

No. D0045154

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

BENETTA BUELL-WILSON and BARRY S. WILSON,

Plaintiffs, Respondents, and Cross-Appellants,

v.

FORD MOTOR COMPANY and DREW FORD,

Defendants, Appellants, and Cross-Respondents.

On Appeal From The San Diego County Superior Court
The Honorable Kevin A. Enright
No. GIC800836

**APPLICATION OF
THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.
FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF
AND *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANTS**

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**APPLICATION OF THE PRODUCT LIABILITY ADVISORY
COUNCIL, INC. FOR PERMISSION TO FILE *AMICUS CURIAE*
BRIEF IN SUPPORT OF APPELLANTS.**

To the Honorable Judith McConnell, Presiding Justice:

The Product Liability Advisory Council, Inc., respectfully applies for permission to file the attached *amicus curiae* brief in support of the appellants.

The Product Liability Advisory Council, Inc. (“PLAC”) is a non-profit association with 128 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States, with emphasis on the law governing the liability of manufacturers of products. PLAC’s perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Since 1983, PLAC has filed over 600 briefs as *amicus curiae* in both state and federal courts presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC’s corporate members is attached as Appendix A.

As part of the regular product-design process, PLAC’s members must routinely analyze and resolve questions about safety in product design. PLAC members who manufacture products with the potential to cause significant physical injury or death—including pharmaceuticals, medical devices, pesticides, foodstuffs, chemicals, appliances, power-tools, and automobiles—have a particular interest in the legal implications of product design decisions.

By imposing punitive liability on a manufacturer because that manufacturer did not implement certain design features that were the subject of ongoing expert debate when design decisions were being made, the

judgment in this case threatens to undermine the product-design process as it exists in our economy and replace it with an irrational system in which every proposed safety-related design feature must be implemented and the most expensive design option must always be selected regardless of its relative merit. Such a system not only would be economically debilitating to PLAC's members, but also would harm consumers by dampening innovation, causing the withdrawal of beneficial products, increasing prices, and in some instances *reducing* the safety of products. Accordingly, PLAC has a strong interest in expressing its views about the impropriety of imposing punitive damages in this case.

The attached brief addresses the question whether punitive damages should be awarded when, as here, the manufacturer's design decision was supported by reasonable expert opinion about the relative safety of the alternative designs at the time the decision was made. Given the natural constraints of briefing the full merits of a case, the parties are obviously unable to provide the Court with this type of focused analysis. PLAC's arguments also attempt to incorporate the broader interests of U.S. manufacturers in a way that the parties' briefs cannot. For these reasons, PLAC's brief provides a perspective not found in the parties' briefs and accordingly should be of assistance to the Court in resolving the punitive-liability issue in this case.

CONCLUSION

The application for permission to file the attached amicus curiae brief should be granted and the brief filed.

Respectfully submitted.

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INTEREST OF THE *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. (“PLAC”) is a non-profit association with 128 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States, with emphasis on the law governing the liability of manufacturers of products. PLAC’s perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Since 1983, PLAC has filed over 600 briefs as *amicus curiae* in both state and federal courts presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC’s corporate members is attached as Appendix A.

As part of the regular product-design process, PLAC’s members must routinely analyze and resolve questions about safety in product design. PLAC members who manufacture products with the potential to cause significant physical injury or death—including pharmaceuticals, medical devices, pesticides, foodstuffs, chemicals, appliances, power-tools, and automobiles—have a particular interest in the legal implications of product design decisions.

By imposing punitive liability on a manufacturer because that manufacturer did not implement certain design features that were the subject of ongoing expert debate when design decisions were being made, the judgment in this case threatens to undermine the product-design process as it exists in our economy and replace it with an irrational system in which every proposed safety-related design feature must be implemented and the most expensive design option must always be selected regardless of its relative merit. Such a system not only would be economically debilitating to PLAC’s

members, but also would harm consumers by dampening innovation, causing the withdrawal of beneficial products, increasing prices, and in some instances *reducing* the safety of products. Accordingly, PLAC has a strong interest in expressing its views about the impropriety of imposing punitive damages in this case.

