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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MARIA GUERRERO et al.,

Plaintiffs and Appellants,

v.

FORD MOTOR COMPANY,

Defendant and Respondent.

E042900

(Super.Ct.No. SCVSS99185)

OPINION

APPEAL from the Superior Court of San Bernardino County. Martin A. Hildreth, Judge. (Retired judge of the former San Bernardino Mun. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Law Office of Joseph D. Davis, Joseph D. Davis; and Charlotte E. Costan for Plaintiffs and Appellants.

Snell & Wilmer, Troy R. Booher and Richard A. Derevan for Defendant and Respondent.

Plaintiffs Maria Guerrero, individually (Guerrero) and as guardian ad litem for Robert Guerrero, Raymond Rangel, individually and as heir at law to Hermila Rangel, the Estate of Hermila Rangel and Vanessa Rangel (collectively Plaintiffs), who were victims of a single vehicle rollover accident, appeal from a judgment entered in favor of defendant Ford Motor Company (Ford) after a jury trial. They claim that the trial court erred in refusing to grant their motion for a new trial because the jury gave inconsistent answers to questions on the special verdict form, and because the evidence was insufficient to support the jury's finding that Guerrero's use of the vehicle was not foreseeable. We disagree and affirm.

FACTUAL AND PROCEDURAL HISTORY

The accident occurred on March 17, 2000, around 7:45 p.m., while on a trip from Adelanto to San Diego for the weekend. It was dark. Guerrero was driving, Robert Guerrero was in the passenger seat, Hermila Rangel was seated behind him, a car seat with a child in it was in the center of the back seat and two girls, Vanessa Rangel, age 12 and Crystal Chavez, age 11, were seated in the seat behind Guerrero. (There is some uncertainty regarding the seating position of Vanessa Rangel in the vehicle, as there is also evidence that she was sitting in the front passenger seat with Robert Guerrero.) Guerrero was heading south on Interstate 15. She was in the No. 2 lane from the left (again there is some conflicting evidence on this point) traveling at 70 miles an hour while attempting to set her cruise control, when she felt a bump in the road. She then swerved back and forth across the traffic lanes several times before the vehicle commenced to roll approximately five times. There was no evidence of mechanical

defect or a collision with another vehicle. Both girls were ejected from the vehicle, as were Robert Guerrero and Hermila Rangel, who was pinned under it when it came to rest. Guerrero and the child in the car seat remained in the vehicle. Hermila Rangel died shortly after the accident and Robert Guerrero, who suffered severe brain injury, went into a coma and remains minimally responsive. None of the other passengers sustained serious injury.

On March 14, 2001, Plaintiffs filed a complaint against Ford and others not party to this appeal alleging causes of action for negligence, breach of warranty, strict liability, loss of consortium and wrongful death. Ford served its answer on July 5, 2001. Prior to the commencement of trial Plaintiffs dismissed their negligence cause of action. The parties commenced their opening statements on September 21, 2006. On November 7, 2008, the trial court granted Ford's motion for nonsuit on the issue of punitive damages. On November 20, 2006, the jury returned a special verdict finding that the Explorer performed as safely as an ordinary user would expect, that Ford failed to prove the benefits of the Explorer's design outweighed the risks of danger of its design, and that plaintiffs' injuries were not caused by a foreseeable use of the Explorer. Judgment was entered in favor of Ford on December 15, 2006.

Plaintiffs then moved for a new trial, initially listing eight separate grounds. However, the points and authorities essentially argued only that there was insufficient evidence to support the jury's verdict. The trial court denied the motion of Plaintiffs and granted Ford's costs with the exception of $585. This appeal followed. While Plaintiffs' notice of appeal indicated their intent to contest the February 28, 2007, denial of their

motion to tax costs, they have specifically abandoned any claim of error in that regard in their briefs on appeal, having decided to rely solely upon a reversal of the judgment to negate the costs award.

DISCUSSION

A. The Special Verdict Form Was Not Inconsistent

The special verdict form asked, "[w]as there a defect in the design of the 1996 Ford Explorer regarding its rollover resistance in that the Explorer failed to perform as safely as an ordinary user would expect?" The jury answered, "No." The special verdict form then asked, "[w]as there a defect in the design of the 1996 Ford Explorer regarding its rollover resistance in that Ford Motor Company failed to prove that the benefits of the design of the Explorer outweighed the risks of danger of its design?" The jury answered, "Yes." Then the jury was asked, "[w]ere the injuries to plaintiffs caused by a use or misuse of the 1996 Ford Explorer that was reasonably foreseeable by Ford Motor Company?" The jury answered, "No," then signed and returned their verdict.

