

**FILED**

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U.S. COURT OF APPEALS

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DAVID MICHERY,

Plaintiff-Appellant,

v.

FORD MOTOR COMPANY, a Delaware  
corporation,

Defendant-Appellee.

No. 17-56844

D.C. No.  
2:12-cv-04957-RSWL-FFM

MEMORANDUM\*

Appeal from the United States District Court  
for the Central District of California  
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted April 8, 2019  
Pasadena, California

Before: RAWLINSON and MURGUIA, Circuit Judges, and RAKOFF,\*\* District  
Judge.

Appellant David Michery (Michery), who was severely injured during an  
accident while driving a 1999 Ford Expedition manufactured by Appellee Ford

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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 Honorable Jed S. Rakoff, United States District Judge for the  
Southern District of New York, sitting by designation.

Motor Company (Ford), appeals the district court’s judgment entered in favor of Ford after a jury trial. Michery alleged that his injuries resulted from a design defect in the Ford Expedition’s front bumper.

1. A new trial is not warranted based on the district court’s decision not to instruct the jury on comparative fault after Ford withdrew its affirmative defense. Under California law, Ford properly asserted that Michery was unable to demonstrate that his injuries were caused by a design defect. *See Demara v. The Raymond Corp.*, 13 Cal. App. 5th 545, 553 (2017) (explaining that “the plaintiff must prove that the design was a substantial factor in causing an injury”) (citations omitted). Michery is also unable to demonstrate the requisite prejudice. *See Dunlap v. Liberty Nat. Prods., Inc.*, 878 F.3d 794, 798 (9th Cir. 2017) (articulating that instructional error is harmless “[w]here it is more probable than not that the jury would have reached the same verdict had it been properly instructed”) (citation and internal quotation marks omitted). The jury never reached the issue of causation, instead rendering its verdict in favor of Ford based exclusively on the risk-benefit design test—an entirely independent basis for determining that Ford was not liable. *See Demara*, 13 Cal. App. 5th at 562 (applying risk-benefit test under California law).

2. The district court properly excluded under Rule 407 of the Federal Rules of Evidence (Rule 407)<sup>1</sup> design improvements to other vehicles several years after the manufacture of the 1999 Ford Expedition. Ford's expert acknowledged that reinforcement of the Expedition's front bumper was feasible, but challenged the utility of Michery's proposed design, thus precluding evidence of subsequent remedial measures. *See Gauthier v. AMF, Inc.*, 788 F.2d 634, 637-38 (9th Cir. 1986) (explaining that, under Rule 407, "where a defendant argues about the trade-offs involved in taking precautionary measures, it is not placing *feasibility* in issue") (citation omitted) (emphasis in the original).

Alternatively, the district court properly excluded subsequent remedial measures implemented on vehicles manufactured several years after the 1999 Ford Expedition as unduly prejudicial under Rule 403 of the Federal Rules of Evidence. *See McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 953 (9th Cir. 2011) (stating that "relevant evidence must be excluded if its probative value

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<sup>1</sup> Michery failed to raise in district court his assertion that the district court erred under *Erie R. R. Co. v. Tompkins*, 304 U.S. 64 (1938) in applying Rule 407 in lieu of California's more lenient evidentiary rules. Therefore, we decline to address this issue on appeal. *See Yamada v. Nobel Biocare Holding AG*, 825 F.3d 536, 543 (9th Cir. 2016), *as amended* ("Generally, an appellate court will not hear an issue raised for the first time on appeal. . . .") (citation omitted). In any event, we have recognized that Rule 407 is the governing procedural rule under *Erie*. *See Rosa v. Taser Int'l, Inc.*, 684 F.3d 941, 948-49 (9th Cir. 2012).

is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury”) (citation omitted).

3. The district court did not abuse its discretion in its formulation of the verdict form. Although listing causation as the first issue to be decided by the jury would have been more consistent with California’s civil jury instructions, *see* Cal. Civ. Jury Inst. 1204, Michery fails to demonstrate that the verdict form improperly shifted the burden of proof under the risk-benefit test. The jury was properly instructed that Ford had the burden of proof under the risk-benefit test, and we presume that the jury followed this instruction. *See Weeks v. Angelone*, 528 U.S. 225, 234 (2000).

**AFFIRMED.**

## United States Court of Appeals for the Ninth Circuit

Office of the Clerk  
95 Seventh Street  
San Francisco, CA 94103

### Information Regarding 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 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

#### 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 -3)

##### (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 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 a pro se 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, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

### **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, available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms*.

### **Attorneys Fees**

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at [www.ca9.uscourts.gov](http://www.ca9.uscourts.gov) under *Forms* or by telephoning (415) 355-7806.

### **Petition for a Writ of Certiorari**

- Please refer to the Rules of the United States Supreme Court at [www.supremecourt.gov](http://www.supremecourt.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:
  - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Jean Green, Senior Publications Coordinator);
  - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT  
Form 10. Bill of Costs**

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