

COPY

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

EDWIN GURULE, individually,
and as personal representative of the Estate of
SAMMY GURULE, deceased,

Plaintiff-Appellee/Cross-Appellant,

vs.

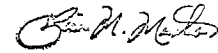
FORD MOTOR COMPANY,

Defendant-Appellant/Cross-Appellee.

COURT OF APPEALS OF NEW MEXICO

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No. 29,296

Appeal from the First Judicial District Court
Rio Arriba County
Honorable Timothy Garcia, Judge

REPLY BRIEF OF CROSS-APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT.....1

THE EVIDENCE OF FORD’S INDIFFERENCE TO THE SAFETY
OF THE ROOF OF THE 1993 RANGER WAS SUFFICIENT TO
CREATE A JURY QUESTION ON FORD’S LIABILITY FOR
PUNITIVE DAMAGES FOR THE DEATH OF SAMMY GURULE.....1

CONCLUSION6

CERTIFICATE OF SERVICE.....8

TABLE OF AUTHORITIES

New Mexico Cases

<i>Allsup's Convenience Stores, Inc. v. North River Ins. Co.</i> , 1999-NMSC-006, 127 N.M. 1, 976 P.2d 1	5
<i>Clay v. Ferrellgas, Inc.</i> , 118 N.M. 266, 881 P.2d 11 (1994).....	4, 5
<i>Couch v. Astec Industries, Inc.</i> , 2002-NMCA-084, 132 N.M. 631, 53 P.3d 398.....	2, 5-6
<i>Gonzales v. Surgidev Corp.</i> , 120 N.M. 133, 899 P.2d 576 (1995).....	3, 4, 6
<i>Jolley v. Energen Resources Corp.</i> , 2008-NMCA-164, 145 N.M. 350, 198 P.3d 376.....	1-2
<i>Public Service Co. of New Mexico v. Diamond D Const. Co., Inc.</i> , 2001-NMCA-082, 131 N.M. 100, 33 P.3d 651	3

Cases from Other Jurisdictions

<i>Burk Royalty Co. v. Walls</i> , 616 S.W.2d 911 (Tex. 1981).....	2
<i>Gurule v. Illinois Mut. Life and Cas. Co.</i> , 152 Ariz. 600, 734 P.2d 85 (1987).....	2
<i>State Farm Mut. Auto. Ins. Co. v. Campbell</i> , 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003).....	2
<i>Transportation Ins. Co. v. Moriel</i> , 879 S.W.2d 10 (Tex. 1994).....	2

Rules

NMUJI 13-308 NMRA (2009).....	2
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ARGUMENT

THE EVIDENCE OF FORD'S INDIFFERENCE TO THE SAFETY OF THE ROOF OF THE 1993 RANGER WAS SUFFICIENT TO CREATE A JURY QUESTION ON FORD'S LIABILITY FOR PUNITIVE DAMAGES FOR THE DEATH OF SAMMY GURULE.

Ford asserts that its decades-long knowledge of the danger of roof crush, particularly in light pickups, including its knowledge of numerous lawsuits relating to roof crush in Ford Rangers; (*see* Br. in Chief on Cross-Appeal at 2-3) its knowledge of how to feasibly design, test and manufacture a safe roof by using closed section construction and full, rather than partial reinforcement of critical structural areas; (*id.* at 4-6) its use of that knowledge to redesign and manufacture the roof of the 1994 Ford Mustang to “resist collapse in a rollover type accident;” (*id.*; Pl. Ex. 1818 p. 3) and its failure to apply the same knowledge and techniques to its contemporaneous design and manufacture of the 1993 Ranger (*id.* at 5) “proved nothing about [its] mental state in designing the 1993 Ranger.” (Ans. Br. on Cross-App. at 1.) Ford further urges that this evidence does not “relate specifically to its design of the 1993 Ranger.” (*Id.* at 10.)

