No. _____

In the
Supreme Court of the United States

GENERAL MOTORS LLC,

Petitioner,

v.

MICHAEL BAVLSIK; KATHLEEN SKELLY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931), this Court held that partial retrials comport with the Seventh Amendment only if "it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." Applying that constitutional presumption against partial retrials, several circuits have properly held that a court may not grant a damages-only retrial if the evidence suggests that the jury may have rendered a "compromise verdict"—that is, awarded low damages to resolve non-unanimity over liability. In the decision below, by contrast, the Eighth Circuit agreed that "a strong case" had been made that the jury rendered a compromise verdict, but nevertheless concluded that a damages-only retrial was acceptable. In doing so, the court joined a minority of circuits in applying a legal test that improperly inverts the *Gasoline Products* presumption, treating a damages-only retrial as presumptively *permissible* and requiring the party that opposes a partial retrial to "clearly demonstrate" that the jury verdict *was* the result of compromise. That legal test is wrong, and the Eighth Circuit's decision employing it exacerbates a division among the lower courts that this Court should resolve.

The question presented is:

Whether the constitutional presumption against damages-only retrials that this Court recognized in *Gasoline Products* permits a damages-only retrial in the face of a finding that "a strong case" has been made that the jury issued an impermissible compromise verdict.

PARTIES TO THE PROCEEDING

Petitioner General Motors LLC was defendant in the district court and defendant-appellee/cross-appellant in the court of appeals.

Respondents Michael Bavlsik and Kathleen Skelly were plaintiffs in the district court and plaintiffs-appellants/cross-appellees in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

General Motors LLC is a Delaware limited liability company whose only member is General Motors Holdings LLC. General Motors Holdings LLC's only member is General Motors Company, a Delaware corporation with its principal place of business in Wayne County, Michigan. General Motors Company owns 100% of General Motors Holdings LLC.

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PETITION FOR WRIT OF CERTIORARI

Nearly a century ago, this Court held that partial retrials comport with the Seventh Amendment only if "it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931). In the decades since *Gasoline Products*, the lower courts have reached conflicting conclusions regarding the propriety of granting partial retrials limited only to damages, particularly in cases involving suspected "compromise verdicts"—that is, cases where a jury appears to have resolved its disagreement over the defendant's liability by awarding the plaintiff legally inadequate damages. This Court should grant certiorari to resolve the division of authority over this important and recurring constitutional question.

This petition arises out of a products-liability case brought by Michael Bavlsik and his wife, Kathleen Skelly, against General Motors, LLC ("GM"). In 2012, Bavlsik hit his head on the roof of his vehicle after running a stop sign, colliding with another vehicle, and rolling down a roadside embankment, rendering him quadriplegic and financially burdening him and his family for the rest of his life. Respondents brought suit in tort against GM, and the case proceeded to trial. During trial, it became clear that the evidence that GM was at fault for Bavlsik's tragic injuries was exceedingly slim, leading the jury to ask during its deliberations whether Bavlsik would be able to receive some compensation "regardless of our decision." After the court responded that Bavlsik would recover only if

the jury found GM liable, the jury promptly returned a verdict that rejected all of respondents' claims except one. Although the jury found that Bavlsik's vehicle contained *no design defects*, the jury nonetheless inexplicably deemed GM liable for negligently failing to adequately "test" for the very defects that the jury found did not exist. The jury then awarded Bavlsik only $1 million as compensation for *past* damages—even though his quadriplegia necessarily means that he will face substantial future costs—and awarded his wife no loss-of-consortium damages.

To state the obvious, that result bears all the hallmarks of an impermissible compromise verdict. Indeed, respondents themselves admitted in the district court that the odd verdict suggests the jury "may have been compromising." The Eighth Circuit likewise conceded that GM made "a strong case" that the verdict was an impermissible compromise, which all agree requires a full retrial of *both* liability and damages. Nonetheless, the Eighth Circuit refused to grant a full retrial because it was not convinced that the record "clearly demonstrate[d]" that the jury had *in fact* reached a compromise verdict. As a result, despite the court's admission that there was "a strong case" that the jury never actually agreed on liability, the jury's liability finding (or, more likely, non-finding) is now set in stone, and respondents will receive a damages-only retrial that virtually guarantees a much larger monetary award.

The Eight Circuit's decision cannot be reconciled with this Court's precedent or with decisions from other circuits. Under *Gasoline Products*, damages-only retrials are presumptively *impermissible* and

should be allowed only when it "clearly appears" that a retrial limited to damages would *not* present fairness concerns. 283 U.S. at 500. Following that rule, several circuits have appropriately concluded that a damages-only retrial is an impermissible remedy when there is *reason to think* that the jury may have compromised, even if the court cannot say for certain that the jury actually did. As those courts have recognized, that is the sole way to ensure not only that a second jury is not reexamining facts found by the first jury, but also that defendants are not forced to pay damages for conduct that no jury actually found tortious. By contrast, the decision below applies a standard under which a damages-only retrial may be held despite "a strong case" that the jury compromised. In reaching that untenable result, the Eighth Circuit joined a minority of circuits in converting the presumption *against* damages-only retrials into a presumption *in favor* of them.

As this case vividly illustrates, inverting the presumption is no mere foot-fault, as where the presumption lies can make all the difference when imposing a remedy. Indeed, this case plainly would have come out differently in the Third and Eleventh Circuits, which require a full retrial if there are "indications" that a jury "may have rendered a compromise verdict," *Collins v. Marriott Int'l, Inc.*, 749 F.3d 951, 960 (11th Cir. 2014), or where there is "reason to think that the verdict may represent a compromise among jurors," *Pryer v. C.O. 3 Slavic*, 251 F.3d 448, 455 (3d Cir. 2001) (quotation marks omitted). That makes this case an excellent vehicle for this Court to provide much-needed guidance on the standard that courts should apply when deciding

whether a damages-only retrial is consistent with the Constitution.

OPINIONS BELOW

The Eighth Circuit's opinion is reported at 870 F.3d 800 and reproduced at App.1-24. The district court's opinion is unreported but available at 2016 WL 362512 and reproduced at App.27-55.

JURISDICTION

The Eighth Circuit issued its opinion on August 31, 2017. GM timely filed a petition for rehearing, which the court denied on October 26, 2017. On January 3, 2018, Justice Gorsuch extended the time for filing this petition to and including February 23, 2018. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment to the U.S. Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Fifth Amendment to the U.S. Constitution provides in relevant part:

> No person shall be … deprived of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

A. The District Court Proceedings

1. GM is one of the largest automobile manufacturers in history. GM sells vehicles under a variety of brands—including GMC, Chevrolet, Buick, and Cadillac—to millions of customers in the United States and around the world. Those customers included respondent Michael Bavlsik, a Missouri resident and father of eight who in August 2003 purchased a 2003 Model GMC Savana, a full-size passenger van that can seat 12 passengers. App.2.

Nine years after purchasing the van, in July 2012, Bavlsik was driving two of his sons and eight other passengers home to St. Louis after a trip to northern Minnesota when he ran a stop sign and hit a boat that was hitched to another vehicle. App.3. Bavlsik lost control of the Savana, which skidded to the opposite side of the road and completed a three-quarters roll down a roadside embankment. App.3. Fortunately, none of Bavlsik's passengers sustained injuries during the accident, but Bavlsik himself tragically suffered a spinal injury that rendered him quadriplegic: "He has no motor movement below [his] chest." App.3 Bavlsik's professional life has been impacted, and he will "need to pay for some form of care for the rest of his life." App.4

2. In March 2013, Bavlsik and his wife, Kathleen Skelly, filed a products-liability lawsuit against GM on diversity grounds in federal district court. App.4. They asserted three claims: (1) strict liability, alleging that the Savana's seatbelt system lacked three specific safety features; (2) negligence, based on GM's failure to implement those seatbelt system safety features or

alleged failure to conduct adequate rollover testing of the van to gauge the performance of the seatbelt system; and (3) failure to warn. App.2. Bavlsik sought past and future damages for loss of income, pain and suffering, medical expenses, and punitive damages, and his wife sought past and future damages for loss of consortium. App.4.

The case proceeded to trial, which lasted three weeks. App.4. At trial, there was almost no evidence that the safety features respondents proposed would have prevented Bavlsik's injuries. And approximately two hours into its deliberations, the jury asked the court a question that revealed its own doubts about GM's liability—namely, whether, if the jury included a past damages figure in the damages section of the special verdict form, Bavlsik could receive compensation "regardless of our decision." App.19-20. The district court responded that Bavlsik would receive money for past damages "only if the jury found GM liable." App.19-20.

The jury returned a verdict just two hours later, finding GM not liable on all but one of respondents' claims. The jury rejected respondents' strict-liability claim, which had asserted that the Savana was in a "defective condition unreasonably dangerous" absent three seatbelt safety features. Add.1.[1] The jury also rejected respondents' failure-to-warn claim, finding that the failure to provide warnings about the absence of respondents' alleged safety features or that a driver's head could contact the roof during a rollover did not render the van unreasonably dangerous.

[1] "Add." refers to the Addendum filed with the Eighth Circuit.

Add.4. And the jury rejected respondents' theory that failure to include the three seatbelt safety features rendered GM "negligent in the design of the plaintiffs' 2003 Savana van." Add.3.

Despite the jury's finding that Bavlsik's van contained *no design defects*, the jury found GM negligent for not "adequately test[ing]" the non-defective seatbelt system, and also found that this negligence "directly cause[d] damage" to Bavlsik. Add.3-4. Yet the jury declined to award Bavlsik *any* future damages, and instead awarded him only $1 million for *past* damages. App.2-3. The jury also declined to award his wife any loss of consortium damages. Add.6.

3. Both parties filed post-trial motions. GM renewed its motion for judgment as a matter of law, contending that respondents' negligent-failure-to-test theory could not stand because the evidence conclusively demonstrated that GM had not designed the Savana's seatbelt system in a defective manner. In the alternative, GM moved for a new trial on the ground that the jury's finding on the failure-to-test theory strongly suggested an improper compromise verdict. Dkt.199 at 9-10.[2] As GM explained, the circumstances of this case, including "the jury's question to the Court" regarding compensation for past damages, indicated "that the jury may have improperly sought to find a way to reimburse [Bavlsik] for past medical expenses" even though it did not actually believe that GM was liable for his injuries. Dkt.199 at 10.

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[2] "Dkt." refers to docket entries in the district court.

Respondents also moved for a new trial—but only a partial retrial limited to damages—arguing that the jury's award was "glaringly inadequate." Dkt.197 at 1. In the alternative, however, respondents agreed with GM that the district court could "find that this was a compromise verdict," which would necessitate a retrial on both liability and damages. Dkt.197 at 2. In support of the latter argument, respondents observed that "after a few hours of deliberation, the jury sent a note … indicating that, at that point, the jury may not have been unanimous" and "may have been compromising." Dtk.197 at 7-8. As a result, and particularly in light of the jury's inadequate damages award, respondents concluded, "a case can be made that this was a compromise verdict." Dtk.197 at 7.

4. The district court granted GM's renewed motion for judgment as a matter of law, thereby setting aside the sole basis for finding GM liable. The court agreed with GM that "there is insufficient evidence to support a verdict for plaintiffs for negligent design based upon a failure to test." App.34-35. As the court explained, the applicable state tort law in this case "requires a defect in the product to support a claim for negligent failure to test," and—as the jury found in rejecting respondents' defect claims—here there was insufficient evidence of any defect. App.32.

As required by Federal Rule of Civil Procedure 50(c)(1), however, the district court also conditionally ruled on both parties' new trial motions. Even though the court had just concluded that there was insufficient evidence to hold GM liable on a negligent failure-to-test theory, it nonetheless held in the

alternative that it would *preserve* the jury's head-scratching liability finding and grant respondents a partial retrial devoted exclusively to "Bavlsik's future damages" and "Skelly's damages, past and future." App.40. The court summarily "reject[ed] [GM's] and [respondents'] arguments for a new trial based on a compromise verdict" without mentioning the *Gasoline Products* standard or grappling with any of the unusual circumstances surrounding the verdict. App-41. In an abbreviated analysis, the court found no compromise because, in its view, evidence in the record could support the jury's failure-to-test finding—without even discussing (let along considering) the strong evidence of compromise that both parties highlighted. App.40-41. Finding the jury's damages award "unjust," App.38, the court concluded that respondents should receive a damages-only retrial in the event the Eighth Circuit disagreed that GM is entitled to judgment as a matter of law.

B. Eighth Circuit Proceedings

Respondents appealed the district court's decision to grant judgment as a matter of law to GM, and GM cross-appealed the conditional ruling granting respondents a damages-only retrial.[3] The Eighth Circuit reversed as to the first issue but affirmed as to the second, thereby providing respondents a new trial at which liability will be conclusively presumed, and respondents need only prove the extent of their damages.

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[3] On appeal, respondents abandoned their argument that the jury may well have rendered a compromise verdict and instead contended only that they should receive a damages-only retrial.

To begin, the court recognized that respondents' negligent-failure-to-test theory—and, in particular, the element of causation—was "hotly contested" at trial, and that the jury's finding on that claim appeared inconsistent with its rejection of the defect claims. Nonetheless, the court ultimately concluded that "there was legally sufficient evidence for a reasonable jury to find GM liable … for failing to conduct adequate testing." App.15.

