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.

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

Defendants-Appellants.

Ct. App. No. 28,240
4th Judicial District No. CV-2005-82
San Miguel County
Hon. James A. Hall, District Judge

BRIEF OF AMICUS CURIAE ASSOCIATION OF COMMERCE AND INDUSTRY

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I. STATEMENT OF THE CASE

This appeal arises from an action filed by Art Bustos, as personal representative of the estate of Marcos Leandro Baca (Marcos), and by Marcos' parents, Marcos and Terri Baca, and his brother, Abel (hereinafter collectively "Plaintiffs"), against Hyundai Motor Company, Hyundai Motor America and Borman Motor Company (hereinafter collectively "Hyundai"). [RP 660-669]

Plaintiffs alleged that Marcos' death was caused by the defective design of the 2002 Hyundai Accent's door latch and roof, which allowed excessive roof crush. The accident occurred when a 2002 Accent owned and driven by Marcos' girlfriend rolled three-and-a-half times before landing on its roof. Plaintiffs alleged that Marcos died as a "result of positional asphyxia when his head was pinned on the asphalt after the roof deformed during the rollover sequence." [RP 663 ¶ 12] The First Amended Complaint asserted claims of negligence, strict products liability and breach of implied warranty. [RP 660-669]

Of the issues raised by Hyundai's appeal, the New Mexico Association for Commerce and Industry (ACI) is most troubled by those related to Plaintiffs' failure to prove a fundamental element of their claims—causation. It is ACI's position that Plaintiffs' causation evidence failed on every level, such that their claim should not have been allowed to go to the jury and that to uphold Plaintiffs' judgment would amount to abandoning the requirement that a plaintiff must prove,

by competent evidence, the conduct complained of more likely than not caused the harm at issue.

II. SUMMARY OF FACTS

In the instant case, Plaintiffs relied on experts with two entirely different fields of expertise—engineering and medicine—in their effort to establish that the design of the 2002 Accent made it an unreasonably dangerous vehicle because it allowed the roof to crush more than three inches in a rollover accident.

Plaintiffs' mechanical engineering expert, Mr. Stilson, fell short of establishing that any of the alternative designs he identified—foam integration in the support pillars, pillar reinforcements or in integrated roll cage--would have reduced the roof crush to three inches or less. In fact, when the undisputed evidence is viewed in light most favorable to Plaintiffs, his testimony supported the opposite inference.

Stilson admitted that, when the required crush test on the roof of the 2002 Accent was performed, the vehicle's roof exceeded Federal Motor Vehicle Safety Standard (FMVSS) 216, which addresses roof strength. [Tr.IV:135] The FMVSS 216 test involved putting the Accent on its roof and applying ever increasing pressure, up to approximately 7,000 pounds, more than twice the vehicle's weight, to determine how much roof crush would result. [Tr.IV:17-18, Tr.VII:170-71] However, Stilson chose to focus on another type of test that he had done years

before, which he called a "drop test." [Tr.IV:91-93, 142-43] In this test a vehicle is dropped on its roof from a height of two or three feet. [Id.] Stilson opined that drop tests done on other types of vehicles—not a 2002 Accent—indicated that use of an integrated roll cage reduced the amount of roof crush to less than three inches. [Tr.IV:88-93] He did not correlate the amount of roof crush one could expect from a simple drop to the amount of crush one would expect from the same roof under other dissimilar circumstances, such as a rollover.

Moreover, Stilson testified about yet another test, a rollover test Hyundai had done to determine compliance with FMVSS 208 (Occupant Crash Protection). He said that the 208 test crushed the roof significantly more than the FMVSS 216 test had done. [Tr.IV:14-16]

The fact that putting a vehicle on its roof and crushing it with ever increasing pressure resulted in significantly less roof crush than occurred in a simulated rollover (the FMVSS 208—Occupant Crash Protection test) would logically lead to the conclusion that less roof crush would also result from a drop test than from a rollover test, or from a real rollover situation. Stilson never denied this, nor did he negate this inference. In fact, he pointed to the results of the FMVSS 208 rollover test in opining that Hyundai should not have relied on the favorable results of the FMVSS 216 test, but should instead have done further testing and redesign. [Tr.IV:36-37]

