

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,

COPY

Plaintiff-Appellee/Cross-Appellant,

vs.

No. 29,296

COURT OF APPEALS OF NEW MEXICO
FILED

SEP 18 2009

Ben M. Morales

FORD MOTOR COMPANY,

Defendant-Appellant/Cross-Appellee.

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

BRIEF IN CHIEF OF CROSS-APPELLANT

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SUMMARY OF PROCEEDINGS

A. Nature and disposition of the case.

The plaintiff sued Ford Motor Company for the wrongful death of Sammy Gurule, who died when the roof of his 1993 Ford Ranger caved in during a rollover accident. The plaintiff alleged that the roof of the Ford Ranger was defective, and that it had been negligently designed and tested. (R.P. 3-6.) The plaintiff sought both compensatory and punitive damages. (R.P. 6-7.)

At trial, in addition to evidence proving the defectiveness of the roof and Ford's negligence in designing and manufacturing it, the plaintiff presented evidence that Ford knew the roof of the Ranger was weak and dangerous, knew it was technically and economically feasible to design and build a safe roof, and that it willfully and recklessly failed to do so. *See infra, passim*. At the conclusion of the plaintiff's case, the trial court granted Ford's motion for a directed verdict on plaintiff's claim for punitive damages. (Tr. 1053-1054.) The jury ultimately found for the plaintiff on the issues of both strict liability and negligence, and awarded compensatory damages of \$8.5 million. (Tr. 8/27/08 - 3:20:08 p.m.; R.P. 2535-2537.) Ford has appealed the judgment based upon the jury's verdict. (R.P. 2792.) The plaintiff cross-appeals the trial court's decision taking the issue of punitive damages from the jury. (R.P. 2805.)

B. Ford knew prior to 1993 that roof crush in rollover accidents cause injury and death.

In the 1960s Ford knew how to build a roof that could withstand a 50 mile-per-hour rollover and a two foot drop test without encroaching into the area of the occupant's head. (Pl. Ex. 69, 70; *see* R.P. 2505-2507.) In 1968 Ford engineer J.R. Weaver wrote a memorandum which concluded: "People are injured by roof collapse. The total number of nationwide deaths and injuries cannot be estimated but it is a significant number." (R.P. 2500; Pl. Ex. 59, p. 2.) (Emphasis in original.) Mr. Weaver noted that "[r]oof intrusion may have a more pronounced effect on occupant injuries with increased usage of upper torso restraints." (Pl. Ex. 59, p.1). He concluded:

It is obvious that occupants that are restrained in upright positions are more susceptible to injury from a collapsing roof than unrestrained occupants who are free to tumble about the interior of the vehicle. It seems unjust to penalize people wearing effective restraint systems by exposing them to more severe rollover injuries than they might otherwise expect with no restraints.

(*Id.* p. 2; R.P 2500-2501.)

In 1991 Ford acknowledged that the danger of rollover fatalities was significantly higher in pickup trucks than in passenger cars, and that the increased danger was related to intrusion of the roof structure into the occupant compartment. In a document titled "Roof Crush Safety Guideline Proposal" Ford stated that:

50% of light truck fatalities resulted from rollover impacts versus 24%

for passenger cars. NHTSA studies show that serious head injury is unlikely in trucks, even among unbelted occupants, unless a rail-like component intruded (A-Pillar, roofheader, etc.) Increased roof structure provides an opportunity to reduce these injuries and fatalities.

(Tr. 641-642; Pl. Ex. 66.) Ford's knowledge of this danger was also in evidence through the parties' stipulation that "prior to Sammy Gurule's accident, Ford received notice of nine lawsuits" alleging the occurrence of deaths in single vehicle rollovers of 1991 and earlier Ford Rangers. (R.P. 2473; Tr. 805-806.)

Ford limited its testing of the roof strength of the 1993 Ranger to compliance with the FMVSS 216 standard. That standard, adopted in 1973 (Def. Ex. 14; Tr. 748), called for a "static . . . or quasi-static test" (Tr. 750) in which force was applied to a corner of the roof with a stiff plate pushed by hydraulic rams. (Tr. 748-750.) The standard required that "the resisting force to deformation, must be one-and-a-half times the weight of the vehicle or 5,000 pounds, whichever is less, within five inches of crush." (Tr. 1598.) Ford did not perform any dynamic testing such as rollover testing or drop testing in its design of the 1993 Ford Ranger. (Tr. 1008-1009; R.P. 2510.) Ford defended its complete reliance on the FMVSS 216 standard, asserting that it allowed assessment of whether a roof gave passengers a "reasonable level of protection." (Tr. 1598.)

