

## FALL 2017 NEWLETTER

### PRODUCTS LIABILITY UPDATE

By Rocky Little

1. ***Richard H. Fisher v. Kawasaki Heavy Industries, Ltd., Kawasaki Motors, Corp., USA Kawasaki Motors Manufacturing Corp., USA, No. 13-15-00364-CV (Court of Appeals, Corpus-Christi-Edinburg), 2017 WL 2817662, June 29, 2017***

This products liability case is based on personal injuries involving a Kawasaki Mule utility vehicle. In 2010, Plaintiff, Richard Fisher, suffered a broken leg and torn meniscus in his knee when he was "flipped up" and off the cargo bed of the Mule onto the ground. As a result of his injuries, he failed a Coast Guard-mandated physical exam resulting in the revocation of his harbor pilot's license. Consequently he lost his job as a licensed harbor pilot at the Port of Houston with an annual salary of slightly more than \$500,000. Fisher offered expert testimony that administrative sedentary jobs for which was qualified paid about \$48,000-\$60,000. Consequently, had he worked until age 68, the mandatory retirement age for harbor pilots, his diminished earnings capacity was \$3,626,009.

Following the accident at his ranch, while still at the scene, Plaintiff, Fisher, called a neighbor, Lucich, Sr. and allegedly told Lucich, Sr. that the cargo bed of the Mule flipped because he did not latch it. Because Lucich, Sr. was at work when he received the call from Fisher, Lucich Sr. called his son, Lucich, Jr. and asked him to check on Fisher. Lunch, Jr. testified that upon arrival, Mr. Fisher told him "I forgot to latch the goddang thing." Fisher denied making this statement, and testified that he had no idea that the cargo bed was unlatched, and had no reason to believe that it was unlatched.

The Mule's cargo bed had a dump feature that allowed the front of the bed to be raised and the back of the bed to be lowered to "dump" cargo off the back of the bed. The dump feature was secured by a latch located under the passenger side of the Mule's bench seat. Plaintiff contended that the latching system was defectively designed. To support this contention, Plaintiff presented testimony from a professional engineer that the over-the-center latching system did not notify the user whether the latching system was engaged when the bench seat was down. Plaintiff's testifying expert also stated that the majority of other similar utility vehicles utilized a slam latch system similar to ones found on an automobile hood or door, and that the slam latch system is a cost-effective design to alert the user if the latch is not engaged.

Plaintiff, Fisher, played the video deposition of Kawasaki's corporate representative, Kaku, who was one of the engineers in charge of designing the Mule's latch system. Kaku testified that all of the Mule models for the past 22 years had the same over-the-center latch system, and there were no other reports complaining of this latch system. Kaku also stated that while the alternative slam latch system was not cost-prohibitive, it also was not necessary.

Plaintiff also presented the expert testimony of a Ph.D. psychologist, Cunitz, who specializes in human factors. Dr. Cunitz testified that the Mule "looks stable" despite being

unlatched, and that the best way to warn users that the latch was disengaged was to have the bed pop up. He likewise testified that the Mule created a tipping hazard because the latch was not obvious or conspicuous for the user to view.

After plaintiff's case in chief, Kawasaki presented testimony of two expert witnesses. The first expert, Olivas was a Ph.D. engineer and former NASA astronaut. Dr. Olivas testified that the Mule's over-the-center latch is visible to any operator, and the user could access it without raising the bench seat. The second expert, Kevin Breen, was the former chair of the Society of Automotive Engineers' Special Purpose Vehicle Committee, which developed standards for vehicles such as the Mule. Breen testified that although more than 66,000 Mules had been sold, he was unable to find any record of a prior incident such as the Plaintiff's. He also testified that the Mule's latching system did not cause or contribute to Fisher's accident and injuries.

Following an eight-day trial, the jury returned a verdict finding no design defects or any defects in the warnings or instructions on the Mule, and the trial court rendered a take-nothing judgment in favor of Kawasaki. Consequently, Fisher appealed on the basis that the trial court committed reversible error by admitting various pieces of evidence. The Court Of Appeals noted that evidentiary rulings are committed to the trial court's sound discretion, and that it would uphold a trial court's evidentiary ruling if there is any legitimate basis for the ruling. Also, even if the admission of evidence is erroneous, the court of appeals would not reverse the trial court's judgment unless the error probably caused the rendition of an improper judgment. After analyzing the admission of multiple pieces of evidence, the court decided that they either were properly admitted or probably did not cause the rendition of an improper judgment. As a result, the take-nothing judgment in favor of the defendant, Kawasaki, was affirmed.