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,

vs.

FORD MOTOR COMPANY,

Defendant-Appellant.

No. 29,296

(D. Ct. No. D-0117-CV-2007-00214)

Appeal from the First Judicial District Court
Rio Arriba County, New Mexico

The Honorable Timothy Garcia, Judge

APPELLANT'S BRIEF IN CHIEF

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CERTIFICATE OF COMPLIANCE

The body of the attached brief exceeds the 35-page limit set forth in Rule 12-213(F)(2) NMRA. As required by Rule 12-213(G) NMRA, we certify that this brief complies with Rule 12-213(F)(3) NMRA, in that the brief is proportionately spaced and the body of the brief contains 8,983 words. This brief was prepared and the word count determined using Microsoft Office Word 2003.

Transcript citations: Citations to the trial transcript are by page and line numbers. Citations to hearing transcripts are by the date of the hearing and by page and line numbers. Citations to deposition designations are by the name of the witness and page and line numbers.

A hearing on motions in limine was held on the morning of August 11, 2008, immediately before jury selection. That hearing is cited by the hearing date and the time notation from the court monitor's log.

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I. SUMMARY OF PROCEEDINGS

A. Nature And Disposition Of The Case

On November 10, 2006, as Sammy Gurule drove his 1993 Ford Ranger northbound on Interstate 25 near Hatch, New Mexico, he failed to follow a right-hand curve and drove his vehicle into the dirt median between the north and southbound lanes. The vehicle ran over several road signs and the wheels eventually furrowed into the ground, causing the vehicle to trip and roll over several times before coming to rest on the driver's side. Sammy Gurule was pronounced dead at the scene of the accident.

Plaintiff Edwin Gurule ("Plaintiff") sued Ford for Sammy Gurule's death, alleging that excessive roof crush caused fatal head injuries and that a non-defective roof would have prevented serious injury. There was no claim that any vehicle defect or negligence by Ford caused the accident. After a two-week trial, the jury returned a verdict in Plaintiff's favor in the amount of $8.5 million. The trial court denied Ford's motions for judgment as a matter of law or alternatively for a new trial and upheld the jury's verdict.

B. Statement Of Relevant Facts

1. The accident and injury

Plaintiff's accident reconstruction expert, Curtis Flynn, testified that Sammy Gurule's vehicle was traveling between 62 and 72 mph when it left the highway and entered the dirt median. (Tr. 128:19-22.) When the vehicle tripped and began

to roll over, it was going about 50 mph. (Tr. 125:9-16.) The vehicle rolled at least 2 ¾ times, possibly more. (Tr. 130:4-7; 138:8-20.) Although the vehicle entered a passenger-side leading roll, because the vehicle initially was airborne, the first ground impact was on the driver's side roof. (Tr. 131:1-10.) The vehicle was spinning at about 230 degrees per second when the roof first slammed into the ground. (Tr. 137:18-23.) Flynn believes that most of the roof damage occurred in this initial ground strike. (Tr. 131:11-16.)

Dr. Ian Paul, a forensic pathologist for the New Mexico Office of the Medical Examiner, performed an autopsy on Sammy Gurule and determined that the cause of death was "blunt force injury to the head." (Paul Dep. at 5:8.) He found abrasions indicating impacts on the left forehead, left lower face, and left lower neck and diffuse bleeding in and around the brain. (*Id.* at 5:11-19.) He also found a fracture at the left base of the skull. (*Id.* at 5:20.) Dr. Paul described the fatal brain injuries as a "rapid deceleration type injury" from a "sudden impact" when Sammy's head was moving and then hit something. (*Id.* at 10:6-15.)

None of Sammy Gurule's other injuries were fatal. (*Id.* at 15:9-12.) Dr. Paul found that the cervical spine was stable and that there was no neck fracture. (*Id.* at 15:13-15.)

2. Plaintiff's evidence of an alleged roof design defect

In support of his design defect theory, Plaintiff presented the testimony of Dr. Michael Huerta, a mechanical engineer who specializes in structural analysis. Dr. Huerta was qualified by the court to testify about structural analysis, which he described as "analysis . . . to determine how [a structure] responds to loading conditions, to calculate the strengths, deflections and stresses." (Tr. 505:11; 506:10-21; 515:22-517:13.) He was not qualified to testify about automobile design and safety. (Tr. 516:7-15.)

Dr. Huerta physically inspected various components of the roof structure of a 1993 Ranger. (Tr. 518:14-522:8.) The components he identified were the "header," which runs along the top of the windshield; the "A-pillar," which runs diagonally along the side of the windshield; the "roof rail," which runs along the top of the door frame; and the "B-pillar," which runs vertically behind the outside shoulder of the driver. (Tr. 520:8-521:2.) Dr. Huerta found that the header, A-pillar, and roof rail were fabricated from steel that was 36 thousandths of an inch thick – identified as 30 gauge steel – and were "open" sections. (Tr. 537:21-24; 616:10-13; 625:22-25.)

In order to analyze the strength of the Ranger roof, Dr. Huerta conducted two "drop tests" of exemplar Rangers, in which he dropped an upside-down vehicle onto the front, driver's side corner of the roof from heights of 24 and 18

inches. (Tr. 522:9-25.) Dr. Huerta found significant buckling of the header and A-pillar in his drop tests. (Tr. 528:24-529:6; 533:9-14.) Without identifying the amount of roof crush in either his drop tests or the accident vehicle, or measuring the forces in either one, he opined that the crush was "similar" and the forces "comparable." (Tr. 696:4-14.) Based only on his drop testing and inspection, he opined that the Ranger roof was weak and that the steel gauge used in the roof was thin. (Tr. 533:22-534:2; 544:8-16.)

Dr. Huerta fabricated reinforcements to the roof of another exemplar Ranger by inserting steel tubing in the A-pillar, header, and roof rail and then conducted an 18-inch drop test of this modified Ranger. (Tr. 596:9-15, 19-22; 602:25-603:1-3.) These reinforcements resulted in considerably less roof crush. (Tr. 605:11-606:11.) With the reinforced roof elements, Dr. Huerta measured four to five inches of roof crush at the junction of the A-pillar, header, and roof rail and two to three inches further back toward the B-pillar. (Tr. 605:22-24; 606:13-17.) Plaintiff introduced a roof section from a 1994 Ford Mustang that Dr. Huerta opined had design features similar to the reinforcements he made to the Ranger roof and that he believed would be more effective in resisting loads. (Tr. 617:16-19; 627:23-629:11.)

