

Reis v Volvo Cars of N. Am., Inc.

2009 NY Slip Op 30467(U)

March 3, 2009

Supreme Court, New York County

Docket Number: 108539/04

Judge: Barbara R. Kapnick

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

BARBARA R. KAPNICK

PRESENT: _____
Justice

PART 12

Reis, M

INDEX NO. 108539/04

- v -

MOTION DATE _____

MOTION SEQ. NO. 05

Volvo Cars

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

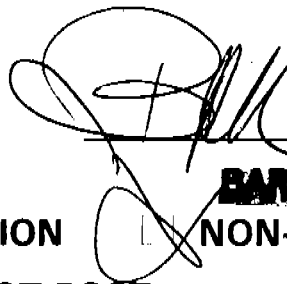
**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED

MAR 04 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/3/09



BARBARA R. KAPNICK /s.c.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

-----X

MANUEL REIS and SARA REIS,

Plaintiffs,

-against-

VOLVO CARS OF NORTH AMERICA, INC.,
VOLVO CARS OF NORTH AMERICA, L.L.C,
VOLVO CAR CORPORATION, AB VOLVO
CORPORATION and FORD MOTOR COMPANY,

Defendants.

DECISION/ORDER
Index No. 108539/04
Motion Seq. No. 005

-----X

VOLVO CARS OF NORTH AMERICA, INC.,
VOLVO CARS OF NORTH AMERICA, L.L.C,
VOLVO CAR CORPORATION, AB VOLVO
CORPORATION and FORD MOTOR COMPANY,

Third-Party Plaintiffs,

-against-

AMERICO SILVA,

Third-Party Defendant.

FILED
MAR 04 2009
COUNTY CLERK'S OFFICE
NEW YORK

-----X

BARBARA R. KAPNICK, J.:

I. INTRODUCTION

This action arises out of a May 24, 2002, accident in which plaintiff Manuel Reis ("Reis") suffered severe injuries when a 1987 Volvo station wagon owned by his friend, third-party defendant, Americo Silva ("Silva"), lurched forward after Silva turned the ignition key while the vehicle's manual transmission was in gear and without applying the parking brake or clutch. Reis' left leg ultimately required amputation.

Plaintiffs have asserted claims based on (1) strict products liability (first cause of action); (2) negligent design (second cause of action); (3) breach of warranties (third cause of action); and (4) loss of consortium (fourth cause of action). Plaintiffs' claims focus primarily on the fact that the vehicle was not equipped with a manual transmission starter interlock device, a device designed to prevent cars from lurching forward in the event an engine start is attempted with the transmission in gear or without the parking brake engaged or only partially engaged.

Defendants Volvo Cars of North America, Inc., Volvo Cars of North America, L.L.C., Volvo Car Corporation, AB Volvo Corporation and Ford Motor Company (collectively "Volvo") have moved for summary judgment dismissing the Complaint. Plaintiffs do not oppose summary judgment on their breach of express and implied warranty claims, as they agree that these claims are barred by the four-year statute of limitations.

II. BACKGROUND FACTS

Plaintiff Reis obtained a driver's license while in the Portuguese Army, and learned to drive using standard transmission vehicles. In his deposition, Reis acknowledged he was aware that standard transmission vehicles could lurch forward under certain circumstances.

Silva purchased the 1987 Volvo station wagon one day before the accident occurred. He had allegedly driven the car at least ten (10) times prior to the accident, but had never experienced the vehicle lurching forward as it did on this occasion.

On May 24, 2002, Reis arrived at Silva's home to pick up his daughter. At the time, Silva was outside cleaning the vehicle. Reis approached Silva, they exchanged greetings and the parties decided Silva would show Reis the engine while it was running. Reis walked to the front of the vehicle and Silva walked to the front driver's side window. While Reis stood in front of the vehicle, Silva reached through the driver's side window and started the engine. The vehicle's manual transmission was in gear and neither the emergency brake nor the clutch were applied. Upon starting the engine, the vehicle lurched forward, striking Reis' left leg.

Prior to the accident, Silva had never read or otherwise reviewed the vehicle's Owner's Manual.

