

# **2018 YEAR IN REVIEW**

## **SIGNIFICANT DECISIONS IN 2018**

### **PRODUCTS LIABILITY**

**By Rocky Little**

*Medina v Michelin North America, Inc., No. 05-16-00794-CV* (Tex. App. – Dallas, January 29, 2018)

This suit alleging serious personal injuries is based on a one-vehicle roll-over accident, which was allegedly caused by the failure of an eleven-year-old tire which suddenly burst. Plaintiffs brought suit based on products liability, negligence, and post-sale duty to warn. The Medinas also sought to recover punitive damages based on gross negligence. Defendant, Michelin, moved for traditional and no-evidence summary judgment which the trial court granted. In order to prevail in a products liability cause of action, one must prove a design defect, and/or a manufacturing defect, and/or a marketing defect. To support their claims, the Medinas retained Troy Cottles, a forensic tire failure analyst and tire design and manufacturing consultant. Cottles testified that the tire's design and manufacture was faulty. Although Michelin moved to exclude Cottles' testimony, that motion was denied. Because Cottles provided more than a scintilla of evidence to support plaintiffs' claims for design defect, manufacturing defect, and negligence, the Dallas Court Of Appeals held that summary judgment in favor of Michelin on these grounds was improper.

The Court Of Appeals next addressed plaintiff's marketing defect claim that the tire at issue should have had a warning that it was unsafe after it was ten years old. Michelin asserted that because the Medinas failed to designate a warnings expert, there was no evidence to support any element of their marketing defect claim. The court, however, noted that an expert opinion is not necessary to prove a marketing defect claim. Additionally, in its no-evidence motion for summary judgment, Michelin failed to specifically identify which of the essential elements of a marketing defect claim it was challenging, which was necessary to support summary judgment on any of these grounds.

To prevail on a marketing defect claim, the plaintiff must establish, among other things, the alleged failure to warn and/or instruct must constitute a causative nexus in the product user's injury. To prove that the failure to warn caused plaintiffs' injuries, plaintiffs are aided by a "rebuttable presumption" that proper warnings would have been heeded. Plaintiffs brought forward more than a scintilla of evidence that a warning that the tire was unsafe after it was ten-years old would have been heeded. Consequently, traditional summary judgment on this basis was improper.

The Court Of Appeals also addressed the trial court's granting of Michelin's motion for summary judgment denying plaintiffs punitive damages claim based on gross negligence. Gross negligence is the breach of duty involving an extreme degree of risk, considering the probability and magnitude of the potential harm to others (an objective element) when the actor has actual

awareness of the risk involved but nevertheless proceeds in conscious indifference to the rights, safety, or welfare of others (subjective element). To defeat summary judgment on their punitive damages claims, plaintiffs were required to put forth more than a scintilla of evidence that (1) the tire in question posed an extreme degree of risk and (2) that Michelin had actual subjective awareness of the extreme degree of risk that the tire posed but nevertheless proceeded with conscious indifference to the consequence of its acts. The extreme degree of risk prong is not satisfied by a remote possibility of injury or even a high probability of minor harm, but rather the likelihood of serious injury to the plaintiff. In this case, plaintiffs failed to produce evidence to support their contention that Michelin had knowledge that its choice of a certain design over another design or failing to inform consumers of risks of using tires past a certain age resulted in an extreme degree of risk, and consciously chose to disregard that extreme risk.

The final issue addressed is whether Michelin had a “Post-Sale Duty To Warn” separate and distinct from any pre-sale duty to warn it may have had. The appellate court noted that Texas has not recognized a general duty to warn of product defects that were not discovered until after manufacture and sale. Plaintiffs argued that because Michelin knew of tire defects before the tire was sold, that it had a continuing duty to warn after sale. Because the Court Of Appeals could not find any legal precedent to support a continuing duty to warn after sale, it affirmed the trial court’s summary judgment on this issue in favor of Michelin.

