IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

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

ORDER

AND NOW, this ___ day of April 2007, the Court DENIES Defendant General Motors' Motion for Summary Judgment. Although General Motors Corporation (GM) contends Kupetz v. Deere & Company, Inc., 435 Pa. Super. 16, 644 A.2d 1213 (Pa.Super. 1994) is controlling precedent for this case, the Court cannot agree. The issues in Kupetz were whether Pennsylvania recognized a "crashworthiness" cause of action and, if so, whether assumption of the risk was a complete defense. The Court finds the statements in Kupetz concerning the plaintiff's burden of proof in a crashworthiness case on the issue of allocation of damages are dicta. In Stecher v. Ford Motor Company, 779 A.2d 491 (Pa.Super. 2001), the Pennsylvania Superior Court disagreed with the trial court that Kupetz compelled a jury instruction that the plaintiff had to establish the extent of the enhanced injuries attributable to the defect and found that plaintiff's burden of proof regarding allocation of damages in a case involving an indivisible injury was an issue of first

impression in the appellate courts of Pennsylvania. 779 A.2d at 494-495. The Pennsylvania Supreme Court agreed that plaintiff's burden of proof regarding allocation of damages was a "significant issue of first impression in this Commonwealth", but it reversed the Superior Court because the issue was moot in light of the jury finding that the defect was not a substantial factor in bringing about Mrs. Stecher's injuries. Stecher v. Ford Motor Company, 571 Pa. 312, 319, 812 A.2d 553, 557 (Pa. 2002); see also Harsh v. Petroll, 584 Pa. 606, 609 n.1, 887 A.2d 209, 211 n.1 (Pa. 2005)(There is continuing controversy regarding the appropriate elements of a crashworthiness claim).

There are two different approaches to the elements of a crashworthiness claim. Under the Fox/Mitchell[1] approach, the plaintiff only needs to prove that the product was defective and the defect was a substantial factor in producing damages over and above those which were probably caused as a result of the original impact or collision. If the plaintiff does so, the burden of proof shifts to the defendants to apportion the damages between them. If they cannot, the defendants are treated as joint and several tortfeasors. Plaintiff's expert indicates in his report that the vehicle was defective because it lacked sufficient side-impact protection and decedent would have suffered moderate injuries like the rest of the occupants if it were not for this defect. The Court finds Plaintiff's expert report is sufficient meet the elements of a crashworthiness claim under the Fox/Mitchell approach.

Under the Huddell/Caiazzo[2] approach, a plaintiff must prove: that the design of the vehicle was defective and that when the design was made, an alternative, safer design practicable under the circumstances existed; what injuries, if any, would have resulted

1 See Fox v. Ford Motor Co., 575 F.2d 774 (10th Cir. 1978) and Mitchell v. Volkswagenwerk, AG, 669 F.2d 1199 (8th Cir. 1982).
2 See Huddell v. Levin, 537 F.2d 726 (3rd Cir. 1976) and Caiazzo v. Volswagenwerk AG, 647 A.2d 241 (2nd

to the plaintiff had the alternative, safer design been used; and some method of establishing the extent of plaintiff's enhanced injuries attributable to the defective design. In his report, Plaintiff's expert enumerates several different ways the vehicle could have been made safer. He also indicates these alternatives were relatively inexpensive (page 12) and offered greater protection without disadvantages (page 6). If the alternates for increased side-impact protection had been utilized, the decedent would have survived the collision with injuries similar to the other occupants (pages 2, 5, and 15). The only aspect that Plaintiff's expert does not address, and it may well be impossible to do so, is the portion of decedent's death attributable to GM's design of the Sunfire as compared to Hobensack's negligence. However, on this point it appears the Pennsylvania Supreme Court would adopt the Fox/Mitchell approach which would permit concurrent causation and joint and several liability for the enhanced injury. In Harsh v. Petroll, the Pennsylvania Supreme Court stated: "In addition to Huddell's crafting of more stringent requirements in terms of the plaintiffs' delimiting of an enhanced injury the Huddell court also indicated that principles of concurrent causation and joint liability should not apply relative to enhanced injuries in a crashworthiness context, a position which we reject here, in favor of Mitchell's approach on this latter point." 584 Pa. at 621 n.20, 887 A.2d at 218 n.20 (citations omitted).

By The Court,

_____
Kenneth D. Brown, P.J.

cc: Matthew Ziegler, Esquire (Plaintiffs' counsel)
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Cir. 1981).

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