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.

Hyundai Motor Company, Hyundai Motor America, and Borman Motor Company,

Defendants-Appellants.

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

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*ON APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT*
*SAN MIGUEL COUNTY, NEW MEXICO*
*HON. JAMES A. HALL, DISTRICT JUDGE*

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# BRIEF OF AMICUS CURIAE THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.

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## STATEMENT OF INTEREST

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with approximately 120 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed over 800 briefs as amicus curiae in both state and federal courts presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as an Appendix.

The issue that PLAC addresses in this brief is the adequacy of New Mexico's uniform jury instruction on product defect, UJI 13-1407 NMRA, as that instruction is applied to cases alleging defective design. A jury's finding that a product is defective in design condemns an entire product line, and jury instructions that fail to adequately instruct juries on the test to be applied in reaching such a profound decision needlessly create an unacceptable risk of errors,

with undesirable consequences to manufacturers, consumers, and society at large. PLAC members therefore have a substantial interest in ensuring that juries are adequately instructed—in language that is as clear and as precise as possible—on the test to be applied in making such a decision.

## SUMMARY OF PROCEEDINGS

PLAC adopts the Summary of Proceedings of Appellants Hyundai Motor Company, Hyundai Motor America, and Borman Motor Company (Hyundai). For purposes of the discussion which follows, however, it is important to emphasize that Plaintiffs' expert, John Stilson, testified that (1) he has not found any vehicle from the time frame of the Hyundai Accent to be safe and non-defective, and (2) every roof he has investigated since leaving Ford Motor Company in 1981 fails to meet his standards. (*See* Tr. Vol. IV at 118:3-5, 145:17-146:24.)

## ARGUMENT

### AS A MATTER OF LAW, LOGIC, AND PUBLIC POLICY, PROOF THAT A PRODUCT IS DEFECTIVELY DESIGNED UNDER THE RISK-UTILITY TEST REQUIRES PROOF OF A REASONABLE ALTERNATIVE DESIGN, AND THE JURY SHOULD HAVE BEEN SO INSTRUCTED.

Hyundai's brief in chief sets forth several reasons why the judgment entered by the district court must be reversed, and PLAC believes that all of these arguments have merit. In particular, PLAC believes that Hyundai makes a compelling argument that the critical gaps in Plaintiffs' evidence require judgment

in its favor. In this brief, however, PLAC will focus on Hyundai's alternative argument that a new trial is required because the district court failed to instruct the jury that Plaintiffs were required to prove that there was a reasonable alternative design that would have reduced or avoided the risk of injury.

As discussed below, 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. Further, this Court and the New Mexico Supreme Court have explicitly recognized that proof of a reasonable alternative design is required in enhanced injury cases like this one. But the district court failed to implement New Mexico law in its instructions to the jury. Indeed, the only instruction given on these issues was UJI 13-1407, the text of which is too ambiguous to inform the jury of the test it is required to apply. In fact, even the district court in this case misinterpreted the instruction in a way that implicitly permits a jury to conclude that passenger cars are unreasonably dangerous—and therefore should not be sold at all—if the risk of rollover injuries cannot be reduced or eliminated. If a learned and knowledgeable trial judge can misinterpret UJI 13-1407 in this way, it is clear that a jury might as well. Thus, if Hyundai is not entitled to judgment in its favor, it is entitled to a new trial

A. New Mexico Law Requires Risk-Utility Balancing In Design Defect Cases.

Under UJI 13-1406, an "unreasonable risk of injury" renders a product defective. UJI 13-1407, which defines "unreasonable risk of injury," does not, on its face, explicitly state a risk-utility balancing test. Rather, that instruction sets forth what seems to be a different standard: it defines an unreasonable risk of injury as a risk which a "reasonably prudent person having full knowledge of the risk would find unacceptable."[1] Nevertheless, the Committee Comments make it plain that the drafters understood this to be a risk-utility test; indeed, the comments note with approval Dean Keeton's view that "there is no way to avoid a risk-benefit calculation in products liability cases." UJI 13-1407 NMRA comm. cmt, *citing* P. Keeton, *Product Liability and the Meaning of a Defect,* 5 St. Mary's L.J. 30, 39 (1973). Consistent with this, the Committee Comments—but not the text of UJI 13-1407 itself—recognize that a product is "unreasonably dangerous if a

