

The law of product liability is undergoing considerable change. The American Law Institute in its conservative Products Restatement in 1997 retained strict liability for defects in manufacturing, but substantially abandoned its no-fault approach for design defects or defects with regard to inadequate warnings or instructions. To establish a cause of action for a manufacturing defect, a plaintiff need only demonstrate that the product that caused an injury differed from the manufacturer's specifications and thus was not the product it intended to produce. Design defects are far more difficult to establish. Under the new Restatement, courts would examine whether the plaintiff has shown a "reasonable alternative design" for the product that would have reduced its unsafe aspects.

Not all courts have rushed to adopt the new Restatement's version of design defect product liability.

WILSON SPORTING GOODS CO. v. HICKOX

United States District Court, District of Columbia, 2013.
59 A.3d 1267.

MCLEESE, ASSOCIATE JUDGE:

Baseball umpire Edwin Hickox was injured while wearing a mask manufactured by Wilson Sporting Goods Company. Mr. Hickox and his wife brought products-liability claims against Wilson. A jury found for the Hickoxes on all claims. Wilson appeals, arguing that the Hickoxes presented expert testimony that lacked an adequate foundation; that Wilson was entitled to a jury instruction on assumption of risk; and that the evidence was insufficient to support the verdict. We affirm.

I.

The Hickoxes' evidence at trial indicated the following. In 2005, at an annual retreat for Major League Baseball umpires, a Wilson representative gave Mr. Hickox an umpire's mask with what the representative claimed was a new, safer design. Several months later, Mr. Hickox wore the mask while working behind home plate as an umpire during a game in Washington, D.C. In the top of the ninth inning, a foul-tipped ball struck the mask. The impact of the ball gave Mr. Hickox a concussion and damaged a joint between the bones in Mr. Hickox's inner ear. As a result, Mr. Hickox suffered permanent hearing loss of mild to moderate severity.

The mask was a traditional umpire's mask, but had a newly designed throat guard that angled forward instead of extending straight down. According to the Hickoxes, the throat guard should have had a center wire and should have extended straight down with no forward angle. Because the mask lacked these features, when the ball hit the throat guard, the mask did not deflect the ball but rather temporarily trapped the ball, concentrating the ball's energy at the point of impact. As a result, the mask was driven into Mr. Hickox's jaw with great force.

Safer, alternative masks were sold at the time of the incident. If Mr. Hickox had been wearing either a hockey-style mask or a traditional mask with a throat guard that extended straight down, he probably would not have suffered the injury.

Mr. Hickox believed that Wilson tested new products and ensured that they were safe before selling them. In fact, Wilson did not test the type of mask worn by Mr. Hickox to determine the forces that would be transferred to the wearer's head upon impact. Such testing would have shown the mask to be defective, because the mask can trap balls rather than deflect them.

Mr. Hickox anticipated that the mask would disperse the force created when a ball hit the mask. That is what the product-design engineers at Wilson intended the mask to do and what Wilson's representative told Mr. Hickox the mask would do. When Mr. Hickox was injured, the mask failed to serve this purpose, because of the mask's defective design.

In contrast to the Hickoxes' version of events, Wilson contended the following at trial. The ball hit the mask above the throat guard, not on it, and so the same injury would have occurred even if the mask had not had a throat guard at all. Wilson intended the mask to provide protection by deflecting balls away from the wearer's head, and the mask accomplished this objective during the incident. At the time of the incident, there were no design or testing standards for wire baseball masks. The mask was designed using feedback from baseball players and umpires, and the forward angle improved the mask's utility by preventing the throat guard from hitting against the umpire's chest protector and dislodging or being knocked out of alignment.

Other companies sold masks with forward-angled throat guards, and those masks were not associated with injuries like Mr. Hickox's. The mask had been field-tested for over five years, and had been lab-tested before the incident. Before the incident, Mr. Hickox had used the mask many times without injury. After the incident, Mr. Hickox suffered additional head injuries while umpiring, even though he was then wearing the hockey-style mask that he claimed to be a safer, alternative design.

Mr. Hickox was an experienced umpire who knew that participating in sports creates the risk of injury, that no face mask can guarantee safety, and that injury is more likely without protective equipment.

At the close of trial, the judge submitted several tort claims to the jury: strict liability for a defective product, design defect, negligent design, design defect due to failure to warn, and breach of implied warranty of fitness for a particular purpose. The jury rendered verdict for the Hickoxes on each of their claims, awarding \$750,000 to Mr. Hickox and \$25,000 to his wife. . . .

Wilson asserts that it was entitled to have the jury instructed on an assumption-of-risk defense. We view the record in the light most favorable to Wilson and inquire whether an assumption-of-risk defense had sufficient evidentiary support. We find no error in the trial court's determination that such support was lacking.

