Nos. 16-1491, 16-1632

In the United States Court of Appeals for the Eighth Circuit

MICHAEL BAVLSIK, M.D.
AND KATHLEEN SKELLY,
Plaintiffs-Appellants/Cross-Appellees,

v.

GENERAL MOTORS, LLC,
Defendant-Appellee/Cross-Appellant.

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

REPLY BRIEF OF PLAINTIFFS-APPELLANTS/CROSS-APPELLEES

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INTRODUCTION

This appeal raises two questions: Is General Motors entitled to judgment as a matter of law despite the jury's verdict against it? And if not, did the district court clearly abuse its discretion by conditionally granting a new trial on future damages?

On the first question: General Motors does not dispute that the district court properly submitted the plaintiffs' strict-liability and negligent-design claims to the jury based on the trial evidence. Nor does it dispute that the jury instructions and special-verdict form permitted—indeed, *required*—the jury to enter liability given its express findings that (a) GM was "negligent in the design" of Dr. Michael Bavlsik's van because it failed to adequately test the seat-belt system, and (b) this negligence "directly cause[d]" his injury. Add. 3–4, 8. And GM does not deny that it failed to object to either the instructions or the special-verdict form at trial. So how can GM possibly be entitled to judgment as a matter of law? GM cites no case—not one—in which an appellate court has held that Rule 50 provides authority to overturn a jury verdict under such circumstances and enter judgment for the losing party.

Yet GM asks this Court to do just that. Repeating the magistrate judge's error below, GM rests its primary argument on a basic flaw of logic: The company contends that it is entitled to judgment as a matter of law—a question that examines the record "*before* the case is submitted to the jury," Fed. R. Civ. P. 50(a) (emphasis added)—based solely on the fact that the jury "expressly rejected" other

theories of liability. But the grounds for a post-verdict motion for judgment as a matter of law "are limited to those asserted in the earlier [pre-verdict] motion." *Conseco Fin. Servicing Corp. v. N. Am. Mortg. Co.*, 381 F.3d 811, 821 (8th Cir. 2004). Suffice it to say, an argument rooted in specific jury findings "could not have been raised in a motion for directed verdict prior to jury deliberations," *Mosley v. Wilson*, 102 F.3d 85, 90 (3d Cir. 1996), and GM does not even contend that it made this argument in its original motion. *See Chaney v. City of Orlando*, 483 F.3d 1221, 1228 (11th Cir. 2007). Nor does GM make any effort to show that the verdict should be overturned under the actual standard: whether "the evidence is entirely insufficient to support the verdict." *Belk v. City of Eldon*, 228 F.3d 872, 878 (8th Cir. 2000).

On the second question: GM does not try to defend the jury's damages award. Instead, it takes the position that the district court should have vacated the *entire* verdict—not just future damages—on the theory that it was an impermissible compromise. If this argument were correct, of course, it would only underscore the impropriety of relying on the jury's findings under Rule 50, and the remedy would be a new trial on all issues—not judgment for GM. But this Court has never found that a district court abused its discretion by declining to nullify a jury verdict as a compromise. And GM gives no persuasive reason why this case should become the first. Because the district court did not manifestly abuse its discretion in ordering a new trial limited to future damages, that order should be affirmed.

ARGUMENT

I. GM's argument that it is entitled to judgment as a matter of law "in light of the jury's findings" is incorrect.

GM makes a single argument for why it is entitled to judgment as a matter of law despite the jury's findings that GM was "negligent in the design" of Dr. Bavlsik's van because it failed to test the seat-belt system, and that this negligence "directly cause[d]" his injury. Add. 3–4. That argument is predicated on the fact that the jury "expressly rejected" other theories of liability, including strict liability. *See* GM Br. 40, 41, 42, 44. Put differently, GM contends (at 2) that it is entitled to judgment as a matter of law under Rule 50 "in light of the jury's findings."