ARGUMENT

This case involves a potentially record-breaking \$75,000,000 punitive award based on Ford Motor Company’s (“Ford”) design decisions. There is no context in which it is more important to ensure that punitive damages are not arbitrary and do not exceed society’s interest in rational deterrence than this one. Products are the lifeblood of the American economy. If not properly constrained, punitive awards against product manufacturers can chill innovation, unnecessarily increase the price of products (perhaps beyond the means of many potential purchasers), and actually decrease product safety.

That is because, in the product-liability context, past punitive awards create powerful, if often irrational, incentives for manufacturers attempting to design products in similar situations. The eight-figure punitive verdict in this case sends the message that product manufacturers must implement *every* safety-related design feature proposed to them regardless of its merits and must make safety-related design decisions based on cost (always preferring *more* expensive designs to *less* expensive ones) rather than the actual merits of competing designs. That result is irrational and dangerous. To avoid the deleterious consequences of overdeterrence, the Court should hold—in accordance with the decisions of courts around the country (*see* Section B.2.b, *infra*)—that punitive damages may not be imposed upon a manufacturer whose design decision was supported by a reasonable (even if not unanimous), contemporaneous expert opinion about the design’s relative merits as

compared to alternative designs. Application of this principle here is necessary to ensure that manufacturers will make design decisions based on the actual merits of the alternatives rather than the perceived need to spend money on “safety features,” regardless of their merits, in order to avoid exposure to punitive liability.

A. The Product-Design Process Necessarily Requires Manufacturers To Make Complex Cost-Benefit Decisions About Proposed Design Features.

No product is completely safe. *See, e.g., Cavers v. Cushman Motor Sales* (1979) 95 Cal.App.3d 338, 347-38. Neither are manufacturers required to build the safest product that money can buy—*e.g.*, installing a NASCAR-style roll cage and five-point seat harness in every automobile.¹ *See, e.g., Hansen v. Sunnyside Prods., Inc.* (1997) 55 Cal.App.4th 1497, 1512 (“the test” for product defect “is not ‘preventable danger’ but ‘excessive preventable danger’”); *Linegar v. Armour of Am., Inc.* (8th Cir. 1990) 909 F.2d 1150, 1154 (a manufacturer “is not obliged to market only one version of a product, that being the very safest design possible”). Instead, the process of product design necessarily involves complex cost-benefit decisions. When deciding whether to implement a particular design feature, a manufacturer must consider many factors: the types of risks that the feature guards against (including their severity and likelihood); the feature’s relative effectiveness as compared to alternative features at avoiding those risks; any risks that the feature might create or exacerbate (including their severity and likelihood); the relative

¹ *See generally* RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY (1998) § 2 cmt. a (“Society does not benefit from products that are excessively safe—for example, automobiles designed with maximum speeds of 20 miles per hour—any more than it benefits from products that are too risky. Society benefits most when the right, or optimal, amount of product safety is achieved.”).

benefits and costs of the feature with respect to other design considerations such as performance, efficiency, marketability, appearance, ease of operation, durability, freedom from maintenance or repair, and ease of manufacture; and, finally, the relative cost to consumers of the feature. The task of a responsible manufacturer is to strike a reasonable balance between these often countervailing interests.²

Of course, the result of this complex cost-benefit analysis is not always controlling. Other factors can supersede the design choices that a manufacturer otherwise would make. For example, for certain aspects of certain classes of products, we, as a society, have decided that uniform centralized rulemaking should supersede, or at least constrain, the design choices of manufacturers. In such situations, a federal regulator solicits opinions from experts, manufacturers, consumer advocates, and the public at large; conducts its own research if necessary; engages in a public deliberative process; and ultimately sets standards for all manufacturers. Because the regulator's reasoning and decision are open and subject to revision, a manufacturer whose internal assessment conflicts with the regulator's can always seek an exemption for its particular product or reconsideration of the rule itself. But manufacturers must comply with the regulator's ultimate edicts or risk government investigations, monetary sanctions, litigation, and recall of their product. Because the costs of these sanctions are so enormous, noncompliance is effectively impossible.

