IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

ART BUSTOS, as Personal Representative of THE ESTATE OF MARCOS LEANDRO BACA, Deceased, and MARCOS BACA, TERRI BACA, and ABEL BACA, Individually,

Plaintiffs-Appellees

v.

Ct. App. No. 28,240
4th J.D. No. CV-2005-82

HYUNDAI MOTOR COMPANY, HYUNDAI MOTOR AMERICA, and BORMAN MOTOR COMPANY,

Defendants-Appellants

On Appeal from the Fourth Judicial District Court
San Miguel County, New Mexico
Hon. James A. Hall, District Judge

ANSWER BRIEF OF APPELLEES

GADDY ♦JARAMILLO
David J. Jaramillo
Maria E. Touchet
2025 San Pedro Dr., NE
Albuquerque, New Mexico 87110
(505) 254-9090

WATTS LAW FIRM, L.L.P.
James H. Hada
555 North Carancahua, Suite1400
Corpus Christi, Texas 78478
(361) 887-0500

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STATEMENT OF COMPLIANCE

As required by Rule 12-213(G), undersigned counsel certifies this brief was prepared in 14-point Times typeface using Microsoft Word, and the body of the brief contains 12,861 words, including footnotes. Appellees have filed an unopposed motion for permission to exceed the type-volume limit by 2000 words, pursuant to Rule 12-213(F)(3).

LIST OF AUTHORITIES

CASES OF NEW MEXICO

CASES OF OTHER JURISDICTIONS

STATUTES, RULES, AND UJI OF NEW MEXICO

OTHER AUTHORITIES

SUMMARY OF FACTS

This case arises out of an accident involving a 2002 Hyundai Accent that resulted in the death of Marcos (Lee) Baca, a 21 year-old student at New Mexico State University.

On a Sunday morning in July 2004, Lee Baca and his fiance, Ricci Montes, went to see her parents in Santa Teresa. [TR3 28:10-12] Ms. Montes was driving her 2002 Hyundai Accent at a speed appropriate for the highway. [TR6 79:19-80:13] She lost control of the vehicle (she veered to the left and made a hard steering input to the right), so that it left the roadway and began to roll over. [TR6 48:4-49:23] At the point the vehicle tripped or began to roll over, it was going 34 m.p.h. [TR2 52:17-53:15, TR6 74:9-14] The vehicle rolled over three and one-half times, coming to rest on its roof. [TR6 74:25-75:2] During the rollover sequence, the roof over the passenger seat, where Mr. Baca was seated, crushed down to the headrest and inward so much that half of the passenger headrest was now outside the plane of the side window. [TR4 26:6-28:9] The roof above the passenger seat at the A-pillar (the pillar that connects the windshield, the front of the door frame, and the front of the roof rail) crushed in 10.9 inches and the roof at the B-pillar (the pillar that connects the back of the door frame to the roof rail) crushed in 10.8 inches. [TR4 31:17-7] Also, during the end of the second roll, the passenger door came open. [TR2 64:14-23]

Ms. Montes, whose roof above her seat was not severely deformed, walked away from the accident. [TR4 32:2-7; TR7 81:21-82:12] Although Mr. Baca sustained some soft-tissue injuries to the sides of his face and his head during the rollover sequence, it is undisputed these injuries were not life-threatening and did not cause his death. [TR5 58:20-59:10; TR7 84:6-87:9] Because of the massive roof crush, however, Mr. Baca was pinned upside down, wedged into the vehicle with his chin tucked against his chest. [TR5 34:18-36:23] With his body forced into this position because of the deformed roof, Mr. Baca's neck and back were bent and his body weight was pushing against them so that it pinched off his airways and his internal organs compressed his diaphragm. [*Id.*] The New Mexico Medical Examiner and a forensic pathologist expert found Mr. Baca died because of position asphyxia as a result of the way his body and neck were flexed in the crushed vehicle. [TR5 23:7-25, 49:19-50:4]

Mr. Baca's family and estate representative brought this lawsuit against Hyundai alleging the vehicle design and Hyundai's negligence caused the death of Lee Baca. [RP 660-669] The case was tried to a jury that found the 2002 Hyundai Accent was defective in design, Hyundai was negligent and breached its implied warranty of merchantability, and Ms. Montes was negligent. [RP 3013] At Hyundai's request, the jury was given alternative verdict questions depending on whether it found the defect caused injuries distinct and separate from injuries

Mr. Baca sustained merely because of the rollover sequence. [RP 3015] Because the jury found the injuries caused by the defect were divisible, it did not compare the fault of Hyundai and Ms. Montes, but instead, awarded only the distinct and separate damages caused by the defect. [RP 3018] The jury found damages for Mr. Baca's estate and loss of consortium for his family members. [RP 3018] Hyundai is not challenging the amount of the jury's verdict.

ARGUMENTS & AUTHORITIES

I. THE TRIAL COURT DID NOT ERR IN ALLOWING THE EXPERT TESTIMONY OF DR. BURTON AND MR. STILSON UNDER *ALBERICO* AND RULE 11-702

A. Application of the Admissibility Standards of Rule 11-702

An expert witness in New Mexico courts may testify to scientific, technical, or other specialized knowledge that, "will assist the trier of fact to understand the evidence or to determine a fact in issue." Rule 11-702, NMRA. In applying this rule, there are three prerequisites for admission of expert testimony: (1) the expert must be qualified; (2) the expert testimony must assist the trier of fact; and (3) the expert may only testify to scientific, technical, or other specialized knowledge. *State v. Alberico*, 116 N.M. 156, 166, 861 P.2d 192, 202 (1993).

The *Alberico* principles should be considered in light of the liberal construction intended by the rules of evidence. "Given the capabilities of jurors and the liberal thrust of the rules of evidence, . . . any doubt regarding the admissibility of scientific evidence should be resolved in favor of admission, rather than exclusion. *Lee v. Martinez*, 2004-NMSC-027, ¶16, 136 N.M. 166, 96 P.3d 291.

Hyundai's challenge was directed only at the last two *Alberico* prerequisites – that the testimony will assist the trier of fact and that the testimony is scientific, technical, or other specialized knowledge. The relevant inquiry on the second

prerequisite for expert testimony is "[o]n *this subject* can a jury from *this person* receive appreciable help." *Alberico*, 116 N.M. at 166, 861 P.2d at 202 (quoting 7 Wigmore *Evidence* § 1923, at 21 (3d ed. 1940) (emphasis in original)). Where an expert's testimony, "could have provided assistance to the trier of fact, the trial court should . . . err[] on the side of admitting the evidence." *State v. Hughey*, 2007-NMSC-036, ¶17, 142 N.M. 83, 163 P.3d 470. The third *Alberico* prerequisite for admissibility under Rule 11-702 contains an implicit standard of reliability that, "focus[es] on the proof of reliability of the scientific technique or method upon which the expert testimony is premised." *Alberico*, 116 N.M. at 168, 861 P.2d at 204. This means, "the trial court must determine whether the scientific technique is based upon well-recognized scientific principles and whether it is capable of supporting opinions based upon reasonable probability rather than conjecture." *Alberico*, 116 N.M at 167, 861 P.2d at 203.

The United States Supreme Court held, in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), that factors it had previously recommended for considering the testimony of scientists did not apply to non-scientists, but that reliability standards still generally apply to "testimony of engineers and other experts who are not scientists." *Id.* at 141. New Mexico courts have not, however, incorporated *Kumho* into New Mexico law. *State v. Lente*, 2005-NMCA-111, ¶4, 138 N.M. 312, 119 P.3d 737 (refusing to decide, and not needing to address the

issue, whether *Alberico* applies to a physician expert witness). At this point, therefore, it is not clear whether *Alberico* and its progeny apply to experts such as Dr. Burton (a forensic pathologist) and Mr. Stilson (an engineer). *Id.*

Even assuming New Mexico recognizes an implicit reliability standard in Rule 11-702 for non-scientist testimony, a trial court considering the reliability of these non-scientist experts' testimony should have broad latitude in its ultimate determination of reliability and in deciding how to determine reliability including choosing which, if any, of the factors to use in a particular case. *Kumho,* 526 U.S. at 141-42. The trial court, therefore, was not bound to strictly apply the factors created for evaluating scientists when determining whether the testimony of these non-scientist experts was reliable. In fact, the court could have adhered to the standard set forth in *Alberico*, which did not delineate a set of factors, but rather, directed trial courts to generally determine, "whether the scientific technique is based on well-recognized scientific principle and whether it is capable of supporting opinions based upon reasonable probability rather than conjecture," while keeping in mind that, "any doubt regarding the admissibility of scientific evidence should be resolved in favor of admission, rather than exclusion." *Alberico*, 116 N.M. at 167, 861 P.2d at 203; *Lee*, 2004-NMSC-027, ¶16. In any event, this Court must review the trial court's decision for abuse of discretion. *Hughey*, 2007-NMSC-036 at ¶9.

