297 Ga.App. 835
Court of Appeals of Georgia.

BAGNELL et al.
v.
FORD MOTOR COMPANY et al.
Ford Motor Company et al.
v.
Bagnell et al.

Nos. A09A0069, A09A0070. | April 16, 2009. | Reconsideration Denied May 14, 2009.

Synopsis

Background: Representatives of van accident victims filed products liability suit against van manufacturer, alleging claims for strict liability, negligent design, and failure to warn of a stability hazard, arising from accident that occurred in Texas when driver who was a Georgia resident lost control of van, and it rolled over and fell off bridge into river, killing five passengers. Defendant filed motion for summary judgment. The State Court, Clayton County, Cowen J., granted the motion in part, and, following jury trial, entered judgment on verdict in favor of defendant. Plaintiffs appealed. Defendant cross-appealed.

Holdings: The Court of Appeals, Johnson, P.J., held that:

[1] in a matter of first impression, Georgia's ten-year statute of repose for products liability actions, rather than 15-year statute of repose of Texas for such actions, applied to strict liability and negligent design claims;

[2] causation testimony of driver was not subject to exclusion on basis that it was speculative;

[3] trial court's error in excluding driver's causation testimony was not harmless;

[4] issue of whether driver would have followed a warning if one had been provided by manufacturer was for jury;

[5] trial court did not abuse its discretion in declining to impose spoliation sanctions on representatives because they failed to preserve van following wreck; and

[6] evidence regarding rental car company's fleet of vans was admissible to show manufacturer's knowledge of a stability hazard in fully loaded van.

Reversed on appeal; affirmed on cross-appeal.

West Headnotes (17)

[1] Limitation of Actions
In actions for tort

Georgia's ten-year statute of repose for products liability actions, rather than 15-year statute of repose of Texas for such actions, applied to strict liability and negligent design claims brought by representatives of accident victims against van manufacturer, arising out of accident that occurred in Texas when Georgia resident lost control of van, and it rolled over and fell off bridge into river, killing five passengers, as statute of repose was remedial/procedural in nature, such that law of state where action was filed controlled. West's Ga.Code Ann. § 51–1–11(b)(2); V.T.C.A., Civil Practice & Remedies Code § 16.012(b).

2 Cases that cite this headnote

[2] Products Liability
Time to sue and limitations

Ten-year statute of repose for products liability actions does not apply to failure-to-warn claims. West's Ga.Code Ann. § 51–1–11(b)(2).

2 Cases that cite this headnote

[3] Torts
What law governs

Under rule of “lex loci delicti,” tort cases are governed by the substantive law of the state where the tort or wrong occurred.

3 Cases that cite this headnote

[4] Action
What law governs

Action
Course of procedure in general

Questions involving procedure or the appropriate remedy are decided using the law of the state where the action was filed.

Cases that cite this headnote

[5] **Statutes**
Retroactivity

Generally, statutes function prospectively.

Cases that cite this headnote

[6] **Statutes**
Procedural Statutes

Legislation that governs court procedure or impacts a remedy may be applied retroactively.

Cases that cite this headnote

[7] **Products Liability**
What law governs

Products Liability
Automobiles

Products Liability
Warnings or instructions

Testimony of driver of van as to whether she would have driven van filled with passengers and luggage if she had known that van was less stable in that condition, or if van manufacturer had placed warning in van regarding rollover risk was not subject to exclusion on basis that it was speculative, in suit brought by representatives of accident victims against manufacturer asserting failure-to-warn claim, arising from accident that occurred when driver lost control of van, and it rolled over and fell off bridge into river, killing five passengers; under Texas substantive law, which applied because accident occurred in Texas, to prove causation, necessary proof could consist of little more than driver's assertion that she would have been mindful of an adequate warning had it been given.

Cases that cite this headnote

[8] **Products Liability**
Warnings or instructions

Under Texas law, a failure-to-warn claimant proves causation by showing that adequate warnings would have made a difference in the outcome, that is, that they would have been followed.

