UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

BRUCE THORNDIKE and LETITIA N. JORDAN, as next friends of CHRISTOPHER THORNDIKE, a minor,	)	
Plaintiffs	)	
v.	)	Civil No. 00-198-B
DAIMLERCHRYSLER CORPORATION et al.,	)	
Defendants	)	

MEMORANDUM OF DECISION ON DEFENDANT DAIMLERCHRYSLER CORPORATION'S MOTION TO PRECLUDE TESTIMONY OF PLAINTIFFS' EXPERT, JOEL IRA FRANCK, M.D.,

AND

RECOMMENDED DECISION ON DEFENDANT DAIMLERCHRYSLER CORPORATION'S MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs Bruce Thorndike and Letitia Jordan, as parents and next friends of Christopher Thorndike, their minor son, commenced a civil action against DaimlerChrysler Corporation ("DaimlerChrysler") on September 26, 2000, alleging that Christopher Thorndike was rendered a paraplegic and suffered severe abdominal and spinal injuries during an automobile accident due to the failure of a spare tire retention system in the 1994 Dodge Ram 350 passenger van in which Christopher was riding. DaimlerChrysler contends that Plaintiffs' medical expert is not qualified to render the necessary opinion on causation or, if qualified, that the opinion he would offer is based on an unscientific and unreliable methodology. (DaimlerChrysler's Mot. to Preclude Test. of Pl.'s Expert, . . . and for Sum. J., Docket No. 110.) Without the testimony of their medical

expert, Plaintiffs would be unable to prove an essential element of their various claims for relief. DaimlerChrysler therefore moves for summary judgment in the event that its Motion to Preclude is granted. I now **DENY** the Motion to Preclude and, accordingly, **RECOMMEND** that the Court **DENY** the Motion for Summary Judgment. In a separate filing, DaimlerChrysler moves for summary judgment against the Plaintiffs' claim for punitive damages. (DaimlerChrysler's Mot. for Sum. J. as to Pl.'s Claims for Pun. Dam., Docket No. 108.) I **RECOMMEND** that the Court **GRANT** this Motion.

Summary Judgment Material Facts

Summary judgment is warranted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); United States Steel v. M. DeMatteo Constr. Co., 315 F.3d 43, 48 (1st Cir. 2002). The following facts are drawn from the parties' Local Rule 56 statements of material facts. The Court credits a given statement of fact if it is properly supported by citation to admissible record evidence, although it may disregard a statement that does not provide information that is directly material to the issues presented in the summary judgment motion or otherwise helpful by way of background. D. Me. Loc. R. 56. When evaluating the merits of the summary judgment motion, the Court is required to construe the available facts in the light most favorable to the non-moving party and to indulge whatever reasonable inferences are raised on the non-movant's behalf. U.S. Steel, 315 F.3d at 48.

This is a product liability action arising out of a head-on collision that occurred between a Dodge Ram 350 passenger van and a tractor trailer on September 23, 1994 on Route 27 in New Vineyard, Maine. (St. of Mat. Facts in Sup. of DaimlerChrysler's Mot. To Preclude Test. . . .

and for Sum. J., Docket No. 111, ¶¶ 1, 4, 7; DaimlerChrysler Corp.'s St. of Mat. Facts in Sup. of its Mot. for Sum. J. as to Pl.'s Pun. Dam. Claim, Docket No. 109, ¶ 1.) Plaintiffs and parents Bruce Thorndike and Letitia N. Jordan, as next friends of Christopher Thorndike, their minor son, allege that as a result of defects in the Dodge van in which Christopher was riding, he sustained serious personal injuries in the accident, including paraplegia. (Docket No. 111, ¶ 1.) Specifically, Plaintiffs allege that a defective spare tire retention system failed during the accident, permitting the van's 72-pound spare tire to fly forward from the rear of the van into the back of the bench seat on which Christopher was sitting. (Id., ¶ 2; Third Amended Complaint, Docket No. 43, ¶¶ 15, 22, 23.)