Turning to the district court's conditional decision to grant a damages-only retrial, the court declared it "generally permissible for a trial court to grant a new trial on damages only." App.16. The "overarching consideration," the court continued, "must be whether the record, viewed in its entirety, clearly demonstrates the compromise nature of the verdict." App.18 (quoting *Boesing v. Spiess*, 540 F.3d 886, 889 (8th Cir. 2008)). "'Several factors' are often probative of whether jurors improperly compromised," such as a "grossly inadequate award of damages," the pattern of jury deliberations, and whether there was "'a close question of liability.'" App.18 The Eighth Circuit addressed each of these factors seriatim.

First, the court acknowledged that "both sides agree the damages award is seriously inadequate," and that "the low verdict amount is consistent with a compromise verdict." App.19. However, because "reduced damages are part of the very definition of a compromise verdict," the court found this factor alone "falls short of convincing us" that "the better route was to order a [full] new trial to remedy the inadequate damages problem." App.19. The court next examined the "odd pattern of jury deliberations"—in particular,

the "note the jury submitted two hours into their deliberations asking whether Bavlsik would recover … past medical expenses … regardless of our decision." App.19. Again, the court agreed that "the jury's question … raises the possibility the jurors compromised." App.20. But the court determined the jury's question did not "compel" that conclusion. App.20-21.

Finally, as to whether liability was a "close question," the court had already acknowledged that liability was "hotly contested." App.11. And it acknowledged "the jury's seemingly inconsistent verdict," puzzling over "how could the jury find rollover testing would have led to a better design capable of preventing Bavlsik's injuries if the jury seemingly rejected the only design alternatives the plaintiffs offered?" App.21. Yet the court refused to treat that seeming inconsistency as evidence of *compromise*, reasoning that GM could point to it only to support an argument that the verdict must be rejected as *inconsistent*. App.21-22. The court did not cite any authority for its apparent view that verdict inconsistency is categorically irrelevant to the compromise verdict analysis.

After rejecting each indicia of compromise in isolation, and without considering the totality of the evidence, the Eighth Circuit concluded that it was "not convinced the record so *clearly* demonstrates a compromise verdict that the trial court *abused its discretion* in not recognizing as much." App.23 (emphasis in original). In the court's view, "there were a number of options the trial court could choose from," and "a new trial for Bavlsik's future damages and

Skelly's past and future damages was one of those permissible options." App.23. Accordingly, after acknowledging that GM "ma[de] a strong case" that the jury rendered a compromise verdict, and thus that the jury never actually found GM liable, App.16, the court nonetheless affirmed the grant of a partial retrial in which the second jury will be instructed that GM has already been found liable for Bavlsik's injuries, App.3, 24.

REASONS FOR GRANTING THE PETITION

The decision below reached the wrong result because the court applied the wrong legal standard. As this Court made clear nearly a century ago, while damages-only retrials are not entirely incompatible with the Constitution, they are presumptively so, and should be allowed only when it is clear that they will not deprive either party of a fair trial. Applying those principles, several circuits have correctly concluded that a damages-only retrial cannot be held consistent with the Constitution if there is reason to suspect that the jury returned a compromise verdict. Instead, consistent with the presumption that *Gasoline Products* establishes, those circuits will allow a damages-only retrial only when it is clear that the jury's verdict was *not* an impermissible compromise.

The Eighth Circuit applied exactly the opposite standard here, treating a damages-only retrial as the presumptively *permissible* remedy, and one that should be allowed absent conclusive evidence that the jury *did* compromise. Indeed, the court affirmed the district court's decision to order a damages-only retrial even though it readily acknowledged that GM made "a strong case" that the verdict was the product of an

impermissible compromise. That gets matters exactly backward, and creates an untenable risk of deprivation of the right to a fair trial on each and every aspect of a case. The Eighth Circuit held that a damages-only retrial could be ordered even though GM had made "a strong case" that the jury *did not actually hold it liable*. That result is impossible to reconcile with this Court's admonition that a damages-only retrial is constitutionally permissible only if it "clearly appears" that "a trial of [damages] alone may be had without injustice." *Gasoline Prods.*, 283 U.S. at 500.

Unfortunately, the Eighth Circuit is not alone in inverting the *Gasoline Products* presumption. Several other circuits likewise have held that a damages-only retrial may be had unless the record "clearly demonstrates" that the jury *did* return a compromise verdict. The decision below thus deepens a division among the lower courts—on an issue that was outcome-determinative in this case. The Court should grant certiorari to resolve that split of authority and confirm that the Constitution cannot tolerate a damages-only retrial when even the plaintiff has conceded that the record supports the conclusion that the jury issued an impermissible compromise verdict.

I. The Lower Courts Are Divided Over The Standard To Apply When Determining Whether A Damages-Only Retrial Can Be Held Consistent With The Constitution.

This Court held long ago that damages-only retrials are presumptively incompatible with the Constitution, and accordingly may be ordered only when it "clearly appears that the issue to be retried is

so distinct and separable from the others that a trial of it alone may be had without injustice." *Id.* Applying that rule, lower courts have repeatedly recognized that a damages-only retrial cannot be held if the jury reached an impermissible compromise verdict. It could hardly be otherwise, as it would be an obvious violation of both the Seventh Amendment and the Due Process Clause to allow a second jury to award damages for conduct that the first jury did not actually find rendered the defendant liable.

Lower courts agree that a damages-only retrial would be unconstitutional if the first jury issued a compromise verdict, but when evaluating a record for compromise, courts have applied different standards and presumptions. Recognizing that it is nearly impossible to know to a certainty what motivated a jury's verdict, several courts have appropriately recognized that requiring clear proof that the jury *in fact* compromised would be inconsistent with the *Gasoline Products* presumption against single-issue retrials, and would pose too great a risk of violating defendants' constitutional rights. Instead, these courts have refused to permit damages-only retrials unless it is clear that the jury *did not* render a compromise verdict.

For instance, in *Collins v. Marriott Int'l, Inc.*, 749 F.3d 951 (11th Cir. 2014), the Eleventh Circuit explained that "[a] motion for a [complete] new trial … must be granted 'when the issues of liability and damages were tried together and there are *indications* that the jury *may* have rendered a compromise verdict.'" *Id.* at 960 (emphasis added) (quoting *Mekdeci By & Through Mekdeci v. Merrell*

Nat'l Labs., a Div. of Richardson-Merrell, Inc., 711 F.2d 1510, 1513 (11th Cir. 1983)). Applying that standard, the court concluded that a full retrial was warranted when the jury's damages finding was "drastically deficient," "[l]iability was hotly contested by the parties at trial," and the jury "ask[ed] whether it could find liability but award zero damages." *Id.* at 960-62. As to the jury's question, the Eleventh Circuit explained that it "suggests" that "some members of the jury *may* have gone along with a finding of liability only if accompanied by an award of zero damages," *id.* at 962 (emphasis added), but it did not require the defendant to "clearly demonstrate" a compromise verdict.

The Fifth Circuit has applied the same standard, explaining in *Lucas v. Am. Mfg. Co.*, 630 F.2d 291 (5th Cir. 1980), that courts "should grant a new trial on all of the issues rather than one limited solely to the issue of damages" when "the issues of liability and damages were tried together and there are *indications* that the jury *may* have rendered a compromise verdict." *Id.* at 294 (emphasis added); *see also Westbrook v. Gen. Tire & Rubber Co.*, 754 F.2d 1233, 1242 (5th Cir. 1985). The court held a new trial on all issues was required where the jury had returned a damages award that "was less than half of [the plaintiff's] stipulated out-of-pocket losses and reflected no award for pain and suffering," and had returned its verdict on the first day of deliberations after being told that it could either return a verdict quickly or return to deliberate at a later date due to an approaching hurricane. *Lucas*, 630 F.2d at 293. The court did not require proof that the record "clearly demonstrates" that the verdict was in fact a compromise verdict; rather, consistent with

Gasoline Products, it was enough that there were "*indications* that the jury *may* have rendered a compromise verdict."

The Third Circuit has used a slightly different formulation, but it too has "steadfastly applied" the *Gasoline Products* standard and has refused to permit a damages-only retrial "where 'there is *reason to think* that the verdict *may* represent a compromise among jurors with different views on whether defendant was liable.'" *Pryer*, 251 F.3d at 455 (emphasis added). In *Pryer*, the court concluded that a damages-only retrial was impermissible because the underlying dispute "involved a 'tangled or complex fact situation,'" "[b]oth sides vigorously contested liability," and the damages award was "not easy to reconcile with the uncontested evidence of injuries." *Id.* at 455, 457. "Simply put," the court concluded, "it is not clearly apparent that the issue of damages is so distinct and separable from the issue of liability that a trial of it alone may be had without injustice." *Id.* at 457 (alterations omitted). Again, the court did not demand "clear proof" that the verdict *was* a compromise; to the contrary, it demanded clear proof that the verdict was *not*.

The Second Circuit likewise has held that "a new trial on damages only is not proper if there is *reason to think* that the verdict *may* represent a compromise among jurors with different views on whether defendant was liable or if for some other reason it *appears* that the error on the damage issue may have affected the determination of liability." *Diamond D Enters. USA, Inc. v. Steinsvaag*, 979 F.2d 14, 17 (2d Cir. 1992) (emphasis added) (quoting 11 Wright & Miller, *Federal Practice and Procedure* §2814 (3d ed.

2017)). Indeed, the Second Circuit has expressly held that a damages-only retrial cannot be had if there are "conflicting inferences from the record," as that means "it cannot be said that there 'clearly' was no relationship between the jury's finding of liability and the inadequate damage award." *Ajax Hardware Mfg. Corp. v. Indus. Plants Corp.*, 569 F.2d 181, 185 (2d Cir. 1977). The Tenth Circuit has taken the same position, finding evidence that "*raise[d] the question* of the reliability of the jury's verdict" sufficient to render a damages-only retrial impermissible. *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1445-46 (10th Cir. 1988) (emphasis added).

The Eighth Circuit took the opposite approach here: It started from the presumption that it is "generally *permissible* for a trial court to grant a new trial on damages only," App.16 (emphasis added), and then demanded clear proof that the verdict *was* a compromise verdict to overcome that presumption. *See, e.g.*, App.18 (the "overarching consideration must be whether the record, viewed in its entirety, clearly demonstrates the compromise nature of the verdict"); App.20-21 (asking whether the jury's question "compel[led]" the conclusion that it rendered a compromise verdict); App.23 (declaring itself "not convinced the record so *clearly* demonstrates a compromise verdict"). In effect, then, the Eighth Circuit inverted the analysis entirely, starting from the wrong presumption and then demanding the wrong showing to overcome it.

Unfortunately, the Eighth Circuit is not alone in getting the analysis backward. In its decision, the court cited favorably to the First Circuit's decision in

Phav v. Trueblood, Inc., 915 F.2d 764 (1st Cir. 1990), which embraced the position that "a second trial limited to damages is entirely proper" unless "the verdict 'could *only* have been a sympathy or compromise verdict.'" *Id.* at 767 (emphasis added). The First Circuit cribbed that standard directly from the Fourth Circuit. *See Spell v. McDaniel*, 824 F.2d 1380, 1400 (4th Cir. 1987). And the Eighth Circuit's own "clearly demonstrates" test has been embraced by the Seventh Circuit. *See Carter v. Chicago Police Officers*, 165 F.3d 1071, 1083 (7th Cir. 1998) (holding that the relevant question is whether the record "clearly demonstrate[s] the compromise character of the verdict").

While these distinctions may sound minor, as a practical matter, they can make all the difference. Indeed, it is the difference between requiring the government to prove that it has a permissible basis for burdening constitutional rights and requiring the challenger to prove that the government does not, or between requiring the regulated to prove that the agency's actions were arbitrary or capricious and requiring the agency to prove that they were not. Simply put, presumptions often dictate the outcome. This is a case a point. There can be no serious dispute that the Eighth Circuit would have reached a different conclusion had it asked whether "there 'clearly' was *no* relationship between the jury's finding of liability and the inadequate damage award," *Ajax Hardware Mfg.*, 569 F.2d at 185 (emphasis added), instead of whether there "clearly" *was* a relationship between the two. After all, the Eighth Circuit itself admitted that there was "a strong case" that the jury had reached an impermissible compromise verdict, and even

respondents agreed that the record supported that conclusion. Under the standard applied by other circuits, that would have compelled a different result.

In sum, the lower courts are divided over what standard to apply when deciding whether a damages-only retrial is permissible, and they are divided in a manner that has immense real-world consequences for defendants and their constitutional rights. The Court should grant certiorari to resolve that division.

II. The Decision Below Is Plainly Wrong.

The Court should also grant certiorari because the Eighth Circuit's decision is plainly wrong. It is hornbook law that "[t]he power to limit a new trial may not be used to deprive a party of the right to a jury trial on the issues in a case." 11 Wright & Miller, §2814. Yet by granting respondents a damages-only retrial despite its considerable doubts that the jury agreed on liability, the Eighth Circuit followed just that verboten path. In doing so, the court not only violated GM's Seventh Amendment rights, but also created a constitutionally intolerable risk that GM's property will be taken without due process of law.

A. This Court's Precedent Establishes a Clear Constitutional Presumption Against Damages-Only Retrials.

The Seventh Amendment provides in relevant part that "[i]n Suits at common law, … the right of trial by jury shall be preserved." U.S. Const. amend. VII. The Seventh Amendment "preserves the right which existed under the common law when the amendment was adopted." *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937); *see also Balt. & Carolina Line v. Redman*, 295 U.S. 654, 657

(1935). And "at common law there was no practice of setting aside a verdict in part." *Gasoline Prods.*, 283 U.S. at 497. Instead, under the traditional common-law rule that prevailed when the Seventh Amendment was ratified, "[i]f the verdict was erroneous with respect to *any* issue, a new trial was directed as to *all*." *Id.* (emphasis added); *see also id.* at 498 (explaining common-law practice of "set[ting] aside the whole verdict" when the verdict is erroneous as to any issue (quoting *Edie v. East India Co.*, 1 W. Bl. 295, 298 (K.B. 1761)); 3 W. Blackstone, Commentaries *391 ("Granting a new trial … *preserves entire* and renders perfect that most excellent method of decision, which is the glory of the English law. A new trial is a rehearing of the cause before another jury; but with as little prejudice to either party, as if it had *never* been heard before." (emphasis added)).

