

Second Largest Liability Verdict in U.S. History

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Small-firm lawyers from Nevada and Philadelphia joined forces to win a \$153 million verdict against the Ford Motor Company last year for the death of a 3-year old boy who was killed when his father's parked pickup truck suddenly rolled downhill and ran over the child in front of the family's home.

The two lawyers persuaded a Reno, Nev., jury to levy more than \$150 million in punitive damages against Ford, claiming the accident resulted from Ford's refusal to warn 884,000 truck owners that their parking brakes had a design flaw that caused the brakes to "spontaneously disengage," allowing the trucks to roll away.

The lawyers argued that Ford could have fixed the defect with a 15-cent plastic wedge.

"This was like the Ford Pinto case," says [Shanin Specter](#) of Philadelphia, the plaintiffs' lead trial counsel. "I didn't think this could happen in the 1990s. I thought Ford had learned its lesson in the 1970s and had measures in place to prevent something like this from happening again."

The award was the largest-ever personal injury verdict in Nevada and the second-largest products liability verdict in U.S. history, topped only by last-year's \$262.5 million door-latch case against Chrysler, says Specter, 40, who has also won record verdicts in Pennsylvania and Delaware.

Nevertheless, Specter says verdict may be too small.

"Ford is a \$30 billion company," he says. "This award represents one-half of 1 percent of Ford's worth. I'm concerned that it's not enough to punish Ford and deter this kind of conduct in the future. They apparently didn't get the message with Pinto."

At trial, Ford denied that the parking brake, which was activated by a floor pedal on the driver's side, had spontaneously disengaged. The company argued that the boy's parents, whom jurors found 40 percent negligent, were responsible for his death.

"We argued that the father allowed the boy to play in the truck, and the boy moved the truck out of gear and released the parking brake," says Joseph Pinto, Ford's trial lawyer. "We think the jury made the finding that indeed this did happen."

The jury's award was not reduced, however, because the verdict was based on claims other than negligence, including failure to warn and intentional misrepresentation.

What's more, the jury found for Ford on the design defect claim, ruling that the brake's faulty design had not directly caused the boy's death. Instead, jurors based their decision to punish Ford on the fact that the company had refused to adequately warn its customers of the dangerous flaw in their parking brakes.

"The jurors felt it was Ford's responsibility to warn people about the problem and that they had misrepresented to the plaintiffs that this was a safe product," says Specter.

A Runaway Truck

On Oct. 9, 1994, Jimmie White, a mechanic for a mining company, left his Ford F-350 pickup truck parked in front of his home near Elko, Nev. Both sides agreed that his son, Walter, got into the truck and was playing the front seat when he nudged the truck out of first gear. The disagreement centered around the parking brake. The defense said the boy also disengaged the parking brake, while the plaintiffs argued that the evidence indicated the boy was never on the driver's side of the truck, where the brake was located. Instead, they claimed the brake spontaneously disengaged because of the design flaw.

In either case, the truck rolled down the slope in front of the White's house. At some point, the boy leaped or fell from the moving vehicle and was crushed beneath the truck's rear wheels.

After running over the 3-year old, the truck rolled across the road and into a neighbor's yard, where it struck a tree. The neighbors called Jimmie White and his wife, Ginny, who rushed from their house and found Walter lying in the road. They drove the boy to the hospital, where he was pronounced dead on arrival.

For months after the accident, Jimmie White thought his son must have somehow released the parking brake. But in March 1995, he got a recall notice from Ford saying that there was a problem with the brake assembly. The recall notice didn't mention spontaneous disengagement, however. Instead, it described another problem in which the parking brake would fail to engage when depressed, and the pedal would push down all the way to the floor.

"Ford didn't inform people of the true nature of the problem," says Specter. "The brake pushing all the way to the floor is not as serious as spontaneous disengagement. It's a problem that people would notice if it happened, and they would simply reapply the brake to make it engage. The recall notice wasn't enough to make people take the problem seriously and bring their trucks in for repair."

But the notice did get Jimmie White's attention. He had been trained early in his career as a Ford mechanic, and suspected the defective parking brake might have caused his son's death.

Discovering the Defects

Soon after receiving the recall notice, the Whites hired Peter Durney, a veteran plaintiffs' lawyer whose two-lawyer firm has offices in Reno and Elko, Nev.

Durney filed suit against Ford in federal court in Reno in the spring of 1995.