Although the van originally was equipped with four passenger benches, the two rear most benches were removed prior to the accident. (Docket No. 111, ¶ 8; Pl.'s Resp. to DaimlerChrysler's St. of Mat. Facts, Docket No. 131, ¶ 8; Docket No. 109, ¶¶ 6, 7.) The spare tire was retained horizontally on the floor of the van by a bolt that fit into a slot in the floor pan at the rear of the van. (Docket No. 111, ¶ 8; Docket No. 109, ¶ 8.) The spare tire retention system consists of a number of separate components, including the spare tire retention bolt, a wing nut assembly, a slot in the floor plan and the spare tire and rim. (Docket No. 109, ¶ 9.) During the course of its product crash testing, DaimlerChrysler discovered that spare tire retention systems utilizing the subject "grade 1 bolt" were capable of failures and developed a practice of tethering spare tires during crash tests to protect expensive testing equipment. (Docket No. 109, ¶¶ 11, 13; Docket No. 134, ¶¶ 11, 13; Id. (Additional Fact Statements) ¶¶ 7, 11, 13, 14, 18, 20, 21.) According to one DaimlerChrysler engineer, failure of the retention system could enable the spare tire to "hit the seat back, thus hitting the [crash test] dummy indirectly." (Docket No. 134, ¶ 18.) DaimlerChrysler's crash test engineers and design

engineers were present at crash tests and/or advised of test results. (Docket No. 109, ¶ 18.) DaimlerChrysler could have improved the retention system by a factor of four with only minor modifications. (Docket No. 134, ¶¶ 36, 37; DaimlerChrysler Reply St. of Fact, Docket No. 153, ¶¶ 36, 37.)

Motion to Preclude Testimony and for Summary Judgment

Plaintiffs' medical expert, Joel I. Franck, M.D., would offer his opinion at trial "that the spare tire impacting the back of Christopher Thorndike's seat . . . was the primary, necessary, and sufficient cause of the numerous and overwhelming injuries that Christopher sustained" and that "Christopher would not have sustained [] complete and irreversible spinal cord injuries" had the tire not struck the rear of his seat during the accident. (Analysis of Christopher Thorndike v. Daimler-Chrysler by Joel I. Franck, M.D., dated Nov. 14, 2001, pp. 1-2. See also Docket No. 111, ¶¶ 3, 11, 12; Docket No. 131, ¶¶ 3, 12.) Dr. Franck further opines that the spare tire's impact with the bench seat, "just to the left of Christopher's central horizontal spinal axis," had the following impact on Christopher's body:

> The tire impact caused Christopher to flex forward. Entrapped by the seat belt, the left portion of his pelvis was impelled to partially "submarine" under the lap belt. This, in turn, caused a torquing of Christopher to the right, impacting his right iliac crest into the lap belt buckle. Christopher, consequently, sustained overwhelming traumatic superficial abdominal damage, abdominal muscle dehiscence, and deep abdominal injuries of enormous long-term consequence.
>
> Christopher, in addition, sustained a rotational torquing and lateral translation force applied at the L3-4 lumbar junction. This caused a lateral translation fracture dislocation, severely stretching and compressing the cauda equine (the intraspinal lumbosacral nerve complex). The tire impact also caused a dramatic hemorrhagic contusion to the upper thoracic spinal cord at T1 through T3 without spinal vertebral bone damage with consequent profound spinal cord injury and paralysis at the upper thoracic level . . . . A second level of cord contusion, above the level of actual spinal vertebral fracture, noted on MRI scan at T12-L1, further contributed to the paralysis.

DaimlerChrysler challenges both the scientific basis for these opinions and Dr. Franck's qualifications to render them. (Docket No. 110 at 1.)

> Pursuant to Rule 702 of the Federal Rules of Evidence:
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (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.

In Daubert v. Merrell Dow Pharms, Inc., 509 U.S. 579 (1993), the Supreme Court assigned to federal judges the gate keeping role of screening from introduction in evidence expert testimony that, although relevant, is nevertheless based on unreliable scientific methodologies. Id. at 597. In General Elec. Co. v. Joiner, 522 U.S. 136 (1997), the Supreme Court explained that a judge exercising this duty must evaluate whether the challenged expert testimony is based on reliable scientific principles and methodologies in order to ensure that expert opinions are not "connected to existing data only by the ipse dixit of the expert." Id. at 146. The latest Supreme Court pronouncement on Rule 702, Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999), extended the gate keeping obligation to all manner of expert testimony that would purport to introduce specialized knowledge or opinion, whether such knowledge or opinion might properly be classified as "scientific" or not. Id. at 147-48. The Kumho Court reiterated that the gate keeping function is "a flexible one" that "depends upon the particular circumstances of the particular case at issue." Id. at 150; see also Daubert, 509 U.S. at 591, 594.

Unlike summary judgment determinations, which are reviewed de novo, Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 25 (1st Cir. 2002), the Court's ruling on the admissibility of expert testimony is reviewed for abuse of discretion. Ruiz-Troche v. Pepsi Cola

of P.R. Bottling Co., 161 F.3d 77, 81 (1st Cir. 1998). This standard "applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion," Kumho, 526 U.S. at 152, even when these decisions are outcome determinative, Joiner, 522 U.S. at 142-43. Finally, the Court may exercise the same discretion "to decide whether or when special briefing or other proceedings are needed to investigate reliability." Kumho, 526 U.S. at 152.[1]

DaimlerChrysler asserts that Plaintiffs are offering Dr. Franck as a "biomechanics" (body motion) expert. DaimlerChrysler contends that Franck must be precluded from testifying on this topic because he is not an expert in biomechanics or in occupant kinematics,[2] as is reflected in various concessions he made during his deposition about the scope of his expertise. According to DaimlerChrysler,

> Dr. Franck's background in neurological surgery does not, even in the broadest sense, provide him with the sufficient background, knowledge or expertise to analyze and provide opinions concerning the forces generated by a spare tire and the biomechanical effects of those forces on a lap belted occupant of a vehicle involved in a head-on collision at high speed.

(Docket No. 110 at 9.) DaimlerChrysler also attacks Dr. Franck's methodology, arguing (1) that Dr. Franck was insufficiently attentive to detail when making a "surrogate reconstruction," (2) that he cannot say precisely when the spare tire hit the bench, what Christopher's body position was at that precise moment, or how much force the 72-pound spare tire would have imparted to

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[1] DaimlerChrysler elected to combine its Daubert motion with a motion for summary judgment. Even though it labels this aspect of its filing as a motion to preclude testimony, it introduces the relevant facts in the context of a formal statement of material facts in accordance with Local Rule 56. In opposition, Plaintiffs have filed an opposing statement of fact, including two additional fact statements, but have otherwise introduced the key evidence in opposition to the motion to preclude by means of an attached affidavit and a collection of photographs, not incorporated into their summary judgment statement. If the Court were to treat DaimlerChrysler's Daubert motion as governed exclusively by Local Rule 56, then Plaintiffs would be required to introduce opposing facts strictly in accordance with Local Rule 56(c), which requires that issues of fact be generated in the responsive statement of material facts rather than simply by means of submitting an opposing affidavit. In my view, the Daubert motion is separate and distinct from the motion for summary judgment and, therefore, Dr. Franck's affidavit is sufficient to introduce evidence in opposition to the Daubert motion.

[2] Webster's defines kinematics as "the branch of mechanics that deals with motion in the abstract, without reference to the force or mass." Webster's New World College Dictionary (3d ed. 1997).

the back of the bench seat and, ultimately, to Christopher's body, and (3) that he cannot say how that force would have caused rotational torquing of Christopher's spine or submarining of Christopher's left ilium (the wide upper portion of the bony pelvis) beneath his lap belt. (Id. at 11-16.)

I find DaimlerChrysler's plaint unpersuasive. To begin, I find it unrealistic, unreasonable and unscientific to say that Dr. Franck cannot offer an opinion that the spare tire caused or contributed to Christopher's severe abdominal and spinal injuries simply because such a hypothesis is not premised on a definitive understanding of Christopher's exact body position during the several milliseconds in which the tire would have first impacted and eventually rebounded from the back of the bench seat. In fact, I would find it incredible if he or any other expert were to suggest such knowledge at the level of precision that DaimlerChrysler is demanding. If expert testimony were admissible only when it could attain this level of precision, there would be little point in referring to it as opinion, theory or even knowledge, rather than as truth or law. For the same reason, I also consider DaimlerChrysler's concern over the so-called surrogate reconstruction or "fit check" to be overblown. Dr. Franck indicates that he relied on plaintiff counsel's administrative assistant to select a child of roughly the same height and weight as Christopher so that he might observe "how Christopher would potentially interact with the seat itself when the tire struck." (Docket No. 130, Exh. 1, ¶ 4.) That Dr. Franck failed to document the surrogate child's name, exact height and weight or take photographs and notes during the fit check does little to inform whether his methodology was reliable.

