical, or other evidence evaluating the relative safety of the various accelerating mechanisms. *Id.* at 323.

Like Dr. Karnes, Bruton was also precluded from testifying that the warning on the jet ski should have been designed to limit riders to those over sixteen. The Third Circuit agreed that such testimony was properly precluded since Bruton offered no support for his beliefs. *Id.*

Plaintiffs offered the testimony of Dr. Robert A. Warren that the accelerating

mechanism was unsafe because it resembled a bicycle brake and that the warnings were inadequate. Dr. Warren held a bachelor's degree in naval architecture and marine engineering, along with higher degrees in other fields. The court found him generally qualified as an expert but restricted the specifics of his testimony.

Although Dr. Warren was allowed to describe the squeeze finger throttle, he lacked the requisite expertise to testify that it was unsafe due to its similarity to a bicycle handle. At the time of his report, Dr. Warren had never even ridden a jet ski. He never examined diagrams of different throttles, and his asserted knowledge of possible alternatives was based on his familiarity with outboard motors which employ a twist grip mechanism. Finally, Dr. Warren conducted no tests to evaluate the merits of proposed alternative designs. *Id.* at 324.

Regarding the warnings, the Third Circuit once again held that the District Court did not abuse its discretion in limiting Dr. Warren's testimony since there was no basis for his opinions in that regard, and he lacked the requisite expertise. *Id.*

The Third Circuit also rejected two other grounds for appeal. First, plaintiffs argued that the District Court erred in granting defendants' motion for judgment as a matter of law on the negligence claims. The Third Circuit held that the focus at trial had been on the strict liability claims, and the plaintiffs had offered only cursory theories of Yamaha's alleged negligence. *Id.*

Finally, the plaintiffs argued that the District Court erred in submitting to the jury the possible negligence of Roffe or Palmas del Mar, neither of which were parties to the lawsuit. The plaintiffs argued that the rules of joint and several liability should govern, and the possible negligence of non-parties should not be considered.

The Third Circuit held that the District Court did not err, and that any error would have been harmless since the jury found, as a threshold matter, that the design of the Yamaha jet ski was not defective. As explained by the court, the possible negligence of either Roffe or Palmas del Mar would only be considered upon a finding that the jet ski was defective. Without such a finding, it never reached the possible negligence of Roffe or Palmas del Mar. *Id.* at 325.

Citing *McDermott, Inc. v. AmClyde*, 511 U.S. 202 (1994), the Third Circuit held that the District Court correctly sought a determination of the relative fault of the parties in the event that the jet ski was determined to be defective. In *McDermott*, the U.S. Supreme Court explained that joint and severally liability may result in a defendant paying more than its apportioned share of liability where the plaintiff is precluded from recovering against another defendant because of factors beyond his control, such as the insolvency of the other defendant.

### HEEDING PRESUMPTION DOES NOT APPLY IN TOBACCO CASES

*Viguers v. Philip Morris USA, Inc.*, 837 A.2d 534 (Pa. Super. 2003)

In *Viguers v. Philip Morris USA, Inc.*, 837 A.2d 534 (Pa. Super. 2003), the Superior Court affirmed summary judgment in favor of a tobacco manufacturer in a claim brought by the husband of a woman who died of lung cancer caused by cigarette smoking. Plaintiff's decedent, Aurelia Viguers, smoked cigarettes from 1957 until 1985 or 1987. She died of lung cancer in 2000. Her husband, Ralph Viguers, asserted claims against Philip Morris in strict liability, negligence, and conspiracy, all based on the alleged defectiveness of the cigarettes.

The primary issue on appeal was whether the so-called "heeding presumption" was applicable in a tobacco case. Aurelia Viguers died before providing any testimony that she would have heeded a warning on the cigarettes had it been provided by Philip Morris. Without such testimony, the Superior Court held that a plaintiff cannot establish causation on a failure to warn claim. 837 A.2d at 537. Pennsylvania courts have previously applied the heeding presumption to asbestos cases. As the court explained:

in cases where warnings or instructions are required to make a product non-defective and a warning has not been given, the plaintiff should be afforded the use of the presumption that he or she would have followed an adequate warning, and that the defendant, in order to rebut that presumption, must produce evidence that such a warning would not have been heeded.