Similarly, the threat of punitive liability can skew, if not entirely

² Under California law, in complex automotive design cases, a product's design is defective if it represents an unreasonable balancing of risks and benefits. *See Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 567. This "risk-benefit" test requires juries to consider roughly the same factors described above. *See Barker v. Lull Eng'g Co.* (1978) 20 Cal.3d 413, 431-32.

displace, a manufacturer's independent design judgment. Put simply, when punitive damages are awarded for a defective product design, they have the purpose and effect of deterring other manufacturers from making similar design decisions.

Because the costs imposed by an award of punitive damages—both the monetary cost of paying the award and collateral costs such as harm to the manufacturer's reputation—are so enormous, the threat of punitive damages can effectively bar broad categories of product-design decisions if those decisions are perceived to be susceptible to punitive liability.³ Unlike a regulatory decision to bar certain product designs, however, the decision to impose punitive damages is made in hindsight, through the lens of a particular plaintiff's lawsuit, without the benefit of all viewpoints (including the viewpoints of consumers other than the plaintiff), without public deliberation, and without the opportunity for reconsideration. Therefore, before awarding punitive damages in the product-liability context, it is important to consider the message that is being sent to other manufacturers and the effect that the award will have on the product-design process in the broader economy.⁴

³ See, e.g., Steven Garber, *Punitive Damages and Deterrence of Efficiency-Promoting Analysis: A Problem Without a Solution?* (2000) 52 STAN.L.REV. 1809, 1814 (an award of punitive damages can give rise to “‘indirect’ costs that manufacturers appear to take very seriously, such as publicity about litigation that may damage the company’s reputation or trigger additional lawsuits, reactions of consumers that could reduce product demand, and reactions of safety regulators such as investigations, product recalls, or stricter regulations”).

⁴ See, e.g., *id.* (“[T]he perceived likelihood and potential costs associated with punitive damages for performing risk or benefit-cost analyses can be large enough to attract attention by corporate decision makers and deter them from doing such analyses.”).

B. The Imposition Of Punitive Liability In This Case Will Have An Irrational And Dangerous Impact On The Product-Design Process.

1. The punitive verdict in this case

In this case, there was no consensus among relevant experts that the design features urged by plaintiffs were necessary to remedy an unacceptable risk of injury in the Explorer at the time that Ford was making design decisions. On the contrary, Ford's conclusion that these features were *not* necessary to remedy an unacceptable risk of injury was based on the reasonable (albeit not unanimous) opinions of experts at Ford and elsewhere.

Specifically, at the time that Ford was designing the Explorer, some experts believed that vehicle roofs should be built to withstand greater force than is required by the National Highway Traffic Safety Administration's ("NHTSA") standard (FMVSS 216). But, after years of debate and research on this very subject, many experts (including the experts at NHTSA as well as those at Ford) believed that roofs designed to meet the same standard as the Explorer's were reasonably safe. *See* Ford's Brief at 49-50.

With respect to the Explorer's center of gravity, the disagreement among experts was more complex. It was widely accepted at the time that, other variables being equal, a higher center of gravity can create a greater risk of injuries in a rollover accident while a lower center of gravity creates a greater risk in other situations such as head-on collisions. There was disagreement, however, when it came to striking an appropriate balance between these competing risk profiles: Some experts argued that it is safer overall to design automobiles with a lower center of gravity and some concluded that the Explorer's design represented a reasonable tradeoff. *See, e.g.,* Ford's Brief at 47-48. Indeed, this ongoing debate is reflected in the internal dialogue between Ford's engineers, who discussed various alternative designs (*see* Plaintiffs' Brief at 10), but ultimately agreed that the final design

of the Explorer was reasonably safe (*see* Ford’s Brief at 7-8).

Furthermore, at a more fundamental level, there was a longstanding disagreement over the appropriate method for evaluating safety in this context. Some experts supported plaintiffs’ contention that vehicle stability should be measured using the Static Stability Index (“SSI”), a figure that reflects the dimensions and weight distribution of the vehicle. Other experts, including those at NHTSA and Ford, concluded that real-world testing is the only accurate indicator of vehicle stability because “SSI” ignores many relevant features that affect stability (*e.g.*, the nature of the suspension system). *See* Ford’s Brief at 47-49.

