SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND PART DCM 3

Index No.: 12660/01
Motion No.: 34, 35, 36, 37

GARY MOTELSON, as Administrator of the Estate of infant BRIAN MOTELSON, Deceased, EVAN MOTELSON, an infant by his parents and natural guardians, GARY MOTELSON and ELISSA MOTELSON, GARY MOTELSON, Individually and ELISSA MOTELSON, Individually,

Plaintiffs

against

FORD MOTOR COMPANY, FORD MOTOR CREDIT COMPANY,

Defendants.

AMENDED

DECISION & ORDER

HON. JOSEPH J. MALTESE

Index No.: 13545/01

Action No. 2

MICHAEL J. MOTELSON, as Administrator of the Estate of STEVEN MOTELSON, Deceased and ENID MOTELSON,

Plaintiffs,

-against-

FORD MOTOR COMPANY and FORD MOTOR CREDIT COMPANY,

Defendants.

This court *sua sponte*, sets aside its Decision and Order dated August 29, 2008 and hereby substitutes this Amended Decision and Order in its place.

The four motions made by all of the parties to set aside the jury verdict of March 22, 2008 and to enter judgments as a matter of law pursuant to CPLR §4404(a) are denied in part and granted in part.

Background

This case arose from a July 1, 2000 motor vehicle accident where a 1998 Ford Explorer, a sport utility vehicle ("SUV") rolled over, three and three quarter times resulting in two deaths and serious injuries to three other passengers. The vehicle was manufactured and designed by the defendant, Ford Motor Company. Ford Motor Credit Co. was the owner and lessor of the SUV. The driver and lessee, Steven Motelson, died in the accident. The front seat passenger, Gary Motelson, was Steven Motelson's

son. He sustained physical and serious emotional injuries as a result of the accident. Two of the rear seated passengers were Steven Motelson's grandsons, who were also Gary Motelson's sons: Brian Motelson, who died one day after the accident, and Evan Motelson, who survived with physical and extreme emotional distress as a result of the accident. The third rear seated passenger, Mitchell Slepian, alleged serious physical, head and psychiatric injuries and settled with Ford Motor Credit Company on June 19, 2007, prior to trial for the amount of $1,750,000. Slepian discontinued his products liability actions against Ford Motor Company.

Facts

On July 1, 2000, a clear and sunny Saturday, Steven Motelson, a 60-year old Boy Scout Leader, drove his adult son, Gary Motelson, along with Gary's two son's, Steven's grandchildren, Brian, age 9, and Evan, age 5, and a family friend, Mitchell Slepian, age 21, to attend a Boy Scout Camp. They arrived at the camp around 10:00 AM, all five dressed in their Boy Scout uniforms and enjoyed the museum and festivities that Gary Motelson and Mitchell Slepian helped plan as members of the First Greater New York Council's Museum Committee. As they drove the short distance from each campsite, which was stationed at different places in the reservation, Steven Motelson, as always, would not start the vehicle engine until everyone in the car was seat belted.[1]

On the return trip home from the Boy Scouts Camp, Steven Motelson pulled over and parked at a Dairy Queen and allowed the children, Mitchell Slepian and Gary Motelson to have ice cream and shakes. After about fifteen minutes, they all returned to the vehicle which Steven Motelson, again, would not start until everyone was seat belted.[2] Gary Motelson turned around and observed that Evan and Brian's seat belts were on.[3] During the return trip while on NY Route 17 South, Steven Motelson and his son, Gary Motelson, were listening to the Mets game on the radio and discussing the game.[4] Gary Motelson testified that the engine suddenly raced and he noticed the SUV was veering to the left

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[1]Tr. p. 1404.

[2]Tr. p. 1407.

[3]Tr. p. 1412.

[4]Tr. p. 1407-1408.

shoulder of the road. The SUV brushed a reflector on the left shoulder of the road and Steven Motelson attempted to straighten the vehicle back onto the road by turning the wheel to the right and then to the left.

The Explorer rolled over 3 3/4 times and Brian and Evan were ejected from the vehicle, along with Mitchell Slepian. The Explorer ultimately landed on the driver's side. Gary Motelson, while hanging above his father by his seatbelt, witnessed his father's head under the roof of the car.[5]

Other drivers riding behind the Motelson vehicle pulled over on the side of Route 17 South and called 911 for assistance and tried to help by pushing the Explorer over onto its wheels. Ambulances arrived at the scene of the accident and Gary Motelson and Evan Motelson were taken to nearby Arden Hill Hospital. Steven Motelson, Brian Motelson and Mitchell Slepian were air lifted to Westchester County Medical Center. Steven Motelson died during the accident and Brian Motelson died approximately 24 hours later on the next day. Gary Motelson and Evan Motelson survived with serious physical and psychiatric injuries.