[1] As given by the district court in this case, UJI 13-1407 provides in relevant part as follows:

> An unreasonable risk of injury is a risk which a reasonably prudent person having full knowledge of the risk would find unacceptable. This means that a product does not present an unreasonable risk of injury simply because it is possible to be harmed by it. The design of a product need not necessarily adopt features which represent the ultimate in safety. You should consider the ability to eliminate the risk without seriously impairing the usefulness of the product or making it unduly expensive.

reasonable person would conclude that the magnitude of the scientifically perceivable danger as it is proved to be at the time of trial outweighed the benefit of the way the product was so designed and marketed." UJI 13-1407 NMRA comm. cmt, *quoting* Keeton, 5. St. Mary's L.J. at 37-38.

The New Mexico Supreme Court has endorsed these comments and this interpretation of UJI 13-1407. *Brooks v. Beech Aircraft Corp.,* 120 N.M. 372, 379-380, 902 P. 2d 54, 61-62 (1995). As the Supreme Court noted in *Brooks,* UJI 13-1407 "requir[es] the jury to make a risk-benefit calculation," properly focuses the jury's attention "on evidence reflecting meritorious choices made by the manufacturer on alternative design," and "minimize[s] the risk that the public will be deprived needlessly of beneficial products for the sake of compensating injured victims." *Id.* Thus, New Mexico is in accord with the vast majority of American jurisdictions that recognize that liability for defects in design must be determined using a risk-utility analysis that includes "choices made by the manufacturer on alternative design." *See generally Restatement (Third) of Torts: Products Liability* § 2, cmt. d (Restatement "adopts a reasonableness ('risk-utility balancing') test as the standard for judging the defectiveness of designs."); David G. Owen, *Toward a Proper Test for Design Defectiveness: "Micro-Balancing" Costs and Benefits,* 75 Tex. L. Rev. 1661, 1661-62 (1997) ("both courts and commentators now largely

agree that such a balancing test may finally and properly prevail" as the standard for determining the defectiveness of product designs).

B. In This Case, and Virtually All Other Design Defect Cases, Risk-Utility Balancing Necessarily Requires Proof of a Reasonable Alternative Design.

As the Supreme Court noted in *Brooks,* the risk-utility test properly focuses the jury's attention on evidence "reflecting meritorious choices made by the manufacturer on alternative design." 120 N.M. at 380, 902 P. 2d at 62. While the Court never directly stated that proof of a reasonable alternative design was required in a design defect case, this is the necessary implication of the Court's decision, as at least one court has recognized. *Morales v. E.D. Etnyre & Co.,* 382 F. Supp. 2d 1278, 1283-84 (D.N.M. 2005). Indeed, as a matter of both law and logic, the risk-utility test necessarily requires proof of a reasonable alternative design in this case and in virtually all other design defect cases.

At the outset, this is an "enhanced injury" case, where the plaintiff does not claim that a defect in the vehicle caused the accident but claims instead that the defect enhanced the injuries suffered in the accident. New Mexico law is clear that, in such cases, the plaintiff must prove "what injuries, if any, would have resulted had an alternative, safer design been used." *Couch v. Astec Industries, Inc.,* 2002-NMCA-084, ¶ 35, 132 N.M. 631, 639; *accord Lewis v. Samson,* 2001-NMSC-035, ¶ 34, 131 N.M. 317, 330 (stating that in medical malpractice