Of course, Ford’s ultimate decision whether to make the changes favored by plaintiffs had financial repercussions. As it happens, Ford’s decision not to implement the features plaintiffs now advocate reduced costs. However, to our knowledge, there is no evidence that Ford made this decision to save money despite concluding that these design features were necessary to remedy an unacceptable risk of injury. *See, e.g.*, Ford’s Brief at 8. On the contrary, the evidence shows that Ford decided not to implement these features because it believed that they were not necessary to remedy an unacceptable risk of injury (thus resolving the conflicting expert opinions in favor of non-implementation) and may even have increased the overall risk to consumers (in the case of plaintiffs’ suggestion to lower the Explorer’s center of gravity). *See, e.g., id.*

The existence of a genuine ongoing dispute among experts over the merits of plaintiffs’ proposed “safety features” colors the nature of Ford’s design decision in this case. Ford had to analyze competing expert opinions on the fundamental safety-related merits of various design features. There was no consensus about whether certain alternatives created an unreasonable risk. Indeed, with respect to the Explorer’s center of gravity, there was no

consensus about which of the various alternatives was safest overall. Ford's ultimate decision was based on its resolution of this debate and its attempt to strike a reasonable balance between all of the diverse factors discussed above (at 3-4). In other words, the design decision involved in this case was not simply a question of dollars and cents versus safety, but involved a fundamental controversy about the relative safety of different product designs.

We take no position on the merits of these competing expert opinions or whether Ford's ultimate decision was correct in hindsight. Those are questions that are appropriately resolved by a factfinder when deciding whether to award compensatory damages. Nor do we here take a position on the more complicated question of when a design decision that straightforwardly chooses costs over known safety risks should give rise to punitive liability. Instead, our point is that, contrary to plaintiffs' theory of the case, punitive liability is never appropriate when, at the time that design decisions were being made, the manufacturer's design decision was supported by a reasonable expert opinion on the relative merits of the design feature(s) in question—even if other experts adhered to a contrary view.

2. The Court should confirm that punitive damages may not be imposed upon a manufacturer whose design decision was supported by a reasonable, contemporaneous expert opinion about the safety-related merits of the alternative designs.

a. Precluding punitive damages when the challenged design decision was supported by reasonable expert opinion is good policy.

Because Ford's decisions in this case were made in the context of genuine expert disagreement about the safety-related merits of the alternatives, the imposition of punitive damages for those decisions sends a powerful message that manufacturers must implement any design feature that is both recommended by an expert and more expensive than the alternatives,

regardless of its relative safety-related merits (*i.e.*, even if it is not necessary to correct an unacceptable risk of injury and even if it makes the product more dangerous overall than the alternatives).

The law should encourage manufacturers faced with a choice whether to implement a proposed design feature to rely on reasonable expert opinion about the relative safety-related merits of the alternatives (in addition to all of the other legitimate factors discussed above (at 3-4)). But the punitive verdict in this case tells manufacturers that even design decisions that are supported by reasonable expert opinion may subject them to reprobation and punishment. This leaves manufacturers who face a design decision characterized by a lack of consensus among experts with no clear path forward: A decision based on a reasonable assessment of the merits of the alternatives is no longer appropriate. Instead, the punitive award in this case suggests that manufacturers can prevent *post hoc* allegations that they “traded lives for dollars,” and thereby protect themselves from punitive damages, only by skewing their decisions in favor of the most expensive design, regardless of the merits.