Cases that cite this headnote

[9] **Appeal and Error**
Automobiles; highways

Trial court's error in excluding testimony of driver of van as to whether she would have driven van filled with passengers and luggage if she had known that van was less stable in that condition, or if van manufacturer had placed warning in van regarding rollover risk, was not harmless, in suit brought by representatives of accident victims against manufacturer asserting failure-to-warn claim, arising from accident that occurred when driver lost control of van, and it rolled over and fell off bridge into river, killing five passengers; while driver eventually testified that she would have heeded a warning, this statement came immediately after court characterized similar evidence as speculative and told jury to disregard driver's testimony about what she might have done if she had seen a warning, and it was possible jury discounted causation testimony eventually admitted.

Cases that cite this headnote

[10] **Appeal and Error**
Same or Similar Evidence Otherwise Admitted

The erroneous exclusion of cumulative evidence is generally harmless.

1 Cases that cite this headnote

[11] **Appeal and Error**
Instructions understood or followed

Qualified jurors under oath are presumed to follow the trial court's instructions.

Cases that cite this headnote

[12] **Products Liability**
Automobiles
Products Liability
Warnings or instructions

Issue of whether driver of van would have followed a warning if one had been provided by van manufacturer was for jury, in action brought by representative of accident victim against manufacturer asserting failure-to-warn claim, arising from accident that occurred when driver lost control of van, and it rolled over and fell off bridge into river, killing five passengers.

Cases that cite this headnote

[13] **Pretrial Procedure**
Failure to Comply; Sanctions

Trial court did not abuse its discretion in declining to impose spoliation sanctions on representatives of accident victims because they failed to preserve van following wreck, in suit brought by representatives against manufacturer asserting failure-to-warn claim, arising from accident that occurred when driver lost control of van, and it rolled over and fell off bridge into river, killing five passengers; court concluded that spoliation resulted from negligence rather than bad faith, and, despite loss of evidence, because van was lost or destroyed shortly after wreck, neither side had opportunity to inspect it, placing all parties on equal footing and limiting any potential for abuse through expert testimony.

1 Cases that cite this headnote

[14] **Appeal and Error**
Depositions, affidavits, or discovery
Pretrial Procedure
Failure to Comply; Sanctions

Trial court has wide discretion in resolving spoliation issues, and appellate court will not disturb the court's ruling absent abuse.

1 Cases that cite this headnote

[15] **Pretrial Procedure**
Failure to Comply; Sanctions

Trial court must decide whether to issue sanctions for spoliation; however, before exercising its discretion, the court should weigh five factors: (1) whether the party seeking sanctions was prejudiced as a result of the destruction of the evidence, (2) whether the prejudice could be cured, (3) the practical importance of the evidence, (4) whether the party who destroyed the evidence acted in good or bad faith, and (5) the potential for abuse if expert testimony about the evidence was not excluded.

Cases that cite this headnote

[16] **Products Liability**
Automobiles
Products Liability
Warnings or instructions

Evidence that rental car company had asked van manufacturer about van's safety record after its van renters experienced a number of accidents involving rollover incidents, and that manufacturer suggested to company that if it placed warning in van, the warning should advise renters that van handled differently especially when fully loaded with passengers and/or luggage was admissible to show manufacturer's knowledge of a stability hazard in fully loaded van, in suit brought by representatives against manufacturer asserting failure-to-warn claim, arising from accident that occurred when driver lost control of van, and it rolled over and fell off bridge into river, killing five passengers; evidence lent credibility to representatives' expert testimony that manufacturer knew about hazard prior to van's initial sale date.

Cases that cite this headnote

[17] **Appeal and Error**
Rulings on admissibility of evidence in general

Trial court's evidentiary rulings will not be reversed absent an abuse of discretion.

Cases that cite this headnote

Attorneys and Law Firms

****491** Cooper, Jones & Cooper, Lance Alan Cooper, Marietta, Scott Bradley Cooper, for appellants.

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Opinion

JOHNSON, Presiding Judge.

***835** This products liability action arose out of a tragic one-vehicle wreck that occurred in July 2001. Barbara Myers, a Georgia resident, ****492** was driving her grandchildren and several other individuals from Houston, Texas to Atlanta in a 1991 Ford Aerostar van when she lost control on a Texas highway. The van rolled over and fell off a bridge into a river. Myers and one of her grandchildren survived, but five passengers drowned.

