

## WHAT'S INSIDE

## AIR BAGS

- 7 Warranty case against GM tossed as untimely  
*Clark v. General Motors* (S.D. Miss.)

## CRASHWORTHINESS

- 8 California man seeks reversal of verdict for Ford in crashworthiness case  
*Verduzco v. Ford Motor Co.* (Cal. Ct. App.)

## CAR JACK

- 9 Plaintiffs trying '11th hour' change of expert's report, BMW says  
*Lindholm v. BMW* (D.S.D.)

## TIRES

- 10 Plaintiffs: Design, failure-to-warn claims against tire maker are 'proper and sustainable'  
*Blundon v. Goodyear Dunlop Tires* (W.D.N.Y.)

## UTILITY TERRAIN VEHICLE

- 11 No defect in Polaris UTV cargo bed latch, jury finds  
*Campbell v. Polaris Industries* (W.D. Tex.)

## SHIFTER (ROLLAWAY)

## Family of 'Star Trek' actor sues Fiat Chrysler over rollaway death

(Reuters) – The parents of the late “Star Trek” movie actor Anton Yelchin sued Fiat Chrysler Automobiles NV for negligence and product liability Aug. 2 over the rollaway crash of a Jeep Grand Cherokee that killed their son.

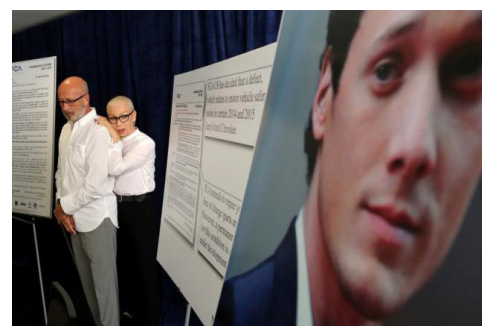
***Yelchin et al. v. FCA US LLC et al., No. BC629026, complaint filed (Cal. Super. Ct., L.A. Cty. Aug. 2, 2016).***

The lawsuit, filed in the Los Angeles County Superior Court, is believed to be the first wrongful-death complaint linked to the Fiat Chrysler recall in April of more than 1.1 million cars and SUVs because of vehicles that roll away after drivers exit them.

Yelchin, 27, was killed June 19 when his 2015 Grand Cherokee, which was covered under the recall, rolled backward in the steep driveway of his Los Angeles home and crushed the actor against a brick wall and fence.

The 18-page lawsuit points to a transmission gear-selector design it describes as “defective” as being the cause of numerous driverless rollaway mishaps like the one that killed Yelchin.

Gary Dordick, the attorney representing Yelchin’s parents, said Fiat Chrysler had sent a recall letter to the actor that was received seven days after his death.



REUTERS/David McNew

**Actor Anton Yelchin's parents speak at a press conference announcing their lawsuit against Chrysler. Yelchin died in June when he was pinned by a rollaway Jeep Grand Cherokee in the driveway of his California home.**

The undated letter addressed to Yelchin was displayed at the news conference and said “your vehicle may roll away, striking and injuring you, your passengers or bystanders, if the vehicle’s engine is left running, the parking brake is not engaged and the transmission is not in the “PARK” position before exiting the vehicle.”

Dordick said Yelchin had returned to his home on the evening of June 19 to pick up something he

**CONTINUED ON PAGE 14**

## EXPERT ANALYSIS

## Potential liability ramifications of self-driving cars

Wayne Cohen and Nicole Schneider of Cohen & Cohen analyze new developments in self-driving cars and how the technology has raised numerous questions about liability and its allocation after an accident.

**SEE PAGE 3**

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## TABLE OF CONTENTS

<b>Shifter (Rollaway): <i>Yelchin v. FCA US</i></b> Family of 'Star Trek' actor sues Fiat Chrysler over rollaway death (Cal. Super. Ct.).....	1
<b>Expert Analysis: By Wayne Cohen, Esq., and Nicole Schneider, Esq., Cohen &amp; Cohen</b> Potential liability ramifications of self-driving cars.....	3
<b>Air Bags: <i>Clark v. General Motors</i></b> Warranty case against GM tossed as untimely (S.D. Miss.).....	7
<b>Crashworthiness: <i>Verduzco v. Ford Motor Co.</i></b> California man seeks reversal of verdict for Ford in crashworthiness case (Cal. Ct. App.).....	8
<b>Car Jack: <i>Lindholm v. BMW</i></b> Plaintiffs trying '11th hour' change of expert's report, BMW says (D.S.D.) .....	9
<b>Tires (Personal Injury): <i>Blundon v. Goodyear Dunlop Tires</i></b> Plaintiffs: Design, failure-to-warn claims against tire maker are 'proper and sustainable' (W.D.N.Y.).....	10
<b>Utility Terrain Vehicle: <i>Campbell v. Polaris Industries</i></b> No defect in Polaris UTV cargo bed latch, jury finds (W.D. Tex.).....	11
<b>Vehicle Safety News From Reuters</b> .....	12
<b>Product Liability News in Brief</b> .....	14
<b>Case and Document Index</b> .....	15

# Potential liability ramifications of self-driving cars

By **Wayne Cohen, Esq., and Nicole Schneider, Esq.**  
*Cohen & Cohen*

Until recently, the self-driving car was a dream reserved for science fiction. But as technology progresses and this dream becomes a reality, questions of safety and liability must be answered to give guidance to users and manufacturers.

The traditional system for compensating those injured in motor vehicle accidents must adapt to these changes in technology or play a role in stymieing its progress.

## HISTORICAL BACKGROUND

The dream of a self-driving car started almost as soon as the first cars hit the road. In the 1930s, the idea was proposed to create an automatic highway system that would allow cars to operate while the driver relaxed. By the 1950s, the ability to self-drive on automated highways was being tested on ordinary General Motor cars.