But, as we explained at length in our opening brief, Rule 50 does not permit a court to rely on the jury's findings as a basis for overturning the verdict and granting judgment for the losing side. The reason is simple: As this Court has squarely held, a post-verdict motion under Rule 50(b) is confined to the grounds "asserted in the earlier Rule 50(a) motion," *Conseco*, 381 F.3d at 821, which is considered "before the case is submitted to the jury," Fed. R. Civ. P. 50(a). So "the jury's particular findings are not germane to the legal analysis," and thus "should be excluded from the decision-making calculus." *Chaney*, 483 F.3d 1228. The court's obligation, rather, is "to ask whether there was sufficient evidence, as a legal matter, from which a reasonable jury could find for the party who prevailed at trial." *Id.*; *see also Hubbard v. BankAtlantic Bancorp*, 688 F.3d 713, 724 (11th Cir. 2012)

("The District Court erred when it relied on the jury's findings in granting [the] renewed motion for judgment as a matter of law," because "[o]nly the sufficiency of the evidence matters; what the jury actually found is irrelevant."); *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 546 (S.D.N.Y. 2011) ("The Court's task on a Rule 50 motion is not to examine different aspects of the jury's verdict to determine whether they can be logically reconciled with one another."); 9B Wright & Miller, *Fed. Practice & Procedure Civil* § 2524 (explaining that a court deciding a Rule 50(b) motion "should not rely on the jury's findings but must make an independent assessment of the sufficiency" of the evidence).

GM does not confront any of this authority, except to assert that one of the cases (the Eleventh Circuit's decision in *Chaney*) "is an incomplete statement of the Rule 50 standard." GM Br. 31. According to GM, "the Federal Circuit has more completely described" the standard, because it has said that a court may also enter judgment for the losing party when "the conclusion(s) implied [by] the jury's verdict cannot in law be supported by those findings." *Id.* (quoting *Pannu v. Iolab Corp.*, 155 F.3d 1344, 1348 (Fed. Cir. 1998)). But GM does not cite any case where an appellate court overturned a jury verdict on these grounds. And even assuming that this were a correct statement of the law, it does not help GM here. Again, the jury expressly found that GM was "negligent in the design" of Dr. Bavlsik's van, and that this negligence "directly cause[d]" his injury. Add. 3–4. Those findings do

not just *support* the jury's conclusion that GM is liable; they *mandate* it—as both the jury instructions and special-verdict form make clear. *See* Add. 3–4, 8. Because GM failed to object to either the instructions or the special-verdict form, it cannot now complain that the jury did what it was told and imposed liability consistent with its findings.

GM also mischaracterizes what the jury actually found. It repeatedly asserts that the jury found that there was "no defect or negligent design." GM Br. 2; *see e.g.*, *id.* ("The jury returned a verdict in favor of GM LLC on the . . . negligent design [claim]."); *id.* at 42 ("The jury expressly rejected Plaintiffs' defect claims."); *id.* at 43–44 ("[N]o defects in design . . . were found by the jury."). Truth be told, however, the jury found that GM *was* "negligent in the design" of Dr. Bavlsik's van, but that the van was not "in a defective condition unreasonably dangerous." Add. 1, 3. As we pointed out in our opening brief (at 40–44), Missouri law distinguishes between strict-liability and negligent-design claims, and leaves it to the jury to determine whether a product is defective or unreasonably dangerous. The jury in this case could have rationally concluded that the problems with the seat belt's design—although serious enough to directly cause Dr. Bavlsik's injuries—did not render the van unreasonably dangerous. *See Patterson v. F.W. Woolworth Co.*, 786 F.2d 874, 877–78 (8th Cir. 1986) (explaining that the phrase "defective condition unreasonably dangerous" requires the jury to find that the product "was both

defective and unreasonably dangerous," so there is "no inconsistency" in finding that a product, "while defective, was not unreasonably dangerous"). "Thus, the jury may have rejected [the strict-liability] claim without considering whether the product was defective in fact." *Randall v. Warnaco Inc., Hirsch-Weis Div.*, 677 F.2d 1226, 1231–32 (8th Cir. 1982). GM's brief is entirely unresponsive to these points.

