
Colby Thompson,

Plaintiff,

v.

Polaris Industries, Inc., and John Does I-X,

Defendants.

**ORDER GRANTING MOTION
TO AMEND COMPLAINT**

Judge Susan M. Robiner
Court File No. 27-CV-17-12608

The above-entitled matter came remotely via Zoom before the Honorable Susan M. Robiner on November 22, 2021 on Plaintiff's motion to amend the Complaint to assert punitive damages. Eric S. Olson, Esq. and Brian E. Wojtalewicz, Esq. appeared on behalf of Plaintiff. Paul D. Collier, Esq., Samuel J. Ikard, Esq., and Wendy J. Wildung, Esq. appeared on behalf of Defendant Polaris Industries, Inc. ("Polaris"). Based upon all the files, records, and proceedings herein, the Court makes the following:

STATEMENT OF FACTS¹

1. This litigation concerns injuries Plaintiff suffered when the 2017 Polaris XP RZR 900 he was driving started on fire. Plaintiff alleges that the fire was caused by a design defect.
2. The Polaris RZR is a brand of off-road vehicle with side-by-side seating, four wheels, a steering wheel, a rollover protective structure, seat belts, and rear cargo bed.
3. Polaris started producing the RZR 900 in model year 2011. Polaris started designing the 2011

¹ This Statement of Facts is intended solely for the purpose of this motion to amend the Complaint to assert punitive damages. For such a motion, "the Court makes no credibility rulings, and does not consider any challenge, by cross-examination or otherwise, to the Plaintiff's proof . . ." *Healey v. I-Flow, LLC*, 853 F. Supp. 2d 868, 873 (D. Minn. 2012).

RZR in 2008 when Polaris decided it needed to increase performance of its prior RZR's in order to stay ahead of competitors.

4. The RZR 900 had a new architectural design from the RZR 800. One of the changes Polaris made for the RZR 900 concerned the orientation of the exhaust system. The RZR 900s are designed such that the exhaust system is routed, shielded, and tightly packaged close to the fuel system. The exhaust header is located immediately behind the passenger compartment. Ex. 235, Kimbrough 1. This is a “poorly ventilated confined space that is subject to the infiltration and accumulation of any escaping gasoline or lubricants.” *Id.* at 2. Exhaust gases in the exhaust header can reach extreme temperatures. Ex. 7-8, 11. Such extreme temperatures can lead to melting of the plastic components proximate to the exhaust header. As a result, Polaris added shielding. Ex. 235, Kimbrough 1, at 2. However, this shielding only exacerbated the trapped heat around the exhaust system. *Id.* The extreme temperatures reached in this area can lead to automatic ignition of leaked fuel. *Id.*; Ex. 7-8.
5. “All of the Polaris engines in Polaris RZR's from [model years] 2011 through to 2020 that use the ProStar 900 and 1000 engines are based on the same architecture and are substantially and functionally similar.” Ex. 237.
6. Polaris was aware at the time of initial design that “packaging exhaust behind seats could cause heat issues.” Ex. 28. Polaris did not have a thermal engineer at the time, did not have a separate safety department, and did not perform thorough heat testing. Ex. 4, 11, 29.
7. After release of the 2011 RZR 900, Polaris started to receive reports from customers about the RZR's starting on fire and/or melting where the exhaust header is located. Ex. 31. Polaris also had an in-house 2011 RZR 900 start on fire in July 2011. Ex. 32.
8. In 2011, Polaris discussed the customer reports at a Product Action Procedure (“PAP”) Committee meetings. The PAP Committee was responsible for discussing whether a product

safety issue required a recall. Dr. Ken d'Entremont, who was the Corporate Product Safety Manager at Polaris, was on the committee and recommended a recall due to the customer reports.

9. Polaris decided not to issue a recall at that time. Rather, Polaris developed a heat shield that dealers could install if a customer brought its RZR 900 in to the dealer. However, customers were not directly contacted and informed about this issue.
10. Polaris continued to design and issue new RZR 900s for each model year, but did not re—engineer the engine architecture. Polaris continued to receive customer complaints about fires and/or melting.
11. At some point, the Consumer Products Safety Commission (“CPSC”) became involved in investigating the RZR 900. Polaris assured the CPSC that the issues were mostly cosmetic and due to aftermarket modifications. Ex. 46. Polaris downplayed the risk to customers of the high heat in the passenger compartments and melting of components by noting that the issues did not “constitute[] a substantial product hazard or pose[] a significant risk of injury.” *Id.*
12. In December 2012, the CPSC informed Polaris that the CPSC had made a preliminary determination that the RZR presented a “substantial product hazard.” Ex. 50. The CPSC recommended that Polaris “stop production and distribution” and “recall or correct potentially hazardous products.” *Id.*
13. Polaris agreed to recall the 2011 RZR 900 in April 2013, but limited the recall to installing the heat shield that was previously provided to dealers. The same heat shield was already installed on 2012 and 2013 RZR 900s that continued to have the same melting and fire issues.
14. Polaris continued to issue new model year RZR 900s with the same engine-exhaust design. Polaris also continued to receive numerous customer complaints about RZR 900s suddenly bursting into flames and customers being injured.