B. The Trial Court was within its Discretion to Allow Mr. Stilson's Testimony

The pre-trial challenges Hyundai raised to the testimony of Dr. Burton and Mr. Stilson were essentially the same arguments they are making on appeal – Mr. Stilson did not test a prototype alternative roof design and Dr. Burton's opinions should not be allowed because they are based, in part, on Mr. Stilson's opinion. In response to Hyundai's motion to exclude Dr. Burton and Mr. Stilson, the Bacas filed affidavits from Dr. Burton and Mr. Stilson, addressing the bases for their opinions. Rules 11-401 and 11-703, NMRA.

Mr. Stilson testified that he knew of several alternative roof designs that would strengthen the roof in rollover accidents. His alternative designs included a double panel roof, reinforced A and B pillars, integrated roll bars, and foam filling in the pillars. [RP 2655-56] He also testified that designing a prototype was unnecessary because, "the designs for making the roof of a Hyundai Accent crush resistant in a rollover event have already been designed and tested on production vehicles." [RP 2652] His alternative design proposals have been designed and tested for several experimental and prototype vehicles and have also been integrated several production model vehicles, including Ford's Explorer, Bronco and F-Series pickups and Chevrolet's Blazer and Camaro. [RP 2655-56] Based on existing engineering knowledge and technology, "Hyundai had the ability to integrate these designs into the roof of the 2002 Hyundai Accent." [RP 2656] After pages of testimony regarding the bases for his opinions, Mr. Stilson testified:

> Based on the above, it is my opinion that **the 2002 Hyundai Accent at issue was defectively designed with regard to both its roof strength** and its door retention system, **and that *the vehicle* could have been designed with a roof that would have sustained no more than two to three inches of deformation into the occupant space *in this accident* without impairing the utility of the vehicle**.
> . . .

[RP 2660 (emphasis added)]

Consequently, the trial court was presented with testimony from Mr. Stilson, for purposes of the gatekeeper hearing, that explains his alternative designs and that they could have been implemented in this vehicle to prevent roof crush of more than three inches in this accident. The fact that the alternative designs recommended by Mr. Stilson had been used in existing production vehicles and had been subjected to testing demonstrates Mr. Stilson's opinions are supported by accepted principles. Hyundai chastises Mr. Stilson's opinions as being too strict because his definition of what makes a roof defective would include most of the vehicles, yet Hyundai's expert, Kenneth Orlowski, believes *no* vehicle allowed on the road in the United States is defectively designed.[1] [TR6

[1] Because Mr. Orlowski believes every vehicle that passed the FMVSS 216 roof crush test is not defective, Hyundai's attempt to introduce exhibit 314 (a chart comparing various vehicles' FMVSS 216 test results) could admittedly not have addressed comparative safety of the vehicles. [TR6 129:12-131:20] Although Hyundai is apparently no longer claiming exclusion of this chart was reversible error, the trial court's discretionary ruling was correct that the chart was of little if any relevance, especially given the potential prejudice or confusion that would have arisen from introducing test results of all these other vehicles. [TR6 131:21-132:5] Rules 11-401 and 11-403, NMRA.

166:6-10, 215:24-25] This disagreement between experts is an issue for the jury to resolve based on the witnesses' credibility. The trial court was well within its discretion to admit Mr. Stilson's testimony.

C. The Trial Court was within its Discretion to Allow Dr. Burton's Testimony

Hyundai's primary challenge to Dr. Burton is that if Mr. Stilson's testimony is excluded, he has no basis for his opinion that a defect in the vehicle was a cause of Mr. Baca's death. The Bacas have never disputed that Dr. Burton's conclusions are based, in part, on the opinions of Mr. Stilson. But because Mr. Stilson's opinions are admissible, so are Dr. Burton's.

The trial court was provided an affidavit from Dr. Burton explaining the basis for his opinion that the excessive roof crush of the Hyundai Accent caused Mr. Baca to die from positional asphyxia. [RP 2071-2085] Dr. Burton explained that although forensic pathologists often have good working knowledge of various non-medical areas, they often rely on other experts as he relied on Mr. Stilson. [RP 2079-80] After stating that if the roof crush had been limited to three inches Mr. Baca would have survived and that according to Mr. Stilson the vehicle could have been designed to limit the roof crush to three inches, Dr. Burton testified, "I can, therefore, state not only that deformation of the vehicle actually aided in or caused the death of Mr. Baca, but that the fact the vehicle was a cause of the death

was due to a design defect that allowed the vehicle's roof to deform excessively into the occupant space." [RP 2080-81]

The trial court had substantial testimony from Dr. Burton to find his opinions were derived from a methodology of forensic pathology, "based on well-recognized scientific principle and . . . capable of supporting opinions based upon reasonable probability rather than conjecture." *Alberico*, 116 N.M. at 167, 861 P.2d at 203. The trial court, therefore, was within its discretion to allow Dr. Burton to testify at trial as an expert in forensic pathology.

II. THERE WAS EVIDENCE THAT DEFECTS IN THE HYUNDAI ACCENT CAUSED MR. BACA'S DEATH

Once the trial court determined the Bacas' experts should be allowed to testify under Rule 11-702, Hyundai repeatedly asked the trial court (and now asks this Court) to ignore their testimony. Hyundai does not dispute Dr. Burton testified that Mr. Baca's death was the result of positional asphyxia caused by roof crush into the survival space. [TR5 49:19-50:4, 91:2-7, 93:16-19] It does not dispute Dr. Burton testified that if Mr. Stilson's alternative designs had been used Mr. Baca would have not died. [TR5 87:11-89:5] Finally, Hyundai does not dispute Dr. Burton testified that if Mr. Baca had survival space in the vehicle after it had stopped rolling over, he would have sustained only non-life-threatening injuries, including a scalp laceration that would have been sewn up and other soft tissue injuries that would have had no long-term effects. [TR5 20:12-23:25,

26:11-18, 31:2-36:23, 58:20-59:10] Although the jury had much more evidence than this testimony, this evidence alone would have been sufficient for the jury to reach its verdict finding the vehicle was defective and was the sole cause of Mr. Baca's death. Because the testimony in the record sufficiently supports the jury's verdict, Hyundai must resort to asking the Court to ignore the testimony in the record.

A. There is a Basis for Dr. Burton's Testimony that an Alternative Design would have Prevented Mr. Baca's Death

Hyundai argues the Court should ignore Dr. Burton's testimony about Mr. Baca's injury being caused by roof crush into the survival space that would have been remedied by alternative designs. Again, Hyundai does not dispute that Dr. Burton provided the necessary testimony, but rather, that "Burton's testimony was legally incompetent to prove" the defective condition of the vehicle caused Mr. Baca's death. [Hyundai's Brief, p. 23] Hyundai claims Dr. Burton's testimony is legally incompetent because there was no trial testimony to support a conclusion that an alternative design could have reduced the roof crush to three inches and because Mr. Stilson never provided such testimony before the trial that Dr. Burton could have relied upon. Even if the Court was legally allowed to ignore Dr. Burton's testimony, Hyundai is wrong about the testimony presented during trial and about the testimony presented before trial that Dr. Burton was able to rely upon in rendering his testimony.

1. Mr. Stilson's Trial Testimony regarding Alternative Roof Designs that Reduce Roof Crush to no more than Three Inches

Hyundai claims Dr. Burton has no basis for believing an alternative roof design would have been able to reduce the roof crush to about three inches, because Mr. Stilson never provided any trial testimony that an alternative design could have reduced roof crush to three inches in this car in this accident. Even if New Mexico requires so strict a standard, Hyundai's argument fails because Mr. Stilson provided this testimony during trial.

Mr. Stilson opined that the subject Hyundai Accent was defective in design and unreasonably dangerous because it lacked adequate roof strength to protect occupants in this particular accident. [TR4 87:2-15 ("My opinion is that the subject Hyundai 2002 Accent roof design is defective and unreasonably dangerous because it lacks adequate strength or crush resistance to provide reasonable protection **in this particular low speed rollover**.")] Mr. Stilson further stated there were feasible alternative designs that could have been integrated into this specific vehicle to provide the necessary roof strength in this specific rollover accident. [TR4 87:21-88:6 ("there were readily available economical feasible design alternatives that **could have been integrated into this vehicle** to have improved its and increased its roof strength capacity **to provide adequate rollover protection under the conditions of this rollover** and those were available prior to the production of the subject vehicle.")]

Mr. Stilson went on to discuss the specific alternative designs and explain how they would have provided the necessary roof crush resistance to less than three inches. Mr. Stilson explained that the roof could have been made stronger by several methods of alternative design, including structural foam in the pillars, reinforcement of the pillars to structurally support them, and an integrated roll cage. [TR4 88:7-19] Mr. Stilson talked at length about the alternative design of an integrated roll cage. He explained that the technology was feasible for the 2002 vehicle and, in fact, had been employed by Ford and General Motors in an experimental vehicle (the ESV) in the 1970s and integrated into the production models of the Ford Bronco and Chevrolet Blazer. [TR4 90:13-92:14] In fact, he personally integrated a roll cage into a production model 1996 Ford Explorer. [TR4 92:22-93:4] During these discussions, Mr. Stilson made it clear that his criteria for whether an alternative roof design was safe or adequate is whether it prevented the roof from crushing more than three inches. [TR4 91:19-21 ("And the objective of that roof – rollover was the roof was not to intrude into the occupant survival space in greater than **three inches**."; TR4 91:24-92:1 ("That drop test was from two feet and the roof could not crush more than **three inches**."); TR4 93:2-4 ("I integrated a roll cage into that vehicle and dropped it from three feet, and it didn't deflect more than **three inches**."); 93:9-10

("dropping those vehicles from up to two feet and again getting less than **three inches** of crush, just adding reinforcements.")]

