

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

MICHAEL J.L CERVINSKY and	:
LORRAINE C. CERVINSKY,	:
Administrators for the ESTATE OF	:
RYAN J. CERVINSKY, and in their	: No. 03-01,731
Individual capacity	:
Plaintiffs	:
	:
vs.	: CIVIL ACTION – LAW
	:
BRIAN S. HOBENSACK, KIMBERLY	:
GETZ, GENERAL MOTORS	:
CORPORATION, THE PEP BOYS-	:
MANNY MOE & JACK,	: Defendant Pep Boys/Rally
RALLY MANUFACTURING, INC.	: Motion for Summary Judgment
Defendants	:

This matter came before the Court on Defendants the Pep Boys-Manny Moe and Jack and Rally Manufacturing, Inc.’s Motion for Summary Judgment. The relevant facts follow.

On or before June 10, 2003, Defendant Brian Hobensack (“Hobensack”) made numerous alterations to his 2000 Pontiac Sunfire GT including, but not limited to, installation of aftermarket performance pedals on the clutch, brake and gas pedals. The performance pedals were distributed by Rally Manufacturing Inc. (“Rally”). Hobensack purchased them at The Pep Boys – Manny Moe and Jack (“Pep Boys”). The performance pedals were fastened to the factory pedals with flexible metal bars.

On June 10, 2003, Ryan Cervinsky (“Decedent”) was a back seat, driver’s side passenger in Hobensack’s Sunfire. Hobensack was entering Route 180 eastbound via the Faxon on-ramp. A vehicle driven by Kimberly Getz (“Getz”) was proceeding east on Route 180 and did not move over to allow Hobensack to merge onto the highway without

yielding. Apparently upset at Getz for not moving over, Hobensack began gesturing at Getz. He pulled his Sunfire onto the highway behind Getz, moved into the passing lane, rapidly accelerated, and attempted to quickly cut in front of the Getz vehicle. As Hobensack was coming back into the right lane, the Sunfire fishtailed twice. Hobensack, who by this time was traveling approximately 90 mph, lost control of the vehicle. The Sunfire careened out of control across the passing lane, through the median and into westbound traffic. The driver's side of the Sunfire collided with a Ford Taurus traveling westbound and Decedent was killed.

After the accident, the performance pedals were damaged - the clutch pedal was broken or chipped and the brake pedal was askew. The following brake and throttle data was obtained from the Sunfire:

Seconds before AE	Vehicle Speed (MPH)	Engine Speed (RPM)	Percent Throttle	Brake Switch Circuit Status
-5	89	4672	98	ON
-4	89	4736	75	ON
-3	60	3008	0	OFF
-2	62	3072	0	OFF
-1	35	1856	0	OFF

This information is subject to limitations, including the following: “If the vehicle is a 2000-2002 Chevrolet Cavalier Z24 or a Pontiac Sunfire GT, with a manual transmission (RPO MM5) and a 2.4L engine (RPO LD9), the Brake Switch Circuit Status data will be reported in the opposite state than what actually occurred, e.g. an actual brake switch status of ‘ON’ will be reported as ‘OFF’.” Neither Hobensack nor his two surviving passengers have any recollection of the accident. Hobensack, however, did testify in his deposition that the

Sunfire had a manual transmission.

Defendants Rally and Pep Boys filed a motion for summary judgment under Pa.R.Civ.P. 1035.2, arguing, alternatively, that either there was no genuine issue of material fact as to necessary elements of Plaintiffs' cause of action against them or Plaintiffs failed to produce evidence of facts essential to their cause of action against Rally and Pep Boys.

Plaintiffs' theory of liability against Rally and Pep Boys is that: the performance pedals were defectively designed with respect to the manner in which they were attached to the factory pedals; the performance brake pedal slipped or slid out of position causing Hobensack to lose control of the vehicle and/or to be unable to avoid the accident. Unfortunately, this theory is based on speculation and conjecture, and Plaintiffs do not have sufficient evidence to submit this theory to a jury. The difficulty with Plaintiffs' theory in this case is it is impossible to tell when the performance brake pedal came out of position. None of the occupants of the Sunfire has much of a recollection of the accident. There is no testimony from Hobensack or his passengers that the performance brake pedal became askew prior to Hobensack losing control of the vehicle or even prior to impact with the westbound Ford Taurus.