Over the years, some courts began to deviate from the common-law rule and permit partial retrials. *See Gasoline Products*, 283 U.S. at 497-98 (collecting cases). But other courts hewed closely to common-law custom and concluded that partial retrials violated the Seventh Amendment. *See id.* (same). This Court finally confronted that question in *Gasoline Products*. There, the Court considered the propriety of granting a partial retrial limited to damages in a case involving "errors … with respect to the measure of damages" on a defendant's counterclaim. *Id.* at 496. The Court reversed the First Circuit's holding that "a new trial … restricted … to the determination of damages only" on the defendant's counterclaim was constitutionally sound. *Id.*

In reaching that result, the Court concluded that the Seventh Amendment does not require rigid adherence to the common-law custom mandating a new trial on all issues whenever a verdict contains any error. *Id.* at 498. At the same time, however, the Court placed "an important limitation on the power to grant a partial new trial." 11 Wright & Miller, §2814. It held that a "partial new trial … may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Gasoline Prods.*, 283 U.S. at 500; *see also id.* at 499 ("[T]he question remains whether the issue of damages is so distinct and independent of the others, arising on the counterclaim, that it can be separately tried."). Applying that exacting standard to the case at hand, the Court concluded that "the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." *Id.* at 500.

In sum, while *Gasoline Products* did not preserve the common-law rule and hold damages-only retrials wholly unconstitutional, it recognized the very real risk that such trials may violate the Seventh Amendment and deprive parties of the "fair trial" that the Constitution demands. The Court therefore established a constitutional presumption *against* partial retrials that can be overcome only when it "clearly appears" that the question of damages is "so distinct and separable" from liability "that a trial of [damages] alone may be had without injustice." *Id.*

B. The Eighth Circuit's Presumption *in Favor* of Damages-Only Retrials Cannot Be Reconciled with *Gasoline Products* or the Constitution.

The Eighth Circuit's conclusion that damages-only retrials may proceed notwithstanding strong evidence of a compromise verdict is irreconcilable with *Gasoline Products* and the Seventh Amendment. "An impermissible 'compromise verdict' results when a jury, unable to agree on the issue of liability, compromises that disagreement by awarding a party inadequate damages." 35B C.J.S. *Federal Civil Procedure* §973 (2018). A compromise verdict thus necessarily demands a damages-only retrial. *See* App.17 (acknowledging that compromise verdicts "necessitate a new trial on all claims and issues"). After all, if there is evidence that a jury compromised its disagreement on liability by awarding inadequate damages, then it cannot be said that it "clearly appears" that liability and damages are "so distinct and separable" that a trial on damages alone "may be had without injustice." *Gasoline Prods.*, 283 U.S. at 500. To the contrary, the two are inextricably intertwined.

More fundamentally, if the jury compromised on liability, then a damages-only retrial obviously cannot proceed, since a defendant cannot be forced to pay damages for conduct for which it has not been found liable. If anything, then, the concerns with damages-only trials are even greater when there are indicia that the jury may have returned a compromise verdict, as allowing a damages-only retrial to proceed when it is not even clear that the first jury found the defendant

liable risks inflicting not one, but two, constitutional violations. *A fortiori*, the presumption that *Gasoline Products* establishes applies with full force to compromise verdict cases: A damages-only retrial cannot be ordered "unless it clearly appears that" the jury did *not* return a compromise verdict. *Id.* Accordingly, before ordering a damages-only retrial, it is incumbent on the court to assure itself that the jury did *not* issue a compromise verdict—not the other way around.

Here, however, rather than presume partial retrials to be constitutionally *impermissible*, the Eighth Circuit stated that "[i]t is generally *permissible* for a trial court to grant a new trial on damages only." App.16 (emphasis added). Even worse, the court permitted a damages-only retrial to proceed even as it admitted that GM had made "a strong case" that the jury rendered a compromise verdict, App.15-16—indeed, a case so strong that respondents themselves acknowledged before the district court that the jury may well have issued a compromise verdict. As the Eighth Circuit acknowledged, the jury's low damages award and its unusual question as to whether Bavlsik could receive damages "regardless of our decision" raised serious concerns that the jury had compromised on liability. App.19-21. And notwithstanding the Eighth Circuit's apparent view that it had to ignore the jury's "seemingly inconsistent" findings of no defect, App.21, there can be no serious dispute that liability was "hotly contested."

Those facts should have made this an easy case for the Eighth Circuit—and plainly would have made it an easy case for the circuits that correctly apply the

Gasoline Products presumption to compromise verdict cases. *See, e.g.*, *Collins*, 749 F.3d at 961 (ordering new trial on both liability and damages when jury issued low damages award, liability was "hotly contested," and jury asked "whether it could find liability but award zero damages"). Indeed, when a court readily concedes that there is "a strong case" that a jury rendered an impermissible compromise verdict—and thus "strong" evidence that jury members traded their disagreement over liability by awarding a plaintiff inadequate damages—it simply cannot be said that damages and liability are so "clearly … distinct and separable" that a damages-only retrial may proceed "without injustice." *Gasoline Products*, 283 U.S. at 500. To the contrary, the only thing that can "clearly" be said under those circumstances is that a damages-only retrial risks violating not just the Seventh Amendment, but the Due Process Clause as well.

Rather than grapple with these problems, the Eighth Circuit apparently felt bound to defer to the district court's decision to deny a full retrial based on a compromise verdict, even though the district court did not consider any indicia of compromise in its analysis. App.23 But, even assuming deference is warranted on this constitutionally-grounded inquiry, *see, e.g.*, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431-35 (2001) (applying *de novo* review instead of abuse-of-discretion review to constitutional issue),[4] once again, that just reveals

[4] Federal Rule of Civil Procedure 59(a)—the procedural device that allows parties to seek partial retrials—"was written in the light of the *Gasoline Products* case" and reflects the constitutional limitations on partial retrials. 11 Wright & Miller,

that the Eighth Circuit asked the wrong question. What matters is not whether it is clear that the verdict *is* a compromise verdict, but whether it is clear that the verdict *is not* a compromise verdict. Had the Eighth Circuit asked the right question, it could not possibly have deferred to the district court, as it was not plausibly within the district court's discretion to conclude on this record that the jury "clearly" did *not* return a compromise verdict.

In short, the Eighth Circuit reached the wrong result because it asked the wrong question. Under a straightforward application of *Gasoline Products* and the test employed by several other circuits, this case would have come out the other way.

III. This Case Is An Ideal Vehicle To Resolve A Frequently Recurring And Exceptionally Important Constitutional Issue.

This case in an excellent vehicle for the Court to resolve the disagreement over the standard for determining whether a damages-only retrial is consistent with the Constitution. This Court has recently expressed interest in the question of when the Constitution permits partial retrials, calling for the views of the Solicitor General in a case in which a court of appeals had "ruled that a partial retrial 'is

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§2814. While Rule 59(a) provides that a "court may, on motion, grant a new trial on all or some of the issues," Fed. R. Civ. P. 59(a), the Advisory Committee Notes to that rule make clear that the propriety of partial retrials is governed by *Gasoline Products* and the constitutional rights that it protects. *See* Advisory Committee Notes on Fed. R. Civ. P. 59 (1937) ("For partial new trials which are permissible under *Subdivision (a)*, see *Gasoline Products* ….").

appropriate where separate trials would not constitute a clear and indisputable infringement of the constitutional right to a fair trial." *See* Conditional Cross Pet. for Cert. at 7, *Cisco Systems, Inc. v. Commil USA, LLC*, No. 13-1044 (U.S. Feb. 27, 2014). Although the Solicitor General acknowledged that "[t]hat formulation … would seem to permit a partial retrial more readily than the *Gasoline Products* standard," he recommended denying certiorari in that case in large part because it did not "appear that the court's erroneous statement affected the outcome" of the case. Br. for the United States as Amicus Curiae at 22-23, *Commil*, No. 13-1044 (U.S. Oct. 16, 2014); *see also id.* at 6.

The opposite is true here. The only reason the Eighth Circuit refused to grant GM a full retrial on both liability and damages was because it did not think that "a strong case" that the jury compromised was enough; instead, the court demanded that GM "*clearly* demonstrate[]" that the jury did in fact return a compromise verdict. App.23. Had the Eighth Circuit properly applied *Gasoline Products* and the tests applied by those circuits that correctly treat damages-only retrials as presumptively impermissible, there can be no serious dispute that GM would have avoided a partial retrial limited to damages. This is thus plainly a case in which the legal standard was outcome-determinative.

Abridging any litigant's constitutional rights is cause enough for concern, but the question presented has impacts far beyond this case. Federal courts may encounter suspected compromise verdicts in *any* civil jury trial involving virtually *any* area of the law,

including products-liability cases like this one, *see Lucas*, 630 F.2d 291; *Phav*, 915 F.2d 764; §1983 actions, *see Pryer*, 251 F.3d 448; breach-of-contract cases, *see Diamond D*, 979 F.2d 14; *Ajax Hardware*, 569 F.2d 181; Title VII actions, *see Skinner*, 859 F.2d 1439; employment-law cases, *see Great Coastal Exp., Inc. v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am.*, 511 F.2d 839 (4th Cir. 1975); premises-liability cases, *see Collins*, 749 F.3d 951; and more. It is thus indisputable that the question presented by this case recurs frequently—and that the answer to that question has profound practical effects for litigants.

Indeed, under the standard embraced by the Eighth Circuit and some of its sister circuits, a jury may be conclusively presumed to have found a defendant liable even when there is "strong" evidence that it did not actually do so. That creates an intolerable risk that defendants will be saddled with massive damages awards without ever having been found liable for the plaintiff's injuries. That result cannot be reconciled with this Court's admonishment that "the purpose of the jury trial in [civil] cases" is "to assure a fair and equitable resolution." *Colgrove v. Battin*, 413 U.S. 149, 157 (1973). The Court should grant certiorari and resolve the division among the lower courts that the decision below deepens.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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February 23, 2018

APPENDIX

TABLE OF APPENDICES

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16-1491

MICHAEL BAVLSIK; KATHLEEN SKELLY,
Plaintiffs-Appellants,
v.
GENERAL MOTORS, LLC,
Defendant-Appellee.

No. 16-1632

MICHAEL BAVLSIK; KATHLEEN SKELLY,
Plaintiffs-Appellees,
v.
GENERAL MOTORS, LLC,
Defendant-Appellant.

Appeal from the United States District Court for
the Eastern District of Missouri - St. Louis

Submitted: March 8, 2017
Filed: August 31, 2017

Before Riley,[1] Chief Judge, Gruender, Circuit Judge, and Gritzner,[2] District Judge

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Riley, Chief Judge.

These appeals are driven, in large part, by the standards of review.

About five years ago Michael Bavlsik was driving his 2003 GMC Savana van when he collided with a boat being towed by another vehicle. Bavlsik was wearing his seatbelt, but that did not prevent him from hitting his head on the roof when the van rolled over. As a result, Bavlsik sustained a cervical-spinal cord injury and is now a quadriplegic. Bavlsik and his wife, Kathleen Skelly, sued General Motors, the company that designed and manufactured the van, for: (1) strict liability, asserting the seatbelt system lacked three specific safety features; (2) negligent design, based on GM's failure to implement these safety features or conduct adequate testing on the van; and (3) failure to warn.

After an eleven-day trial, the jury found GM negligent for failing to test the van and such negligence caused Bavlsik's injuries. The jury rejected all other claims and theories. Bavlsik was set to recover $1 million (all for past damages), until the trial court granted GM's renewed motion for judgment as a

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[1] The Honorable William Jay Riley stepped down as Chief Judge of the United States Court of Appeals for the Eighth Circuit at the close of business on March 10, 2017. He has been succeeded by the Honorable Lavenski R. Smith.

[2] The Honorable James E. Gritzner, United States District Judge for the Southern District of Iowa, sitting by designation.

matter of law (JML) and set aside the verdict. On Bavlsik's and Skelly's motion, the trial court also conditionally granted a new trial solely as to damages. Both decisions are before us now. Bavlsik and Skelly contend they presented sufficient evidence to support the verdict, therefore GM was not entitled to JML. GM disagrees, and argues that if a new trial is necessary, then the parties should also retry the liability issue. We reverse the grant of JML, and affirm the grant of a new trial on damages only. *See* 28 U.S.C. § 1291 (appellate jurisdiction).

I. Background

A. The Crash

On July 7, 2012, Bavlsik was driving two of his sons and eight others home to St. Louis after spending a week at Boy Scout camp in northern Minnesota when he hit a boat and trailer being towed by a pickup truck. The initial collision did not cause any significant harm, but then Bavlsik's vehicle—a twelve-passenger 2003 GMC Savana van he had purchased nine years earlier—swerved and completed a three-quarters roll at a relatively low speed. Bavlsik was wearing his seatbelt, but still slid far enough out of his seat to hit the roof of the van with enough force to dislocate his neck and sever his spinal cord. No one else was seriously hurt.

