

# Retailer Dismissed Under Innocent-Retailer Statute and Manufacturer Wins Summary Judgment Because Plaintiff Lacked Expert Testimony

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## Key Takeaways:

- Retailers should be aware of defenses under Texas innocent-retailer statute in products liability cases
- Lack of expert testimony in support of product liability claims can be fatal to claims against manufacturers in Texas

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A recent Texas federal court decision, *Johnson v. Ford Motor Co.*, No. 5:21-CV-023, 2022 WL 1471425 (N.D. Tex. May 10, 2022), highlights the protection that the Texas innocent-retailer statute provides to retailers in products liability cases and demonstrates how the plaintiff's failure to introduce expert evidence can be fatal to the plaintiff's products liability claims at the summary judgment stage.

*Johnson* arose from an accident in which the plaintiff LaQuintin Johnson alleged that the accelerator pedal on the Ford Fusion he was driving got stuck and caused him to rear-end another car.<sup>[1]</sup> Someone else had purchased the Ford Fusion "as is" from the car dealership. Johnson sued the car manufacturer (Ford), the car dealership (Yes Indeed), and the owner of the car dealership (Pete Chavez) in a Texas state court.<sup>[2]</sup> Johnson claimed that "Ford should be liable for its manufacture, design, and failure to warn of its defective product" because Ford "knew or should have known of the propensity of the accelerator control pedal to [become] disconnected or break without warning, that the defective pedal rendered the vehicle unreasonably dangerous and that the defective pedal caused his injuries."<sup>[3]</sup> He brought claims against the car dealership and its owner for negligent misrepresentation and failure to warn him of the pedal's alleged defect.<sup>[4]</sup>

Ford removed the case to federal court on the grounds that the car dealership and its owner were improperly joined.<sup>[5]</sup> Johnson failed to timely designate any expert witnesses except for the health care providers who treated his injuries.<sup>[6]</sup> All three defendants moved to dismiss Yes Indeed and Pete Chavez as improperly joined.<sup>[7]</sup> Ford also moved for summary judgment on the grounds that Johnson failed to designate a product-liability expert.<sup>[8]</sup>

### Improper Joinder

The court explained that the defendant has a “heavy burden” of proving that joinder was improper. The removing party must show: (1) that there was actual fraud in the pleading of jurisdictional facts; or (2) that the plaintiff is unable to establish a cause of action against the non-diverse defendant in state court.<sup>[9]</sup> The defendants argued that Johnson’s claims against the non-diverse car dealership and its owner were barred by the Texas “innocent-retailer statute.”

The court explained that under the Texas innocent-retailer statute a seller that did not manufacture a product “is not liable for harm caused to the claimant by the product” unless the claimant proves one of the following seven exceptions:

- (1) that the seller participated in the design of the product;
- (2) that the seller altered or modified the product and the claimant’s harm resulted from that alteration or modification;
- (3) that the seller installed the product, or had the product installed, on another product and the claimant’s harm resulted from the product’s installation on the assembled product;
- (4) that: (A) the seller exercised substantial control over the content of a warning or instruction that accompanied the product; (B) the warning or instruction was inadequate; and (C) the claimant’s harm resulted from the inadequacy of the warning or instruction;
- (5) that: (A) the seller made an express factual representation about an aspect of the product; (B) the representation was incorrect; (C) the claimant relied on the representation in obtaining or using the product; and (D) if the aspect of the product had been as represented, the claimant would not have been harmed by the product or would not have suffered the same degree of harm;
- (6) that: (A) the seller actually knew of a defect to the product at the time the seller supplied the product; and (B) the claimant’s harm resulted from the defect; or
- (7) that the manufacturer of the product is: (A) insolvent; or (B) not subject to the jurisdiction of the court.”<sup>[10]</sup>

The court found that Johnson had argued only the fourth exception, but it ultimately held that none of the exceptions applied. The court ruled that Johnson’s efforts to invoke the fourth exception to the innocent-retailer statute “[f]ell short” because Johnson failed to “allege that Yes Indeed or Chavez exercised any control over the warnings or instructions that accompanied the vehicle regarding the accelerator pedal.”<sup>▯</sup>

The court further ruled that even if Johnson had “alleged that Yes Indeed and Chavez exercised substantial control over the content of the warning or instruction regarding the accelerator pedal,” joinder still would have been improper because those defendants did not make any warning or instruction to Johnson. Someone other than Johnson had purchased the car he was driving “as is” from the dealership.<sup>[12]</sup> The court stated that Johnson “ha[d] no personal knowledge about any oral representations [those] defendants may or may not have made at the time of sale.”<sup>[13]</sup>