The operative question is whether Dr. Franck's opinions are connected to the available data by a meaningful and reliable methodology or process of scientific or logical reasoning. In my view, they are. Dr. Franck's understanding that the tire impacted the seat just to the left of

Christopher is informed by, among other things, his observations of the deformed bench seat and by the testimony of Plaintiffs' accident reconstruction expert. That Christopher's pelvis submarined under the lap belt only on the side of the tire's impact might be deduced from the tearing of his abdominal muscles on the left side, the nature of his internal injuries, and the distinctive marking left in his left-side abdomen by the belt buckle. Also probative of this fact is evidence that Christopher's right iliac crest was fractured, suggesting it absorbed force from the seat belt, unlike the left iliac crest. Furthermore, Dr. Franck describes Christopher's left side as appearing as though it had been pinched between the seat back and the seat belt. In light of the data available to him, including his own empirical observations, Dr. Franck's opinion on causation is based on significantly more than conjecture and speculation. As Dr. Franck relates, Christopher's injuries include spinal "fracture, rotation and displacement to the right," contusions and abrasions on his back, and the appearance, in the eyes of Dr. Franck, that Christopher's midsection was pinched between the forward momentum of a 72-pound tire traveling in the region of 50 miles per hour and the relatively inert seat belt strapped around his midsection. In addition to these indicia of reliability, Dr. Franck relates that his opinion is also informed, to a degree, by the experience of the child seated directly in front of Christopher, who was similarly restrained by only a lap belt.[3] That child, exposed to the same basic forces as Christopher,[4] except for the tire, is purportedly "walking around today without any life altering

[3] This child actually had a shoulder strap available for his use but appears to have placed that portion of the restraint system behind him. It is suggested by Plaintiffs that this child's circumstance, but for the tire, was actually worse than Christopher's, because the lap belt portion of a lap-and-shoulder belt tends to ride higher on the occupants frame, thus making submarining more likely when the shoulder belt portion is not worn.

[4] In its reply memorandum, DaimlerChrysler argues that it is purely speculative to suggest that any other children in the van experienced the same basic degree of acceleration/deceleration during the collision event. (DaimlerChrysler Consol. Reply, Docket No. 149, at 5.) However, I consider this particular assumption to be one that anyone might reasonably draw. If the change in forward velocity experienced by Christopher was significantly different from that experienced by other occupants in the van due to his placement in the van, DaimlerChrysler may attempt to establish that fact through the testimony of its own experts. To the extent that it might be able to

problems or conditions." (Docket No. 130, Exh. 1, ¶ 12.) In my view, Dr. Franck's methodologies are sufficiently reliable to pass through the Daubert gate.

Finally, I consider unfounded DaimlerChrysler's contention that Dr. Franck is not sufficiently qualified to have a meaningful opinion. DaimlerChrysler misrepresents Dr. Franck's deposition testimony concerning his expertise. In fact, Dr. Franck testified that he considers himself an expert in the biomechanics of the spine, but not in regard to the biomechanics of the extremities. Dr. Franck's testimony, of course, does not concern injuries to Christopher's extremities. Ultimately, Dr. Franck does not need to be an expert in occupant kinematics and accident reconstruction to opine that a left-back, indirect impact from a 72-pound tire, in an accident of this intensity, was the proximate cause of Christopher's permanently disabling injuries, where the available data indicates significant deformation of the bench seat back just to the left of the vertical axis of Christopher's spine, crushing injuries to Christopher's left-side abdominal muscles, tissues and organs, abrasions and contusions on Christopher's left-side back, and displacement of the alignment of his spinal column to the right, injuries on an order not experienced by other children survivors who only experienced the whiplash-like motions imparted by the collision event. The so-called "concessions" DaimlerChrysler elicited from Dr. Franck during his deposition do little or nothing to call into question Dr. Franck's qualifications to capably reach the conclusions he has. Dr. Franck has extensive qualifications in the area of neurological surgery and spinal injuries. He has treated over a hundred patients who have suffered neurological injury, including paraplegia, as a result of automobile injuries. In my view, this experience qualifies Dr. Franck to render an opinion that the tire's impact with the bench

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distinguish the circumstances of the other occupants Dr. Franck makes reference to, such evidence will go to the weight of Dr. Franck's opinion, not to its admissibility. In my view, some deductions and assumptions can be considered reliable even if the minds that make them (mine included) lack formal training in such areas of expertise as "occupant kinematics."

seat back more likely than not caused Christopher's injuries to be more severe than they otherwise would have been. I therefore **DENY** DaimlerChrysler's Motion to Preclude. Because DaimlerChrysler's incorporated Motion for Summary Judgment is premised exclusively on the professed inadmissibility of Dr. Franck's testimony, I **RECOMMEND** that the Court **DENY** that Motion as well.

