TORT LAW
February 2006

Protect Against Expert Exclusion

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The Second Appellate District recently addressed exclusion of expert witness testimony in *Stephen v. Ford Motor Company Inc*. (2005) 2005 WL 3193835. A lack of evidentiary basis for the expert's opinions resulted in exclusion of the testimony and nonsuit. Rather than accepting $200,000.00 in pre-trial offers, the plaintiff became liable for $176,858 of defendant's costs. This was the direct result of the exclusion of plaintiff's expert's testimony following an Evidence Code §402 hearing. Reviewing this decision will enable you and your experts to protect against such a result before facing evidentiary hearings.

FACTS

Plaintiff Cheryl Stephen sued Ford Motor Company ("Ford") and Bridgestone/Firestone North America Tire LLC ("Firestone") following a 1998 roll-over accident in her 1996 Ford Explorer. The California Highway Patrol report noted the tire tread had completely separated from the tire. The Explorer had been driven for 58,700 miles. The rear tire which detreaded was factory installed.

The Explorer was deemed a total loss. Pictures were taken by the insurance company adjuster and by the plaintiff's boyfriend. The vehicle was then scrapped and sold for salvage by the insurance company. The plaintiff filed suit in 2000 against both Ford and Firestone. The case proceeded to trial in 2004.

Trial Court Proceedings

Ford and Firestone filed motions *in limine* to exclude testimony by plaintiff's experts. The court conducted a series of hearings pursuant to Evidence Code §402. A synopsis of the proffered testimony from the tire expert includes the following:

- He was a tire engineer who previously worked for Firestone for 27 years in the company's retread division;

- He had worked on approximately 300 Firestone tire failure cases;

- He had determined there was a systematic design defect due to excessive sulfur in the rubber skim stock recipe resulting in weakness in the peel strength causing separation of the inner and outer radial steel belts at high speeds; and

- He could determine by reviewing photographs of the plaintiff's tire that the failure occurred in the middle of the rubber tread which is consistent with the design defect.

Extensive briefing and additional hearings followed the initial Evidence Code §402 hearing. Despite these, the trial court excluded the tire expert's testimony in its entirety upon grounds including the following: (1) the amateur photographs of the Explorer were unreliable; (2) the other accidents he relied upon were insufficiently similar to the plaintiff's accident to support his opinions; and (3) his opinions were too speculative since he had no basis to support his conclusion the tread detachment more likely than not resulted from a defect rather than another potential cause. The plaintiff proceeded with her case following which defendants' motions for nonsuit were granted.

The plaintiff filed an appeal, contending the issues used by the trial court to exclude the testimony go to the weight of the evidence rather than the admissibility of the tire expert's testimony which should not have been excluded.

Appellate Court Analysis

The Second District recognized that the tire expert was unable to perform any testing upon or even examine plaintiff's tire since it had previously been destroyed. The court acknowledged the testimony was necessarily based upon a review of amateur photographs and experience with other tire failures. However, this was not fatal to plaintiff's claim. The court stated evidence of substantially similar tire-failure accidents would be admissible to prove that plaintiff's accident occurred in the same manner. This means exclusion was not necessarily required if an expert had never previously opined without testing or forensically inspecting a tire.

The problem which the court noted was an inadequate showing of the similarity of the other tire-failure accidents upon which the expert was relying. In the initial evidentiary hearing, the expert only referenced 10 other cases and only three of those involved the specific tires at issue. Post-hearing briefing was permitted and plaintiff then offered a list of 96 tire failures in which the expert had personally examined the type of tire at issue. However, details of the failures which would show similarity to plaintiff's tire failure were not provided; *e.g.*, the age or condition of the tires, the circumstances of the failures, copies of police reports, etc.

The court was also not impressed with an expert relying upon amateur photographs. The court stated it was not aware of any authority permitting this as a basis for an expert's opinion. However, the photo issue was addressed as a separate possible basis for the expert's testimony.

The Second District agreed that the defendants' motions for nonsuit were properly granted. Whether or not an abuse of discretion standard was employed seems irrelevant. The expert's opinions were determined to be mere speculation which could not constitute evidence. Therefore, the deficiencies related to the admissibility rather than the weight of the evidence.

Further, the court held expert testimony was necessary to establish both the defect and causation. The plaintiff's arguments that liability could be established via the consumer

expectation test (*i.e.*, tires should not separate and cause accidents) without expert testimony were not accepted. The court stated the consumer expectation standard was only applicable when a defect can be determined by common knowledge regarding minimum safety expectations rather than when an expert was necessary to balance the benefits of design against the risk of danger. Therefore, the exclusion of the plaintiff's expert's testimony was fatal to her claim.

CONCLUSION

Plaintiff attorneys who utilize expert testimony should review the *Stephen v. Ford Motor Company Inc*. decision carefully. Pretrial evidentiary motions and hearings are common. The *Stephen* decision will further encourage defense attorneys they have nothing to lose and everything to gain by such attempts to exclude expert testimony. The *Stephen* case will enable plaintiff attorneys to further prepare their cases and retain experts to protect against such outcomes.

One lesson to be learned is experts should be encouraged to keep *thorough* records regarding their past investigations. A prior case list and independent recollection is not sufficient. Generally referring to past experience and circumstances will not suffice as a basis for admissible evidence. The *Stephen* decision implies that had plaintiff's expert been able to produce case files and/or an extensive factual compilation regarding those prior 97 cases then his current opinions may have been admissible. The defendants' criticisms of his testimony would then have only gone to weight to be given rather than operating to preclude the testimony altogether.

Another lesson from the *Stephen* case is the importance of preservation of evidence. Although the harm may already be done before the attorney has an opportunity to evaluate the case, attorneys should keep the *Stephen* case in mind when accepting such cases and/or interviewing potential experts.

The one positive concept from the case is the court's statement regarding the admissibility of evidence of substantially similar occurrences. Defendants often file motions *in limine* seeking to exclude reference to similar prior acts. Plaintiffs should attempt to use the *Stephen* case offensively to admit such evidence via their experts.