ORIGINAL

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

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

APPELLANTS' REPLY BRIEF

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As required by Rule 12-213(G), undersigned counsel hereby certifies that this brief was prepared in 14-point Times New Roman typeface using Microsoft Word, and that the body of the brief contains 4,205 words.

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INTRODUCTION

Plaintiffs' Answer Brief ("AB") does nothing to undermine the conclusion that Hyundai is entitled to judgment in its favor or, at a minimum, a new trial. In its Brief-in-Chief ("BIC"), Hyundai demonstrated the absence in the trial record of any evidence to support Plaintiffs' theory of injury causation. In response, Plaintiffs have identified none. Faced with Hyundai's extensive showing that their expert Stilson's defect opinions should have been excluded as unreliable, Plaintiffs claim that in New Mexico, an expert's testimony need not be reliable at all. Finally, forced to confront the reality that an automobile design cannot logically be found to pose an "unreasonable" risk of injury without evidence that an alternative design would be safer, Plaintiffs have no answer. Plaintiffs' failure to rebut Hyundai's demonstration of prejudicial error thus confirms that Hyundai is entitled to judgment as a matter of law, or, at a minimum, a new trial.

ARGUMENT

I. Plaintiffs Have Identified No Evidence Sufficient To Support Their Central Claim That An Alternative Design Could Have Reduced Roof Crush To Three Inches In This Accident.

Hyundai's opening brief demonstrated that Plaintiffs proffered no evidence sufficient to prove a critical element of their case: the alleged causal link between any alleged roof defect and the decedent's injuries. BIC13-25. Plaintiffs' strained attempts to supply what is not present merely confirm the deficiency of their proof.

A. None of Stilson's Statements Was Sufficient To Establish The Critical Causal Link.

For example, Hyundai's opening brief established that at trial, Mr. Stilson never offered the evidence on which Dr. Burton's theory of injury causation relied: testimony that a feasible alternative roof design could have reduced the Accent's roof crush to three inches or less in this fatal accident. BIC16-22. Although Plaintiffs now make a halfhearted attempt at rebuttal, that attempt noticeably omits any reference to actual testimony *proving* the causal link. And their other arguments rely upon hearsay statements that were not before the jury and cannot be used to prove the truth of what they assert.

1. Stilson did not provide the missing testimony at trial.

Although Plaintiffs' brief claims that "Mr. Stilson provided [the missing] testimony at trial," their lengthy reprise of Stilson's trial performance reveals no such testimony. AB12-14. Plaintiffs basically admit as much: following that recitation, they fall back upon the complaint that Hyundai's argument presents "an unreasonably strict interpretation of Mr. Stilson's trial testimony." *Id.* at 14. And they claim that, although Stilson never squarely testified on the critical issue of how much an alternative design would have reduced roof crush in *this* accident, 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." *Id.* But again, Plaintiffs can point to no testimony from Stilson

specifically opining that any such design would have reduced roof crush to no more than three inches *in this accident*—as Burton's injury causation opinion required. And even if one were to interpret Stilson's general statements to the effect that his alternatives could have provided "adequate" protection "under the conditions of this rollover" (AB12) as an opinion that those alternatives would have reduced roof crush to three inches in this accident, that opinion would have been inadmissible because Stilson offered zero support for it.

In short, Plaintiffs' suggestion that "everybody knew what he meant, even if he didn't say it" is not a legally viable means of establishing sufficiency of the evidence. Indeed, that approach would eviscerate any party's burden to prove each element of a claim or defense with evidence sufficient for a reasonable juror to rule in that party's favor. *See* Brief of *Amicus Curiae* Association of Commerce and Industry at 13-15.

2. Stilson's deposition did not provide the crucial testimony, and in any case Plaintiffs cannot rely upon his out-of-court opinions to prove an element of their claim.

Apparently recognizing that Stilson's trial testimony could not support a finding of roof-crush causation, Plaintiffs claim that his *deposition* testimony, which they admit was not before the jury (AB17), provided the missing link. They are wrong.