III. SUMMARY OF ARGUMENTS

The defendants argue in the first instance that defendants AB Volvo Corporation {"AB Volvo"} and Ford Motor Company ("Ford") are not proper parties to this action and that the action must also be dismissed as against defendant Volvo Cars of North America, Inc. as

it is no longer in existence and is simply a prior incarnation of Volvo Cars of North America, L.L.C.

Defendants also contend that plaintiffs' claims sounding in products liability must be dismissed because plaintiffs have not presented any evidence showing that Volvo marketed an unreasonably dangerous product.

Finally, defendants assert that plaintiffs' claims sounding in negligence must be dismissed as plaintiffs have failed to offer any proof of a duty owed to them by defendants and have failed to establish that the Volvo's design was the proximate cause of plaintiff's injuries.

IV. DISCUSSION

A. Strict Products Liability

Plaintiffs' Complaint alleges that Volvo negligently designed and/or manufactured the 1987 Volvo vehicle at issue by failing to include a starter interlock system, which allegedly would have prevented plaintiffs' injuries.

The Court of Appeals has held that

a "defectively designed product is one which, at the time it leaves the seller's hands, is in a condition not reasonably contemplated by the ultimate consumer and is unreasonably dangerous for its intended use; that is one whose utility does not outweigh the danger inherent in

its introduction into the stream of commerce". (*Robinson v Reed- Prentice Div. of Package Mach. Co.*, *supra* at 479, 426 NYS2d 717, ...) Strict products liability for design defect thus differs from a cause of action for a negligently designed product in that the plaintiff is not required to prove that the manufacturer acted unreasonably in designing the product. The focus shifts from the conduct of the manufacturer to whether the product, as designed, was not reasonably safe. (citation omitted). A manufacturer is held liable regardless of his lack of actual knowledge of the condition of the product because he is in the superior position to discover any design defects and alter the design before making the product available to the public. Liability attaches when the product, as designed, presents an unreasonable risk of harm to the user.

In order to establish a *prima facie* case in strict products liability for design defects, the plaintiff must show that the manufacturer breached its duty to market safe products when it marketed a product designed so that it was not reasonably safe and that the defective design was a substantial factor in causing plaintiff's injury.

The plaintiff, of course, is under an obligation to present evidence that the product, as designed, was not reasonably safe because there was a substantial likelihood of harm and it was feasible to design the product in a safer manner. The defendant manufacturer, on the other hand, may present evidence in opposition seeking to show that the product is a safe product - that is, one whose utility outweighs its risks when the product has been designed so that the risks are reduced to the greatest extent possible while retaining the product's inherent usefulness at an acceptable cost.

Voss v Black & Decker Mfg. Co., 59 NY2d 102, 107-108 (1983)

Therefore, we conclude that the proper standard to be applied should be whether the product as designed was "not reasonably safe" -- that is, whether it is a product which, if the design defect were known at the time of manufacture, a reasonable person would conclude that the utility of the product did not outweigh the risk inherent in marketing a product designed in that manner. (citation omitted).

[* 7]

It will be for the jury to decide whether a product was not reasonably safe in light of all the evidence presented by both the plaintiff and defendant.

Voss v Black & Decker, supra at 108.

In *Voss*, the plaintiff severely injured his hand while working with a circular saw, even though the protective guard functioned properly. In holding that the evidence established a prima facie case of strict products liability based on the defectively designed product, the court pointed to the opinion of the plaintiff's expert that it would have been simple to design the saw so that it would be safer by extending the protective guard to conform with minimum safety standards and good design standards.

Similarly, in the instant case, plaintiffs have presented evidence that could lead a jury to believe that the Volvo, as designed, was not reasonably safe. Plaintiffs' expert, Thomas G. Feaheny, an automotive engineering consultant, states in his Affidavit that "[m]anual transmission starter interlock devices were widely available on the market in the 1987 timeframe (when the subject car was manufactured) and for many years prior to that time. Indeed ... Ford incorporated such devices into its manual transmission cars in the 1970's. Additionally, other manufacturers such as Chevrolet had also incorporated [the devices] into its cars in and/or before the 1970's." He further states that the "primary

[* 8]

function [of the starter interlock device] is to prevent cars from lurching forward in the foreseeable circumstance that an engine start is attempted with the transmission in gear without the parking brake being engaged, or being partially engaged" and that they could "have easily and inexpensively been included into the manual transmission design of the subject vehicle by Volvo in and/or before 1987. It is also [his] opinion that vehicles with such devices installed are much safer than vehicles that do not have such devices installed."