At a more fundamental level, what GM really seems to be saying—by trying to use some of the jury's findings to nullify others—is that the findings are inconsistent. But the reason GM doesn't actually say this is threefold. One: GM waived this argument because it did not "object to the inconsistency before the jury [wa]s discharged," *Williams v. KETV Television, Inc.*, 26 F.3d 1439, 1443 (8th Cir. 1994), nor did it object to the jury instructions or special-verdict form mandating that liability be imposed based on the findings the jury made. *See Jarvis v. Ford Motor Co.*, 283 F.3d 33, 54–65 (2d Cir. 2002) (Sotomayor, J.). Two: This Court must "harmonize inconsistent verdicts, viewing the case in any reasonable way that makes the verdicts consistent." *Anheuser-Busch, Inc. v. John Labatt Ltd.*, 89 F.3d 1339, 1347 (8th Cir. 1996). As just discussed, the findings here can be harmonized. "It is reasonable to read the special verdicts as saying that [GM's] failure to [test] was unreasonable conduct, although the danger posed by the product itself was not greater than an ordinary consumer would reasonably expect." *Toner for Toner v. Lederle Labs.*, 828 F.2d 510, 513 (9th Cir. 1987) (Kennedy, J.). Likewise, even

though the jury did not find that GM was negligent by failing to implement a *specific* design improvement, that does not mean that the seat belt was adequately designed—as the jury's causation finding makes apparent. Three: Even if the verdict were inconsistent, and GM had preserved the argument, the remedy would be a new trial—not judgment for GM. *Kosmynka v. Polaris Indus., Inc.*, 462 F.3d 74, 82 (2d Cir. 2006).

Because GM cannot mount a successful inconsistency argument, it is forced to argue that it is entitled to post-verdict judgment as a matter of law under Rule 50(b) based solely on the jury's findings. But, in addition to the other problems GM faces with respect to this argument (discussed a couple of pages ago), GM does not identify where it preserved the argument in its original Rule 50(a) motion. In other words, where in the record did GM say to the court, before the case was submitted to the jury, that it would be entitled to judgment as a matter of law if the jury were to find as it did? GM is silent on this dispositive question. Nor does GM say anything about why it would be entitled to judgment were this Court to apply the proper standard. Under Rule 50, the Court must "review all of the evidence in the record" and "draw all reasonable inferences in favor of the nonmoving party," *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000), and leave the verdict in place unless there is "a complete absence of probative facts to support" it, *Walsh v. Nat'l Computer Sys., Inc.*, 332 F.3d 1150, 1158 (8th Cir. 2003). Although GM

tries to couch its arguments in these terms—asserting (at 28) that there is "no evidence of defect" or "causation"—the explanation it advances for why this is so is entirely dependent on crediting the jury's findings (and an incorrect understanding of them at that).[1] These failures are fatal to GM's bid for judgment as a matter of law.

II. GM has not shown that the district court manifestly abused its discretion when it found that the trial record did not "clearly demonstrate" an impermissible compromise verdict.

If the Court concludes that GM is not entitled to judgment as a matter of law, then the correct course is to affirm the district court's conditional grant of a new trial on the issue of future damages. *See Dominium Mgmt. Servs., Inc. v. Nationwide Housing Group*, 195 F.3d 358, 361 (8th Cir. 1999) (reversing the district court's grant of judgment as a matter of law and affirming "the conditional grant of a new trial" on damages). That course is particularly appropriate given that GM agrees that the jury's no-future-damages award should be set aside as inadequate.

But GM goes a step further: It asks the Court to wipe out the *entire* verdict and order a new trial on everything. The reason why, says GM, is that the verdict was the product of an impermissible compromise, meaning that jurors "resolve[d]

[1] To give an example: GM claims (at 43) that "[t]here is no evidence to support Plaintiffs' claim that an alleged failure to test the restraint system *caused* injury to Plaintiffs." Why? Because "no defects in design, manufacture or warnings were found by the jury; therefore, the alleged failure to test 'cannot by itself cause any injury.'" GM Br. 43–44. But that is wrong—both as a factual matter and a legal matter.

their inability to make a determination with any certainty or unanimity on the issue of liability by finding inadequate damages." *Reider v. Phillip Morris USA, Inc.*, 793 F.3d 1254, 1260 (11th Cir. 2015) (quotation marks omitted).

