FILED
United States Court of Appeals
Tenth Circuit

June 1, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ROY MUNOZ,

Plaintiff - Appellant,

v.

FCA US LLC,

Defendant - Appellee,

and

JOHN DOE CORPORATIONS; FIAT CHRYSLER AUTOMOBILES US LLC, f/d/b/a Chrysler/Dodge,

Defendants.

No. 22-2077
(D.C. No. 1:17-CV-00881-WJ-SCY)
(D. N.M.)

ORDER AND JUDGMENT*

Before **HARTZ**, **KELLY**, and **BACHARACH**, Circuit Judges.

Roy Munoz appeals the district court's grant of summary judgment to FCA US LLC (Fiat Chrysler Automobiles US LLC) (FCA) in this product liability action.

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Munoz was seriously injured while driving a truck manufactured by FCA—a 2012 Ram 1500. Munoz brought claims for defective manufacturing and breach of warranty, alleging the truck's airbags did not deploy when he struck two elk at highway speed. The district court granted summary judgment to FCA, ruling that Munoz failed to provide expert testimony to establish the presence of a defect that caused his injuries. On appeal, Munoz contends the district court erred in (1) requiring expert evidence and (2) overlooking other evidence he did provide. He also seeks to certify two state-law questions to the New Mexico Supreme Court regarding his evidentiary burden. Exercising jurisdiction under 28 U.S.C. § 1291, we deny the motion for certification and affirm the district court's judgment.

I

The material facts in this case center on the truck's occupant restraint system. In support of its motion for summary judgment, FCA provided testimony and a declaration from Lisa Fodale, an electrical engineer and FCA's Senior Specialist in Products Analysis. Fodale provided technical information as to how the truck's airbags and seatbelts functioned. She explained the truck's airbags and seatbelts are operated by an "Occupant Restraint Controller" (ORC). Aplee. App. at 40. The ORC uses several accelerometers in different locations of the truck to continuously monitor for deceleration. Based on information from the accelerometers, a model-specific algorithm, and other information, the ORC determines whether to deploy the airbags and seatbelt pretensioners. Fodale indicated that the airbags and seatbelt pretensioners are "designed to deploy in full frontal impacts when the longitudinal

deceleration of the vehicle is equivalent to impacting a flat fixed barrier at 16 miles per hour or greater." *Id.* at 41, ¶ 20. She stated this "must-deploy threshold" is the "barrier equivalent velocity flat frontal test," *id.* at 30-31, but she cautioned that "[a]ll crashes are unique and the velocity of the vehicle at impact is not the sole measurement for determining whether air bags will deploy," *id.* at 40, ¶ 14.

Fodale further explained that the ORC monitors the readiness of the occupant restraint electrical system, and if there is a malfunction, an airbag warning lamp (ABWL) will illuminate in the truck. She indicated that the ORC also keeps an Event Data Record (EDR) if there is either a deployment or a change in velocity of 5 mph in 150 milliseconds, in which case the ORC will record the event and other vehicle information such as whether the driver's seatbelt was buckled and whether the ABWL was illuminated. Fodale added that the specific ORC in the truck Munoz was driving underwent end-of-line testing and was functioning properly when it was sent to the truck's assembly plant. She also stated that each vehicle is tested before it is shipped to ensure the ORC is functioning properly and the ABWL is off.

In addition to this evidence, FCA submitted a declaration from another engineer, John Hinger, who specializes in vehicle crashworthiness. Hinger inspected the truck after the collision and ran diagnostics on the ORC using two different tools. As a result of his inspection, Hinger determined the ABWL, the airbag system, and the seatbelt pretensioners were all functioning properly. Although he detected four fault codes (two for loss of communication with front crush-zone sensors and two for high and low battery voltage), he explained these fault codes were all stored after the

collision and played no role in the non-deployment of the airbags or the seatbelt pretensioners. Additionally, he explained airbags typically inflate in 30 milliseconds, which can cause ancillary injuries, so they are designed to deploy only when the benefit of doing so likely outweighs the risk of injury.