Congress realized the importance of this technology and in 1991, passed a bill directing the Department of Transportation to develop an automated vehicle and highway system by 1997.<sup>1</sup>

Although Congress's goal was not then met, the quest for a self-driving car continued. Instead of creating a new highway system, efforts shifted to creating a car that would operate autonomously on existing roads.

The problem innovators faced was creating artificial intelligence that would be able to process information and make decisions that



A Google self-driving vehicle

REUTERS/Stephen Lam

drivers face on the road. Just as Congress saw the appeal of self-driving vehicles, entrepreneurs started investing in a broader application of the technology in hopes of eventually reaching the consumer market.

Private research and testing of autonomous passenger vehicles started to ramp up in the 2010s. Google's first self-driving car in 2012 was able to sense where it was using mapping technology and recognize each type of feature it encountered, such as another car or human, and adjust its behavior accordingly.

This breakthrough allowed the car to "process" information in the same way a driver does, but without the chance for human error. Google's cars drove more than 1.4 million miles before being involved in an accident that was the driverless car's fault.<sup>2</sup>

Automobile manufacturers sought to enter the market too. In 2013, a Mercedes S-class drove completely autonomously for 100 kilometers in Germany. In 2014, Tesla announced a car that was able to autonomously steer, brake and park. In 2015, a car designed by Delphi Automotive became the first automated vehicle to drive from coast to coast in the United States. The first wave of autonomous vehicles is expected to enter the market for consumers to purchase by 2020.<sup>3</sup>

## HUMAN CONTROL

While not fully driverless, regular cars actually have had some of these features for years, such as adaptive cruise control, automatic braking, lane keeping assist and blind spot assistance. This progression towards decreased human control and increased vehicle responsibility has led to some disagreement among manufacturers.



**Wayne Cohen** (L) is professor of trial skills at the George Washington University School of law and the managing partner of **Cohen & Cohen** in Washington. **Nicole Schneider** (R) is a graduate of Tulane Law School and a litigation associate at the firm. Republished with permission.

Google believes the safest approach is no human involvement at all. Google has developed a self-driving pod car without a steering wheel or pedals.<sup>4</sup> The idea is that human error causes the overwhelming majority car accidents and removing the human element entirely will be safer.

Tesla has taken the opposite approach. The driver must stay fully engaged even when the car has taken over control. When Tesla launched its AutoPilot system, it stressed that the feature was not fully autonomous and the driver still must be in control and responsible for the vehicle.

For example, during the Tesla car's test trip across the United States, there was a time when the vehicle was driving fast and the road curved. Had the driver not taken control, the car would have ultimately gone off the road.

In Tesla vehicles, the driver must touch the wheel every few seconds, otherwise the car will beep and eventually come to a stop.<sup>5</sup> In fact, failing to periodically place hands on the wheel violates the terms drivers agree to when enabling the feature. Mercedes's Intelligent Drive System takes it further, requiring hands on the wheel at all times.

But even with these policies in place, there will inevitably be accidents. In March 2016, Tesla reported its first autonomous driving fatality.

The driver of a Tesla Model S drove into the trailer of a semi-truck on a highway. The car's sensors apparently failed to detect the white reflection of the truck against the sky. Allegedly the driver of the Tesla was watching a movie when the crash occurred.

Under Tesla's approach to self-driving cars, the driver should have been able to override the system when it became clear that the vehicle was not going to stop before colliding with the trailer.

Even though Tesla announced the accident as a statistical inevitability and noted that regular cars yield a fatality more frequently, the question remains: who is responsible when these systems inevitably fail?<sup>6</sup>

## LEGAL FRAMEWORK

Currently there is no special framework for assessing liability with self-driving cars. Because new laws are slow to develop as cases work their ways through the trial and

appellate courts, self-driving cars must try to fit into the existing system for the time being.

With simple car accidents, drivers and vehicle owners are held liable for the accidents they cause. Insurers are behind the scenes paying the claims.

A driver has a duty to safely operate his or her vehicle. If the driver breaches this duty, he or she will be held liable for the damage caused. But with self-driving cars, numerous other parties will be thrown into the mix, including computer programmers, mapping companies, and automobile manufacturers.

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In Tesla vehicles, the driver must touch the wheel every few seconds, otherwise the car will beep and eventually come to a stop.

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For example, a driver may be liable for improperly using a vehicle's features, a manufacturer may be liable for failure to warn, and a mapping company may be liable for providing incorrect roadway data. Assessing who is liable in that scenario causes problems not currently involved in simple car accidents.

One problem is that assigning blame to anyone other than drivers and owners can convert the claim from one of simple negligence to product liability. Strict product liability would make it easier to hold the manufacturer liable because the facts of the accident would be irrelevant. Unfortunately, a product liability case is also expensive because of its complicated nature.

An expert may give an opinion based on their scientific, technical, or otherwise specialized knowledge to help the trier of fact determine a fact in issue under Federal Rule of Evidence 702.

Utilizing expert testimony is costly and only the most catastrophic cases would be effective to bring. Ultimately this system would deny access to the civil justice system for smaller cases where the costs of litigating exceed the damages.

Even without cost considerations of potential products liability claims, the additional defendants will make cases more complex. Assigning blame becomes particularly

challenging with cars that are not fully automated.

For example, in a Tesla vehicle, depending on the landscape of the state, juries will be forced to decide what percentage of fault to assign to a driver who fails to keep his or her hands on the wheel, the designer of the computer program that failed, and the manufacturer of the vehicle itself.

In the few remaining states that maintain contributory negligence, the distinction of fault is even more important. Any action or inaction the driver may have taken that contributed to the accident could potentially bar him or her from recovery.<sup>7</sup>

In a car that is able to operate completely on its own, it is very likely drivers will become distracted and unable to refocus to override the system on the rare occasion it becomes necessary.