Ford is mistaken in these assertions. Among the several categories of reprehensible behavior which will warrant an award of punitive damages is tortious conduct evincing "an indifference to . . . the health or safety of others." *Jolley v.*

Energen Resources Corp., 2008-NMCA-164, ¶ 32, 145 N.M. 350, 359, 198 P.3d 376, 385 (internal quotation marks omitted), quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). In a products liability case punitive damages may be awarded when safety problems either “arose from or reflected a reckless indifference.” *Couch v. Astec Industries, Inc.*, 2002-NMCA-084, ¶ 60, 132 N.M. 631, 644, 53 P.3d 398, 411. (Emphasis added.) Indifference consists of “[a] lack of interest in or concern about something; apathy.” *Black's Law Dictionary* (8th ed. 2004). A defendant is recklessly indifferent when he “knew about the peril, but his acts or omissions demonstrated that he didn't care.” *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 922 (Tex. 1981). “Such conduct can be active or passive in nature.” *Id.*

Because of “the practical difficulty of producing direct evidence of conscious indifference short of the defendant's admission” *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 23 (Tex. 1994), courts allow circumstantial proof of the defendant’s subjective mental state. *Id. Accord, Gurule v. Illinois Mut. Life and Cas. Co.*, 152 Ariz. 600, 602, 734 P.2d 85, 87 (1987) (“The inquiry in every punitive damage case focuses on the defendant's state of mind, which may be established by either direct or circumstantial evidence.”) A jury weighs circumstantial evidence by considering the reasonable inferences arising from it. NMUJI 13-308 NMRA (2009).

Accordingly, on appeal the sufficiency of evidence of a culpable mental state is reviewed under the same standard as the sufficiency of evidence for any other claim or element. The reviewing court views “the facts *and all reasonable inferences* in the light most favorable to the party resisting the motion.” *Gonzales v. Surgidev Corp.*, 120 N.M. 133, 145, 899 P.2d 576, 588 (1995). (Emphasis added.) *Cf. Public Service Co. of New Mexico v. Diamond D Const. Co., Inc.*, 2001-NMCA-082, ¶ 36, 131 N.M. 100, 112, 33 P.3d 651, 663 (jury verdict awarding punitive damages reviewed by indulging all reasonable inferences in support of verdict.)

Ford’s indifference to the fatal danger of the Ranger roof can be inferred from its knowledge of the danger, its knowledge that it could feasibly mitigate that danger, and its failure to heed what it knew to make the Ranger roof safe. Ford argues that this is not enough – that the plaintiff has improperly relied on general evidence of the “aggregate of corporate conduct as a whole.” (Ans. Br. on Cross-App. at 10.) That is not the case. The plaintiff’s evidence of Ford’s indifference focuses on Ford’s knowledge and its failure to use it. This evidence is “aggregate” in that it is based upon the statements and acts of a number of corporate actors over a long period of time. Ford’s indifference is properly inferred from those statements and acts, even if individually they were not reckless or wilfully indifferent. This is exactly the type of aggregate evidence of a culpably indifferent mental state which would support a

jury's award of punitive damages under the principles stated in *Clay v. Ferrellgas, Inc.*, 118 N.M. 266, 270, 881 P.2d 11, 15 (1994), which held that while no individual employee of the defendant may demonstrate a culpable mental state, a court should look to employees' cumulative conduct to determine the employer's state of mind. *See also* Br. in Chief on Cross-App. at 11.

Ford calls particular attention to the fact that it undertook a program to strengthen roofs in light trucks, and that the Ranger roof exceeded a federal standard, FMVSS 216. (Ans. Br. on Cross-App. at 2-6.) Meeting federal safety standards does not preclude an award of punitive damages. *Gonzales*, 120 N.M. at 148, 899 at 591. The issue is not whether Ford undertook to strengthen the roof; nor is it whether the roof Ford developed exceeded the federal standard. The issue is whether Ford's satisfaction with a roof which exceeded the federal standard but which lacked the strength which enabled Ford's Mustang roof to "resist collapse in a rollover type accident" (Pl. Ex. 1818 p. 3) showed its reckless indifference to the actual safety of the Ranger. This was a question for the jury.