When Plaintiff sought design and safety opinions from Dr. Huerta, Ford objected that "this witness can talk to the structural engineering issues, about how

much you can limit it and so forth, but he is not entitled, based upon his background and experience, to talk about a safe or unsafe roof. He's made no such foundational showing he can talk to that at all." (Tr. 634:14-636:16.) The court overruled this objection, because "that goes to weight, not to the ability to give the opinion" and "[w]ho else is going to give this opinion if it's not going to come from the engineer, as to the dangers?" (Tr. 636:17-20.) In response to continuing objections by Ford, the court subsequently questioned the propriety of "asking a structural engineer to make an unreasonably dangerous opinion," but it ultimately allowed him to do so. (Tr. 637:4-17; 643:20-644:2; 647:13-648:8; 666:8-10.)

As a result, Dr. Huerta was allowed to opine that the 1993 Ranger roof was "unreasonably dangerous" based on the results of his drop testing, his opinion that the roof could be reinforced for about $100 per vehicle, and the opinion of Plaintiff's biomechanic, Dr. Joseph Peles, that if roof crush had been limited to two or three inches, Sammy Gurule would have suffered only minor injuries. (Tr. 663:19-666:10.) Dr. Huerta opined that the roof should be "reasonably strong so that you do not get large amounts of roof intrusion that can lead to head injuries." (Tr. 689:9-12.) Dr. Huerta defined excessive intrusion as "six, eight, ten inches," while two to three inches "is something that could be tolerated," and five inches "is probably maximum in terms of the head area." (Tr. 687:11-14; 688:1-19.)

3. Plaintiff's evidence of the cause of Sammy Gurule's fatal injuries

In order to establish that the alleged roof defect caused Sammy Gurule's death, Plaintiff presented the testimony of Dr. Peles, a biomechanical engineer. Dr. Peles was qualified by the court to testify about the forces on, and movement of, Sammy Gurule's body during the accident and how those forces caused injury. (Tr. 257:12-18; 264:2-10.) He was not qualified to testify about automobile design or safety. (*See id.*)

Dr. Peles testified that the inertial forces in a rollover accident cause occupants in the vehicle to move upward and outward against the roof even if they are properly restrained. (Tr. 286:20-287:5 ("[E]ven if you're wearing a restraint system, what typically happens is your head either becomes very close to or in contact to the header panel, right in that area.").)

According to Dr. Peles, Sammy Gurule's head was touching the roof near the junction of the header and roof rail, likely "right up against the roof rail," at the point of impact:

> Typically as the vehicle is side skidding, it will pull you over that way some. But then as the roll continues to progress . . . , the person is going to move upward and outward, and that's the area that they're going to be, right up against that roof rail, right up against where we saw the blood and everything in that area, is where I'm – a person typically is.

(Tr. 287:9-16.) (*See also* Tr. 385:7-20; Tr. 456:8-11 ("[T]hat's where their head is, constrained by the header panel and the . . . roof rail. . . .").) Dr. Peles repeatedly confirmed his opinion that Sammy Gurule's head was "touching the roof for sure" at the time the Ranger roof first impacted the ground. (Tr. 382:25-383:6; 386:1-3; 387:1-3.)

The impacts on Sammy's head indicated that a combination of vertical and lateral forces caused the brain hemorrhages and skull fracture that resulted in Sammy's death. (Tr. 289:14-17, 20; 292:15-23; 294:1-14; 333:21-24.) Dr. Peles explained that the brain "is going to move toward the impact point" within the skull. (Tr. 296:24-25.) Based on the location of the brain hemorrhages, Dr. Peles determined that "the brain move[d] up, away from the bottom of the skull," tearing the connecting veins at the base of the skull:

> Well, there's veins and blood vessels that travel through these layers and connect to the outer portions of the skull. So if the brain moves within the skull, those veins can be torn, and they can cause bleeding. And that's what a subdural and subarachnoid hemorrhage is. . . . But his are located at a very specific location, down here. And that tells me that the brain moved up, because if the brain moves up, away from the bottom of the skull – the brain is sitting in the skull like this. If it moves up, it's going to stretch those veins and tear those veins. And that's what happened in this case.

(Tr. 294:8-14.)

The fact that Sammy suffered head injuries, rather than a neck injury, indicated to Dr. Peles that the injury-causing force had a "significant lateral

component." (Tr. 295:17-296:7; 388:11-389:1.) This corresponded to the roof crush, which also had a lateral and vertical component. (Tr. 296: 4-7 ("It was not completely leftward, left to right, on the skull. It was a combination of downward and left to right, exactly as the roof crush would dictate, because we had the lateral and downward roof crush.").)

Dr. Peles measured the total lateral roof crush as 2.75 inches, while the vertical roof crush over the driver's seat was approximately 12 inches. (Tr. 272:17-273:5.) He explained that the fatal injuries were caused by the "initial" roof crush, when the lateral and vertical components were "relatively equal," and not by the "residual" crush as the roof continued to deform:

> Q. You believe . . . that there is some vertical component and some lateral component.
>
> A. Correct. Yes.
>
> Q. And I think your position is that they are, even though you didn't calculate it, relatively equal.
>
> A. I believe so, yes.
>
> Q. So we've got a roof deforming, your opinion, as much as 12 inches, but you have an equal lateral and vertical component.
>
> A. Yes, yes, because if forces are occurring earlier, then it's not the residual crush that produced the injuries, it was the initial caving in of the roof that occurred and produced it. So they're going to be more equal at that point.

(Tr. 389:7-20 (emphasis added).)

Despite the admitted fact that it had nothing to do with the injuries, Dr. Peles testified at some length about how the residual roof crush pushed Sammy Gurule into his seat and trapped him against the roof rail where his blood was found. (Tr. 280:5-285:19.) At the conclusion of his direct testimony, Dr. Peles agreed with the statement of Plaintiff's counsel that, if roof crush had been limited to two or three inches, Sammy would have "walked away" from the accident with only minor injuries. (Tr. 352:20-353:1.)

4. Plaintiff's evidence regarding hedonic damages

Before trial, Ford moved to exclude the testimony of William Patterson purporting to give an expert opinion on the "lost value of life." (R.P. 1692.) The trial court denied the motion. (Tr. (8/11/08) 11:25:54 to 11:26:31.) Over Ford's objection at trial, Patterson was allowed to opine, as an expert, that the value of life is $10,000 to $100,000 per year purportedly based on certain generic "benchmarks" derived from surveys. (Tr. 904:16-23; 906:13-24.) Patterson testified that based on these benchmarks, the present value of Sammy Gurule's loss of enjoyment of life would total $598,680 to $5.99 million. (Tr. 907:4-12.) This opinion testimony was not tied specifically to Sammy Gurule's life circumstances in any way. (Tr. 934:17-935:24.) The jury ultimately awarded $5.8 million as lost value of life damages. (R.P. 2265.)