Unfortunately, this perverse message is likely to come across loud and clear in the manufacturing base of our economy, because individuals with responsibility for making product-design decisions are notoriously risk averse. Indeed, “management literature suggests that behavioral effects [of the possibility of punitive damages] are likely to be even larger than what would be predicted” because “managers tend to evaluate risks in terms of worst-case scenarios, and they seem willing to forego [sic] substantial amounts of expected profits to avoid risks that could lead to financial disaster or prevent managers from achieving their performance targets.” Garber, 52 STAN.L.REV. at 1814; *see also* James G. March & Zur Shapira, *Managerial Perspectives on Risk and Risk Taking* (1987) 33 MGMT.SCI. 1404. In other words, the

perceived threat of punitive damages for a controversial product-design decision that happens to save money may create an attitude of “spend first and ask questions later” in the risk-averse individuals who make design decisions. Although we do not suggest that this consideration will always control the ultimate design decision, it surely will operate to skew decisions at the margins.

Plaintiffs may argue that this is no bad thing—that when there is a debate about the safety-related merits of a proposed feature, it is better to err on the side of caution and adopt the feature even if there is some question about its merits. That argument is flawed for at least two reasons.

First, such an approach creates a one-way ratchet, driving costs up without any sensitivity to the actual value conferred by the design features being adopted. If any expert advocates for a design feature, then a manufacturer can refuse to incorporate the feature only at the risk of potentially disastrous punitive liability, even if other experts tell the manufacturer that the feature is unnecessary. That is because if—as is almost inevitable with a mass-marketed product—someone is eventually injured in a way that conceivably could have been prevented by the feature, a plaintiff always can produce some expert to opine that the feature should have been adopted and would have prevented this plaintiff’s injury.⁵ Thus, unless the

⁵ Cf. Andrew C. Clausen & Annette M. Carwie, *Problems Applying the Life of Georgia v. Johnson Case in the Liability Setting: Where Do We Go With Punitive Damages After BMW v. Gore?* (1997) 58 ALA.LAW. 46, 49 (“Regardless of how high the manufacturer sets the design safety standard, when an accident does occur, the plaintiff’s lawyer will have an expert to testify the product could have been made safer, and the injury prevented, if the manufacturer had just been willing to spend some additional money. As a result, an argument for reprehensibility can be supported in virtually every case.”).

manager making product-design decisions is confident that no one could *ever* be injured in a way that could have been prevented by the design feature at issue, the threat of punitive liability could force him to implement what he (and most relevant experts) consider to be a relatively useless “safety feature.”

Second, the incentives created by the punitive liability verdict in this case, in some instances, are likely to result in *more* dangerous products. That is because product design sometimes approaches a zero-sum game: In some instances, a manufacturer can decrease one type of risk only by increasing another.⁶ Indeed, Ford’s design decision here provides a case in point. Plaintiffs argue that Ford should have designed the Explorer with a lower center of gravity. Even if such a change may have reduced the risk of the type of injury that plaintiffs sustained, it would have increased the risk of other types of injuries in other types of accidents such as head-on collisions.

In such situations, a manufacturer’s assessment of the safety-related merits of the alternatives, including divergent expert opinions, will have a significant impact on consumer safety. A manufacturer’s difficult and complex task is to select a design that minimizes the risk of injury overall (setting aside the many other legitimate concerns that may enter into its decision (*see* Section A, *supra*)).⁷ But no matter what choice is made, some individuals may be injured (or more seriously injured) who would not have

⁶ *Daly v. Gen. Motors Corp.* (1978) 20 Cal.3d 725, 747 (because “a design rendered safe in one situation may become more dangerous in others,” courts must “consider the product as an integrated whole”).

⁷ RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY (1998) § 2 cmt. f (“When evaluating the reasonableness of a design alternative, the overall safety of the product must be considered. It is not sufficient that the alternative design would have reduced or prevented the harm suffered by the plaintiff if it would also have introduced into the product other dangers of equal or greater magnitude.”).

been injured (or would have been injured less severely) if another choice had been made. If the existence of a reasonable debate about the relative safety of the alternatives does not preclude punitive damages, manufacturers may select the more expensive (thus, they believe, “punitive-immunized”) design notwithstanding any concerns they may have that it will result in more overall harm to consumers. In other words, if manufacturers making this type of zero-sum decision are motivated (even just at the margins) not by the desire to select the safety-maximizing design, but instead by the desire to avoid the appearance that they are reluctant to spend money on “safety features,” more people than necessary are likely to be injured.