Weighing the evidence in these cases becomes even more crucial as the car will be able to provide its own "testimony." In simple negligence cases, the drivers present their story and juries can determine the credibility of each witness. But juries may be inclined to believe the computer data more than human memory, putting the drivers involved in a difficult situation.

Plaintiffs would not be able to attack the credibility of the car in the same way it could a human under Federal Rule of Evidence 608, for example.

There is also the issue of spoliation. Federal Rule of Civil Procedure 34 has some provisions for the production of electronically stored information, but the data kept by the cars will be essential to these cases and there will be little room for error.

Courts will need to decide how to handle these evidentiary issues and litigants may spend years without guidance as these rules develop.

## LEGAL STRATEGY AND POTENTIAL SOLUTIONS

The simplest solution to these challenges would be to hold the manufacturers strictly liable for any damages caused by their vehicles. Strict liability is not based on a warranty and the manufacturer would be liable for any defects, even if its quality control efforts satisfy the standards of reasonableness.<sup>8</sup>

There would also likely not be an issue of privity, like in warranty claims. Any foreseeable user could recover, not just the owner.

Surprisingly, some manufacturers support strict liability. Volvo, Google, and Daimler AG's Mercedes-Benz have all pledged to accept liability if their vehicles cause an accident.

Volvo has declared that it would pay for any injuries or property damage caused by its fully autonomous IntelliSafe Autopilot system. Volvo's position is that the system will contain so many redundant and backup systems that human intervention should never be needed. As such, a human driver could never be at fault.<sup>9</sup>

This would allow the civil justice system to continue as is, only with the manufacturer taking the place of the driver and insurance company in litigation. However, not all manufacturers support this idea, particularly with those vehicles that depend on some form of human intervention.

If product liability is too expensive and strict liability does not apply, litigants may be able to seek relief under contract law. But manufacturers may try to circumvent any contract liability with the use of disclaimers. Tesla has announced that a failure to keep hands on the steering wheel violates its terms and conditions.

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Weighing the evidence in these cases becomes even more crucial as the car will be able to provide its own "testimony."

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Another approach could be the breach of an implied warranty of fitness for a particular purpose. Under the Uniform Commercial Code § 2-314, there is an implied warranty that goods be fit for the particular purpose for which the goods are required. The seller is also required to know this purpose and that the buyer is relying on the seller's skill or judgment.

However, under this system a manufacturer is liable for harm caused by software flaws that are foreseeable as a class but neither preventable nor reasonably discoverable in their individual instance. This is a higher burden for the plaintiff to meet.

Additionally, manufacturers could still disclaim this warranty.<sup>10</sup> Using contract law adds new legal theories to what is currently simple negligence, further complicating the litigation process.

Another approach to liability would be regulations at either the state or federal level. Many manufacturers are calling for legislators to create uniform regulations so they, and their customers, will know where the stand in terms of liability. But determining what those regulations will look like is not so simple.

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### NHTSA is actively involved in the development and adoption of safe vehicle automation and plans to propose guidance in mid-2016.

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Some states have proposed requiring all self-driving cars have a licensed driver behind a physical steering wheel at all times. California has proposed rules that would require drivers to always be ready to take the wheel.

But with the different types of driverless cars, this regulation would be difficult to apply broadly, particularly with cars that do not even have a steering wheel for drivers to take.

In Google's car, National Highway Traffic Safety Administration (NHTSA) has recognized that the software, not the human, is the driver. This has wide-ranging implications for Google's engineers.

NHTSA is actively involved in the development and adoption of safe vehicle automation and plans to propose guidance on establishing principles of safe operation of fully autonomous vehicles in mid-2016.<sup>11</sup>

The shift of liability will also have an impact on who is ultimately paying the bill. Insurance companies are already addressing how to consider driverless cars in drafting new policies.

Insurance will face many of the same issues, including the proportion of blame to assign to the driver and to the car. In assessing the responsibility of the manufacturers, considerations must also be paid to not driving manufacturers and suppliers out of business.

While caps exist in some jurisdictions, those typically only apply to negligence claims, not strict liability. These caps could be extended to cover self-driving cars.

Some type of no-fault automobile insurance system has also been proposed to protect manufacturers as liability is transferred from drivers to manufacturers.

On the other hand, as technology improves, the hope is that self-driving cars will decrease the number of accidents and as a result the costs insurance companies have to pay.

### SAFETY

Even with new regulations and legal framework, consumers will still be hesitant about driverless cars. 88% of adults worry

about traveling in driverless cars and 52% fear hackers could gain control.<sup>12</sup>

Manufacturers will have to convince consumers that their cars are safe and secure if self-driving cars are going to thrive. Ultimately, self-driving cars will be beneficial to society.

The technology can make recalls and safety improvement campaigns more effective. It could improve traffic conditions and provide better mobility to those otherwise impaired. It can even change the way people purchase vehicles. Multiple vehicles per family might not be necessary if members could summon the car when needed without a driver.

Although self-driving cars may be novel and intimidating at first, they will likely be safer because the failure rate is much lower than human error. Virginia Tech Transportation Institute researchers determined that the national crash rate of 4.2 accidents per million miles is higher than the 3.2 crashes per million miles of self-driving cars.<sup>13</sup>

While the initial assumption is that autonomous cars would have a higher incident rate, the reality is the opposite. Their data also found that self-driving vehicles have lower rates of the most-severe crashes.<sup>14</sup>

An ideal system will allow cars to drive automatically but also have the backup of a focused human driver. The problem with a hybrid system is that consumers may become distracted. People waste massive amounts of time on a daily basis commuting and may be tempted to use this time to multitask in





## Warranty case against GM tossed as untimely

A breach-of-warranty action began to accrue when a 2008 Chevrolet Tahoe was delivered to its original buyer, thus the six-year limitations period had expired before the plaintiff filed suit in 2014, a Mississippi federal judge has ruled.

