TADC PRODUCTS LIABILITY NEWSLETTER

Selected Case Summaries
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I. Summary

1. In a significant clarification and/or extension of *Havner* potentially useful to defense product practitioners, the Texas Supreme Court held that the plaintiffs failed as a matter of law to prove causation through reliable evidence because the plaintiffs failed to proffer two properly-designed studies where the deceased was similar to the subjects in the study, and in which the studies proved a statistically significant doubling of the risk. *Merck & Co. v. Garza*, 54 Tex. Sup. Ct. J. 1697, 2011 WL 3796364 (Tex. Aug. 26, 2011).

2. The Texas Supreme Court (a) held a defendant's submission of information to the Consumer Product Safety Commission added requirements not preempted by federal law, and (b) rejected the plaintiff's manufacturing defect claim, holding that the evidence was insufficient as a matter of law to prove that small deviations from some product specifications were a producing cause of the injuries. *BIC Pen Corp. v. Carter*, 54 Tex. Sup. Ct. J. 1168, 2011 WL 2420125 (Tex. June 17, 2011).

3. Product claims involving a medical product must meet the requirements of the Texas Medical Liability Act. *Turtle Healthcare Group, L.L.C. v. Linan*, 337 S.W.3d 865 (Tex. Aug. 29, 2011) (per curiam).

4. Product claims for negligent marketing of a medical device with specialized uses require expert testimony on the standard of care in marketing such a device because that standard is not within the experience of laymen. *Ethicon Endo-Surgery, Inc. v. Gillies*, 343 S.W.3d 205 (Tex. App.—Dallas April 26, 2011, no pet.).

5. In attempting to prove the required feasible alternative design, a plaintiff's expert (a) must present evidence at trial that the alternative designs would have prevented the occurrence at issue, (b) must provide evidence of the costs of incorporating the alternative design into the helicopter at issue, and (c) must prove the alternative design was available when the product at issue was manufactured. *Damian v. Bell Helicopter Textron, Inc.*, No. 02-08-00210-CV, 2011 WL 3836464 (Tex. App.—Fort Worth Aug. 31, 2011, no pet. h.).

6. The statutory presumption of no liability under Texas Civil Practice & Remedies Code § 82.008 (which creates a rebuttable presumption that a product manufacturer is not liable if the product's design complied with mandatory Federal safety standards) might not apply to a manufacturer if the standard is not a design standard and did not govern the risk allegedly causing the occurrence. *Kia Motors Corp. v. Ruiz*, No. 05-10-00198-CV, 2011 WL 3435758 (Tex. App.—Dallas Aug. 5, 2011, no pet.).

II. Discussion

1. *Merck & Co. v. Garza*, 54 Tex. Sup. Ct. J. 1697, 2011 WL 3796364 (Tex. Aug. 26, 2011).

In *Merck*, the Texas Supreme Court (a) reiterates the *Havner* requirements that plaintiffs must show doubling of risk, (b) applies further limits to plaintiffs' use of scientific studies, and (c) holds that plaintiffs must show the deceased is similar to the subjects of at least two properly designed studies. Thus, the Supreme Court reversed the court of appeals and rendered judgment against the plaintiffs.

Mr. Garza had a history of heart disease and had several heart procedures in the years preceding his death. Twenty-five days before his death, Garza's doctor gave him a week's supply of 25 mg Vioxx for pain relief. Seventeen days before his death, another doctor prescribed Garza an additional thirty of the 25 mg Vioxx pills. When Mr. Garza died seventeen days later, his immediate cause of death was determined to be myocardial infarction initiated at least in part by severe coronary artery disease.