Plaintiffs argue that in order to answer yes to question No. 2, the jury necessarily had to find that Guerrero's use of the vehicle was foreseeable. Therefore, the jury's response to question No. 3 was completely inconsistent. Consequently, they conclude the verdict is against the law and a new trial should have been granted. (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 682 (*City of San Diego*).)

In the first instance, Ford correctly argues that Plaintiffs raise this issue for the first time on appeal. In their motion for new trial plaintiffs did not attempt to persuade

the trial judge that the verdict was inconsistent. "Contentions or theories raised for the first time on appeal are not entitled to consideration. [Citations.]" (*City of San Diego*, *supra*, 126 Cal.App.4th at p. 685.) Appellate courts do have discretion to consider newly raised arguments that concern a pure question of law on undisputed facts and are most likely to do so when the issue involves important matters of public policy. (*Sea & Sage Audubon Society, Inc. v. Planning Com*. (1983) 34 Cal.3d 412, 417.) Despite Plaintiffs overly impassioned rhetoric, the question of whether the special verdict form crafted by the parties for use in this single piece of litigation was internally inconsistent can hardly be considered an important matter of public policy.

Second, even were we to exercise our discretion to consider this issue, there simply is no inconsistency in the findings as a matter of law. The jury was instructed as follows: "Plaintiffs claim that the Explorer's design caused harm to plaintiffs. To establish this claim, plaintiffs must prove all of the following:

"1. That defendant Ford Motor Company manufactured the Explorer;

"2. That the Explorer was used or misused in a way that was reasonably foreseeable to defendant Ford Motor Company; and

"3. That the Explorer's design was a substantial factor in causing harm to plaintiffs.

"If plaintiffs have proved these three facts, then your decision on this claim must be for plaintiffs unless defendant Ford Motor Company proves that the benefits of the design outweigh the risks of the design. In deciding whether the benefits outweigh the risks, you should consider the following:

"(a) The gravity of the potential harm resulting from the use of the Explorer;

"(b) The likelihood that such harm would occur;

"(c) The feasibility of an alternative design;

"(d) The cost of an alternative design;

"(e) The disadvantages of an alternative design."

This instruction explains how the jury should determine, not whether the Explorer was defectively designed, but rather, whether the Explorer's design caused harm to Plaintiffs. The first two questions on the special verdict form do not ask whether the design caused harm to Plaintiffs. Rather, they only seek to discover whether there was a defect in the design. They do not, therefore, track the instructions and the instructions cannot be used, as Plaintiffs have essayed, to demonstrate any inconsistency. Indeed, the instruction recited above encompasses question Nos. 2 through 4 of the special verdict form. The special verdict asked the jury to decide the last point of the instruction first, leaving the foreseeability and causation questions for later. By determining that Plaintiffs' use or misuse of the vehicle was not reasonably foreseeable to Ford, the jury determined, consistent with the instruction, that the Explorer's design did not cause harm to Plaintiffs. Plaintiffs failed to raise this issue below and have failed to demonstrate that there was any inconsistency in the jury's responses to the special verdict form as a matter of law. They do not merit the relief that they seek on this ground.

B. Substantial Evidence Supports the Jury's Finding

Although the arguments raised by Plaintiffs on appeal are less than precisely stated as a result of their improper focus on the evidence that would have supported a verdict in

their favor, it appears that there are three main assertions regarding the jury's finding on the issue of foreseeability.