Stilson did not testify that the results of the drop test could be transported into a rollover scenario—a connection which had to be made for his discussion of the drop tests to have had probative value. Stilson's only testimony respecting the design alternatives he had listed was that, while they would have increased the roof's crush resistance "10 to 20%" [Tr.IV:19, 22-23, 25], no design incorporated into any vehicle on the market in 2002 was reasonably safe. [Tr.IV:145-46] Stilson did not translate his "10 to 20%" figure into a figure that the jury could use in determining how much the Accent's roof would have crushed had one of his alternate designs been used. He admitted that he could not even quantify the forces exerted on the Accent's roof during the three-and-a-half rollovers. [Tr.IV: 142]

While Stilson testified at great length about the Accent's door system, neither he nor Plaintiffs' medical expert, Dr. Burton, ever linked this alleged defect to Marcos' death. [See Tr.IV:38-80; Tr.V:38-39, 41; RP 2067; see also Hyundai's Brief in Chief at § I(B)] After expressing opinions critical of the door system, opining that the door had come open during the rollovers and discussing alternative designs, Stilson ultimately admitted that the door coming open did not affect the amount by which the roof had crushed and was not the cause of Marcos' head being outside the vehicle when the vehicle came to rest. [Tr.IV:57-58] Burton confirmed that the injuries to Marcos' head were not serious, let alone fatal [Tr.V:20-23, 28], that there was no real difference from Marcos' head having been

outside, as opposed to inside, the vehicle [Tr.V:35], and that his head was outside the vehicle because the window glass was gone. [Tr.V:42] It was undisputed that the door system had nothing to do with the accident. [Tr.VI:113-14] Thus, the extensive criticism of the door system actually led nowhere, in terms of establishing a claim of product liability, while being misleading to both the judge and jury.

On cause of death Plaintiffs relied on Dr. Burton, a physician who claimed expertise in forensic pathology. It was his opinion that Marcos died of positional or mechanical asphyxia—a condition whereby a person is, as a result of his body's position, unable to take in enough oxygen to sustain life. Dr. Burton also opined that, once the Accent had landed upside down, the limited space between Marcos' body and the CD changer that had landed on the ground under his head kept his chin against his chest, causing him to asphyxiate. [Tr.V:14, 23, 27, 49-50]

However, Dr. Burton could not provide the necessary connecting evidence that it was an unreasonably dangerous, defective design of the vehicle which caused the space remaining between Marcos' body and the ground to be too small. This essential piece of evidence could only come from Stilson. [See Tr.V:88-90 (admission that this was outside Burton's area of expertise)]

As discussed in the Hyundai's Brief in Chief, Dr. Burton based his testimony that the Accent had a defect that caused the death on a demonstrably

erroneous belief that Stilson had already provided the causal link between the positional asphyxia and the Accent's design. Dr. Burton linked the Accent to the death because he mistakenly thought Stilson had said that a different design would have reduced the roof crush to three inches or less. [Tr.V:87-90; RP 995-97, 2745, 3061] Burton then steered the judge and jury wrong by leaving them with the same erroneous impression that Stilson had, in fact, said that a car that incorporated one of three alternative designs would have reduced the roof crush of the vehicle to less than three inches. [Tr.IV:88 (Stilson testimony on alternative designs and testing of those designs); Tr.V:88, 124-25 (Burton understanding of Stilson testimony and district court's consequent error); Tr.VII:114 (district court's statement that Stilson "instructed" Burton that, with an alternative design, there would be a reduction of roof crush to three inches); RP 996, 1427-31]

Dr. Burton's testimony also failed because he never addressed the likelihood that Marcos would have suffered from positional asphyxia due to being upside down and unconscious. The only person who did address the expected positional asphyxia which would result from Marcos' state of unconsciousness was Hyundai's expert, Dr. Raddin, an aeronautic and astronautic engineer and medical doctor, who specializes in injury causation analysis. [Tr.VII:8-15, 18]

Dr. Raddin explained that, based on the anatomy of the head and neck, one would expect a person who is upside down and unconscious to suffer positional

asphyxia. He testified that this would be the expectation even where that person's neck is not flexed and sufficient space remains for movement of the neck or head. [Tr.VII:65-74] The reason is that a person's tongue will block their airway when they are unconscious and upside down and they will not, as a conscious person would, tighten up the muscles of the tongue or move their tongue so as to open up that airway. [Tr.VII:72-75] It was Dr. Raddin's opinion that Marcos was unconscious when the vehicle came to rest after the last rollover. [Tr.VII:72] Dr. Burton could not and did not say otherwise. [Tr.V:59]