Garza's beneficiaries, sued Merck & Co., the manufacturer of Vioxx, for products liability, alleging that the drug was defective as designed and as marketed with inadequate warnings. The jury returned a verdict for the Garzas, awarding $7 million actual damages, plus $25 million in punitive damages, which the trial court reduced to the applicable statutory maximum. The court of appeals below held that the Garzas could not recover on their design defect claim because they did not present sufficient evidence of a safer alternative design but held they could recover on their inadequate warning claim. The court of appeals rejected Merck's argument that the Garzas failed to meet *Havner*'s requirements for proving causation because they had not produced two statistically significant epidemiological studies showing that Vioxx, at the dose and for the duration taken by Garza, more than doubled Garza's risk of heart attack. The court of appeals concluded sufficient evidence existed from expert testimony to support general causation but reversed for juror misconduct and remanded. The Texas Supreme Court granted Merck's petition for review.

First, the Texas Supreme Court confirmed that *Havner* causation requirements has two components: (1) general causation (whether a substance is capable of causing a particular injury or condition in the general population), and (2) specific causation (whether a substance caused a particular individual's injury).

Merck contended that Plaintiffs' evidence did not meet *Havner*'s requirements for scientific reliability. In response, Plaintiffs argued that *Havner*'s "doubling of risk" requirements for epidemiological studies apply only to uncontrolled, observational studies—not studies from clinical trials (on which Plaintiffs relied against Merck). Alternatively, Plaintiffs argued that even if *Havner* did apply, it does not establish bright-line requirements and instead charges courts with surveying the totality of the evidence regarding causation.

Next, the Court clarified the basis of its holding in *Havner*. When proving causation indirectly with epidemiological studies (that lack direct, scientifically reliable proof of causation), the court requires that "the claimant demonstrate that exposure to the substance at issue increases the risk of their particular injury."

The Court held that "[t]he use of scientifically reliable epidemiological studies and the requirements of more than a doubling of the risk strikes a balance between the needs of our legal system and the limits of science." The Court expressly rejected the Garzas' argument that *Havner* applied only to observational studies and held that "*Havner*'s requirements necessarily apply to all epidemiological evidence, including the causation evidence the Garzas presented at trial."

Further, the Court rejected the Garzas' argument that language in *Havner* limiting its ruling was a recognition that doubling of the risk might not always be necessary. The Court ruled that the limiting language in the *Havner* opinion was intended to reflect the court's concern that statistically reliable studies showing a doubling of the risk might be insufficient to prove causation in some cases—not that they would ever be unnecessary.

Finally, after strengthening the application of the *Havner* rule, the Court considered whether the Garzas presented more than two studies showing a statistically significant doubling of the risk of heart attack from taking Vioxx. The Garzas pointed to four different studies, but the Court held that no two studies cited by the Garzas met the standards of reliability. Thus, the Texas Supreme Court held that as a matter of law, "the totality of the evidence cannot prove general causation if [two studies do] not meet the [2.0 standards] for scientific reliability established by *Havner*." The Court reversed and rendered that the Garzas take nothing.

There is much in *Garza* for defense product practitioners to use in pharma, asbestos, and benzene cases. Defense product practitioners should benefit from (a) the Court's confirmation that the reservation in *Havner* does not detract from the *Havner* holding, and (b) the Court's confirmation that plaintiff's experts cannot

extend even well-designed or well-executed studies beyond the scope of the study itself. Likewise, the rationale in *Garza* should help defense practitioners argue that plaintiff's experts should not be permitted to select portions of studies while attempting to ignore the results of a study.

2. *BIC Pen Corp. v. Carter*, 54 Tex. Sup. Ct. J. 1168, 2011 WL 2420125 (Tex. June 17, 2011).

In *BIC Pen*, the Texas Supreme Court held that the plaintiff's manufacturing defect claim was not preempted because it did not impose a higher child-resistance standard than that imposed by the Consumer Product Safety Commission (CPSC), but reversed the case, finding that the evidence was legally insufficient to prove that small deviations from minimum force specifications in two of the lighter's five child-resistant features were a producing cause of the injuries at issue.