To ensure that manufacturers do not receive the socially deleterious message that they must always choose the most expensive option (no matter its relative merits) in order to fend off punitive-damages claims, it is essential that courts embrace a clear rule that punitive liability may not be imposed when the design decision is based on a reasonable expert judgment about the design’s relative merits as compared to alternative design options—even if there is room for expert disagreement on the subject. Because this bar to punitive liability applies only when the design decision was supported by *contemporaneous* reasonable expert opinion, plaintiffs are mistaken in suggesting that applying it here would mean that “a product manufacturer cannot be subject to punitive damages so long as it can find an expert to support its position.” Plaintiffs’ Brief at 45.⁸ In fact, by focusing on the state

⁸ Of course, contemporaneous expert opinion that was fraudulent or manufactured would not insulate design decisions from punitive liability. However, once the defendant has shown that there was a contemporaneous expert opinion supporting its design decision, it is the plaintiff’s burden to prove that the opinion was transparently unreasonable or was based on an intentional distortion of the underlying evidence. The mere existence of a contrary expert opinion ought not be enough.

of expert opinion at the time of the design decision, this principle avoids the well-known problems with hired experts who characterize past decisions through the lens of litigation and with 20/20 hindsight (*see* pages 14-16, *infra*).

b. The principle that punitive damages may not be imposed when there is a good-faith disagreement among experts is well-established.

Precluding punitive damages when the challenged conduct was supported by a reasonable expert opinion on one side of a good-faith disagreement among experts is not only good policy, it is also the law. California courts have repeatedly held that, when there is a legitimate dispute about coverage or benefits due under an insurance contract, an insurer cannot be liable in tort (much less suffer punitive damages). *See, e.g., Chateau Chamberay Homeowners Assoc. v. Associated Int’l Ins. Co.* (2001) 90 Cal.App.4th 335, 347 (“It is now settled law in California that an insurer denying or delaying the payment of policy benefits due to the existence of a genuine dispute with its insured as to the existence of coverage liability or the amount of the insured’s coverage claim is not liable in bad faith even though it might be liable for breach of contract.”); *Fraley v. Allstate Ins. Co.* (2000) 81 Cal.App.4th 1282, 1293 (“Where the parties rely on expert opinions [to determine costs of repairs under insurance policy], even a substantial disparity in estimates for the scope and cost of repairs does not, by itself, suggest the insurer acted in bad faith.”). As courts across the country have recognized, the same principle applies in the context of product design and compels precluding punitive liability when there is evidence of a genuine dispute among experts as to the safety of a product or the propriety of challenged conduct.⁹

⁹ *See, e.g., Mercer v. Pittway Corp.* (Iowa 2000) 616 N.W.2d 602, 618 (concluding that, where there was reasonable disagreement among experts about adequacy of product design and testing, rational fact finder could not as

It is particularly important that trial and appellate courts actively enforce this constraint on punitive damages in the product-liability context. Because product-liability cases always involve a concrete person who has been injured or killed and a distant corporation that has made a calculated product-design decision, often recognizing that its product is not completely safe, juries are easily provoked to a state of outrage that leads them to award punitive damages irrespective of the true culpability of the defendant's conduct under the applicable legal standard. Whereas the manufacturer had to make a prospective decision that contemplated all potential users of its product and all potential uses, the jury sees the manufacturer's decision in retrospect with a focus on specific features and uses and through the lens of the injury suffered by an individual plaintiff.