For three years, he handled the case alone. During discovery, he gathered facts about the history of problems with the parking brake assembly, which he found was manufactured by the Orschein Co., of St. Louis and installed in approximately 884,000 trucks and vans made by Ford through 1994, including the company's popular F-series pickup trucks, Econoline vans and Explorers.

Subsequently, Durney also sued Orschein.

"Ford and Orschein jointly developed this parking brake in the mid-1980s," says Durney. "This was a self-adjusting brake, one which Ford was highly motivated to put into production."

Durney explains that a traditional parking brake assembly costs an auto manufacturer more to install and maintain than a self-adjusting mechanism.

"What happens over the life of a traditional brake is that the cable loosens and you have to get it adjusted," he says. "It first has to be adjusted during assembly in the factory. Then there's an additional expense to adjust it during the warranty period."

He compares this to the way a self-adjusting parking brake works.

"With a self-adjusting parking brake, you put a spring-actuated drum in there so that the drum is always pulling against the cable," Durney says. "The drum uses a strong spring to rotate and to keep the cable adjusted. It requires a little pawl and ratchet mechanism that traditional brakes don't have. That little pawl and ratchet is critical to the functioning of the brake. If it releases, the whole brake disengages, and the vehicle is free to roll."

This pawl-and-ratchet mechanism was the source of many problems for Ford and Orschein, he says.

"It was first used by Ford in its Aerostar vehicles," says Durney. "They found that when you applied the brake, sometimes the brake pedal would push through all the way to the floor. That's because the pawl was skipping off the ratchet. That wasn't much of a problem because when it happened the operator simply had to reapply the brake. Moreover, it wasn't a problem because the Aerostars were only equipped with automatic transmissions, which act as a primary braking device when you leave the vehicle in park. So even if the brake did release, the vehicle wouldn't roll away."

Greater problems arose in 1991, when Ford began installing Orschein's self-adjusting parking brake in its F-series trucks, many of which have standard transmissions, Durney says.

"They knew they were experiencing problems from the design and development phase," he says. "But they went ahead and put it in these vehicles anyway."

In 1992, Ford began to get dozens of reports from dealers and truck owners that vehicles were rolling away, he says.

Ford and Orschein engineers were sent into the field to examine these runaway vehicles, says Durney. It was at this time, around February 1993, that a young Ford engineer named Timothy Rakowicz wrote what Durney and Specter describe as a recall recommendation report, but which Ford contends was merely a working paper.

Regardless, Durney says, it was then that Ford first knew about spontaneous disengagement.

"It works like this: the ratchet and pawl have to engage," Durney explains. "But because of the design, the pawl can rest precariously on top of the ratchet rather than falling neatly between the teeth. If it engages the tip of the tooth instead, you have a very precarious contact between the two. With a vibration as light as the wind blowing, or the activity of a 40-pound boy playing in the cab, the ratchet can skip off the pawl and the vehicle rolls away."

The plaintiffs' lawyers maintain that Ford and Orschein duplicated spontaneous disengagement several times in their own testing.

But Ford's lawyer puts a different spin on it.

"They got it to do it once after shaking and knocking it around for hours," says Pinto.

Nevertheless, Ford asked Orschein to come up with a "service fix" for the problem, says Durney.

"Orschein developed a 15-cent plastic wedge that eliminates the self-adjustment feature and the potential that it could fail," he says. "It takes about a half-hour to install. In total, it's a \$20 fix for Ford."

The plaintiffs' lawyers say the wedge was available as early as the summer of 1993. In November of that year, they say, Ford sent a technical service bulletin to its dealers alerting them to the spontaneous disengagement problem. And by early 1994, the plastic wedges were on dealers' shelves, ready to install.

"At that point, Ford didn't recall the vehicles," says Durney. "Instead it opted to make this part available only to customers who brought in their vehicles complaining of parking brake problems."

This was the situation until August 1994, when the federal government asked Ford to recall the vehicles. For several years, the National Highway Safety Traffic Administration (NHSTA) had also been receiving reports on its consumer hotline that Ford's brakes were releasing on their own, says Durney. In response, NHSTA notified Ford of these complaints, investigated some incidents, and urged a recall.

Ford then wrote back to the government and promised to recall the vehicles in a timely fashion. Durney contends they failed to do that.

The NHSTA warning was issued in August. Walter died in October. And the recall did not begin until November in the east and didn't reach Nevada until the following March.