Six-year-old Brittany Carter was burned when her five-year-old brother accidentally set fire to her dress with a BIC lighter. Brittany's mother, Janace Carter, sued BIC as Brittany's next of friend, claiming that her daughter's injuries were the result of manufacturing and design defects.

A jury found that both types of defects were producing causes of Brittany's injuries, and the trial court rendered judgment against BIC for actual and exemplary damages found by the jury. The court of appeals held, in part, that the design defect claim was not preempted by federal law and the evidence was sufficient to support producing cause for the design defect claim.

The Texas Supreme Court granted review and first held that the design defect claim was preempted by federal law, remanding the case to the court of appeals to consider the remaining issues. The court of appeals concluded that the plaintiff's manufacturing defect claim was also not preempted by federal law and again held that the evidence supported the jury's finding.

BIC again petitioned for review arguing that: (1) the manufacturing defect claim was also preempted by federal law; and (2) the plaintiff did not prove that a manufacturing defect caused the injuries because there was no evidence of (a) variation from the manufacturer's specifications, (b) an unreasonably dangerous product, or (c) causation.

The Texas Supreme Court began by analyzing the preemption argument and outlining the different types of preemption. State law may be preempted in three ways: (1) expressly, by federal law specifically preempting state law; (2) impliedly, by the scope of the federal law or regulation indicating Congress intended the federal law or regulation to exclusively occupy the field; or (3) impliedly, by the state law conflicting with a federal law or regulation to the extent it is impossible to comply with both or by the state law obstructing Congress's objectives as reflected by the federal law.

Next, the Court acknowledged that the CPSC is the independent regulatory body charged with protecting the public against unreasonable risks of injury associated with consumer products by developing safety standards, but the Court delineated that the burden is on the manufacturers to design lighters that comply with the performance standards. The CPSC requires that at least eighty-five percent of the children, under five years of age, who are tested to determine if they can operate the lighter, must be unable to operate it.

The Court held, in the previous appeal, that the plaintiff's design defect claim was preempted because the design of BIC's lighter was properly certified according to federal protocol, and state law imposing a higher common-law standard for child resistance would conflict with the federal regulations. BIC argued that the plaintiff's manufacturing defect claim also imposed a higher child-resistant standard than the CPSC standard because Brittany's brother was over five, and the standards do not apply to children over five years old.

This time, the Court disagreed, distinguishing that the plaintiff's claim was not based on whether the lighter would be child resistant to older children in general. The plaintiff's claim was that BIC failed to manufacture the lighter to the specifications BIC submitted to the CPSC, lessening the force required to operate the lighter and making it unreasonably dangerous. The Court also refused to agree that holding BIC liable for failing to meet internal goals that exceed federal specifications conflicted with federal law. The

Texas Supreme Court concluded that Carter's manufacturing defect claim was not preempted.

However, the Court reversed the case on sufficiency of the evidence. First, the Court found that the plaintiff presented legally sufficient evidence that the subject lighter did not meet manufacturing specifications. Carter presented evidence that the 1995 specifications for the child resistant lighter applied and further presented expert testimony that BIC's approximate compliance with those standards was unreasonable.

Next, the Court addressed causation. BIC claimed that even if the lighter deviated from specifications, Carter failed to prove that the deviation was a producing cause of Brittany's injuries. The Court explained that there must have been some evidence that the fire that burned Brittany started because of the specific manufacturing defects and that absent those defects Brittany's injuries would not have occurred. Thus, expert testimony was required, on the causation element of the manufacturing defect claim arising from the incident, to show the impact of the small deviations from the specifications of the lighter's child resistant features because such an issue was not within a lay juror's general experience and common understanding.

The plaintiff asserted that because the lighter relied on force to provide child resistance the jury could have concluded that the deviations from the standard posed a significantly increased risk to a user; however, Carter did not point to evidence that would have guided the jury in determining the impact of the deviations from the standard. Carter also did not present evidence of what impact developmental delays of the child who operated the lighter had on his ability to operate the lighter in its condition.