At the time of trial, the plaintiffs claimed that this accident resulted from three alleged defects: (1) the cable on the speed control system malfunctioned because it was not designed with a dust cover to prevent debris from jamming the cable and causing the vehicle to experience a sudden unintended acceleration; (2) the roof was defectively designed because the strength of the vehicle's roof structure was too weak and not "crashworthy" or capable of surviving a roll over without crushing, which caused the driver, Steven Motelson's death; (3) the design of the vehicle's rear seatbelts were defectively designed because they unlatched from Evan and Brian Motelson upon the impact from the roll over, causing each of them and Mitchell Slepian to be ejected from the rear window of the SUV due to centrifugal forces when the vehicle rolled over 3 3/4 times. Prior to the trial, the plaintiffs also claimed that the Explorer was defective because of the vehicle's lack of stability and inferior handling due to its high center of gravity, which increased its ability to roll over when making sharp turns. That cause of action was discontinued.

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[5]Tr. p. 1410.

Ford has maintained that the accident was solely caused by the driver, Steven Motelson's negligence in drifting off the roadway onto the left shoulder and steering too sharply to the right and then to the left, causing the Explorer to roll over. Ford contends that there were no defects in the design of the vehicle's speed control cable, its roof or rear seat belts.

Jury's Findings

After three weeks of testimony, the jury found that the roof support system of the 1998 Ford Explorer SUV was defectively designed and found Ford liable in strict liability and negligent design, both of which were substantial factors in causing the driver, Steven Motelson's death. The jury found that the acceleration cable of the speed control system was not defective. The jury found that the two children, Evan and Brian Motelson, were not wearing their seatbelts and therefore concluded that the rear seat belts were not defectively designed causing them to unlatch upon a sustained impact, as plaintiffs demonstrated.

The jury found that Gary Motelson, Elissa Motelson, Evan Motelson, and the Estate of Brian Motelson were not entitled to any compensation. However, the jury awarded Enid Motelson $5,000,000 for the "total amount of economic loss" for the death of her husband, Steven Motelson. The jury also awarded the Estate of Steven Motelson $1,500,000 for the loss of earnings.

Discussion

In considering a party's post-trial motion to set aside the verdict pursuant to CPLR §4404, the court must consider whether the jury verdict is contrary to the weight of the credible evidence.[6] "Whether a jury verdict should be set aside as contrary to the weight of the evidence does not involve a question of law, but rather requires a discretionary balancing of many factors."[7] In seeking the motion, the movant has the heavy burden of establishing that there was no rational basis on which a jury could have found for the non-moving party, the non-moving party being entitled to every inference, which could reasonably be drawn from the evidence submitted by them.[8]

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[6] *Matter of Tokarz,* 199 AD2d 400, 605 NYS2d 365 [2d Dept 1993].

[7] *Ruscito v Early,* 253 AD2d 461, 676 NYS2d 649 [2d Dept 1998].

[8] *Rhabb v NYC Housing Auth.,* 41 NY2d 200, 202 [1976], citing 4 Weinstein-Korn-Miller, NY Civ Prac, par 4401.05.

Ford's Motion to Set Aside the Jury Verdict

Ford first claims that this court should grant their motion to set aside the jury verdict because plaintiffs failed to make out a *prima facie* case on the strict products liability claim involving the design of the vehicle's roof.

In *Voss v Black & Decker Mfg. Co.*,[9] the Court of Appeals listed seven factors that a jury must weigh in order to properly consider whether or not a product is reasonably safe. These include (1) the utility of the product to the public, (2) the likelihood that the product will cause injury, (3) the availability of a safer design, (4) the ability to design and manufacture a product that is safer yet remaining functional and reasonably priced, (5) the ability to avoid injury through careful use, (6) the degree of awareness of potential danger which can be attributed to the plaintiff, and (7) the manufacture's ability to spread costs related to improving safety of the design.[10]

Here, this court finds that plaintiffs did make a *prima facie* case of strict liability. Plaintiffs' expert, Dr. Jeremy Cummings testified that the 1998 Ford Explorer was not reasonably safe to protect occupants in foreseeable rollover collisions because the Explorer's roof would deform inward on the driver's side in a passenger side leading roll over. Furthermore, Plaintiffs presented the video deposition of engineer, Brian Herbst, who testified as to the various alternative designs that he had developed that strengthened the roof and/or roof support system for these model Explorers without impairing their efficacy. Mr. Herbst testified that he had performed drop testing on the test vehicles as modified to simulate a roll over accident. The testing showed that the roof of the modified vehicles would not significantly deform and that although the proposed design would slightly reduce occupant survival space, "the change is made up for in its retention of occupant survival space after the impact." In addition, Mr. Herbst's proposed design changes were said to be simple and could be incorporated at a low cost.