Lori Bagnell and other representatives of the accident victims (collectively "Bagnell") sued Ford Motor Company in Clayton County, alleging that a design defect in the Aerostar van made it unstable and prone to roll over when fully loaded with passengers and/or luggage. A jury ultimately returned a defense verdict, and the trial court entered judgment for Ford. Bagnell appeals that judgment in Case No. A09A0069, arguing that the trial court erred in applying the statute of repose to several claims and improperly excluded causation testimony.[1] Ford cross-appeals in Case No. A09A0070, challenging several rulings. For reasons that follow, we reverse the ***836** judgment in Case No. A09A0069 and affirm the judgment in Case No. A09A0070.

Case No. A09A0069

[1] **[2]** 1. Bagnell's original complaint alleged claims against Ford for strict liability, negligent design, and failure to warn of a stability hazard. Following discovery, Ford moved for summary judgment on several grounds, including that Georgia's ten–year statute of repose barred the strict liability and negligent design claims, which were filed over twelve years after Ford first sold the van.[2] The trial court granted the motion as to the strict liability allegations. It also found the statute of repose applicable to the negligent design claim, but concluded that questions of fact remained as to whether Ford's conduct fell within the "willful, reckless, or wanton disregard" exception to the statute.[3]

Bagnell challenges these rulings on appeal. She contends that because the wreck occurred in Texas, the trial court should have applied Texas' fifteen–year statute of repose,[4] rather than Georgia's ten–year statute. Asserting that she brought her claims less than 15 years after Ford sold the van, Bagnell argues that the trial court erred in barring the strict liability claim and in imposing a wilful/reckless conduct requirement on her negligent design allegations.

[3] **[4]** Georgia's choice-of-law rules provide the key for resolving this claim of error. Under lex loci delicti, tort cases are governed by the substantive law of the state where the tort or wrong occurred—in this case, Texas.[5] Questions involving procedure or the appropriate remedy, however, are decided using the law of the state where the action was filed.[6] We must determine, therefore, whether the statute of repose is substantive or remedial/procedural in nature. If remedial or procedural, Georgia law applies.

Our research has revealed no Georgia authority discussing this issue in the choice-of-law context. But we apply a similar substantive versus procedural/remedial analysis in determining whether a statute has retroactive effect, and the analysis in those cases is helpful here.

[5] **[6]** ***837** Generally, statutes function prospectively. Legislation that governs court procedure or impacts a remedy, however, ****493** may be applied retroactively.[7] And such is the case with statutes of repose. As explained in *Trax–Fax, Inc. v. Hobba*, "statutes of repose *look only to remedy and not to substantive rights*, and thus under certain conditions can be applied retroactively."[8] We see no reason why the *Trax–Fax* language—specifically, its determination that the statute of repose is remedial/procedural in nature—should not extend to choice-of-law cases.

Trying to avoid this result, Bagnell argues that our Supreme Court deemed the statute of repose substantive in *Browning v. Maytag Corp.*[9] We disagree. Although the *Browning* Court refused to apply the statute of repose retroactively to

bar a pre-existing substantive claim, [10] nothing in *Browning* characterized the statute as substantive or found that it could never be applied retroactively. The Court merely concluded that in certain circumstances, the statute of repose has no retroactive effect—a conclusion entirely consistent with *Trax–Fax.*

On appeal, Bagnell notes that several other jurisdictions have found statutory time limitations to be substantive in nature. Georgia courts, however, have consistently held that the statute of repose involves remedial—rather than substantive—rights. And under our choice-of-law rules, Georgia's procedural and remedial provisions govern this case. Accordingly, the trial court properly applied the ten–year statute of repose to Bagnell's claims.

2. Nevertheless, an evidentiary error at trial compels us to reverse the jury's verdict and the resulting judgment for Ford. Following the statute of repose rulings, Bagnell proceeded to trial only on her claim that Ford was required, but failed, to place a warning in the van regarding the alleged stability hazard. [11] Attempting to establish causation for this claim, Bagnell's counsel asked Barbara Myers at trial whether she would have driven the van filled with passengers and luggage if she had known "that the vehicle was less stable in that condition." When Myers replied "no," Ford objected, asserting that the testimony was speculative. The trial court sustained the objection.