First, the deposition does not contain the evidence necessary to support Burton's opinion on injury causation. *See* BIC23-25 (reviewing Stilson deposition); *cf.* AB15-20. Plaintiffs evidently hope that a mishmash of quotations, culled from nine different pages of the deposition and juxtaposing the words "alternative design" and "three inches" in various contexts, will somehow transform itself into a coherent statement of the missing evidence. It is like piling steel, leather, and rubber in the garage on Monday, hoping to return on Tuesday to find a car. Plaintiffs cannot sustain the verdict this way.

Second, even if Stilson's out-of-court deposition contained the missing evidence, Burton's reliance could not magically transform it into substantive record evidence. It is beyond dispute that the evidence necessary to prove a claim (and sustain a verdict) must be properly before the jury and in the record. It is also beyond dispute that Stilson's deposition was neither before the jury nor in the trial record. And it is likewise beyond dispute that Burton, an expert in forensic pathology and not automotive design, was not qualified, as he elsewhere conceded, to opine on alternative designs and their effects on roof crush. *See* Tr.Vol.V-13:11-18; 88:9-14. The only question is whether, having failed to prove roof-crush causation with record evidence, Plaintiffs were entitled to prove it by importing *non*-record evidence through their medical expert.

The answer to that question must be "no." Whether or not Burton was entitled to rely upon Stilson's hearsay statements as a foundation for his *own* opinions on matters within his expertise (the issue governed by Rule 11-703 NMRA), his reliance could not transform hearsay statements on matters outside his expertise into substantive evidence proving the truth of those same hearsay statements. As the Tenth Circuit has repeatedly held, Rule 703 permits the admission of hearsay evidence "for the limited purpose of informing the jury of the basis of the expert's opinion and not for proving the truth of the matter asserted." *Wilson v. Merrell Dow Pharma., Inc.*, 893 F.2d 1149, 1153 (10th Cir. 1990); *accord TK-7 Corp. v. Barbouti*, 993 F.2d 722, 734 n.9 (10th Cir. 1993) (quoting *Wilson*, 893 F.2d at 1153). The corresponding New Mexico rule obeys the same principle. *See, e.g., Santa Fe v. Komis*, 114 N.M. 659, 845 P.2d 753 (1992); *Wilson v. Leonard Tire Co., Inc.*, 90 N.M. 74, 76, 559 P.2d 1201, 1203 (Ct. App. 1976).

Thus, whether or not Stilson's deposition was sufficient to prove roof-crush causation (it was not), and whether or not Burton was entitled to rely upon it in forming his opinions within his own expertise, that reliance *as a matter of law* could not carry Plaintiffs' burden of proof on the critical question of whether a different feasible roof design could have limited roof crush to three inches in this accident. The mere fact that a piece of evidence may be admissible under Rule 11-

703 does not mean that it automatically constitutes proof of a matter outside the expert's expertise.

Plaintiffs' confusion of admissibility with substantive proof also forecloses their argument that Hyundai somehow waived its objections to Burton's reliance on Stilson's deposition. By not objecting, Hyundai may have waived a subsequent argument about the propriety of Burton's reliance on Stilson's testimony under Rule 11-703 as a basis for opinions within Burton's expertise. But that is not Hyundai's argument. Hyundai's point is that, whether or not Stilson's deposition could properly be admitted under that Rule, it cannot constitute substantive evidence on the issue of roof-crush causation because it was outside Burton's expertise, and therefore was not (and could not be) admitted for the truth of the matter asserted. That argument was not required to be preserved by an *evidentiary* objection in addition to being preserved, as it was in Hyundai's motion for directed verdict. *See* Tr.Vol.VII.-109-113. Plaintiffs either proved their case, or they did not, and Hyundai had no obligation to advise them at trial of the deficiencies in their proof.

3. Plaintiffs cannot rely on Stilson's out-of-court affidavit to prove an element of their case.

For the first time on appeal, Plaintiffs also claim that the missing proof of roof-crush causation may be found in an affidavit submitted by Stilson in the pretrial *Daubert* proceedings. AB20-21. The affidavit, of course, was not in

evidence, and thus (as we have shown above) could not be relied upon to *prove* anything at trial.