Munoz offered no evidence to dispute these facts. Instead, he submitted a report from Dr. Jahan Rasty, who inspected the truck and determined there was no evidence the seatbelt pretensioners or airbags activated in the collision. Rasty calculated a range of likely changes in velocity, or "delta-V's," the truck experienced during the collision and determined the delta-V was within the range for recording an event on the ORC, yet there was no EDR. Aplee. App. at 116-17. He further indicated that "to validate and finalize [his] analysis and opinions" he would need to review the "delta-V thresholds for passenger restraint system activation." *Id.* at 117. Rasty offered no opinion whether the truck met the barrier equivalent velocity for must-deploy status.

Apart from Rasty's report, Munoz submitted the transcript of a 911 call made by a first responder at the scene of the accident. He also offered deposition testimony from his physician and his psychiatrist, both of whom were permitted to provide limited testimony about their treatment of Munoz.

Given this evidence, the district court granted FCA's motion for summary judgment. The district court ruled that Munoz was obligated to support his claims with expert testimony establishing both the presence of a defect and that the defect caused his injuries, but Munoz failed to provide evidence supporting either element.

The district court observed that Rasty offered no opinion on whether a defect caused the injuries, and although Munoz sought to rely on common sense, lay opinions, or circumstantial evidence, the district court determined these efforts could not satisfy his evidentiary burden.

Munoz now contends the district court erred in requiring expert evidence and overlooking the evidence he did provide.[1]

II

"We review the district court's rulings on summary judgment de novo, applying the same standard as the district court." *Markley v. U.S. Bank Nat'l Ass'n*, 59 F.4th 1072, 1080 (10th Cir. 2023). "[W]e must draw all reasonable inferences and resolve all factual disputes in favor of the non-moving party." *Jordan v. Maxim Healthcare Servs., Inc.*, 950 F.3d 724, 730 (10th Cir. 2020). Summary judgment is

[1] We pause to clarify Munoz's claims and the scope of his appellate arguments. "New Mexico courts have recognized that the theory of products liability is applicable to three defects: design, manufacturing, and marketing (warnings)." *Nowell v. Medtronic Inc.*, 372 F. Supp. 3d 1166, 1228 (D.N.M. 2019) (citing *Fernandez v. Ford Motor Co.*, 879 P.2d 101, 110 (N.M. Ct. App. 1994)). The district court found the operative complaint did not specify which product defect theory Munoz was pursuing. The district court determined he provided no evidence to support a marketing defect theory and he could not proceed on a design defect theory because he disavowed such a theory until Rasty suggested it in a belated affidavit, which the district court struck. The district court therefore proceeded to analyze a manufacturing defect claim, as well as Munoz's claims for breach of express and implied warranty. On appeal, Munoz at times alludes to a design defect theory, but he does not challenge any of the district court's rulings limiting his strict liability claim to a manufacturing defect theory. Nor does he mention his breach of warranty claims. We limit our analysis accordingly. *See Tran v. Trs. of State Colls. in Colo.*, 355 F.3d 1263, 1266 (10th Cir. 2004) ("Issues not raised in the opening brief are deemed abandoned or waived." (internal quotation marks omitted)).

appropriate if "'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(a)). If a party who will bear the burden of proof at trial fails to make a sufficient showing to establish an essential element of their case, summary judgment is proper, "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Because this case arises under the district court's diversity jurisdiction, we apply New Mexico substantive law. *See Racher v. Westlake Nursing Home Ltd. P'ship*, 871 F.3d 1152, 1162 (10th Cir. 2017). Our review of the district court's interpretation of state law is de novo. *Jordan*, 950 F.3d at 730. In New Mexico, a plaintiff pursuing a strict liability claim must prove, among other things, that (1) the product is defective and (2) the defect was the proximate cause of the injuries. *See Tenney v. Seven-Up Co.*, 584 P.2d 205, 206 (N.M. Ct. App. 1978).