15. In 2015, Polaris's engineering manager over powertrain, Rupak Paul, proposed to upper management that the exhaust of the RZR be rotated, such that it would exit the rear of the vehicle rather than toward the occupant seats. Ex. 73. Mr. Paul believed this change would significantly reduce RZR fires, and thought that the changes could be implemented in time for the 2017 model year. *Id.* However, the cost of implementing the change would have been large and Polaris ultimately decided against making this proposed change.
16. In October 2015, internal Polaris documents note that Polaris conducted a survey among customers and found that "almost all carry a fuel container with them when using their" vehicles. Ex. 98.
17. On April 5, 2016, Polaris met with the CPSC about another recall of the RZRs. Polaris represented that the primary contributors to fires included: misrouting of the fuel tank vent line, engine misfires, voltage regulator failure, and consumers carrying fuel in the cargo box. Ex. 102. Polaris proposed to remedy these issues by: checking vehicles to make sure the vent lines were properly routed, adding a new calibration with misfire detection, replacing the voltage regulators, and adding a warning label instructing consumers not to carry fuel in the cargo bed. *Id.* Polaris subsequently added more remedies, including: an improved fuse box, a better muffler heat shield, and a shield that would be installed under the cargo bed to divert spilled fuel away from the exhaust header. Ex. 103, 105. However, the proposed remedies were focused on issues that only produce small, localized fires rather than large fires that happened quickly and burned the vehicles to their frames. Ex. 106.
18. On April 15, 2016, the CPSC informed Polaris that the CPSC recommended a voluntary recall of the 2013-2016 RZR 900s. Ex. 108. On April 19, 2016, Polaris issued a recall that would provide remedies for the fuel vent line, misfire, fuse box and voltage regulator issues. Ex. 109.
19. In June 2016, Polaris added more staff focused on testing and safety. This included hiring

Polaris's first thermal engineer, Ramesh Goyal.

20. In August 2016, Mr. Goyal wrote an internal email summarizing his review of the RZR 900 and 1000 models. Ex. 138. The email noted several observations, including:

- Key issue seems to be in the shielding as well of its implementation, air flow limitation, and on architectural issues.
- Components are densely packaged especially on the exhaust pipe sides and not well protected from radiation heat.
- Dense packaging and limited air flow in engine compartment.
- Packaging components in the vicinity of exhaust system.
- Heat shield attached to the heat pipe with no air gap in-between make shield ineffective. This makes high temperature environment in the close vicinity.
- Limited packaging space - need architecture refinement.
- Thermal sensitive materials and hoses/conduits needs to be routed away from heat source if possible.

Id. Mr. Goyal also made several recommendations for future vehicles, including “Try to re-route thermal sensitive components away from exhaust system side.” *Id.*

21. In September 2016, Polaris held internal meetings to discuss possible fixes for the growing number of fires. The proposed fixes included providing a fire extinguisher with the RZR, which was ultimately rejected due to the possibly negative connotation. Ex. 145. Polaris also discussed using flame retardant materials and noted that the majority of thermal incidents “in which the vehicle is left unrecoverable . . . begin in the engine compartment where the main heat source is the engine's exhaust system.” Ex. 146.

22. On February 28, 2017, the CPSC wrote a letter to Polaris noting that the CPSC was seeking a civil penalty against Polaris due to Polaris's long history of failing to report fire incidents with the RZR 900 or reporting the incidents long after Polaris was aware of them.

23. On March 2, 2017, Polaris issued another fire-related recall for 2016-2017 RZR 900s. This

recall focused on misfiring and unintended brake drag caused by the brake master cylinder.