To circumnavigate that inconvenience, Plaintiffs now argue that Burton claimed to have relied generally "on what Mr. Stilson had said before trial, *including* his deposition testimony." AB20 (emphasis added). But that is not what Burton said. He testified that he relied on Stilson's "deposition"—period. *See* Tr.Vol.V-87:16-19, 88:25-89:5. Burton never mentioned an affidavit. He never said anything about "pre-trial testimony" in general. His "understanding" of Stilson's theory of roof-crush causation, which formed the critical predicate for his ultimate opinion on injury causation, relied entirely on Stilson's "deposition"—a deposition which, as we have seen, did not provide the necessary predicate.

Moreover, even if Burton had relied upon the affidavit, that reliance could not save Plaintiffs' case: For all the reasons articulated above, such reliance is relevant only to establishing the foundation of an expert's opinion; it is not a device for converting hearsay into substantive proof.

B. Hyundai's Expert, Dr. Orlowski, Did Not Supply The Missing Predicate For Burton's Injury Causation Analysis.

Also for the first time on appeal, Plaintiffs claim that the missing causal link between roof crush and injury was provided by *Hyundai's* expert witness, Dr. Orlowski. AB14-16. Although Orlowski never testified that any alternative feasible design could have reduced roof crush to three inches in this accident,

Plaintiffs claim that Orlowski, in testimony related to modified 1980s-vintage Chevy Malibu sedans, proved the next best thing: that "an alternative roof design could have been integrated that would not merely have reduced roof crush to three inches, but 'guaranteed' no deformation at all during a rollover sequence." *Id.* at 16. If the roof could have been designed to eliminate crush entirely, they argue, then *a fortiori* it could have been designed to crush less than three inches.

Plaintiffs' argument does not survive scrutiny. The Chevy Malibu sedans discussed by Orlowski had been specifically modified to "overly support" the roof structure for rollover testing. Tr.Vol.VI-185:12-16. Orlowski testified that although such a modification would be physically possible, "it wouldn't be practical" – that is, it was not an alternative *feasible* design. Tr.Vol.VI-210:15-17. He further explained why that is so: because overstrengthening the roof structure would compromise other features of the car, including its safety. As Orlowski put it, "You could make a roof stronger...[but] there's a lot of other things that the roof does for a vehicle. A lot of other safety considerations. ...The roof construction affects even stability handling and ride of the vehicle." Tr.Vol.VI-211:13-24. Thus, even if the *roof* could have been made stronger, the vehicle as a whole would not necessarily have been made safer, and the injuries sustained would not necessarily have been reduced. Tr.Vol.VI-190:16-23, 191:6-15.

Indeed, Plaintiffs' argument would effectively read "feasibility" out of the alternative feasible design requirement. One can always point to an "alternative design" that would have prevented almost any injury—a Sherman tank, for example. But under settled law, feasibility requires more than mere *physical* possibility. To be "feasible," an alternative design must also be consistent with other design objectives such as cost (including, as to cars, gas mileage), functionality, and safety. *See Brooks v. Beech Aircraft Corp.*, 120 N.M. 372, 379-80, 902 P.2d 54, 61-62 (1995); *see also Morales v. E.D. Etnyre & Co.*, 382 F. Supp. 2d 1278, 1282-84 (D.N.M. 2005). Thus, Orlowski's general testimony that a 1980s Malibu could be modified to "overly...support" the roof has no bearing on whether an alternative design could feasibly have been incorporated into the 2002 Hyundai Accent to prevent the roof crush in this accident.

Plaintiffs, therefore, simply failed to establish the critical predicate for Burton's causation opinion—that an alternative *feasible* design could have reduced roof crush *in this accident* to no more than three inches. Without such evidence, Hyundai is entitled to judgment in its favor.

II. Plaintiffs' Response Confirms That Expert Stilson's Opinions Should Have Been Excluded Under *Daubert* And *Alberico*.