Munoz first contends the district court failed to evaluate his strict liability, manufacturing defect claim in accord with New Mexico law. He incorporates by reference arguments he made in his motion to certify the state law questions, where he contends expert evidence is unnecessary.[2] Munoz argues there are some cases in

[2] We caution plaintiff's counsel that incorporating arguments into an opening brief by reference to arguments made elsewhere is generally disfavored and does not substitute for legal argument. *See* Fed. R. App. P. 28(a)(8)(A); *see also Concrete Works of Colo., Inc. v. City & Cnty. of Denver*, 321 F.3d 950, 979 n.14 (10th Cir. 2003) (explaining "[t]his court is under no obligation to consider arguments not fully set forth in a party's appellate brief, including arguments incorporated by reference to

which lay jurors can understand that a product is defective. But as the district court correctly explained, cases involving alleged defects in automobile occupant restraint systems are not among them. *See* Aplt. App. at 163 (Dist. Ct. Summ. J. Order) ("[A] layperson would not know what physical forces and deceleration forces should trigger airbag deployment (whether or not the driver was using a seatbelt), or whether the seat belt assembly mechanism was functioning properly if the airbag did not deploy."). Indeed, in New Mexico, expert testimony may be necessary to help a fact-finder understand scientific, technical, or specialized evidence that is beyond the common experience of an average lay juror. *See Villalobos v. Bd. of Cnty. Comm'rs*, 322 P.3d 439, 441 (N.M. Ct. App. 2014). "[T]he intricacies of occupant protection systems and their potential design or manufacturing defects are outside the realm of a juror's everyday experience." *Ruminer v. Gen. Motors Corp.*, 483 F.3d 561, 565 (8th Cir. 2007). This is because "common experience does not dictate that if an individual is injured in a car accident, the injury is most likely a result of a defect in the automobile's occupant protection system." *Id.*

Here, expert evidence was required to establish a defect because, as Fodale explained, the functioning of the truck's occupant restraint system was highly technical. Fodale described the complex system in which multiple accelerometers, a vehicle-specific algorithm, and other information factored into the ORC's

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prior pleadings and other materials[,]" because the practice "hinders [our] ability to review the merits of the argument . . . [and] unfairly allows the party to avoid the page and word limitations imposed on appellate filings").

determination of whether or not to deploy the airbags in a given collision. Although she referenced the must-deploy barrier equivalent velocity, she emphasized the must-deploy threshold related to a fixed, flat barrier, and she cautioned it was but one of many factors that go into the ORC's determination of whether or not to deploy the airbags. She indicated the ORC was functioning properly when it was shipped to the vehicle assembly plant, and after assembly, each vehicle is tested to ensure the ORC and ABWL are still functioning properly. Hinger added that because of the risk of ancillary injuries from airbags, they are designed to deploy only when the benefit of doing so outweighs the risks. He determined the ABWL, the airbag system, and the seatbelt pretensioners were all functioning properly.

Munoz provided no evidence to dispute these facts, nor did he provide any expert evidence of a defect. Rasty's report indicated the truck's delta-V should have triggered an EDR, but as the district court correctly observed, whether or not there was an event record says nothing about whether there was a defect in the truck's occupant restraint system that prevented the airbags from deploying when they should have. Nor did Rasty offer an opinion of whether the truck exceeded the barrier equivalent velocity for must-deploy status. Rather, he acknowledged he had not reviewed the delta-V thresholds for activation of the passenger restraint system, including the seatbelt pretensioners or the airbags. In fact, Munoz himself acknowledged he had no evidence at all of a manufacturing defect. In response to FCA's interrogatories, he conceded "it is impossible to determine whether the Occupant Restraint System components did not function as designed due to a

manufacturing defect." Aplee. App. at 51 (Suppl. Answer to Interrog. No. 10). This concession doomed his claim. *See Celotex Corp.*, 477 U.S. at 322-23.

Yet even if Munoz had presented evidence of a defect, he failed to provide expert evidence of causation. New Mexico courts require a plaintiff to show causation by expert evidence in cases such as this, where an alleged defect does not cause the initial collision, but it "enhances the ultimate injury." *Duran v. Gen. Motors Corp.*, 688 P.2d 779, 782 (N.M. Ct. App. 1983), *overruled on other grounds by Brooks v. Beech Aircraft Corp.*, 902 P.2d 54 (N.M. 1995). Such vehicle "crashworthiness" cases require a plaintiff to "show that the defect proximately caused an injury more severe in degree than would have resulted had the defect not been present." *Brooks*, 902 P.2d at 56 (internal quotation marks omitted). "[I]n this highly technical area expert proof is essential" to establish that an alleged defect caused a plaintiff's enhanced injuries. *Duran*, 688 P.2d at 790. "Without expert testimony, the jury would be left to stack inferences upon inferences," which is "impermissible." *Id.*[3]