**Clark et al. v. General Motors LLC, No. 14-cv-505, 2016 WL 3574408 (S.D. Miss., N. Div. June 23, 2016).**

U.S. District Judge Daniel P. Jordan III of the Southern District of Mississippi dismissed Michael Clark's lawsuit over the sudden deployment of his Tahoe's air bags, agreeing with General Motors LLC that Clark had filed the suit two months too late.

The judge also said an exception to the statute covering warranties that "explicitly extend to future performance of the goods" did not apply because the warranty had expired before Clark bought the used vehicle.

Furthermore, the exception did not apply to a special-coverage warranty on the vehicle because that warranty did not extend to the sudden air-bag deployment, Judge Jordan held.

According to the opinion, GM shipped the Tahoe in 2007 to a dealer, which sold it March 10, 2008. Michael Clark and his wife then bought it secondhand from a Mississippi dealership March 10, 2010.

Their son Shannon was driving Nov. 28, 2012, when the air bags suddenly and improperly deployed while he was stopped at an intersection, resulting in damage to the vehicle but no personal injury, according to the opinion.

The Clarks sued GM on May 21, 2014, in the Hinds County Circuit Court for negligence and breach of express and implied warranties. In June that year GM removed the case to federal court and moved for summary judgment, arguing that the six-year limitations period had expired before the suit was filed.

The Clarks argued that state's statute of limitations, Miss. Code Ann. § 75-2-725(2), contains a future-performance exception applicable to the vehicle's warranty.

But Judge Jordan said it was questionable that the "repair and replace" warranty covering design and operation defects constituted an express warranty and, regardless, the warranty had expired by the time the Clarks had bought the car.

The Clarks argued that a special warranty running until March 10, 2018, provided additional coverage of a "specific component."

But the judge said GM offered credible evidence that the special coverage was limited to replacement of the throttle position sensor and reprogramming of the engine control module, not the air bag system.

Next the Clarks argued that a breach could not occur — and a cause of action therefore could not accrue — until there was a defective performance reasonably discoverable by them.

Judge Jordan disagreed, noting Section 75-2-725(2) set the accrual date "regardless of the aggrieved party's lack of knowledge of the breach."

The Clarks further claimed the limitations period should be tolled as to Shannon, who was a minor at the time of the alleged warranty breach.

The judge again disagreed, saying Shannon had no recoverable damages for breach of warranty because his parents were the Tahoe's sole buyers and owners.

Finally, the Clarks had alleged negligent design and manufacture, and delayed repair of the vehicle in addition to the warranty claims.

GM said those claims must be dismissed under the economic-loss doctrine, which bars tort recovery when the only damage is to the product itself.

The Clarks responded that "sudden or dangerous occurrences," such as the unexpected deployment of the air bags, are excepted from the economic-loss doctrine. They cited *Fireman's Fund Insurance Co. v. SEC Donohue*, 679 N.E.2d 1197 (Ill. 1997), in support.

Judge Jordan said the Illinois Supreme Court has since abandoned the interpretation outlined in *Fireman's* and limited the sudden-or-dangerous-occurrence exception to those claims where the property damage is to something other than the allegedly defective product.

Warranty claims are the proper avenue to pursue damage that involves the product itself, he said. **WJ**

**Related Court Document:**  
Order: 2016 WL 3574408

## California man seeks reversal of verdict for Ford in crashworthiness case

A man injured at age 13 in a 2000 auto accident is challenging a verdict for Ford Motor Co. in a suit alleging design defects in a 1993 Taurus.

**Verduzco v. Ford Motor Co., No. F070062, appellant's opening brief filed (Cal. Ct. App., 5th Dist. July 6, 2016).**

Irvin Verduzco argues in his opening brief to the 5th District California Court of Appeal that the trial judge erroneously excluded evidence on proposed alternative designs involving impact protection in the rear part of the car, and improperly instructed the jury on injury causation.

The plaintiff was a back-seat passenger in the Taurus when it was rear-ended May 19, 2000. He suffered serious head injuries and filed suit in 2007, two years after he turned 18 and a few weeks before the statutory deadline for filing product liability actions.

The first trial in 2013 ended in a mistrial after Ford argued it had been prejudiced by certain rulings on vehicle testing and related expert testimony.

The second trial took place in 2015 in the Stanislaus County Superior Court.

Verduzco claimed the lack of sufficient impact protection allowed a large speaker box in the trunk of the Taurus to intrude into the back seat, pushing him forward. This caused his head to strike the head of the front seat occupant or the front seat headrest, he alleged.

Ford claimed Verduzco was hurt when the speaker box hit the back of his head.

The jury returned a verdict for the automaker, finding the design of the Taurus was not a substantial factor in causing the plaintiff's injuries.

### APPEAL CENTERS ON DESIGN

Challenging the verdict in the 5th District Court of Appeal, Verduzco says experts for both sides agreed that stronger rear impact



REUTERS/Ho New

The plaintiff was a minor and a back-seat passenger in a 1993 Ford Taurus when it was rear-ended in May 2000. A 1994 Taurus is shown here.

protection could have prevented his injuries, regardless of whether Verduzco's head hit the headrest or was hit by the speaker box.

The appellant says he presented crash test evidence on the 1990 Volvo 740, which used a solid metal barrier between the back seat and the trunk. This design would have prevented the speaker box from crashing into the passenger compartment, he said, but the trial judge barred the evidence because the Volvo design was not substantially similar to the Taurus.

"This was error because as it was evidence of an *alternative* design, there is no legal requirement that the design be substantially similar," Verduzco says.

The judge should have ordered Ford to produce developmental crash testing data because it would have shown the defendant knew of designs that could reduce intrusion in rear collisions without increasing

acceleration forces on vehicle occupants, the appellant says.

He also argues that the Superior Court should have instructed the jury that vehicle design can be the basis of injury liability even if it had no role in causing the accident.