Initially, by analogizing to *Horn v. General Motors Corp*. (1976) 17 Cal.3d 359, which found at page 371 that "the driving of an automobile without using a seat belt is an entirely foreseeable use of the vehicle" and by citing to *Cronin v. J.B.E. Olson Corp*. (1972) 8 Cal.3d 121, which states at page 126 that "vehicle manufacturers must take accidents into consideration as reasonably foreseeable occurrences involving their products," Plaintiffs ask this court to take this issue from the hands of the jury by concluding that Guerrero's use of the vehicle was foreseeable as a matter of law. Then, citing to *Bigbee v. Pacific Tel. & Tel. Co*. (1983) 34 Cal.3d 49 (*Bigbee*), which holds at pages 57-58 that "it is settled that what is required to be foreseeable is the general character of the event or harm . . . not its precise nature or manner of occurrence," Plaintiffs urge this court to find that the use of the vehicle, which must reach the level of foreseeability, was simply that Guerrero was driving it down the freeway at or near the speed limit. Plaintiffs further urge that the evidence showed that Ford knew the vehicle was unsafe and prone to rollovers and therefore indisputably demonstrates that the rollover was foreseeable to Ford. This argument misstates the issue. The question is not whether Ford could foresee that an Explorer might roll over, but whether Ford could foresee Guerrero's use of the vehicle such that it had to design a vehicle that would not roll over under such circumstances. Plaintiffs also seem to contend that because other juries have held Ford responsible in very similar cases, this jury was required to do so as well.

Essentially, each of these contentions argues that question No. 3 on the special verdict form should never have been put to the jury. There is no evidence in the record to indicate that Plaintiffs ever objected to the inclusion of question No. 3 in the special verdict form, nor is there any indication that they ever urged the trial court to decide this question as a matter of law. At this point, the issue is not whether the verdict was inconsistent (an issue that is not waived by failure to object before the jury is discharged (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1182) but with the issue of whether the question should have gone to the jury at all. Because Plaintiffs failed to raise the issue in the trial court, they have forfeited the right to have it considered on appeal. (*Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 47, fn. 3 [failure to object to form of special verdict amounts to waiver of issue on appeal].) "'It is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided.' [Citations.]" (*People v. Earp* (1999) 20 Cal.4th 826, 882.)

When pared down to their essence, the balance of Plaintiffs' public policy arguments urge us to conclude that Ford is so assuredly despicable and Guerrero so sympathetic and even heroic in comparison that there should not have even been a trial as to the liability phase, as that was a forgone conclusion, and the only question the jury was competent to decide was the amount of damages. There are at least two problems with this approach. First, such tactics are not well taken at the appellate level where the court, because it is not a trier of fact, cannot be swayed by emotional arguments designed to invoke sympathy and outrage.

The second problem is that Plaintiffs' argument is completely at odds with the jury system, which is among the most basic and highly esteemed public policies in our legal system. As confirmed by the court in *Bigbee*, "ordinarily, foreseeability is a question of fact for the jury. [Citation.]" (*Bigbee*, *supra*, 34 Cal.3d at p. 56.) In that case, the defendant was attempting to have the appellate court take the question from the jury as are the Plaintiffs here. (*Id*. at pp. 55-56.) The Supreme Court, finding that it was possible that reasonable jurors could reasonably conclude that the risk at issue was foreseeable, refused to take the issue from the jury as requested. (*Id*. at p. 58.) Similarly, we conclude that this jury could decide that Ford was under no obligation to manufacture a vehicle that would not roll over under the conditions to which Guerrero subjected it. This is what it did when it decided that Guerrero was not using the vehicle in a manner reasonably foreseeable to Ford at the time of the accident.

Plaintiffs also argue generally, that the trial court erred when it failed to grant their motion for a new trial on the ground that the evidence was insufficient to support the jury's finding that Guerrero's use of the vehicle was not foreseeable to Ford. "A trial court has broad discretion in ruling on a new trial motion, and the court's exercise of discretion is accorded great deference on appeal. [Citation.] An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice. [Citations.] Accordingly, we can reverse the denial of a new trial motion based on insufficiency of the evidence . . . only if there is no substantial conflict in the evidence and the evidence compels the conclusion that the motion should have been granted.

(*Fassberg Const. Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 752.)

Plaintiffs make the argument that because there was insufficient evidence to support the verdict on this point, the judgment must be reversed. In determining this question, "the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.* [Citations.]" (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.) In reviewing the record, we view the evidence in the light most favorable to Ford as the party who prevailed in the trial court, and resolve all issues of credibility and make all inferences in Ford's favor. (*Thompson v. Tracor Flight Systems, Inc*. (2001) 86 Cal.App.4th 1156, 1159, 1166.) Because we find that substantial evidence supports the jury's findings, we will also conclude that the trial court did not abuse its discretion in refusing to grant Plaintiffs a new trial on this ground. Hence these last two of Plaintiffs' arguments are considered together.