Hyundai's argument that Mr. Stilson did not provide testimony that the alternative roof designs could reduce roof crush to about three inches is based on an unreasonably strict interpretation of Mr. Stilson's testimony. His entire discussion of alternative roof designs centered on the fact that these alternatives were safer because they would have reduced the roof crush to no more than three inches. Hyundai and the jury understood Mr. Stilson's standard for an alternative design being adequate is that it reduces roof crush to no more than three inches.

2. Hyundai's Expert Witness's Trial Testimony regarding Alternative Roof Designs that "Guaranteed" No Roof Crush during Rollover Accidents

Hyundai, its experts, and the entire automotive industry know that roofs can be designed so they do not crush in rollover accidents. During trial, Hyundai's expert engineer, Kenneth Orlowski, testified that alternative roof designs could be integrated into production vehicles to prevent roof crush during rollover accidents.

In the 1980s, Mr. Orlowski was part of a team of engineers at General Motors who conducted rollover tests, "to evaluate whether making the roof stronger would make it necessarily safer." [TR6 181:10-182:3] Because they used Chevrolet Malibus as the test vehicles, the tests are often referred to as the "Malibu" tests. [*Id.*] The Malibu rollover tests were conducted by using a sled to

release the vehicles with a trip speed of 32 m.p.h. [TR6 186:1-2] Half of the vehicles were rolled over with a production roof that crushed, and half were rolled over with an integrated roll cage that guaranteed there would be no roof crush. [TR6 185:14-16 "So we were **guaranteed not to get any pillar deformation** during these rollover tests so we could compare roll cage vehicles to production vehicles."]

During trial, Mr. Orlowski showed the jury video of one of the Malibu rollover tests with the integrated roll cage alternative design that prevented the roof from crushing. [TR6 182:11-21, 184:25-188:25] Mr. Orlowski chose this video to demonstrate to the jury the occupant kinematics of a crash test dummy during a rollover, **"without any roof deformation."** [TR6 182:11-21] Mr. Orlowski explained that the trip speed for the test rollover was 32 m.p.h. and the vehicle rolled three and one-half times. [TR6 186:1-2, 187:16] The Hyundai Accent in which Mr. Baca was an occupant had a trip speed of 34 m.p.h. and rolled over three and one-half times, so Mr. Orlowski was trying to show the jury the similarities of occupant kinematics in a relatively similar rollover scenario. He emphasized for the jury that even though the dummy's head extended, "beyond the window pane and, obviously, with this vehicle there's really been **no deformation**." [TR6 188:2-5]

On cross-examination, Mr. Orlowski was asked about the alternative design he integrated into the Malibu vehicles for his tests. He admitted that by 1990 automobile manufacturers had the ability to integrate alternative designs into their vehicles to keep the roof from crushing during rollover accidents. [TR6 210:7-17] Mr. Orlowski testified he had done it, it is done commercially, and he had done it in production vehicles. [TR6 210:18-23]

Hyundai's own expert has confirmed, therefore, that an alternative roof design could have been integrated that would have not merely reduced roof crush to three inches, but "guaranteed" no deformation at all during a rollover sequence similar to the one in this case. Consequently, even if Mr. Stilson had not testified that such alternative designs would have reduced the roof crush to about three inches, there was evidence presented by Hyundai's expert for the jury to find there was an alternative design that would have prevented the roof crush that caused Mr. Baca to die from positional asphyxia.

3. Mr. Stilson's Deposition Testimony regarding Alternative Designs that Reduce Roof Crush to no more than Three Inches

Dr. Burton was not in the courtroom when Mr. Stilson testified. He stated, however, that he relied upon representations Mr. Stilson made about his alternative designs before trial. [TR5 87:13-88:24] Dr. Burton, as an expert witness, is permitted to rely on testimony made known to him before trial. Rule 11-703, NMRA (experts can base opinions on facts or data, "made known to the

expert at **or before** the hearing.") (emphasis added); *Seese v. Volkswagenwerk A.G.*, 648 F.2d 833, 843-44 (3rd Cir. 1981) (holding expert accident reconstructionist was allowed to rely on deposition testimony of medical experts); *Bauman v. Centex Corp.*, 611 F.2d 1115, 1120 (5th Cir. 1980) ("In general, whether the facts relied on by an expert are in evidence, or ever could be in evidence is not relevant. The pertinent inquiry under Rule 703 is whether the facts are of a type reasonably relied on by experts in the particular field."). Hyundai disputes, however, that Mr. Stilson made representations during his deposition that his alternative designs would reduce the roof crush to three inches. [Hyundai Brief, pp. 23-24] But instead of cross-examining Dr. Burton on what Mr. Stilson said during his deposition, Hyundai chose to wait until after trial and then ask the court to ignore Dr. Burton's testimony.

Hyundai had an opportunity to attempt to discredit or disprove Dr. Burton during trial, but failed to do so. It cannot be heard to now complain on appeal about an issue it never raised at trial. Rule 12-216, NMRA; *Cockrell v. Cockrell*, 117 N.M. 321, 323, 871 P.2d 977, 979 (1994). Hyundai asked the trial court post-trial, and is now asking this Court, to consider the deposition testimony of Mr. Stilson, which Hyundai never introduced at trial. The trial court refused to consider the deposition, finding that if Hyundai wanted to attack Dr. Burton's

testimony based on what it believed was a misstatement of Mr. Stilson's deposition, it should have done so during trial. [TR9 22:14-24]

Because Hyundai did not raise the issue of whether Dr. Burton was correct in relying on Mr. Stilson's deposition testimony, it not only failed to preserve the issue for appeal, but it also prevented the Bacas from addressing the issue with Dr. Burton during trial. It was not until after the evidence had been closed and the trial had been completed that Hyundai for the first time claimed that Dr. Burton's opinions should be disregarded because he relied on Mr. Stilson's deposition testimony instead of his live testimony. Under Rule 11-705, an expert is not required to disclose the underlying facts or data upon which he bases his opinion unless asked on cross-examination. Rule 11-705, NMRA. Rule 11-705 places the burden squarely on the cross-examiner, "to ferret out whatever empirical deficiencies may lurk in the expert's opinion." *University of R.I. v. A.W. Chesterton Co.*, 2 F.3d 1200, 1218 (1st Cir. 1993). Because Hyundai failed to ferret out what it now claims are deficiencies in the basis for Dr. Burton's opinions, the Bacas were never put on notice that Hyundai believed there was any problem with Dr. Burton relying on Mr. Stilson's deposition testimony in support of his opinions. The Bacas, consequently, were effectively denied the opportunity to address the issue with Dr. Burton.

If Hyundai had cross-examined Dr. Burton on Mr. Stilson's deposition testimony, the jury would have been told that Mr. Stilson testified, in his deposition, that in his opinion the 2002 Hyundai Accent is defective and unreasonably dangerous because the roof lacks adequate roof crush resistance. [RP 2369, Depo. 40:5-41:2] It is his opinion that a roof should crush no more than three inches in a rollover accident. [RP 2385, Depo. 130:20-131:2 ("a maximum of three inches of residual crush."). He testified the, "equivalent drop height for this particular accident," was "12 to 18 inches." [RP 2386, Depo. 135:16-19] His alternative designs would produce no more than three inches of roof crush from a drop height of three feet (which exceeds the equivalent drop height of this particular accident). [RP 2385, Depo. 130:22-131:23 and Depo. 154:12-155:7] He also testified that his alternative designs could[2] be integrated

[2] Hyundai claims Mr. Stilson, "admitted he did not know how the Accent could be modified to meet his self-defined roof crush standard." [Hyundai Brief, p. 24] That is not what Mr. Stilson said. He testified the vehicle could have alternative designs involving reinforcement, structural foam, or an integrated roll cage. [RP 2389, Depo. 158:12-16] When he was asked how those specific alternative designs would be integrated into this specific vehicle, Mr. Stilson testified that because he would be integrating alternative designs into a vehicle that already had certain design parameters he was not exactly sure which alternative design he would use. But he then gave examples of what he might do to integrate his alternative designs in this specific vehicle without changing the styling of the existing vehicle. [RP 2389, Depo. 158:22-159:12] Hyundai is incorrect in claiming Mr. Stilson said he did not know how the Hyundai Accent *could* be modified. What he said is that he did not know how the Hyundai Accent specifically *would* be modified, but that it would be one of several options of available alternative designs.

into the 2002 Hyundai Accent. [RP 2389, Depo. 158:12-159:12] Consequently, if Hyundai had cross-examined Dr. Burton on the specific portions of Mr. Stilson's deposition testimony that he relied upon, its attempt to discredit Dr. Burton's opinions would have failed. It is not surprising then that instead of raising this issue on cross-examination, Hyundai waited until after the close of evidence to raise its new argument that the court should ignore the testimony of Dr. Burton because it was based on testimony he obtained before trial.