The Court also rejected Carter's argument that a *Havner*-type analysis as to causation applied in this case. The Court's reasoning in *Havner* included that "[w]hile testing can be done in some toxic tort cases to determine specific causation, direct experimentation cannot be done in many instances" Yet, the Court distinguished that the "nature of the injury-causing activities and testing that would have to be done to show causation" in this case were not similar to *Havner* because testing of the J-26 lighters was possible.

Therefore, even though federal law did not preempt the plaintiff's manufacturing defect claim, the Texas Supreme Court concluded that there was legally insufficient evidence to support the finding that manufacturing defects in BIC's lighter were a cause-in-fact of Brittany Carter's injuries.

BIC Pen serves defense practitioners in that it refuses to extend the *Havner* general-causation analysis to cases where specific evidence exists to show that the product in question in fact caused the particular injury at issue.

3. *Turtle Healthcare Group, L.L.C. v. Linan*, 337 S.W.3d 865 (Tex. Aug. 29, 2011) (per curiam).

The issue in this Texas Supreme Court case was whether claims that are based on the failure of a ventilator can be brought both as claims subject to the Texas Medical Liability Act (TMLA) and common law negligence claims governed by a standard of ordinary care. The Court held that the claims were health care liability claims subject to the TMLA and must be dismissed because no expert report was served.

Turtle Healthcare Group supplied a ventilator to Maria Linan. Maria's mother and caretaker contacted Turtle in July of 2005 and requested an oxygen tank and two additional external ventilator batteries because of an impending hurricane but was only given one battery. The next day the hurricane arrived, and the power went out. Later, Maria's family discovered that the ventilator was not operating, and Maria had died.

The Linans filed suit against Turtle, alleging that Maria died as a result of the equipment failure. The Linans asserted that Turtle was negligent in the operation and maintenance of the ventilator and its components and accessories.

Turtle filed a motion to dismiss on the grounds that the Linans' claims were healthcare liability claims and that the Linans had failed to file an expert report. The trial court determined that the Linans' claims were not health care liability claims and denied Turtle's motion to dismiss. Turtle filed an interlocutory appeal.

The court of appeals held that to the extent the Linans' allegations involve acts or omissions

beyond the alleged failure to provide properly charged batteries—such as their claims involving failure to provide warnings and properly maintain—those claims clearly involve acts or omissions that are inseparable from the rendition of medical services and are barred due to the failure to serve an expert report. Yet, the court found that the simple failure to provide functioning, charged batteries was not a health care liability claim. Then, Turtle filed a petition for review, but the Linans did not.

The Court first stated that pursuant to the TMLA, "a claimant in a healthcare liability claim must serve an expert report within 120 days after filing a claim." A health care liability claim is one against a health care provider. The Linans did not challenge Turtle's status as a health care provider.

Turtle argued that the court of appeals wrongly divided the Linans' battery claims from their non-battery claims. The Linans urged that their claims were governed by a standard of ordinary care and were claims for common law negligence.

The Court cited to *Yamada v. Friend*, explaining that, "permitting a claimant to maintain both health care liability claims and different types of claims based on the same underlying factual scenario would open the door to splicing health care liability claims into a multitude of other causes of action with standards of care, damages, and procedures contrary to the Legislature's explicit requirements." Because the substance of the Linans' claims are that Turtle failed to provide Maria with a properly functioning ventilator, no products liability claim exists for the Linans to assert.

Further, because the Linans failed to file a petition for review challenging the portion of the court of appeals' judgment dismissing part of their claims because they were health care liability claims, the Court did not reach the issue. Thus, the unchallenged holding required dismissal by the Texas Supreme Court of all the Linans' claim.

Turtle Healthcare is useful for defense attorneys in that it enlarges the application of the TMLA. Further, the Supreme Court's holding prevents artful pleading and recasting of claims by plaintiffs to circumvent the expert report and other requirements under the TMLA.