24. On July 11, 2017, Polaris documented that it had “on-going reports of thermal events due to various causes.” Ex. 171.
25. On July 24, 2017, Plaintiff Colby Thompson was driving a friend’s 2017 Polaris XP RZR 900 on an off-road trail in the Bridger Mountains of Montana. Plaintiff’s friend who owned the vehicle, Jeff Hoffman, was sitting in the passenger seat. There were no other passengers in the vehicle.
26. There was a small canister of gasoline in the rear cargo bed of the vehicle. Ex. 235. The canister was securely strapped down in the cargo bed with ratchet straps. Ex. 240. The vehicle also had a shield installed under the cargo bed that was designed by Polaris to drain spare fuel away from the exhaust system.
27. Plaintiff drove the vehicle over a small dip described as a drainage furrow. Plaintiff sped up at the bottom of the dip. The vehicle shortly thereafter burst into flames. The vehicle had not rolled, tipped, or contacted another object prior to catching on fire.
28. Mr. Hoffman was not wearing his seatbelt and was able to quickly exit the vehicle. Plaintiff was wearing a seatbelt and was not able to quickly exit the vehicle as Plaintiff “had to deal with flames coming through the opening below the seat belt stalks.” Ex. 236 at 2.
29. The vehicle was burned to the frame and Plaintiff suffered severe burns.
30. Due to the speed of the fire, the fire is consistent with a gasoline fire. Ex. 235, Kimbrough 1 at 4. However, the evidence indicates that the fuel did not come from the small canister that was in the cargo bed, but rather from “fuel escaping from the vehicle’s fuel system.” *Id.*
31. Mr. Hoffman’s RZR had all prior recalls incorporated into the machine.
32. Polaris inspected the vehicle four days after Plaintiff was burned and wrote an internal inspection report. Ex. 177. On the front cover of the report, someone handwrote “Do Not

Send to CPSC.” *Id.*

33. On November 1, 2017, Polaris met with the CPSC and noted the many changes it had made. Ex. 190. The CPSC countered that there were many RZR 900s still starting on fire after receiving the recall repairs. Ex. 191. Specifically in relation to 2017 RZR, there had already been 23 thermal incidents, which resulted in five injuries. *Id.* The CPSC stated that it expected to continue to see approximately ten incidents a month. *Id.*

CONCLUSIONS OF LAW

I. Legal Standard

A Plaintiff cannot seek punitive damages at the commencement of a civil action. Minn. Stat. § 549.191. Rather, the plaintiff must move the court to amend the complaint to seek punitive damages. *Id.* A motion to amend to add a punitive-damages claim must be supported by “one or more affidavits showing the factual basis for the claim.”² *Id.*

The standard for allowing punitive damages is “clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.” Minn. Stat. § 549.20, subd. 1. A defendant’s acts show deliberate disregard for the rights or safety of others when “the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others” and the defendant then acts with “conscious or intentional disregard of the high degree of probability of injury” or “indifference to the high degree of probability of injury.” *Id.*

However, “a plaintiff need not demonstrate an entitlement to punitive damages *per se*, but only an entitlement to allege such damages.” *Berczyk v. Emerson Tool Co.*, 291 F. Supp. 2d 1004, 1008 (D. Minn. 2003). A court must grant a plaintiff permission to amend the pleadings to claim punitive damages if the court finds *prima facie* evidence in support of the motion. Minn. Stat. §

² Plaintiff’s motion was accompanied by an affidavit of counsel, which provided the documents that support the factual underpinnings of the motion to amend.

549.191. “The term “prima facie” does not refer to a quantum of evidence, but to a procedure for screening out unmeritorious claims for punitive damages.” *Swanlund v. Shimano Indus. Corp.*, 459 N.W.2d 151, 154 (Minn. Ct. App. 1990). “[A] prima facie case simply means one that prevails in the absence of evidence invalidating it.” *Blumberg v. Palm*, 56 N.W.2d 412, 415 (Minn. 1953). This ultimately means that “the Court makes no credibility rulings, and does not consider any challenge, by cross-examination or otherwise, to the Plaintiff’s proof, but the Court must carefully scrutinize the evidence presented by the moving party to make sure that it amounts to a prima facie showing that the substantive requirements for punitive damages have been met.” *Healey v. I-Flow, LLC*, 853 F. Supp. 2d 868, 873 (D. Minn. 2012).

The district court should also keep its focus on the acts of the defendant, and not the resulting harm, to promote the purposes of punitive damages, which are “to punish the perpetrator, to deter repeat behavior and to deter others from engaging in similar behavior.” *Jensen v. Walsh*, 623 N.W.2d 247, 251 (Minn. 2001) (providing a history of the law of punitive damages and reiterating the purpose of such relief).