While Verduzco says the jury was free to believe Ford's version of the accident, "the evidence was undisputed that a different *design* would have eliminated the head injury."

Therefore, the appellant contends, the jury had no reasonable basis for concluding that the Taurus' design was not a substantial factor in causing his injury. **WJ**

#### Attorneys:

*Appellant:* Joseph W. Carcione Jr. and Joshua S. Markowitz, Carcione, Cattermole, Dolinski, Stucky, Markowitz & Carcione, San Mateo, CA

#### Related Court Document:

Brief: 2016 WL 3647899



## Plaintiffs trying '11th hour' change of expert's report, BMW says

The estate of a man killed when a jack collapsed while he was underneath a 1997 BMW 540i is trying to escape summary judgment by filing an "eleventh-hour contradictory affidavit" from its expert witness, BMW of North America says.

***Lindholm et al. v. BMW of North America LLC, No. 15-cv-3003, defendant's supplemental brief filed (D.S.D. June 29, 2016).***

The automaker argues in a supplemental brief filed with the U.S. District Court for the District of South Dakota that estate representative Bruce Lindholm is trying to "repair and completely overhaul" his expert's testimony.

The suit claims BMW defectively designed the original-equipment jack and is responsible for the death of Alexander Lindholm.

In its December motion for summary judgment, BMW said Lindholm had placed the jack in the passenger rear side jack-point to raise the car to access an exhaust system hanger.

A person working on the hanger needs to be positioned underneath the car, but the sole purpose of the jack is to raise the car for tire repairs by someone at the side of the vehicle, according to BMW.

The defendant said the 540i owner's manual clearly warns users never to lie under the vehicle when it is supported by the jack because of the risk of fatal injury. It is uncontested that Lindholm disregarded these warnings, BMW said.

In a January response brief, the plaintiffs said BMW mischaracterized the testimony of their expert witness, mechanical engineer Aaron Lalley.

They said Lalley's reports clearly show the jack was negligently and defectively designed and reasonable design alternatives were available.

On the issue of misuse, the plaintiffs said Alexander Lindholm was using the jack properly by placing it into one of the four jack "receptacles" on the underside of the 540i.

### BMW: PLAINTIFFS SPRINGING A SURPRISE

In its June 29 supplemental brief in support of summary judgment, BMW says the trial judge gave the estate until June 14 to file a supplemental brief with information the estate said the court needed to rule on summary judgment.

But on June 13, BMW says, the plaintiffs presented new reports from Lalley that "fly in the face of proper procedure for supplementing expert disclosures and are highly prejudicial" to the defendant.

"Plaintiffs should not be afforded a 'do-over' to alter the well-developed record of their expert in a last-ditch attempt to escape summary judgment," BMW says.

The defendant says that in Lalley's earlier reports, he said the jack as designed was safe for its intended purpose. But in the new reports, he said the jack is defective and unreasonably dangerous, BMW says.

The new filings also contain data on two prior jack-collapse incidents that occurred years after Lindholm's 540i was sold and distributed, which are not substantially similar to the one at issue here, the automaker says. [WJ](#)

#### Attorneys:

*Defendant:* Thomas P. Branigan and Jeffrey T. Gorcycya, Bowman & Brooke, Bloomfield Hills, MI; Robert B. Anderson, May, Adam, Gerdes Thompson LLP, Pierre, SD

#### Related Court Document:

Defendant's supplemental brief: 2016 WL 4011033

**See Document Section B (P. 25) for the brief.**



## Plaintiffs: Design, failure-to-warn claims against tire maker are 'proper and sustainable'

A New York couple who say their motorcycle accident occurred because a Goodyear Dunlop tire suddenly deflated are fighting the company's motion to dismiss their design defect and failure-to-warn claims.

**Blundon et al. v. Goodyear Dunlop Tires North America Ltd., No. 11-cv-990, plaintiffs' opposition brief filed (W.D.N.Y. July 13, 2016).**

In moving for summary judgment in the U.S. District Court for the Western District of New York, Goodyear Dunlop Tires North America Ltd. says that after five years of proceedings, the plaintiffs "still cannot provide sufficient evidence" on either claim.

But Leslie Blundon and his wife Laura Heinen say their claims are proper and sustainable under New Hampshire law.

The plaintiffs are New Hampshire residents who bought the tire in their home state. The tire was manufactured in New York, and the accident happened in Arizona.

The District Court ruled in 2015 that New Hampshire law applied because the tire was placed in the stream of commerce in that state.

Blundon claims he was riding a 2007 Harley-Davidson in September 2009 when its rear tire, a Dunlop D402, deflated without warning, causing him to lose control and crash. Blundon and Heinen, who was his passenger, were injured.

### DESIGN, FAILURE-TO-WARN CLAIMS

In its June brief supporting partial summary judgment, Goodyear Dunlop says Blundon and Heinen cannot show a design defect existed or caused the accident. The company claims under-inflation caused the tire to over-deflect in a turn, leading to a loss of control.

On the claims alleging failure to warn of the tire's load limitations, Goodyear Dunlop says the plaintiffs never made such a claim in their original complaint or the amended versions.

Further, the defendant says, there is no evidence the warnings provided were inadequate or that a failure to warn caused their injuries.

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If the accident was caused by tire overloading, the plaintiffs say, a better design might have prevented it.

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The only real issue is a question of manufacturing defect, Goodyear Dunlop says.

### THE PLAINTIFFS COUNTER

In their brief opposing dismissal, Blundon and Heinen say they have raised valid questions on what constitutes "too much weight" on a motorcycle tire, if Goodyear Dunlop should have modified the design due to its knowledge that tires get overloaded and what kind of warnings it should have given consumers.