***838** A short time later, Bagnell's counsel asked Myers whether she would have driven the van that day if Ford had placed a warning in the vehicle regarding the rollover risk. Ford again raised a speculation objection, which the trial court sustained. Recalling that Myers responded "no" when first asked whether she would have driven the vehicle if warned of the danger, Ford then moved the trial court to strike that answer. The trial court instructed the jury:

> I did not recall that [Myers] may have answered the question. I had sustained an objection as to a question about what she might have done if she had seen something that she apparently did not see as speculation. If she did answer that question, ladies and gentleman, you should not take her answer into account because I sustained the objection as to that question.

[7] Bagnell argues that the trial court gutted her failure-to-warn case by preventing her from presenting proper causation testimony through Myers. She notes that, according to the jury's special verdict form, jurors found that Ford failed to provide adequate warnings in the van, but that this failure did not proximately cause the injuries and damages at issue. Bagnell thus claims that the erroneous evidentiary ruling undermined her case, requiring reversal. We agree.

[8] Under Texas law, [12] a failure-to-warn claimant proves causation by showing "that ****494** adequate warnings would have made a difference in the outcome, that is, that they would have been followed." [13] As explained by the Texas Supreme Court, the necessary proof may consist of little more than a driver's "self-serving assertion" that he or she "would have been mindful of an adequate warning had it been given." [14] This is just the type of evidence Bagnell sought to introduce through Myers, and the trial court erred in excluding it as speculative.

[9] Ford argues on appeal that even if the trial court erred in excluding the causation evidence, the error was harmless. It notes that immediately after the trial court instructed the jury to disregard Myers' testimony, Bagnell's counsel questioned Myers as follows:

> Q. Mrs. Myers, do you believe, as a consumer who was driving this Aerostar in a fully loaded condition with ***839** passengers and luggage, that you should've been warned of the increased risk of rollover with the vehicle in this condition?
>
> A. Yes, I really do. I wouldn't have gone if we saw that because we had children.

Once again, Ford objected to Myers' response as speculative. This time, however, the trial court overruled the objection. Based on the admission of this evidence, Ford argues that the excluded testimony was merely cumulative. In Ford's view, the jury ultimately heard Myers testify that she would not have driven the van if adequately warned, mitigating any evidentiary error.

[10] **[11]** It is true that to prevail on appeal, Bagnell must show *harmful* error, and the erroneous exclusion of cumulative evidence is generally harmless. [15] But "[q]ualified jurors under oath are presumed to follow the trial court's instructions." [16] Although Myers eventually

testified that she would have heeded a warning, this statement came immediately after the trial court characterized similar evidence as speculative and told the jury to disregard Myers' testimony "about what she might have done if she had seen" a warning. Because jurors presumably complied with this instruction, they may have discounted the causation testimony eventually admitted by the trial court. [17]

Given the jury's ultimate finding that Bagnell failed to prove causation, we cannot conclude that the trial court's error was harmless. [18] Accordingly, we must reverse the judgment for Ford.

Case No. A09A0070

In its cross-appeal, Ford challenges several rulings that remain at issue following our reversal in the main appeal. We find no error.

[12] 3. Ironically, Ford first argues that the trial court should have directed a verdict on the failure-to-warn claim because Bagnell offered no evidence of causation. Ford points to Myers' testimony that she did not look for any warnings in the van and did not review the owner's manual. It also argues that Myers knew well before the wreck that the ten–year–old vehicle had various mechanical and tire problems.

***840** Bagnell, however, presented evidence that the van had a high center of gravity and lacked stability when fully loaded. And she offered evidence that Myers would not have driven the van if she had been warned about the instability. Such testimony created a jury question as to whether Myers would have followed a warning if one had been provided—the key element of causation in a failure-to-warn claim. [19] The trial court, ****495** therefore, properly denied Ford's motion for a directed verdict on this issue. [20]

4. Ford also argues that the trial court should have imposed sanctions on Bagnell because she failed to preserve the van following the wreck. In essence, it claims that the trial court was required to issue some sort of sanction, such as dismissing the case or excluding Bagnell's evidence. We disagree.