Punitive damages are considered “an extraordinary remedy to be allowed with caution and within narrow limits.” *J.W. ex rel. B.R.W. v. 287 Intermediate Dist.*, 761 N.W.2d 896, 904 (Minn. Ct. App. 2009), citing *Lewis v. Equitable Life Assurance Soc’y of the U.S.*, 389 N.W.2d 876, 892 (Minn. 1986). Therefore, “when presented with a motion to permit assertion of a punitive damage claim, the function of the trial court is to do more than ‘rubber stamp’ the allegations in the motion papers.” *Shetka v. Kueppers, Kueppers, Von Feldt & Salmen*, 454 N.W.2d 916, 918 (Minn. 1990).

II. Plaintiff has presented prima facie evidence that Polaris deliberated disregarded the safety of others

A. Polaris knew the 2017 RZR 900 presented a high probability of injury to others

Polaris has had a long history of melting and fire issues with the RZR 900, since the first

model year was introduced in 2011. This history is demonstrated by the many consumer complaints, news stories, internal documents and reports by employees, and meetings with the CPSC. While Polaris cannot present counter-evidence on a motion to amend to assert punitive damages, Polaris raises several arguments, which are addressed below.

Polaris argues that the Court should not consider the extensive history behind the RZR 900, but instead focus solely on the 2017 RZR 900 as that was the vehicle driven by Plaintiff in this case. This argument ignores the fact that the specific alleged defect in Mr. Hoffman's 2017 RZR that caused Plaintiff's injuries – the exhaust-fuel system – was a continuing problem from prior RZR models. Plaintiff has put forth expert evidence supporting his argument that the architecture of the exhaust and fuel system “are substantially and functionally similar” across all RZR 900 models, starting in 2011 and past 2017. Ex. 237. Therefore, the history of prior model RZR fires is relevant to establish Polaris's knowledge of the design defect.

Polaris next argues that the Court should not consider the consumer complaints made to Polaris documented in Plaintiff's brief as they constitute hearsay. However, all of the direct statements made by customers to Polaris about the issues they were having with RZR 900s are not hearsay as the statements are not being offered to prove the truth of the matter, but rather being offered for the effect on the listener, i.e. to show that Polaris had knowledge about the dangerous fire issues many customers were having with their RZR 900s.

Polaris contends that evidence of other fires is not enough to show that Polaris had knowledge about the specific issue faced in Plaintiff's case, as there is not sufficient evidence that the other fires were similar to Plaintiff's. However, Plaintiff submitted an expert report by Mark Arndt, noting that he reviewed over 1000 RZR fire incident files and found 406 that were similar to Plaintiff's fire. Ex. 242. Mr. Arndt describes his method and procedure for reaching this conclusion in his extensive report. *Id.* Polaris challenges the finding that these were substantially

similar events; however, the Court does not make credibility determinations or consider challenges to Plaintiff's proof on a motion to amend. *See Healey*, 853 F. Supp. 2d at 873. Rather, the Court must scrutinize the evidence to see whether Plaintiff has presented a prima facie case. Here, the expert report details how and why it chose the fire claims it did as substantially similar to Plaintiff's, and the Court finds that it does support a prima facie showing of Polaris's knowledge about the dangers caused by the RZR 900.

Polaris inexplicably argues that its recall modifications and improved design reduced the number of RZR fires in the 2017 RZR to be similar to the number of fires expected from highway vehicles. Polaris does not explain why it equates its family-friendly, recreational off-road vehicle to highway vehicles. Presumably this is to support Polaris's position that the 2017 RZR did not create a "*high* probability of injury to others," but rather a small, expected level of injury. This comparison is a false equivalence and is not relevant to the subject matter.

Plaintiff has presented prima facie evidence that the alleged defective design creates a high probability of injury. The hottest part of the exhaust system is located directly behind the passenger seat in a confined space, with limited airflow. Polaris exacerbated the heat issue by adding more shielding, which restricted airflow even further, driving the exhaust temperature up. This superheated system is packaged in close proximity to the fuel system and directly below the cargo bed, where Polaris knows that customers often carry spare gasoline canisters. The temperatures are so high that any leak of fuel from the fuel system or from a spare fuel container will automatically ignite directly behind the passenger seating and spread rapidly.

While a sudden fuel fire may be the type of issue expected in a racing vehicle, it is not the type of issue expected in a family-friendly off-road vehicle being used for its intended purpose. A racecar driver may expect certain fires to arise and to need to exit their vehicle quickly. Passengers do not have the same expectation in a RZR, which drives up the probability of injury.