If their accident was caused by overloading or over-deflection, the plaintiffs say, "a better design, increased psi or a warning to the consumer" might have prevented it. [WJ](#)

#### Attorneys:

*Plaintiffs:* J. Michael Hayes, Buffalo, NY

*Defendant:* Thomas S. Lane, Webster Szanyi LLP, Buffalo, NY; James M. Brogan, DLA Piper LLP, Philadelphia, PA

#### Related Court Document:

Plaintiffs' brief: 2016 WL 3853967

**See Document Section C (P. 32) for the brief.**



REUTERS/Jacky Naegelen

The plaintiff says he was injured when a tire deflation caused him to lose control of his Harley-Davidson motorcycle and crash.

## No defect in Polaris UTV cargo bed latch, jury finds

A federal court jury in Austin, Texas, has returned a verdict for Polaris Industries Inc. in a personal injury lawsuit alleging design defects in a utility terrain vehicle.

**Campbell et al. v. Polaris Industries Inc., No. 14-cv-891, verdict returned (W.D. Tex., Austin Div. June 21, 2016).**

Plaintiffs Charlie Campbell and Gina Wolff claimed they were thrown off a “high seat” mounted on the cargo bed of the 2013 Polaris Ranger 900 XP, when the bed unlatched.

The cargo bed on the Ranger 900 is similar, but much smaller, to that on a pickup truck and can tilt to dump loads out of the back tailgate. High seats are car seats or benches that can be installed in truck beds to provide users an elevated view of the surrounding terrain.

The complaint filed in the U.S. District Court for the Western District of Texas said Campbell sustained a cervical spine fracture

and “irrevocable damage” to her spinal cord and Wolff fractured her pelvis and lumbar spine when they were dumped from the UTV.

They alleged that “numerous instances of inadvertent cargo box unlatching” occurred during the company’s testing of the vehicle and a latch design change failed to correct the problem.

Polaris countered in court filings and at trial that it had warned consumers against installing high seats on the cargo bed and that such product misuse was not foreseeable to the company.

In moving for summary judgment, Polaris said Campbell and Wolff did not show the warnings were inadequate and, in any event, did not heed them.

“The obviousness of the danger of using a high seat in an unsecured cargo box designed to dump cargo” precludes a finding that the UTV was unreasonably dangerous, Polaris said.

The plaintiffs also failed to present evidence of a feasible safer alternative design for the cargo bed and latch, the company said.

The District Court denied the defense motion and allowed the case to proceed, but the jury returned a verdict for Polaris after one day of deliberation. [WJ](#)

**Attorneys:**

*Plaintiffs:* Andrew M. Edge, Carlos R. Soltero, Jessica B. Palvino, Kayla Carrick, Patton G. Lochridge and Ray Chester, McGinnis Lochridge & Kilgore, Austin, TX

*Defendant:* Benjamin W. Allen and T. Christopher Trent, Johnson Trent West & Taylor, Houston, TX

## WESTLAW JOURNAL AVIATION



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### Tesla mulling two theories to explain 'Autopilot' crash, source says

(Reuters) – Tesla Motors Inc. told U.S. Senate Commerce Committee staff it is considering two theories that may help explain what led to the May 7 fatal crash that killed a Florida man who was using the car's "Autopilot" system, a person familiar with the meeting told Reuters on July 29.

Tesla staff members told congressional aides at an hour-long briefing July 28 that they were still trying to understand the "system failure" that led to the crash, the source said.

Tesla is considering whether the radar and camera input for the vehicle's automatic emergency braking system failed to detect the truck trailer or the automatic braking system's radar may have detected the trailer but discounted this input as part of a design to "tune out" structures such as bridges to avoid triggering false braking, the source said.

Tesla declined to discuss the meeting except to say it did not suggest the vehicle's cameras nor radar "caused" the accident. It was not clear if other factors were under investigation.

Joshua Brown was killed when his vehicle drove under the tractor-trailer. It was the first known fatality involving a Model S operating on the Autopilot system that takes control of steering and braking in certain conditions.

Tesla Chief Executive Officer Elon Musk was asked on Twitter why the radar did not detect the truck. Musk wrote in a June 30 tweet that "radar tunes out what looks like an overhead road sign to avoid false braking events."

Tesla said in a June blog post that "neither Autopilot nor the driver noticed the white side of the tractor-trailer against a brightly lit sky."

Tesla confirmed that the briefing occurred, but a spokeswoman declined to comment on what transpired.

The source said Tesla also told committee staffers it views braking failure as separate and distinct from its "Autopilot" function, which manages steering, changing lanes, and adjusting travel speed.

On July 26, the U.S. National Transportation Safety Board said its preliminary findings showed the Model S was traveling at 74 miles per hour in a 65-mph zone at the time it struck the semi-truck near Williston, Florida.

The report said the NTSB confirmed the Model S driver was using the advanced driver assistance features Traffic-Aware Cruise Control and Autosteer lane-keeping assistance at the time. The NTSB has not yet determined the probable cause of the crash.

Tesla faces a separate investigation by the U.S. National Highway Traffic Safety Administration into whether the system poses an unreasonable risk to driver safety. It faced a July 29 deadline to answer the safety agency's initial questions about the crash. **WJ**

*(Reporting by David Shepardson; editing by Jonathan Oatis and David Gregorio)*

### Mercedes pulls U.S. E-Class ad touting self-driving car

(Reuters) – Mercedes-Benz has withdrawn an ad in the United States, which compared its new E-class with a futuristic self-driving concept car following allegations from local consumer groups that the marketing claims were misleading.

During the week of July 25, U.S.-based Consumer Reports urged the U.S. Federal Trade Commission to scrutinize Mercedes' "The Future" campaign, which touts the automated driving features available in the new E-Class.

"Given the claim that consumers could confuse the autonomous driving capability of the F015 concept car with the driver assistance systems of our new E-Class in our ad 'The Future,' Mercedes-Benz USA has decided to take this ad out of the E-Class campaign rotation," the company said in a statement.

