NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 18 2009

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U.S. COURT OF APPEALS

DAWN BEVILLE, individually, and Personal Representative for an on behalf of the Estate of Paul Baxter Beville IV; PAUL BAXTER BEVILLE, III; DIANE BEVILLE,

Plaintiffs - Appellants,

v.

FORD MOTOR COMPANY, INC., a foreign corporation,

Defendant - Appellee.

No. 07-16605

D.C. No. CV-03-00237-ROS

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Roslyn O. Silver, District Judge, Presiding

Submitted February 12, 2009**
San Francisco, California

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: GOULD, BYBEE and TYMKOVICH,*** Circuit Judges.

Dawn Beville, individually and as representative of the estate of Paul Beville, along with other Beville family members (collectively "Beville"), appeal the district court's denial of two motions for a new trial. Beville sued Ford Motor Company ("Ford"), alleging that Ford's decision not to mandate a back-up alarm on one of its semi-truck models was a design defect, and that the defect caused an accident in which of one of these vehicles backed up into Paul Beville, crushing and killing him. We conclude that the district court did not abuse its discretion in denying the motions, and we affirm. *See Navellier v. Sletten*, 262 F.3d 923, 948 (9th Cir. 2001) ("A district court's denial of a motion for new trial is reviewed for abuse of discretion.").

Beville argues that a new trial is warranted because one juror prepared a series of questions and answers while at home during a break in deliberations and discussed these notes with the jury. Beville claims that the juror's notes contradicted the district court's jury instructions and referred to excluded evidence. However, the notes cannot be used to impeach the verdict because they are not extraneous information. *See* Fed. R. Evid. 606(b); *Tanner v. United States*, 483

*** The Honorable Timothy M. Tymkovich, United States Circuit Judge for the Tenth Circuit, sitting by designation.

U.S. 107, 117 (1987) (noting that a "near-universal and firmly established common-law rule in the United States flatly prohibit[s] the admission of juror testimony to impeach a jury verdict"). The notes reflected the juror's internal thought processes, and there is no evidence the juror relied on extrinsic materials in preparing them. We conclude that the district court did not abuse its discretion in concluding that the notes were not extraneous information and could not establish juror misconduct.

The district court also did not abuse its discretion in deciding that another juror's discussion of his personal experience with a forklift did not warrant a new trial. The personal experiences described here were of the type permissible for discussion during juror deliberations. *See Grotemeyer v. Hickman*, 393 F.3d 871, 879 (9th Cir. 2004).

The record also supports the district court's decision to direct a verdict that the nonparty driver of the accident vehicle was at least partially at fault. Reviewing this issue *de novo*, *M2 Software, Inc. v. Madacy Ent. Corp.*, 421 F.3d 1073, 1086 (9th Cir. 2005), we conclude that the record establishes that the driver knew that his training required him to use a spotter when backing up, yet neglected to use one, although he assumed that Beville was behind the vehicle before he started driving. The accident would not have occurred but for the driver's

negligence, and the absence of a back-up alarm was not a superseding cause because it was not an "unforseeable" and "extraordinary" intervening force, as required by Arizona law. *Robertson v. Sixpence Inns of Am., Inc.*, 789 P.2d 1040, 1047 (Ariz. 1990). A reasonable jury would have found the driver at least partially at fault, and we affirm the directed verdict on this point which did not impede Beville's ability to have a fair trial.

Ford's references during closing argument to Beville's potential fault did not warrant a new trial because the district court made sufficient curative statements. *See United States v. Randall*, 162 F.3d 557, 559 (9th Cir. 1998) ("Ordinarily, cautionary instructions or other prompt and effective actions by the trial court are sufficient to cure the effects of improper comments, because juries are presumed to follow such cautionary instructions."). The district court twice told the jury during Ford's closing argument that Beville's fault was not an issue for the jury to decide, and on request by the district court Ford clarified this for a third time. Beville did not object to the district court's curative measures. It was reasonable to assume that the jury followed the district court's instructions.

Beville also did not request an instruction that the jury must not consider whether Beville was at fault, nor did he object when the district court did not include such an instruction. Consequently, he cannot challenge the absence of this

instruction on appeal. *See Voohries-Larson v. Cessna Aircraft Co.*, 241 F.3d 707, 713–14 (9th Cir. 2001).

The district court did not abuse its discretion in admitting into evidence three articles concerning back-up alarms and a notice by a federal regulatory agency. Beville waived any objection to at least three of the four items by introducing them into evidence during direct examination. *See Ohler v. United States*, 529 U.S. 753, 755 (2000) ("Generally, a party introducing evidence cannot complain on appeal that the evidence was erroneously admitted."). Even if Beville had not introduced the evidence, the district court did not abuse its discretion by admitting the items because Beville's objections went "to the weight of the evidence rather than its admissibility." *Hemmings v. Tidyman's Inc.*, 285 F.3d 1174, 1188 (9th Cir. 2002).

Finally, the district court did not abuse its discretion in rejecting Beville's proposed jury instructions. Beville advanced only a strict liability design defect claim at trial, and the district court was not required to provide instructions concerning information defect or negligence claims that were not presented at trial. *See Jenkins v. Union Pac. R.R. Co.*, 22 F.3d 206, 210 (9th Cir.1994) (stating that a party is "entitled to an instruction about his or her theory of the case").

AFFIRMED.

United States Court of Appeals for the Ninth Circuit
Office of the Clerk
95 Seventh Street; San Francisco, California 94103

General Information
Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue seven calendar days after the expiration of the time for filing a petition for rehearing or seven calendar days from the denial of a petition for rehearing, unless the court directs otherwise. To file a motion for stay of mandate, file it electronically via the appellate ECF system or by paper with an original and four copies of the motion.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -4)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - A material point of fact or law was overlooked in the decision;
  - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - An apparent conflict with another decision of the court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:
  - Consideration by the full court is necessary to secure or maintain uniformity of the court's decisions; or
  - The proceeding involves a question of exceptional importance; or
  - The opinion directly conflicts with an existing opinion by another

court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within fourteen (14) days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If an unrepresented litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.
- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11.

- If a petition is filed electronically via the appellate ECF system, no paper copies are required.
- If filing a petition for panel rehearing by paper, submit an original and 3 copies.
- If filing a petition for rehearing en banc by paper, submit an original and 50 copies.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information.

Attorney's Fees

- Circuit Rule 39-1 describes the content and due dates for attorney fee applications.
- All relevant forms are available on our website www.ca9.uscourts.gov or by telephoning (415) 355-7806.

Petition for Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourtus.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - West Publishing Company; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Kathy Blesener, Senior Editor);
  - and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court."

Form 10. Bill of Costs .....*(Rev. 1-1-05)*

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk			
	No. of Docs.*	Pages per Doc.	Cost per Page**	TOTAL COST	No. of Docs.*	Pages per Doc.	Cost per Page**	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other			$	$			$	$
			TOTAL:	$			TOTAL:	$

Form 10. Bill of Costs - *Continued*

Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys fees **cannot** be requested on this form.

* If more than 7 excerpts or 20 briefs are requested, a statement explaining the excess number must be submitted.

** Costs per page may not exceed .10 or actual cost, whichever is less. Circuit Rule 39-1.

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk