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SC High Court Evaluates US Product Liability Trends

Law360, New York (September 03, 2010) -- In August the South Carolina Supreme Court issued an opinion in an automobile rollover case that brings South Carolina in line with the majority of U.S. jurisdictions regarding how a court determines whether a product is unreasonably dangerous because of a design defect.

In *Branham v. Ford Motor Co.* the court addressed nationwide trends regarding the proper application of the risk-utility test and the consumer expectation test in a product liability case and held that "the exclusive test in a product liability design case is the risk-utility test with its requirement of showing a feasible alternative design," reserving the "consumer expectation" test only for manufacturing defect cases. No. 26860, 2010 WL 3219499 (S.C. Aug. 16, 2010).

The case arose from a single-car accident in 2001 involving a Ford Bronco II, in which a 12-year-old boy was ejected from the vehicle and suffered severe brain injury. The case went to trial in South Carolina, and the jury returned a verdict against Ford for \$16 million in actual damages plus \$15 million in punitive damages.

The South Carolina Supreme Court gave a thorough and scholarly analysis of the nature and implications of the risk-utility test and consumer expectation test in a product liability design defect claim.

These tests are different methods of determining whether a product is "unreasonably dangerous" in a strict liability claim, where, if a product leaves the manufacturer's hands in an unreasonably dangerous condition, the manufacturer can be held liable for injuries caused by the product even if the manufacturer was not negligent.

Under the risk-utility test, "a product is unreasonably dangerous and defective if the danger associated with the use of the product outweighs the utility of the product." *Bragg v. Hi-*

Ranger Inc., 462 S.E.2d 321, 328 (S.C. Ct. App. 1995).

"[N]umerous factors must be considered [when determining whether a product is unreasonably dangerous], including the usefulness and desirability of the product, the cost involved for added safety, the likelihood and potential seriousness of injury, and the obviousness of danger." Claytor v. General Motors Corp., 286 S.E.2d 129, 132 (S.C. 1982).

Under the consumer expectation test, however, "[t]he test of whether a product is or is not defective is whether the product is unreasonably dangerous to the consumer or user given the conditions and circumstances that foreseeably attend use of the product." *Id.* at 131.

In the early development of product liability law, courts often used the consumer expectation test, which was codified in the Restatement (Second) of Torts. This test evolved during a time when product liability claims were almost exclusively based on manufacturing defects, and cases based on alleged design defects were virtually unknown.

The consumer expectation test made sense for manufacturing defect cases because consumers can use their experience to compare a defectively manufactured product to a properly manufactured one.

The inquiry in manufacturing defect cases is relatively simple and straightforward because the alleged "defect" is limited to the particular unit and there are no countervailing "benefits" from such a defect for the jury to balance or consider.

However, the test as codified in the Restatement (Second) of Torts was never intended to apply to design defect cases.

In contrast to manufacturing defect cases, the jury in a design defect case is asked to evaluate whether a product that is correctly manufactured according to its intended design is defective nonetheless because the design itself is unreasonably dangerous. The plaintiff must prove that a safer, feasible alternative design existed at the time the product was manufactured.

The inquiry in design defect cases presents issues of social utility and requires a balancing of the benefits and the risks of the design and a consideration of alternatives.

The consumer expectation test does not address this aspect of design defect cases. It can prove unworkable because, in many situations, "the consumer would not know what to expect, because he would have no idea how safe the product could be made." *Barker v. Lull*

Eng'g Co., 573 P.2d 443, 454 (Cal. 1978).

As the South Carolina Supreme Court acknowledged, while the Restatement (Second) included the consumer expectation test, the newer Restatement (Third) of Torts: Product Liability squarely rejected it for design defect claims. Restatement (Third) of Torts: Prod. Liab. § 2, cmt. d, reporters' note (1998).

Claims of defective design require application of risk-utility standards, including determinations that the product reasonably could have been made safer by a better design or instruction or warning. Id. § 2, cmt. d.

Under the risk-utility analysis, "consumer expectations do not constitute an independent standard for judging the defectiveness of product designs," as consumer expectations "do not take into account whether the proposed alternative design could be implemented at reasonable cost, or whether an alternative design would provide greater overall safety." Id. § 2, cmt. g.

In Branham the South Carolina Supreme Court cited case law from almost every jurisdiction in the nation and concluded that "35 of the 46 states that recognize strict product liability utilize some form of risk-utility analysis in their approach to determine whether a product is defectively designed." Branham, 2010 WL 3219499 *8 n.11.

"Some of these jurisdictions exclusively employ a risk-utility test, while others do so with a hybrid of the risk-utility and the consumer expectations test, or an explicit either/ or option. States that exclusively employ the consumer expectations test are a decided minority." Id. at *8.

Consistent with the majority of other states, the court explained:

[I]n design defect cases the risk-utility test provides the best means for analyzing whether a product is designed defectively. Unlike the consumer expectations test, the focus of a risk-utility test centers upon the alleged defectively designed product. The risk-utility test provides objective factors for a trier of fact to analyze when presented with a challenge to a manufacturer's design. Conversely, we find the consumer expectations test and its focus on the consumer ill-suited to determine whether a product's design is unreasonably dangerous.

In every design defect case the central recurring fact will be a product that failed, causing damage to a person or his property. Consequently, the focus will be whether the product was

made safe enough. This inquiry is the core of the risk-utility balancing test in design defect cases, yet we do not suggest a jury question is created merely because a product can be made safer. We adhere to our long-standing approval of the principle that a product is not in a defective condition unreasonably dangerous merely because it [can be made safer]. *Id.* at *8-9.

The adoption by the majority of jurisdictions of the risk-utility test is rooted in the practical implications of the test as well. If the court uses the consumer expectation test, the fact finder considers only the effect of a design decision on the user.

By adopting the risk-utility test, the court allows the defendant to explain its rationale and justification for the design of the product and allows the fact finder to consider this in its decision as to liability and damages.

The issue of risk-utility test versus consumer expectation test was just one of numerous issues on appeal in *Branham*. In concluding that the trial court improperly instructed the jury on the consumer expectation test, the South Carolina Supreme Court reversed the \$31 million verdict against Ford and remanded the case for a new trial.

--By Robert W. Foster Jr. (pictured) and Jay T. Thompson, Nelson Mullins Riley & Scarborough LLP

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*C. Mitchell Brown and William C. Wood, Jr., of Nelson Mullins Riley & Scarborough LLP represented Ford Motor Co. in the appeal of *Branham v. Ford Motor Co.**

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