IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 22-ICA-208

Angel Ellen Tyler,
As Administrator of the Estate of Breanna Kristen Bumgarner,

Plaintiff-Respondent,

v.

Ford Motor Company,

Defendant-Petitioner.

On Appeal from Judgment
Circuit Court of Kanawha County, West Virginia (No. 18-C-182)
(The Honorable Joanna I. Tabit)

REPLY BRIEF OF FORD MOTOR COMPANY

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INTRODUCTION

Plaintiff Angela Tyler's response brief is remarkable in one way: It doubles down on her theory that manufacturers can be liable in the State of West Virginia for having designed products that are reasonably safe for their intended use. That defies common sense and would make West Virginia an outlier. This Court should reason from settled principles of West Virginia tort law to make clear that a negligent design product liability claim requires proof of a defect—as the Circuit Court held—which in turn requires proof of a feasible alternative design the manufacturer could have used which would have avoided the harm that occurred. That sensible holding accords with the common law and follows from the Supreme Court of Appeals' statement in *Morningstar v. Black and Decker Manufacturing Co.* that the "key component" of strict liability "is to remove the burden from the plaintiff of establishing in what manner the manufacturer was negligent." 162 W. Va. 857, 883, 253 S.E.2d 666, 680 (1979). It will provide consistency across strict liability and negligent design claims, both of which, at their core, seek to impose liability when a product was not reasonably safe for its intended use and caused injury. Neither Plaintiff's cited pattern jury instructions nor *Mullins v. Johnson & Johnson*, 236 F. Supp. 3d 940 (S.D. W. Va. 2017) (*Mullins II*) offers a rationale for evaluating defectiveness without proof of a feasible alternative design.

It follows from a holding by this Court on the necessity of a feasible alternative design that judgment was warranted in Ford's favor on Plaintiff's brake fluid reservoir claim. The only purported feasible alternative that her expert offered at trial did not rely on *Ford*'s *validated* model, but on her *expert's unvalidated* simulation, which changed the key parts of Ford's model: the load conditions, the parts of the vehicle, and their material properties. That simulation was also technologically infeasible because it required an infinitely strong attachment that does not exist when building a vehicle from real-world materials. Plaintiff's response is to downplay that

purported alternative and invoke three others that were either never argued below, never tested to show they would have avoided the harm complained of here, or were tested and failed.

This Court should also hold that the Circuit Court erred in admitting testimony about inadmissible simulations involving dissimilar accident conditions, warranting a new trial. Tellingly, Plaintiff does not defend the Circuit Court's interpretation of *Ilosky v. Michelin Tire Corp.*, 172 W. Va. 435, 307 S.E.2d 603 (1983), instead suggesting that her expert (Dr. Chandra Thorbole) convinced the Circuit Court that its pretrial ruling on the dissimilarity between the simulation and the accident conditions was incorrect. That position cannot be squared with the court's own analysis at trial, when the court continued to exclude the simulations themselves.

Plaintiff's evidentiary shortcomings on breach and proximate cause also warrant remand for entry of judgment in Ford's favor. She attempts to minimize the severity of this 100 mph closing speed accident, but nowhere disputes that a brake fluid reservoir is never leakproof under all accident conditions, a vehicle is never fireproof, and no safety standard requires manufacturers to satisfy what would be impossible criteria.

The Court should reverse the judgment below. It should direct judgment in Ford's favor given Plaintiff's lack of proof of a feasible alternative design that would have remedied the harm at issue and her lack of proof on breach and proximate cause. At minimum, this Court should order a new trial on Plaintiff's brake fluid reservoir claim based on the erroneous—and prejudicial—jury instruction and admission of testimony about simulations not substantially similar to the conditions of Ms. Bumgarner's wreck.

ARGUMENT

I. None of Plaintiff's Arguments Refute That West Virginia Law Requires Proof Of A Feasible Alternative Design.

A. The Circuit Court correctly rejected Plaintiff's bizarre theory that a manufacturer can be liable for designing a reasonably safe product.

A product liability plaintiff in West Virginia may challenge a product's design by arguing that the design is defective; the manufacturer negligently designed a defective product; or the design amounts to a breach of warranty. *See* Syl. Pt. 6, *Ilosky*, 172 W. Va. at 437, 307 S.E.2d at 605 ("Product liability actions may be premised on . . . strict liability, negligence and warranty."). The principal difference between the first two theories is that strict liability "remove[s] the burden from the plaintiff" to prove the manufacturer's negligence, making strict liability an easier theory to prove. *Morningstar*, 162 W. Va. at 883, 253 S.E.2d at 680. Strict liability asks *only* about a product's condition; negligent design asks about *both* a product's condition and a manufacturer's conduct. Restatement (Third) of Torts: Prod. Liab. § 2 cmt. n (1998).

Plaintiff nevertheless leads by arguing that she "overproved" her case because West Virginia negligent design claims do not require proving that the product's design is defective. Response 11-12. The Circuit Court rejected this view—and for good reason. A product without a design defect is one that is reasonably safe for its intended use. *Stone v. United Eng'g, a Div. of Wean, Inc.*, 197 W. Va. 347, 363, 475 S.E.2d 439, 455 (1996); *Morningstar*, 162 W. Va. at 888, 253 S.E.2d at 683. The notion that manufacturers should face negligent design liability *for designing reasonably safe products* finds no basis in West Virginia law.