As an initial matter, this argument cannot be reconciled with GM's Rule 50 argument. After all, if GM were right that the verdict is a compromise, then it is especially improper to rely on any of the jury's findings to reverse the verdict and grant judgment as a matter of law for GM. True compromise verdicts infect the whole proceeding and require a new trial on all issues; none of the findings may be credited.[2]

The district court, however, concluded that the verdict in this case did not reflect an impermissible compromise. This Court has been exceedingly reluctant to overturn a district court's on-the-ground determination that a jury did not produce a compromise verdict. In fact, as best we can tell, it has never done so. Instead, it has stressed the doubly deferential standard of review in such cases—deferential, in the first instance, to the jury, and in the second, to the district court. A jury verdict may be erased on compromise grounds only if "the record, viewed in its entirety,

[2] In a footnote, GM suggests that some of the jury's findings—those in GM's favor—should be left intact were the Court to conclude that the district court abused its discretion by declining to invalidate the verdict as an impermissible compromise. *See* GM Br. 57 n.9. But GM cites no precedent to support this view. And elsewhere it concedes that, "[w]hen 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." *Id.* at 48 (quoting *Carter v. Chicago Police Officers*, 165 F.3d 1071, 1083 (7th Cir. 1998) (emphasis added)).

clearly demonstrates the compromise nature of the verdict." *Boesing v. Spiess*, 540 F.3d 886, 889 (8th Cir. 2008) (emphasis added). And this determination is "left to the sound discretion of the trial court," which "this court will not disturb . . . absent a *clear showing of abuse of discretion*." *Id.* (emphasis added); *see also Nichols v. Cadle Co.*, 139 F.3d 59, 63 (1st Cir. 1998) ("The appellate decisions show a marked tendency to give great weight to the district court's assessment *whether* the verdict reflects an improper compromise," and "[t]here are good reasons for this view: the district court 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."); *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 485 (1933) (Brandeis, J.) ("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."). Putting these standards together, GM can win on this question only if the district court *clearly* abused its discretion in finding that the verdict was not *obviously* a compromise.

This Court has identified "several factors" that "may be useful" to the compromise-verdict inquiry, "including the existence of a close question of liability, a grossly inadequate award of damages, and other circumstances such as the length of jury deliberations." *Boesing*, 540 F.3d at 889. But these factors are not exclusive, nor is any controlling. *Id.*; *see Reider*, 793 F.3d at 1260 ("Given that Rule 606(b)(1) of the Federal Rules of Evidence generally prohibits courts from inquiring into the

jury's deliberative process, courts try to ascertain whether a verdict was compromised by looking at the totality of the circumstances."). So "an insufficient damages verdict, standing alone, does not necessarily indicate a compromise." *Carter*, 165 F.3d at 1082–83. The task of weighing the possible explanations for an inadequate damages award—and thus deciding whether to require "a new trial confined to damages alone" (as the district court did here) or a new trial "on all issues"—"is quintessentially a decision committed to the informed discretion of the judge who has conducted the trial and can best estimate the relative possibilities." *Spell v. McDaniel*, 824 F.2d 1380, 1400 (4th Cir. 1987); *see Phav v. Trueblood, Inc.*, 915 F.2d 764, 769 (1st Cir. 1990) (holding that "the district court did not abuse its discretion in allowing plaintiff's motion for a new trial limited to the issue of damages," rather than a retrial on all issues on compromise-verdict grounds).

GM gives no persuasive reason to think that the district court acted outside its substantial discretion here. The first two reasons it submits are really just one, and they are reminiscent of its flawed Rule 50 argument. GM contends (at 48–54) that the jury's liability verdict—its finding that GM's failure to test "resulted in a defective design" and directly caused injury—was without "substantial evidence" because "[t]he jury specifically rejected the notion that the [van's seat-belt system] was defective, or that GM was negligent in the design of the restraint system." But again, the jury expressly found that GM *was* "negligent in the design" of the van

because it did not adequately test the van's seat-belt system. Add. 3. And again, to the extent that GM is arguing that the jury's liability findings are somehow inconsistent with one another, that argument is neither preserved nor correct. *See* Opening Br. 37–44. It is not preserved because the jury instructions mandated that liability be imposed based on the findings that the jury made, and GM did not contest those instructions or object to the verdict before the jury was discharged. *See Phav*, 915 F.2d at 769 (holding that, because defendant did not object to the instructions, "we do not consider the jury's answers to the special questions as evidence" in support of defendant's compromise-verdict argument; "[t]o decide otherwise would countenance agreeable acquiescence to perceivable error as a weapon of appellate advocacy"). And it is incorrect because the findings can be reconciled, as already explained.