case, plaintiff claiming an enhanced injury must prove "the degree of enhancement caused by the medical treatment by introducing evidence of the injuries that would have occurred absent the physician's negligence"). In fact, in *Lewis,* the Supreme Court applied the analysis of the Third Circuit in *Huddell v. Levin,* 537 F. 2d 726, 737-738 (3d Cir. 1976), where the court recognized that "in establishing that the design in question was defective, the plaintiff must offer proof of an alternative, safer design, practicable under the circumstances," and that it is "absolutely necessary that the jury be presented with some evidence as to the extent of injuries, if any, which would have been suffered . . . had the plaintiff's hypothetical design been installed." Thus, under this Court's decision in *Couch* and the Supreme Court's decision in *Lewis,* there can be no question that in this enhanced injury case Plaintiffs were indeed required to prove what injuries would have occurred had an alternative, safer design been used. That showing obviously requires proof in the first instance of an alternative, safer design.

Moreover, the facts of this very case illustrate why, properly understood and applied, the risk-utility balancing test established by UJI 13-1407 necessarily requires proof of a reasonable alternative design in most—indeed, virtually all—design defect cases. As noted above, the text of UJI 13-1407 requires the jury to determine whether the risk is one that a reasonably prudent person would find unacceptable. In this case, if there were no reasonable way to reduce or eliminate

the risk of rollover injuries associated with the Hyundai Accent, and no evidence that any other manufacturer of passenger cars had successfully done so, a reasonably prudent person would have only two choices: conclude that (1) the sale of passenger cars should be prohibited or (2) the unavoidable and unreducible risk of rollover injuries was acceptable. There can be no question that a reasonable person under these circumstances would accept the risk of rollover injuries. The enormous benefits of passenger cars to individuals, families, employers, employees, and every segment of society obviously outweigh an unavoidable and unreducible risk of injury in rollover accidents. *In other words, a reasonably prudent person could not possibly conclude that the risk of rollover injuries presented by passenger cars is unacceptable unless there was a reasonable way to eliminate or reduce that risk.*

The same is true for any product which offers any non-negligible benefits to users or to society in general. In fact, there is only one class of cases where—theoretically—proof of an alternative design would not logically be necessary: those cases where the unavoidable and unreducible risk presented by the product is so great, and the benefits of the product so negligible, that the product should not be sold at all and should, in effect, be banned. *See, e.g., Wilson v. Piper Aircraft Corp.*, 577 P.2d 1322, 1328 n. 5 (Or. 1978) ("If, for example, the danger was relatively severe and the product had only limited utility, the court might properly

conclude that the jury could find that a reasonable manufacturer would not have introduced such a product into the stream of commerce."). But decisions about whether an entire class of products—alcohol, tobacco, handguns, etc.—should be banned is a public policy decision more properly entrusted to the legislature than to individual juries. Not surprisingly, therefore, the Reporters for the *Restatement (Third) of Torts: Products Liability* found that "only one American jurisdiction currently recognizes such a position other than by way of dictum in cases that do not present the issue on their facts." *Restatement (Third) of Torts: Products Liability* § 2, Reporters' Notes. As the Reporters also noted, such a position has been consistently rejected, even in cases involving tobacco and handguns. *Id.*

C. The Jury Instructions In This Case Improperly Failed To Require Proof of a Reasonable Alternative Design.

The district court in this case gave no instructions that specifically required the jury to apply a risk-utility analysis; no instruction that specifically informed the jury that it could not find the Hyundai Accent defective or unreasonably dangerous, unless it found that a reasonable alternative design was available to reduce or avoid the risk of rollover injuries; and no instruction that Plaintiffs were required to prove what injuries would have been suffered, had such an alternative design been used. Instead, the district court rejected Hyundai's proposed instruction and simply used the unmodified text of UJI 13-1407. This was error, not just because the text of that instruction failed to give the necessary guidance,

but also because it was affirmatively misleading and permitted recovery on a theory not applicable to this case.