4. Mr. Stilson's Affidavit Testimony regarding Alternative Designs that Reduce Roof Crush to no more than Three Inches

During trial, Dr. Burton testified that he relied on what Mr. Stilson had said before trial, including his deposition testimony. Hyundai, however, focuses only on Mr. Stilson's deposition testimony and ignores the pre-trial testimony contained in Mr. Stilson's affidavit.

Before trial, Mr. Stilson and Dr. Burton provided affidavits in response to Hyundai's *Alberico* challenge. Mr. Stilson's affidavit contains the following testimony:

> it is my opinion that the 2002 Hyundai Accent at issue was defectively designed with regard to both its roof strength and its door retention system, and that ***the vehicle*** **could have been designed with a roof that would have sustained no more than two to three inches of deformation into the occupant space *in this accident*** without impairing the utility of the vehicle.

[RP 2660 (emphasis added)] Dr. Burton's affidavit provides the following:

> John Stilson is a vehicle design engineer expert who has opined that the fact the Hyundai Accent's roof and pillars deformed to such an extent was because of a defect in design and that it could have been designed so that it would not have deformed into the occupant space more than two to three inches. Based on this opinion by Mr. Stilson, I can, therefore, state not only that the deformation of the vehicle actually aided in or caused the death of Mr. Baca, but that the fact the vehicle was a cause of the death was due to a design defect that allowed the vehicle's roof to deform excessively into the occupant space.

[RP 2081]

These pre-trial affidavits not only support Dr. Burton's trial testimony that he had obtained facts or data from Mr. Stilson before trial regarding how an alternative design would have affected Mr. Baca's chances of survival, they also show that Hyundai's lawyers knew the exact basis for Dr. Burton's opinions before he got on the stand at trial. Hyundai knew Dr. Burton was relying on Mr. Stilson's opinions that he had received before trial.

Hyundai's argument on appeal that Dr. Burton had no basis for his opinion is contrary to the trial testimony of Mr. Stilson, contrary to the trial testimony of Hyundai's own expert engineer, and contrary to the pre-trial testimony of Mr. Stilson in his deposition and affidavit. There was a sufficient basis for Dr. Burton's testimony that the defect in the Hyundai Accent caused Mr. Baca's death.

B. There was Sufficient Evidence of a Defect in the Door, but the Issue is Not Outcome Determinative in this Appeal

Hyundai argues there is no evidence to link the defect in the door to Mr. Baca's death. The Bacas have never contended the defect in the door was alone a cause of Mr. Baca's death. Rather, they contend that to the extent the door coming open during the rollover weakened the structure of the roof, the fact the door came open was due to a design defect. Consequently, the Bacas presented evidence to prove that to the extent the door opening caused additional roof crush, the injury caused by the total amount of roof crush would be related to a combination of defects in the roof and door.

The door was defectively designed so that it came open during the rollover sequence. [TR5 63:5-22, 79:6-16, 80:10-22] Mr. Stilson showed the jury several photographs and animations of doors and also showed the subject door and an exemplar door. In doing so, he showed the jury that the upper door frame latches to the side roof rail from the A-pillar to the B-pillar, which necessarily provides additional structural support for the side roof rail. [TR5 55:15-56:8] In fact, one of Mr. Stilson's alternative designs for the roof is an integrated roll cage that provides a similar type of support along the side roof rail. [TR5 88:1-19, 91:8-93:4] Mr. Stilson also testified Hyundai could have used a cable system in the door instead of the tension rod system used in the subject door. [TR5 79:17-80:9] Hyundai actually uses that alternative cable system in some of its doors. [*Id.*]

Hyundai claims Mr. Stilson testified the door opening did not contribute to the roof crush. [Hyundai's Brief, p. 28] Mr. Stilson opined that during the rollover, the front fender of the vehicle crushed back, causing the A-pillar to crush back into the door, which resulted in the actuation of the tension rods and the opening of the door. [TR5 57:19-58:16] Up to that point, the door remained closed and did not affect the roof strength. It was only after the door opened that it could have had an affect on the roof strength.

In any event, the jury was not required to find defects in both the door and the roof in order to find a defect in the Hyundai Accent caused Mr. Baca's death. If the jury found the door opening did not contribute to the extent of the roof crush in the rollover sequence, then it was not required to find a defect in the door. But to the extent the jury found the door opening during the rollover did contribute to the roof crush, the Bacas presented sufficient evidence for it to still find defects in the Hyundai Accent (a combination of the roof and the door) caused Mr. Baca's death.

If Hyundai is correct that the opening of the door did not contribute to the roof crush, the only issue for this Court is whether the Bacas proved a design defect in the roof. But if the opening of the door contributed to the roof crush, there is also sufficient evidence to support the jury verdict that Mr. Baca's death was caused by a defect in the vehicle (i.e., the roof and the door). Because

Hyundai does not dispute there was evidence of a design defect in the door and a reasonable alternative design for that defect, the issue of the door defect does not raise any issue of error and is not relevant to whether this Court should affirm the judgment.

C. There was Sufficient Evidence for the Jury to Find a Separate Injury Caused by the Design Defect

After arguing the Court should ignore Dr. Burton's testimony regarding Mr. Baca's death being caused by the roof crush, Hyundai argues the Court should ignore Dr. Burton's testimony regarding the degree of injury enhancement caused by the lack of survival space.

Under New Mexico law, when there are multiple tortfeasors involved in causing a plaintiff's injuries, the issue of the plaintiff's increased harm caused by the second tortfeasor can be decided by the jury in one of two ways. In *Payne v. Hall*, 2006 NMSC-029, 139 N.M. 659, 137 P.3d 599, the Supreme Court explained that if there is evidence of a separate, divisible injury caused by the second tortfeasor, that tortfeasor will be responsible only for the amount of the increased harm. *Id.* at ¶45. But if it is determined the increased harm is not a divisible injury, the several liability of the tortfeasors will be determined by the jury comparing fault for the entire harm. *Id.* The Supreme Court again acknowledged this process of providing alternative sets of jury instructions and questions (one for divisible injuries and the other for indivisible injuries), when it

recently adopted new UJIs. UJI 13-1802E, 13-2222. Although these UJIs had not yet been adopted at the time of trial, they are substantially similar to the instructions and verdict form requested by Hyundai and given to the jury in this case. [RP 2865, 2878-83, 2893, 2909-14, 2998, 3015-18] Hyundai even submitted a trial brief specifically requesting the court instruct the jury that if it were to find an indivisible injury to Mr. Baca it must compare the fault of Hyundai and Ms. Montes, so that Hyundai would be held liable only for its percentage of fault in causing Mr. Baca's indivisible injury. [RP 2928-38]

The jury, in this case, was asked to decide whether the Bacas had proven the injuries sustained by Mr. Baca because of the defectiveness of the vehicle were separate and distinct from the injuries he sustained in the rollover accident. [RP 3015] It answered that question "Yes" and, therefore, skipped the questions on comparative responsibility between Ms. Montes and Hyundai. [RP 3016-17]

There was substantial evidence in the record for the jury to determine the divisible increased harm Mr. Baca suffered because of the defect in this Hyundai Accent. Dr. Burton and the New Mexico Medical Examiner both opined that Mr. Baca died not as a result of any injuries he sustained in the rollover sequence, but because of positional asphyxia, which occurred after the rollover sequence had come to rest. [TR5 10:24-13:10, 23:23-25, 49:19-50:4, 58:11-59:10] Mr. Baca's death was caused by factors that were wholly different from those that affected

him during the rollover. To distinguish between the types of injuries, Dr. Burton provided detailed descriptions of the injuries Mr. Baca sustained during the rollover. [TR5 20:24-23:25, 24:8-28:19, Exs. 31 and 35] These injuries included soft tissue injuries to both sides of his face and a laceration to his head. [*Id.*] Dr. Burton opined, and Hyundai's expert Dr. Raddin agreed, that none of the injuries sustained by Mr. Baca during the rollover sequence were life-threatening or a cause of his death. [TR5 26:11-18, 58:20-59:6; TR7 84:6-87:9] The most significant injury sustained by Mr. Baca was a laceration to his head. Dr. Burton described the consequences of that injury as, "it would have been sewn up . . . and the hair would have grown back around the edges of it except for there being a scar there later. That would have been the only consequence of that injury." [TR5 26:14-18]