Although the 1993 Ranger met or exceeded the FMVSS 216 standard (Def. Ex.

191; Tr. 1601), the plaintiff offered proof that the platen test of FMVSS 216 fails to replicate what occurs to the roof of a vehicle in a real world rollover accident. (Tr. 683, 748-752.) The plaintiff's engineering expert, Dr. Michael Huerta, subjected the 1993 Ranger to drop testing which generated forces comparable to those which caused the roof of Sammy Gurule's truck to cave in and kill him. (Tr. 696.) This testing led Dr. Huerta to conclude, and the jury to agree, that the roof was defective and negligently designed. (Tr. 666; Tr. 8/27/08 - 3:20:08 p.m.; R.P. 2535-2537.) Although Ford contested the efficacy and applicability of the drop testing performed by Dr. Huerta (Tr. 695-696 , 714-721), the plaintiff also introduced evidence that Ford has used drop testing to assess the strength of vehicle roofs (Pl. Ex. 70, 1857, 1860), and that other vehicle manufacturers also use drop testing. (Tr. 715-716, 744, 747.)

C. Ford knew how to feasibly manufacture and market a vehicle with a safe roof, but designed, built and sold the 1993 Ranger with a roof it knew was dangerous.

Ford built the 1994 Mustang with a strong, well designed roof. The header and side rails of the Mustang roof employed closed-section rather than open-section construction (Tr. 623), and was built of heavier gauge metal. (Tr. 614; Pl. Ex. 1819, p. 5.) The Mustang had "extra gussets and reinforcements" (Tr. 614; Pl. Ex. 1819, p. 5), tubular roof headers and rails, and fully reinforced A-pillars. (Tr. 614-615; Pl. Ex.

1819, p. 5.) Ford's marketing materials touted the safety of 1994 Mustang roof (Tr. 613-618), and boasted that it could "resist collapse in a rollover type accident." (Pl. Ex. 1818 p. 3.)

Dr. Huerta testified that the roof header and rails of the 1993 Ranger, unlike those of the Mustang, were built as weak, open sections using thin sheet metal. (Tr. 537-538, 541-542.) The roof header was only partially reinforced. (Tr. 543.) The A pillars, which supported the front of the roof, were built of thin sheet metal and were only partially reinforced. (Tr. 539-540.) The roof members contained a number of holes which further weakened them. (Tr. 537.)

Dr. Huerta performed drop tests on unmodified 1993 Ford Ranger roofs, and on an identical roof which he reinforced to make its structure more like that of the 1994 Mustang. (Tr. 593-594, 596, 599-600, 630-634; Pl. Ex. 718, 719, 729.) In these tests the roof headers and A pillars of the production model Rangers all buckled, caving in where the reinforcements ended. (Tr. 539-540, 543.) These deformations were similar to the fatal deformation of the roof of Sammy's truck. (Tr. 352-353, 480-481, 483-484.) The roof Dr. Huerta reinforced did not buckle and cave in when it was drop tested. (Tr. 605-607.) Dr. Huerta used basic structural engineering principles to design and build his modified roof. These principles were well known to Ford when it designed the Ranger, as the roof of the 1994 Mustang attested. (Tr.

Tr. 670-671.)

D. Ford disregarded its own cost benefit analysis in failing to provide adequate rollover protection in the Ranger.

In 1967 Ford conducted a cost-benefit analysis in which it concluded that "...totally effective rollover protection cannot be easily justified if it costs more than 26 dollars per car." (Pl. Ex. 81, p. 5.) In 1993 dollars this would have amounted to \$119 per car. (Tr. 927-928.) Testifying in 2008, Dr. Huerta estimated that the roof of the Ranger could be manufactured with sufficient strength to withstand the buckling forces which caused Sammy's death at a cost of about \$100 per vehicle. (Tr. 608-609, 630-634, *see* Tr. 352-353.) This is significantly less, in inflation-adjusted dollars than the amount Ford had long before determined was justifiable to provide adequate roof strength. *See infra* at 9.