4. *Ethicon Endo-Surgery, Inc. v. Gillies*, 343 S.W.3d 205 (Tex. App.—Dallas April 26, 2011, no pet.).

In *Ethicon*, the Dallas Court of Appeals held that the non-suit of the design defect claim by the plaintiff included both the mother's strict liability design defect and negligent design defect claims. The Court further held that expert testimony was required to prove the plaintiff's negligent marketing claim of the staple used in bariatric surgery requiring specialized technique for use, finding the plaintiff failed to provide expert testimony complying with the standard of care.

Rebecca Castaneda suffered from diabetes and high blood pressure related to her weight and had a body mass index of over fifty. She opted to undergo gastric bypass surgery to combat her obesity. Dr. John Mason began Ms. Castaneda's surgery and selected a LONG45A Endocutter staple, made by Ethicon Endo-Surgery, Inc., to seal off and divide the stomach. Each LONG45A came in a box with Instructions for Use that: (1) gave suggestions as to which staple size to use; and (2) provided contraindications for use of the device. Specifically, the instructions warned surgeons not to use LONG45A, with a closed staple height of 2.0 mm, on any tissue that required excessive force to compress the 2.0 mm or on any tissue that compressed easily to less than 2.0 mm.

When Dr. Mason first fired the 1.5 mm staple, the staple did not completely form or close, creating a hole in Ms. Castaneda's stomach. Dr. Mason then decided to convert from laparoscopic to open surgery and used a 2.0 mm staple to close the gastronomy.

After surgery, at first Ms. Castaneda progressed normally; however, three days after surgery she developed abdominal pain, infection, and showed signs of sepsis. Dr. Mason performed an exploratory surgery and found a pinhole leak in the 2.0 mm staple, causing an infection and fever. Following the exploratory surgery, Ms. Castaneda seemed to be doing well, but seven days after the surgery she became unresponsive and went into cardiac arrest. An autopsy revealed that the immediate cause of death was a pulmonary thromboembolism.

Ms. Castaneda's mother filed suit, individually, and as next of friend of the patient's son, alleging strict liability and negligence for Ethicon's defective design, manufacture, assembly, and marketing of the surgical stapler and staples. The first trial resulted in a mistrial after a hung jury.

During the second trial, the plaintiff represented that she was not asserting a manufacturing defect claim and orally non-suited her design defect claim during a jury recess. The jury answered in the affirmative to a negligence question in the charge, awarding $320,000 in damages but answered the remaining questions in favor of the defendant.

Among many issues, Ethicon alleged that there was no evidence to support the jury's negligence finding, specifically with regard to the standard of care and proximate cause. Based on the court of appeals determination on this first issue, it needed not to address any remaining issues.

The Court saw this issue as two-fold—whether sufficient evidence existed to support: (1) the plaintiff's negligent design defect claim, and (2) the plaintiff's negligent marketing claim. First, the Court held that based upon the statements of both counsel and the trial court, including the Court's limitation of evidence due to its stated understanding that the case remained only about marketing, the plaintiff non-suited both her strict liability design defect claim and her negligent design defect claim. Thus, having determined the only remaining negligence claim asserted was a claim for negligent marketing, the Court next addressed whether the plaintiff failed to present evidence in support of her claim for negligent marketing.

The Court first explained that although its review of Texas case law demonstrated a consensus that expert testimony is required in the context of strict liability and marketing defect claims, no Texas court had addressed whether expert testimony was required in negligent marketing cases, like the one at-hand. Yet, the Texas Supreme Court had determined that expert testimony is necessary to establish the standard of care when the alleged negligence is of such a nature as to be within the experience of laymen.

The Court further addressed that when the conduct at issue involves the use of specialized equipment and techniques, expert testimony must establish both the standard of care and a violation of that standard. Therefore, the Court held that because the standard of care in marketing a specialized medical device requiring specialized technique for use is not within the experience of laymen, expert testimony was required to prove negligent marketing of such a device, requiring the plaintiff to offer expert testimony that Ethicon failed to exercise ordinary care in the marketing of the LONG45A.