II. ARGUMENT

A. Ford Is Entitled To Judgment As A Matter Of Law Because Plaintiff Failed To Prove That The Alleged Defect Caused The Fatal Injuries.

There was conflicting evidence in this case as to whether Sammy Gurule suffered his fatal injuries when his head went outside the vehicle and hit the ground or whether he received the injuries when his head was inside the vehicle in contact with the roof. But there was no conflict that excessive roof crush did not cause the fatal injuries because Plaintiff's own expert testified unequivocally that it did not. Ford is entitled to judgment, therefore, because there was no evidence that the alleged defect caused the fatal injuries.

Plaintiff's own expert testified unambiguously, based on his analysis of the physical evidence, that Sammy Gurule's head was on the vehicle roof when it impacted the ground and that the very first roof deformation caused the fatal blunt force injuries, not the allegedly excessive crush as the roof continued to deform. As explained below, in the context of this clear and detailed testimony exonerating the claimed defect, the solitary statement that the trial court relied on to deny Ford's motions for judgment is not susceptible to the interpretation the court gave it and does not constitute substantial evidence supporting the verdict. In addition, Plaintiff presented no evidence that an alternative, non-defective roof design would have limited roof crush in this accident sufficiently to prevent the fatal injuries.

Although this was a tragic accident in which a young man lost his life due to a momentary mistake, affirming this verdict when (1) Plaintiff's own expert conceded that the allegedly excessive roof crush had nothing to do with Sammy Gurule's fatal injuries and (2) there was no evidence that an alternative roof design could have limited roof crush to the extent necessary to prevent the injuries would be manifestly unjust. This Court should reverse and direct judgment for Ford. Alternatively, this Court should order a new trial because the weight of Plaintiff's own evidence is "clearly and palpably contrary to the jury's verdict." *Rhein v. ADT Auto., Inc.*, 1996-NMSC-066, ¶ 23, 122 N.M. 646, 930 P.2d 783.

Ford preserved its challenge to the sufficiency of the evidence to prove causation during trial (Tr. 840:19-841:1), by its motion for directed verdict at the close of Plaintiff's evidence (Tr. 1058:15-1066:14), and by its motion for judgment notwithstanding the verdict or new trial after the verdict (R.P. 2638; *see id.* at 2642, 2643-47; Tr. (12/29/08) 4:19-6:16, 8:9-12:11.)

1. Standard of review

A verdict must be supported by substantial evidence, which is "such relevant evidence that a reasonable mind would find adequate to support a conclusion." *Salazar v. D.W.B.H., Inc.*, 2008-NMSC-054, ¶ 6, 144 N.M. 828, 192 P.2d 1205 (internal quotation marks & citation omitted). In reviewing the sufficiency of the evidence, the court must "resolve all factual disputes and indulge all reasonable

inferences in favor of" the prevailing party. *Id.* This standard does not mean, however, that the court must or should accept unreasonable inferences, statements taken out of their context, or assertions that are physically impossible or patently false. *Id.* ¶ 11 ("[D]rawing inferences from statements taken out of context would be unreasonable."); *see also State v. Graham,* 2005-NMSC-004, ¶ 11, 137 N.M. 197, 109 P.3d 285 (recognizing that testimony the fact finder has believed may be rejected "if there is physical impossibility that the statements are true or the falsity of the statement is apparent without resort to inferences or deductions" (internal quotation marks & citation omitted)).

Whether there is sufficient evidence to submit a claim to the jury is a question of law, which this Court reviews *de novo. State v. Duran,* 2005-NMSC-034, ¶ 19, 138 N.M. 414, 120 P.3d 836; *Loucks v. Albuquerque Nat'l Bank,* 76 N.M. 735, 740, 418 P.2d 191, 196 (1966).

2. Plaintiff presented no evidence that the alleged roof defect caused enhanced injuries to Sammy Gurule.

In this crashworthiness case, to establish causation Plaintiff was required to prove "(1) that the defective design caused injuries over and above those which otherwise would have been sustained, and (2) the degree of enhancement." *Couch v. Astec Industries, Inc.,* 2002-NMCA-084, ¶ 35, 132 N.M. 631, 53 P.3d 398. "The degree of enhancement may be established by proof of what injuries, if any, would have resulted had an alternative, safer design been used." *Id.*

This case was about excessive roof crush. The unreasonable risk of injury identified by Plaintiff's purported "design" expert, Dr. Huerta, was from excessive roof crush. (Tr. 605:11-607:19; 687:11-689:12.) Dr. Huerta conceded that a "perfectly stiff roof is a nonachievable concept" (Tr. 711:17-18), but he held that a roof should be strong enough to limit intrusion into the passenger space to three inches or less (Tr. 688:10-19). In order to establish that the alleged design flaw or negligence caused the fatal injuries, Plaintiff had to present sufficient evidence to support a finding that the "excessive" roof crush over three inches caused Sammy Gurule's fatal injuries and that a non-defective roof would have limited roof crush sufficiently to prevent those injuries. Plaintiff's evidence, however, did not support either of these conclusions.

a) Plaintiff's own expert admitted that excessive roof crush did not cause the fatal injuries.

Although Dr. Peles testified that roof crush caused Sammy's fatal injuries, that was not sufficient to establish causation in this case. Dr. Huerta conceded that even a non-defective roof would crush up to three inches in a rollover like this one. (Tr. 605:22-24; 606:13-17; 687:11-14; 688:1-19.) Accordingly, Plaintiff had to submit sufficient evidence to conclude that excessive roof crush – i.e., roof crush over three inches – caused Sammy Gurule's fatal injuries, not just any roof crush. But Plaintiff's evidence, in fact, showed the opposite.

Dr. Peles, based on a lengthy and well-documented analysis of the physical evidence and Sammy Gurule's injuries, testified unequivocally that the injuries were caused by the "initial cave-in of the roof," and not by the "residual" roof crush. (Tr. 389:7-20.) He defined specifically what he meant by "initial" roof crush: the crush that occurred almost immediately upon impact with the ground, when the lateral roof crush – which was always less than three inches – and the vertical roof crush were "relatively equal." [1] (*Id.*) The only possible conclusion from this testimony is that the additional nine or ten inches of vertical roof crush that Dr. Huerta deemed excessive occurred after Sammy had suffered his fatal injuries and had nothing to do with causing those injuries.