ARGUMENT

THERE WAS SUFFICIENT EVIDENCE THAT FORD'S FAILURE TO DESIGN AND BUILD THE 1993 RANGER WITH A SAFE ROOF WAS RECKLESS. FORD KNEW THE DANGERS OF INADEQUATE ROOF DESIGN AND KNEW HOW TO FEASIBLY AND ECONOMICALLY BUILD A SAFE ROOF, BUT IT INEXPLICABLY FAILED TO DO SO.

A. Preservation and standard of review.

The issue of whether there was sufficient evidence of Ford's culpable state of mind to be submitted to the jury was preserved by the allegations of the plaintiff's complaint (R.P. 6-7) and his responses to the defendant's motion for directed verdict. (Tr. 1047-1051.)

The district court's ruling on a motion for directed verdict on the issue of punitive damages is a matter of law which is reviewed de novo. *Littell v. Allstate Ins. Co.*, 2008-NMCA-012, ¶ 59, 143 N.M. 506, 177 P.3d 1080. "[C]onflicts in the evidence or reasonable interpretations of it are viewed in favor of the party resisting the directed verdict." *Id.* A directed verdict is

a drastic measure that is generally disfavored inasmuch as it may interfere with the jury function and intrude on a litigant's right to a trial by jury. Hence, a directed verdict is appropriate only when there are no true issues of fact to be presented to a jury, and it is clear that the facts and inferences are so strongly and overwhelmingly in favor of the moving party that the judge believes that reasonable people could not arrive at a contrary result

McNeill v. Rice Engineering and Operating, Inc., 2003-NMCA-078, ¶ 31, 133 N.M. 804, 70 P.3d 794. (Citations and internal quotation marks omitted.) “[A] directed verdict is proper only when there is no pretense of a prima facie case.” *Klopp v. Wackenhut Corp.*, 113 N.M. 153, 155, 824 P.2d 293, 295 (1992).

B. When viewed in the aggregate, Ford's actions show a reckless state of mind.

In a products liability case, liability for punitive damages may be established by evidence that the manufacturer knew its product was dangerous and likely to cause injury or death, but continued to market the product without making feasible modifications to eliminate the danger. *Gonzales v. Surgidev Corp.*, 120 N.M. 133, 147, 899 P.2d 576, 590 (1995). As the risk of danger increases, so does the duty of care, *Clay v. Ferrellgas, Inc.*, 118 N.M. 266, 269, 881 P.2d 11, 14 (1994), and “conduct that amounts to a breach of duty is more likely to demonstrate a culpable mental state.” *Id.* In determining the existence of a culpable mental state a court must consider the actions of the defendant and its employees cumulatively. *Id.* at 270, 881 P.2d at 15. The question is whether, under the totality of the circumstances, the evidence indicates “a wanton or reckless disregard for the lives, safety or property of other persons.” *Id.* at 271, 881 P.2d at 16. (Citation and internal quotation marks omitted.)

In *Grimshaw v. Ford Motor. Co.*, 119 Cal.App.3d 757, 174 Cal.Rptr. 348, 358 (1981) the court upheld an award of punitive damages against Ford where Ford knew from crash tests that the fuel tank of the Ford Pinto was vulnerable to puncture and rupture from low speed rear impacts, creating a significant risk of death or injury from fire, and where Ford could have corrected the defect at minimal cost, but failed to do so because of a cost-benefit analysis which balanced lives against profits. *Id.* at 813, 174 Cal.Rptr. at 384. In this case as in *Grimshaw* Ford ignored its knowledge of a serious danger that it could have easily and economically remedied.

Ford knew that rollover accidents posed significant risks of injury and death, especially to seat-belted occupants. Ford knew that half the fatalities in light truck accidents resulted from rollover impacts. Ford knew that this was twice the risk of death from rollovers in passenger cars. Ford knew of a number of legal claims alleging deaths in Ranger rollovers. Ford knew how to build safe roofs – it built passenger cars such as the 1994 Mustang with roofs designed to withstand the crushing forces of rollovers. Yet Ford failed to make the feasible modifications necessary to protect the lives of people riding in Ranger pickups.