Dr. Burton never addressed the issue of positional asphyxia resulting from Marcos' upside down position and unconscious state and so never expressly ruled out the likelihood that Marcos would have suffered from positional asphyxia regardless of the amount of roof crush. He never addressed the likely consequences of oxygen deprivation had Marcos survived after experiencing positional asphyxia caused by his having been left in an upside down and unconscious position as a result of the accident. He said only that, absent asphyxia, Marcos would have survived. [Tr.V:87-90; RP 3065]

Thus, Dr. Raddin's testimony that positional asphyxia is likely to occur under the conditions of this accident, regardless of the amount of space the unconscious person has available to him, stands uncontradicted. The question of what the consequences of such asphyxia would likely have been to a person who

survived (for example brain damage and organ damage) remain unanswered. Placing Dr. Burton's conclusion in the broader context provided by Dr. Raddin demonstrates that Dr. Burton failed to provide the necessary foundation for his causation opinion, rendering it inadequate to meet Plaintiffs' burden on either enhanced injury or cause of death.

III. POINTS AND AUTHORITIES

A. Allowing Plaintiffs To Disregard Or Gloss Over The Requirement Of Proving Causation Violates New Mexico Law And Public Policy

The huge gaps left in Burton's and Stilson's testimony left the jury to speculate about virtually all of the causation issues because they simply did not have enough information to determine the significance of the drop tests Stilson talked about, the amount the 2002 Accent's roof would have crushed had any alternative design been used, the likelihood that Marcos would have suffered positional asphyxia as a result of the accident having left him unconscious and upside down, and whether Marcos would have suffered brain damage, or any of the consequences that can follow from oxygen deprivation related brain damage, even if there had been adequate space in the vehicle and he had survived.

It is axiomatic that, whether a plaintiff's theory sounds in negligence, strict products liability, or contract, a required part of that plaintiff's burden of proof is proof that the alleged default, defect or breach was both the cause-in-fact and the

proximate cause of the injuries sustained. Bishop v. Evangelical Lutheran Good Samaritan Society, 2008-NMCA-033, ¶ 13, 143 N.M. 640, 179 P.3d 1248 (recognizing as a fundamental requirement that the tort or breach of contract must be the cause-in-fact of a loss before liability can be imposed), cert. granted, 2008-NMCERT-2 (Feb. 28, 2008); Tenney v. Seven-Up Co., 92 N.M. 158, 160, 584 P.2d 205, 207 (Ct. App. 1978) (a plaintiff must prove that a product's alleged defect proximately caused the injury); Alberts v. Schultz, 1999-NMSC- 015, ¶ 29, 126 N.M. 807, 975 P.2d 1279 (observing, in the context of a medical malpractice action, that "plaintiff must introduce evidence that the injury more likely than not was proximately caused by the act of negligence in question"); accord, Hinger v. Parker & Parsley Petroleum Co., 120 N.M. 430, 436-37, 902 P.2d 1033, 1039-40 (1995) (discussing the elements of a claim for strict liability for an inherently dangerous activity, including proximate cause).

In Spectron Development Laboratory, a Div. of Titan Corp. v. American Hollow Boring, 1997-NMCA-025, ¶ 13, 123 N.M. 170, 936 P.2d 852, this Court quoted Section 1 of the Restatement (Third) of Torts: Product Liability (Tentative Draft No. 2, 1995) as stating the basic rule of product liability that, "One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons...*caused by the product defect.*" (Emphasis added). "Causation of an injury is an ultimate fact in

every case." New Mexico v. General Electric Co., 335 F. Supp.2d 1185, 1247 (D.N.M. 2004). ACI has found no case wherein the New Mexico courts have departed from this basic principle.

In discussing the requirement that a plaintiff prove proximate cause, the Court in General Electric Co., 335 F. Supp.2d 1248, stated that, "[u]nderlying the issue of proximate cause, of course, is the question of causation in fact, that is, the *factual connection* between a defendant's conduct and the plaintiff's injury." (emphasis in original). It articulated the cause-in-fact requirement as this Court had done in Chamberland v. Roswell Osteopathic Clinic, Inc., 2001-NMCA-045, ¶ 18, 130 N.M. 532, 27 P.3d 1019, 1023: "there must be a chain of causation initiated by some negligent act or omission of the defendant, which in legal terms is the cause in fact or the 'but for' cause of plaintiff's injury."