As she did below when the Circuit Court directly asked whether "any case law in West Virginia or case law anywhere in the country" supported her theory that non-defective products can nevertheless be negligently designed, Plaintiff points primarily to West Virginia pattern instructions. IV JA 3404:24-3407:3; *see also* IV JA 3405:9-15 (court admonishing Plaintiff that

"you don't want to be going up to the Supreme Court [of Appeals] and citing pattern jury instructions"). But those pattern instructions are not binding and are sourced from cases that give Plaintiff no support. The express "Caveat" on the first page describes them as "NOT BINDING ON THE TRIAL JUDGE," emphasizes that "the Supreme Court of Appeals is not bound by the correctness of these pattern instructions," and directs lawyers to "ensure the correctness of any pattern instruction that may be read to the jury." W. Va. P.J.I. Caveat. Ford followed that direction in requesting the Circuit Court instruct the jury that Plaintiff's negligent design claim required proof of Ford's negligence in defectively designing the 2014 Mustang, including proof there was a feasible alternative design Ford could have used that would have avoided the injury at issue after this accident. III JA 566-567. The Circuit Court, after looking at relevant case law from West Virginia and elsewhere, correctly concluded: "If there's no defect, then the product was reasonably safe as designed," and "if that's the case, you can't make a finding of negligence," IV JA 3415:7-9; *see also* IV JA 3415:1-3416:1.

Plaintiff offers no basis to overturn that ruling.[1] The Supreme Court of Appeals has never held that a negligent design plaintiff may prevail against a manufacturer who designed a reasonably safe product. That explains why Plaintiff can only point to the pattern instructions; none of her cited "sources" supporting those instructions endorse her backwards view of negligent design. Response 11-13 (citing W. Va. P.J.I. §§ 401, 402, 424). *Morningstar*'s cited points of law do not address negligent design, and the only distinction *Morningstar* makes between strict liability and negligent design is that strict liability *relieves* the burden of proving manufacturer conduct related to defective products. Syl. Pts. 4-6, *Morningstar*, 162 W. Va. at 857, 253 S.E.2d at 667. If

[1] This issue is "not properly before the Court" in any event because Plaintiff did not cross-assign error as required by W. Va. R. App. P. 10(f). *Brooks v. City of Huntington*, 234 W. Va. 607, 611 n.7, 768 S.E.2d 97, 101 n.7 (2014); *Bd. of Educ. of the Cnty. of Tyler v. White*, 216 W. Va. 242, 248 n.8, 605 S.E.2d 814, 820 n.8 (2004).

anything, *Morningstar* undermines Plaintiff's position that the existence of a defect is irrelevant to whether a manufacturer's conduct was reasonable because it *defines* "defect" by reference to "what a reasonably prudent manufacturer's standards should have been." Syl. Pt. 4, *id.*; *see also* Syl. Pt. 5, *id.* (similar). *Ilosky* recognizes that strict liability, negligent design, and warranty theories "contain[] different elements," 172 W. Va. at 437, 307 S.E.2d at 605, but does not disclaim that there are some overlapping elements. Nor could it: no one would dispute, for example, that causation is an element of all three theories. *Honaker* and *Strahin* are further afield—neither even purports to discuss negligent design. *Strahin v. Cleavenger*, 216 W. Va. 175, 183, 603 S.E.2d 197, 205 (2004); *Honaker v. Mahon*, 210 W. Va. 53, 58, 552 S.E.2d 788, 793 (2001).

B. Proof of a feasible alternative design that eliminates the risk at issue is required to prove a product is defective.

Because Plaintiff is wrong about whether a negligent design claim requires proof of a defect, she is also wrong about whether that defect must be shown with evidence of a feasible alternative design. As Ford's brief explained (at 24-25), the feasible alternative design requirement provides a clear benchmark for deciding whether a product is reasonably safe: A product is not reasonably safe if it risks harm to users that an economically and technologically feasible alternative design would have eliminated. *See Church v. Wesson*, 182 W. Va. 37, 40, 385 S.E.2d 393, 396 (1989). Plaintiff does not actually disagree with this point anywhere in her brief.

Plaintiff's bold claim that the law is definitively settled in her favor is strange when no West Virginia case holds, or even suggests, that a defendant can be liable for negligently designing a product absent any evidence that the manufacturer could have avoided the harm that resulted by designing the product differently. Even the Circuit Court recognized that this issue is one on which "there needs to be a 'new point of law' in West Virginia" from the appellate courts. VIII JA 4161.