The Mercedes-Benz F105 is a fully autonomous, self-driving research vehicle which allows passengers to travel without anyone doing the driving.

Recently, consumer groups warned car buyers not to rely too heavily on a new generation of cruise control systems, which use computers and sensors to automatically keep in lane and brake, following a fatal crash by a Tesla car operating in "autopilot" mode.

The ensuing investigation of the Tesla accident by the U.S. National Highway Traffic Safety Administration has increased scrutiny of automated driving technology and the marketing claims made by carmakers seeking to push sales.

Mercedes said its marketing materials had always made clear that the driver of an E-Class needs to be in control of their vehicle and that technology in the car is designed to assist the driver, not to encourage customers to ignore their responsibilities as drivers.

"While the new E-Class has a host of technology that will serve as the building blocks for increasing levels of autonomy, it is not an autonomous vehicle and we are not positioning it as such," Mercedes-Benz said.

Automotive News was first to report that the ad had been withdrawn.

**WJ**

*(Reporting by Edward Taylor; editing by Mark Potter and Jane Merriman)*



## U.S. extends oversight of Fiat Chrysler safety practices by a year

(Reuters) – U.S. auto safety regulators said July 29 they were extending oversight of Fiat Chrysler Automobiles NV for an additional year, requiring the Italian-American automaker to submit to monthly meetings and early disclosures of potential vehicle issues.

In July 2015, Fiat Chrysler agreed to a \$105 million settlement with the U.S. National Highway Traffic Safety Administration for mishandling nearly two dozen recall campaigns covering 11 million vehicles. It also agreed to monitoring by former U.S. Transportation Secretary Rodney Slater.

Fiat Chrysler said in a statement that NHTSA's decision to extend the requirements was not based on the company's performance to date, but rather to "facilitate continued communication," citing a letter from the agency.

In May, the NHTSA extended its oversight of General Motors Co.'s decision-making about potential vehicle safety issues until May 2017 under a similar settlement.

Fiat Chrysler has faced a number of questions about its safety record over the last year and has recalled a record number of vehicles.

In December, the NHTSA fined Fiat Chrysler \$70 million for failing to report vehicle crash deaths and injuries since 2003. The company failed to comply with a 2000 law that requires disclosure of death and injury reports to help safety officials detect defect trends early.

In June, Fiat Chrysler said it would speed up its software fix for 1.1 million recalled vehicles for rollaway risks like the recalled Jeep Grand Cherokee involved in the death of actor Anton Yelchin.

Yelchin, best known for playing "Chekov" in "Star Trek," was killed when his 2015 Jeep Grand Cherokee rolled backward in the steep driveway of his Los Angeles home, pinning him against a brick wall and a fence.

Fiat Chrysler said July 29 it is "intent on continuing to build our relationship with NHTSA as we embrace our leadership role in the industry as a public safety advocate." **WJ**

*(Reporting by David Shepardson; editing by Jonathan Oatis and Leslie Adler)*

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## Mitsubishi Motors investigation blames slack governance for mileage scam

(Reuters) – Poor communication, slack governance and pressure on resource-starved engineers to improve fuel efficiency at Mitsubishi Motors Corp. were at the root of its mileage cheating scandal, an investigation concluded.

Investigators hired by Mitsubishi after the automaker admitted in April to overstating the fuel economy on its mini-vehicles criticized the firm for "not having the manufacturing philosophy of an automaker."

They also said in their report Aug. 2 that Japan's sixth-largest automaker by vehicle sales had not rallied its workers to help get it back on track following previous scandals going back to 2000, when it revealed it had covered up customer complaints for more than two decades.

Rather, the investigators said the company had been more focused on cutting costs from 2004, when it admitted to conducting secret recalls, which squeezed the resources engine designers needed to keep the company competitive.

This meant testing engineers had an impossible task of tweaking existing engine designs to gain greater fuel efficiency, they said, adding that this led to a culture within the division where employees felt they could not speak up against unattainable targets.

"That the company did not take a united, cooperative approach to developing cars was a key factor behind the falsifications," Yoshiro Sakata, a member of the investigation team, said.

The probe was carried out by three former public prosecutors and an ex-director of Toyota Motor Corp. after Mitsubishi admitted that two of its mini-vehicle models and two models manufactured for Nissan Motor Co. Ltd. had overstated fuel economy readings.

This led to a suspension of their sales for nearly three months while further revelations showed Mitsubishi used improper data to calculate mileage for other models, going back to 1991.

This caused a slump in Mitsubishi's market value and prompted the company to seek financial assistance from Nissan, which agreed to buy a controlling one-third stake in the company for \$2.2 billion.

The investigation revealed that the company on two occasions failed to address the possibility that the vehicle performance testing division was manipulating mileage test results when issues were raised by employees.

In 2005, managers brushed off concerns raised by a new employee that the division had been making up mileage calculation figures, according to the investigation, while responses from a 2011 compliance survey addressing other falsifications were not passed up the line.

"There were missed opportunities to deal with issues at the division," Mitsubishi Motors CEO Osamu Masuko told reporters.

"This is regrettable."

The report recommended five improvements at the company: a revamp in development, stricter compliance, greater transparency, a better understanding of the law, and a greater willingness to uncover and tackle violations.

The scandal led to President Tetsuro Aikawa and its top technology executive Ryogo Nakao stepping down. **WJ**

*(Reporting by Nomi Tajitsu and Tim Kelly; additional reporting by Norihikou Shirouzu; editing by Muralikumar Anantharaman and Alexander Smith)*

## Rollaway death

CONTINUED FROM PAGE 1

had forgotten and exited the car, “believing the vehicle to be in park.”

The Russian-born actor, whose parents were both celebrated figure skaters in the former Soviet Union, was best known for playing the young starship navigator Pavel Chekov in the movie reboot of “Star Trek.”