Plaintiff is bound by this unequivocal testimony by his own witnesses. *See Romero v. Turnell,* 68 N.M. 362, 366, 362 P.2d 515, 518 (1961). Based on this evidence, no reasonable mind could find that excessive roof crush caused the fatal injuries. While Dr. Peles attributed the fatal injuries to the initial roof crush, he did not attribute any injuries to the excessive roof crush that Dr Huerta said resulted from negligent design and constituted a defect.

This failure of proof is the same as, but even more clear than, the failure that required a directed verdict for the defendant in *Duran v. General Motors Corp.,*

[1] Although not part of the evidence presented to the jury, Dr. Peles confirmed this causation scenario in questioning by the trial court outside the presence of the jury, explaining that Sammy received the blunt force injuries "as the roof starts to cave in, as this portion starts to buckle . . . ." (Tr. 479: 3-4 (emphasis added).)

101 N.M. 742, 688 P.2d 779 (1983), *overruled on other grounds by Brooks v. Beech Aircraft Corp.,* 120 N. M. 372, 902 P.2d 54 (1995). In *Duran*, the plaintiff presented expert opinion that roof crush caused the injury, but his causation expert did not address how the amount of roof crush made any difference in the outcome. As the Court explained, this was insufficient to establish enhanced injury caused by the alleged defect – i.e., excessive roof crush:

> Plaintiff did not claim, and his experts did not testify, that the roof should not have buckled on impact. It is the additional intrusion attributable to the defects that is at issue. Defendants are not liable for injuries caused by the initial impact and intrusion of the rear header resulting therefrom. They are only liable, if at all, for that portion of the damage or injury caused by the defects over and above the damage or injury that probably would have occurred as a result of the van impacting on its roof without those defects. The doctor does not address this in his testimony.

101 N.M. at 752, 688 P.2d at 789 (emphasis added & original emphasis omitted).

In this case, as in *Duran,* Plaintiff conceded that some roof crush was inevitable, requiring him to establish that it was the excessive roof crush that caused the injuries. Plaintiff's evidence not only failed to support this, it proved exactly the opposite. Whereas the expert in *Duran* did not address the role of excessive roof crush, Dr. Peles expressly testified that the "initial cave-in" was the culprit, not the "residual" roof crush. (Tr. 389:7-20.) Particularly given Dr. Peles's emphasis on the significant role of lateral roof crush, which was less than

three inches, no reasonable mind could find from his testimony that excessive roof crush caused the fatal injuries.

b) The trial court adopted an unreasonable and impermissible interpretation of the evidence in upholding the verdict.

In denying Ford's motions for directed verdict and judgment notwithstanding the verdict, the trial court relied on the single statement by Dr. Peles, at the end of his direct testimony (Tr. 352:20-353:1), agreeing with Plaintiff's counsel that Sammy Gurule would have walked away with minor injuries if roof crush had been limited to two or three inches. (Tr. 1062: 14-25 ("He said he would have walked away from the incident without that injury."); Tr. (12/29/08) 8:17-22, 10:4-6 ("He said if there had only been two inches of deformation there would have been no injury"; "But he did say . . . if the roof crush had not been more than two inches, he would've received no injury.").)

Based in part on his questioning of Dr. Peles outside the presence of the jury, the trial court interpreted this statement as creating an inference that Sammy Gurule's head was "outside the impact zone" if roof crush had been limited to two or three inches and that his fatal injuries were <u>not</u> caused by the initial roof crush. (Tr. 841:11-842:1 ("That's what I asked him . . . . He said no, he wouldn't have been in that initial impact zone if the roof hadn't crushed as far as it did, if it had been strengthened. That's my understanding of his testimony.").) The trial court

reiterated this belief in denying Ford's post-verdict motion on the same issue. (Tr. (12/29/08) 6:23-24; 11:8-10 ("He said there would have been no force if it had not crushed more than two inches . . . . That's what my understanding is. He would not have been within that two-inch region against the rail.").) The trial court concluded that this created an inconsistency in the testimony, and an issue of fact for the jury, as to whether Sammy Gurule's head was in the impact zone and received his injuries from the initial roof crush or the allegedly excessive roof crush. (Tr. (12/29/08) 4:16-5:3.)

This was not a reasonable or permissible inference from this single statement by Dr. Peles. Dr. Peles never said that Sammy Gurule's head was outside the initial impact zone or that fatal injuries were not caused by the initial roof crush – he consistently said the opposite. And the solitary statement relied on by the trial court is susceptible to that interpretation only if one ignores all of Dr. Peles's detailed testimony about how and when the fatal injuries occurred. This is not a legally appropriate substantial evidence review, as the New Mexico Supreme Court recently explained:

> Part of our task in resolving factual disputes is to indulge all reasonable inferences in favor of [the prevailing party]. However, drawing inference from statements that have been taken out of context would be unreasonable. *See Payne v. Tuozzoli,* 80 N.M. 214, 218, 453 P.2d 388 (Ct. App. 1969) ("In resolving conflicts in the evidence in support of the findings, it is not contemplated, nor is it consistent with reason, that words, phrases, clauses or sentences may be selected out of context and then combined to give support for a conclusion

which is not supportable by the entire text of the testimony of the witnesses on the particular subject or subjects from which the selections are taken.")

Salazar v. D.W.B.H., Inc., 2008-NMSC-054, ¶ 6, 144 N.M. 828, 192 P.2d 1205.

Dr. Peles's testimony, reviewed as a whole, permits only one reasonable conclusion. He confirmed numerous times, including in his colloquy with the trial court outside the presence of the jury, that Sammy's head was on the roof either at or so close to the point of impact that he received the fatal blunt force injuries immediately from the "initial cave-in" – i.e., the "start" of the roof crush. (Tr. 382:25-383:6; 386:1-3; 387:1-3; 481:7-482:7.) Dr. Peles's testimony was consistent and unequivocal on this point:

Q. And you would agree with me that there's no mention of him being two to three inches away from the roof in that testimony?

A. I – oh, it's not.

Q. You agree with me?

A. Oh, no. He's not away from the roof. No. No. He's from the plastic trim panel more lateral. He's touching the roof for sure.

* * *

A. No. They're not separated to start with, no, if that's what you're saying.

(Tr. 385:21-387:22 (emphasis added).)

Dr. Peles expressly told the court, just as he told the jury, that the very beginning of the roof crush caused Sammy Gurule's injuries – again emphasizing the lateral roof crush of less than three inches – not the "push" of the allegedly excessive vertical roof crush:

> THE COURT: And this [blunt] force that you're describing is received while he's in the upper portion of the truck, or when he's down to the next slide, which shows the resting position?
>
> THE WITNESS: It's received as the roof starts to cave in, as this portion starts to buckle – as the lateral crush is occurring and the buckling is occurring is when its received.
>
> * * *
>
> THE COURT: Well, if the primary force is – are you saying the primary force isn't hitting him within that first two to four inches of this roof crush?
>
> THE WITNESS: I would say that the cave-in starts – yes, early, it starts buckling in, laterally deforming very early.
>
> THE COURT: And isn't blunt force trauma when the impact occurred as opposed to when the push occurs?
>
> THE WITNESS: Yeah, it's not a push, it's that impact....