Volvo contends that the use of the starter interlock device was less than widespread. However, in their Response to Defendant's Second Set of Interrogatories, plaintiffs point to at least sixteen (16) different models and four (4) car makers (including two foreign makers) that had incorporated the device. In light of the conflicting evidence, the issue of whether the product was not reasonably safe is an issue for the jury.

Volvo also points to the fact that it had never received any complaints from dealers, customers or others about accidents occurring as a result of the lack of the starter interlock device. However, as the Court of Appeals stated in *Voss, supra*, in a strict liability context, the manufacturer need not have knowledge of the

condition; it is the design of the product, and not the conduct of the manufacturer that is the focus of the inquiry.

Additionally, the plaintiff is required to show that

the defectively designed product caused his injury and that the defect was the proximate cause of the injury. (citations omitted). By proximate cause in the context of strict products liability for design defects, we mean that after weighing the various factors and concluding that the design was defective the jury has decided that the defect was a substantial factor in causing plaintiff's injury. (citation omitted).

Proximate cause in a products liability case serves a somewhat different role than in a case sounding in negligence because that cause of action seeks to impute liability to the manufacturer not on the basis of his negligence but because the product is not reasonably safe as it was designed. The tie which proximate cause is to provide in order to impose legal liability must be between the design defect of the product and the injury -- that is, the plaintiff must show that the design defect in the product was a substantial factor in causing his injury.

Voss, supra at 109-110.

The facts of this case present at the very least, an issue of fact as to the proximate cause of plaintiff's injury. Here, because the vehicle's engine was purposefully manufactured to be able to start without putting the car in neutral or depressing the clutch, the triable issue for the jury to decide is whether this alleged defective design was a substantial factor in causing plaintiff's injury.

B. Negligence

"A cause of action for negligent design additionally requires proof that the manufacturer acted unreasonably in designing the product" (*McArdle v Navistar Intl. Corp.* [293 AD2d 931 (2002)]...). Indeed, in design defect cases very little difference exists between prima facie cases in negligence and in strict liability, and a finding of questions of fact with regard to one "inevitably raises material questions of fact" as to the other (citation omitted).

Blandin v Marathon Equipment Co., 9 AD3d 574, 576 (3rd Dep't 2004).

Volvo has set forth three grounds upon which summary judgment should be granted on plaintiffs' negligent design claims: (1) they did not owe Reis a duty of care; (2) they lacked both actual and constructive knowledge of a dangerous condition; and (3) the alleged negligent design and failure to warn were not the proximate cause of Reis' injury.

To make out a claim of negligence, the defendant must owe the plaintiff a specific, legally recognized duty of care. *Hamilton v Beretta U.S.A. Corp.*, 96 NY2d 222, 232 (2001). Although the duty owed must be specific, the precise manner of the harm forming the basis of the alleged negligent act need not be anticipated. *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 316 (1980). It is the responsibility of the Court in the first instance to determine the existence and scope of a duty. *Di Ponzio v Riordan*, 89 NY2d 578, 583 (1997). In making such a determination, courts will

[* 11]

consider the relationship of the parties, whether the plaintiff was within the zone of foreseeable harm and whether the accident was within the reasonably foreseeable risks. *Di Ponzio, supra* at 583. Generally, questions concerning what is foreseeable are for the factfinder to resolve. *Derdiarian, supra* at 316.

However, defendants claim that it was not foreseeable that plaintiff would stand between the front bumper and a wall while the third-party defendant reached into the driver's side window to start the vehicle causing it to lurch forward and strike plaintiff, and thus plaintiffs' claims sounding in negligence must be dismissed as a matter of law.

This Court determines that the particular behavior in this case - namely, standing in front of a vehicle while someone else starts the engine - though perhaps not advisable, cannot be said to be unforeseeable as a matter of law.