*Id.* (quoting *Coward v. Owens-Corning Fiberglas Corp.*, 729 A.2d 614, 621 (Pa. Super. 1999)).

In refusing to apply the heeding presumption to tobacco cases, the Superior Court traced the development of the presumption and its applicability to asbestos cases. The court explained that the rationale for the presumption lies in comment j to the RESTATEMENT (SECOND) OF TORTS § 402A, which states that "[w]here a warning is given, the seller may reasonably assume that it will be read and heeded." *Id.* at 537-538. The heeding presumption thus becomes an evidentiary advantage to the defense. Although the Restatement does not provide a corollary advantage to the plaintiff where no warning has been given, courts have "engrafted such an advantage onto the Restatement language" as a matter of public policy. *Id.* at 538.

Thus far, the only Pennsylvania cases to employ the heeding presumption are those involving work-related exposure to asbestos. Plaintiffs forced, as a condition of their employment, to work in an environment where asbestos was present are entitled to an evidentiary presumption in their favor when no or inadequate warnings are given. The public policy justification for the heeding presumption does not apply, however, where a plaintiff is not forced by his employment to be exposed to a dangerous product. *Id.* Thus, the Superior Court refused to apply the heeding presumption in a tobacco case involving the voluntary choice of a smoker to begin and continue smoking.

The court also stated that even if such a presumption was applicable in tobacco cases, Philip Morris had produced ample evidence to rebut the presumption. Specifically, the record contained evidence that Aurelia Viguers continued to smoke long after federally-mandated warnings appeared on cigarette packages in 1969.<sup>1</sup> Having rebutted the presumption, the burden would then have shifted back to the plaintiff to establish that the warnings would have changed Aurelia's behavior. The court affirmed the trial court's decision that Viguers had failed to produce evidence to meet this burden as a matter of law.

The court then addressed the plaintiff's remaining issues on appeal. It affirmed the striking of an affidavit from plaintiff's expert, Dr. Allan Feingold. While acknowledging Pennsylvania's liberal standard for admitting expert testimony, the court held that Feingold, as a medical

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doctor with extensive experience in treating smokers during his career as a pulmonary specialist, was not qualified to render an opinion regarding the allegedly defective design of cigarettes and the feasibility of safer alternatives. *Id.* at 540. In fact, Viguers' expert pathologist testified that cigarette design is a field that is far removed from medicine, requiring knowledge of "tobacco processing, paper design, filters, aerodynamics, and organic chemistry." *Id.* at 540, n.5.

The court also rejected Viguers' claim for conspiracy to commit fraud, which consists of six elements:

- (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the representation; and (6) the resulting injury was proximately caused by the reliance.

*Id.* at 540. Because Viguers could not make out a case in negligence or strict liability in that he was unable to establish that the failure or a defectively designed cigarette caused Aurelia's death, he was unable to establish two necessary elements to make out a claim for fraud, justifiable reliance and causation. *Id.*

Finally, the court rejected plaintiff's claim that the trial court erred in dismissing the entire complaint because there was still a claim for "negligent failure to test." The court held that "negligent failure to test" is not a viable cause of action in Pennsylvania. To the contrary, a failure to test claim is nothing more than a routine products liability case, and that plaintiff must still prove that the product was defectively designed. *Id.* (citing *Oddi v. Ford Motor Co.*, 234 F.3d 136, 143-144 (3d Cir. 2000)). Any duty to test defendant's cigarettes would be subsumed within the defective design and manufacture claims since it was the flawed design that allegedly injured the plaintiff, not the failure to test. *Id.* (citing *Shires v. Celotex Corp.*, 1988 WL 1001970, \*2 (E.D. Pa. 1988)).<sup>2</sup>