Dr. Burton then presented the jury with illustrations, based on a person the size, height, and weight of Mr. Baca comparing the injuries that would be suffered under a non-deformed roof with those that would be suffered with a roof that deformed like this Hyundai Accent. [TR5 31:1-36:23, exhibit 32A, noting that the first illustration is, "showing what happens to a person in a non-deformed roof."] Dr. Burton then showed more illustrations comparing what would happen to people in deformed and non-deformed vehicles. [TR5 36:24-38:16, exhibit 32B] Finally, Dr. Burton described and showed photographs of testing he

personally performed to demonstrate the difference in potential injuries that would occur based on the amount, or lack, of survival space, while belted in a vehicle upside down. [TR5 44:19-49:7] The test was performed by having Dr. Burton suspended in his belt in an inverted vehicle with incrementally decreasing space between the seat cushion and the roof. [*Id.*] He explained that when he was suspended upside down with no deformation and with a correlation of three inches of deformation, he would not suffer any injuries and, "could have stayed there indefinitely, basically." [TR5 48:1] But when he was suspended upside down under conditions closer to those Mr. Baca was under with the crushed roof of the Hyundai Accent, he could not breath. [TR5 48:17-49:7]

Dr. Raddin provided similar testimony regarding the injuries Mr. Baca sustained during the rollover accident. Dr. Raddin determined the injuries to Mr. Baca's head and the sides of his face were caused because Mr. Baca's head went outside the plane of the passenger side window during the rollover sequence. [TR7 28:17-22, 30:11-31:5, 37:22-40:15] Dr. Raddin showed the jury a diagram of an occupant in a vehicle with a non-deformed roof to show that an occupant's head can get outside the window plane during a rollover with a non-deformed roof, and explained that the injuries Mr. Baca suffered to his face and head were "typical" of the types of injuries sustained in those situations with a non-deformed roof. [TR7 38:10-40:3, exhibit 292] Dr. Raddin agreed with Dr. Burton,

however, that none of these injuries sustained by Mr. Baca during the rollover sequence were life-threatening or the cause of his death. [TR7 84:6-87:9]

Even though there was evidence that Mr. Baca's injuries that resulted in his death by positional asphyxia were completely separate and divisible from the injuries he sustained to his face and head during the rollover accident, that the rollover sequence had completely come to rest before Mr. Baca began to experience positional asphyxia, and that if the roof had not deformed Mr. Baca would have suffered no additional injuries, Hyundai argues the evidence was not sufficient for the jury to find the degree of enhanced injuries caused by the defect. Hyundai claims the evidence is not sufficient to satisfy the requirements of the Third Circuit case of *Huddell v Levin*, 537 F.2d 726 (3rd Cir. 1976) and the Delaware case of *Mazda Motor Corp. v. Lindahl*, 706 A.2d 526 (Del. 1998). These cases are distinguishable on their facts because Mr. Baca's injuries caused by the defect occurred completely after and separate from the original accident sequence, where as the injuries in *Huddell* and *Lindahl* were caused in the initial crash sequence. Hyundai also argues for too precise a test for measurement of increased harm that is not consistent with the law of New Mexico. Finally, Hyundai's request for judgment as a matter of law on this issue fails to recognize its own request for comparative responsibility if the damages are indivisible.

1. The Facts of this Case are Distinguishable from *Huddell* and *Lindahl* because the Injuries Caused by the Defect were Temporally Separated from the Rollover Sequence

There is no dispute that in crashworthiness cases the plaintiff is required to prove some causation between the defect and the increased or enhanced harm to the plaintiff. Where courts have sometimes disagreed is regarding the degree of evidence necessary to prove the increase in harm caused by the defect. The cases relied upon by Hyundai involve situations where the court was attempting to determine the degree of evidence required to prove the distinction between the injuries that occurred in one accident sequence involving a defective product. In *Huddell* and *Lindahl*, the courts found it was the plaintiff's burden, "to establish that the injuries actually received in an accident with a defective product are greater than the injuries that would have been received in an accident with a non-defective product." *Lindahl*, 706 A.2d at 532.

Automotive crashworthiness cases are sometimes referred to as "second collision" cases because they involve not only a collision between the vehicle and some other object, but also a second collision, during that same accident sequence, between the occupant and part of the vehicle. The facts of this case, however, present a wholly separate injury sequence, separated by time from the initial rollover sequence. The injuries Mr. Baca sustained because of the defect (i.e., the roof crush) did not occur during the rollover sequence. Consequently, the issue

Hyundai raises regarding what injuries Mr. Baca would have sustained *during* a rollover sequence with a non-deformed roof are misguided because the issue is what injuries would Mr. Baca had sustained *after* the rollover sequence with a non-deformed roof. In *Caiazzo v. Volkswagenwerk A.G.*, 647 F.2d 241, 250 n.16 (2nd Cir. 1980), the court noted the burden of apportionment set forth in *Huddell* is "insignificant" in cases where the second collision injuries are, "clearly distinguishable from those suffered during the initial collision," such as in post-collision fuel-fed fires. *Id.* (citing *Polk v. Ford Motor Co.*, 529 F.2d 259 (8th Cir. 1976) (the injuries were not caused during the rollover, but rather, because the occupant was trapped by the crushed roof during the post-collision fuel-fed fire)).

2. Hyundai Argues for Too Precise a Measurement of Additional Harm

Regardless of whether the issue is comparison to injuries that would have occurred after the rollover sequence or during the rollover sequence, there was sufficient evidence presented to the jury distinguishing the injuries that would have occurred with a non-deformed roof to the death that did occur with the deformed roof. Hyundai's experts, Dr. Raddin and Dr. Orlowski, as well as Dr. Burton, demonstrated to the jury what would happen to an occupant of a vehicle in a rollover with a non-deformed roof. [TR6 182:11-21, 188:20-23 (occupant can break the plane of the window and sustain no injuries); TR5 58:11-59:10; TR7 37:22-40:15 and exhibit 292 (occupant can break the plane of the

window and sustain non-fatal injuries similar to the type incurred by Mr. Baca)] Dr. Burton showed the jury "what happens to a person in a non-deformed roof." [TR5 31:2-34:4, 38:14-16, 44:19-49:7] The jury was also told that Ms. Montes, whose roof crushed in only a few inches (which is consistent with the alternative designs), had no significant injuries and walked away from this accident. [TR4 32:2-7; TR7 81:21-82:12]

Hyundai's contention that the Bacas were required to demonstrate the exact injuries Mr. Baca would have sustained in a vehicle with a safer alternative design is unfounded. In *Couch v. Astec Industries, Inc.*, 2002-NMCA-084, ¶38, 132 N.M. 631, 53 P.3d 398, the court held that, "such precision is not required by our case law." In *Couch*, the plaintiff claimed a conveyor belt was defective because it should have shut off within a second after his foot was caught. *Id.* at ¶36. The plaintiff's expert testified that if the machine had cut off within five seconds, the plaintiff's injuries would have been restricted to the area below the knee. *Id.* at ¶37. The court held this testimony, "supports an inference" of the degree of additional harm and, "[a]lthough no testimony specifically pinpointed a place on Plaintiff's leg where the entanglement would have stopped upon activation of an emergency pull cord, such precision is not required by our case law." *Id.* at ¶38. Consequently, it was within the jury's prerogative, "to assess the degree of enhancement and appropriate damages." *Id.*

The Tenth Circuit interpreted New Mexico law to allow the jury to infer the degree of enhanced injury even though there was no direct testimony regarding what injuries would have occurred in the accident without the defect. *Cleveland v. Piper Aircraft Corp.*, 890 F.2d 1540, 1552 (10th Cir. 1989). In *Cleveland*, the plaintiff's expert testified that if plaintiff had been wearing a shoulder harness, he would not have struck the camera in the front seat. Even though the experts did not specify what injuries the plaintiff would have sustained if a safer alternative design had been used, the court noted the only significant injury the plaintiff received was a massive head injury and thus, "it is reasonably inferable from Plaintiff's evidence that Plaintiff would have received no injury had he been wearing a shoulder harness." *Id.* at 1552. The court held the, "evidence amply supports the reasonable inference that Plaintiff would have sustained no injuries in the absence of the alleged crashworthiness design negligence." *Id.* at 1552 ("there was evidence from which the jury could properly find that Plaintiff would have received no injuries if he had been wearing a shoulder harness.").

Other courts that have applied the *Huddell* standard have agreed that the plaintiff does not need to present exact proof of the injuries that would have occurred with the alternative design. In *Reed v. Chrysler Corp.*, 494 N.W.2d 224 (Iowa 1992), the plaintiff claimed the vehicle was defective because it used a fiberglass roof and should have used a metal roof. *Id.* at 227. The court held that

in determining a just and reasonable amount of enhanced damages, "a jury may act on probable and inferential, as well as direct and positive proof." *Id.* The court further held that, "although Reed cannot show the injuries that would have occurred with a metal top, he contends he satisfied this element by showing the injury to his arm would not even have occurred with a metal top. We agree." *Id.* at 228. In response to Chyrsler's argument that the plaintiff had to establish his precise injuries, the court held, "[w]here some damages appear, recovery should not be denied merely because of difficulty in fixing an exact amount." *Id.* Likewise, the Third Circuit (the court that authored the *Huddell* opinion) has upheld awards based on inferences of enhanced damages. In *Seese v. Volkswagenwerk A.G.*, *supra*, the court relied, in part, on the fact that another occupant of the vehicle who was not subjected to the defect had only slight injuries as support for the conclusion that if the plaintiff had not been subjected to the defect he would have sustained no injuries. *Id.* at 845. In *Dawson v. Chrysler Corp.*, 630 F.2d 950 (3rd Cir. 1980), the court found there was evidence to satisfy the *Huddell* standard because had the occupant not been subjected to forces caused by the defect, "it is a reasonable inference that his cervical vertebrae would not have been ruptured." *Id.* at 960.