"There was more than adequate time," says Durney. "The wedge was available. They could have notified all consumers in a matter of days. Everything was in place. This boy didn't need to die." Even when Ford finally did recall the vehicles, the notice to truck owners only described the "push through" problem, not the much more dangerous problem of spontaneous disengagement, the plaintiffs' lawyers say.

"If a recall notice isn't strongly worded enough, the consumer won't be motivated to bring in the vehicle," says Durney. "To this day, there are thousands of vehicles out there that haven't been fixed. All of these could roll away, just like Jimmie White's truck."

Calling in Reinforcements

Durney was comfortable handling the case alone until April 1998, just a few months before trial. But Ford's pretrial behavior convinced him he needed additional manpower.

First, Ford and Orschein refused to settle the case, opting instead to file a counterclaim against the Whites, claiming the child's death was caused by his parents' negligence in leaving the truck unlocked. Ford dismissed its counterclaim midway through the trial.

Then, in April 1998, Ford filed 27 pretrial motions.

"They were trying to bury me," says Durney. "They overwhelmed me. That's when I got Shanin Specter involved."

Durney had met Specter during discovery in February 1996 after he asked Ford in an interrogatory about prior lawsuits involving the parking brake. He learned Specter had settled a Pennsylvania case in which a runaway Ford truck rolled over the head of a 10-month-old baby, injuring but not killing the child. Specter's opponent in that case had been Joseph Pinto.

"When I learned about Shanin's case in 1996, I flew to Philadelphia to see him," says Durney. "He was a very gracious person, a wonderful man. His settlement with Ford had been confidential, but he showed me what he

was permitted to in his files. It helped me immensely to get started. He shared what insight he could. I thanked him and went on."

But then "it became evident that this case was war, and I needed reinforcements. I called Shanin," says Durney.

"We were six months from trial. I have one partner. We've been practicing for 25 years," says Durney. "We're good lawyers, but we don't have the kind of money it took to continue this case properly. Having spent so much money already and realizing that there was the potential of losing, I asked Shanin if he would like a second bite of the apple."

Specter agreed. Soon afterwards, Ford hired Pinto as its new trial counsel.

Specter's nine-lawyer firm helped respond to Ford's barrage of pre-trial motions. Then, just a few days before trial, Specter flew to Nevada to lead the trial team.

"I did 90 percent of the trial work, while Pete Durney did all of the discovery and depositions," says Specter, who worked for 11 years in Philadelphia's Beasley, Casey & Erbstein, a high-powered personal injury operation, before leaving with his friend Thomas Kline to start their own firm.

Specter, son of Pennsylvania Arlen Specter, has won a host of mega-verdicts including a \$19.9 million decision that remains the largest personal injury award in Delaware history, and a \$24 million verdict in 1995 which, at the time, was the largest verdict in Pennsylvania history. This record was topped just last year by a \$33 million award won by his partner, Tom Kline.

A Crucial Cross-Examination

At trial the plaintiffs' lawyers called only a handful of witnesses, including the Whites and an expert metallurgist who testified about his inspection of the parking brake assembly.

"The jurors' time and intelligence should be respected, so I try to err on the side of calling fewer witnesses," says Specter.

The key to the plaintiffs' case, Specter says, was his cross-examination of Ford's witnesses, including Tim Rakowicz, the young Ford engineer who'd been assigned to investigate the skip-out problem on the parking brake.

"Rakowicz was likable, young, and he had clearly tried to do the best he could when he was in charge of the product," says Specter. "I had taken his deposition in the Pennsylvania case for two days so I'd gotten to know him pretty well."

During two days of trial, Specter had Rakowicz review 55 documents regarding the parking brake problem, displaying them on large video screens in the courtroom. The documents included Rakowicz's own Feb. 22, 1993 draft report which recommended a recall. That document summarized 22 reports of spontaneous release in F-series trucks. Other documents demonstrated that Ford had considered and rejected engineer Rakowicz's recall recommendation.

But Specter says it was a stroke of luck that this evidence was ever admitted at all.

Before trial, the judge ruled that Ford's recall of the parking brake was a "subsequent remedial measure" - an evidentiary rule that prohibits plaintiffs from using a company's attempts to fix a problem as evidence that the problem existed. The rule was implemented to avoid situations where companies decide not to make product improvements for fear those improvements will be used against them.