Proximate cause superimposes considerations of foreseeability on cause-in-fact. General Electric Co., 335 F. Supp.2d 1249, (citing Torres v. El Paso Electric Co., 1999-NMSC-029, ¶ 14, 127 N.M. 729, 987 P.2d 386 (noting the necessity of limiting "potentially limitless liability arising from mere cause in fact")). Thus, a plaintiff must plead and prove that the injury foreseeably resulted from an unreasonably dangerous condition of the product. Korando v. Uniroyal Goodrich Tire Company, 637 N.E.2d 1020, 1024 (Ill. 1994).

To meet his burden of proving cause-in-fact and proximate cause a plaintiff must first establish that there is a reasonable probability that the defendant's acts or product caused the injury. Sanders v. Atchison, Topeka and S.F. Ry. Co., 65 N.M. 286, 289, 336 P.2d 324, 326-27 (1959) (The circumstances as shown by the evidence should be "sufficiently strong that a jury might properly, on the grounds of probability as distinguished from certainty, exclude the inference favorable to the defendant."); Wintz v. Northrop Corp., 110 F.3d 508, 512 (7th Cir. 1997) (The plaintiffs, as the parties with the burden of proof, bore the burden of establishing the essential elements of their claim, including proximate cause).

Stilson's testimony was insufficient because he did not establish the necessary link between the roof's design and the roof crushing more than three inches. Without evidence that there was a design that could have limited roof crush to 3 inches under the circumstances of this accident, the design that was used simply cannot be faulted. Morales v. E.D. Etnyre & Co., 382 F. Supp.2d 1278, 1283 (D.N.M. 2005).

Burton's testimony was insufficient because it depended entirely on an opinion to which Stilson had not testified, and one which, even if Stilson had articulated it, lacked the kind of foundation required for expert testimony. Alberts, 1999-NMSC-015, ¶ 38 ("The burden of proving reasonable medical probability rests with plaintiff and a causal connection...cannot be substantiated by arguments

based on conjecture, surmise or speculation"); accord, TK-7 Corp. v. Estate of Barbouti, 993 F.2d 722, 732 (10th Cir. 1993) (holding expert testimony is unreliable where the expert failed to show that the other expert, upon whose opinion he had based his conclusion, was reliable); Lindenmier v. City of Rockford, 508 N.E.2d 1201, 1207 (Ill. App. 1987) ("The concept of proximate cause is the same in both cases of negligence and strict liability in tort, and liability cannot be predicated upon speculation, surmise or conjecture.").

Additionally, Burton failed to address the requirement that an injury must have been foreseeable for the proximate cause element to have been met. Burton never said that Marcos' head ending up on an after-market CD changer, which reduced the survival space by another 2-3 inches, could have been foreseen. Instead, he characterized the chances of this occurring as "remote." [Tr.V:75]

Moreover, in the absence of evidence respecting the oxygen deprivation Marcos would have suffered as a result of the upside-down and unconscious position in which the original accident left him, the likelihood of his surviving that deprivation, and the likely consequences of such deprivation if he had survived, there is simply no way to measure the injury attributable to the 2002 Accent.

Plaintiffs were required to provide the jury with a way to make that measurement. Duran v. General Motors Corp., 101 N.M. 742, 750, 688 P.2d 779, 787 (Ct. App. 1983) (the degree of enhancement in a crashworthiness case cannot

be left to surmise and speculation but, instead, must be established by the plaintiff), overruled on other grounds by Brooks v. Beech Aircraft Corp., 120 N.M. 372, 383, 902 P.2d 54, 65 (1995); Couch v. Astec Indus. Inc., 2002-NMCA-084, ¶ 35, 132 N.M. 631, 53 P.3d 398; Lewis v. Samson, 2001-NMSC-035, ¶ 41, 131 N.M. 317, 35 P.3d 972 (evidence that plaintiff would have survived is insufficient in the absence of evidence of the extent of the injuries plaintiff would have suffered).

The fundamental requirement that any party seeking to impose liability on another—whether that party is a plaintiff or a defendant with an affirmative defense such as comparative fault—prove cause-in-fact and proximate cause, is essential to any rationally based tort system. It assures that persons are only held liable for harm in situations where it is just to do so and that simply being in a business which sells a product or provides a service does not expose that business, or the persons who gain their livelihoods from it, to limitless liability should their product or service have some connection, however remote, to a tragic event.