***In Re: Toyota Motor Sales, U.S.A., Inc. and Toyota Motor Corporation, No. 05-18-00582-CV (Tex.App. – Dallas, June 14, 2018)***

Benjamin and Kristi Reavis were traveling in the front seats of their 2002 Lexus ES300 when it was rear-ended by another vehicle. The Reavises contend that upon impact, the front seats failed and the seatbacks collapsed into the back seat striking their minor children resulting in skull fractures and traumatic brain injuries, among other severe and permanent injuries.

As part of the discovery process, the trial court ordered Toyota to diligently search for and produce documents relating to seatback failures, restraint systems, and vehicle crash-worthiness in rear collisions for the "relevant class of vehicles". The relevant class of vehicles was defined as 1997-2001 model year U.S.-bound Lexus ES300, 2002-2006 model year U.S.-bound Lexus ES300/ES330, and 2007-2012 model year U.S.-bound Lexus ES350. Also as part of the discovery process, the trial court ordered Toyota to provide a listing, e.g. a "table of contents" in English that is sufficient to identify the folders and sub-folders within specified databases, and a copy of the index, ledger, bibliography, or other compilation of information from which the papers that are maintained in Toyota’s technical library can be identified. Toyota was also ordered to identify all engineers who have had responsibility at any time since 1995 for designing or testing vehicles or seats.

Toyota was likewise ordered to conduct additional searches in accordance with a protocol that requires the parties to work together in good faith to formulate appropriate search queries, with a presumption that the Reavises’ proposed formulation would be used if it is reasonably calculated to lead to the discovery of admissible evidence concerning seat systems and/or restraint systems’ design or crashworthiness. The protocol also provides that Toyota produce documentation showing the search queries that were performed and describe the results

generated in such a way as to enable the Reavises to determine whether search modifications should be made. The protocol allows the Reavises to review the responsive documents after Toyota determines whether documents should be withheld based on a privilege, and allows the parties to seek an order from the trial court expanding or limiting the scope of the searches.

In response, Toyota filed with the Dallas Court Of Appeals (“Court”) a Petition for Writ of Mandamus claiming the trial court’s discovery order improperly permits what amounts to direct access to Toyota’s databases and is overbroad in requiring the production of irrelevant information. The Court noted that mandamus is an extraordinary remedy and is available only when the trial court abuses its discretion and there is no adequate remedy by appeal following judgment. Likewise, the Court noted that the scope of discovery is generally within the trial court’s discretion, but the trial court must make an effort to impose reasonable discovery limits. The Court also noted that a party would have no adequate remedy by appeal if it is forced to disclose "patently irrelevant" information or a burden is imposed on the producing party far out of proportion to any benefit to the requesting party.

The Court held that the trial court abused its discretion in ordering Toyota to identify all folders and subfolders within all databases and papers maintained in Toyota’s technical library. Likewise, the requirement that Toyota, one of the largest industrial concerns in the world, provide a table of contents listing all folders and subfolders and an index of papers maintained in its technical library, without limitation, is an abuse of discretion because it is not anchored to the subject matter of the lawsuit, nor is it limited to a reasonable amount of time. The Court noted that there is no benefit to producing the many irrelevant folders and subfolders and papers such as those concerning fuel lines, engines, facilities, maintenance, and employees, and to do so would require “undue” expense. The trial court’s order should have been limited to folders and subfolders and portions of the technical library that contain documents within the previously defined scope of discovery. The Court also held that the search queries be limited to the relevant class of vehicles and include time constraints. Toyota also asserted that even appropriate search queries will yield documents that are not relevant. The Court indicated that Toyota should only be required to produce relevant documents rather than all documents identified by appropriate search queries.

Toyota also contended that the trial court abused its discretion by ordering it to identify “all engineers who have had responsibility (at any time since 1995) for designing seats” because it is not reasonably limited in time or scope. The Court stated that Toyota should only have to identify the engineers who worked on designing seats for the relevant class of vehicles, which is applicable only to specific models and model years. Finally, the Court concluded that mandamus is an appropriate remedy in this case because, otherwise, Toyota would have to produce “patently irrelevant” information and the burden on Toyota to do so is out of proportion to the benefit, if any, to the Reavises.