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[9]59 NY2d 102, 209 [1983].

[10]*Id.*

Furthermore, defendant's own expert, Dr. Catherine Corrigan testified that the likelihood that an occupant of a 1998 Explorer would sustain fatal injuries in the subject roll over accident was 100%, regardless of whether the roof was deformed. This testimony presents a basis for the jury to conclude that occupants in the vehicle were almost certain to have injuries and that the injuries would be severe or fatal. Dr. Cummings further testified that Steven Motelson would not have died had the roof not deformed in this accident. This court finds that the plaintiffs, through their expert testimony, did make out a *prima facie* case for this jury to conclude that the design of the vehicle's roof was not reasonably safe.

Second, Ford claims that plaintiffs failed to make a *prima facie* case for negligence because no evidence was presented about Ford's decision to put the vehicle into the market. For a case in negligence rather than strict products liability, the focus is on whether the manufacturer was aware of that condition and chose to market the product anyway.[11] Here, Dr. Cummings testified that he had reviewed Ford's documents pertaining to the design of the Explorer from 1992 to 1998. He explained that the Explorer had undergone three design changes during this period and the 1998 Explorer was known as the "third generation" Explorer. Based on the numbers in Ford's documents, Dr. Cummings explained that the 1998 Explorer's roof was weaker than the second generation, which was weaker than the first generation. Ford's documents also revealed that a steel beam was removed from the 1998 Explorer, which allowed the jury to conclude that Ford was aware of other available designs and was negligent in the design choices made for the 1998 Explorer and that this negligence lead to the death of Steven Motelson. Therefore, this court concludes that plaintiffs' did make out a *prima facie* case under the negligent design theory.

Third, Ford claims that plaintiffs failed to present a *prima facie* case under the "second collision doctrine." Under the second collision doctrine, a plaintiff must prove that the injuries were more severe than they would have been had the product been properly designed.[12] New York establishes a three prong test requiring plaintiff to sustain his or her claim: (1) that the design in question was defective and

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[11] *Voss v Black & Decker Mfg.*, 450 NY2d 102, 108 [1983].

[12] *Burgos v Lutz*, 128 AD2d 496, 512 NYS2d 424 [2d Dept 1987] citing *Bolm v Triumph Corp.*, 33 NY2d 151, *Cornier v Spagna*, 101 AD2d 141, 146, 475 NYS2d 7.

that an alternative safer design was practicable under the circumstances; (2) what injuries, if any, would have resulted had the alternative, safer design been used; and (3) establishing, through some viable method, the extent of enhanced injuries attributable to the defective design.[13]

Here, Ford finds this following portion significant during Ford's cross-examination of plaintiff's expert, Dr. Cummings:

> Q: ". . . even if the roof doesn't deform at all, a driver because of rotational forces can still suffer fatal head injuries without any deformation correct?"
>
> A: "I would agree with that, but the probability of him suffering fatal injuries is drastically reduced."[14]

This court does not find that portion of the testimony defeats plaintiffs' *prima facie* case under the second collision doctrine. As discussed previously, plaintiffs' expert testified that Steven Motelson would not have suffered fatal injuries if the roof had not been deformed. In acknowledging that it is *possible* that a driver can still suffer fatal head injuries without any roof deformation does not diminish the plaintiffs' case that Steven Motelson would not have suffered a fatal injury, but for the roof deformation. Accordingly, plaintiffs did present a *prima facie* case and have satisfied the "second collision doctrine."

Fourth, Ford claims that they are entitled to a new trial on the issue of the vehicle's roof structure because the verdict was against the weight of the evidence, and because the court allowed highly prejudicial evidence to be admitted along with the jury's "inconsistent" finding with regard to the driver's lack of culpability.

As to the issue of whether the verdict was against the weight of the evidence, Ford makes the same arguments discussed and rejected above claiming plaintiffs had not made their *prima facie* case. As to Ford's claim that this court made highly prejudicial evidentiary rulings, Ford claims that the court

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[13]*Garcia v Rivera,* 160 AD2d 274, 553 NYS2d 378 [1st Dept 1990].

[14]Tr. p. 1130

should not have allowed plaintiffs' expert, Dr. Jeremy Cummings to testify. Dr. Cummings is a biomechanical engineer and accident reconstructionist. He is the Principle Consulting Scientist and Biomedical Engineer of Cummings Scientific, LLC in Tallahassee, Florida, specializing in the analysis of accidents. After hearing Ford's arguments *in limine,* this court, in an order dated February 25, 2008, allowed Dr. Cumming's to testify about body movement within the vehicle and the observations as to the performance of the vehicle with reference to passenger safety. When Dr. Cummings testified regarding the Explorer's roof structure, this was not "in contravention of the court's own earlier rulings" as Ford argues. Rather, this court exercised its reasonable discretion as a trial court and found his testimony to be within the ambit of his expertise and notice to the defendants.