Plaintiffs assert that one can infer the performance brake pedal slipped out of position and contributed to the accident from the brake switch circuit status data retrieved from the Sunfire after the accident, which indicated that the brakes were on five seconds before impact until three seconds before impact but were off from three seconds before impact until impact. This Court cannot agree for several reasons.

First, Hobensack testified in his deposition that the Sunfire had a 2.4 liter engine and a manual transmission. Hobensack Dep., p. 28. Therefore, according to the

express limitation contained in the report of the brake switch circuit data upon which Plaintiffs rely, the data reported is opposite of what actually occurred so that the brakes would have been off five seconds before impact and on from three seconds before impact until impact.

Plaintiffs assert the Sunfire did not have a manual transmission, but rather had a manual transaxle (RPO-M86). Although Plaintiffs make this assertion in bold typeface in their brief, there is nothing in the **record** to support their assertion. “‘Bold unsupported assertions cannot create genuine issues of material fact’ sufficient to overcome the grant of a motion for summary judgment.” Botkin v. Metro. Life Ins. Co., 907 A.2d 641, 647 (Pa.Super. 2006), quoting McCain v. Pennbank, 379 Pa.Super. 313, 549 A.2d 1311, 1313-14 (Pa.Super. 1988). For purposes of the rules regarding summary judgment, the record includes the following: “(1) pleadings, (2) depositions, answers to interrogatories, admissions and affidavits, and (3) reports signed by an expert witness that would, if filed, comply with Rule 4003.5(a)(1), whether or not the reports have been produced in response to interrogatories.” Pa.R.Civ.P. 1035.1. Plaintiffs claim their contention can “be confirmed by inspection of the vehicle, which has been entered into evidence.” The vehicle has not been entered into evidence and would not be considered part of the record under Rule 1035.1. Furthermore, whether the Sunfire had a manual transmission or manual transaxle would not be something within the knowledge of the average lay person/juror.

Even assuming *arguendo* that the brakes were off from three seconds prior to impact, that does not mean the reason they were off was because the brake pedal came out of position. There is nothing in the record to show the performance brake pedal moved prior to impact and Plaintiff’s theory is based on nothing more than speculation and conjecture. To

the contrary, Hobensack stated in his deposition that he had no reason to believe that he might have had a problem with the pedals at the time of the accident. Hobensack Dep., p 114. Hobensack also stated in his deposition that he did not recall his foot ever slipping, shifting or moving as a result of pedal movements prior to the impacts of the accident. Hobensack Dep., p. 120. Furthermore, when asked if he could recall anything about the accident from the point when he moved into the left lane until the collision occurred, Hobensack stated: “I remember pulling in the left lane. The next thing I remember is headed backwards with grass flying up on my car. I blacked out once again. Then waking, air bag was deployed in front of me.” Hobensack Dep., p. 81. While the jury could infer that the reason the brakes were off was because Hobensack lost consciousness, there is nothing from which the jury could legitimately conclude that the performance brake pedal slipped or moved prior to impact.

Even if the jury could infer that the brake pedals slipped out of position prior to impact from the brake status report and the fact that the pedal was askew post-accident,¹ Plaintiff’s record does not include any evidence, expert or otherwise, that there was a safer, alternate design. Plaintiff also has not presented any evidence in opposition to the summary judgment motion to show that the accident could have been avoided or the injuries suffered by Decedent would have been less severe if the brake pedal hadn’t slipped. Pep Boys presented portions of the deposition of Trooper Curtis Albaugh, the accident reconstructionist from the Pennsylvania State Police who investigated this accident, wherein he testified that in his opinion even if the performance brake pedal slipped and cause Hobensack’s foot to slip off the brake pedal or onto the accelerator that would not have been

a causative factor in the accident. Albaugh Dep., p166.

For the forgoing reasons, the Court finds summary judgment is appropriate.

Accordingly, the following order is entered:

ORDER

AND NOW, this ____ day of February 2007, the Court GRANTS Defendants
Pep Boys and Rally's Motion for Summary Judgment.

By The Court,

Kenneth D. Brown, P.J.

cc: Matthew Ziegler, Esquire (Plaintiffs' counsel)
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¹ This was the only evidence provided by Plaintiff in support of the inference.