“In spite of our unbelievable grief, we decided to come here to prevent other families from the same tragedy,” his father, Victor Yelchin, said in tearful remarks to reporters.

His wife, Irina Yelchin, said of her son, “He was very special, but now he’s very special because his death might just save some other life.”

The automaker said in a statement it had not been served with a lawsuit and declined to comment on it, but expressed its “sympathies to the Yelchin family for their tragic loss.”

The U.S. National Highway Traffic Safety Administration has said the gear selectors in question clearly pose a safety issue that has led to hundreds of crashes and dozens of injuries.

The problem has been tied to at least 68 injuries, 266 crashes and 308 reports of property damage. Yelchin’s death marked the first known fatality linked to the issue.

The recall applies to 811,000 vehicles in the United States, covering the 2014-2015 model years of the Jeep Grand Cherokee sport utility vehicle and 2012-2014 Dodge Charger and Chrysler 300 sedans.

Fiat Chrysler announced in June that it would soon furnish software upgrades to address the problem in all recalled vehicles.

*(Reporting by Piya Sinha-Roy; additional reporting by David Shepardson; writing by Steve Gorman; editing by Grant McCool and Jonathan Oatis)*

### Attorney:

Plaintiffs: Gary Dordick, Los Angeles, CA

### Related Court Document:

Complaint: 2016 WL 4099028

See Document Section A (P. 17) for the complaint.

## PRODUCT LIABILITY NEWS IN BRIEF

### CLASS ACTION SAYS SAMSUNG CLOTHES WASHERS EXPLODE

A Pennsylvania woman wants a Philadelphia federal court to certify statewide and national class-action lawsuits on behalf of consumers who own certain Samsung clothes washers she says can explode during use. Plaintiff Rose Wagner seeks to represent an undetermined number of consumers who bought Samsung WA400 and WA500-series top loading washers that are subject to “explosions” when their high-speed drums violently tear from their internal mounts. Wagner says her Samsung Model WA456DRHDWR-AA caused \$25,000 in damage to her home in 2015 when it malfunctioned and its pump leaked while she was not home. The complaint filed in the U.S. District Court for the Eastern District of Pennsylvania says Wagner’s washer was repaired by Lowe’s, which sold her the appliance.

***Wagner et al. v. Samsung Electronics America Inc. et al., No. 16-cv-3623, complaint filed (E.D. Pa. June 30, 2016).***

### Related Court Document:

Complaint: 2016 WL 3565985

### KAWASAKI RECALLS OFF-HIGHWAY VEHICLES FOR FLOORBOARD FIX

Kawasaki Motors Corp. USA wants customers to return certain Mule Pro off-highway recreational vehicles so the floorboards can be bolstered to prevent puncture. The company announced its recall of 28,000 of the four-wheel, multi-passenger vehicles in a July 7 statement through the U.S. Consumer Product Safety Commission. Kawasaki said it received two reports of debris penetrating the floor covering. In one of the incidents, the debris reportedly struck the operator’s leg. Kawasaki dealers nationwide sold the units between July 2014 and June 2016, the CPSC said. Owners should contact Kawasaki at 866-802-9381 to schedule a free repair.

### YOUTH FOOTBALL LEAGUE CAN SUE HELMET MAKER

A West Virginia federal judge has allowed to proceed a youth football league’s class-action suit alleging that Riddell Inc. misleadingly marketed pricey football helmets based on purported concussion-reduction qualities, although they were no better than cheaper alternatives. U.S. District Judge John T. Copenhaver Jr. of the Southern District of West Virginia said Midwestern Midget Football Club Inc. can proceed with claims against Riddell for unjust enrichment and violations of the West Virginia Consumer Credit and Protection Act, W. Va. Stat. Ann. § 46A-6-106(a). The judge rejected the company’s argument that Midwestern failed to plead a cognizable injury or show it had relied on Riddell advertising claims in purchasing the helmets.

***Midwestern Midget Football Club Inc. v. Riddell Inc., No. 15-cv-244, 2016 WL 3406129 (S.D. W. Va. June 17, 2016).***

### Related Court Document:

Opinion: 2016 WL 3406129

## CASE AND DOCUMENT INDEX

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<i>Blundon et al. v. Goodyear Dunlop Tires North America Ltd.</i> , No. 11-cv-990, <i>plaintiffs' opposition brief filed</i> (W.D.N.Y. July 13, 2016) .....	10
<b>Document Section C</b> .....	32
<i>Campbell et al. v. Polaris Industries Inc.</i> , No. 14-cv-891, <i>verdict returned</i> (W.D. Tex., Austin Div. June 21, 2016).....	11
<i>Clark et al. v. General Motors LLC</i> , No. 14-cv-505, 2016 WL 3574408 (S.D. Miss., N. Div. June 23, 2016) .....	7
<i>Lindholm et al. v. BMW of North America LLC</i> , No. 15-cv-3003, <i>defendant's supplemental brief filed</i> (D.S.D. June 29, 2016) .....	9
<b>Document Section B</b> .....	25
<i>Midwestern Midget Football Club Inc. v. Riddell Inc.</i> , No. 15-cv-244, 2016 WL 3406129 (S.D. W. Va. June 17, 2016).....	14
<i>Verduzco v. Ford Motor Co.</i> , No. F070062, <i>appellant's opening brief filed</i> (Cal. Ct. App., 5th Dist. July 6, 2016).....	8
<i>Wagner et al. v. Samsung Electronics America Inc. et al.</i> , No. 16-cv-3623, <i>complaint filed</i> (E.D. Pa. June 30, 2016) .....	14
<i>Yelchin et al. v. FCA US LLC et al.</i> , No. BC629026, <i>complaint filed</i> (Cal. Super. Ct., L.A. Cty. Aug. 2, 2016) .....	1
<b>Document Section A</b> .....	17