Plaintiff's argument relies, once again, on the pattern jury instructions and one wrongly decided federal decision. But she ignores the pattern instructions' express "caveat" and all of the arguments about why *Mullins II* was wrongly decided. *See* Ford Br. 27-28. As noted above, the pattern instructions "were written to help trial judges and lawyers instruct the jury in a civil case"; they do not claim to guide courts on open questions of law. *See* W. Va. P.J.I. Caveat. None of the "sources" for the sections she cites, *id.* §§ 424-428, are even negligent design cases. *E.g.*, *id.* § 424 (citing *Yost v. Fuscaldo*, 185 W. Va. 493, 408 S.E.2d 72 (1991) (negligent assembly claim); *Webb v. Brown & Williamson Tobacco Co.*, 121 W. Va. 115, 2 S.E.2d 898, 899 (1939) (negligent packing claim)); *id.* § 425 (citing *Strahin*, 216 W. Va. at 183, 603 S.E.2d at 205 (negligent landowner claim); *Honaker*, 210 W. Va. at 58, 552 S.E.2d at 793 (negligent driver claim)).

Mullins II does not move the needle either. As Ford explained in its opening brief (at 27), *Mullins II* concluded that negligent design claims do not require proof of a feasible alternative design based on the flawed premise that no elements of negligent design and strict liability can ever overlap, *contra Johnson by Johnson v. Gen. Motors Corp.*, 190 W. Va. 236, 246, 438 S.E.2d 28, 38 (1993) (recognizing elements of failure to warn claim might be similar under strict liability and negligence theories). *Mullins II* also ignores that, under common law principles, negligent design claims require evidence of unreasonable conduct and a defect, *contra* Restatement (Third) of Torts: Prod. Liab. § 2 cmt. n, and *Mullins II* departs without explanation from the same court's prior finding that "the breach element of" a negligent design claim "easily fits within the defective-design analysis," *Mullins v. Ethicon, Inc.*, 117 F. Supp. 3d 810, 812 (S.D. W. Va. 2015). As a result, *Mullins II*, much like Plaintiff's arguments, offers no explanation for how a product's design can be defective without an alternative design that would be feasible and eliminate the risk at issue.

Block quoting *Mullins II*, as Plaintiff does (at 14), does not address or resolve any of these flaws. Under the reasoning of *Mullins II*, causation could not be an element of strict liability because it is an element of negligent design claims, *contra Ilosky*, 172 W. Va. at 444, 307 S.E.2d at 612, and a manufacturer could be liable for designing a product in the safest feasible way. Neither of those outcomes makes any sense; both counsel against the correctness of *Mullins II*.

With little to show for her affirmative argument, Plaintiff resorts to flimsy attacks on the authorities that Ford offered. None are persuasive. For starters, Ford did not "misrepresent[] a key holding from the *Morningstar* court." Response 15. *Morningstar* provides that a product is defective when "it is not reasonably safe for its intended use." 162 W. Va. at 888, 253 S.E.2d at 683. Ford made the point that plaintiffs pursuing both strict liability and negligent design theories must meet at least this standard, which includes having evidence of a feasible alternative design. It would make no sense to judge a product's defectiveness under different standards based on the liability theory. Instead, Plaintiff asks this Court to make West Virginia an extreme outlier by allowing negligent design liability for reasonably safe products. *See* Brief of *Amicus Curiae* Product Liability Advisory Counsel, Inc. 14-17 ("PLAC Amicus Br.") (cataloguing state law).

Plaintiff's effort to ascribe disfavored status to the Third Restatement of Torts is without merit. Just the opposite: the Third Restatement of Torts regularly informs the Supreme Court of Appeal's tort jurisprudence. *E.g.*, *Modular Bldg. Consultants of W. Va., Inc. v. Poerio, Inc.*, 235 W. Va. 474, 483, 774 S.E.2d 555, 564 (2015); *Community Antenna Serv., Inc. v. Charter Commc'ns VI, LLC*, 227 W. Va. 595, 608 n.46, 712 S.E.2d 504, 517 n.47 (2011) (citing *Bennett v. Asco Servs., Inc.*, 218 W. Va. 41, 49, 621 S.E.2d 710, 718 (2005)); *Strahin*, 216 W. Va. at 188, 603 S.E.2d at 210. So, too, have West Virginia courts looked to scholarship published by West Virginia's flagship law journal. *E.g.*, *Harris v. CSX Transp., Inc.*, 232 W. Va. 617, 621, 753 S.E.2d

275, 279 (2013); *State ex rel. U-Haul Co. of W. Va. v. Zakaib*, 232 W. Va. 432, 440, 752 S.E.2d 586, 594 (2013). Indeed, the very federal judge upon whom Plaintiff leans for the *Mullins II* decision has favorably cited the exact article that Plaintiff downplays as "musings" (at 15). *See Tyree v. Boston Sci. Corp.*, No. 2:12-cv-08633, 2014 WL 5359008, at *4 (S.D. W. Va. Oct. 20, 2014) (Goodwin, J.) (citing Philip Combs & Andrew Cooke, *Modern Products Liability Law in West Virginia*, 113 W. Va. L. Rev. 417, 425 (2011)).