Today, Bavlsik is a quadriplegic. He has "no motor movement below [his] chest," however he was able to regain partial function of his arms after a nerve transplant and considerable rehabilitation work. Bavlsik's limitations have had predictable effects on his life. Professionally, Bavlsik was able to resume his work as a doctor just a few months after the accident.

Needless to say Bavlsik's medical practice has changed—he "see[s] less patients in the office" due to his problems getting around, he has "lost a lot of patients," and he has to work harder to accomplish routine tasks. Personally, Bavlsik misses the way life was when he could hike, bike, swim, and maintain an active lifestyle with his family. Bavlsik also worries about what the future holds, both for himself and his family. According to Skelly, she shares many of these feelings and concerns. And financially, not only have Bavlsik's professional prospects been curtailed, but he will also need to pay for some form of care for the rest of his life.

B. The Case

Bavlsik and Skelly filed a products-liability suit against GM in the Eastern District of Missouri less than one year after the accident. *See* 28 U.S.C. § 1332(a)(1) (diversity jurisdiction). The complaint included claims for strict liability, negligent design, and failure to warn. Bavlsik sought past and future damages for loss of income, pain and suffering, medical expenses, and punitive damages; Skelly sought additional damages for loss of consortium. Both sides consented to a magistrate judge presiding over the action. *See id.* § 636(c)(1) (magistrate jurisdiction).

The case culminated in a multi-week jury trial in September 2015. The foundation of the plaintiffs' case-in-chief was crafted around four key facts: first, there was no pretensioner, a device that activates in the event of a crash and removes slack from the seatbelt; second, the van did not employ an all-belts-to-seat design, which (as the name implies) consists of

attaching the seatbelt to the seat rather than the body of the vehicle; third, the seatbelt did not use a sliding-cinching latch plate, which limits how freely the latch moves on the webbing of the belt; fourth, the van's seatbelt system had not been tested to see how it would perform during a rollover accident.

There was no dispute about whether these four facts were true. Rather the case hinged on the significance of these facts. Bavlsik's and Skelly's expert, Larry Sicher, testified that the lack of the three features he identified rendered the van's seatbelt system defective, testing would have revealed as much, and implementing any of these design alternatives would have prevented Bavlsik's injuries. Sicher's testimony was the primary way the plaintiffs tried to satisfy their burden for the factual questions facing the jury. On the strict liability claim, did the lack of the three proposed safety features mean the van was "in a defective condition unreasonably dangerous when put to a reasonably anticipated use?" On the negligence claim, did the absence of any of these features and the lack of testing mean GM breached a duty by designing the van as it did?[3] And for both claims, there was the issue of causation—would these features or some type of testing have prevented Bavlsik's injuries?

When the plaintiffs rested their case on day six of trial, GM moved for JML. *See* Fed. R. Civ. P. 50(a). According to GM, there was insufficient proof "that any alternative design … would have made any

[3] Neither side makes any argument about the failure-to-warn claim, and because we agree it has no relevance to this appeal, we will not elaborate on it here.

difference," and as for testing it was unclear "what the test should have been" or "in what way the information gathered from such a test should have been used." Bavlsik and Skelly countered, citing their expert's testimony about the effect the proposed features have on keeping passengers safely in their seats during a rollover. Bavlsik and Skelly also highlighted testimony about the "importance of testing" and posited that had there been adequate testing, "maybe [GM] could have considered some alternative—some of the many alternative designs that were offered into evidence in this case." The trial court orally denied JML, so GM proceeded with its case-in-chief. At the close of all evidence, GM renewed its motion for JML "for the same reasons previously stated," plus its supposed "direct evidence that … none of the alternatives … are actually effective and that there is nothing feasible that could have been done that would have prevented the injury." Again, the trial court orally denied the motion.

The trial court submitted the plaintiffs' claims on a general verdict form with special interrogatories that listed all of their theories within each claim (including lack of testing for negligent design). The jury returned a verdict after over four hours of deliberation, finding GM was negligent for not testing the van's seatbelt system, and that negligence directly caused Bavlsik's injuries. The jury found GM was not strictly liable or negligent for failing to implement any of the specific safety features Bavlsik and Skelly had proposed. With the verdict, Bavlsik was to recover $1 million—all for past damages, none for future damages—and Skelly was to recover nothing. GM did

not object to the jury instructions, the verdict form, or the verdict itself.

Both sides filed post-trial motions. Bavlsik and Skelly moved for a new trial only on the damages issue. *See* Fed. R. Civ. P. 59(a). GM renewed its motion for JML, *see* Fed. R. Civ. P. 50(b), and alternatively moved for a new trial only on the failure-to-test portion of the negligent-design claim, *see* Fed. R. Civ. P. 59(a). This time the trial court granted GM's request for JML, reasoning "[t]he jury's finding of no defect rendered the other finding of negligent failure to adequately test a legally insufficient basis for liability." From this, Bavlsik and Skelly appeal. In addition, the trial court conditionally granted Bavlsik and Skelly a new trial on damages only, because the jury's award was "shockingly inadequate." *See* Fed. R. Civ. P. 50(c)(1). From this, GM conditionally cross-appeals.

II. Discussion

A. Judgment as a Matter of Law

We must first decide whether the district court was right to grant GM's renewed motion for JML, which is a question we review de novo. *See Stults v. Am. Pop Corn Co.*, 815 F.3d 409, 418 (8th Cir. 2016). Here, GM is entitled to JML only if "a reasonable jury would not have a legally sufficient evidentiary basis" to return a verdict for Bavlsik and Skelly on their failure-to-test theory of negligent design. Fed. R. Civ. P. 50(a)(1). "[T]he law places a high standard on overturning a jury verdict because of the danger that the jury's rightful province will be invaded when judgment as a matter of law is misused." *Hunt v. Neb. Pub. Power Dist.*, 282 F.3d 1021, 1029 (8th Cir. 2002)

(citation omitted). The proper analysis for considering renewed JML motions reflects our hesitancy to interfere with a jury verdict:

> "[T]he [trial] court must (1) consider the evidence in the light most favorable to the prevailing party, (2) assume that all conflicts in the evidence were resolved in favor of the prevailing party, (3) assume as proved all facts that the prevailing party's evidence tended to prove, and (4) give the prevailing party the benefit of all favorable inferences that may reasonably be drawn from the facts proved. That done, the court must then deny the motion if reasonable persons could differ as to the conclusions to be drawn from the evidence."

Ryther v. KARE 11, 108 F.3d 832, 844 (8th Cir. 1997) (en banc) (first alteration in original) (quoting *Haynes v. Bee-Line Trucking Co.*, 80 F.3d 1235, 1238 (8th Cir. 1996)); *accord Browning v. President Riverboat Casino-Mo., Inc.*, 139 F.3d 631, 634 (8th Cir. 1998) ("Judgment as a matter of law is proper only when the evidence is such that, without weighing the credibility of the witnesses, there is a complete absence of probative facts to support the verdict."). With this perspective in mind, we must determine whether there was legally sufficient evidence to support the jury's liability finding.[4] We hold there was.

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[4] The trial court did not adhere to this evidence-centric approach in granting GM's renewed motion for JML, and instead relied largely (if not exclusively) on the jury's findings. Much of the parties' briefing focused on whether this approach was compatible with our precedent regarding Rule 50 and what

The jury found GM liable for "not adequately test[ing]" the van. This theory of liability was presented to the jury as a subpart of the broader negligent-design claim, so Bavlsik and Skelly had the burden of establishing the traditional negligence elements: duty, breach, causation, and damages. *See Stanley v. Cottrell, Inc.*, 784 F.3d 454, 463 (8th Cir. 2015) ("To prove a negligent design claim under Missouri law, a plaintiff must show that the defendant breached its duty of care in the design of a product and that this breach caused the injury."). We assess these elements in turn.

GM makes no meaningful argument it did not have a duty to exercise reasonable care in designing the van. Both Missouri appellate courts and our court have recognized companies have a duty to exercise due care when they design and manufacture a potentially dangerous product, which includes taking reasonable steps to reduce the likelihood of such injury. *See, e.g.*, *Johnson v. Auto Handling Corp.*, No. SC 95777, ___ S.W.3d ___, ___, 2017 WL 2774620, at *1-2, *7-8 (Mo. June 27, 2017); *Mathes v. Sher Express, L.L.C.*, 200 S.W.3d 97, 109 (Mo. Ct. App. 2006); *McKnight ex rel. Ludwig v. Johnson Controls, Inc.*, 36 F.3d 1396, 1411 (8th Cir. 1994).[5] Thus GM had a duty to exercise reasonable care in designing the van.

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significance, if any, we should place on the jury's other findings. However, at oral argument GM conceded the point and invited us to focus only on the evidence. We accept this concession, and assume for the sake of this appeal that everything else (including the jury's other findings) is irrelevant.

[5] We described a car manufacturer's duty to design its vehicles with care in *Larsen v. General Motors Corp.*, 391 F.2d 495, 502-

Whether GM breached that duty was "a question of fact for the jury." *Lopez v. Three Rivers Elec. Co-op., Inc.*, 26 S.W.3d 151, 157 (Mo. 2000). To support their failure-to-test theory, Bavlsik and Skelly relied on their design expert, Sicher, who testified about the important role testing plays (or should play) in the design process: "[T]he basic design principles are set your goals, determine how you're going to test or evaluate them, and then start testing them." If the test results are unsatisfactory, then the company should "go back and either do a redesign or evaluate whether that was a true indicative method of evaluating [the goal] properly." That is, in Sicher's opinion, rollover testing is vital to producing a careful design because it allows a company like GM to discover how a vehicle performs during a rollover and what alternatives, if any, can improve that performance—to him, failure to test means failure to exercise reasonable care. *Cf. McKnight*, 36 F.3d at 1411 (recognizing "[f]ailure to test is a viable theory of recovery under Missouri law" in a manufacturing defect case); *Zesch v. Abrasive Co.*

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03 (8th Cir. 1968). There, we held "[a] manufacturer is under a duty to use reasonable care in the design of its vehicle to avoid subjecting the user to an unreasonable risk of injury in the event of a collision." *Id.* at 502. We went on to explain "[t]he manufacturers are not insurers but should be held to a standard of reasonable care in design to provide a reasonably safe vehicle in which to travel. … At least, the unreasonable risk should be eliminated and reasonable steps in design taken to minimize the injury-producing effect of impacts." *Id.* at 503. *Larsen* attempted to divine and apply Michigan law, *see id.* at 497, but it is a "landmark decision" of sorts on this issue, and we have looked to the *Larsen* court's reasoned analysis in a products-liability case governed by Missouri law. *See Polk v. Ford Motor Co.*, 529 F.2d 259, 264, 266 (8th Cir. 1976) (en banc).

of Phila., 183 S.W.2d 140, 145 (Mo. 1944) ("[W]here it is shown that the imperfection could be disclosed by a test, it would seem reasonable that the manufacturer in the exercise of ordinary care would be under a duty to make the test.").

Such testing did not happen here. In a deposition played to the jury, GM's corporate representative admitted the company conducted no rollover testing to assess the seatbelt system's performance before bringing the van to market in early 2003. Without testing, GM could not know whether the van provided adequate protection to occupants during a rollover, or whether any reasonable alternatives would have afforded additional protection. To be sure, there was evidence GM conducted compliance testing and met certain required safety standards. Yet as the jury was instructed, proof of such compliance "is relevant to, but not determinative of, whether the manufacturer exercised ordinary care in the design of its motor vehicles." The jury was still free to accept Sicher's testimony and find GM breached its duty by not conducting any sort of rollover testing before selling the van.[6]

We proceed to the more hotly contested issue at trial and on appeal—*causation*: whether GM's negligence "directly caused" the harm, meaning Bavlsik would not have been injured "'but for'" the van's negligent design and GM's failure to test. *Poage*

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[6] Though it does not affect the analysis given our de novo review, we note the trial court's only reference to the evidence itself was a comment that the jury's conclusion GM "negligently failed to adequately test the seat belt restraint system" *was* "supported by legally sufficient evidence."

v. Crane Co., No. ED 103953, ___ S.W.3d ___, ___, 2017 WL 1632580, at *3-4 (Mo. Ct. App. May 2, 2017) (quoting *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852, 863 (Mo. 1993)). In this case, the causation requirement means Bavlsik and Skelly had to prove both that testing would have shown the van did not provide adequate protection during a rollover, and that testing would have prompted GM to explore and implement a safer design capable of preventing Bavlsik's injuries. Like breach, causation "is a factual question left for the jury." *Id.* at ___, 2017 WL 1632580, at *3. Here the jury was properly instructed on the causation question, and found Bavlsik and Skelly satisfied their burden. GM contends there is legally insufficient evidence to support this finding, suggesting at oral argument that Bavlsik's and Skelly's causation evidence is "vague, and speculative, and woefully inadequate to support th[e] verdict." We disagree.

The heart of the plaintiffs' causation evidence came from Sicher, who unequivocally opined that testing would have shown the van was not safe during a rollover, and "that there were designs available … that would have prevented Dr. Bavlsik's injuries." Sicher, a mechanical engineering expert with over twenty years of experience, explained the many tests he relied upon to reach this critical opinion.[7] First came the seminal "Malibu II" report in

[7] GM moved in limine to exclude Sicher's testimony, arguing he was not qualified to testify as an expert, the testing he relied on was unreliable and inapplicable to this case, and his conclusions were not adequately supported. The trial court rejected these

1990, which revealed significant neck injuries were likely during a rollover, even if the occupant was wearing a seatbelt. Then there were a number of tests over the next fifteen-plus years that showed, according to Sicher, how various design alternatives can improve seatbelt effectiveness and reduce rollover injuries. Last came research GM conducted on the Savana model in 2007 and 2014, which Sicher said is proof the Savana's seatbelt system "d[id] not provide a reasonable level of protection in a rollover." Taken together, Sicher's testimony and the peer-reviewed literature he relied upon support a reasonable inference that pre-2003 testing would have revealed the Savana seatbelt system was inadequate and could have been improved by adding feasible safety features.