Rule 1-051 NMRA generally requires the district court to instruct the jury in the language of the Uniform Jury Instructions. However, Rule 1-051(D) recognizes a necessary exception where "the published UJI Civil is erroneous or otherwise improper." It has long been New Mexico law that it is improper to give instructions that are "not pertinent to the issues of fact raised by the evidence and thus inject[] false and misleading issues." *Embrey v. Galentin,* 76 N.M. 719, 721, 418 P. 2d 62, 64 (1966). Jury instructions "should direct the attention of the jury to the specific issues which it is their province to determine, and embrace *only* the statements of law by which the evidence on these issues is to be examined and applied." *Martin v. La Motte,* 55 N.M. 579, 237 P. 2d 923 (1951) (emphasis added). "Generally, those serving upon juries are not accustomed to the duties devolving upon them, and are likely to be confused by the conflicting evidence and the arguments of counsel; and hence it is extremely important that, in order to aid them in discharging their duties intelligently, the issues of fact which they are to determine should be made plain, and the rules of law applicable to such issues succinctly stated." *Id.* at 582, 237 P. 2d at 924.

Particularly under the circumstances of this case, the instruction given by the district court—the unmodified text of UJI 13-1407—does not meet this standard.

The text of that instruction does not, on its face, require the jury to conduct a risk-benefit analysis. Rather, to a lay jury not steeped in the nuances of product liability law, the text sets forth what seems to be a completely different standard: it instructs the jury that the principal issue for it to decide is whether "a reasonably prudent person having full knowledge of the risk would find [that risk] unacceptable." As discussed above, the comments to the instruction make it clear that its drafters assumed that a reasonably prudent person would conduct a risk-utility analysis to determine if the risk was acceptable, but that assumption is not evident from the text of the instruction itself.

It is true, of course, that the instruction also tells the jury that it "should consider" the manufacturer's "ability to eliminate the risk without seriously impairing the usefulness of the product or making it unduly expensive." But this language actually aggravates the problem for several related reasons. First, it merely suggests that the jury "should," not must, consider whether an alternative design was available. The instruction does not impose the burden of presenting evidence on this issue on either party, and establishes no consequences for failing to produce such evidence. Thus, as long as the jury "considers" the issue, it has complied with the instruction and remains free to decide—based on other factors not identified in the instruction—that a reasonable person would find the risk

unacceptable even if there were no practical or reasonable way to make the product safer.

As discussed above, this interpretation of the instruction, while consistent with the text, is not consistent with the intention of the drafters or with New Mexico law. Further, as also discussed above, this interpretation of UJI 13-1407 cannot be correct, because a reasonably prudent person could not find the risks inherent in a useful and socially desirable product to be unacceptable unless there were a practical way to reduce that risk without unreasonably interfering with the utility and safety of that product. And yet, the district court in this case, by concluding that proof of an alternative design was not required, necessarily adopted exactly this erroneous interpretation of the instruction, in effect permitting the jury in this case to decide that an unavoidable risk of rollover injuries in passenger cars outweighed all of the benefits provided by passenger cars, that passenger cars are unreasonably dangerous—and that passenger cars therefore simply should not be sold. Even assuming that the New Mexico Supreme Court might recognize a theory of recovery for injuries caused by dangerous products that have so little utility that they should be banned, that theory would have no applicability to passenger cars or most other products. In most product liability cases, therefore, it would be error to give an instruction which improperly

permitted recovery on such an irrelevant theory. And yet, that is exactly what the unmodified text of UJI 13-1407 does.

It may be that the district court did not recognize the full significance of its holding, precisely because the language of the instruction (unlike the language of the Committee Comment) is on its face imprecise and ambiguous. Precisely because UJI 13-1407 does not expressly require risk-utility analysis and does not expressly require proof of a reasonable alternative design, it is possible to speculate that there might in fact be *some* logical basis for imposing liability under UJI 13-1407 even without such proof. This, in effect is what the district court did:

> I don't see any controlling authority [in] New Mexico that would make alternative design an element of this type of case. I recognize Judge Browning's opinion [in *Morales]*, but I am not as convinced, as perhaps he was, that that's the direction New Mexico is going. . . . . [B]ecause there is no controlling authority in New Mexico, I would deny Defendant's request to include reference to the alternative design in the jury instructions . . . .