Again, there was sufficient direct evidence that if Mr. Baca had been in a vehicle with an alternative design he would have suffered injuries no greater than

what he was subjected to during the rollover sequence. But even without this direct evidence, the jury was presented with ample evidence allowing it to infer that Mr. Baca's injuries would have been no greater than the superficial, non-life-threatening injuries he sustained in the rollover sequence before his internal organs and body weight cut off his airways that resulted in positional asphyxia. Consequently, even if the court were to apply the *Huddell* factors to this case where the injuries caused by the defect were separate, distinct, and divisible by time and location, there was still ample evidence to support the jury finding of a specific divisible injury.

3. The Jury was Not Required to Find Mr. Baca's Death was Caused by being Unconscious

Apparently understanding the weakness in its argument that there was no evidence to support a finding of enhanced injuries separate from the injuries sustained in the rollover sequence, Hyundai argues the jury was required to find Mr. Baca was unconscious after the rollover accident and would have died regardless of whether the roof had crushed in on him. Hyundai's expert, Dr. Raddin, opined that when a person is unconscious he can die of positional asphyxia as a result of the tongue eventually becoming relaxed and its muscle group lengthening and occluding the airways. [TR7 68:19-69:16] Hyundai claims this testimony, "establishes that Mr. Baca would have died in *any* redesigned vehicle that still landed on its roof in this rollover accident." [Hyundai

Brief, p. 32 (emphasis in original)] Hyundai is wrong that Dr. Raddin's testimony "establishes" any fact in this case, especially that Mr. Baca would have died regardless of the roof crush.

One reason Hyundai's argument is wrong is because it mischaracterizes Dr. Raddin's testimony. First, Dr. Raddin testified that he had no opinion as to the cause of Mr. Baca's death. [TR7 79:19-21] Consequently, Hyundai is incorrect to claim Dr. Raddin testified that Mr. Baca's death was caused by *anything*, since he clearly held no such opinions. Second, although Dr. Raddin testified that he believed Mr. Baca was unconscious after the rollover accident, the issue was not conclusively established. Dr. Burton explained that Ms. Montes thought Mr. Baca, "was making eye movements, trying to open his eyes; that he was breathing but breathing irregularly," but that he could not render a medical opinion, one way or the other, whether Mr. Baca was conscious immediately after the rollover accident. [TR5 63:16-64:7] Third, Dr. Raddin did not testify that unconscious people always die of positional asphyxia, but rather that it "increases the likelihood" that it could happen. [TR7 71:11-23] Finally, when discussing Mr. Baca's specific situation, Dr. Raddin testified about a hypothetical situation where Mr. Baca remained hanging upside down in the vehicle for 20 minutes. [TR7 74:21-75:7] In this case, however, Ms. Montes and several other people were at the accident scene right after the rollover stopped and would have been

able to upright Mr. Baca from hanging in his seat belt well within 20 minutes. [TR6 213:19-214:18; TR7 81:21-82:12] Because Dr. Raddin did not testify that Mr. Baca died because he was unconscious and qualified his opinions on factors that might not be consistent with the facts of this case as determined by the jury, Hyundai is incorrect to claim his testimony "establishes" that Mr. Baca would have died regardless of the roof crush.

Even if Dr. Raddin had unequivocally testified that in his opinion the cause of Mr. Baca's death was positional asphyxia caused by being unconscious, the jury was not required to believe such expert testimony. The trier of fact always has the power not to believe an expert witness and come to a contrary conclusion. *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627-28 (1944) ("if the court admits the testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony. The jury, even if such testimony be uncontradicted, may exercise their independent judgment."). In fact, the trial court specifically instructed the jury in this case that they could give expert testimony whatever weight they believe it deserves or reject it entirely. [TR2 42:1-5] Consequently, Hyundai cannot rely on its expert's opinion testimony to "establish" something that is contrary to the jury verdict.

There was evidence Mr. Baca's death was not caused by any of the soft-tissue injuries he sustained in the rollover sequence, but was caused by positional

asphyxia resulting from the position of his body pinned in the vehicle because of the massive roof crush. There is evidence that if reasonable alternative designs had been integrated, the roof would not have deformed to the point where it posed a threat of positional asphyxia and Mr. Baca would have survived. The injuries Mr. Baca sustained during the rollover sequence were divisible in time, location, and effect from the injuries he sustained because of the defective roof once the vehicle came to a stop. Because there was evidence that the defect in the vehicle caused Mr. Baca's death and the jury had the ability to find the injuries caused by the defect were separate from the injuries that would have otherwise resulted, this Court should affirm the verdict and the judgment.

III. NEW MEXICO LAW DOES NOT REQUIRE THE JURY FIND A REASONABLE ALTERNATIVE DESIGN AS AN ELEMENT OF DESIGN DEFECT

Although the Bacas presented evidence of reasonable alternative designs to the defects in the roof and door, Hyundai and its amicus argue the jury verdict should be set aside because the jury was not asked to expressly find the existence of a reasonable alternative design as an element of the strict liability claim. The trial court refused to include jury instructions Hyundai proposed that deviated from the UJI and re-defined a defective product as one that fails to adopt a reasonable alternative design. The trial court's decision was not error. First, the trial court was required to instruct the jury consistent with the UJI. Second, the New Mexico Supreme Court expressly refused to adopt the Restatement (Third) of

Torts: Products Liability, §2, which is the basis for Hyundai's argument. Third, even if New Mexico were to adopt the Restatement (Third) of Torts: Products Liability, §2, the current UJI, which was given in this case, is sufficient for the jury to consider alternative designs. Fourth, the instruction requested by Hyundai would have been erroneous even under the new standard Hyundai is asking this Court to create, so that the trial court's refusal to include it was not error.

A. The Trial Court was Required to Instruct the Jury with the Language of UJI 13-1407

The trial court is required to adhere to the specific language of the UJI. Rule 1-051(A), NMRA ("The trial judge **shall** instruct the jury in the language of the Uniform Jury Instructions on the applicable rules of law.") (emphasis added). There is no dispute the trial court was required to instruct the jury on the "unreasonable-risk-of-injury" standard for products liability, which is set forth in UJI 13-1407. The trial court's Jury Instruction No. 10 properly instructs the jury on the three paragraphs contained in UJI 13-1407. *Compare* RP 2982 *with* UJI 13-1407. The trial court, consequently, properly exercised its duty and instructed the jury, "in the language of" UJI 13-1407. Rule 1-051(A), NMRA.

Amicus argues the trial court was not required to instruct the jury in the language of UJI 13-1407 because it is an erroneous statement of the law of New Mexico. But the New Mexico Supreme Court has expressly approved these exact

jury instructions as being consistent with the law of New Mexico.[3] *Brooks v. Beech Aircraft Corp.*, 120 N.M. 372, 379-80, 902 P.2d 54, 61-62 (1995). To find these jury instructions erroneous would require a reversal of the *Brooks* decision, which neither the trial court nor this Court can do. Consequently, even if this Court decides the law of New Mexico should change to require the jury make an express finding of an alternative design, it would require a reversal of the law that existed at the time the trial court provided UJI 13-1407 to the jury in this case. Because the trial court instructed the jury with the language of the UJI consistent with the law at the time of trial, its instruction was not in error.[4] This Court should, therefore, affirm the judgment of the trial court.

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[3] Hyundai implies that the trial court found there was no authority one way or the other on whether it should require the jury find a safer alternative design as an element of the products liability claim. [Hyundai Brief, p. 41] To the contrary, the court found there was authority contrary to Hyundai's position. [TR7 130:14-17 "So what I see in the New Mexico cases is a willingness to allow lawyers to argue it, and I don't see any controlling authority in New Mexico that would make alternative design an element of this type of case."]

[4] Hyundai argues that because this Court reviews jury instructions *de novo* it can remand this case for a new trial based on erroneous jury instructions. That argument, however, is based on the erroneous assumption that the *Brooks* decision had been reversed by the time of trial. If this Court or the Supreme Court were to adopt the arguments of Hyundai and its amicus and find that under New Mexico law a jury must find an alternative design as a predicate for a finding of design defect, it would be adopting new law that was not applicable to this case when it was submitted to the jury. Any such finding would be prospective in nature and would not affect the judgment in this case. *Beavers v. Johnson Controls World Serv.*, 118 N.M. 391, 397-98, 881 P.2d 1376, 1383-84 (1994) (selective prospectivity is applicable when there is a new principle of law overruling precedent relied on and there would be inequitable results if applied retroactively).