An assumption-of-risk instruction is warranted in a design-defect case if the defendant offers evidence that the plaintiff knew about the specific alleged defect and the associated danger. . . . Simply showing that Mr. Hickox knew the general risks of baseball umpiring was inadequate. Wilson needed evidence that Mr. Hickox knew that the throat guard's acute, forward angle had a tendency to concentrate energy and increase the risk of injury. Because Wilson failed to present such evidence, the trial court did not err by declining to give an assumption-of-risk instruction.

* * *

Wilson argues that there was insufficient evidence to support judgment against it on any of the products-liability claims. We view the evidence in the light most favorable to the Hickoxes and will reverse only if no reasonable person could have rendered a verdict in the Hickoxes' favor. A motion for judgment notwithstanding the verdict should be granted only in extreme cases. As Wilson acknowledges, a finding that the evidence was sufficient on any one of the claims found by the jury will support the judgment in this case in its entirety. Because we find sufficient evidence to support the design-defect claim, we address only that claim.

There are two tests commonly used to determine whether a product's design was defective: the consumer-expectation test and the risk-utility test. In challenging the sufficiency of the evidence to support the jury's finding of a design defect, Wilson appears to analyze the evidence under the risk-utility test. In the circumstances of this case, however, we conclude that the evidence should properly be analyzed under the consumer-expectation test.

Wilson explicitly assented at trial to jury instructions that required the jury to make findings under a consumer-expectation test. Specifically, the jury was told that "[a] design is defective if the product fails to perform as safely as an ordinary customer would expect when [the product is]

used in an intended or reasonably foreseeable manner.” This formulation is essentially equivalent to the consumer-expectation test as defined by this court and others. . . .

We employ the consumer-expectation test to evaluate the sufficiency of the evidence in this case. Under that test, a product has a design defect if it “fails to perform in the manner reasonably to be expected by the ordinary consumer.” A reasonable juror could have found that test to have been met in this case.

Viewed in the light most favorable to the Hickoxes, the evidence indicated that the mask at issue was more dangerous than comparable masks sold at the time, such as hockey-style masks, because the mask could concentrate energy at the point of impact, rather than distribute energy evenly throughout the padded area of the mask. Because the energy possessed by a pitched baseball is adequate to cause severe injury, the jury could reasonably have concluded that a mask that concentrated energy would increase the risk of severe injury.

The jury could also have relied on the existence of safer, commercially available alternatives to draw inferences about the level of safety an ordinary user would expect. There was evidence that alternative masks with detachable throat guards and no forward angle work well and do not excessively restrict the umpire’s movement. There also was evidence that Mr. Hickox would not have suffered injury to his ear had he been wearing a hockey-style mask or a mask with a center wire and no forward angle.

In addition, the jury could have concluded that the statements made by Wilson’s representative to Mr. Hickox about the mask reflected Wilson’s standard marketing approach, and that an ordinary consumer therefore would have expected the mask to perform more safely than other models. There was evidence that Wilson’s representative told Mr. Hickox that the mask would disperse energy and protect against concussion, and that the mask was the best and safest technology. Mr. Hickox also testified that he believed that companies like Wilson tested new products and did not sell them unless they were safe to use. Jurors could consider such testimony in combination with their own reasonable inferences to determine an ordinary consumer’s expectations.

Evidence of industry practice can also be relevant to reasonable consumer expectations. Wilson’s objective in designing the mask was to disperse energy, not to concentrate it. At the time of the incident, Wilson tested its hockey-style masks to determine if they met impact-intensity standards, but did not perform such testing on its baseball masks. At a time when Wilson used energy dispersal as a design objective for its baseball masks and when impact-intensity standards existed for football helmets, a reasonable juror could infer that an ordinary consumer would have expected baseball masks to disperse rather than concentrate energy. In sum, considering all the evidence, a reasonable juror could conclude that an ordinary consumer would have expected the mask to perform more safely than it did.

Finally, liability for design defect requires proof that the defect proximately caused the plaintiff’s injury. Wilson argues that the Hickoxes failed to present sufficient causation evidence, because they did not show that additional product testing by Wilson would have uncovered the design defect. We are doubtful that such proof was required, because proof that a product was designed defectively under the consumer-expectations test does not appear to require proof that the defect was reasonably foreseeable, whether through testing or otherwise. In any event, there was sufficient evidence that testing would have revealed the defect, because Dr. Paul testified that Wilson would have discovered the defect if it had conducted testing to measure the force exerted by the mask on the wearer’s head after impact by a baseball. Combined with Dr. Paul’s testimony that Mr. Hickox would not have suffered the same injury if he had worn an alternative mask, this evidence was sufficient to establish proximate causation.

The judgment of the trial court is therefore affirmed.