a matter of law hold defendant liable for punitive damages even though it could reasonably find liability on plaintiff's underlying tort claims); *Loitz v. Remington Arms Co.* (Ill. 1990) 563 N.E.2d 397, 407 (reversing punitive award in part because there was a good faith disagreement among metallurgical experts regarding the safety of the material used in making the gun barrel that exploded, causing plaintiff's injury); *Hillrichs v. Avco Corp.* (Iowa 1994) 514 N.W.2d 94, 100 (affirming j.n.o.v. on punitive damages because "an award of punitive damages is inappropriate where room exists for reasonable disagreement over the relative risks and utilities of the conduct and device at issue"); *Owens-Corning Fiberglas Corp. v. Garrett* (Md. 1996) 682 A.2d 1143, 1163-1165, 1167-1168 (reversing punitive award in part because there was a genuine scientific dispute regarding the safety of the product at issue); *Satcher v. Honda Motor Co.* (5th Cir. 1995) 52 F.3d 1311, 1317 (vacating punitive award in part because "there is a genuine dispute in the scientific community as to whether leg guards do more harm than good"); *Burke v. Deere & Co.* (8th Cir. 1993) 6 F.3d 497, 511 (reversing denial of j.n.o.v. because "[a]n award of punitive damages is not appropriate when room exists for reasonable disagreement over the relative risks and utilities of the conduct at issue"); see generally David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products* (1982) 49 U.CHI.L.REV. 1, 38.

As Judge Easterbrook explained in a case involving the design of the emergency stop button on an escalator:

The *ex post* perspective of litigation exerts a hydraulic force that distorts judgment. Engineers design [complex products] to minimize the sum of construction, operation, and injury costs.
* * *

Come the lawsuit, however, the passenger injured by a[n] [accidental escalator] stop presents himself as a person, not a probability. Jurors see today's injury; persons who would be injured if buttons were harder to find and use are invisible. Although witnesses may talk about them, they are spectral figures, insubstantial compared to the injured plaintiff, who appears in the flesh. * * * [N]o matter how conscientious jurors may be, there is a bias in the system. *Ex post* claims are overvalued and technical arguments discounted in the process of litigation. And the claims of crippled neighbors receive more weight than do potential injuries to be felt by passengers (and stockholders) in other states.

Carroll v. Otis Elevator Co. (7th Cir. 1990) 896 F.2d 210, 215-16 (Easterbrook, J., concurring) (citation omitted); *see also* W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts* (2001) 30 J.LEGAL STUD. 107, 116 (corporations' "superior ex ante risk judgments may be outweighed by the ex post reality of the accident victim"). Such "hindsight bias" is compounded substantially when the plaintiff is able to show that the defendant employed a cost-benefit analysis in selecting one particular design rather than another—or, as the plaintiff's lawyer will put it, that the defendant "traded lives for dollars." *See* W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?* (2000) 52 STAN.L.REV. 547, 552 (mock juror study revealed that even proper corporate balancing of risks against costs leads to inflated punitive awards); David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products* (1982) 49 U.CHI.L.REV. 1, 11.

Because this "hindsight bias" is an unavoidable human reaction, courts

must play the primary role of guaranteeing that the deterrent force of punitive damages is appropriately constrained by entering judgment as a matter of law when the evidence shows that a product-design decision was supported by a reasonable expert assessment of the relative safety of alternative designs. If, instead, jurors are allowed to make a decision constrained only by vague terms such as “reprehensibility,” they will naturally be inclined to see a corporation’s past dispassionate decision about product design (which, perhaps, recognized the possibility of the very injuries sustained by the plaintiff), as recklessly indifferent when contrasted with the emotional impact of serious injury or death.¹⁰

* * * *

In sum, there is no place for punitive damages—the point of which is to deter the defendant and other manufacturers from making similar design decisions in the future—when, as here, the manufacturer’s design decision was supported by a reasonable expert assessment of the relative merits of the alternatives, even if there was disagreement among experts about that decision. In such circumstances, manufacturers should be left free to carefully and fully balance the *merits* of different points of view, the evidence on both sides of the debate, the arguments put forward by various experts, and all other relevant considerations. Adding to this mix the threat of punitive liability for “cost-saving-choices” can only distort manufacturers’ design processes to the detriment of both manufacturers and consumers.

¹⁰ The “traditional” language defining reprehensibility is often inadequate in the product-liability context because, “[u]nlike the standard negligence case of yesteryear, the modern products liability case comes with ‘intent’ built in”—*i.e.*, the case always involves a “conscious design choice” that resulted in injury. Aaron D. Twerski, *Punitive Damages: Through the Five Prisms* (1994) 39 VILL.L.REV. 353, 356.

CONCLUSION

The Court should order that judgment be entered for Ford as to punitive damages.

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