Sicher also demonstrated a sufficient understanding of the relevant case-specific circumstances. At 6'1" and about 260 pounds, Bavlsik was not a small man. Bavlsik had about four inches of clearance between his head and the roof when he was seated in a "normal driving position" like he was when the collision occurred. Upon impact, Bavlsik's van began a counterclockwise yaw and completed a three-quarters roll at around 11 to 15 miles per hour, beginning on the passenger's side and stopping on the driver's side. Evidence suggested the van was flipped exactly 180 degrees when Bavlsik sustained the injury. According to Sicher, he accounted for all these factors in reaching his ultimate conclusion that his

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arguments and certified Sicher as an expert. *See generally* Fed. R. Evid. 702. GM does not appeal this decision.

proposed design changes would have prevented Bavlsik's injuries.

For its part, GM sought to downplay its failure to test by casting doubt on whether test results would have shown any of Sicher's proposed designs to be effective. GM's counsel cross-examined Sicher at length about supposed flaws in his methodology and whether the available testing actually supported his conclusions. GM then called two of its own engineering experts, who rebutted Sicher's opinions and opined there were no feasible design changes that would have prevented Bavlsik's injuries. GM's argument seemed to be that testing would have done nothing more than show there was a problem with no solution.

The jury heard considerable expert testimony about whether testing would have revealed design alternatives capable of protecting Bavlsik during the rollover. Sicher "testified extensively" about his opinion on the matter and was "subjected to lengthy and detailed cross-examination." *Adams v. Toyota Motor Corp.*, Nos. 15-2507, -2516, -2635 to -2638, ___ F.3d ___, ___, 2017 WL 3445112, at *7 (8th Cir. Aug. 11, 2017). GM's experts did the same and were similarly challenged. This is a classic example of conflicting evidence that must be weighed and decided by a jury, not a court. *See id.* ("Though Toyota disagrees with Stilson's opinions and conclusions … 'questions of conflicting evidence must be left for the jury's determination,' and we will not re-weigh the evidence." (quoting *Bonner v. ISP Techs., Inc.*, 259 F.3d 924, 930 (8th Cir. 2001))). It appears the jurors believed Sicher, at least in regards to testing,

which they were entitled to do.[8] Thus viewing the evidence and accepting all inferences in the light most favorable to Bavlsik and Skelly, we find legally sufficient evidence to support the jury's causation finding.

We end our JML analysis with damages, the final element and the one that requires little analysis in this case. For Bavlsik, there was an abundance of evidence about the harm he suffered physically, emotionally, professionally, and financially. For Skelly, there was evidence she plainly sustained loss-of-consortium damages. (We discuss the extent of such damages in more detail below.) In sum, there was legally sufficient evidence for a reasonable jury to find GM liable for negligent design, specifically for failing to conduct adequate testing. JML was improper.

B. New Trial

Given our decision above, we must now decide whether the trial court was wrong conditionally to "grant a new trial only on plaintiff Bavlsik's future damages and on plaintiff Skelly's damages, past and future." *See* Fed. R. Civ. P. 59 (new trial); *see also* Fed. R. Civ. P. 50(c)(1) (conditional new-trial rulings). GM contends the trial court abused its discretion by limiting the potential new trial like this "because the entire record demonstrates the compromise character of the verdict." GM says the parties should retry the failure-to-test theory in its entirety, including the

[8] We reiterate, although it may seem counterintuitive and odd from a practical perspective, our focus is confined to what the jury found in regards to this issue (GM is liable for failure to test), without any regard to what the jury found on other issues.

question of liability. Although GM makes a strong case, we are unable to say the trial court abused its considerable discretion and committed reversible error.

A trial court "may, on motion, grant a new trial on all or some of the issues," provided there is a good reason to do so. Fed. R. Civ. P. 59(a)(1). It is generally permissible for a trial court to grant a new trial on damages only. *See Haug v. Grimm*, 251 F.2d 523, 527-28 (8th Cir. 1958); *see also Gasoline Prods. Co., Inc. v. Champlin Ref. Co.*, 283 U.S. 494, 499-500 (1931). That is what happened here. The trial court first referenced Missouri law and recognized reversal on damages was warranted if the jury's award was "shockingly inadequate." *See Riordan v. Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 416 F.3d 825, 833 (8th Cir. 2005); *see also Niemiec v. Union Pac. R.R. Co.*, 449 F.3d 854, 858-59 (8th Cir. 2006) (noting "state law governs the question of adequacy of damages" even though "'the appropriateness of a new trial is a federal procedural question decided by reference to federal law'" (quoting *Sanford v. Crittenden Mem'l Hosp.*, 141 F.3d 882, 884 (8th Cir. 1998))). The trial court then used this standard to evaluate the evidence presented at trial and concluded the damages were indeed "shockingly inadequate." We review this conclusion only for an abuse of discretion. *See Dominium Mgmt. Servs., Inc. v. Nationwide Hous. Grp.*, 195 F.3d 358, 366 (8th Cir. 1999); *see also Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980) (per curiam) ("The authority to grant a new trial … is confided almost entirely to the exercise of discretion on the part of the trial court.").

The trial court did not abuse its discretion. As the trial court put it, the plaintiffs proved Bavlsik sustained "a permanent injury that would require medical care of some sort for the rest of his life." Such care does not come cheap—Bavlsik's and Skelly's expert on the issue predicted Bavlsik would incur $7 million in life-care costs if he lived to age 79. This is in addition to whatever Bavlsik lost in earning potential, which another expert said will likely range between $296,000 (if Bavlsik worked until age 67) and $5.8 million (if Bavlsik quit immediately). As for Skelly, the evidence was clear regarding the impact her husband's injury had and will continue to have on her. Though GM questioned the size of the plaintiffs' claims, it did not suggest the jury should award $0 for future damages or loss of consortium. The parties fought about the extent of damages, not the existence of them.

Rather than try to justify the award, GM posits the low damages figure is one of several signs the verdict represents an improper compromise. While it is true a retrial on only damages is sometimes proper, it is inappropriate "where there is good reason to believe that the inadequacy of the damages awarded was induced by unsatisfactory proof of liability and was a compromise." *Haug*, 251 F.2d at 527-28; *see also Phav v. Trueblood, Inc.*, 915 F.2d 764, 767 (1st Cir. 1990) ("Where a verdict is set aside because of an inadequate damages award, retrial of all the issues is required 'if the verdict could *only* have been a sympathy or compromise verdict.'" (quoting *Spell v. McDaniel*, 824 F.2d 1380, 1400 (4th Cir. 1987))). Generally such situations necessitate a new trial on all claims and issues. *See Carter v. Moore*, 165 F.3d

1071, 1083 (7th Cir. 1998) ("When a court recognizes that the jury's verdict is a result of impermissible compromise, such a verdict taints the *entire proceeding* and the proper remedy is a new trial *on all issues*." (emphasis added)).

"A compromise verdict results when the jury, unable to agree on the issue of liability, compromises that disagreement by awarding a party inadequate damages." *Boesing v. Spiess*, 540 F.3d 886, 889 (8th Cir. 2008). "[S]everal factors" are often probative of whether the jurors improperly compromised, like "a close question of liability, a grossly inadequate award of damages, and other circumstances such as the length of jury deliberations." *Id.* Yet "the overarching consideration must be whether the record, viewed in its entirety, clearly demonstrates the compromise nature of the verdict." *Id.*

The trial court explicitly rejected any suggestion of a compromise verdict, perceiving "no question regarding the jury's limited finding of liability." We note two overlapping forms of deference are at play in our review of this conclusion—we defer first to the jury, as we start with the assumption jurors fulfilled their obligation to decide the case correctly; and we defer second to the trial court, which "has a far better sense of what the jury likely was thinking and also whether there is any injustice in allowing the verdict to stand." *Nichols v. Cadle Co.*, 139 F.3d 59, 63 (1st Cir. 1998); *see also id.* ("[T]here is … a settled hostility toward [finding] 'compromise' verdicts."); *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 485 (1933) ("Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a

want of diligence or perspicacity in appraising the jury's conduct."). We proceed with this doubly deferential standard in mind.

First, as discussed above, both sides agree the damages award is seriously inadequate—although they disagree on the degree of the inadequacy. Given that reduced damages are part of the very definition of a compromise verdict, this factor exists in nearly every case where a court finds an improper compromise. *See, e.g.*, *Mekdeci ex rel. Mekdeci v. Merrell Nat'l Labs.*, 711 F.2d 1510, 1513-14 (11th Cir. 1983). "Insufficient damages alone, however, do not establish a compromise verdict." *Reider v. Philip Morris USA, Inc.*, 793 F.3d 1254, 1260 (11th Cir. 2015). If the rule were any different, a retrial on damages only would never be appropriate, and that is not the case. To be sure, the low verdict amount is consistent with a compromise verdict. However, it falls short of convincing us the trial court abused its discretion in deciding the better route was to order a new trial to remedy the inadequate damages problem.

Next, GM draws our attention to an "odd pattern of jury deliberations." *See Phav*, 915 F.2d at 768 ("In addition to inadequate damages, the telltale signs of a compromise verdict are a close question of liability and an odd chronology of jury deliberations."). The basis for this argument is a note the jury submitted two hours into their deliberations asking whether Bavlsik would recover the stipulated amount of past medical expenses—about $577,000—"regardless of our decision." The trial court informed the jury Bavlsik would recover that sum only if the jury found GM

liable. The jury reached a unanimous verdict for $1 million two hours later.

GM tries to analogize this to the situation in *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439 (10th Cir. 1988). In *Skinner*, the jury asked to see "testimony relating solely to the issue of liability" during the second day of deliberations. *Id.* at 1446. Then the jury explicitly "informed the court that it was unable to reach a unanimous decision." *Id.* The court told the jury to continue its effort, and a short time later there was a unanimous verdict. *See id.* The Tenth Circuit found the "sudden arrival at unanimity, when just a few hours before [the jury] was still struggling with an apparently close issue of liability," to be "suspect." *Id.*

Those are not the facts here. The jury deliberated for only four hours, a reasonable (if not short) length of time for a complex eleven-day trial. *See Boesing*, 540 F.3d at 889-90 (rejecting a compromise claim despite multiple days of deliberations, an *Allen* charge, and lower-than-expected damages); *see also Burger King Corp. v. Mason*, 710 F.2d 1480, 1488 (11th Cir. 1983) ("After a long, protracted trial, the jury required only two to three hours to reach its verdict. It obviously was not deadlocked."). While the jury's question could indicate a struggle with liability, it could also be read as a request for clarification on what the jury needed to account for in deciding damages or whether the jury could add to or reduce the stipulated number if they saw fit to do so. After all, this was the only pre-filled answer on the verdict form and the instructions made clear the plaintiffs' right to recover was dependent on the jury first finding GM liable. Much like the inadequate damages, this factor raises the possibility

the jurors compromised but it does not compel such a conclusion. *See Boesing*, 540 F.3d at 889-90; *see also Phav*, 915 F.2d at 768 (stating "[t]here [wa]s nothing in the deliberation process indicating a compromise verdict" even though the jury deliberated for four hours, asked if the verdict had to be unanimous, and had the court repeat the liability instruction).

That leaves GM's argument about the close liability question and the jury's seemingly inconsistent verdict—how could the jury find rollover testing would have led to a better design capable of preventing Bavlsik's injuries if the jury seemingly rejected the only design alternatives the plaintiffs offered?[9] We admit we share GM's confusion about how the jury reached the conclusion it did. But the proper way to resolve this problem would have been for GM to object to the format of the verdict form or the final verdict itself—it did neither. *See Chem-Trend, Inc. v. Newport Indus., Inc.*, 279 F.3d 625, 629 (8th Cir. 2002).

The First Circuit faced a similar situation in *Phav v. Trueblood, Inc.*, where the jury's causation findings could not be reconciled with one another. *See Phav*,

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[9] An inconsistent verdict is one in which the jury "reach[es] contradictory factual findings." *Lowry ex rel. Crow v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 762 (8th Cir. 2008). GM resists classifying this argument as one about inconsistent verdicts, but we see no other way to characterize it. If GM thought the failure-to-test theory was only viable if the jury found for Bavlsik and Skelly on one of their other alleged theories, then GM should not have allowed the jury to be instructed that failure to test was an independent basis for liability (or at least objected when the jury reached that conclusion). The jury merely followed the instructions given to it.

915 F.2d at 765. The court affirmed a second trial solely on damages, notwithstanding this apparent inconsistency, because the defendant failed to object to the special interrogatories or the jury's verdict. *See id.* at 769. Our sister circuit reasoned:

> [T]he use of special interrogatories puts the parties on notice that there might be an inconsistent verdict. If a slip has been made, the parties detrimentally affected must act expeditiously to cure it, not lie in wait and ask for another trial when matters turn out not to their liking.
>
> … Because of defendant's waiver, we do not consider the jury's answers to the special questions as evidence of its confusion on liability. To decide otherwise would countenance agreeable acquiescence to perceivable error as a weapon of appellate advocacy.