Hyundai's opening brief also demonstrated why Stilson's generic, prefabricated opinions on defect issues should have been excluded under Rule 11-702 NMRA. BIC34-40. Plaintiffs do not dispute that those opinions were the

same ones Stilson gives in every case: that (a) an automobile roof is safe only if it limits crush to three inches in every possible accident, no matter how severe, and (b) every production automobile he has ever tested has a defective roof. *See* BIC34-40. His "expert opinion" is, essentially, "If it has a commercially manufactured roof, it's defective." As Hyundai showed, because that opinion was not anchored in the specific facts of this car or this accident, it should have been excluded as unhelpful and unreliable under *Daubert*, *Alberico*, and Rule 11-702. *Id.*

In response, Plaintiffs first assert—apparently in all seriousness—that Stilson's testimony was not *required* to be helpful and reliable, because he is not a "scientist." AB5-6. But this is flatly contrary to New Mexico law. Rule 11-702 requires expert testimony to "assist the trier of fact to understand the evidence," and on its face applies to "scientific, technical, *or* other specialized knowledge." Even the most jaundiced view of Stilson's expertise must acknowledge that he purportedly possesses "technical or other specialized knowledge." That was the basis on which he was allowed to testify as an expert. If Stilson's testimony was unhelpful to the jury—as Hyundai has shown it was—it was inadmissible under Rule 11-702, whether or not, as Plaintiffs contend, New Mexico has declined to adopt *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *cf.* AB5-6.

Second, Plaintiffs again attempt to demonstrate the reliability and helpfulness of Stilson's opinions by reciting his testimony at length. AB7-8. But the attempt is hopeless: Stilson's broad, generic, untested opinions do not improve with repetition. If anything, Plaintiffs' attempt at rehabilitation confirms that Stilson's testimony was not connected to the "pertinent inquiry" of this case, as required by *Daubert*. The "pertinent inquiry" here is not whether roofs can be made stronger in general, but whether *this* roof could reasonably have been made to perform non-defectively in *this* accident. *See* BIC34,36-37. Because Stilson testified that no production car roof could have performed non-defectively, and because he made no effort to determine how a 2002 Accent could be modified to perform non-defectively under the forces in this accident, his testimony was neither pertinent nor helpful. And the jury should not have been permitted to hear it. *See* BIC34-40.

In response, Plaintiffs attempt to equate Stilson's unchangeable view that all car roofs are defective with Orlowski's view that roofs that meet the government's roof-crush standard are non-defective, calling the two views a mere "disagreement between experts." AB8&n.1. The falsity of the equivalency should be apparent: Orlowski's position is supported by the federal agency charged with ensuring automobile safety, whereas Stilson's position is supported only by Stilson. This is a mere "disagreement between experts" in the same sense as a dispute between a

NASA geophysicist and a quack "scientist" advocating a flat-earth theory. It is not the kind of genuine dispute that can or should be resolved by a jury. The District Court's refusal to exclude Stilson's opinions mandates a new trial.

III. Plaintiffs' Response Confirms The Absence Of Evidence Causally Linking The Alleged Door Defect To Roof Crush, And In The Absence Of Such Evidence That This Issue Should Not Have Gone To The Jury.

Plaintiffs give short shrift to another compelling argument for a new trial, namely, the District Court's failure to instruct the jury to ignore the alleged door defect that Plaintiffs pressed at trial. Indeed, Plaintiffs' Answer Brief identifies no evidence supporting their contention that "to the extent the door came open during the rollover [it] weakened the structure of the roof," or their claim that they "presented sufficient evidence for [the jury] to still find defects in the Hyundai Accent (a combination of the roof and door) caused Mr. Baca's death." AB22-23. Instead, they merely assert that the "the issue is not outcome determinative in this appeal." *Id.*

But the issue *is* potentially "outcome determinative." As explained in Hyundai's opening brief, the district court's refusal to instruct the jury that they could not base liability on the door-related evidence was an independent error. BIC25-29. And that error, as we have shown, requires (at least) a new trial. *Id.* Plaintiffs do not dispute that. And that implicit concession is sufficient to foreclose an affirmance of the judgment.

IV. Hyundai's Argument That The Jury Should Have Been Instructed On "Reasonable Alterative Design" Was Properly Preserved, And Is Correct Under New Mexico Law.