## PLAINTIFF'S NEGLIGENCE CLAIMS AGAINST MANUFACTURER NOT PRECLUDED WHERE JURY REJECTS STRICT LIABILITY CLAIM, FINDING THAT PRODUCT WAS NOT DEFECTIVE

*Moroney v. General Motors Corporation*, 2004 PA Super 104, 2004 WL 739684 (Pa. Super. 2004)

In *Moroney v. General Motors Corporation*, 2004 PA Super 104, 2004 WL 739684, the Superior Court held that plaintiffs' negligence claims against a manufacturer survived even though a jury had found that the product was not defective and returned a defense verdict on plaintiffs' strict liability claims.

Plaintiff, Maureen Moroney, was driving through a Kmart parking lot, intending to shop at that store. While doing so, she noticed defendant, Chester Vaxter, Jr., walking through the lot. Believing Vaxter to be a potential threat to her, Moroney parked close to the entrance, far from him. Moroney was driving a 1995 Pontiac Grand Am, manufactured by defendant, GM. The vehicle was designed that when the ignition was turned off, the vehicle's door locks automatically opened. After parking her car, Moroney was momentarily distracted. Vaxter approached her vehicle, opened the driver's side door, and demanded the car keys. He then violently assaulted Moroney. The assault was disrupted by Kmart employees, and Vaxter fled. He was subsequently arrested. *Id.* at 2, \*1.

Moroney and her husband brought suit against GM alleging negligence and strict liability, against Kmart for negligence, and against Vaxter for assault and battery. Kmart was dismissed by summary judgment. At trial the jury found Vaxter liable for assault and battery and awarded Moroney \$1.8 million and her husband \$360,000 in damages. However, the jury found in favor of GM, responding in the negative to an interrogatory asking whether plaintiffs proved the vehicle was defectively designed because of the inclusion of the automatic unlock feature. *Id.* at 3, \*1.

Plaintiffs' primary issue on appeal was the viability of their negligence claim. Specifically, plaintiffs argued that the trial court erred in concluding that they could not present a separate case of negligence to the jury if the jury found no defect and that the trial court erred in refusing to charge the jury on negli-

gence, holding that the negligence claim was subsumed within the strict liability cause of action. *Id.* at 14, \*4.

The trial court relied upon language in *Dambacher by Dambacher v. Mallis*, 485 A.2d 408, 424 (Pa. Super. 1984), which stated:

in a negligence case the plaintiff must prove, not only that the product was defective and that the defect caused his injury, but in addition, that in manufacturing or supplying the product the defendant failed to exercise due care.

This language was subsequently cited in *Fitzpatrick v. Madonna*, 623 A.2d 322, 326 (Pa. Super. 1993), where the court held there could be no liability for negligence because the product at issue was not defective. *Id.* at 15, \*4.

Relying on the recent Supreme Court decision in *Phillips v. Cricket Lighters*, 841 A.2d 1000, the Superior Court declined to follow *Dambacher* and *Fitzpatrick*. In *Phillips*, a five-year old child inadvertently started a fire with a butane cigarette lighter that had no child resistant features. The Supreme Court held that the trial court had properly granted summary judgment on plaintiffs' strict liability design defect claim because the child was not an intended user of the lighter. However, the *Phillips* Court rejected the argument that plaintiffs' negligence claim should also fail merely because summary judgment was granted on their strict liability claim.

This reasoning is deeply flawed and we decline to adopt it. As we discussed supra, negligence and strict liability are distinct legal theories. Strict liability examines the product itself, and sternly eschews considerations of the reasonableness of the conduct of the manufacturer. In contrast, the negligence cause of action revolves around an examination of the conduct of the defendant. Were we to dispose of the negligence claim merely by an examination of the product, without inquiring into the reasonableness of the manufacturer's conduct in creating and distributing such a product, we would be divorcing our analysis from the elements of the tort. Thus, as the elements of the causes of actions are quite distinct, it would be illogical for us to dispose of Appellee's negligence claim based solely on our disposition of her strict liability claim.