Punitive Damages

Under Maine law, punitive damages are available only where the defendant's conduct was motivated by actual malice directed against the plaintiff or where the defendant's conduct was "so outrageous that malice toward a person injured as a result of that conduct can be implied." Tuttle v. Raymond, 494 A.2d 1353, 1361 (Me. 1985). Neither recklessness nor gross negligence will suffice under this standard. Id. The burden of proof of actual or implied malice is by clear and convincing evidence. Id. at 1363.

In Tuttle, the Law Court reserved for later consideration how the punitive damages regime might apply in products liability cases. Id. at 1360 n.20 ("[A]lthough our opinion today provides a careful evaluation of a longstanding doctrine, many issues concerning the availability of punitive damages . . . remain for future consideration and resolution. These issues include, *inter alia*, . . . the application of punitive damages in products liability . . . litigation."). The Law Court has not returned to this issue over the intervening 17-18 years. Thus, it is at least conceivable that the Law Court might lower the standard for an award of punitive damages in the products liability context in recognition of the special policy concerns that invigorate Maine's strict liability regime. Although Plaintiffs reference this seemingly auspicious footnote in Tuttle, they appear to concede that this Court should interpret it to mean that punitive damages in products liability cases should be assessed under existing Maine law. (Docket No. 133 at 21

n.3.) Their position is that the Court "simply apply the [Maine] standard for punitive damages which . . . is "implied malice." (Id. at 23.) Because the parties are in agreement that the Tuttle standard should govern, there is no need for the Court to concern itself over the absence of Maine law on this point.

DaimlerChrysler's bid for summary judgment against the punitive damages claim relies primarily on a rose-colored perspective of the summary judgment record. It contends that the facts cannot support a finding that it was on notice of a defective condition in the tire retention system used in the 1994 Dodge 350 van or that it ever deliberately withheld such information from its design engineers. Contrary to these assertions, I believe that the facts presented in the context of this motion would permit a jury to conclude that DaimlerChrysler was on notice of a dangerous condition. Furthermore, whether or not this dangerous condition was purposefully withheld from design engineers, knowledge on the part of the crash test engineers should be sufficient to support a finding of actual or constructive notice on the part of DaimlerChrysler. In addition to these findings, the summary judgment record is sufficient to support a finding, directly or by inference, that DaimlerChrysler could readily have corrected this dangerous condition at minimal expense before the 1994 model year was produced. Taken together, such findings could readily support a further finding of negligence on the part of DaimlerChrysler. Nevertheless, on this evidence even the most critical juror could not reasonably find anything more than "reckless indifference to the rights of others," which finding would be insufficient to support an inference of malice as a matter of Maine law. Tuttle, 494 A.2d at 1362; DiPietro v. Boynton, 628 A.2d 1019, 1024 (Me. 1993). There clearly is no evidence of an orchestrated cover-up involving the bolt retention system. Nor had DaimlerChrysler received any information of other passenger injuries as a result of the failure of the bolt retention system. For

this reason, I **RECOMMEND** that the Court **GRANT** DaimlerChrysler's Motion for Summary Judgment as to Plaintiffs' Claim for Punitive Damages.

Conclusion

For the reasons stated herein, I **DENY** DaimlerChrysler's Motion to Preclude.

SO ORDERED.

I further **RECOMMEND** that the Court **DENY** DaimlerChrysler's Motion for Summary Judgment (Docket No. 110) and **GRANT** DaimlerChrysler's Motion for Summary Judgment as to Plaintiffs' Claim for Punitive Damages (Docket No. 108).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection. Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Margaret J. Kravchuk
United States Magistrate Judge

STANDARD

May 15, 2003

U.S. District Court
District of Maine (Bangor)
CIVIL DOCKET FOR CASE #: 1:00-cv-00198-DBH
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THORNDIKE, et al v. DAIMLER CHRYSLER, et al
Assigned to: JUDGE D. BROCK HORNBY
Referred to:

Date Filed: 09/26/00
Jury Demand: Both
Nature of Suit: 355 Motor Vehicle

Demand: $0
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 28:1332 Diversity-Product Liability

Prod. Liability
Jurisdiction: Diversity

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