At bottom, Plaintiff tells this Court that because a negligent design claim requires a plaintiff to go beyond the product itself and present evidence of a manufacturer's conduct, the tradeoff for doing so must be that no feasible alternative design is required. Response 16-17. Nothing in *Morningstar* suggests that it intended such a system of strategic tradeoffs between these two theories. Indeed, Morningstar shows the falsity of Plaintiff's criticism (at 16) of Ford's argument that strict liability is intended to be easier to prove. As *Morningstar* made plain, "the most beneficial aspect of [strict liability] is that it relieves [plaintiffs] of proving specific acts of negligence." 162 W. Va. at 877, 253 S.E.2d at 677.

Plaintiff wonders why counsel in a product liability case would assert a negligent design claim if it is harder to prove than strict liability claims, but there are many reasons. One is that negligent design claims may broaden the scope of discovery by bringing a manufacturer's conduct into play. *See* W. Va. R. Civ. P. 26(b)(1). Another is that when plaintiffs seek punitive damages, as Plaintiff did here, they must present evidence of a manufacturer's conduct to succeed in their claim. W. Va. Code § 55-7-29(a). The say-so of Plaintiff's counsel about the rate at which plaintiffs assert negligent design claims is irrelevant to the legal issues in this case, and, in any event, inconsistent with the experience of corporate members from a broad cross-section of American and international product manufacturers. PLAC Amicus Br. 13 n.6 ("Negligent design

cases are less common than cases premised on strict liability."). The dearth of case law in this area suggests, if anything, that negligent design claims are not the prevalent product liability theory. Either way, this Court should not be moved by Plaintiff's unadorned speculation.

C. Plaintiff's claim that she presented substantial evidence of a feasible alternative design misstates the trial record in critical ways.

To establish a feasible alternative design, a plaintiff must offer evidence of a design that a reasonably prudent manufacturer would have adopted and that would have eliminated the risk of the injury suffered. *Nease v. Ford Motor Co.*, 848 F.3d 219, 233-234 (4th Cir. 2017). Generic testimony that "safer, proven design alternatives existed during the relevant time" is inadequate absent "support that the alternative designs . . . identified were safer." *Id.* at 234. No reasonable juror could conclude that Plaintiff made this showing here.

At trial, Plaintiff's expert (Thorbole) proposed one—and only one—alternative design that he said would have protected the 2014 Mustang's brake fluid reservoir: placing a boron steel bar in between the 2014 Mustang's cowl and shock tower. IV JA 1882:24-1883:24; IV JA 1885:1-12. The only "proof" of that design's feasibility was Thorbole's testimony about his crash simulation—which was a spin-off of Ford's finite element model that he manipulated extensively without validating his changes. *Infra* 10 n.2, 12-16. Plaintiff then opposed judgment as a matter of law by citing to Thorbole's testimony that "a boron bar can be placed in the engine compartment of the 2014 Mustang and sufficiently fastened." IV JA 3373:19-21.

In her appeal brief, however, Plaintiff makes Thorbole's simulated alternative the last of four reasons she offers for how a jury could reasonably have found a feasible alternative design. Response 20-21. Neither Thorbole's testimony nor newly proffered arguments—which were not argued to the jury and fail on their own terms—show a feasible alternative design. Starting with Thorbole's simulated alternative, even assuming it was admissible, *see infra* 12-16, the design was

not feasible: the simulation involved a boron bar with characteristics no real-world material could replicate. The bar stayed attached because *it was programmed to be permanently affixed*. Ford Br. 14; IV JA 2959:17-23. Even then, the shock tower still contacted the brake fluid reservoir. IV JA 2962:20-23. Plaintiff disputed none of this below or on appeal. *See* Response 19-22.

Plaintiff tries to dodge the significant deficiencies in Thorbole's testimony by reciting his credentials and leaning into the fact the origin of his simulation was Ford's model. Thorbole's expertise is not the issue, and while he may have *started* working from Ford's model, the unvalidated simulations he described to the jury bore no resemblance to that model.[2] The relevant standard for a feasible alternative design asks whether a manufacturer could feasibly "eliminate the unsafe character of the product," *see Morningstar*, 162 W. Va. at 886-887 & n.20, 253 S.E.2d 666, 681-682 & n.20 (citation omitted); *In re Tobacco Litig.*, No. 13-1204, 2014 WL 5545853, at *2-3 & n.5 (W. Va. Nov. 3, 2014), and his simulation could not answer that question because it was unvalidated and defied real-world material properties. Neither of those facts was disputed.

Plaintiff next points, for the first time on appeal, to evidence about the *safety cage* of a 2003 Volvo and recasts it as "the state of the art" evidence about an alternative design to protect the 2014 Mustang's *brake fluid reservoir*. Response 20-21. But Thorbole testified about the 2003 Volvo's safety cage in support of Plaintiff's failed entrapment claim. IV JA 1855:7-15 (Thorbole presenting 2003 Volvo as a feasible alternative safety cage because it allowed "[m]inimal collapse"); III JA 644 (judgment order). He never identified the Volvo's safety cage as a design