GM offers only one other reason why this Court should find that the district court manifestly abused its discretion, claiming that "[t]he circumstances under which the jury decided for Plaintiffs on their negligent failure to test claim strongly suggest that the jury's decision on that issue was the result of an improper compromise." GM Br. 54. GM focuses, in particular, on the fact that the jury submitted a note during deliberations asking the court whether Dr. Bavlsik would get the stipulated amount of damages for past medical expenses—$576,701.00—"regardless of our decision." *Id.* From this, GM speculates that the jury must have

"intended to find for GM LLC on liability," but "wanted to see Dr. Bavlsik's out of pocket expenses be paid regardless of liability." *Id.* at 56.

If that were true, however, one might have expected the jury to award only the stipulated amount as past damages. It did not. Instead, the jury awarded almost double that amount, including an award of nearly $300,000 in past damages not intended to cover any out-of-pocket expenses, but to compensate for pain and suffering. *See* Add. 5. GM has no explanation for this award, and it is entirely possible that the jury submitted the note because one of the jurors simply wanted to confirm the significance of the limited damages stipulation. On these facts, GM has not shown that the note so obviously establishes that the verdict was a compromise that the district court manifestly abused its discretion by concluding otherwise.[3]

GM identifies just one case holding that a district court abused its discretion by declining to find that a jury verdict was an impermissible compromise. *See* GM Br. 55 (discussing *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439 (10th Cir. 1988)). But that case, a per curiam decision from another circuit, involved circumstances not present here: multi-day deliberations and an express admission by the jury that "it

[3] One additional point on this score warrants a quick response: GM asserts (at 48) that we have adopted a "revised version of the jury's actions" from what we said below. That is a mischaracterization of our position. In the district court, we asserted that, "because the damages award was grossly inadequate, a case can be made that this was a compromise verdict." ECF No. 197, at 7. That is a far cry from arguing that the verdict was so clearly the product of a compromise that the district court would manifestly abuse its discretion by concluding to the contrary.

was unable to reach a unanimous decision." *Skinner*, 859 F.2d at 1446. This case involved only a few hours of deliberations—following a three-week trial—a feature that courts have held suggests that the jury was not deadlocked. *See, e.g.*, *Phav*, 915 F.2d at 768–69 (holding that district court did not abuse its discretion in finding no compromise verdict where jury deliberations lasted only an afternoon even though damages were inadequate and jury sent a note asking whether they had "to have a unanimous . . . verdict for each question"); *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."); *Gries v. Zimmer, Inc.*, 940 F.2d 652, 1991 WL 137243, at *10–11 (4th Cir. 1991) (finding no compromise verdict when, "after a seven-day trial, the jury debated only three and one-half hours" and "gave no indication of being deadlocked or confused as to liability," and "the evidence on liability, even now weighing the evidence and the credibility of the witnesses, was sufficient to preserve the possibility that a compromise verdict was not rendered"). In light of these cases, GM has not shown that the district court manifestly abused its discretion by declining to undo the jury's liability finding and ordering a new trial on future damages only.

The Court should therefore hold, on de novo review, that GM is not entitled to judgment as a matter of law. And it should affirm, on clear-abuse-of-discretion review, the district court's conditional grant of a new trial on future damages.

CONCLUSION

This Court should vacate the grant of judgment as a matter of law for GM and remand for the district court to reinstate the jury verdict that GM was negligent in the design of the van's seat-belt-restraint system. The Court should also affirm the district court's conditional grant of a new trial on damages.

Respectfully submitted,

/s/ Deepak Gupta

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October 21, 2016

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(B)

I hereby certify that my word processing program, Microsoft Word, counted 3,972 words in the foregoing brief, exclusive of the portions excluded by Rule 32(a)(7)(B)(iii). The brief has been scanned for viruses and is virus free.

/s/ Deepak Gupta

October 21, 2016 Deepak Gupta

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2016, I electronically filed the foregoing Reply Brief for Plaintiffs-Appellants with the Clerk of the Court of the U.S. Court of Appeals for the Eighth Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

/s/ Deepak Gupta
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