Not only has Plaintiff presented a prima facie case that the RZR 900 presents an unreasonably high risk of injury, but Plaintiff has also presented a prima facie case that Polaris had knowledge of this fact:

- Polaris knew at the time of original design that the exhaust architecture in the RZR 900 could create heat issues.
- The CPSC told Polaris that the RZR presented a “substantial product hazard.” Ex. 50.
- Polaris received numerous reports from customers about RZR’s melting and/or burning and causing injuries and deaths. Many of these reports noted the extreme danger of the situation as the melting and fires occurred in the passenger compartment.
- Several of Polaris’s employees expressed concerns about the RZR. Mr. Paul proposed rotating the exhaust system to improve the heat issues that were causing fires. Mr. Goyal suggested a similar restructuring of the exhaust system after documenting the thermal issues caused by the current architecture.
- Polaris knew that its recall modifications were insufficient as it continued to receive complaints of on-going fire issues after vehicles were fitted with the recall modifications.

Finally, by equating RZR fires to highway vehicle fires, Polaris appears to acknowledge in its response to the motion that Polaris knows RZR fires are occurring and expects them to continue to occur.

B. Polaris acted with intentional disregard to the high probability of injury to others

Plaintiff presents compelling prima facie evidence that Polaris acted with indifference to the high probability of injury to others. The prima facie evidence shows that Polaris rushed out a newly designed engine and exhaust system for the RZR 900 in order to stay ahead of competition. In its rush, Polaris failed to follow many safety measures, despite being aware that the new design could create heat issues behind the passenger seats. Once the 2011 RZR was issued, Polaris started receiving complaints from customers about melting and fires starting with the product. Polaris even had one 2011 RZR 900 start on fire in-house.

Polaris's Corporate Product Safety Manager recommended a recall of the 2011 RZR 900, but Polaris declined to do so. Polaris only acted when the CPSC became involved and recommended a recall. However, Polaris did not undertake a recall; rather, Polaris offered a new heat shield to dealers to be installed on RZR 900s *if* customers happened to bring the machines in to a dealer. Polaris did not contact customers about this issue. Polaris continued to make and sell RZR 900s despite receiving more complaints from customers about melting and fires even after the new heat shield was installed.

Several internal employees noted the heat issue caused by the exhaust system and proposed changing the architecture in order to make the machine safer. Mr. Paul suggested that the exhaust could be rotated to the rear of the vehicle rather than toward the passenger seats. He believed this could be done in time for the 2017 RZR 900s. However, Polaris declined to do so. Similarly, Mr. Goyal, Polaris's first thermal engineer, noted the same issues with the architecture of the exhaust and noted that the design needed to change in order to move "thermal sensitive components away from exhaust system side." Ex. 138. However, Polaris did not make any immediate changes. Despite all of the information that Polaris had about the dangers of the exhaust system architecture in the RZR 900s, Polaris chose to continue using the same architecture in its machines from model years 2011 through and past 2017 – the model year that burned Plaintiff. Plaintiff's prima facie evidence presents a compelling picture from which a jury could find that Polaris chose not to do so for financial reasons, arguably placing profits over the safety of its customers.

Polaris argues that it did not act with disregard to the safety of others because it cooperated with the CPSC and issued recalls that were warranted. Polaris's picture of a harmonious combined effort with the CPSC to address RZR 900 fires is not supported by Plaintiff's prima facie evidence. The CPSC itself wrote a letter in February 2017 noting all of Polaris's missteps and failures to report RZR fires and their causes to the CPSC. Furthermore, specific to this case, someone at

Polaris handwrote “Do Not Send to CPSC” on the front cover of Polaris’s inspection of Mr. Hoffman’s vehicle.

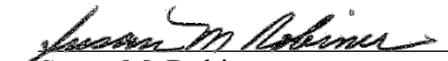
Furthermore, while Polaris did undertake many recalls, the items fixed were focused on small, localized fires; Polaris chose to not address the key issue causing the heat, i.e. the architecture of the exhaust system, despite being aware from multiple internal employees and reports that the exhaust system was a large thermal issue. Plaintiff stated it well in his reply brief: “Performing recalls that a company knows will not and have not fixed the problem cannot be a defense to punitive damages.” Plaintiff’s Reply Brief at 9. If it were, companies would be incentivized to perform expedient recalls that do not actually fix the problem. In fact, Polaris was well aware that the recall modifications did not fix the issues, as the customer reports of fires continued even when all recall modifications were made on a vehicle, including Mr. Hoffman’s vehicle.

ORDER

1. Plaintiff’s motion to amend the Complaint to assert punitive damages is GRANTED.
2. Plaintiff shall file and serve the Amended Complaint by March 4, 2022.

BY THE COURT:

Dated: February 18, 2022


Susan M. Robiner
Judge of District Court