B. Relaxing The Burden Of Proof On Causation Would Have Seriously Adverse Consequences For New Mexico Businesses And Would Further Negatively Impact The State Economy By Discouraging New Businesses From Locating In New Mexico

New Mexico product liability law provides no basis for the radical departure from the burden of proof that the instant case would represent if upheld on appeal because product liability has never been absolute liability. Tenney, 92 N.M. at 160, 584 P.2d at 207 (requiring proof of proximate cause); Spectron Development

Laboratory, 1997-NMCA-025, ¶ 13 (relying on the Restatement (Third) draft respecting the requirements for proving a products liability claim, including that the injury was caused by the product's defect).

New Mexico product liability law is consistent with that of other jurisdictions that have held that product liability law should not be read to create an insurance system. See e.g. Anderson v. Owens-Corning Fiberglas Corp., 810 P.2d 549, 552 (Cal. 1991) in which the California Court stated that the strict liability doctrine, as established by Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1963), makes a manufacturer liable in tort when its product "proves to have a defect that causes injury..." and reiterated that "from its inception...strict liability has never been, and is not now, absolute liability.... [U]nder strict liability the manufacturer does not thereby become the insurer of the safety of the product's user." (Quoting Daly v. General Motors Corp., 575 P.2d 1162, 1166 (Cal. 1978)).

Causation has universally been recognized as an essential element of a product liability claim. See e.g. Sorce v. Naperville Jeep Eagle, Inc., 722 N.E.2d 227, 237 (Ill. App. 1999) (stating that "strict products liability is not absolute liability. ... The manufacturer of a product is not an absolute insurer" and listing, as the first element a plaintiff must prove "that the injury or damage *resulted from* a condition of the product") (emphasis added); Powers v. Taser International, 174 P.3d 777, 784 (Ariz. App. 2008) (noting, in a failure to warn case, that the doctrine

of strict liability does not convert the manufacturer into "the insurer of the safety of the product's use"); Rigby v. Beech Aircraft Co., 548 F.2d 288, 291 (10th Cir. 1977) (stating that, under Utah law, "sellers and manufacturers of products are not insurers" and listing as an element of the strict liability claim that user of a product must prove "that the defect was the proximate cause of the injuries suffered").

Causation cannot simply be assumed. The requirement of proving causation has never been abandoned or abrogated, no matter how egregious the conduct or the injury at issue. However, given the gaping holes in the Plaintiffs' case where competent evidence establishing causation should have been found, allowing this judgment to stand is to countenance an abrogation of this essential element of Plaintiffs' burden of proof or, at a minimum, a loosening of causation standards. Abrogation or even relaxation of this essential requirement would make doing business in New Mexico an entirely unpredictable and extraordinarily risky enterprise, such that it would place locally based businesses at a severe competitive disadvantage, given that they would have to pay substantially more for liability insurance coverage, if they could still get it, and find ways to deal with exposure unlike that experienced by their counterparts in other jurisdictions. It would surely discourage new businesses from locating here.

Impeding a healthy flow of commerce and discouraging businesses from becoming a part of the local community has never been a goal of our tort system

and furthers no legitimate goal of that system. Giving businesses that provide services or goods needed here a reason not to do business here or to find ways to prevent their products from ending up here, because exposure to liability has become an entirely random event, is simply not compatible with the needs or interests of New Mexicans.

However heartrending this particular death may be, it does not provide any sound reason for departing from universal and centuries-old requirements for proving one's case. Placing the burden of a loss on another, based on their involvement in an injury producing event, is a serious matter. It requires adherence to the principles that underlie our system of justice, however much one may wish to reach a different result in a tragic situation.

In the instant case, the finding against the manufacturer and sellers of the 2002 Accent, which met or exceeded federal safety standards in all material respects, and which was not shown to have been the cause-in-fact or proximate cause of the passenger's injury or death, is entirely at odds with the policy and principles of our justice system.

IV. CONCLUSION

For the reasons stated herein, the judgment should be reversed and the district court ordered to enter judgment in Hyundai's favor. In the alternative, Hyundai should be granted a new trial.

Respectfully submitted,

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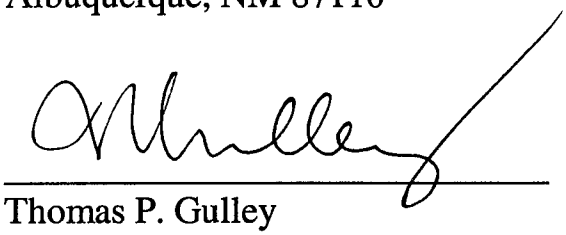

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