The present case, at the very least, presents an issue of fact as to the foreseeability of Reis' conduct.

Volvo also maintains that its lack of knowledge of a dangerous condition bars a finding of negligence, citing *Zanki v. Cahill*, 2 NY3d 783 (2004). However, that case involved a slip and

fall where the plaintiff allegedly slipped on a foreign substance while walking down a stairwell. The standard in negligent design cases is different. In *Pahuta v Massey Ferguson, Inc.*, 942 F. Supp. 161 (W.D.N.Y. 1996), the plaintiff was injured while using a tractor loader and brought a design defect action sounding in both negligence and strict liability against the manufacturer. The Court there held that

[u]nder New York law, a manufacturer has a duty to use reasonable care in designing its product "so as to avoid any unreasonable risk of harm ... when the product is used in the manner for which [it] was intended ... as well as an unintended yet reasonably foreseeable use. *Micallef v Miehle Co., Div. of Miehle-Goss Dexter*, 39 NY2d 376, 385-386 ... (1976)... Thus, in a claim of negligent design, the focus shifts to the conduct of the manufacturer. The plaintiff must show not only that the product was defective when it left the manufacturer's hands, but also that the manufacturer could have foreseen the injury and therefore acted unreasonably in designing its product. (citations omitted).

Pahuta v Massey Ferguson, Inc., *supra* at 165.

This Court has already determined that there are questions of fact as to whether the product was defective when it left the manufacturer's hands, and as to whether Volvo could have foreseen the injury.

Volvo also argues that Silva's conduct in starting the engine with the vehicle in gear was the sole proximate cause of Reis' injury, and that where a superceding act is not foreseeable in the normal course of events or is far removed from defendants' conduct, it breaks the causal nexus and defendants cannot be held liable. *Dickinson v Dowbrands*, 261 AD2d 703 (1999). While the plaintiffs must show that the defendants' alleged negligence was a substantial cause of the events that produced the injury, plaintiffs need not demonstrate that the exact manner in which the accident took place was foreseeable. *Derdiarian, supra* at 315. "[A] superseding act may intervene between the defendant's conduct and the plaintiff's injury." *Dickinson, supra* at 703. In such instances, liability will turn on whether the intervening act is "a normal or foreseeable consequence of the situation created by the defendant's negligence." (citations omitted). *Derdiarian, supra* at 315.

In *Hart v. Hytrol Conveyor Co., Inc.*, 823 F. Supp. 87, 91 (N.D.N.Y. 1993), the Court held that even where a product's safety device is deliberately bypassed by a third party, if the product was "purposefully manufactured" to be operated without the safety device, "it is for the jury to determine the scope of the product's intended purposes and whether the product was not reasonably safe when placed in the stream of commerce." See also, *Sheppard v Smith Well Drilling & Water Sys.*, 93 AD2d 474 (3rd Dep't 1983). Here,

[* 14]

the jury should be permitted to decide whether Silva's conduct was sufficient to break the chain of causation between defendants' alleged negligent design and plaintiff's injuries, or whether it should just be taken into consideration on the issue of intervening cause and apportionment of fault.

C. Failure to Warn

Volvo further argues that Reis' claim for negligent failure to warn should be dismissed.¹ The Court of Appeals has held that "[a] manufacturer may be liable for failing to warn against the dangers of foreseeable misuse of its product (citations omitted)." *Liriano v. Hobart Corp.*, 92 N.Y.2d 232, 240 (1998). "Unlike design decisions that involve the consideration of many interdependent factors, the inquiry in a duty to warn case is much more limited, focusing principally on the foreseeability of the risk and the adequacy and effectiveness of any warning." *Id.* at 239. The duty to warn "does not arise when the injured party is already aware of the specific hazard (citation omitted) or the ... danger is obvious (citation omitted)." *Lonigro v. TDC Electronics, Inc.*, 215 A.D.2d 534, 536 (2nd Dep't 1995); see also, *Banks v Makita, U.S.A.*, 226 AD2d 659 (2nd Dep't 1996). "[W]here reasonable minds might disagree as to the extent of plaintiff's knowledge of the hazard, the

¹ Under New York law, "where the theory of liability is failure to warn, negligence and strict liability are equivalent (citations omitted)." *Wolfgruber v Upjohn Co.*, 72 AD2d 59, 62 (4th Dep't 1979); aff'd 52 NY2d 768 (1980).

question is one for the jury (citation omitted)." *Liriano, supra* at 241.