With respect to Ford's argument that Mr. Herbst's video testimony should not have been allowed, the Civil Practice Law and Rules ("CPLR") §3117(a)(3)(v) states, in part:

> the deposition of any person may be used by any party for any purpose against any other party who was present or represented at the taking of the deposition or who had the notice required under these rules, provided the court finds:
>
> (v) upon motion or notice, that such exceptional circumstances exist as to make its use desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court.

Mr. Herbst's testified in another similar case against Ford Motor Co. where counsel for Ford was present and cross-examined Mr. Herbst on the same issues. Plaintiffs gave notice to Ford that they intended to play Mr. Herbst's videotaped deposition testimony. This court gave numerous opportunities for Ford to move *in limine* of any known pretrial issues, instead, Ford waited until trial to raise the issue of playing Mr. Herbst's videotaped testimony. Pursuant to CPLR §3117(a)(3)(v), this court exercised its discretion in the "interests of justice" and in conformance with judicial economy to permit the showing of the videotaped testimony, rather than attempting to subpoena him from out-of-state.

Ford also argues that the court should not have allowed plaintiffs to present two items to the jury: (i) a chart prepared by Ford summarizing their roof crush tests and (ii) a 1984 document from the chairman of Ford. This court allowed these documents to be presented to the jury under the hearsay exception as Ford's business records, which when presented was not as *prima facie* evidence of the facts, but merely some evidence of the facts which the trier of fact was free to disbelieve even though the adverse party offered no evidence on the point.[15] Furthermore, Ford had the opportunity to call its own witnesses to explain these documents to the jury and chose not to present such witnesses.

Fifth, Ford claims that the jury's verdict was inconsistent because the jury found neither Ford nor the driver Steven Motelson to have been responsible when his vehicle drifted off the road onto the shoulder of the road. This court rejects Ford's contention that the jury verdict was inconsistent. Although it can be argued that Steven Motelson may have been negligent in drifting off the road, it is not inconsistent for the jury to then find that his actions were reasonable when confronted with that event in steering right to get back onto the road and then left to straighten the vehicle back into the left lane. However, as a result of his steering right and then left, it was not foreseeable that his vehicle would then suddenly turn over 3 3/4 times. The substantial factor in causing his fatal injuries was not the rollover, but the weak roof design that crushed his head, which was recognized by the jury in their verdict.[16] Indeed, Steven's son, Gary, survived without traumatic head injury as a front seat belted passenger. It is only "where a jury's findings with regard to negligence and proximate cause are irreconcilably inconsistent [that] the judgment cannot stand."[17] Here, plaintiffs brought claims under three theories of product liability. The jury found that Ford was liable under strict product liability and negligent in its design of the roof structure, which was found to be the proximate cause or substantial factor of Steven Motelson's death. This court concurs with that finding and will not disturb the jury's verdict on those causes of action.

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[15] *Consolidated Midland Corp v Columbia Pharmaceutical Corp,* 42 AD2d 601, 345 NYS2d 105 [2d Dept 1973], *Matter of Frenke v Frenke,* 267 AD2d 238, 699 NYS2d 313 [2d Dept 1999].

[16] *Waild v Boulos,* 770 NYS2d 253 [4th Dept 2003]; *Rubin v Pecoraro,* 141 AD2d 525, 529 NYS2d 142 [2d Dept 1988].

[17] *Pimpinella v McSwegan,* 213 AD2d 232, 623 NYS2d 863.

Ford's sixth and last argument is that the $5,000,000 damages awarded to Enid Motelson, the widow of Steven Motelson, was excessive, as was the jury award of $1,500,000 in loss of earnings to the Estate of Steven Motelson. Ford claims that the $1,500,000 awarded to the Estate was excessive in light of testimony of plaintiffs' economic expert, Dr. Conrad Berenson, who only estimated a loss of earnings of $1,327,000, resulting in a difference of $173,000. Since there was no other evidence to support the jury's verdict of $1,500,000, it is speculative.[18]

As to Ford's argument that the $5,000,000 awarded to the widow, Enid Motelson, was duplicative, this court finds that amount should be reduced by $1,327,000, the amount of the loss of earnings to the Estate of Steven Motelson. The Court of Appeals held in *Gonzalez v New York City Housing Authority*[19] that "pecuniary injuries" caused by a wage earner's death may be calculated, in part, from factors relevant to the decedent's earning potential, such as present and future earnings, potential for advancement and probability of means to support heirs, as well as factors pertaining to the decedent's age, character and condition, and the circumstances of the distributees.[20] Unlike the case which Ford relies on, *Korn v Levick,*[21] the decedent's business finances were not completely predictable with a simple straight line analysis. Here, testimony was given and undisputed that Steven Motelson planned on expanding his business, Dome Property Management, as evidenced by his purchase of a building immediately before his death. Furthermore, after hearing weeks of testimony from both sides, the jury concluded that $5,000,000 was an appropriate amount given Steven Motelson's age, potential for advancement, and the role he played in supporting his heirs. However, this court finds that the amount should be reduced by $1,327,000 to reflect the loss of wages awarded to the Estate of Steven Motelson wherein Enid Motelson was the sole heir. Hence, the award to the Estate would be duplicative.