Id. (citation and internal quotation marks omitted); *see Fox v. City Univ. of N.Y.*, 187 F.R.D. 83, 92 (S.D.N.Y. 1999) ("In [*Phav*], the First Circuit held that a party's failure to object to the form of the special interrogatories submitted to the jury precluded a subsequent argument that the answers indicated a compromise verdict."); *see also Buchwald v. Renco Grp., Inc. (In re Magnesium Corp. of Am.)*, 682 F. App'x 24, 29-30 (2d Cir. 2017) (summary order) (rejecting a compromise-verdict claim "because that would sneak [a waived inconsistency claim] in through the back door, while undermining the principle that the jury must be given the opportunity to reconcile any apparent or alleged inconsistency in the first instance"

(alteration in original) (citation and internal quotation marks omitted)) *pet. for cert. filed* (U.S. Aug. 09, 2017) (No. 17-228); *cf. Reider*, 793 F.3d at 1261 ("[N]ot all inconsistent verdicts are compromise verdicts.").

We agree with this reasoning and refuse to consider the jury's unclear answers in deciding whether there was an improper compromise. Our analysis may have been different had GM preserved the issue for our review. But GM did not do so, perhaps because making a timely objection to the verdict might have reduced its odds of prevailing. Now the confusion lingers on appeal in a repackaged argument about a compromise verdict. We decline to make Bavlsik and Skelly pay the price for GM not acting on this perceived error in a timely manner.

Having closely reviewed the record, we are not convinced the record so *clearly* demonstrates a compromise verdict that the trial court *abused its discretion* in not recognizing as much.[10] *See Boesing*, 540 F.3d at 889. The facts are such there were a number of options the trial court could choose from in deciding whether a new trial was warranted, and if so, how much of the case should be retried. Because we are satisfied the issues regarding damages and liability are "distinct and separable" from one another, a new trial for Bavlsik's future damages and Skelly's past and future damages was one of those permissible options. *Champlin*, 283 U.S. at 500.

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[10] To the extent GM renews its arguments about whether substantial evidence supports the jury's liability finding, we refer to our lengthy discussion earlier in regards to JML and the trial court's conclusion on the issue. *See Children's Broad. Corp. v. Walt Disney Co.*, 357 F.3d 860, 867 (8th Cir. 2004).

III. Conclusion

We reverse the trial court's decision to grant GM's renewed motion for JML, and affirm the trial court's conditional grant of a partial new trial on damages.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16-1491

MICHAEL BAVLSIK and KATHLEEN SKELLY,

Appellants,

v.

GENERAL MOTORS, LLC,

Appellee.

No. 16-1632

MICHAEL BAVLSIK and KATHLEEN SKELLY,

Appellees,

v.

GENERAL MOTORS, LLC,

Appellant.

Appeal from the United States District Court for the Eastern District of Missouri - St. Louis

(4:13-cv-00509-DDN)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Benton and Judge Loken did not participate in the consideration or decision of this matter.

October 26, 2017

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

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/s/ Michael E. Gans

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 4:13 CV 509 DDN

MICHAEL BAVLSIK, M.D., and KATHLEEN SKELLY,

Plaintiffs,

v.

GENERAL MOTORS, LLC,

Defendant.

MEMORANDUM AND ORDER

This action is before the court upon the post-judgment motions of the parties. Plaintiffs have moved for a new trial under F. R. Civ. P. 59(a)(1)(A). (Doc. 196.) Defendant has moved for judgment as a matter of law under F. R. Civ. P. 50(b) or for a new trial under Rule 59. (Doc. 198.)

The court has subject matter jurisdiction over the action pursuant to 28 U.S.C. § 1332.

Background

Plaintiffs Michael Bavlsik, M.D., and Kathleen Skelly, his spouse, citizens of Missouri, commenced this action against defendant General Motors LLC following a motor vehicle collision on July 7, 2012 outside Detroit Lakes, Minnesota. Plaintiffs alleged that their 2003 GMC Savana van, manufactured by defendant, was defective and unreasonably dangerous

in the design and manufacture of the driver's seat belt restraint system and of the van's roof above the driver's head. On that day, plaintiff Bavlsik was driving the van when it collided with a boat-loaded trailer being pulled by a pickup truck. Following the collision, the van skidded off the roadway, rolled three-fourths of a roll, Dr. Bavlsik's head made contact with the roof above his head, and he was severely injured and rendered a quadriplegic.

Plaintiffs alleged claims of strict product liability, negligent product liability, and, for plaintiff Skelly who was not in the van a claim for loss of consortium resulting from the injuries to her husband. Plaintiffs asserted their claims based on an enhanced injury or second collision basis wherein the original cause of the initial collision with the pickup truck and trailer was not relevant to defendant's liability or to plaintiff Bavlsik's responsibility for his injuries. (Doc. 103.)

The court submitted plaintiffs' claims to a jury on a special verdict form: strict liability for product defect, negligent design that resulted in product defect, failure to warn of defective seat belt restraint system, and plaintiff Skelly's derivative claim for loss of consortium. (Doc. 189.) Plaintiffs withdrew their claim of product defect based upon the van's roof.

The jury made one finding of liability in favor of plaintiffs as follows:

> defendant General Motors LLC [was] negligent in the design of the plaintiffs' 2003 Savana van, because the plaintiffs' 2003 Savana van seat belt restraint system: … (d) was not adequately tested by defendant[.]

(Doc. 189 at 3.) When asked whether the vehicle was defective because it lacked a frontal activated pretensioner, an all belts to seat system, or a sliding-clinching latch plate, the jury on both the strict liability claim and on the negligence claim, the jury answered each specification of defect "No." (*Id.* at 1, 3.)

Upon the single finding of negligent design due to the defendant's failure to adequately test the seat belt restraint system, the jury awarded plaintiff Bavlsik $294,164.00 for past physical and emotional pain and physical impairment, $576,701.00 for past health and personal care expense,[1] and $129,135.00 for past loss of earnings. The total of plaintiff Bavlsik's damages awarded by the jury was $1,000,000.00. (*Id.* at 5.) The jury awarded no damages, past or future, to plaintiff Skelly. (*Id.* at 6.)

II. Judgment as a Matter of Law

Defendant's post-judgment motion for judgment as a matter of law under F. R. Civ. P. 50(b) follows its

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[1] This amount was stipulated by the parties in the event the jury found in favor of plaintiff Bavlsik. (Doc. 158.) For this reason, this amount was filled in on the special verdict form by the court as a convenience to the jury in the event the jury found liability in favor of plaintiff Bavlsik. There was no objection to this procedure. During deliberations the jury asked the court whether this amount would be awarded to plaintiff Bavlsik regardless of the jury's decision. (Doc. 192.) In response to the jury's question, in open court the court orally advised the jury that that amount had been agreed by the parties as the amount plaintiff had incurred for past health and personal care expenses and that the figure had been placed on the verdict form by the court only as a convenience to the jury in the event the jury, in answer to other questions, found defendant liable for past health and personal care expenses. (Tr. Vol. 12B, at 73.)

earlier similar motions under Rule 50(a) at the close of plaintiff's case and at the close of its case. (Doc. 175.)

At the close of plaintiffs' case, defendant moved for judgment under Rule 50(a) on three specific grounds: (1) plaintiffs did not show that the van was defective (Trial Tr. Vol. 6A, 95:25-96:5); (2) plaintiffs did not show what further testing should have been done and what defective condition that testing would have shown (*id.* at 96:6-11); and (3) regarding the failure to warn claim, plaintiffs did not show what the standard was, what the prevailing industry practice was, or what the warning should have stated. (*Id.* at 96:13-23.) The court denied the motion and defendant's case began. (*Id.*, at 100.)

At the close of all the evidence, defense counsel orally renewed the earlier motion for judgment as a matter of law. He specifically incorporated the arguments made at the close of plaintiffs' case. He also argued that none of plaintiffs' alternatives for the product had been shown to be likely to have prevented plaintiff Bavlsik's injury. (Doc. 180, at 55-56.)

In ruling on the current motion, the court may (1) enter judgment on the jury's verdict; (2) order a new trial; or (3) enter judgment as a matter of law in defendant's favor notwithstanding the jury's verdict. F. R. Civ. P. 50(b). If the court grants judgment as a matter of law, it must also conditionally rule any motion for a new trial. Fed. R. Civ. P. 50(c).

"A court reviewing a Rule 50(b) motion is limited to consideration of only those grounds advanced in the original, Rule 50(a) motion." *Nassar v. Jackson*, 779 F.3d 547, 551 (8th Cir. 2015). Issues not included in a Rule 50(a) motion are waived and cannot be included

in a Rule 50(b) motion. *Canny v. Dr. Pepper/Seven-Up Bottling Grp., Inc.*, 439 F.3d 894, 900-01 (8th Cir. 2006).

Now, in its post-judgment motion for judgment as a matter of law on plaintiffs' claim for negligent failure to test, defendant makes three arguments: (1) under Missouri law there is no independent "duty to test" outside of proven manufacturing defects or latent defect claims; (2) a failure to test claim is dependent on a finding of a design defect, which finding the jury did not make; and (3) plaintiffs failed to submit legally sufficient evidence to support any of their claims. (Doc. 199 at 4-9.) Defendant's first argument in the current motion was not raised in its Rule 50(a) motions and is waived for consideration now. *Canny v. Dr. Pepper/Seven-Up Bottling Grp., Inc.*, 439 F.3d at 900-01.

Defendant's second Rule 50(b) argument was presented in the combination of its first and second Rule 50(a) arguments, i.e. that the failure to test claim was dependent upon the jury finding the existence of a defect in the seat belt restraint system, which the jury did not find.

As stated above, the jury found defendant liable for negligently designing the van because defendant did not adequately test the driver's seat belt restraint system. In order to find defendant liable for the negligent design of the vehicle, Missouri law[2] required the jury to find the existence of facts which establish:

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[2] In its memorandum filed on October 9, 2015, the court stated its reasons why Missouri law supplied the rules of decision for this case. *See* 28 U.S.C. § 1528; (Doc. 195).

(1) a duty existed on General Motors' part to protect plaintiff from injury; (2) General Motors failed to perform that duty; and, (3) the plaintiff was injured because of the defendant's failure. *Menz v. New Holland North Am., Inc.*, 460 F. Supp. 2d 1050, 1056 (E.D. Mo. 2006) (citing *Scheibel v. Hillis*, 531 S.W.2d 285, 288 (Mo. 1976) (en banc)). Missouri law does not require a plaintiff to submit alternative designs in a products liability case, although such evidence may aid the jury. *Sappington v. Skyjack, Inc.*, 512 F.3d 440, 446 (8th Cir. 2008) (applying Missouri law).

The court agrees with defendant that plaintiffs' case for negligent design based upon the defendant's failure to test fails because the jury found that the plaintiffs' van was not defective in its seat belt restraint system. Although they are separate claims, strict products liability and negligent design are often inextricably entwined. "A verdict in favor of the defendant-manufacturer on the issue of strict liability, finding no defect in the product, would in some jurisdictions preclude recovery under the theory of negligence." *McIntyre v. Everest & Jennings, Inc.*, 575 F.2d 155, 157 (8th Cir. 1978) (citing *Browder v. Pettigrew*, 541 S.W.2d 402, 404 (Tenn. 1976)).

The law of Missouri also requires a defect in the product to support a claim for negligent failure to test.

> "It is said that if the nature of a thing manufactured is such that, when lawfully used for the purpose for which it is manufactured, it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger and the manufacturer of this thing of danger is under

> a duty to make it carefully. And given an article which may contain a latent imperfection making the article reasonably certain to be a thing of danger (though it is carefully manufactured), *where it is shown that the imperfection could be disclosed by a test, it would seem reasonable that the manufacturer in the exercise of ordinary care would be under a duty to make the test."*

Cohagan v. Laclede Steel Co., 317 S.W.2d 452, 454 (Mo. 1958) (quoting *Zesch v. Abrasive Co. of Philadelphia*, 183 S.W.2d 140, 145 (Mo. 1944) (italics added; interior reference to cites omitted).

Other courts have expressed the principle that a claim of negligent failure to test requires a defect in the product. *See McIntyre*, 575 F.2d at 159 (the jury's finding in favor of the defendant on the issue of strict liability precludes a finding for the plaintiff under either the theory of negligent design or negligent failure to test); *see, e.g.*, *Oddi v. Ford Motor Co.*, 234 F.3d 136, 144 (3d Cir. 2000) ("it appears that [plaintiff's] 'negligent failure to test' claim is, at bottom, nothing more than a routine products liability case based on negligence, and that the claimed negligence is the failure to test.... Thus, [plaintiff] must first establish that the vehicle was defective."); *Mello v. K-Mart Corp.*, 792 F.2d 1228, 1233 (1st Cir. 1986) ("even if [seller] were negligent in respect to its testing of [product], that negligence could not have been the proximate cause of plaintiffs' injuries, because no amount of testing would have weeded out what, according to the jury, was a non-defective [product]").

Plaintiffs argue that, if the court concludes that a defect in the product is necessary for a negligent failure to test, then the special verdict findings by the jury of no defect yet the defendant negligently failed to test are inconsistent, and, therefore, a new trial must be ordered under F. R. Civ. P. 49(b)(4). (Doc. 203 at 1-4.)

The court disagrees, because the jury's findings on the special verdict form were not legally inconsistent. If the findings can be reasonably reconciled, they are not legally inconsistent and do not require retrial. *Dairy Farmers of Am., Inc. v. Travelers Ins. Co.*, 391 F.3d 936, 945-46 (8th Cir. 2004); *Lockard v. Mo. Pac. R. Co.*, 894 F.2d 299, 305 (8th Cir. 1990).