In this case, Volvo has alleged that both Reis and Silva were "very familiar" with the tendency of manual transmission vehicles to lurch forward under certain circumstances. However, unlike the plaintiffs in *Lonigro* and *Banks*, the parties here did not have extensive knowledge of the specific mechanical workings of this vehicle. In fact, Reis and Silva knew very little about this particular vehicle, Silva having purchased the vehicle just one day earlier and Reis having seen it for the first time only minutes before the accident occurred.

Moreover, plaintiffs also have the burden of proving that the user of the product would have "read and heeded a warning had one been given." See *Sosna v American Home Prods.*, 298 AD2d 158 (1st Dep't 2002).

Here, the defendants' duty to warn is complicated by the fact that any warning should have been directed at Silva, not Reis. While it should be expected of owners to apprise themselves of their vehicle's workings by reading the Owner's Manual, the same is not true for the owner's acquaintances.

The Owner's Manual submitted as part of Exhibit H to Defendants' Notice of Motion does describe the proper method for starting the engine, but does not specifically indicate that the vehicle could lurch forward if started by some other means. The only warnings pertain to potential misuse that could result in engine damage.

In light of the apparent lack of any clear warning from Volvo, the existence and/or adequacy of a warning cannot, at this point, be decided as a matter of law.

V. Claims Against Certain Defendants

Finally, Volvo contends that defendants AB Volvo, Volvo Cars of North America, Inc. ("VCNA") and Ford should be dismissed as they are not proper parties to this action. Where a defendant in a products liability action proves that it had nothing to do with the design, assembly, manufacture, sale or distribution of the allegedly defective product, the defendant must be dismissed from the action. *Vesligaj v PMT Forklift Corp.*, 213 AD2d 541 (2nd Dep't 1995).

Volvo has annexed to its papers an Affidavit from Michael Thomas, who was employed (as of December 17, 2007) as Vice

President and General Counsel of Volvo Cars of North America, L.L.C. stating that (1) AB Volvo is a Swedish corporation that did not design, manufacture or market the subject vehicle; (2) AB Volvo was a holding company for several corporations that manufactured trucks, buses and passenger vehicles, including Volvo Car Corporation; (3) AB Volvo sold Volvo Car Corporation to Defendant Ford in 1999; (4) Ford did not design, manufacture or market the subject vehicle; (5) VCNA is no longer in existence; and that (6) VCNA became a limited liability corporation in 2002 and is now known as Volvo Cars of North America, L.L.C.

As to defendants AB Volvo and VCNA, plaintiffs merely argue that the defendants did not provide them with a "clear representation" that the remaining defendants are the correct defendants, are the liable entities in the event of a judgment, have adequate insurance or ability to otherwise pay any judgment, or that a judgment can be properly executed against them in the United States, and thus they cannot agree to their dismissal from the case.

These arguments, however, are not sufficient to refute the statements of Mr. Thomas or keep said defendants in the case.

Accordingly, plaintiffs' Complaint is dismissed as against the defendants Volvo Cars of North America, Inc. and AB Volvo Corporation with prejudice and without costs or disbursements. The Clerk is directed to enter judgment accordingly.

As to defendant Ford, plaintiffs argue that defendants have failed to provide any information as to whether Volvo Car Corporation retained any of its liabilities after the 1999 sale to Ford or whether Ford contractually assumed those liabilities or is a successor corporation liable for those liabilities.

Accordingly, that portion of the motion seeking to dismiss this action as against Ford Motor Company is denied at this time, with leave to renew at trial.

This constitutes the decision and order of this Court.

Date: March 2, 2009


BARBARA R. KAPNICK
J.S.C.

FILED
BARBARA R. KAPNICK
J.S.C.
MAR 04 2009
COUNTY CLERK'S OFFICE
NEW YORK