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[18]*Cramer v Kuhns,* 213 AD2d 131, 630 NYS2d 128 [3d Dept 1995]; *Brownell v Thomas,* 201 AD2d 872, 609 NYS2d 710 [4th Dept 1994]; *Liebman v Otis El. Co.,* 145 AD2d 546, 536 NYS2d 100 [2d Dept 1988]; *Buggs v Veterans Butter & Egg Co.,* 120 AD2d 361, 502 NYS2d 12 [1st Dept 1986].

[19]77 NY2d 663 [1991].

[20]*Id.* at 667.

[21]231 AD2d 606, 647 NYS2d 808 [2d Dept 1996].

Remittitur

In accordance with the above findings, this court will order a new trial on the issue of damages, unless the Estate of Steven Motelson stipulates and agrees in writing by April 14, 2009 to accept the reduced sum of $1,327,000 as its damages award.

In addition, this court will order a new trial on the issue of damages awarded to Enid Motelson unless Enid Motelson stipulates and agrees in writing by April 14, 2009 to accept the reduced sum of $3,673,000 as her damages award.

Plaintiffs' Motion to Set Aside the Verdict

Plaintiffs seek an order directing judgment be entered in favor of plaintiffs, Gary Motelson, his wife Elissa Motelson, Evan Motelson and the Estate of Brian Motelson.

Seat Belt Defense

The plaintiffs claim that it was against the weight of the evidence for the jury to find that the back seat passengers, Evan and Brian Motelson, were not wearing their seatbelts. This court having heard the testimony and observed the evidence personally believes that the two children were wearing the seatbelts. The court bases its personal opinion upon the photographs of the apparent seat belt marks on Evan Motelson, the habit testimony by the Motelson family that the boys always wore their seat belts, and the testimony by their father, Gary Motelson, who was in the front passenger seat and who was found to be wearing his seat belt, that he actually saw both boys in their seat belts. The court also believes that the plaintiffs' theory that the rear seatbelts inertially unlatched when the force of the wheels hitting the rear undercarriage of the SUV after the first roll over, was sufficiently demonstrated in open court.

However, this court will not substitute its judgment of the facts for that of the jury and consequently, does not overturn the finding that the Motelson children were not seat belted. The jury in the case heard Ford's experts, Edward Paddock and Geoffrey Germane, who testified that in their opinion, Evan and Brian were not wearing their seatbelts and reached their conclusion, which this court will leave undisturbed.

The jury found further that as a result of not wearing their seat belts, both Evan and Brian's injuries should be reduced by 100%. However, the failure to wear a seat belt is considered only as a factor in mitigation of damages.[22] It may not be considered in resolving the issue of liability, because failure to use a seat belt does not itself cause the injury, although it may contribute to an accident.[23] Here, it did not contribute to the cause of the accident. Furthermore, the seat belt defense addressed the physical injuries plaintiffs may have suffered rather than their psychological injuries.[24]

While Evan Motelson sustained physical injuries as a result of his ejectment from the rear seat, his injuries are mainly psychiatric just like his father Gary Motelson, who was wearing his seat belt. More likely than not, Evan would have sustained the same psychiatric injuries regardless of whether he was seat belted because he was within the "zone of danger" in a position of peril and observed the death of his grandfather, Steven Motelson, and his brother, Brian Motelson, which resulted in his extreme emotional distress.

Here, the jury failed to discern the difference between the physical injuries to include brain injuries that may have been prevented or limited by the use of a seat belt and the extreme emotional distress sustained by Evan Motelson as a result of his having been in the "zone of danger" and

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[22]N.Y. Veh. & Traf. Law §1229-c(8); *Ruiz v Rochester Telephone Co.*, 195 AD2d 981, 600 NYS2d 879 [4th Dept 1993].

[23]*Curry v Moser*, 89 AD2d 1, 454 NYS2d 311 [2d Dept 1982].

[24]*See, e.g., Dowling v Dowling*, 138 AD2d 345, 525 NYS2d 636 [2d Dept 1988]; *Denio v State*, 7 NY3d 159 [2006].

witnessing the serious injuries and death of his older brother, Brian, and grandfather, Steven. As to the extreme emotional distress suffered by Evan, it is irrelevant whether he was wearing a seat belt. He would still have witnessed the trauma of this horrific accident resulting in his uncontested permanent psychiatric condition, which requires extensive psychiatric treatment, counseling and numerous medications. The conclusion of the jury that Evan Motelson's injuries should be discounted by 100% shocks the conscience and is a conclusion that no reasonable jury should have reached and, consequently, should be set aside on the issue of damages and a new trial ordered.

