

LAW WEEK

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Strictly About Risks and Benefits

Colorado Supreme Court rules on use of consumer expectation test in Walker v. Ford Motor Co.

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The Colorado Supreme Court issued a decision Nov. 13 that both upholds its previous precedents in products liability law and sets a new one stipulating arguments for claims of both strict liability for design defects and negligence need to turn on the same analysis. In *Walker v. Ford Motor Co.*, the court affirmed a prior decision from the Colorado Court of Appeals that the trial court in the underlying case erred when allowing the jury to apply either the consumer expectation or risk-benefit test in determining whether the design of a car seat made it unreasonably dangerous.

In the underlying case, a jury returned a verdict on claims of strict liability and negligence in favor of Forrest Walker, who claimed he was injured in a car accident in part because Ford defectively designed the seat in his 1998 Ford Explorer and that it was unreasonably dangerous.

Ford appealed, and the Court of Appeals ruled the trial court erred in instructing the jury separately on the consumer expectation test because the consumer expectation test comprises one element of the risk-benefit analysis.

The Supreme Court determined the risk-benefit test was the appropriate analysis to use in assessing the car seat's dangerousness and affirmed that the trial court erred in instructing the jury on both tests. The Supreme Court also ruled the separate finding of negligence did not render the instructional error harmless and remanded the case.

Theresa Wardon, a partner at Wheeler Trigg O'Donnell who argued the case on behalf of Ford before the Supreme Court, explained she believes the most precedent-setting piece of the Supreme Court's decision is its de-

termination that arguments for claims of strict liability for defective designs and negligence need to be based on the same analysis.

"As a manufacturer, you can't be negligent for designing a reasonably safe product," she said. "You can't say that Ford wasn't liable under the risk-benefit test but is negligent. ... That provided some guidance that I don't think was in the law before."

According to the opinion, "regardless of whether a design-defect claim is based in strict liability or negligence, in order to properly return a verdict for the plaintiff, a fact-finder must determine that the product at issue is unreasonably dangerous."

Wheeler Trigg O'Donnell partner Ed Stewart also worked on the case.

John Purvis, attorney with Purvis Gray Thomson who argued the case on behalf of Walker, did not respond to a request for comment.

The Supreme Court followed its own precedent in determining the appropriateness of the consumer expectation and risk-benefit tests. In 1986, the court determined in *Ortho Pharm. Corp. v. Heath* that the risk-benefit test must be used to determine whether a product is unreasonably dangerous because of a design defect when the dangerousness is "defined primarily by technical, scientific information" and laid out seven factors that could be considered to weigh risks and benefits. The court determined the consumer expectation test is not suitable in a case hinging on scientific or technical information. That decision was later overruled in 1992 by *Armentrout v. FMC Corp.* to the extent the case placed the burden of proof on the manufacturer.

In *Walker v. Ford Motor Co.*, the court determined assessing the car seat's unreasonable dangerousness necessarily included analysis of scientific, technical information and found

the trial court erred in instructing the jury on both the consumer expectation and risk-benefit tests.

"We want manufacturers thinking about risks and benefits," Wardon said. "That's what you want engineers to be thinking about, not what a jury member may think about a design."

She used the example of a car seat that might look strange to the average consumer because of certain aspects added for safety in case of a crash, but the physical appearance would not be an appropriate basis for judging the seat's safety.

"If you have tests that turn on what an individual consumer might think, their subjective expectations about a product, it makes it very difficult for a manufacturer to design a safe product."

The court also looked to its 1987 decision in *Camacho v. Honda Motor Co.* The ruling held unreasonable dangerousness can be "due to a manufacturing defect, which causes the product to fail to conform to the manufacturer's specifications or due to a failure to warn or a design defect that renders the product unreasonably dangerous despite the fact that it was manufactured exactly as intended," according to *Ford v. Walker*.

Brian Matisse and Nelson Boyle, attorneys with Burg Simpson who co-authored an amicus brief on behalf of the Colorado Trial Lawyers Association advising the Supreme Court to correct the Court of Appeals' original determination that the consumer expectation test to determine defective design should not be used in Colorado anymore, explained the benefits of using the consumer expectation test in some cases.

Matisse, a shareholder with the firm, said the test makes more sense in cases where proving a product has a defective design does not depend on scientific and technical information and instead on consumers' ordinary expect-

tations. Boyle pointed to the example used in the Supreme Court's opinion of a consumer's expectation that whiskey he or she purchases would not contain fuel oil.

"(You wouldn't) hire a whole bunch of experts to prove that," Boyle said. "The Court of Appeals opinion would have said, no, you'd have to go through this big analysis of hired experts to prove that whiskey could be better made without fuel oil, which doesn't make sense. ... The viability of the consumer expectations test means that you can still bring some of these cases without spending exorbitant amounts on experts."

Matisse and Boyle disagreed that a manufacturer can't be held liable simply because its product is reasonably safe. Matisse instead said the court recognized the relationship between negligence and product liability law.

He said the opinion meant an incorrect instruction to a jury on what is unsafe under product liability law necessarily has an impact on negligence law. Favoring the risk-benefit test over the consumer expectation test has become increasingly common across the U.S., and federal courts applying Colorado law have used it exclusively for years.

Wardon said she believes the biggest unanswered question left by the Colorado Supreme Court's decision is when applying the consumer expectation test for products liability will be appropriate in the future. Although *Walker v. Ford* did not establish it can't be used, she said it will likely be difficult to justify using in cases involving automobiles or other technical products.

"I think (the decision is) going to bring a lot of clarity to products law," Wardon said. "These jury instructions have been in issue for a number of years, and it was difficult to find the right case to challenge it." •

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