Finally, Plaintiffs have offered no viable defense of the trial court's refusal to instruct the jury that Plaintiffs' design-defect claim must be supported by proof that a reasonable alternative design was available. In its opening brief, Hyundai showed that the inevitable logic of a design-defect claim requires that the plaintiff offer proof of a "reasonable alternative design" that would have prevented whatever injury has occurred. *See* BIC40-43; *see generally* RESTATEMENT (THIRD) OF TORTS § 2. As Hyundai also showed (and as the Products Liability Advisory Council ("PLAC") showed), the need for proof of reasonable alternative design is already present in the law of this State—specifically, in the "risk-benefit" approach to design defects required by the Supreme Court in *Brooks*, 120 N.M. 372, 902 P.2d 54. *See* BIC42-43. The only court to squarely reach the issue agrees. *See Morales*, 382 F. Supp. 2d at 1283.

Plaintiffs' lengthy response ultimately collapses into two points, neither of which has merit.

A. Hyundai Properly Preserved Its Instructional Objection.

First, Plaintiffs claim that even if New Mexico law requires evidence of reasonable alternative design to prove a design defect claim, Hyundai waived its argument on this issue by proposing an instruction that included the word

"foreseeable," which they claim is a negligence concept and which they say rendered the instruction incorrect under *Brooks*. AB49-50. But *Brooks* did not hold that design-defect claims "should" or "must" be brought in strict liability. To the contrary, *Brooks* expressly held that "a design-defect claim may be brought in *both* negligence and strict liability." 120 N.M. at 373, 902 P.2d at 55 (emphasis added). Moreover, the "unreasonable risk of injury" standard favored in *Brooks* cannot plausibly be read to exclude *all* negligence concepts from the design-defect regime. Indeed, the concept of an "unreasonable risk" is itself a negligence concept.

In any event, Plaintiffs' waiver argument rests on an inaccurate view of the preservation doctrine. Contrary to Plaintiffs' suggestion, neither *Mireles v. Broderick*, 117 N.M. 445, 872 P.2d 863 (1994), nor *Childers v. Southern Pac. Co.*, 20 N.M. 366, 149 P. 307 (1915), nor *Newman v. Utility Trailer & Equip. Co.*, 278 Or. 395, 567 P.2d 674 (1977), addresses the issue of waiver. And Plaintiffs' waiver theory was plainly rejected in *Baros v. Kazmierczwk*, 68 N.M. 421, 427-29, 362 P.2d 798, 802-803 (N.M. 1961), in which the Supreme Court held that to preserve error in instructions "[w]here the court has instructed erroneously, it is *not* a prerequisite to a right to complain of an instruction that a correct instruction be offered." *Id.* at 428, 362 P.2d at 803 (emphasis added). Rather, "*the important question concerns the clarity with which the errors in the instruction given have*

been called to the attention of the trial court." *Id.* (emphasis added). Thus, to preserve error, all that is required is that the objection be "specific enough to alert the district court to the particular vice in the defective instruction." *Andrus v. Gas Co. of New Mexico*, 110 N.M. 593, 597-98, 798 P.2d 194, 198-99 (Ct. App. 1990).

Here, there is no doubt that Hyundai made its objection to the instruction abundantly clear: the parties discussed the issue at length in open court on two occasions. *See* Tr.Vol.VI-222-225; Tr.Vol.VII-130-31. Indeed, the District Court itself stated that Hyundai has "properly framed the issue" for appeal. Tr.Vol.VII-130. In short, the court was on notice of Hyundai's specific objection to the instruction; and, accordingly, Hyundai properly preserved its objection.

B. Plaintiffs Have No Good Answer To *Brooks*, Which "Requires" The Jury To Make A Risk-Benefit Calculation And Thus Requires Proof Of A Reasonable Alternative Design.

On the merits, as both Hyundai and amicus PLAC demonstrated, the "risk-benefit calculation" held by the Supreme Court to be "requir[ed]" in design defect cases makes it logically impossible to find a design defective in the absence of a reasonable alternative. *See Brooks*, 120 N.M. at 379-80, 902 P.2d at 61-62; BIC40-45; PLAC3-13. And because the instruction as given here permitted the jury to find the Accent's roof defective *without* proof of such an alternative, the instruction was erroneous as a matter of New Mexico law. *See* PLAC9-13.