2004 PA Super 104, 17, 2004 WL 739684, \*5 (quoting *Phillips*, 841 A.2d at 1008). (citations omitted).

The Superior Court explained that while the jury concluded that the locking mechanism was not defective in design or manufacture, they should have been able to consider whether GM was negligent by unreasonably creating a locking system where the door locks automatically unlocked whenever the ignition was turned off. *Id.* at 18, \*5. Accordingly, the court remanded for a new trial on the plaintiffs' negligence claims.

On all other issues on appeal, the Superior Court affirmed the trial court. The court found no abuse of discretion in allowing GM's expert, an electrical engineer to testify on the general workings of the locks and how the locks might impact on security issues even though the expert was not testifying as a security expert. *Id.* at 9, \*2. The court also found no abuse of discretion in allowing evidence of the non-existence of prior claims or lawsuits relating to the door locking mechanism. A witness testified that the locks had been put in most car lines since 1994 and had been used in approximately 37 to 38 million vehicles. Because the witness did not research the matter himself, a hearsay objection would have been sustained had one been made. None was, however, and the witness was cross-examined regarding his lack of knowledge concerning the collection of the data. The court concluded that the jury was free to accept or reject the expert's testimony. *Id.* at 11, \*3.

The court also found no error in the trial court's refusal to allow plaintiffs' failure to warn claim to go to the jury since plaintiff failed to establish that the absence or inadequacy of any warnings was the legal cause of her injuries. Moroney knew that the door locks unlocked when the ignition was turned off, she knew that the doors could be re-locked manually or automatically, and she knew that Vaxter was in the parking lot and was someone to be avoided. Thus, the court concluded that there was no evidence that warnings regarding the locks would have prevented the attack on Moroney. *Id.* at 13, \*3.

For the defense practitioner, *Moroney* stands for the proposition that a manufacturer will not always escape liability merely because its product has been found not defective since a plaintiff's negligence claims will not always be

automatically subsumed by the strict liability claims. While this opinion, at first glance, appears to further confuse the distinction between strict liability and negligence claims, it may be helpful to view this case as being particularly fact sensitive. Here, Moroney was not arguing that the automatic door locks were negligently designed or manufactured. In fact, the door locks worked precisely as intended. Instead, it appears that she was simply claiming that GM was negligent for incorporating such a feature into the Grand Am in the first place. The factually-sensitive nature of plaintiff's claims may make it possible to distinguish Moroney from other cases where the strict liability and negligence claims are more closely related.

**PLAINTIFF NOT ENTITLED TO ADVERSE INFERENCE WHERE MANUFACTURER OFFERS SATISFACTORY EXPLANATION FOR LOSS OF ALLEGEDLY DEFECTIVE PRODUCT; JURY PROPERLY CHARGED IN CRASHWORTHINESS CASE**

*Raskin v. Ford Motor Co.*, 837 A.2d 518 (Pa. Super. 2003)

In *Raskin v. Ford Motor Co.*, 837 A.2d 518 (Pa. Super. 2003), plaintiff was driving a Ford vehicle when she was rear ended while stopped at a red light. She brought suit against Ford alleging that the vehicle's seat and/or restraint system was defective and resulted in enhanced injuries to her. The jury returned a verdict in favor of Ford, and plaintiff appealed, raising several issues.

Plaintiff asserted that the trial court erred in refusing to attach an adverse inference to Ford's failure to produce the original driver's seat. Ford purchased the vehicle from a third party prior to trial. At trial, Ford informed the court that seat had gone missing from the courtroom following an earlier trial of this matter. The court accepted this explanation and refused to attach an adverse inference. The general rule for an adverse inference is that

where evidence which would properly be part of a case is within the control of the party in whose interest it would naturally be to produce it, and, without satisfactory explanation he fails to do so, the jury may draw an inference that it would be unfavorable to him.