[13] **[14]** **[15]** A trial court has wide discretion in resolving spoliation issues, and we will not disturb the court's ruling absent abuse. [21] Ultimately, the trial court must decide whether to issue sanctions for spoliation. [22] Before exercising its discretion, however, the court should weigh five factors:

> (1) whether the party seeking sanctions was prejudiced as a result of the destruction of the evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the party who destroyed the evidence acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence was not excluded. [23]

The record shows that the trial court thoroughly analyzed and considered these factors. It found that the van was an important piece of evidence, particularly in determining the cause of the wreck; that Ford was prejudiced by the van's destruction; and that the prejudice could not be cured. It also concluded, however, that the spoliation resulted from negligence, rather than bad faith. Moreover, because the van was lost or destroyed shortly after the wreck, neither side had an opportunity to inspect it, placing all parties "on ***841** equal footing" and limiting any potential for abuse through expert testimony.

After considering the required factors, the trial court decided not to impose spoliation sanctions on Bagnell because, despite the loss of evidence, all parties remained on a level playing field. Although another factfinder might have resolved the spoliation issue differently, we find no abuse of discretion. [24]

[16] 5. Finally, Ford claims that the trial court erred in denying its motion in limine to exclude evidence regarding Value Rent–a–Car's fleet of Aerostar vans. Over Ford's objection, the trial court admitted evidence that in 1992, Value asked Ford about the Aerostar's safety record after its Aerostar renters "experienced a number of accidents involving rollover incidents." Value also proposed placing a warning label in the vans stating that the vehicle handled differently than a typical car and that failure to operate it correctly could result in loss of control or rollover. In response, Ford defended the Aerostar's safety and asserted that no warning was necessary. It further suggested, however, that if Value placed a warning in the van, the warning should advise renters that the vehicle handled differently "especially when fully loaded with passengers and/or luggage."

[17] Ford argues that this evidence should have been excluded as irrelevant. A trial court's evidentiary rulings, however, will not be reversed absent an abuse of discretion. [25] In this case, we agree with the trial court

that the Value evidence—and particularly Ford's unsolicited suggestion that Value advise renters that the van handled differently when filled with passengers and luggage—was relevant to Ford's knowledge of a stability hazard in a fully loaded Aerostar van. [26]

Noting that the correspondence with Value took place in 1992 and 1993, Ford argues ****496** that the evidence opened it to liability for a post-sale duty to warn not recognized under Texas law. [27] The trial court, however, determined that Ford owed no such duty, and it specifically instructed jurors that a manufacturer is not required to warn of dangers discovered after a product leaves the manufacturer's control. Jurors, therefore, were well aware that Ford could not be held liable unless it knew of a stability hazard before it sold the van.

***842** Moreover, Bagnell offered expert testimony that Ford in fact knew about the hazard prior to the van's initial sale date. Although made post-sale, Ford's unsolicited statements in the Value correspondence lent credibility to this testimony and supported the jury's finding of knowledge. The trial court, therefore, did not abuse its discretion in deeming the Value evidence relevant. [28]

Ford also argues that because the evidence referenced other rollover incidents, Bagnell was required—but failed—to establish the necessary foundation for admitting other "similar incidents" in a products liability case. [29] We recognize that the initial correspondence from Value vaguely referenced "rollover incidents." But the Value evidence was not admitted to prove these other incidents or to show that they placed Ford on notice of a hazard. [30] Instead, it was admitted to demonstrate that Ford drew Value's attention to handling problems in a fully loaded van. Other incidents were not at issue.

Finally, we find no merit in Ford's claim that the Value evidence consisted of inadmissible lay opinions from Value employees regarding the Aerostar's stability. Again, the evidence was admitted to demonstrate Ford's response to Value's concerns about the van. The trial court did not abuse its discretion in finding the evidence relevant and admissible for this purpose. [31]

Judgment reversed in Case No. A09A0069. Judgment affirmed in Case No. A09A0070.

ELLINGTON and MIKELL, JJ., concur.

Parallel Citations

678 S.E.2d 489, 09 FCDR 1447

Footnotes

1 Bagnell also sued Myers for negligence, and the jury returned a verdict in Myers' favor. Bagnell has not raised any claim on appeal that would affect the judgment entered for Myers. Accordingly, Myers is hereby dismissed from this appeal. See *Flynn v. Mack,* 259 Ga.App. 882, 883, 578 S.E.2d 488 (2003) ("It is well settled that where several are sued at law or in equity and a several verdict is had, a new trial as to one will not disturb the other.") (citation and punctuation omitted).