Avoiding that central issue, Plaintiffs advance three meritless responses. First, they claim that because "the trial court was required to instruct the jury consistent with the UJI," the UJI instruction the court gave could not have been error. AB37. Although Plaintiffs point to Rule 1-051(A) NMRA for the proposition that "[t]he trial court is required to adhere to the specific language of the UJI," AB38, Plaintiffs overstate the Rule's requirements. All Rule 1-051(A) requires is that the "the trial judge shall instruct the jury in the language of the Uniform Jury Instructions on the applicable rules of law." It does not say the judge must instruct the jury *only* in the language of the UJI, and thus does not preclude a court from offering additional instructions where the UJI does not provide an instruction applicable to the facts.

That is all that happened here. As Plaintiffs concede, Hyundai's proposed instruction "included the three paragraphs for UJI 13-1407, plus two extra paragraphs" addressing the alternative design issue. AB49. By including all the language of the applicable UJI, Hyundai's proposed instruction satisfied the express requirements of Rule 1-051(A). Nothing in that Rule prohibited the trial court from giving Hyundai's additional language.

Second, Plaintiffs argue that in *Brooks* the Supreme Court "expressly refused to adopt" the Restatement (Third) of Torts § 2, on which the "reasonable alternative design" principle is based, and instead "repudiate[d]...the risk-utility

and reasonable alternative design doctrines." AB45. But that assertion is impossible to square with *Brooks*, which expressly acknowledged both that New Mexico design defect law "*requir[es]* the jury to make a risk-benefit calculation" and that such a calculation is needed "to focus jury attention on evidence reflecting meritorious choices made by the manufacturer on alternative design." *Brooks*, 120 N.M. at 379-80, 902 P.2d at 61-62 (emphasis added); *see also id.* at 380, 902 P.2d at 62 (noting the "risk-utility calculation...required by [New Mexico's] jury instructions"). *Brooks,* then, "repudiated" § 2 of the Restatement (Third) of Torts *only* to the extent that the Restatement provided for a negligence standard rather than a strict-liability standard. *Id.* But neither the need for risk-benefit balancing nor the coincident need to prove the availability of a reasonable alternative design is rooted in a negligence standard. As the *Brooks* court pointed out, *both* negligence and strict liability regimes require risk-benefit analysis: the distinction between them is merely "the time frame in which the risk-benefit calculation is made." *Id.* at 381, 902 P.2d at 63. *Brooks* thus embraced the requirement that design defect be proved with evidence of a reasonable alternative design.

Finally, Plaintiffs assert that even if they are wrong and "New Mexico were to adopt the Restatement (Third)," the instruction given was not error because it permitted (but did not require) the jurors "to consider alternative designs." AB37-38; *accord id.* at AB47-49. Although superficially reasonable, Plaintiffs' position

makes no sense. In a particular case, a design defect either can be proved without evidence of a reasonable alternative design, or it cannot. If it cannot, then an instruction *requiring* an alternative design is necessary if the jury is to have a proper understanding of its role in making the design-defect determination. Here, no such instruction was given, and its omission entitles Hyundai to a new trial.

CONCLUSION

Plaintiffs' Answer fails to undercut Hyundai's demonstration of the errors that require reversal of the judgment below. Most important, Plaintiffs have identified no evidence to support a finding of injury causation based on roof crush; and their attempt to create one out of the penumbras of Stilson's trial testimony and out-of-court hearsay statements merely highlights the deficiency in their proof and Hyundai's consequent entitlement to a judgment in its favor. And even if one were to ignore that deficiency, Hyundai would still be entitled to a new trial on the three other independent grounds described above.

In the end, Plaintiffs' reliance on strained and unconvincing arguments only make it all the more apparent that Hyundai has been wrongly blamed for a tragic death in an accident it did not cause; in a car that, at least in the respects relevant to this case, was undisputedly among the safest on the road. Hyundai respectfully requests that this injustice be undone.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2008, I caused copies of the foregoing *Appellants' Reply Brief* to be served by first-class United States mail, postage prepaid, on

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