(Tr. 481:10-481:19 (emphasis added).)[2]

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[2] In this colloquy, Dr. Peles did not even recall agreeing with Plaintiff's counsel that Sammy Gurule would have had only minor injuries if roof crush had been limited to three inches (Tr. 483:25-484:8) and now agreed that in Sammy's position even "two to four inches" of roof crush could "cause very serious injury" (Tr. 480:24-481:3). He nevertheless attempted to justify the statement, not on the ground that Sammy Gurule was outside the initial crush zone or that his injuries

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Nothing that Dr. Peles said at any point in the trial can be interpreted or understood to mean that Sammy Gurule's head was outside the initial crush zone when the roof impacted the ground. The trial court had to rely on non-existent evidence and an unreasonable inference to uphold the verdict. Dr. Peles testified over and over that Sammy's head was in the initial crush zone and felt the full brunt of the initial roof crush – and that it caused his fatal injuries. The trial court clearly erred in holding otherwise.

Moreover, Dr. Peles never offered any explanation of the statement relied on by the trial court that supports an inference that Sammy Gurule was injured by excessive roof crush. New Mexico, like other jurisdictions, recognizes that the probative value of an expert opinion depends on the existence of some reasonable explanation for the opinion. *Four Hills Country Club v. Bernalillo County Property Tax Protest Bd.*, 94 N.M 709, 714, 616 P.2d 422, 427 (Ct. App. 1979) ("The rule is [sic] this jurisdiction has long been that experts must satisfactorily

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were caused by excessive roof crush, but on the theory that the "blunt force is lower" with a stronger roof even during the initial roof crush. (Tr. 484:12-18.) But Dr. Peles admitted that he had not measured those forces or presented any such opinion to the jury. (Tr. 481:19-24.) The verdict cannot be upheld on a defect and causation theory that was never presented to the jury. *See Duran,* 101 N.M. at 752, 688 P.2d at 779 (rejecting alternate causation theory proposed in appeal brief because "the jury did not consider this contention. Without it, according to plaintiff's own statement, there is no basis for the verdict because it cannot be sustained on the intrusion alone.").

explain the steps followed in reaching a conclusion, and without such an explanation the opinion is not competent evidence." (citation omitted)); *State v. Foster,* 1999-NMSC-007, ¶ 43, 126 N.M. 646, 974 P.2d 140; *Walker v. L.G. Everist, Inc.,* 102 N.M. 783, 790, 701 P.2d 382, 389 (Ct. App. 1985). At the very least, to raise the inference suggested by the trial court, notwithstanding Dr. Peles's testimony as a whole, some reasonable explanation was required. As a federal court explained:

> We must remember, however, that evidence sufficient to support a jury verdict must be substantial evidence .... An expert's opinion must be supported to provide substantial evidence; we look to the basis of the expert's opinion, and not the bare opinion alone .... A claim cannot stand or fall on the mere *ipse dixit* of a credentialed witness.

Guile v. United States, 422 F. 3d 221, 227 (5th Cir. 2005) (internal quotation marks & citation omitted). *See also Weisgram v. Marley Co.,* 528 U.S. 440, 454 (2000) ("When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict." (internal quotation marks & citation omitted)).

Plaintiff did not create a conflict in the evidence, and a jury issue on causation, simply because his expert agreed to a single leading statement that could support the verdict only if it is taken out of context and Dr. Peles's testimony as a whole is ignored, and that Dr. Peles never explained. Because Plaintiff presented

no evidence that a reasonable mind would accept to find that the allegedly excessive roof crush caused enhanced injuries to Sammy Gurule – and, in fact, Plaintiff's expert admitted that excessive roof crush had nothing to do with the injuries – Ford is entitled to judgment as a matter of law.

3. Plaintiff presented no evidence that an alternative design would have prevented the fatal injuries.

Even if Dr. Peles's testimony had been sufficient to find that Sammy Gurule's fatal injuries were caused because the roof crushed more than three inches, Plaintiff did not present any evidence that an alternative roof design would have limited roof crush to two or three inches in this accident and thereby prevented the fatal injuries. As a result, Plaintiff failed to present sufficient evidence that Sammy Gurule suffered more severe injuries than he would have in the absence of the defect, or the extent of the enhancement, as required by *Couch.*

Dr. Huerta identified two alternative stronger roof designs: a reinforced Ranger roof structure that he created and the roof of a 1994 Mustang that he testified contained similar design features to his reinforcements. He also opined that a roof should withstand 3.5 times its own weight before crushing five inches, instead of the 1.5 times required by federal regulation. (Tr. 681:11-23.) One can infer from his testimony that his reinforced Ranger roof met this "strength-to-weight" ratio. (Tr. 736:8-737:5.)

But Dr. Huerta never opined that any of these alternative roof designs would have limited roof crush in this accident to two or three inches. On the contrary, in the only test Dr. Huerta conducted on an alternative design – the 18-inch drop test of his reinforced Ranger roof – which Dr. Huerta claimed generated forces "comparable" to those in the accident, the alternative design incurred four to five inches of roof crush at the junction of the header and roof rail near where Sammy's head was located. (Tr. 605:22-24; 606:13-17; 696:4-14.) There was no testimony from Dr. Peles that this would have been sufficient to prevent or reduce the fatal injuries.

Once again, the trial court denied Ford's motions for directed verdict and for judgment based on testimony that Dr. Huerta never gave. In denying the directed verdict motion, the court said:

> Dr. Huerta specifically indicated that the requirements for his standard, in order to avoid the intrusion, would have been a two to three-inch intrusion requirement, and strengthening the ratio from one-and-a-half to three-and-a-half to one would accomplish that requirement, and, in fact, he used tests to show how it would be done.

(Tr. 1064:24-1065:5 (emphasis added).)

Dr. Huerta never gave the emphasized testimony. While he testified that it was possible, from a "structural analysis standpoint," to build a roof strong enough to limit roof crush to two or three inches in this accident (Tr. 609:13-17), he never testified that any of his proposed alternative designs would do so or that a roof

meeting his proposed 3.5 to 1 strength-to-weight ratio would do so. Indeed, the strength-to-weight ratio proposed by Dr. Huerta is based on a federal roof strength test allowing five inches of roof intrusion at the corner of the A pillar, header, and roof rail. (Tr. 735:13-18.)