Dr. William Hyman served as the plaintiff's expert witness in support of her negligent marketing claim. The Court next looked to his testimony to determine whether there was any evidence of the appropriate standard of care for the marketing of the LONG45A.

In Dr. Hyman's opinion, Ethicon should have either stopped marketing the LONG45A and contraindicated it for bariatric surgery, or warned people not to use it under conditions where the tissue was more than 2.0 mm thick and design a device that was appropriate. In Dr. Hyman's opinion, because the LONG45A was not appropriate for use on gastric tissue of more than 2.0 mm thick, it should not have been marketed for use in bariatric surgery.

The Court held that simply stating that a product was defectively designed for use in certain situations and, therefore, should not be marketed at all, does not establish a standard of ordinary care applicable to the marketing of the product for use in other situations. Therefore, the Court reversed the judgment because the plaintiff failed to provide expert testimony establishing the appropriate standard of care for her negligent marketing claim or that Ethicon failed to comply with that standard.

Ethicon assists defense practitioners because the Court refused to allow the plaintiff to disguise a design defect claim as a negligent marketing claim. The Court's holding stands to show that plaintiffs will be required to establish a standard of ordinary care applicable to the marketing of the product, aside from its design problems.

5. *Damian v. Bell Helicopter Textron, Inc.*, No. 02-08-00210-CV, 2011 WL

3836464 (Tex. App.—Fort Worth Aug. 31, 2011, no pet. h.).

In *Damian*, the Fort Worth Court of Appeals first held that the claims by helicopter crash victims against the helicopter manufacturer were not preempted by federal law and that evidence supported expert testimony regarding safer alternative seatbelt design, but the Court held that expert testimony regarding an alternative safer helicopter windshield was conclusory, that existence of an alternative design was not evidence of a safer alternative design, and that expert testimony regarding an alternative aluminum helicopter construction was no evidence of a safer alternative design, reversing.

In January, the Romagosa family, Lorenzo, his father, and his two aunts, flew on a Bell 407 helicopter from Panama City to conduct business at one of Café Duran's farms in Sona, Panama. Captains Damian and Garay piloted the helicopter. After the family conducted its business, Captains Damian and Garay, flew Lorenzo and his two aunts back to Panama City. Only ten minutes from Panama City, Lorenzo heard Captain Garay say, "birds ahead." Lorenzo testified that less than a minute later the helicopter made an abrupt movement, and a bird crashed through the front windshield of the helicopter. The bird hit Captain Damian in the head and knocked him unconscious. The helicopter crashed into the mountainous terrain. All of the helicopter's occupants were injured in the crash, and Captain Damian's and Gloria Gasperi's injuries were fatal.

The helicopter crash victims and the representatives of the deceased victims brought actions against Bell Helicopter, alleging strict products liability and negligence. The jury found that there was a design defect in the helicopter and that the negligence of one of the helicopter pilots caused the injuries, apportioning liability to each party 50%. The district court entered judgment on the jury verdict awarding $292,300 to the plaintiffs. The parties appealed.

The Court first addressed Bell's argument that the FAA and related federal regulations, through field or conflict preemption, impliedly preempted all common-law claims relating to helicopter design and airworthiness. First, Bell attempted to show that Texas Civil Practice & Remedies Code § 82.008 created a rebuttable presumption of non-liability (as is argued in *Kia*, below); however, the Court held that Bell failed to establish that its design of the Bell 407 complied with applicable mandatory safety standards or regulations and was therefore not preempted. Next, Bell asserted that the FAA certification process is evidence of field preemption. The Court cited *Monroe v. Cessna Aircraft Co.*, in rejecting this argument and stated that "the certification process does not in and of itself constitute a pervasive regulatory scheme evidencing an intent by Congress to preempt this field of aviation." Finally, the Court further rejected Bell's conflict preemption arguments, declining to hold that the plaintiffs claims were preempted by federal law.