Despite its knowledge and ability Ford designed and built the 1993 Ranger with a weak roof that catastrophically buckled and caved into the cab when it rolled over. In doing so it disregarded its own cost-benefit analysis which justified spending

up to \$119 per vehicle in 1993 dollars to achieve rollover protection. (Pl. Ex. 81, p. 5; Tr. 895, 927-928.) Based on this evidence and common knowledge, the jury could infer that the value of one hundred 2008 dollars was significantly less than \$100 in 1996. ¹ A jury may draw reasonable inferences based on common knowledge and experience. *Tafoya v. Seay Bros. Corp.*, 119 N.M. 350, 352, 890 P.2d 803, 805 (1995) (inference as to proximate causation). Jurors may “use their common sense and apply common knowledge, observation, and experience gained in the ordinary affairs of life when giving effect to the inferences that may reasonably be drawn from the evidence.” *U.S. v. Flores-Chapa*, 48 F.3d 156, 161 (5th Cir. 1995). The effect of inflation and interest rates on the value of money is within the common knowledge of jurors. *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1347-1348 (9th Cir. 1987). In inflation-adjusted dollars, the cost of building a safe roof would have been less than the \$26 Ford said it was willing to spend to save lives in 1967.

The jury could have found that Ford’s inexplicable failure to build the Ranger

¹ In fact, the value was about \$65. The U.S. Dep’t of Labor, Consumer Price Index, All Urban Consumers, U.S. city average (1982-84 = 100) for January 1993 is 138.1. The index for January 2009 is 211.08. See <ftp://ftp.bls.gov/pub/special.requests/cpi/cpiiai.txt>. The 1993 value of one hundred 2008 dollars is calculated:

$$\begin{aligned} 100/211.08 &= x/138.1 \\ 211.08x &= 13,810 \\ x &= 13,810/211.08 \\ x &= 65.43. \end{aligned}$$

with a safe roof – a roof it knew how to build at a cost it had already determined was justifiable – was in reckless disregard of the lives that would be lost.

In granting Ford's motion for a directed verdict the trial court appears to have misapplied the standard for determining the sufficiency of evidence to submit the question of punitive damages to the jury. The court stated:

Again, there was general evidence with regard to knowledge as to weaknesses in roof structures and to improvements in roof structures, but we didn't have any evidence as to how those weaknesses were addressed and how those improvements occurred and how it directly related to - - from those vehicles over to the subject vehicle in any manner.

(Tr. 1054.) The test of sufficiency does not require the specificity that these comments indicate. The court must look to the aggregate conduct of the defendant in determining whether there is a question for the jury. *Clay*, 118 N.M. at 270, 881 P.2d at 15. In the aggregate, the evidence shows that Ford knew the roof of the Ranger was unsafe when compared with its own standard of roof safety, the Mustang. Its knowledge of the danger was heightened by data showing the increased risk of injury and death in light truck rollovers. It knew how to remedy the danger at a cost far less than it had long before determined was justifiable. Despite this, Ford continued to produce and market the Ranger without making the feasible modifications to the roof that would have made it safe. This evidence was sufficient to allow the jury to

determine that Ford's negligence in the design and manufacture of the 1993 Ranger rose to the level of recklessness.

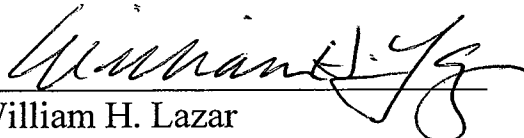
CONCLUSION

In *Sanchez v. Wiley*, 1997-NMCA-105, 24, 124 N.M. 47, 946 P.2d 650 this Court, reversing a directed verdict on the plaintiff's punitive damage claim, remanded for trial solely on punitive damages. The directed verdict taking the issue of Ford's liability for punitive damages from the jury should be reversed and this case remanded for trial on punitive damages.

Respectfully submitted,

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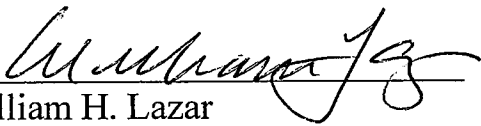
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served upon:

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William H. Lazar