Thus, even if Plaintiff had established that limiting roof crush to three inches would have prevented the fatal injuries, Plaintiff presented no evidence that an alternative roof design would have limited roof crush to three inches in this accident. The only alternative design tested by Plaintiff's expert did not accomplish that goal even in an 18-inch drop test. For this reason as well, the trial court erred in denying Ford's motions for directed verdict and for judgment notwithstanding the verdict.

B. Ford Is Entitled To A New Trial Because Of The Erroneous Admission Of Prejudicial Evidence.

1. Standard of review

This Court reviews the trial court's admission or exclusion of evidence, including expert opinions, for an abuse of discretion. *State v. Campbell*, 2007-NMCA-051, ¶ 9, 141 N.M. 543, 157 P.3d 722. "An abuse of discretion standard of review, however, is not tantamount to rubber-stamping the trial [court's] decision." *State v. Alberico*, 116 N.M. 156, 170, 861 P.2d 192, 206 (1993). This Court must still "conduct[ ] a meaningful analysis of the . . . scientific testimony to ensure that

the trial [court's] decision was in accordance with the Rules of Evidence and the evidence in the case." *Id.*

2. The trial court abused its discretion by admitting Dr. Huerta's unqualified opinions on automotive design and safety.

Expert testimony is admissible only if the expert is qualified in the field, the testimony will be helpful to the trier of fact, and the testimony is scientifically reliable. *Alberico,* 116 N.M. at 166-67, 861 P.2d at 202. The trial court abused its discretion and denied Ford a fair trial by admitting Dr. Huerta's opinions on whether the 1993 Ranger roof was unreasonably dangerous and on the feasibility and superior safety of alternative designs, because Dr. Huerta was not qualified to give opinions on automotive design and safety and his opinions were not reliable and admissible under the *Alberico* standard.

Ford preserved this error by objecting to Dr. Huerta's design, safety, and alternative design opinions at trial (Tr. 634:14-636:16) and in its post-verdict motion for judgment notwithstanding the verdict or new trial (R.P. 2638; *see id.* at 2640; Tr. (12/29/08) 12:19-13:23).

a) Dr. Huerta was not qualified to give opinions about automotive design and safety.

Dr. Huerta is a mechanical engineer with a specialty in structural analysis. (Tr. 505:23-506:21.) All of his professional experience is in analyzing the strength

and integrity of structures, such as shipping casks and military weapons systems. (Tr. 507:23-514:19.) He has no education, training, or experience in motor vehicle design or passenger safety. Nevertheless, when Ford objected to Dr. Huerta giving opinions about the safety of roof designs, as opposed to simply their strength, and how they should be designed to avoid unreasonable risk to persons, the trial court overruled the objection because "that goes to weight, not to the ability to give the opinion." (Tr. 636:17-20.) This was manifest error, as *Alberico* makes clear that a lack of qualifications renders the opinions inadmissible. 116 N.M. at 166, 861 P.2d at 202 ("We discern three prerequisites in Rule 702 for the admission of expert opinion testimony. The first requirement is that the expert be qualified.").

The trial court never found that Dr. Huerta was qualified to render opinions on automobile design and safety. In fact, the court seemed to recognize that he was not. (Tr. 643:1-4 ("[Y]ou're asking a structural engineer to make an unreasonably dangerous opinion . . . .").) The decision to allow him to do so was driven, in substantial part, by the fact that Plaintiff had no other expert to render such opinions. (Tr. 636:19-20 ("Who else is going to give this opinion if it's not going to come from the engineer, as to the dangers?").) While the court made Dr. Huerta go through a so-called "hazard analysis" before rendering an "unreasonably dangerous" opinion (Tr. 647:17-22), this only exacerbated the error by suggesting

to the jury that Dr. Huerta was qualified to perform such an analysis with respect to passenger safety in motor vehicles (Tr. 663:19-666:10).

Dr. Huerta expressed many opinions in this case that he had no qualifications to give. He was allowed to opine about how much it would cost an automobile manufacturer to incorporate his proposed roof reinforcements into a production roof, and how much they would add to the weight of the vehicle, even though he had no training or experience in automobile design or manufacturing processes. (Tr. 632:11-634:13.) He was allowed to perform a purported "hazard analysis" on the Ranger roof design, considering such things as the degree of risk reflected by Fatal Accident Reporting System statistics, whether a safer design was "technologically and economically feasible," and what an automobile design engineer should do in response to potential hazards, even though he had no training or experience in those subjects. (Tr. 641:10-643:22; 663:19-666:10.)

Ultimately, Dr. Huerta was allowed to opine that the Ranger roof was "unreasonably dangerous." (*Id.*) This required him to perform a "risk-benefit calculation" evaluating "the [manufacturer's] ability to eliminate the risk without seriously impairing the usefulness of the product or making it unduly expensive." *Brooks v. Beech Aircraft Corp.*, 120 N.M. 372, 379-80, 902 P.2d 54, 61-62 (1995). Dr. Huerta had no qualifications allowing him to assess how design changes to reduce or eliminate roof crush would affect the usefulness of a motor vehicle. For

example, Ford's expert testified that structural deformation, by absorbing energy, slows the vehicle during a rollover and reduces loads on the occupants. (Tr. 1621:3-25; 1801:18-1802:3.) Dr. Huerta had no qualifications to assess such trade-offs between roof strength, energy absorption, and occupant safety.

Once Dr. Huerta was allowed to render these unqualified opinions, Ford was forced to cross-examine him about them, providing him the opportunity to express more opinions that he was not qualified to give. For example, he testified that the "current standard" for judging excessive roof crush in a rollover accident is five inches of intrusion into the passenger compartment, but he then opined that the standard should be two or three inches. (Tr. 687:8-688:21.) He also opined that the federal standard requiring vehicle roofs to withstand 1.5 times vehicle weight before crushing five inches in a "platen" test (Tr. 734:20-735:23) should be increased to 3.5 times vehicle weight (Tr. 681:14-23). Nothing in his background qualified him to make such judgments about either roof design or safety standards.

Dr. Huerta's experience and training were solely in connection with the strength and structural integrity of non-passenger carrying structures and equipment. He was completely unqualified to perform a "hazards analysis" with respect to passenger safety in motor vehicles and assess the feasibility and relative safety of alternative roof designs. The trial court abused its discretion and prejudiced Ford by allowing him to testify and render opinions on those matters.

b) Dr. Huerta's opinions about automobile design, safety, and alternative designs were not reliable.