2 See OCGA § 51–1–11(b)(2). The statute of repose does not apply to failure-to-warn claims. See *Chrysler Corp. v. Batten,* 264 Ga. 723, 727(4), 450 S.E.2d 208 (1994).

3 OCGA § 51–1–11(c) (ten–year limitation period does not apply to "an action seeking to recover from a manufacturer for injuries or damages ... arising out of conduct which manifests a willful, reckless, or wanton disregard for life or property").

4 See Tex. Civ. Prac. & Rem. Code § 16.012(b).

5 *Fed. Ins. Co. v. Nat. Distrib. Co.,* 203 Ga.App. 763, 765, 417 S.E.2d 671 (1992).

6 Id.

7 See *Davis v. Lugenbeel,* 283 Ga.App. 642, 643, 642 S.E.2d 337 (2007).

8 (Citations and punctuation omitted; emphasis supplied.) *Trax–Fax, Inc. v. Hobba,* 277 Ga.App. 464, 470–471(2)(b), 627 S.E.2d 90 (2006). See also *Davis,* supra at 643–644, 642 S.E.2d 337; *Bieling v. Battle,* 209 Ga.App. 874, 878(1), 434 S.E.2d 719 (1993).

9 261 Ga. 20, 401 S.E.2d 725 (1991).

10 Id. at 21–22, 401 S.E.2d 725.

11 Bagnell dismissed her negligent design claim after the trial court determined that it was subject to the wilful/reckless conduct standard of proof.

12 As discussed above, the trial court applied Texas substantive law because the wreck occurred in Texas.

13 *Gen. Motors Corp. v. Saenz*, 873 S.W.2d 353, 357 (Tex.1993).
14 Id.
15 See *Murray v. Barrett*, 257 Ga.App. 438, 439(1), 571 S.E.2d 448 (2002).
16 (Citation and punctuation omitted.) *Mobley v. Wright*, 253 Ga.App. 335, 336–337(2), 559 S.E.2d 78 (2002).
17 Id.
18 See *Murray*, supra (evidentiary error harmless where it is highly probable that the error did not contribute to the judgment).
19 See *Saenz*, supra at 357–358; see also *Jobe v. Penske Truck Leasing Corp.*, 882 S.W.2d 447, 451 (Tex.App.1994) (claimant's testimony that he would have read and heeded warning if one had been provided created question of fact regarding causation on his failure-to-warn claim).
20 See *Tensar Earth Technologies v. City of Atlanta*, 267 Ga.App. 45, 53(5), 598 S.E.2d 815 (2004) (trial court can direct a verdict only if no conflict in the material evidence remains and the evidence demands a certain verdict).
21 *AMLI Residential Properties v. Ga. Power Co.*, 293 Ga.App. 358, 667 S.E.2d 150 (2008).
22 Id. at 361(1), 667 S.E.2d 150.
23 (Citation and punctuation omitted.) Id.
24 See id. ("Whether [spoliation] remedies are warranted is a matter for the trial court to decide.") (citation and punctuation omitted).
25 *Lindsey v. Turner*, 279 Ga.App. 595, 597(2), 631 S.E.2d 789 (2006).
26 See *Shoppers World v. Villarreal*, 518 S.W.2d 913, 917 (Tex.App.1975) (to prove that manufacturer failed to warn of a product defect, claimant must show that manufacturer had actual or constructive knowledge of defect).
27 See *Dion v. Ford Motor Co.*, 804 S.W.2d 302, 310 (Tex.App.1991).
28 See *Lindsey*, supra. ("[I]f the evidence offered by a party is of doubtful relevancy, it should nevertheless be admitted and its weight left to the jury.") (citation and punctuation omitted).
29 See *Cooper Tire etc., Co. v. Crosby*, 273 Ga. 454, 455(1), 543 S.E.2d 21 (2001) ("In products liability cases, the 'rule of substantial similarity' prohibits the admission into evidence of other transactions, occurrences, or claims unless the proponent first shows that there is a 'substantial similarity' between the other transactions, occurrences, or claims and the claim at issue in the litigation.").
30 See *Stovall v. DaimlerChrysler Motors Corp.*, 270 Ga.App. 791, 792–793(1), 608 S.E.2d 245 (2004) (evidence of other incidents involving a product may be admissible and relevant to whether the manufacturer had notice of a product defect).
31 See *Lindsey*, supra.