Munoz failed to provide expert evidence suggesting a defect that proximately caused him to suffer more severe injuries. Rasty's report offered no opinion as to whether Munoz suffered more significant injuries than he would have if the airbags

[3] Munoz urges us to shift the burden to FCA, presupposing the existence of a defect and asserting it was FCA's burden to show the injuries would have been worse if there had been no defect. But that is not the law. *See Tenney*, 584 P.2d at 206 (recognizing "a plaintiff has the burden of proving" the elements of a strict liability claim, including a defect and causation).

and seatbelt pretensioners had deployed. Without any such evidence, Munoz fails to show the district court erred in granting summary judgment.

Munoz resists this result, arguing the district court overlooked other evidence he submitted, which he says established factual disputes about whether the truck's occupant restraint system caused his injuries. He says the district court did not consider testimony he provided from his doctor and psychiatrist. He also says the district court failed to consider the statements made by a first responder at the scene of the accident. But the district court did consider this evidence. The district court noted the first responder was neither an expert, nor qualified to express any opinion as to whether the airbags should or should not have deployed or how Munoz's body moved in the crash sequence. *See* Aplt. App. at 167 n.10. The district court also ruled that testimony from Munoz's doctor and psychiatrist was limited to their treatment of him, and it was therefore "inappropriate and irrelevant" to the question of whether a defect was the proximate cause of his injuries. *Id.* at 179. Munoz shows no error in the district court's consideration of this evidence.

III

Finally, despite having failed to establish either a defect or causation, Munoz asks us to certify two questions to the New Mexico Supreme Court. First, relying on New Mexico Civil Uniform Jury Instruction 13-1407, he asks us to certify whether summary judgment is precluded when there is evidence that a product is defective,

even if its manufacturer could not have known it posed a risk of harm.[4] Second, he asks us to certify whether a manufacturer of a defective product may be held liable if there is evidence the product complies with governmental and industry standards.[5] Neither of these questions warrant certification.

"Whether to certify a question of state law to the state supreme court is within the discretion of the federal court." *Armijo v. Ex Cam, Inc.*, 843 F.2d 406, 407

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[4] NMRA, Civ. UJI 13-1407 provides:

> An unreasonable risk of injury is a risk which a reasonably prudent person having full knowledge of the risk would find unacceptable. This means that a product does not present an unreasonable risk of injury simply because it is possible to be harmed by it.
>
> . . . .
>
> Under products liability law, you are not to consider the reasonableness of acts or omissions of the supplier. You are to look at the product itself and consider only the risks of harm from its condition or from the manner of its use at the time of the injury. [The question for you is whether the product was defective, even though the supplier could not have known of such risks at the time of supplying the product.]

[5] Munoz's specific questions are:

1. Does the last bracketed sentence of NMRA 13-1407 prohibit summary judgment when there is evidence the product is defective as defined therein, regardless of whether the supplier could have known of the risks before supplying the product and regardless of whether expert testimony is presented to confirm the likely existence of the defect in the mind of a reasonable person?

2. Is the supplier of a defective product, as defined above, absolved of all potential liability if there is evidence the product complies with governmental and industry standards?

Mot. for Certification at 4-5.

(10th Cir. 1988). Certification may be appropriate if the questions presented are determinative of the case at hand and sufficiently novel that we are reluctant to decide it without guidance from the state court. *See Pino v. United States*, 507 F.3d 1233, 1236 (10th Cir. 2007); N.M. Stat. Ann. § 39-7-4. "[W]e generally will not certify questions to a state supreme court when the requesting party seeks certification only after having received an adverse decision from the district court." *Pacheco v. Shelter Mut. Ins. Co.*, 583 F.3d 735, 738 (10th Cir. 2009) (internal quotation marks omitted).

Munoz did not seek certification until after the district court entered judgment against him. And neither question is determinative of this appeal. Indeed, both questions presuppose there is evidence of a defective product, which Munoz failed to present, and even if he had offered such evidence, he failed to present expert evidence creating a material fact question as to causation.

IV

Accordingly, we deny Munoz's motion for certification and affirm the district court's judgment.

Entered for the Court
Per Curiam