But in a move that stunned and delighted the plaintiffs, Ford introduced the recall to show it had tried to resolve the problem.

"That opened it all up," says Specter. "Rakowicz did his best to talk around the recall report he'd written in 1993. He tried to say that his conclusions had been wrong then, and that the facts were different than he said they were, but that approach didn't have much credibility. Ford had duplicated spontaneous disengagement in testing, and he'd been part of it."

Arguing Causation

Another hotly contested point was whether Walter White had released the parking brake while playing in the truck.

The plaintiffs argued that Jimmie White set the parking brake and that it spontaneously disengaged. To bolster their version of events, the plaintiffs offered the testimony of Ginny White's 17-year-old brother, who testified in deposition that the parking brake was still depressed when he moved the truck shortly after the accident.

"The parking brake lever was found in the depressed position," says Specter. "That is the classic tell-tale sign that the parking brake had disengaged spontaneously. The teeth of the ratchet were also heavily damaged in the parking brake mechanism itself, showing damage to the brake and other possible instances of spontaneous disengagement in which the truck had remained in gear and so had not rolled away."

Furthermore, the truck was very dusty inside and showed no signs that the boy had played on the driver's side.

"Walter's fingerprints were all over the passenger side of the vehicle and the door," Specter says. "There was nothing placing him over there by the parking brake. That was a real problem for Ford."

Ford argued that (1) the teenager's memory couldn't be trusted and (2) the evidence documented by police investigators indicated that Walter White had fallen from the driver's side door of the truck. This evidence

included the undisputed fact that the boy had been crushed by the truck's driver's side wheels. This was important because the brake release was on the driver's side and couldn't have been released by a boy who played on the passenger side only.

Punishing Ford

On the last day of trial, Orschein settled with the Whites for \$2 million. Ford then offered a settlement "in excess of \$2 million," says Specter, but the Whites declined this offer.

"The Whites were insistent about the case going to verdict," he says. "They felt very strongly about sending a national message and letting other people know about this dangerous defect."

Jurors deliberated for three days, returning their 15-question verdict form on July 31.

As the jury foreman read the panel's answers, Pinto thought Ford had won.

"The jury said that the design defect hadn't caused the accident," he says. "We thought the case was over. When they then turned around and blamed Ford, it was kind of stunning."

Although the verdict appears contradictory - a company being ordered to pay \$153 million for a product the jury concluded did not directly cause the injury - the plaintiffs' lawyers insist the jury based its verdict on Ford's failure to warn.

"I think the jury wanted to hold Orschein responsible for the design defect, but they were already out of the case," says Specter. "But they thought Ford should have warned its customers about the design defect."

Deliberations for punitive damages lasted only a few hours.

"They only had one piece of evidence to consider: Ford's balance sheet," says Specter.

Specter handled the closing arguments in both phases. Don Nomura, the lawyer who handled Ford's counterclaim against the Whites, also delivered a closing argument in the punitive phase.

Specter urged jurors to consider Ford's huge net worth in deciding how much to punish the company.

"If a company were worth \$30 million, and the punitive award was \$150,000, you would think that was light. They could write a check for that amount," Specter says, echoing his remarks to jurors in closing: "Ford is worth \$30 billion, so \$300 million is only 1 percent, and \$150 million is just one half of 1 percent. If you think about it in those terms, you realize how much it is going to take to punish Ford and deter this kind of conduct in the future."

Jurors returned a punitive award of \$150,884,000 against Ford. The \$884,000 represented the number of vehicles containing the defective parking brake sold by Ford. In addition, they awarded the Whites \$2.3 million in compensatory damages.

In post-trial motions, Ford has asked the court to throw out the verdict and grant a new trial.

But Specter thinks Ford got off easy.

"Ford was lucky that the jury was so restrained," he says. "They could easily have gone for 1 or 2 or 10 percent of the company's net worth. We had a conservative jury. These were people from small-and-medium-sized communities in western Nevada, which is a very conservative place."

Since the trial, Specter has written to NHSTA, urging the federal agency to order Ford to recall the vehicles again. This time, he says, the company should tell people about spontaneous disengagement and fix the problem.

"I believe strongly that it's lawyers' duty to report what they learn to the government authorities, which is what we've done in this case," he says. "It's because of cases like the Ford Pinto case that vehicles are safer. I plan to do everything I can here. There needs to be a fix with this."