Although a myriad of issues were addressed in the Fort Worth Court of Appeals lengthy opinion, the Court's main focus was the analysis of the expert testimony regarding the design defects. Bell contended that because the plaintiffs' expert witnesses lacked necessary qualifications and their testimony was unreliable, conclusory, or speculative, no evidence existed to support the jury's design defect findings. During trial the plaintiffs offered three experts' testimonies—Bobby Ross, who prepared an animation reconstructing the flight and crash, Billy Hinds, a windshield expert, and William Muzzy, a seatbelt expert. The Court analyzed these testimonies, beginning with the helicopter windshield expert.

Billy Hinds testified both that the windshield was unreasonably dangerous because it was not bird-impact resistant and that safer materials existed to manufacture the windshield at the time of the crash. Bell pointed to the fact that Hinds failed to address any structural changes that would be necessary in altering the material of the Bell 407 windshield. Further, Bell argued that Hinds only had expertise in airplane windshield design and lacked qualifications as an expert for helicopter windshield design. The Court found that Hind's failure to analyze the structure of the Bell 407 or to even calculate the load transferred to the structure following a bird strike was a significant gap under the *Gammill* analytical gap standard. Because the defendant preserved its challenge to reliability, the Court also analyzed Hind's opinion under the *Robinson* factors and found that he did not link his conclusions to the facts of the case, his theory relied heavily upon his own subjective interpretation and was not generally accepted within the aircraft community, his opinion had no non-judicial uses,

and his theory could have been tested but was not. The Court explained that "the absence of Hind's underlying analysis and the availability of testing 'highlights the extent to which Hind's theory was subject to testing and examining for reliability.'" Thus, the Court held that Billy Hind's opinion was speculative and not entitled to probative weight. The Court further rejected the plaintiffs' other evidence of safer alternative design, holding that the existence of another design is not evidence of a safer alternative design.

The Court also addressed the helicopter door mounts and restraint system. The Court again found that the plaintiffs' expert on the door mounts, Bobby Ross, gave testimony that was conclusory and no evidence that the door mounts were defectively designed or that a safer alternative design existed.

Yet, the Court accepted the opinion of William Muzzy, the expert who testified that the restraint system was defective. The Court found that Texas law does not require proof that the proposed safer alternative design would have gained regulatory approval and that Muzzy's testimony was not conclusory. Using the animation of the crash sequence, Muzzy demonstrated each time Gloria's restraint system would have failed by locking and unlocking, and he showed that the lack of an omni-directional vehicle sensing retractor in the aircraft was the proximate cause of her ejection from the helicopter and subsequent death.

Finally, the Court held that evidence supported the finding that the helicopter pilot was negligent and 50% at fault and rejected the plaintiffs' argument of alleged jury misconduct. Thus, the Fort Worth Court of Appeals affirmed the portion of the judgment relating to the claims on behalf of Gloria Gasperi, finding sufficient evidence to support the restraint system defect claim. Yet, the Court reversed the remainder of the judgment, rendering judgment on the defective windshield claims.

Defense practitioners can be helped by *Damian* because it strengthens the holdings of *Gammill* and *Robinson*, forcing the plaintiff to proffer expert testimony that is not conclusory. *Damian* further reminds defense attorneys to preserve challenges to reliability so that plaintiffs cannot argue that actual design or testing of an alternative is not required.

6. *Kia Motors Corp. v. Ruiz*, No. 05-10-00198-CV, 2011 WL 3435758 (Tex. App.—Dallas Aug. 5, 2011, no pet.).

The Dallas Court of Appeals held, in *Kia*, that Kia was not entitled to a no-defect presumption because the federal standard at issue was a performance, not a design, standard, which did not govern the risk that allegedly caused the harm and thus Texas Civil Practice & Remedies Code § 82.008 did not apply. The Court further held that the evidence was legally sufficient to support the jury's finding of negligent design, and the trial court did not abuse its discretion in the admission or exclusion of evidence.