Dr. Huerta's opinions that the 1993 Ranger roof was unreasonably dangerous and that a safer alternative design was technologically and economically feasible also lacked any reliable methodology or foundation. To the extent his testimony is interpreted to include an opinion that an alternative roof design would have limited roof crush in this accident to three inches, this opinion also had no reliable basis or methodology because it was not based on any testing or calculation of forces.

In determining whether an expert opinion or methodology is sufficiently reliable to be admitted, the trial court must consider whether the technique can be and has been tested, whether it has been subjected to peer review and publication, the known potential error rate and applicable standards, and whether it has been generally accepted in the particular scientific field. *State v. Stills,* 1998-NMSC-009, ¶ 27, 125 N.M. 66, 957 P.2d 51 (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 580 (1993)).

Dr. Huerta's defect and alternative design opinions were based largely on the results of an 18-inch drop test. (Tr. 664:2-4.) It is undisputed that this testing methodology has been rejected in the relevant scientific field by the Society of Automotive Engineers, because it is not repeatable and does not relate to injury

causation in rollovers. (Tr: 718:20-721:7.) In short, it suffers from exactly the type of unpredictability, variability, and irrelevance that renders a methodology invalid and unreliable. *Alberico,* 116 N.M. at 167, 861 P.2d at 203 ("[R]eliability has been defined as a measure of bringing about consistent results, and validity is seen as proof of the technique's ability to show what it purports to show."). Even if drop tests were adequate for comparing the relative strength of different roof structures (and the lack of repeatability suggests they are not), they are unreliable and invalid in judging the safety of automobile roof structures in rollovers, which is how Dr. Huerta purported to use them. (Tr. 663:25-664:4.)

In fact, Dr. Huerta admittedly did no testing at all to evaluate the injury-causing forces generated in rollovers with different levels of roof crush or to assess potential injury mechanisms that could be increased by less roof crush, such as more violent rollovers or greater forces exerted on occupants by seat belts. (Tr. 697:16-702:23.) As a result, his opinion that the Ranger roof was "unreasonably dangerous" due to the potential for excessive roof crush lacked any reliable foundation or methodology.

Moreover, Dr. Huerta's purported standards for judging adequate roof strength and determining that the Ranger roof was defective were entirely arbitrary, not based on any methodology at all. He testified that the accepted standard is a maximum of five inches of intrusion into the passenger compartment,

but he then asserted that "personally, I would like to see less" and that roof crush should be limited to two or three inches. (Tr. 687:8-21.) No better foundation was given for his personal opinion that the federal roof strength standard should be increased to 3.5 times vehicle weight. This type of idiosyncratic personal opinion on issues requiring expertise is neither reliable nor helpful to the jury. *Alberico*, 116 N.M. at 166, 861 P.2d at 202 ("Scientific knowledge is what distinguishes Rule 702 expert opinion testimony . . . . Otherwise, an expert's testimony would be nothing more than lay opinion testimony, which is generally not allowed except in limited circumstances . . . .").

Dr. Huerta's automotive design and safety opinions and qualifications did not satisfy the *Alberico* standards and should have been excluded. Because of their centrality to Plaintiff's defect claims, the erroneous admission of these opinions was highly prejudicial, entitling Ford to a new trial.

3. The trial court abused its discretion by admitting Patterson's opinions purporting to quantify the value of life.

The trial court also abused its discretion by admitting economist William Patterson's "expert" testimony purporting to quantify the value of life. This is not a proper subject of expert testimony; Patterson's calculations did not assist the jury as they were not sufficiently tailored to the case; and his opinions, as well as the

studies on which they were based, were unreliable and inadmissible under the *Alberico* standard for scientific knowledge.

The "[a]dmissibility of evidence directed at establishing [the value of life itself] is governed by the rules of evidence." *Romero v. Byers*, 117 N.M. 422, 429, 872 P.2d 840, 847 (1994). Under New Mexico Rule of Evidence 11-702, the trial court may admit expert testimony only if it first determines (1) that the expert's testimony will assist the trier of fact and (2) that the expert's testimony is based on scientific knowledge. *See Alberico*, 116 N.M. at 166-67, 861 P.2d at 202-03 (citing *Daubert,* 509 U.S. at 590-93).

Ford preserved this error by filing a pre-trial motion to exclude Patterson's testimony regarding the lost value of life, or hedonic damages, and by objecting to his testimony at trial. (R.P. 1692; Tr. 891:20-892:1.) Because the jury awarded hedonic damages closely matching Patterson's "upper range" for the lost value of life, the erroneous admission of his testimony cannot be deemed harmless and entitles Ford to a new trial.

a) Patterson was not qualified and his testimony did not assist the jury.

The New Mexico wrongful death statute permits a jury to award damages for the "lost value of life." *Byers,* 117 N.M. 422, 872 P.2d 840. This Court has held that "where an expert witness has been properly qualified," it is not error for a trial court to allow an economist to opine regarding the economic value of a

plaintiff's loss of enjoyment of life. *Sena v. N.M. State Police,* 119 N.M. 471, 478, 892 P.2d 604, 611 (Ct. App. 1995). This Court has not articulated what the necessary qualifications are – but whatever they are, Patterson did not have them.

Patterson has a bachelor's degree in economics with no post-graduate training. (Tr. 887:15-888-14.) His primary experience before becoming a full-time, professional expert witness was three years in "information technology" for a large food wholesaler, which included doing cost/benefit analysis for proposed capital projects. (Tr. 888:15-890:5.) He has no specialized education, training or experience in valuing the "loss of enjoyment of life."

Given his lack of any special qualifications, the jury was as capable as Patterson of determining the value to be placed on the enjoyment of life based on their own knowledge and common experience. *See Martinez v. Caterpillar, Inc.*, Civ. No. 06-236, 2007 WL 5377515 (D.N.M. Sept. 6, 2007) (excluding Patterson's proposed testimony because jurors are capable of valuing life themselves). Certainly with respect to Patterson, if not other experts, "men of common understanding[ ] are as capable of comprehending the [value of life] and of drawing correct conclusions . . . as are [so-called expert] witnesses . . . ." *Mercado v. Ahmed*, 974 F.2d 863, 870 (7th Cir. 1992) (internal quotation marks & citation omitted); *see also McGuire v. City of Santa Fe*, 954 F. Supp. 230, 233 (D.N.M. 1996).