B. The New Mexico Supreme Court Expressly Refused to Adopt the Reasonable Alternative Design Standard Hyundai is Promoting

Hyundai and its amicus base their argument regarding jury instructions on a misunderstanding of the Supreme Court's analysis of strict products liability set forth in *Brooks*. Relying on an *Erie*-guess that did not bind the trial court, they claim *Brooks* adopted a risk-utility test, like that set forth in the Restatement (Third) of Torts: Products Liability §2, for design defect cases.[5] Hyundai and its amicus argue, "the New Mexico Supreme Court has interpreted UJI 13-1407 NMRA to **require** a risk-utility test for defective design, and that test necessarily **requires** proof of a reasonable alternative design." [PLAC Brief, p. 3 (emphasis added)] This argument is wrong because it is based on a misconception of *Brooks*.

1. The Controversy regarding Design Defect Tests at the time *Brooks* was Decided

The concept of modern products liability law began with the case of *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), which held that manufacturers had a duty to all persons harmed by a product that was

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[5] *Morales v. E.D. Etnyre & Co.*, 382 F.Supp.2d 1278 (D. N.M. 2005) did not address whether the jury should be given non-UJIs regarding alternative designs and seemed to indicate UJI 13-1407 was sufficient, as long as the party made a prima facie showing of alternative design so that the issue of defect could go to the jury. *Id.* at 1284. Consequently, even though the Bacas disagree with the *Erie*-guess in *Morales* that New Mexico would adopt the Restatement (Third) of Torts: Products Liability, §2(b), the prima facie evidence presented in this case satisfies the holding in *Morales*.

negligently made, so that the cause of action was based in tort, not contract. *Id.* at 389, 111 N.E. 1050. In 1965, the Restatement (Second) of Torts, §402A adopted the doctrine of strict products liability, and recommended the test for whether a product is defective be based on "consumer expectation." Restatement (Second) of Torts, §402A, cmt. (i). Specifically, §402A would impose liability for products that are "unreasonably dangerous" to "the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Id.*

Although the consumer expectation test was widely adopted, some courts refused to adopt it, believing it improperly injected the concept of foreseeability into strict liability. *See, e.g., Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 882-83 (Alaska 1979). Some courts rejected the consumer expectation test in favor of a balancing test that inquired whether the product's risks outweighed its benefits. *See e.g., Radiation Technology, Inc. v. Ware Construction Co.*, 445 So.2d 329, 331 (Fla. 1983). This test is often referred to as the "risk-utility" test. Other courts established alternative tests, allowing for a determination of defect based on either the consumer expectation test or the risk-utility test. *Barker v. Lull Engineering Co.*, 20 Cal.3d 413, 435, 573 P.2d 443 (1978). To assist the jury in evaluating a product's risks and utilities, several courts set forth a list of nonexclusive factors derived from an article published by Dean John Wade. *See*

e.g., Radiation Technology, Inc., 445 So.2d at 331; *see also* J. Wade, "On the Nature of Strict Tort Liability for Products," 44 Miss.L.J. 825, 837-38 (1973).

In the 1990s, the American Law Institute undertook to substantially rewrite the law of products liability as it had been set forth in §402A. Restatement (Third) of Torts: Products Liability §§1-21 (1998). One of the major distinctions between the Restatement (Third) of Torts: Products Liability and §402A is the ALI's abandonment of the consumer expectation test in favor of the risk-utility test. Further, instead of adopting Dean Wade's nonexclusive factors for a jury to consider as many courts had done, the Restatement (Third) of Torts: Products Liability, §2(b) made proof of an alternative design an element or prerequisite for establishing a design defect. Restatement (Third) of Torts: Products Liability, §2(b) ("A product . . . is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller . . . and the omission of the alternative design renders the product not reasonably safe."). The reporters to the Restatement (Third) of Torts: Products Liability claimed most states had rejected the consumer expectation test in favor of the risk-utility test. Restatement (Third) of Torts: Products Liability, §2, Reporter's Note, cmt. d. This position drew heavy criticism from commentators and courts who found, "the majority of jurisdictions *do not* impose upon plaintiffs an absolute requirement to prove a

feasible alternative design." *Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319, 1331 (Conn. 1997) (citing several law review articles addressing the Draft Restatement (Third)) (emphasis in original); *see also* P. Lavelle, "Crashing into Proof of a Reasonable Alternative Design: The Fallacy of the Restatement (Third) of Torts: Products Liability," 38 Duq.L.R. 1059 (2000).

2. *Brooks* – New Mexico Weighs in on the Tests for Proving Design Defects

The primary issue in *Brooks* was whether New Mexico requires a design defect case be tried under a theory of negligence or strict liability. In addressing this issue, the Court took the opportunity to clarify several issues regarding design defect cases under New Mexico law. It detailed four reasons why New Mexico should apply strict liability instead of negligence to design defect claims in general and crashworthiness claims in particular. It explained that New Mexico's "unreasonable-risk-of-injury" test is not limited to consumer expectations or risk-utility analysis. It then expressly refused to adopt the Restatment (Third) of Torts: Products Liability (which at that time was still in draft) because the Court considered it to be based on negligence, not strict liability.

a. Brooks – *Design Defect Sounds in Strict Liability, not Negligence*

When this Court adopted the crashworthiness doctrine in *Duran v. General Motors Corp.*, 101 N.M. 742, 688 P.2d 779 (Ct.App. 1983), it held the claim sounded only in negligence. *Duran*, 101 N.M. at 745-47, 688 P.2d at 782-84. In

Brooks, the plaintiff brought products liability claims in both negligence and strict liability. Consequently, the issue of whether to allow design defect claims in strict liability was squarely before the Court. After considering the reasons Beech and its amici gave for requiring negligence as the standard for measuring a manufacturer's liability for defective designs, the Court provided the policy reasons for imposing strict liability. First, and foremost, the Court found that strict liability places, "the cost of injuries caused by *defective* products on the manufacturer who is in a better position to pass the true product cost on to all distributors, retailers, and consumers of the product." *Brooks*, 120 N.M. at 375, 377, 902 P.2d 57, 59 (emphasis in original). Second, the Court found imposing strict liability would relieve the injured plaintiff of the "onerous burden" of establishing the manufacturer's negligence. *Id.*, 120 N.M. at 375-77, 902 P.2d at 57-59. Third, imposing strict liability provides the full chain of protection from suppliers who are in a better economic bargaining position to select reputable and responsible manufacturers and get them to bear financial responsibility for product-related injuries. *Id.*, 120 N.M. at 376-77, 902 P.2d at 58-59. Fourth, imposing strict liability serves the interests of fairness by placing financial responsibility on those who cast the defective product into the stream of commerce and profited thereby. *Id.*

b. **Brooks** – ***New Mexico Design Defect is not based on Protypes, Consumer Expectation Test, Risk-Utility Test, or Reasonable Alternatives, but instead, on the Reasonable-Risk-of-Injury Test that Allows Proof and Argument under any Rational Theory of Defect***

In addressing these policy considerations favoring strict liability (which focuses on the product) instead of negligence (which focuses on conduct in designing the product), *Brooks* held that New Mexico does not measure product liability by comparing the defective product to a "prototype." *Id.*, 120 N.M. at 379, 902 P.2d at 61. *Brooks* expressly held that New Mexico does not adhere to either the consumer expectation test or the risk-utility test in evaluating whether a product is defective, but rather, allows "proof and argument under any rational theory of defect." *Id.* Although Hyundai and its amicus claim that New Mexico "requires" a finding of design defect based on the risk-utility test, *Brooks* expressly holds this is not true.

> In New Mexico, however, a defect giving rise to strict products liability is not measured by comparison with a prototype. **We have for fifteen years rejected the definitions of "defect" – "defect is defect," "consumer expectation," "risk-utility," "reasonable alternative" – that have fueled much of the controversy as product-supply interests strike back at liability for defective products.** Our "reasonable-risk-of-injury" test seems to have allowed for proof and argument under any rational theory of defect.

Id. (emphasis added). There could not be a clearer repudiation of strict adherence to the risk-utility and reasonable alternative design doctrines than this holding in *Brooks*. By stating that New Mexico does not measure a defect by "comparison

with a prototype" and that it has rejected the "risk-utility" test and the "reasonable alternative" test that have, "fueled much of the controversy," *id.*, the *Brooks* court was clearly referring to proposals set forth in the Restatement (Third) of Torts: Products Liability regarding adoption of the risk-utility test and requiring reasonable alternative designs and the controversy the Restatement had caused. In the end, the Court held that instead of adopting any of these particular tests, New Mexico would continue to adhere to its "unreasonable-risk-of-injury" test that does not require a finding of consumer expectation, risk-utility, or reasonable alternative designs. *Id.*

c. **Brooks** – ***New Mexico's UJIs allow the Jury to Consider Reasonable Alternative Designs***

After explaining that New Mexico's "unreasonable-risk-of-injury" test does not require any of these particular definitions that were causing such controversy, *Brooks* analyzed the products liability UJIs to determine whether they were consistent with imposing strict liability under the "unreasonable-risk-of-injury" test. *Brooks*, 120 N.M. at 379-80, 902 P.2d at 61-62. The Court noted the instructions directed the jury to determine the defectiveness of the product by whether there was an unreasonable risk of injury resulting from the condition of the product, not the conduct of the manufacturer. *Id.* The jury was then told an unreasonable risk of injury is one that a reasonably prudent person having full knowledge of the risk would find unacceptable. *Id.* Finally, the jury is instructed

to consider, "the ability to eliminate the risk without seriously impairing the usefulness of the product or making it unduly expensive." *Id.* The Court found this risk-utility component of its "unreasonable-risk-of-injury" test allowed the jury to focus attention on evidence reflecting meritorious choices made by the manufacturer on alternative designs. *Id.*

Although *Brooks* recognized the instructions allowed the jury to make a risk-utility analysis, it distinguished this approach from the Restatement (Third) of Torts: Products Liability, which is based in negligence. *Brooks*, 120 N.M. at 380-81, 902 P.2d 62-63. The Court ultimately concluded that, "[g]iven the risk-benefit calculation on which the jury is instructed in New Mexico, and the policy considerations that favor strict liability, we believe that it is logical and consistent to take the same approach to design defects as to manufacturing flaws." *Id.*, 120 N.M. 381, 902 P.2d at 63.