The case was submitted to the jury on the essential element of plaintiffs' claims, i.e., whether there was a defect in the vehicle's seat belt restraint system. The jury answered the special verdict questions on this issue in the negative. (Doc. 189 at 1-2.) When asked whether defendant negligently failed to adequately test the seat belt restraint system of the van, the jury answered in the affirmative. As set forth below, that affirmative answer is supported by legally sufficient evidence. Defendant's witness admitted in a deposition played to the jury that it never tested the van's seat belt restraint system regarding driver movement during rollover events. The jury's finding of no defect rendered the other finding of negligent failure to adequately test a legally insufficient basis for liability. *McIntyre*, 575 F.2d at 159.

Therefore, the court grants defendant's renewed motion for judgment as a matter of law, because there is insufficient evidence to support a verdict for

plaintiffs for negligent design based upon a failure to test.

III. Motion for a New Trial

The court now considers both parties' motions for new trials. Federal Rule of Civil Procedure 50(c)(1) provides,

> [i]f the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

Plaintiffs seek a new trial on damages only or, in the alternative, on all issues. They argue that the damages findings are against the weight of the evidence and grossly inadequate. They also argue the special verdict was an impermissible compromise, and that defendant's expert improperly testified outside his previously disclosed opinions.

Defendant argues that the verdict was an improper compromise and that the court made incorrect evidentiary rulings.

A. Inadequate Damages

Plaintiffs argue that the damages findings are both against the weight of the evidence and grossly inadequate. Defendant argues that damage awards are left to the discretion of the jury except in extreme cases and plaintiffs failed to carry their burden of proving future damages and loss of consortium damages. The court agrees with plaintiffs.

"Although the appropriateness of a new trial is a federal procedural question decided by reference to federal law, in determining whether a state law claim damage award is excessive, state case law guides our inquiry." *Niemiec v. Union Pacific R.R.Co.*, 449 F.3d 854, 858-59 (8th Cir. 2006). The question of damages is generally within the province of the jury. *Blanks v. Fluor Corp.*, 450 S.W.3d 308, 407 (Mo. Ct. App. E.D. 2014). For the court to find the jury's award inadequate it must be "so shockingly inadequate as to indicate that it is a result of passion and prejudice or a gross abuse of its discretion." *Tomlin v. Guempel*, 54 S.W.3d 658, 660 (Mo. Ct. App. 2001) (quoting *Leasure v. State Farm Mut. Auto. Ins. Co.*, 757 S.W.2d 638, 640 (Mo. Ct. App. 1988)). "It is the jury's duty to judge the credibility of witnesses and to weigh and value a witness's testimony. The jury's discretion includes accepting or rejecting all or part of the plaintiff's claimed expenses." *Id.* "The ultimate test for a jury verdict is what fairly and reasonably compensates the plaintiff for the injuries sustained." *Riordan v. Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints*, 416 F.3d 825, 834 (8th Cir. 2005) (quoting *Root v. Manley*, 91 S.W.3d 144, 146 (Mo. Ct. App. 2002)).

Missouri courts have often found juries are justified in awarding zero damages for future pain and emotional suffering, when a plaintiff is adequately compensated for actual future damages. *Riordan*, 416 F.3d at 828, 832-34 ($1.18 million in past medical expenses, future medical expenses, and past non-economic damages acceptable even though zero awarded for future non-economic damages); *Thornton v. Gray Auto. Parts Co.*, 62 S.W.3d 575, 580 (Mo. Ct.

App. 2001) (award of $450,000 for all damages adequate even though that figure included only approximately $110,000 in possible future damages as well as pain and suffering); *Root*, 91 S.W.3d at 146-47 (only $100 in pain and suffering to one plaintiff and no pain and suffering for the other three not "grossly inadequate" because known medical expenses were awarded). An award for medical damages and no pain and suffering can be suspect, but not always. *Id.*; *see also Davidson v. Schneider*, 349 S.W.2d 908, 913 (Mo. 1961). Non-economic damages such as pain and suffering are hard to quantify and best left to the jury's judgment. *Eich v. Bd. of Regents for Cent. Mo. State Univ.*, 350 F.3d 752, 763 (8th Cir. 2003) (quoting *Frazier v. Iowa Beef Processors, Inc.*, 200 F.3d 1190, 1193 (8th Cir. 2000)).

Plaintiffs argued for awards of substantial compensatory damages. Their counsel argued that Dr. Bavlsik's future care would cost $6,998,316.97. (Trial Tr. Vol. 3B, 100:13, Doc. 156.) During cross-examination of plaintiff's cost of care witness, Ms. Bond, defendant cited to National Spinal Cord Injury Statistical Center Facts as stating a fifty-year old would need approximately $2.1 million in future care costs. (*Id.* at 119:22-120:13). Plaintiffs' economics witness, Dr. Ireland, provided the jury with a chart documenting how much Dr. Bavlsik would lose in earnings depending on how many "work years" he lost due to his injuries. This estimate ranged from $296,000 (assuming Dr. Bavlsik worked until he was 67) to $5,804,251 (if he could no longer work starting immediately). (*Id.* at 131:20-132:25.) It was up to the jury to decide how long Dr. Bavlsik would be able to

work, based on the medical evidence presented. (*Id.* at 132:15-21.)[3]

Regarding pain and suffering, plaintiffs' lawyer, in closing argument, suggested $5 million for past damages and $15 million for future damages. (Trial Tr. Vol. 12A, 95:23-96:7, Oct. 1, 2015, Doc. 190.) Defense counsel stated $35 million was the amount requested by plaintiffs' counsel during closing argument. (*Compare* Trial Tr. Vol 12A, 80:7-84:21, 90:18-98:9 *with* Doc. 200 at 5.) Nevertheless, the jury awarded zero dollars for plaintiff Bavlsik's future health and personal care expenses, physical and emotional pain and physical impairment, loss of earnings, as well as plaintiff Skelly's loss of companionship. (Doc. 189 at 6.)

Although in an appropriate case the awarding of no damages for physical and emotional pain and physical impairment, future loss of earnings, and loss of companionship might be sustained by the jury disregarding the evidence presented. However, in this case the award of zero dollars for future health and personal care expenses is shockingly inadequate. Although the jury could find that the plaintiffs overestimated the future medical expenses, an award of zero is unjust. Plaintiffs proved that Dr. Bavlsik suffered substantial past damages, based on a permanent injury that would require medical care of some sort for the rest of his life. Having found

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[3] Plaintiffs concede that, although improbable, the jury could have decided that Dr. Bavlsik would work until age 67, resulting in no loss of earnings. (Doc. 197 at 1 n.1.)

defendant liable for the life-altering injuries to Dr. Bavlsik, the jury was instructed that it

> must award plaintiff Michael Bavlsik such sum as [the jury believed] will fairly and justly compensate [him] for any damages you believe he has sustained and is reasonably certain to sustain in the future as a direct result of the occurrence mentioned in the evidence.

(Doc. 191, at 16.) And regarding plaintiff Kathleen Skelly, the jury was instructed:

> If you find in favor of plaintiff Michael Bavlsik on any or all of the aforesaid claims, and you further find that plaintiff Kathleen Skelly sustained damage as a direct result of the injury to her husband, plaintiff Michael Skelly, you must award plaintiff Kathleen Skelly such sum as you believe will fairly and justly compensate plaintiff Kathleen Skelly for any damage due to injury to her husband which you believe she has sustained and is reasonably certain to sustain in the future as a direct result of the occurrence mentioned in the evidence.

(*Id.*)

While there can be cases where juries' verdicts to withhold non-economic damages or to severely limit medical damages are not shockingly inadequate, this is not such a case. In the context of the trial evidence of this case, to totally eliminate future medical expenses is shockingly inadequate.

For these reasons, the court would grant a new trial only on plaintiff Bavlsik's future damages and on plaintiff Skelly's damages, past and future, if the court's granting of defendant's motion for judgment as a matter of law is reversed on appeal.

B. Compromise Verdict

Plaintiffs and defendant argue that, if the court finds the jury's verdict was a compromise verdict, a new trial in its entirety is the only proper remedy. (Docs. 197 at 7-8; 199 at 9-11.) "A compromise verdict results when the jury, unable to agree on the issue of liability, compromises that disagreement by awarding a party inadequate damages." *Boesing v. Spiess*, 540 F.3d 886, 889 (8th Cir. 2008). Such a compromise verdict requires an entirely new trial. *Id.*; *Haug v. Grimm*, 251 F.2d 523, 527-28 (8th Cir. 1958).

The court does not conclude that the jury's verdict was a compromise verdict. A special verdict form was submitted to the jury so it could clearly report its findings regarding liability. To the court's perception there is no question regarding the jury's limited finding of liability. The jury found that defendant negligently did not adequately test the vehicle's seat belt restraint system. (Doc. 189 at 3.) Substantial evidence supports this finding. Defendant's own expert, James White, testified in a deposition that General Motors did not test this vehicle's seat belt restraint system in order to find problems regarding excursion (movement of the belted driver in the driver's seat) in rollovers. (Doc. 197-4 at 184:5-188:16.) This deposition was played to the jury. (Trial Tr. Vol. 5B, 6:17-7:13, Doc. 160.)

The court rejects plaintiffs' and defendant's arguments for a new trial based on a compromise verdict.

C. Evidentiary Grounds

Both parties argue for different reasons that a new trial should be granted for various evidentiary rulings the court made. Plaintiffs contend the court improperly allowed non-disclosed expert testimony of Dr. Thomas McNish, defendant's biomechanics expert. (Doc. 197 at 8.) Defendant contends that the court's denials of its motions in limine Nos. 10 and 11 were improper and allowed inadmissible evidence to be published to the jury.

A new trial based on evidentiary errors is warranted only when, had it not been for the errors, the result of the trial would have been different. *Pointer v. DART*, 417 F.3d 819, 822 (8th Cir. 2005); Fed. R. Civ. P. 61. "No error in either the admission or the exclusion of evidence … is ground for granting a new trial … unless refusal to take such action appears to the court inconsistent with substantial justice." *Ladd v. Pickering*, 783 F. Supp. 2d 1079, 1086 (E.D. Mo. 2011) (quoting *Harris v. Chand*, 506 F.3d 1135, 1138 (8th Cir. 2007)).

1. Dr. McNish's Testimony

Expert opinions and their bases must be provided to the opposing party under Federal Rule of Civil Procedure 26(a)(2)(B). This allows opposing counsel to properly prepare their case and retain additional experts or evidence if needed. An expert cannot change his opinion in the middle of trial. *Voegeli v. Lewis*, 568 F.2d 86, 96 (8th Cir. 1977).

Plaintiffs argue that Dr. McNish, the defendant's biomechanics expert, substantially changed his opinions and added new bases for those opinions during the trial in violation of Rule 26(a)(2)(B). (Doc. 197 at 8.) Specifically, plaintiffs argue that Dr. McNish changed his definition of "normal driving position" between his expert report (Doc. 197-5 at 8), and his trial testimony. (Trial Tr. 10A, 50:14-51:10, Doc. 179.) Defendant counters that plaintiffs chose not to explore "normal driving position" during Dr. McNish's deposition and instead interpreted "normal driving position" in a manner inconsistent with Dr. Bavlsik's own testimony. (Doc. 200 at 9-10.) Furthermore, defendant argues that Dr. McNish's position remained consistent among his expert report, his deposition, and his trial testimony. (*Id.* at 10-11.)

Plaintiffs chose not to explore "normal driving position" during Dr. McNish's deposition. They were offered a second deposition of Dr. McNish after he released his supplemental report, but plaintiffs chose not to take defendant up on the offer. (Trial Tr. 10A, 11:11.) In response to the court's question outside the presence of the jury, Dr. McNish provided a definition of "normal driving position," that a driver is "seated behind the wheel and within a range of minor deviations within that seating position" and that the driver's bottom is in contact with the seat cushion, but "probably not full force against the seat cushion …." (*Id.* at 50:18-24, 51:4-10.) Plaintiffs' counsel was afforded the opportunity to ensure that Dr. McNish's trial testimony would match the opinions in his report as well as his deposition testimony.

[MR. HANSON, counsel for defendant]: Dr. McNish, if Dr. Bavlsik had applied the brake hard and actually lifted himself up as he said, would that cause you to say he was no longer in a normal driver's seated position at that time?

[DR. MCNISH]: No, sir.

[MR. SIMON, counsel for plaintiffs]: Your Honor, as long as he is not going to testify that putting his foot on the brake pulled him up out of the seat. I think we are all on the same page. That's my whole point.

…

MR. SIMON: Dr. McNish, in your report of June 27, 2014, you gave that opinion that we just covered, correct? That he was in his normal seated position; is that right?

DR. MCNISH: I did.

MR. SIMON: Okay. And at that time or prior to the time you prepared your report, you had an opportunity to receive and review completely Dr. Bavlsik's deposition, correct?

DR. MCNISH: Yes, sir.

MR. SIMON: Okay. And after reviewing his testimony and looking carefully at what he described he was doing prior to the accident you formulated this opinion, correct?

DR. MCNISH: Yes

MR. SIMON: And you've told the Court today that what you meant by normal seated or normal driving position is he was still in

> contact with the seat, despite the fact he had struck the boat, correct?
>
> DR. MCNISH: He would have been in contact with but perhaps not compressing the seat cushion as forcefully as he would were he completely relaxed. I didn't say he was in a relaxed driving position.
>
> MR. SIMON: And then —
>
> DR. MCNISH: I would consider putting force on the brake which may relieve some of the pressure under your buttocks from the seat cushion as still being a normal driving position, depending on the situation.
>
> MR. SIMON: It's your opinion in this case that that impact did not cause him to come out of his normal driving position, as you've described it correct?
>
> DR. MCNISH: That's correct, sir.