[2] Ford produced in discovery a specific model for a specific crash condition—a 40 mph, 40% overlap crash. Thorbole took that model and changed the load conditions to be a 40 mph, 25% overlap (SORB) crash, without attempting to validate the model (i.e., show that it accurately would predict the vehicle's performance in that crash mode). Thorbole then further modified the load conditions, increased the speed to 45 mph and shaved down the barrier—and, again, without doing any work to show the simulation accurately predicted real-world performance. Then, Thorbole changed the vehicle in the model—adding a boron bar and other parts—including adding unrealistic properties for those parts. II JA 367-369, 494-497; IV JA 1745:15-1747:21; IV JA 1749:5-1751:24; *see also infra* 12-16.

for protecting the brake fluid reservoir, and he never claimed that some Volvo vehicle or some specific aspect of the design of a Volvo would have protected the reservoir in this crash. IV JA 1847:16-1849:18 (discussing safety cage performance). The same is true of Plaintiff's references to "Ford's own fleet." Response 21 (citing IV JA 1854:1-10). And Thorbole never discussed the 1965 Mustang. It was first identified in Plaintiff's cross-examination of Ford employee, Ram Krishnaswami, who specifically rejected that it had any crash-related function. IV JA 3316:7-14.

Finally, Plaintiff points to a 2012 Mercedes that incorporated a boron steel "high strength strut" between its shock tower and cowl panel. IV JA 1882:6-24. Contrary to what Plaintiff now asserts (at 21-22), Thorbole never testified that this design was state of the art—indeed, there was no evidence any other vehicle ever used it. Moreover, the boron bar failed to protect the brake fuel reservoir in a SORB test of this vehicle. IV JA 2084:11-13, 2085:17-18, 2086:1-9. After watching footage of the crash test, Thorbole admitted this fact, IV JA 2085:22-24, and disclaimed the 2012 Mercedes' boron bar as his proposed alternative design, IV JA 2093:8-12.

Because Plaintiff failed to establish a feasible alternative design for the 2014 Mustang's brake fluid reservoir, Ford is entitled to judgment in its favor. *Nease*, 848 F.3d at 233-234.

D. The Circuit Court's inaccurate jury instructions prejudiced Ford and warrant a new trial.

The proper remedy for the Circuit Court's error in eliminating the feasible alternative design requirement is to remand for entry of judgment in Ford's favor on Plaintiff's brake fluid reservoir claim. Because Plaintiff's strict liability claim remained at issue until the last day of trial, Plaintiff had both reason and opportunity to present evidence of a feasible alternative design for the Mustang's brake fluid reservoir—and failed to do so.

At minimum, Ford is entitled to a new liability trial on that claim because the Court provided the jury instructions which allowed a liability finding absent proof of a feasible

alternative design. Inaccurate jury instructions are *presumptively* prejudicial. Syl. Pt. 6, *Ratlief v. Yokum*, 167 W. Va. 779, 779-780, 280 S.E.2d 584, 585 (1981). They require a new trial unless it is apparent from the record that the instruction was not harmful. *Id.*

Plaintiff's only argument is to invite speculation about the jury's deliberations. Response 22. She first suggests that the jury's same-day verdict—which was a split verdict—indicates that the jury was committed to ruling against Ford, no matter the instructions, *id.*, and then hypothesizes that the jurors may not have even remembered the feasible-alternative-design requirement even if they were given the correct instructions, *id.* The Court should reject this cynical view. "If we were to presume juror confusion, we would have no reason to believe that any verdict represented a proper application of the law to the facts." *United States v. Stone*, 9 F.3d 934, 941 (1993). This is particularly true here given the split verdict—which "reflect[s] a thoughtful and deliberate jury," *United States v. Cornell*, 780 F.3d 616, 627 (4th Cir. 2015), who "conscientiously follow[s]" the court's instructions, *United States v. West*, 877 F.2d 281, 288 (4th Cir. 1989). *Cf. United States v. Dominguez*, 226 F.3d 1235, 1248 (11th Cir. 2000) (similar).

There can be no question that Ford was prejudiced by improper instructions here. Plaintiff lacked evidence of a feasible alternative design that could have prevented a fire in the context of a crash like the one here. *Supra* 9-11. Thus, she could not have prevailed had the jurors been properly instructed. *Id.* At a minimum, a new trial is warranted. *Tracy v. Cottrell ex rel. Cottrell*, 206 W. Va. 363, 376, 524 S.E.2d 879, 892 (1999).

II. Thorbole's Testimony About The Dissimilar Crash Simulations Should Have Been Excluded Under *Ilosky* And Their Admission Warrants A New Trial.

Seeking to avoid *de novo* review, Plaintiff asks this Court to review whether the crash simulations were improperly admitted as an ordinary evidentiary ruling governed by the abuse-of-discretion standard. Response 23. While evidentiary rulings generally are reviewed for abuse of

discretion, Syl. Pt. 3, *State v. McCracken*, 218 W. Va. 190, 192, 624 S.E.2d 537, 539 (2005), that discretion "does not apply where 'the trial court . . . applies the wrong legal standard,' " *McDougal v. McCammon*, 193 W. Va. 229, 238, 455 S.E.2d 788, 797 (1995) (citation omitted). Here, the trial court applied the wrong legal standard under *Ilosky*, II JA 331-334, so *de novo* review is proper, *see State ex rel. Harvey v. Yoder*, 239 W. Va. 781, 787, 806 S.E.2d 437, 443 (2017); *State v. LaRock*, 196 W. Va. 294, 470 S.E.2d 613 (1996). Even under abuse-of-discretion review, however, it would be an abuse of discretion to misstate the law. The Circuit Court did exactly that when it held that Thorbole's simulation testimony was admissible under *Ilosky* even though *Ilosky* bars the simulations themselves.