C. UJI 13-1407 Allows the Jury to Consider Reasonable Alternative Designs, Consistent with the Restatement (Third) of Torts: Products Liability

Hyundai and its amicus are incorrect to characterize *Brooks* as adopting an absolute risk-utility requirement for a finding of design defect. *Brooks* stated that New Mexico's "unreasonable-risk-of-injury" test is not limited to a consumer expectation or a risk-utility analysis, but allows for, "proof and argument under any rational theory of defect." *Brooks*, 120 N.M. at 379, 902 P.2d at 61. But

even assuming the risk-utility analysis that *Brooks* recognized as a proper basis for a finding of design defect was a required test, the Court found the UJIs (which were given to the jury in this case) were sufficient for the jury to make a risk-utility analysis. *Id.*, 120 N.M. at 380, 902 P.2d at 62 ("our existing uniform jury instructions allow proof and argument on all of the factors suggested by the Restatement (Third) of Torts as relevant in determining whether the omission of a reasonable alternative gave rise to an unreasonable risk of injury."). In other words, even if New Mexico requires a finding of defect be based on a risk-utility analysis, it does not require a specific finding of a reasonable alternative design. *See Potter*, 694 A.2d at 1331, n.11 (listing *Brooks* and New Mexico as a jurisdiction in which feasible alternative design is merely one of several factors the jury may consider in determining whether a product design is defective).

Brooks noted that the current jury instructions "focus jury attention on evidence" regarding alternative design and allow arguments of all the factors "relevant in determining whether the omission of a reasonable alternative gave rise to an unreasonable risk of injury." *Brooks*, 120 N.M. at 380, 902 P.2d at 62. Consequently, the trial court was correct in finding that New Mexico requires giving the current UJIs and allowing the attorneys to argue the existence or appropriateness of reasonable alternative design. [TR7 130:5-25]

D. Hyundai Waived any Error by Failing to Submit a Correct Instruction on Alternative Design under Strict Liability

Finally, even if Hyundai and its amicus are correct that New Mexico law requires the jury base a finding of design defect on a risk-utility analysis that requires a finding of reasonable alternative design, Hyundai failed to preserve error on this issue because it failed to present the trial court with a "correct instruction." Rule 1-051(I), NMRA.

Hyundai's requested instructions regarding alternative design included the three paragraphs for UJI 13-1407, plus two extra paragraphs that instructed the jury as follows:

> A product is defective in design when **the foreseeable risks of harm** posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.
>
> The test is whether a reasonable alternative design would, at reasonable cost, have reduced **the foreseeable harm** posed by the product and if so, whether the omission of the alternative design by the seller rendered the product not reasonably safe.

[RP 2901 (emphasis added)]

These requested instructions are not correct statements of New Mexico law because they are in direct conflict with the holding in *Brooks* that products liability claims for design defects should be based in strict liability instead of negligence. These instructions inject into the jury's analysis the issue of

foreseeability, specifically foreseeable harm. Foreseeability is an element of negligence. UJI 13-1402. In *Brooks*, the Court refused to adopt the Restatement (Third) of Torts: Products Liability because it was based on foreseeable risks of harm, which the *Brooks* Court found to, "advocate a negligence approach." *Brooks*, 120 N.M. at 380, 902 P.2d at 62. By tying the finding of reasonable alternative designs to foreseeable risks of harm, Hyundai's instructions violate this tenet of New Mexico law that a design defect claim is based in strict liability.

Because Hyundai's non-UJI is not a correct statement of the law, the trial court was correct in refusing it. *Mireles v. Broderick*, 117 N.M. 445, 450, 872 P.2d 863, 868 (1994) ("a requested instruction that is erroneously or inaccurately drafted need not be given."); *Childers v. Southern Pac. Co.*, 20 N.M. 366, 375, 149 P. 307, 309 (1915) (holding that if the requested instruction is erroneous "either wholly or in part," it is properly refused). The Supreme Court of Oregon addressed a similar issue in *Newman v. Utility Trailer & Equip. Co.,* 278 Or. 395, 399-400, 564 P.2d 674, 676-77 (1977), holding that an instruction of foreseeable risk of harm in a strict liability action was so erroneous it required reversal and a new trial. In *Newman*, the trial court instructed the jury, in a strict liability design defect case, that it needed to determine the foreseeable risk of harm. This was held to be in error. *Newman*, 278 Or. at 397, 564 P.2d at 675 ("In a defective design case the essential difference between a negligence action and a products

liability action is that in negligence the foreseeability of the harm by the manufacturer or seller is submitted as a question of fact to the jury, whereas in strict liability the knowledge of the article's propensity to inflict harm as it did is assumed."). The *Newman* court further held the error required a re-trial despite the fact it was, "only one erroneous sentence in the totality of the instructions," because under the given instructions, "plaintiff was never given the opportunity to prevail on a strict liability theory." *Id.*, 278 Or. at 400, 564 P.2d at 677. Likewise, in this case, if the court had given Hyundai's requested instructions, this new element of reasonable alternative design would have been predicated on a finding of the foreseeable risk of harm, which sounds in negligence, not strict liability. Consequently, the requested instructions were not merely erroneous, but were so contradictory to the law of New Mexico that, if given, would have merited a new trial.

Because Hyundai's requested jury instructions on reasonable alternative design were erroneous statements of New Mexico law, Hyundai has waived error on the issue of whether the trial court should have instructed the jury to find a reasonable alternative design as an element of design defect. This Court should, therefore, affirm the trial court's judgment.

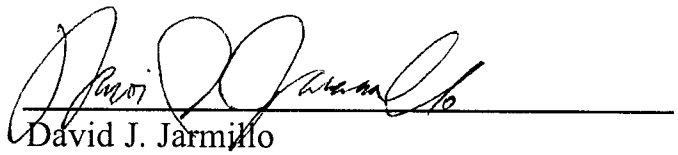
CONCLUSION

The trial court had discretion to allow the testimony of the Bacas' experts. The testimony of those witnesses cannot, therefore, be ignored. Witnesses for both the Bacas and Hyundai presented evidence from which the jury was able to find the 2002 Hyundai Accent was defective in design and the injuries to Mr. Baca caused by the defect were separate and distinct from the injuries he suffered during the rollover sequence or would have suffered if the roof had not crushed down to the headrest. Further, although the Bacas presented evidence of reasonable alternative designs, under the UJIs and New Mexico law, the jury was not required to expressly find the existence of an alternative design as an element of the design defect claim.

Because there was no reversible error and sufficient evidence for each of the jury's findings, the Bacas request this Court affirm the jury verdict and the trial court's judgment.

Respectfully submitted,

Gaddy ♦ Jaramillo



David J. Jaramillo
Maria E. Touchet
2025 San Pedro Dr., NE
Albuquerque, New Mexico 87110
(505) 254-9090
(505) 254-9366 Fax

Watts Law Firm, L.L.P.
James H. Hada
555 North Carancahua, Suite 1400
Corpus Christi, Texas 78478
(361) 887-0500
(361) 887-0055 Fax

Attorneys for Plaintiffs – Appellees

CERTIFICATE OF SERVICE

A true and correct copy of the Answer Brief of Appellees was this 20th day of November, 2008, forwarded by U.S. First Class Mail, to:

David M. Prichard
Brendan K. McBride
Prichard, Hawkins,
McFarland & Young, LLP
10101 Reunion Place, Suite 600
San Antonio, TX 78216

Gene C. Schaerr
Geoffrey P. Eaton
Sarah E. Saucedo
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006

Sarah M. Singleton
Montgomery & Andrews, PA
P.O. Box 2307
Santa Fe, NM 87504

Thomas P. Gulley
Lewis and Roca LLP
201 Third St. NW, Suite 1950
Albuquerque, NM 87102

John M. Thomas
Bryan Cave LLP
161 North Clark Street, Suite 4300
Chicago, IL 60601

Thomas C. Bird
Keleher & McLeod, PA
201 Third Street NW
Albuquerque, NM 87102

David J. Jaramillo