More generally, in *Couch v. Astec Industries, Inc.*, notwithstanding the Court's approval of a different expert's testimony about the value of life, the Court analogized hedonic damages to damages for "pain and suffering," which are to be awarded based on "the enlightened conscience of impartial jurors acting under the sanctity of their oath . . . with fairness to all parties." 2002-NMCA-084, ¶ 20, 132 N.M. 631, 53 P.3d 398 ("[W]e see no difference in the process of evaluating the loss of enjoyment of life."). But no "expert" would be allowed to opine about the proper amount of damages for pain and suffering, because that determination is solely within the province of the jury.

Thus, *Couch* at least implicitly supports the view that the lost value of life is not a proper subject of expert testimony because it improperly usurps the role of the jury. Patterson's testimony, in particular, improperly invaded the jury's domain by purporting to quantify the value of Sammy Gurule's loss of life. (Tr. 904:16-23; 906:13-24; 907:4-12.) Expert testimony like Patterson's that places a monetary value on hedonic damages is inadmissible as it usurps the jury's fact-finding role. *See Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1244-46 (10th Cir. 2000) (excluding expert's quantification of hedonic damages but permitting testimony on the definition of loss of enjoyment of life and four broad areas of human experience to be considered in determining such damages).

In any event, Patterson's opinions could not assist the jury because the jury was charged with the task of determining the value of a particular life. Patterson admitted that he had not ascertained whether Sammy's life circumstances might make his enjoyment of life greater or lesser than that of the average person – exactly the things that the jury was required to consider – because such information would be irrelevant to his calculation. (Tr. 934:17-935:24.) Patterson's testimony regarding the value of a life, therefore, was not sufficiently tied to the facts of the case to be helpful to the jury. *See Sullivan v. United States Gypsum Co.*, 862 F. Supp. 317, 321 (D. Kan. 1994).

b) Patterson's testimony and underlying methodology were unreliable.

Even if Patterson were qualified, and even if hedonic damages were a proper subject for expert testimony, the trial court erred by admitting Patterson's testimony because the methodology he used utterly failed to meet the *Alberico* standard of scientific reliability. Under *Alberico*, the focus of Rule 11-702's scientific knowledge requirement is on "the validity and the soundness of the scientific method used to generate the evidence" and, ultimately, "whether [that method] is capable of supporting opinions based upon reasonable probability rather than conjecture." 116 N.M. at 167, 861 P.2d at 202.

Here, Patterson calculated the value of Sammy Gurule's lost enjoyment of life at $598,680 to $5.99 million by using "benchmarks" of $10,000 and $100,000

per year. (Tr. 906:22-907:12.) Patterson's $100,000 benchmark represented the present day annual value of a statistical human's enjoyment of life as determined by a survey of various willingness-to-pay studies. (Tr. 904:16-906:21); *see* Ted R. Miller, *The Plausible Range for the Value of Life—Red Herrings Among the Mackerel,* 3 Journal of Forensic Economics 17 (1990) ("*Plausible Range*"). The methodology used in the *Plausible Range* survey has been described by one court as "one that has made whatever adjustments were necessary to bring the raw data within a target range." *Ayers v. Robinson*, 887 F. Supp. 1049, 1061 (N.D. Ill. 1995). That court noted the major "adjustments" made to the raw data in a subset of wage-risk studies to arrive at this "plausible range": dividing by three the large survey results that were said to be "biased" by a factor of three; removing a portion of the underlying data in certain studies and recalculating the results; multiplying some very low survey results by 2.2; trashing seven studies altogether; and multiplying certain survey results by 1.234 to account for "risk underestimation." *Id.* at 1060. Beyond "[a]dding, subtracting, multiplying and dividing with a predetermined result in mind," the court found no established method or procedure for those adjustments. *Id.* at 1061.

Moreover, Patterson's $10,000 benchmark appears to have been suggested, not because it had any basis, but because it provided Patterson with an easy mathematical formula to calculate loss of life damages for the jury. Indeed,

Patterson himself admitted as much by testifying that "if you use $1,000 per year, I don't mind. That doesn't make any difference. 1,000, 10,000, 100,000, it doesn't matter, moving over the decimal and adding a zero." (Tr. 959:20-960:1.) This plainly does not satisfy either the reliability or validity standards of *Alberico.*

Patterson's methodology also has not been widely accepted in the economic literature. Studies like *Plausible Range* have been criticized as a basis for awarding hedonic damages because what they measure is not the "lost value of life" that a jury is compensating in a wrongful death case. *See* W. Kip Viscusi, *Misuses and Proper Uses of Hedonic Values of Life in Legal Contexts,* 3 Journal of Forensic Economics 111, 117 (2000) ("The real problem is that there is a mismatch between the underlying theory of the value of life and the use of this measure as a compensation mechanism."). Instead, they measure the statistical "risk-money tradeoff pertinent to setting an efficient level of safety and for determining the appropriate level of deterrence." *Id.* at 116. That has nothing to do with fair compensation for Sammy Gurule's lost value of life.

Courts have almost uniformly rejected proposed expert testimony purporting to quantify hedonic damages because it is unreliable. *See, e.g., Smith*, 214 F.3d at 1245 ("Troubled by the disparity of results reached in published value-of-life studies and skeptical of their underlying methodology, the federal courts which have considered expert testimony on hedonic damages in the wake of *Daubert*

have unanimously held quantifications of such damages inadmissible.") (citing *Saia v. Sears Roebuck & Co.*, 47 F. Supp. 2d 141, 148-49 (D. Mass. 1999); *Crespo v. Chicago*, No. 96-C-2787, 1997 WL 537343 (N.D. Ill. Aug. 22, 1997); *Brereton v. U.S.*, 973 F. Supp. 752, 758 (E.D. Mich. 1997); *Kurncz v. Honda North America, Inc.*, 166 F.R.D. 386 (W.D. Mich. 1996); *McGuire v. City of Santa Fe*, 954 F. Supp. 230, 232-33 (D.N.M. 1996); *Ayers v. Robinson*, 887 F. Supp. 1049 (N.D. Ill. 1995); *Hein v. Merck & Co.*, 868 F. Supp. 230 (M.D. Tenn. 1994); and *Sullivan v. U.S. Gypsum Co.*, 862 F. Supp. 317, 321 (D. Kan. 1994)).

Accordingly, because the methodology used by Patterson in formulating his "benchmarks" is inherently unreliable as a measure of hedonic damages, the trial court abused its discretion by admitting Patterson's opinions purporting to quantify the value of life.

III. CONCLUSION

For these reasons, Ford respectfully requests that this Court **REVERSE** the judgment entered for Plaintiff and **REMAND** to the district court to enter judgment in favor of Ford, or alternatively, grant Ford a new trial.

Respectfully submitted,

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I certify that a true copy of the foregoing was served by first-class mail to the following counsel of record this 12th day of August, 2009.

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