(Trial Tr. 10A, 51:20-53:17.)

Additionally, plaintiffs argue Dr. McNish added an opinion[4] based on undisclosed testing. (Doc. 197 at 9.) Plaintiffs argue that Dr. McNish based his opinions regarding the alternative restraint systems only on the static testing performed in anticipation of this litigation. (*Id.* at 9-10.) Defendant counters that neither Dr. McNish's opinions nor the data he used

[4] Plaintiffs argue that Dr. McNish's opinion that no seat belt restraint system could support the 2600 pounds of pressure being exerted by the forces of the crash and Dr. Bavlsik (13 Gs of pressure multiplied by the approximate weight of Dr. Bavlsik, 200 pounds) was not disclosed prior to trial. (Doc. 197 at 10.)

were outside the scope of his reports, and plaintiffs' objection was untimely. (Doc. 200 at 10-12.)

Dr. McNish disclosed that he used Mr. Croteau's calculations in his own report, "Subsequent calculations by Mr. Jeff Croteau determined the vertical velocity of Dr. Bavlsik's torso at the time the subject vehicle driver's side roof rail struck the ground to have been 8.1 miles per hour, with an equivalent drop height of 2.2 feet." (Doc. 197-5 at 7.) Sources of his data and findings included: 2004 Savana Drop Test, Due Care Testing Under FMVSS 216 Roof Structure, Inverted Drop Test of 2005 Chevrolet Express 3500, SAE Article "Characteristics of Soil-Tripped Rollovers", "Drag Factors from Rollover Crash Testing for Crash Reconstruction", "Evaluation of Dynamic Roof Deformation in Rollover Crash Tests", and Roll Spit Testing. (Doc. 197-5 at 3-4.) In his supplemental report, dated March 13, 2015, Dr. McNish provided additional papers and testing as data sources for his findings. (Doc. 197-7 at 2.) Plaintiffs chose not to depose Dr. McNish regarding this supplemental report which addressed one of plaintiffs' expert's reports dated July 28, 2014. During his deposition on August 7, 2014, Dr. McNish spoke at length about the various forces, measured as newtons,[5] that would have been exerted on Dr. Bavlsik's neck during the rollover. (Doc 71-8.) Additionally, during trial, Dr. McNish testified, in

[5] A "newton" is the amount of force required to accelerate one kilogram of mass one meter per second per second. https://en.wikipedia.org/wiki/Newton_%28unit%29 (viewed January 27, 2016).

detail, without objection, to the forces being exerted during the rollover:

> [MR. HANSON]: Now if we move on to the next slide, what do we have here? What are we adding to the equation now?
>
> [DR. MCNISH]: Well, we are adding an impact between the roof rail and the ground. And based upon the analysis done by Mr. Tandy and by Mr. Croteau, the velocity was of—the downward velocity was about 8.1 miles per hour. So we know that the roof rail strikes the ground. The vertical component of that strike is about 8.1 miles per hour. Which means that it stops. [Dr. Bavlsik's] head is already in contact with it or very close contact with that roof rail/roof area. And so from that we can determine that the downward acceleration of his body toward the ground, the deceleration that is created it goes from that 8.1 miles per hour downward to zero is about 13 Gs or 13 times Dr. Bavlsik's body weight.
>
> Obviously you would subtract from that the weight of the head because it's stopped, but the weight of the mass that is continuing to move and to decelerate experiences about 13 Gs of deceleration during that.
>
> MR. HANSON: Now, did you evaluate Mr. Croteau's calculations to determine whether they are, in fact, conservative?
>
> DR. MCNISH: I did.
>
> MR. HANSON: What did you conclude?

DR. MCNISH: In my opinion, they were a very conservative approach to analyzing the impact velocity.

MR. HANSON: And you use those kinds of torso velocity calculations yourself routinely, do you not?

DR. MCNISH: I do them and use them, yes, sir.

MR. HANSON: You do them yourself sometimes?

DR. MCNISH: Yes, sir. It has to do with occupant kinematics. So, yes, sir.

MR. HANSON: Now, so if it turns out that that 8.1 miles per hour is conservative and the velocity at impact with the ground was more, then you are going to get even more than 13 Gs?

DR. MCNISH: More than that force or that -- if you just say for rough numbers you have 200 pounds that are being decelerated at 13 Gs, that's 2600 pounds that are being applied to the restraint system.

MR. HANSON: So when you put somebody into a position like this illustration shows, are you now asking the body and the belts to deal with 13 times, at least, the body weight of the person?

MR. SIMON: Your Honor, may we approach, please.

(Trial Tr. Vol. 10A, 115:23-117:13.)

Only at this point did plaintiffs object. At this point the court held a sidebar discussion and plaintiffs argued that the specific forces being discussed were not previously disclosed. The court overruled plaintiffs' objection and the direct examination of Dr. McNish continued. Plaintiffs' objection was made after Dr. McNish had testified to the allegedly undisclosed opinions.

Even if plaintiffs had objected timely, the court finds that Dr. McNish did not change his opinions or change how he came to those opinions from his original expert report dated June 27, 2014, his deposition on August 7, 2014, or his supplemental expert report dated March 13, 2015. Plaintiffs' motion for a new trial is denied.

2. Defendant's Motions in Limine Nos. 10 and 11

Defendant argues that the court's denials of its motions in limine No. 10 (Doc. 116) and No. 11 (Doc. 118) were in error. It argues that denial of motion in limine No. 10 allowed plaintiffs to admit improper hearsay documents in violation of Federal Rule of Evidence 803(18), the learned treatise exception. (Doc. 199 at 12.) It argues denial of motion in limine #11 allowed plaintiffs to suggest an improper standard of care for a product manufacturer, under Missouri law. (*Id.* at 13.)

The court heard oral argument on September 4, 2015, and issued a written order on September 8, 2015. (Doc. 147.) Motion in limine No. 10 was denied as moot with leave to refile after counsel for both sides conferred about which documents the parties will seek to admit under Rule 803(18). (*Id.* at 3.) Motion in

limine No. 11 was denied with leave to raise the issue as needed at trial. (*Id.*) Neither motion in limine was refiled thereafter before trial. (*See generally* CM/ECF docket entries 148-150.)

A court's ruling on a motion in limine is only appealable in those instances where the court makes a definitive ruling on a fully briefed and argued motion and that ruling affects the entire course of the trial. *Spencer v. Young*, 495 F.3d 945, 949 (8th Cir. 2007). If there is no definitive ruling on a party's motion in limine, then the party must object at trial to preserve the issue. *Ross v. Douglas Cnty.*, Neb., 234 F.3d 391, 394 (8th Cir. 2000). Without objection, the matter is reviewed for plain error and a verdict will be set aside only if the error prejudices the substantial rights of a party and a miscarriage of justice would result if the verdict stands. *Spencer*, 495 F.3d 945, 949 (8th Cir. 2007); *Bady v. Murphy-Kjos*, Civ. No. 06-2254 (JRT/FLN), 2009 WL 3164793, at *6 (D. Minn. Sept. 29, 2009).

The court did not make a definitive ruling on defendant's motion in limine No. 10. The court ruled that defendant had "leave to refile" the motion. (Doc. 147 at 3.) Defendant did not refile the motion, but did raise the issue several times during trial. The court allowed plaintiffs to read portions of learned treatise papers to the jury, after each was "established as a reliable authority by the expert's admission or testimony …." F. R. Evid. 803(18)(B). The court did prohibit these learned treatise and papers from being admitted into evidence. Plaintiffs' Exhibit 285, a paper co-authored by plaintiffs' expert Larry Sicher, was

allowed to be read to the jury, but excluded from being formally received as an exhibit.

MR. SIMON: And that article was from 2006; is that right?

MR. SICHER: Yes.

MR. SIMON: Okay. You're one of the authors, right?

MR. SICHER: Right.

MR. SIMON: And is this an article that is typically relied on by members of your profession?

MR. SICHER: Yes

MR. SIMON: And --

MR. HANSON: Your Honor, there's no foundation about who else relies upon it. Objection.

THE COURT: I'm going to overrule that objection.

MR. SIMON: Okay. And, Mr. Sicher, you do research, right?

MR. SICHER: Yes.

MR. SIMON: And you look up and research articles, correct?

MR. SICHER: Yes.

MR. SIMON: And those articles are technical articles, engineering articles, articles from different engineering publications, correct?

MR. SICHER: Yes.

MR. SIMON: Including the Society of Automotive Engineers, correct?

MR. SICHER: Yes

MR. SIMON: Okay. And that's something you routinely do through the course of your career, right?

MR. SICHER: Right.

MR. SIMON: Okay. And is this one of those articles that engineers would typically research, rely on and use in the course of their research?

MR. SICHER: Yes

MR. SIMON: Okay. And let's -- let's go, please, to Exhibit 285. Okay. And is this the article?

MR. SICHER: Yes.

MR. SIMON: Okay. And you're one of the authors. It says there Larry Sicher.

MR. HANSON: Your Honor, object to displaying this to the Jury.

THE COURT: Step up to the sidebar, please.

A bench conference was held on the record and outside of the hearing of the Jury as follows:

THE COURT: Okay. The objection is what?

MR. HANSON: The rules don't permit you just to pull out a document and show it to the jury just because somebody says they rely upon it. That's not what the learned treatise

evidentiary rule is. It's 803(18). This is not a proper use of a technical paper.

MR. SIMON: Your Honor, I laid proper foundation for it. He's relied upon it. We're going to the portion of the article that he relied on. We're going to present it to the Jury. I've laid proper foundation. It's proper evidence in this case.

MR. HANSON: Well, it can't be received into evidence, but it can be read in.

MR. SIMON: I'm not moving to --

MR. HANSON: Well, it's sort of the same thing when you display it to the Jury.

MR. SIMON: Well, I'm not moving to have it admitted.

THE COURT: All right. Now, there has not been one exhibit used in direct examination in the plaintiffs' case and in cross-examination by defense where exhibits have been offered and received by the Court. Not one. I've been -- you know, the perception of the Court is that objections to exhibits have been discussed with counsel, but that's not the point. This exhibit has not been offered, and what do you intend -- how do -- how would you --

MR. SIMON: I intend to offer it. I intend to offer it and show a small portion, publish a small portion to the Jury, and I'm not intending to ask that the Jury receive it at the end of the case but just that it be admitted for limited purposes with this witness.

> MR. HANSON: And I think the rule explicitly says you can't offer it as an exhibit; you can merely read from it.
>
> THE COURT: Okay. He can read from it. Don't offer it. You can display it to the Jury because that's nothing more than an aid in having it read to them. I'll overrule the objection.

(Trial Tr. 4A, 53:25-56:24.)

When plaintiff's counsel attempted to have it admitted into evidence, the court denied the request, ruling,

> [w]ell, as I understand the Rule of Evidence, what it does, it allows the jury to consider the witness' expertise, but it does not allow the learned treatise to be received in evidence as substantial evidence to support a verdict. And so that's my understanding. It can be a basis for the opinion, and the opinion can be substantial evidence to support a verdict, but the learned treatise, such as that, would not. So I'm going to sustain the objection about receiving it into evidence.

(Trial Tr. 4B at 26:23-27:6, Sep. 17, 2015, Doc. 161.) This happened again with plaintiffs' Exhibit 223, a technical article on pretensioners (a device which automatically causes a seat belt to tighten in a collision) partially authored by General Motors. (Trial Tr. 4B, 43:7-19.)

While the court may have been in error about not formally admitting these exhibits into evidence, there would have been no different outcome had the court

formally admitted the exhibits into evidence. This is because the court allowed counsel to use the materials in questioning and by them being read to the jury. *See* Fed. R. Evid. 803(18).

The court did not make a definitive ruling on defendant's motion in limine No. 11. However, the court specifically ruled defendant had "leave to raise the issue as needed at trial." (Doc. 147 at 3.) Defendant did object to either its corporate representatives or plaintiffs' experts rendering an opinion on what a manufacturer should do when designing a product, thereby preserving this issue for review. (*See, e.g.*, Trial Tr. 3B, 5:11-7:18, 8:9-9:17; Trial Tr. 4A, 58:5-11, Doc. 161.) Lay and expert witnesses may offer their opinions to a jury if they will help the jury decide the facts. F. R. Evid. 701(b), 702(a). Furthermore, "an opinion is not objectionable just because it embraces an ultimate issue." F. R. Evid. 704.

In the present case, witnesses were questioned about what manufacturers "should" do, particularly if they know of a certain injury. Plaintiffs submitted a negligence claim, which required them to show that General Motors' actions were not reasonable. *Sapp v. Morrison Bros. Co.*, 295 S.W.3d 470, 485 (Mo. Ct. App. 2009) (citing *Blevins v. Cushman Motors*, 551 S.W.2d 602, 608 (Mo. 1977) (en banc)). Therefore, the witnesses were within Rules 701 and 702 when they opined about whether they found defendant's actions reasonable based on their research.

IV. Conclusion

For the reasons stated above,

IT IS HEREBY ORDERED that the motion of defendant for judgment as a matter of law (Doc. 198) is sustained.

IT IS FURTHER ORDERED under Federal Rule of Civil Procedure 50(c) (1) that, if the United States Court of Appeals for the Eighth Circuit reverses the court's judgment in favor of defendant as a matter of law, the motion of plaintiffs for a new trial (Doc. 196) is sustained only on the issue of future damages for plaintiff Michael Bavlsik, M.D. and on all damages for plaintiff Kathleen Skelly.

An appropriate Judgment Order is issued herewith.

/s/ David D. Noce
UNITED STATES MAGISTRATE JUDGE

Signed on January 29, 2016.