Plaintiff argues that Thorbole merely used Ford's model in the same way Ford would. Not so. Thorbole fundamentally changed Ford's model. He changed the barrier, he changed the speed, he changed the parts, and he changed the material properties for the parts. He made all of these changes without validating that his simulation accurately reflected the real world. *Supra* 10 n.2. It is entirely inaccurate to refer to Thorbole's simulations as "Ford's" in any way.

Furthermore, Plaintiff's response turns entirely on a claim that Thorbole gave in camera testimony that convinced the Circuit Court that its pretrial ruling was wrong to have excluded the simulation evidence as not substantially similar to the accident conditions, misleading, and prejudicial. Response 24-27. That never happened. Plaintiff's narrative about the in camera testimony is belied by the record for at least the following three reasons.

First, Plaintiff does not identify a single difference between the information the court had about Thorbole's simulations pre-trial and Thorbole's in camera testimony. The pre-trial ruling was based on Thorbole's report and deposition, which showed that he received from Ford a crash-test simulation validated for a specific set of conditions, II JA 368, and that validation is essential

to show accurate results, II JA 367, 494-497. Thorbole admitted at his deposition that he changed the conditions to run his simulation—increasing the speed, reducing the radius of the impact point, and substituting the deformable barrier for a rigid one, II JA 367-369—without validating the model under those new conditions. II JA 368-369. And Thorbole's report made clear that the purpose of this unvalidated model was to replicate the failure modes that happened in Ms. Bumgarner's accident. II JA 494. Thorbole's in camera testimony provided the same information as his report and deposition.[3] IV JA 1745:15-1747:21; IV JA 1749:5-1751:24.

Now, appearing to concede the simulations were not substantially similar to the crash, Plaintiff repeatedly suggests his simulations reflect substantially similar "vehicle failure modes." Response 4, 25, 27. Thorbole's discussion of failure modes, too, was before the court both pre-trial and at trial. That discussion focused entirely on failure modes for the *safety cage*, not the brake fluid reservoir. *See, e.g.*, II JA 366-367 (deposition testimony); IV JA 1749:5-7 (trial testimony).

Second, the Circuit Court changed *nothing* about its exclusion of Thorbole's simulations. After the in camera testimony, the court told the parties that it was not "changing my order regarding the admissibility of the simulation" itself because the court still "found that problematic." IV JA 1775:3-6. The fact that the simulations remained excluded at trial for the reasons given in the pre-trial order is not debatable. They had been and remained excluded because the Circuit Court found them irrelevant under *Ilosky* and misleading and confusing under W. Va. R. Evid. 403. II JA 538. This alone refutes Plaintiff's narrative about the in camera testimony. If Thorbole had, as Plaintiff now says, convinced the Circuit Court that his simulations were

[3] Contrary to Plaintiff's suggestion (at 27), the Circuit Court's statement, "I understand. I think I've got enough." did not somehow indicate she was impressed with Thorbole's testimony, but that she wanted it to stop. Two lines earlier in the transcript, the court cut off Thorbole's testimony because it was going so "far afield." IV JA 1765:23-1766:1.

substantially similar to the essential conditions of Ms. Bumgarner's wreck, then the Circuit Court would not have continued to enforce the pre-trial order. The relevance determination in that pre-trial order would be wrong, and the Rule 403 balancing would necessarily require re-weighing.

Third, the Circuit Court explained *why* it believed that it could treat Thorbole's simulation testimony more favorably than the simulations themselves—and that reasoning had nothing to do with Thorbole's in camera testimony. Plaintiff correctly notes that the court "***recited*** [*Ilosky*'s] key holding regarding test admissibility," Response 27 (emphasis in original) (citing IV JA 1775:6-12), but Plaintiff leaves out what the court said next:

> [T]he Court determined in *Ilosky* that the trial court erred in refusing to admit a particular test. And that's in the *Spurling* case. But what was significant in the case was that they didn't believe that the trial court's error was prejudicial because the trial court permitted the expert to testify before the jury accordingly. That ruling did not prevent the appellant from presenting evidence of the test. It just restricted the manner in which the evidence could be presented, *which is what I was doing in my pretrial ruling and what I am continuing to do* as it relates to presentation of Dr. Thorbole's testimony. So it's consistent, frankly, with the *Ilosky* decision.