*Id.* at 520-521 (quoting *Clark v. Philadelphia College of Osteopathic Med.*, 693 A.2d, 202, 204 (Pa. Super. 1997)). The Superior Court held that a principal requirement of the adverse inference is that the party controlling the evidence fails to come up with a satisfactory explanation for its disappearance. Here, however, Ford had an explanation that the trial court found satisfactory, and the Superior Court found no abuse of discretion in that determination. *Id.* at 521. In a footnote, the court also noted that plaintiff's father owned the vehicle for five years before selling it to the third party from whom it was subsequently purchased by Ford. *Id.*

Plaintiff then argued that the trial court erred in permitting the dismissal from the case of other drivers involved in the accident, and that she should have been permitted to refer to Ford's dismissal of its cross-claims against the other drivers and to Ford's failure to join as defendants her treating physicians. Thus, she claimed that the defense verdict was predicated on jurors' reluctance to place the entire blame for the accident on Ford. The Superior Court rejected these arguments as based on mere speculation with no evidence to support them. Moreover, the jury found no defect in the seat or restraint system, and the existence of any defect was wholly independent of any actions by other drivers or treating physicians. *Id.*

Plaintiff then argued that the court erred in charging the jury as follows:

When an explanation consistent with the existence of a defect is as probable as an explanation inconsistent with the defect, then the plaintiff has not met her burden of proof. In that case, your verdict must be for Ford Motor Company.

*Id.* at 522. This language is nearly identical to that in *Lonon v. Pep Boys*, 538 A.2d 22, 26 (Pa. Super. 1988). Plaintiff argued that Ford did not provide an alternative explanation for the accident in the case, and thus should not have been afforded the benefit of this charge. The Superior Court disagreed, holding that Ford did not provide an explanation for the initial accident since it was not defending itself from that accident. Instead, the case against Ford stemmed from plaintiff's allegations that she

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sustained additional enhanced injuries as a result of a defect in the restraint system. For these “post-collision” injuries, Ford did provide an alternative explanation. Ford’s expert, a biomechanical engineer, testified that “post-collision” injuries could be sustained even with a properly functioning seat and seat belt system. The expert further testified that given the speed and angle of the impact, it wouldn’t have made a difference whether plaintiff wore a seat belt or not. *Id.*

Finally, plaintiff argued that the trial court erred in charging the jury on both the malfunction theory and the crashworthiness doctrine, rather than limiting its instructions to the malfunction theory. The Superior Court held that these doctrines are not mutually exclusive, nor are they alternative theories of recovery in a products liability case. The malfunction theory is simply an evidentiary tool whereby a plaintiff may prove a defect without direct evidence. This theory allows a plaintiff to prove defect by establishing evidence of a malfunction, absence of abnormal use, and absence of reasonable secondary causes. *Id.* at 523.

Proof of a defect is one element of the crashworthiness doctrine. This doctrine extends the liability of manufacturers to “situations in which the defect did not cause the accident or initial impact, but rather increased the severity of the injury of that which would have occurred absent the design defect.” *Id.* (quoting *Colville v. Crown Equip. Corp.*, 809 A.2d 916, 922 (Pa. Super. 2002)).

Despite plaintiff’s claim that the jury may have been confused by instructions on the crashworthiness doctrine, she failed to point to any specific instruction that was inaccurate or failed to reflect the case she was trying to prove. In reviewing plaintiff’s case from opening to closing statement, the Court found that she presented a crashworthiness case using the malfunction doctrine in an attempt to prove the defect. Thus, the Court found no error in either instruction, which reflected an accurate statement of the applicable law. *Id.* at 525.