(Tr. Vol. VII at 130:15-24.)

The fact that no logical basis exists for liability without a reasonable alternative design in cases like this, or in the vast majority of product liability cases, becomes apparent only after a careful and sophisticated analysis that takes account of the Committee Comments, the decisions of New Mexico courts discussing the meaning of defective design, and the fundamental nature of risk-

utility analysis. Even with the benefit of all of this information, however, the district court reached a mistaken conclusion. The jury in this case, in contrast, had none of this information except the text of UJI 13-1407, and little or no experience with the type of analysis necessary to reach the correct result. Thus, the risk that the jury would misinterpret UJI 13-1407, just as the district court did, was plainly unacceptable. *See, e.g., LaBarge v. Stewart,* 84 N.M. 222, 225, 501 P. 2d 666, 669 (Ct. App. 1972) ("Since lawyers and courts cannot agree upon the meaning of critical words, certainly the jury cannot be expected to know what they mean . . . .")

The purpose of instructing the jury is to "make the issues that they are to determine plain and clear." *Haynes v. Hockenhull,* 74 N.M. 329, 334, 393 P. 2d 444, 447 (1964). But the text of UJI 13-1407 tends to obscure rather than illuminate the issues that the jury must determine in cases like the present one. Thus, under the circumstances of this case, UJI 13-1407 was "erroneous or otherwise improper," Rule 1-051(D) NMRA, and it should have been modified as requested by Hyundai to specifically inform the jury that it could not find the risk of rollover injuries in passenger cars unacceptable unless there was a way to reduce or eliminate that risk.

## CONCLUSION

If Hyundai is not entitled to judgment in its favor, the failure of the district court to give Hyundai's modified version of UJI 13-1407 requires a new trial.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on August 27, 2008, I caused copies of the foregoing *Brief of Amicus Curiae Product Liability Advisory Council, Inc.* to be served by first-class United States mail, postage prepaid to the following individuals.

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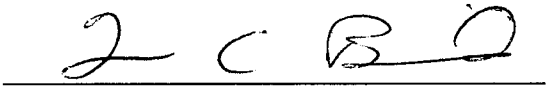

Counsel for Amicus Curiae
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# APPENDIX

# Corporate Members of the Product Liability Advisory Council

as of 6/6/2008
Total: 120

3M
ACCO Brands Corporation
Altec Industries
Altria Corporate Services, Inc.
American Suzuki Motor Corporation
Andersen Corporation
Anheuser-Busch Companies
Arai Helmet, Ltd.
Astec Industries
BASF Corporation
Bayer Corporation
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Briggs & Stratton Corporation
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chrysler LLC
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
Daimler Trucks North America LLC
The Dow Chemical Company
E.I. DuPont De Nemours and Company
Easton-Bell Sports, Inc.
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Genentech, Inc.
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Harley-Davidson Motor Company
Hawker Beechcraft Corporation
The Heil Company
Honda North America, Inc.
Hyundai Motor America
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Komatsu America Corp.
Kraft Foods North America, Inc.
Leviton Manufacturing Co., Inc.
Lincoln Electric Company
Magna International Inc.
Mazda (North America), Inc.
Medtronic, Inc.
Merck & Co., Inc.
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Mueller Water Products
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Nokia Inc.
Novartis Pharmaceuticals Corporation
Occidental Petroleum Corporation
PACCAR Inc.
Panasonic
Pfizer Inc.
Porsche Cars North America, Inc.
PPG Industries, Inc.
Purdue Pharma L.P.
Putsch GmbH & Co. KG
The Raymond Corporation
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Sanofi-Aventis
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.

# Corporate Members of the Product Liability Advisory Council

as of 6/6/2008
Total: 120

St. Jude Medical, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation
Textron, Inc.
TK Holdings Inc.
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive
UST (U.S. Tobacco)
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.