The Ranger roof lacked strength in those critical areas where Ford reinforced the roof of the Mustang. (*Id.* at 5.) The roof of Sammy Gurule's truck failed and collapsed in precisely those areas. (Tr. 521-522, 753-754.) It is reasonable to infer that Ford was indifferent to the fact that the Ranger roof, while it exceeded FMVSS

216, lacked the strength to meet Ford's own standard of roof safety, the 1994 Ford Mustang, and to provide meaningful rollover protection.¹ This is the evidence, "indivisible from the conduct constituting liability," *Allsup's Convenience Stores, Inc. v. North River Ins. Co.*, 1999-NMSC-006, ¶ 53, 127 N.M. 1, 19, 976 P.2d 1, 19, which Ford claims was absent – namely, that Ford "ignored its knowledge that weak roofs caved in, causing injuries and fatalities, and that the risk of fatalities in light truck rollovers was greater in light trucks than in passenger cars." (Ans. Br. on Cross-App. at 9.) A jury could reasonably infer that by substituting compliance with FMVSS 216 for effective resistance to collapse in a rollover, Ford showed such indifference. This is the evidence of "some culpable mental state" required by *Clay v. Ferrellgas, Inc.*, 118 N.M. 266, 269, 881 P.2d 11, 14 (1994). (Emphasis added.)

This case is not, as Ford asserts, like *Couch*, a case in which expert opinions

¹ Because of variability in manufacturing, Ford had to design the roof to exceed the federal standard by at least 25% so it could have "statistical confidence that all vehicles [would] comply." (Tr. 724.) FMVSS 216 could be met with a strength-to-weight ratio of 1.5 to 1. While the Ranger that Ford tested achieved a strength-to-weight ratio 47.6% greater than that, or about 2.2 to 1 ($1.5 \times 1.476 = 2.214$), (Tr. 734) the plaintiff introduced evidence that a strength-to-weight ratio of 3.5 to 1 would have been necessary to make the roof safe in a rollover. (Tr. 681-682, 722-723.) Dr. Huerta, the plaintiff's expert in structural engineering, testified that Ford's test results, rather than demonstrating the Ranger roof's safety, were "characteristic of a structure that buckles, or it can't carry load and it just collapses." (Tr. 752.) Dr. Huerta further testified that the platen test of FMVSS 216 does not replicate what happens to a roof in an actual rollover. (Tr. 752.)

on the dangerousness of the defendant's machine were not alone sufficient to allow an inference of a culpable mental state, "where the defendant presented evidence regarding the steps it had taken to address safety concerns." (Ans. Br. on Cross-App. at 12.) In *Couch* there was extensive evidence of the defendant's "integrated safety program," *id.*, 2002-NMCA-084, ¶ 61, regular safety meetings of engineers, regular service calls and seminars, and efforts to fix safety problems as they arose. *Id.* The evidence in this case is that Ford designed the Ranger roof to FMVSS 216, not to a standard of actual safety, resulting in a roof which lacked the structural integrity to "resist collapse in a rollover type accident." These circumstances sharply distinguish this case from *Couch*, and make it more like *Gonzales*, where the manufacturer's indifference was shown by its knowledge of well-documented risks and its failure, in light of that knowledge, to issue a warning. *Id.*, 120 N.M. at 147, 899 P.2d at 590. Ford's indifference is shown by its knowledge of well-documented dangers and its failure, in light of that knowledge, to build the safe roof it knew how to build.

CONCLUSION

The district court erred in taking the issue of punitive damages from the jury. Upon affirmance of the underlying judgment for negligence and product liability, this case should be remanded to the district court for trial solely on the issue of Ford's liability for punitive damages.

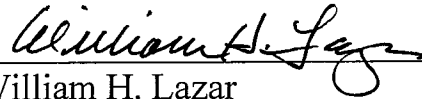
Respectfully submitted,

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