Andrea Ruiz was fatally injured when the 2002 Kia Spectra that she was driving was hit head-on by a pick-up truck driven by Harvey Tomlin. The Kia's passenger-side airbag deployed, but the driver's-side frontal airbag did not deploy. Ms. Ruiz's death was caused by two dislocated vertebrae in her neck that resulted from a severe front-to-back movement of her head.

Previous to the accident, Ms. Ruiz's husband had installed a new radio in the Kia. After the installation, he noticed that the airbag warning light was illuminated. The warning light remained on until the accident.

Ms. Ruiz's survivors sued Kia, claiming that the Kia Spectra was defective because the driver's-side frontal airbag failed to deploy in the collision. After some confusion and four attempts to reach a verdict, the jury found that responsibility should be apportioned 55% to Tomlin and 45% to Kia. The jury awarded $1.9 million in actual damages and $2.5 million in exemplary damages, which was reduced by Kia's percentage of responsibility.

On appeal, Kia asserted it was entitled to a statutory presumption of no liability that was not rebutted and that there was no evidence of negligent design. Kia also challenged the admission and exclusion of evidence.

The Court began by addressing the statutory presumption issue. Section 82.008 requires a rebuttable presumption where the product manufacturer established the product's design complied with mandatory safety standards that governed the product risk that allegedly caused

the harm. Ruiz argued that the presumption did not apply because the government standards did not govern the product risk that actually caused the harm. Kia argued that the compliance with Federal Motor Vehicle Safety Standard (FMVSS) 208 triggered the § 82.008 presumption because the standard covers the risk of occupant injury in the crash.

First, the Court identified that the provisions of FMVSS 208 were framed as performance standards and were intended as minimum standards applicable to performance characteristics of a vehicle. Thus, the standards specify the minimum safe performance of the vehicle but not the manner in which the manufacturer is to achieve the specified performance.

Next, the Court considered the standard in the context of § 82.008. In looking to the legislative history, the Court found that the intent of § 82.008 was to have the presumption apply only when there was a mandatory federal standard that was designed to regulate the aspect of the manufacture or design of the product that the plaintiff claims is defective. Thus, § 82.008 applies only where there is a specific relationship between the regulation and the alleged defect in the manufacture or design. The stated purpose of FMVSS 208 was to specify crashworthiness requirements in terms of forces and accelerations and equipment requirements for active and passive restraint systems. The Court analyzed that the alleged injury in this case resulted from the failure of the driver's-side airbag to deploy because of defectively designed circuitry, which was an aspect outside the scope of FMVSS 208's standards. Therefore, the Court held that Kia was not entitled to a no-defect presumption under § 82.008.

After analyzing the statutory presumption, the Court moved to Kia's argument that insufficient evidence existed to support the jury's finding of negligence. Kia claimed that there was no evidence of a specific defect, a safer alternative design, breach of the standard of care, or proximate cause.

The Court first found that Ruiz's expert, Geoffrey Mahon, identified a specific defect, the driver's airbag wiring harness circuit that was equipped with connectors that failed to make reliable electrical contact. The Court also overruled Kia's arguments as to safer alternative design, breach of the standard of care, and causation.

Thereafter, the Court addressed Kia's objections as to admission and exclusion of evidence. For each argument, the Court found that the trial court did not abuse its discretion in admitting or excluding the evidence. The Court also rejected Kia's argument that a supplemental instruction should have been given to the jury in response to the manner in which the trial court handled the jury's confusion during deliberations.

Finally, the Court overruled Ruiz's cross-point that the trial court erred in refusing to include the $2.5 million exemplary damage award in the judgment against Kia. The Court held that because the verdict was not unanimous with regard to the underlying theory of liability, the trial court did not err in refusing to award the exemplary damages. Thus, having overruled Kia's and Ruiz's issues, the Dallas Court of Appeals affirmed the trial court's judgment.