## ASBESTOS MANUFACTURER ENTITLED TO SUMMARY JUDGMENT WHERE PLAINTIFF HAS NOT SUFFERED FROM A COMPENSABLE INJURY

*Ryan v. Asbestos Corp. Ltd.*, 829 A.2d 686 (Pa. Super. 2003)

In *Ryan v. Asbestos Corp. Ltd.*, 829 A.2d 686 (Pa. Super. 2003), the Superior Court affirmed the trial court’s granting of summary judgment in favor of the manufacturer, holding that plaintiff had failed to demonstrate that plaintiff’s decedent suffered from a compensable injury associated with an asbestos-related condition.

Plaintiff alleged that the decedent, Robert Ryan, had contracted esophageal cancer and asbestosis from exposure to defendants’ asbestos products. After Ryan died of esophageal cancer, plaintiff withdrew that claim and proceeded solely on the asbestosis claim. Prior to trial, the defendant filed a motion for summary judgment contending that plaintiff had failed to establish a compensable injury. This motion was granted by the trial court.

Under Pennsylvania law damages may only be awarded in an asbestos case for:

a compensable injury where a plaintiff is diagnosed with an asbestos-related condition and has suffered a discernable physical symptom, a functional impairment or disability from said asbestos exposure.

*Id.* at 688. (citing *Giffear v. Johns-Manville Corp.*, 632 A.2d 880 (Pa. Super. 1993), *aff’d sub nom, Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996)). Plaintiff argued that Ryan suffered from shortness of breath, and that while her expert may not have specifically used those “magic words,” the expert report clearly indicated that Ryan suffered from restricted breathing. The defendant argued that plaintiff’s expert report did not reveal that Ryan suffered from any shortness of breath as a result of the alleged asbestosis. Consequently, plaintiff had failed to establish a compensable injury under *Giffear. Id.*

In affirming the trial court, the Superior Court agreed with the defense argument, holding that there was no evidence that Ryan’s shortness of breath was causally related to a diagnosis of asbestosis. *Id.* at 689.

It is common knowledge that breathlessness is also associated with any number of non-asbestos-related ailments, including lung cancer, excessive cigarette smoking, heart disease, obesity, asthma, emphysema and allergic reactions.

*Id.* (quoting *Taylor v. Owens-Corning Fiberglas Corp.*, 666 A.2d 681, 687, n. 2 (Pa. Super. 1995)). The court determined that the report of plaintiff’s expert did not assert or conclude that Ryan suffered from shortness of breath due to asbestosis. *Id.* at 689. “Pleural thickening, absent disabling consequences or manifest physical symptoms, is a non-compensable injury and is therefore not a cognizable claim.” *Id.* at 688 (citing *Giffear*, 632 A.2d at 884).

In a concurring opinion, Judge Klein noted that plaintiff’s expert was a pathologist, not a pulmonary specialist. In a “standard case,” the pulmonary physician could make a diagnosis of parenchymal asbestosis by way of x-ray and pulmonary function test, and such a diagnosis would carry the presumption that the disease was symptomatic. *Id.* at 689. Here, however, it was clear to Judge Klein that there was major shortness of breath from the metastatic cancerous lung tumor which resulted from cancer of the esophagus. Notably, there was no report from plaintiff’s expert on tests done prior to the lung cancer. *Id.* at 689. Although there was pathological evidence of “interstitial fibrosis with ‘honeycombing’ and scattered asbestos bodies,” which was typical of parenchymal asbestosis, it was not clear whether the pathological finding was due to symptoms from asbestos exposure or symptoms from cancer. *Id.*

## ENDNOTES

<sup>1</sup>Aurelia Viguers’ failure to warn claim was limited to Philip Morris’ failure to warn before 1969 only, since any claims of failure to warn beyond that date would be preempted by Section 1334(b) of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1341. *Id.* at 536, n.1.

<sup>2</sup>This reasoning may be called into question based on *Phillips v. Cricket Lighters*, 841 A.2d 1000 (Pa. 2003) and *Moroney v. General Motors Corporation*, 2004 PA Super 104.