This Court will not disturb the jury finding as to the lack of an award for the Estate of Brian Motelson due to the jury finding that he was not wearing a seat belt. Had Brian remained belted in the rear of the SUV, he would not have suffered the traumatic brain injuries which resulted in his death. Moreover, calculating his last hours of extreme emotional distress and conscious pain and suffering would be highly speculative because he was unconscious for much of that time.

Zone of Danger

The plaintiffs claim that Gary Motelson and Evan Motelson should be awarded damages because they were in the "zone of danger" when the accident occurred and sustained severe emotional distress as a result of the accident, which has caused each of them to undergo extensive psychiatric treatment, that has not been contested by the defendants. In the seminal case, *Bovsun v Sanperi,*[25] the New York Court of Appeals held that the emotional distress caused by observing the death or serious injury of a close relative is compensable if the witness was within the "zone of danger" and was threatened with bodily harm created by the defendant's negligence.[26]

The Court of Appeals in *Bovsun*[27] stated:

> "We are not today creating a new cause of action which has not heretofore existed under the tort law of New York; rather we are recognizing the right

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[25]61 NY2d 219 [1984].

[26]*Id.*

[27]61 NY2d 219 [1984].

> of a plaintiff to whom the defendant has owed but breached a duty of reasonable care (as determined under traditional tort principles) to recover as an element of his or her damages, those damages attributable to emotional distress caused by contemporaneous observation of injury or death of a member of the immediate family caused by the same conduct of the defendant."[28]

In addition, the *Bovsun* case limits the damages for emotional distress to those which are "serious and verifiable."[29] New York allows recovery under the "zone of danger" rule only where the plaintiff can prove that he or she feared for his or her own safety as a result of the defendant's found negligence.[30]

Gary Motelson was the son of Steven Motelson and the father of Brian Motelson. Evan Motelson was the brother of Brian Motelson and the grandson of Steven Motelson. In *Shipley v Williams,*[31] a brother and sister were both passengers in an automobile accident where they were trapped within the vehicle. The sister witnessed her brother in tremendous pain, who was suffering from severe injuries, which ultimately resulted in his death. As a result of witnessing her brother's death while in the "zone of danger," the sister sustained severe emotion distress, which required extensive psychological treatment for which the defendant was held liable. In *Shipley,* after reviewing numerous state statutes defining "immediate family" this court found that the term "immediate family" always included siblings and most of them also included grandparents.

Ford claims that plaintiffs failed to prove that either Gary or Evan Motelson reasonably and imminently feared for their own physical safety as a result of the roof structure defect. But Gary and Evan's psychiatrist, Dr. DiTuri, testified that they were fearful and thought they would die.[32] It is undisputed here that the jury found that Ford was negligent in the design of the Explorer's roof support system and that it was a substantial factor in causing Steven Motelson's death.

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[28] *Id.* at 232-233.

[29] *Bovsun,* at 231. *See,* Restatement, Torts 2d, § 436, subd [3], Comment g.

[30] *Gonzalez v New York City Housing Auth.,* 181 AD2d 440, 580 NYS2d 760 [1st Dept 1992].

[31] *Shipley v. Williams*, 14 Misc3d 682, 826 NYS2d 882 [Sup Ct, Richmond County 2006].

[32] Tr. p. 1410-1411.

Here, Gary and Evan Motelson not only witnessed their father and grandfather's head crushed under the roof, but also feared that their own lives were in peril as they were under the same roof as it turned over and over and over again, which the jury found was defective and negligently designed. They were injured physically and emotionally from the same positions of peril. This is not a scenario where the son and grandson merely observed the scene after the accident. Here, they were both in the same vehicle when it rolled, causing the roof to crush, killing Steven Motelson. Gary and Evan Motelson were within the "zone of danger" and can recover for the emotional distress resulting from it.

Ford contends that Evan Motelson could not recover from the emotional distress of having witnessed his brother's death because Ford was not found liable for any negligence that may have caused Brian Motelson's death, unlike the case of Steven Motelson. However, Ford never challenged the value of the injuries in the case of Evan Motelson or Gary Motelson, meaning it is impossible to distinguish whether the emotional distress was a result of witnessing his grandfather's or brother's death. What this court is left with, therefore, is the monetary figures that the experts presented that were never contested by Ford as to future damages of Gary and Evan Motelson.[33]

Upon review of the cases in New York involving the "zone of danger" rule, this court comes to the conclusion that when the roof crushed killing Steven Motelson, Gary's father and Evan's grandfather, they were both in the "zone of danger" and sustained uncontested severe emotional distress resulting in extensive and permanent psychiatric treatment. The defendants chose not to question the psychiatrists appearing for either Gary Motelson or Evan Motelson, nor did the defendants present any contrary evidence.