There is ample evidence in the record to support a jury finding that an inattentive Guerrero overreacted to a perceived danger of her own creation and steered the vehicle in a fashion that, in the jury's estimation, Ford was not obligated to consider when designing the Explorer. Witness Yolanda Mitchell testified that Guerrero passed her on

the right and veered right, then came back left, then veered right and left again before commencing to roll. The turning maneuver was a "swerve." There were four direction changes before the vehicle began to roll. She also testified that there was a warning sign and arrow indicating a bump in the road and that Guerrero passed her after she felt the bump. There is no evidence in the record that Guerrero ever saw this warning. Witness Mark Sirevaag, who was driving in lane No. 5, testified that Guerrero came up on his left side fast (he estimated her speed at 85 to 90 miles an hour) and then swerved across the road in front of him. The first time Guerrero swerved she came near to the right roadway edge. She cut across the lanes, then cut again, recorrected twice and began to roll. The corrections were not gradual but were harsh as the vehicle was sideways across the lanes. Witness Ivan Rodriguez also testified that Guerrero was travelling between 65 and 80 miles an hour as she passed him. Just prior to the accident Guerrero testified that she was in lane No. 2, traveling at 69 to 70 miles an hour, and was in the process of setting the cruise control when she felt a bump, and then felt the Explorer pulling to the right. She only drove the Explorer on the freeway twice a month and she only used the cruise control when she was on the freeway. In spite of this infrequent use of the device, on direct examination she testified that she could set the cruise control without taking her eyes off of the road, and it was her intention to set the cruise control at 69 miles an hour. On cross-examination she admitted that she had to look at the speedometer in order to set the speed and that it was during that process that she was surprised by the bump she felt.

Plaintiffs' expert witness Michael Kaplan testified that turning a vehicle back and forth makes it more likely to roll because of the bounce that you get from the shocks and

springs. The Guerrero vehicle was traveling approximately 57 miles an hour when it commenced to roll. At some point, the vehicle was generating enough lateral force to leave four skid marks totaling about 140 feet in length. However, the vehicle must have been fishtailing prior to those marks since it could not have reduced speed sufficiently in that space to account for the 57 miles an hour speed at the commencement of the roll. Dr. Kaplan testified that the vehicle swerved at least four times, possibly up to six before rolling. The deceleration from 70 miles an hour to 57 miles an hour was caused by the vehicle swerving or fishtailing because there was no evidence Guerrero braked other than one eyewitness whose testimony was discounted. Dr. Kaplan also testified that in order for a vehicle to be defective due to instability leading to rollovers, the steering inputs must be reasonable. He could testify that a vehicle was defective if it rolled after three steering reversals but had no opinion after additional steering reversals because he had not tested that circumstance. He admitted that Guerrero steered at least four times and perhaps as many as six.

Plaintiffs' expert David Bilek testified that there could be a number of steering inputs beyond which he would conclude that a vehicle was not defective. He had only tested vehicles up to three steering inputs and did not know if a vehicle was defective if it rolled after any number of steers beyond three. Mr. Bilek was willing to accept Dr. Kaplan's testimony regarding the number of steering inputs Guerrero made before rolling the Explorer. He also allowed that if suspension bounce causes a rollover, the vehicle may not be defective.

Finally, Ford's expert Donald Tandy testified that steering reversals at freeway speeds will cause vehicles' tires to lift, including Explorers. He opined that Guerrero's steering inputs created the overturn and that the result of those steering inputs was not limited to Ford Explorers. Dr. Tandy further explained that you could not design a vehicle that was rollover immune no matter what the driver did with it or how many steering inputs a driver made. The fact that the vehicle in this accident swerved back and forth across the road means that Guerrero was steering it to do so. If she was not steering, the vehicle would have straightened and not continued to swerve. Driving a vehicle in such a way as to make it fishtail four to six times and render it out of control does not constitute reasonable steering inputs.

All of this evidence supports the jury's finding that Guerrero was using the Explorer in a way that was not reasonably foreseeable to Ford. While there was ample evidence based upon which the jury could have reached a different conclusion, it did not do so and we may not substitute our judgment for theirs. And because there was ample evidence to support the jury's finding on the issue of foreseeability, we conclude that the trial court did not abuse its discretion when it declined to order a new trial on the grounds that the evidence was insufficient to support the verdict. No miscarriage of justice has been demonstrated.

DISPOSITION

The judgment is affirmed. Respondent to recover its costs on appeal.

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/s/ MILLER
J.

We concur:

/s/ McKINSTER
Acting P. J.

/s/ RICHLI
J.