The court then held that none of the other exceptions applied. The first three factors did not apply to the dealership or its owner because they did not design, modify or install the accelerator pedal. The court also found that the fifth exception to the innocent retailer statute did not apply because Johnson had “failed to allege [] reliance [on the representation in obtaining or using the product], given that the undisputed evidence show[ed] he did not purchase the vehicle from the defendants.”<sup>[14]</sup>

The court found that the sixth exception did not apply because Johnson’s allegations that the dealership and its owners “actually knew or reasonably should have known” about the alleged defect were insufficient because the innocent-retailer statute requires “actual knowledge” of the defect.<sup>[15]</sup>

Finally, the court held that the seventh exception did not apply because Ford was neither insolvent nor outside the jurisdiction of the court.<sup>[16]</sup>

Thus, the court granted the motion to dismiss the dealership and its owner for improper joinder and concluded that Ford’s removal of the claims was proper. The court then addressed Ford’s motion for summary judgment.<sup>[17]</sup>

## Summary Judgment

The court held that Johnson’s failure to designate a liability expert was fatal to his claims.<sup>[18]</sup> The court stated that “[under Texas law, expert testimony is generally encouraged if not required to establish a products liability claim.”<sup>[19]</sup> The court explained that “[s]ummary judgment is generally appropriate if a plaintiff fails to designate experts in a products-liability action because the plaintiff cannot raise a genuine issue of material fact concerning key elements of [that party’s] products liability claim.”<sup>[20]</sup> Specifically, the court found that all of Johnson’s product liability claims required proof of the existence of a defect and that the defect was “the producing and proximate cause of the accident.”<sup>[21]</sup> The court explained that both issues “require specialized and technical knowledge” that require expert testimony. Further, the lack of expert testimony also prevented Johnson from showing “that a safer alternative design existed, which defeats his design-defect claim”<sup>[22]</sup>

The court also cited similar cases involving “unintended acceleration” where courts did not allow plaintiffs to solely rely on their allegations that “they had done nothing.” The court stated that “liability cannot be based on unintended acceleration alone, on lay testimony regarding its cause, or on defects not confirmed by actual inspection.”<sup>[23]</sup>

The court also found that even if Johnson’s failure to designate an expert did not defeat his claims, his failure to offer any material evidence to support his claims did.<sup>[24]</sup> The court explained that “[s]ome Texas courts have held that ‘[i]f the plaintiff has no evidence of a specific design defect or manufacturing defect,’ through expert testimony, for example ‘he may offer evidence of the product’s malfunction as circumstantial proof of the defect.’”<sup>[25]</sup> The court found that the two photos of the allegedly broken accelerator pedal “after a high-speed collision does not raise a fact issue on the cause of the crash or whether the pedal was defective in the first instance” and “merely shows that an accident occurred and that the pedal broke as a result.”<sup>[26]</sup>

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<sup>[1]</sup> 2022 WL 1471425, at \*1.

<sup>[2]</sup> *Id.*

<sup>[3]</sup> *Id.* (internal citations and quotation marks omitted) (alteration in original).

<sup>[4]</sup> *Id.* (internal citation and quotation marks omitted).

<sup>[5]</sup> *Id.* at \*2.

<sup>[6]</sup> *Id.*

<sup>[7]</sup> *Id.*

<sup>[8]</sup> *Id.*

<sup>[9]</sup> *Id.* (internal citations and quotation marks omitted).

<sup>[10]</sup> Tex. Civ. Prac. & Rem. Code Ann. § 82.003(a)(1-7) (West).

<sup>[11]</sup> *Johnson*, 2022 WL 1471425 at \*5.

<sup>[12]</sup> *Id.*

<sup>[13]</sup> *Id.*

<sup>[14]</sup> *Id.*

<sup>[15]</sup> *Id.* at \*6 (internal quotation marks and citations omitted).

<sup>16</sup> *Id.* at \*6, n.2

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (internal quotation marks and citation omitted).

<sup>20</sup> *Id.* at \*7 (internal quotation marks and citation omitted).

<sup>21</sup> *Id.* (quoting *Horak v. Pullman, Inc.*, 764 F.2d 1092, 1095 (5th Cir. 1985)).

<sup>22</sup> *Id.* (internal citations and quotation marks omitted).

<sup>23</sup> *Id.* at \*8 (quoting *Nissan Motor Co. v. Armstrong*, 145 S.W. 3d 131, 137 (Tex. 2004)) (internal quotation marks omitted).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* (quoting *Sipes v. Gen. Motors Corp.*, 946 S.W.2d 143, 155 (Tex. App.—Texarkana 1997, writ denied)).

<sup>26</sup> *Id.*

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