Additur

The failure of the jury to assess extreme emotional distress sustained by Gary Motelson, who was found wearing his seat belt, and Evan Motelson, even adopting its factual finding that Evan Motelson was not wearing a seat belt, shocks the conscience and is not a finding that a reasonable jury should have found.

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[33] *Delosovic v City of New York,* 143 Misc2d 801, 809, 541 NYS2d 685, 691 [Sup. Ct. New York County 1989].

Accordingly, this court is ordering a new trial on damages only to assess the undisputed extreme emotional distress damages sustained by Gary Motelson, unless the defendants, Ford Motor Company and/or Ford Motor Credit Company stipulate and agree to accept in writing by April 14, 2009 a damages award in the sum of $3,189,055 calculated as follows.

Based on the low-end estimated costs of Gary Motelson's future psychiatric care and prescription medications given through testimony by his treating psychiatrist, Dr. Ortiz-Tulla[34] and economist, Dr. Conrad Berenson,[35] this court assesses that Gary Motelson is entitled to $529,027 for future prescription medication costs and $2,160,028 for future psychiatric treatment costs, totaling $2,689,055[36] plus $250,000 for past pain and suffering and $250,000 for future pain and suffering for his extreme emotional distress for 43.86 years for a total sum of $3,189.055.

Moreover, this court is ordering a new trial on damages only to assess the undisputed extreme emotional distress damages sustained by Evan Motelson, unless the defendants, Ford Motor Company and/or Ford Motor Credit Company stipulate and agree to accept in writing by April 14, 2009 a damages award in the sum of $5,457,90, based upon the following calculations.

Evan Motelson's treating psychiatrist for over four years, Dr. Richard DiTuri, testified that Evan still continues to have post-traumatic stress disorder, attention deficit hyperactivity disorder ("ADHD"), oppositional defiant disorder caused from being in the accident and witnessing the death of his grandfather and his older brother. The psychiatrist stated that Evan Motelson will definitely need continued, if not increased, psychiatric sessions as well as prescription medications.[37] Dr. DiTuri testified that Evan has been suicidal and that he has recurrent nightmares about the accident and his

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[34]Tr. p. 1381.

[35]Tr. p. 1722, 1723.

[36]*Spinrad v Gasser,* 235 AD2d 687, 652 NYS2d 156 [3d Dept 1997].

[37]Tr. p. 1464, 1465.

brother, Brian.[38] Out of all of Dr. DiTuri's patients, Evan is on the highest dose of Concerta, a medication which treats ADHD.[39] Based upon Dr. DiTuri's testimony as well as the economist, Dr. Conrad's Berenson's low-end estimation[40] of Evan Motelson's future medical needs, he is entitled to $1,558,440 for future prescription medications and $3,149,500 for future psychiatric care, totaling $4,707,940.[41] In addition, Evan Motelson is entitled to $250,000 for past pain and suffering caused by his extreme emotional distress and $500,000 for future pain and suffering due to extreme emotional distress for 62.8 years for a total of $5,457,940.

This court finds that such damages awards to Steven Motelson and Evan Motelson to be reasonable inasmuch Ford Motor Credit Company settled with Mitchell Slepian for $1,750,000, who was ejected from the back seat of the SUV like Evan Motelson, but who did not witness a member of his immediate family die as a result of the negligence of the defendants.

Loss of Consortium

The plaintiff, Elissa Motelson, the wife of Gary Motelson, claims she is entitled to compensation for loss of consortium. Although the action for loss of consortium is a separate cause of action, it is derivative of the main claim by the injured party for his or her own injuries. Therefore, if the primary claim that fails to state a cause of action is terminated, the action of the spouse for loss of consortium is also terminated.[42] Here, it is uncontested that Elissa Motelson's husband, Gary Motelson, sustained extreme psychiatric injuries as a result of the accident. The Motelson family and Gary Motelson's treating psychiatrist, Dr. Dorothy Ortiz-Tulla testified that Gary Motelson suffered from posttraumatic stress disorder, major depressive disorder, generalized anxiety disorder, and symptoms of obsessive

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[38]Tr. p. 1458.

[39]Tr. p. 1468.

[40]Tr. p. 1725, 1726.

[41] *Lopez v Gomez*, 305 AD2d 292, 761 NYS2d 601 [1st Dept 2003].