IV JA 1775:13-1776:5 (emphasis added). There can be no question that the court believed that *Ilosky* allows trial courts to permit testimony about simulations even when the simulations themselves are excluded. The court, after all, told the parties that is how it read *Ilosky*. *Id.*

All told, Plaintiff attacks a straw man in suggesting that Ford is arguing a crash simulation can never be substantially similar to a real-world crash, or that crash simulations must precisely replicate every single aspect of an accident to be admissible. *See* Response 24. Ford argued, and the Circuit Court once agreed, that Plaintiff failed to show that *Thorbole's* crash simulations were substantially similar to the essential conditions of Ms. Bumgarner's accident because Thorbole made major changes to Ford's validated model without ever validating whether the model still correlated to real-world performance. II JA 331-334, 537-538. On top of that, still undisputed testimony then showed that Thorbole's simulations "rigidly affixe[d]" a boron bar onto the 2014

Mustang—an "infinitely strong" connection that Ford never could have replicated using real-world materials. IV JA 2959:1-2960:20. Thorbole did not and could not show that the essential conditions of his simulations were substantially similar to Ms. Bumgarner's accident. His simulations and related testimony were therefore inadmissible to show what happened in the wreck at issue here. Ford Br. 31-34; Syl. Pt. 16, *Ilosky*, 172 W. Va. at 438, 307 S.E.2d at 606. Not even Plaintiff contends that this legal error was harmless. Response 23-28.

III. Plaintiff's Failure To Prove A Breach Of The Duty Of Care Or Proximate Cause Entitles Ford To Judgment As A Matter Of Law.

Plaintiff's response to Ford's arguments about the lack of evidence of breach or proximate cause is to lean hard on the deferential standard of review for sufficiency of the evidence challenges. This deferential standard does not excuse an absence of proof on a required element. *Herbert J. Thomas Mem'l Hosp. Ass'n v. Nutter*, 238 W. Va. 375, 795 S.E.2d 530 (2016). Plaintiff has not identified any evidence that Ford's design of its *brake fluid reservoir* departed from the design choices a reasonable manufacturer would have made, or that a different design would have avoided a post-collision fire. Both shortcomings entitle Ford to judgment as a matter of law.

A. No reasonable juror could conclude that Ford failed to exercise due care when designing the 2014 Mustang's brake fluid reservoir.

Plaintiff does not suggest Ford's duty of due care required Ford to design an accident-proof vehicle or afford perfect protection against the negligence of others in all accident conditions—both of which are impossible. Nor does she dispute that her own expert testified that (1) it is impossible to prevent the release of engine-compartment fluids in all crashes, III JA 1474:3-9; (2) no manufacturer can eliminate the risk of post-collision fires in all crashes, IV JA 1473:20-1474:2; (3) the 2014 Mustang's design complied with all safety standards imposed by law and adhered to the state of the art, III JA 1161-1162; IV JA 1918-1924, 1930, 2002. Instead, Plaintiff makes multiple arguments that are simply not supported by the record.

First, Plaintiff insinuates Ford had "actual knowledge of a 'foreseeable risk of harm' " when it placed the brake fluid reservoir in the engine compartment, on the other side of the dashboard from the driver. Response 30. But Ford presented evidence that, by design, the 2014 Mustang's brake fluid reservoir sits in the same location *as nearly every other brake fluid reservoir in every vehicle made by any manufacturers.* IV JA 2848:8-24. When a driver presses her brakes, it compresses a piston within the master brake cylinder, pushes brake fluid out of the master brake cylinder, and delivers braking power to each of the wheels. IV JA 2843:2-2844:14. Ford presented testimony that the "safest and most effective way" to design the braking system is to "keep th[e] piston in line with where the brake pedal is"—i.e., directly in front of the driver. IV JA 2847:17-19. This testimony was undisputed at trial. Even now, Plaintiff cannot point to any evidence Ford should have located it elsewhere.

Second, Plaintiff's record-based arguments related to breach focus on: (1) a SORB crash test that *post-dates* the 2014 Mustang's design; (2) a steel strut in a 2012 Mercedes that the jury heard *came loose upon impact in crash tests* allowing the brake fluid reservoir to "topple[] over" and go "tumbling around," IV JA 2084:11-13, 2085:17-18, 2086:1-9; VIII JA 3970-3972; (3) the design of a 1965 Mustang; and (4) evidence about *entrapment* that the jury unequivocally rejected in finding for Ford on Plaintiff's passenger compartment/entrapment claim. Response 30-34. No reasonable juror could have found that Ford failed to exercise due care based on this evidence.

Taking the SORB crash test first, it is irrelevant to whether Ford knew the 2014 Mustang's brake fluid reservoir was defective. There is no dispute that the 2014 Mustang's design standards were set in 2001 and the SORB test was not available *until 11 years later*, in 2012. IV JA 1900:3-7 (Thorbole testifying the SORB test came "into play" in 2012), IV JA 2787:1-22 (2014 Mustang's design standards were "locked in" in 2001). In addition, at trial, Thorbole told the jury that this

SORB test put Ford on notice that the 2014 Mustang's *occupant compartment* was defective and should have been redesigned. IV JA 1745:8-1746:16, 1900:3-7. The jury necessarily found this evidence unpersuasive because it found for Ford on the occupant compartment claim. This test was developed by the IIHS, does not evaluate the performance of a vehicle's brake fluid reservoir, and did not detract from Ford's compliance with the federal motor vehicle safety standards or adherence to the state of the art. III JA 1161-1162; IV JA 1918-1924, 1930, 2002. Plaintiff should not be permitted to repurpose evidence to support her brake-fluid reservoir claim.

The evidence about the 2012 Mercedes design is also an insufficient basis to sustain the jury's verdict on breach of duty of care. As discussed above (*supra* 11) and in Ford's opening brief (at 10-11, 30), the boron bar there failed. IV JA 2085:11-2086:4. It did not secure the brake fluid reservoir in the Mercedes, and it required an "infinitely strong" attachment to work in Thorbole's simulated Mustang. IV JA 2959:13-23.

Plaintiff's reference to the 1965 Mustang is even more off-base: The record is devoid of any evidence that the brace Ford used for torsional stiffness in a 1965 model Mustang would protect the brake fluid reservoir. *See* IV JA 3317:22-3318:9 (indicating Thorbole did not do crash-performance test on 1965 Mustang). Plaintiff tried and failed at trial to elicit testimony through *Ford's* witness that the 1965 Mustang used a brace to protect the brake-fluid reservoir. IV JA 3256:24-3259:23. After being shown a series of unexplained "legacy photos," the witness explained that the brace shown in the photos could have a range of purposes, IV JA 3257:5-3259:19, and that it would be "irresponsible" for an engineer to make engineering judgments based on a photograph, IV JA 3317:18-21. No reasonable jury could have found Ford breached its duty of care by not using a design choice that there was no evidence would have made the brake fluid reservoir in the 2014 Mustang any safer.

Plaintiff finally resorts to arguing that evidence of weakness related to steel in the safety cage could be used to support a jury finding that the shock tower itself was insufficiently strong. Response 31-34. No deferential review attaches to this argument, because the jury found the exact opposite or never passed on the question of law. *See* Syl. Pt. 5, *Orr v. Crowder*, 173 W. Va. 335, 339, 315 S.E.2d 593, 597 (1983) (deference owed only to prevailing party). Plaintiff's uncited contention (at 31) that "the jury was reasonable to find that the strength of the safety cage steel has a dynamic relationship with the design requirements of a brake fluid reservoir" is a mystery. Nothing in the verdict suggests the jury made this finding. In rejecting Plaintiff's entrapment claim, the jury impliedly discredited Thorbole's testimony that the 2014 Mustang used "inferior materials in the safety cage" by using 395 megapascal steel. IV JA 1752; IV JA 1764:19-1965:6. The jury instead favored Ford's evidence that the steel used in the 2014 Mustang was common throughout the industry when the car was designed and remains prevalent today. IV JA 3310:5-20. Plaintiff cannot repurpose evidence the jury rejected to claim (for the first time) that Ford's use of 395 megapascal steel for the brake fluid reservoir was inadequate.

Independently, this Court should reject Plaintiff's weak-shock-tower theory because she never presented it below. Her change of theory on appeal only further affirms the precarity of the one she actually presented.

B. No reasonable jury could conclude that the design of the 2014 Mustang's brake fluid reservoir proximately caused the post-collision fire.

Lastly, the jury's verdict cannot be sustained because Plaintiff failed to prove that the injury claimed "would not have happened without the design defect." III JA 563; *see also* Syl. Pt. 4, *White v. Wyeth*, 227 W. Va. 131, 133, 705 S.E.2d 828, 830 (2010) (requiring "unbroken" sequence between cause and the wrong complained of) (citation omitted). As she did in the post-trial briefing below, Plaintiff asks this Court to view her proof on proximate cause as whether there

was any evidence Ms. Bumgarner's death was traceable to brake fluid leakage. Response 34-35. But that is not the relevant question. In a negligent design claim, the proximate cause inquiry is whether the chosen *design* caused a plaintiff's injury. For the design to have proximately caused the injury, there would have to be some other design that could have been chosen and would have avoided brake fluid leakage and a fire in the circumstances of this accident. If no such other design exists, the design was not the proximate cause of the injury. Plaintiff's proposed alternative designs for the 2014 Mustang's brake fluid reservoir are either ineffective or impossible. Without evidence that the post-collision fire could have been avoided with a feasible alternative design, no reasonable jury could make a finding of probable cause. Syl. Pt. 3, *Spencer v. McClure*, 217 W. Va. 442, 443, 618 S.E.2d 451, 452 (2005).

CONCLUSION

For the foregoing reasons, this Court should vacate the judgment below on Plaintiff's claim that Ford negligently designed the 2014 Mustang's brake fluid reservoir and order the Circuit Court to enter judgment in Ford's favor on that claim. In the alternative, the Court should vacate the judgment below on Plaintiff's claim that Ford negligently designed the 2014 Mustang's brake fluid reservoir and order that the Circuit Court conduct a new liability trial on this claim.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jason A. Proctor, counsel for Petitioner, do hereby certify that on this 5th day of April, 2023, I served the "**Reply Brief of Ford Motor Company**" via the E-Filing System maintained by the Intermediate Court and Supreme Court of Appeals of West Virginia, and upon the following counsel of record via U.S. mail:

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