[42]*Millington v Southeastern Elevator Co.*, 22 NY2d 498 [1968]; *Maddox v City of New York*, 487 NYS2d 354 [2d Dept 1985], aff'd, 66 NY2d 270 [1985].

compulsive disorder, all derived from the accident that led to the loss of his father and son. Based upon a holding that Gary Motelson was in the "zone of danger," and suffered severe psychiatric injuries, which have permanently altered this relationship with his wife, Elissa Motelson is entitled to a new trial on the issue of damages only for compensation for her loss of services. While Elissa Motelson seeks $300,000 for her loss of services, this court will order a new damages trial unless the defendants, Ford Motor Company and/or Ford Motor Credit Company agree to accept an award to Elissa Motelson for $150,000 for her loss of services.

Loss of Guidance

The plaintiffs, Gary Motelson, Michael Motelson and Gayle Lydell, the adult children of the decedent, Steven Motelson, each seek an order granting them a judgment notwithstanding the verdict for an amount of $300,000 for the loss of guidance and support. The jury, after having had the opportunity to listen to the testimony of the adult children, decided that no award was justified. The jury's role in assessing the credibility of the witnesses as the fact finder does not require the court to interfere solely because the opposition did not agree with the outcome.

This accident which resulted in the death of the adult children's father was indeed a tragedy. As a parent, Steven Motelson provided for his children's education, some financial and moral guidance and played a significant role in their lives. However, this court cannot overturn the finding of the jury in this regard and does not find that the verdict awarding no damages for loss of guidance and support was against the weight of the evidence or shocks the conscience.[43]

Ford Motor Credit Company's Motion to Set Aside the Verdict

Ford Motor Credit Company advances the same argument as Ford Motor Co. that this court should enter judgment that Steven Motelson was negligent as a matter of law. As discussed previously,[44]

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[43]*See, Kastick v U Haul Co. of Western Michigan,* 292 AD2d 797, 740 NYS2d 167 [4th Dept 2002];

[44]*See,* p. 8.

this court similarly held that although it can be argued that Steven Motelson may have been negligent in drifting onto the left shoulder and steering right to get back on the road and then steering left to get back into the left lane, it was not a *substantial* factor in bringing about his fatal injuries.[45] Therefore, Ford Motor Credit Company's motion for a judgment notwithstanding the verdict or granting a new trial on the ground that the liability verdict is inconsistent, is denied.

Accordingly, it is hereby:

ORDERED, Ford Motor Company's motion to set aside the verdict, is granted in part and denied in part in that this court will order a new trial on damages, unless the Estate of Steven Motelson stipulates and agrees in writing to reduce the jury damages award from $1,500,000 to $1,327,000 by April 14, 2009; and it is further

ORDERED, that Ford Motor Company's motion to set aside the verdict is granted in part and denied in part in that this court will order a new trial on damages, unless the plaintiff, Enid Motelson, stipulates and agrees in writing by April 14, 2009 to reduce her award from $5,000,000 to $3,673,000; and it is further

ORDERED, that plaintiffs' motion to set aside the jury verdict is granted in part and denied in part in that this court is ordering a new trial on damages only unless the defendants, Ford Motor Company and/or Ford Motor Credit Company, stipulate and agree to accept an additur award of the following damages to Gary Motelson for: $529,027 for future prescriptions and medications, $2,160,028 for future psychiatric care over 43.86 years, and $250,000 for past pain and suffering for extreme emotional distress and $250,000 for future pain and suffering for future extreme emotional distress for 43.86 years for a total amount of $3,189,055; and it is further

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[45] *Waild v Boulos, supra*; *Rubin v Pecoraro,* 141 AD2d 525, 529 NYS2d 142 [2d Dept 1988].

ORDERED, that the motion of plaintiff, Elissa Motelson, is granted in part in that this court is ordering a new trial on damages for loss of services of Gary Motelson unless the defendants, Ford Motor Company and/or Ford Motor Credit Company, stipulate and agree to accept an additur award of $150,000 by April 14, 2009; and it is further

ORDERED, that the motion of plaintiff, Evan Motelson, is granted in part in that this court is ordering a new trial on damages only, unless the defendants, Ford Motor Company and/or Ford Motor Credit Company, stipulate and agree to accept in writing by April 14, 2009 an additur award to Evan Motelson for $1,558,440 for future prescriptions and medications, plus $3,149,500 for future psychiatric treatment expenses over 62.8 years and $250,000 for past pain and suffering for extreme emotional distress and $500,000 for future pain and suffering for extreme emotional distress for 62.8 years, totaling $5,457,940; and it is further

ORDERED, that the motion of defendant, Ford Motor Credit Company, to set aside the verdict is otherwise denied; and it is further

ORDERED, that the motions of plaintiffs, Gary Motelson, Michael Motelson and Gayle Lydell, for judgment notwithstanding the verdict is denied.

ENTER,

DATED: March 26, 2009

Joseph J. Maltese
Justice of the Supreme Court