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

BRIEF OF PLAINTIFFS-APPELLANTS/CROSS-APPELLEES

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

When his seat belt failed to protect him in a rollover collision, Dr. Michael Bavlsik suffered a spinal-cord injury that rendered him a quadriplegic. A jury found that General Motors was negligent because it failed to adequately test the seat belt's design, and that this negligence directly caused Dr. Bavlsik's injuries. At trial, the jury heard GM's own expert testify that GM—ignoring well-known risks—performed no rollover testing. And, later, when GM tested its seat-belt system for the first time, it failed GM's own safety standards, and the company implemented safety features that would have prevented Dr. Bavlsik's injuries.

The district court's decision to vacate the jury's verdict and grant judgment to GM requires reversal. *First*, the court based its decision on the jury's finding that GM was not strictly liable, rather than reviewing the record and asking whether there was enough evidence to uphold the jury's negligence verdict—as Rule 50(b) and this Court's precedents require. *Second*, had the court applied the right standard, it would have concluded that ample evidence supported the jury's liability finding—as the court itself recognized in twice denying GM's motion for judgment under Rule 50(a). *Third*, the jury's liability findings are neither inconsistent nor insufficient, and GM waived any argument to the contrary by failing to object to either the jury instructions or verdict form.

For these reasons, Dr. Bavlsik requests 30 minutes of oral argument.

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INTRODUCTION

As Dr. Michael Bavlsik was driving a group of ten Boy Scouts home from camp one summer morning in 2012, the van he was driving collided with a towed boat and rolled over at a very slow speed. Only Dr. Bavlsik—who was wearing his seat belt—was injured. Because the seat belt lacked basic safety features found in the vast majority of other vans, Dr. Bavlsik fell well out of his seat when the van turned over. As a result, his head hit the roof, and his body crashed down with enough force to break his neck and render him a quadriplegic.

After a three-week trial, the jury found that the van's manufacturer, General Motors, was negligent in designing the seat belt, and that this negligence directly caused Dr. Bavlsik's injury. The jury found that GM was negligent because it had failed to perform adequate testing of the seat belt's design—a finding that the district court held was supported by substantial evidence because GM's own expert testified that it performed no rollover testing of the vehicle, despite the well-known safety risks of rollovers. And when GM later tested the seat-belt system, it failed GM's own safety standards, exceeding the injury threshold by a factor of three.

This evidence prompted the district court to twice reject GM's motion for judgment as a matter of law during trial. But, after the trial, the court nevertheless overturned the jury's liability finding and granted GM's renewed motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b).

The court's about-face was not based on a reconsideration of "all of the evidence," *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000), much less a determination that the evidence was somehow entirely insufficient to support the verdict, as is required to grant a renewed motion under Rule 50(b). Instead, it was based on the court's belief that the jury, by declining to impose strict liability, had found that the van's seat belt was not defective—a ground that GM did not raise in its original motion for judgment as a matter of law under Rule 50(a).

The court's entry of judgment for GM is indefensible. "By placing an undue emphasis on the jury's particular findings as to [strict liability]—and by repeatedly making decisions on the Rule 50 motion through the lens of what the jury found—the court engaged in an erroneous analysis in deciding [GM's] renewed motion for judgment as a matter of law." *Chaney v. City of Orlando*, 483 F.3d 1221, 1228 (11th Cir. 2007). As this Court has repeatedly held, the "grounds for the renewed motion under Rule 50(b) are limited to those asserted in the earlier Rule 50(a) motion." *Conseco Fin. Servicing Corp. v. N. Am. Mortg. Co.*, 381 F.3d 811, 821 (8th Cir. 2004). The jury's findings, of course, "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).

Had the court applied the correct standard under Rule 50(b), it would have denied GM's renewed motion—just as it had twice denied GM's original motion. Ample evidence supports the jury's negligence and causation findings.

At bottom, GM's "real argument" appears to be not that the verdict lacks an evidentiary basis, but that it was inconsistent—which would require a new trial, not judgment for GM. *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 549 (S.D.N.Y. 2011). But GM waived that argument by "fail[ing] to object to the inconsistency before the jury [was] discharged." *Williams v. KETV Television, Inc.*, 26 F.3d 1439, 1443 (8th Cir. 1994). A finding of waiver is especially appropriate here because, although GM's "current contention" seems to be that, "after determining that [GM] was not strictly liable, the jury should not have considered whether [GM] was negligent," GM "did not object to instructing the jury on both theories of liability or to the instruction in the jury charge and on the verdict sheet that the jury could find [GM] negligent but not strictly liable." *Jarvis v. Ford Motor Co.*, 283 F.3d 33, 54–65 (2d Cir. 2002) (Sotomayor, J.) (vacating a grant of judgment as a matter of law and reinstating a verdict that Ford was negligent but not strictly liable). Nor did GM object to the fact that the instructions and verdict form allowed for negligence liability to be premised on the findings that the jury made.

In any event, there is no inconsistency in those findings. Under Missouri law, negligence and strict liability are distinct. So the "law and the instructions required the jury to examine the case from two different points of view." *Toner for Toner v. Lederle Labs.*, 828 F.2d 510, 513 (9th Cir. 1987) (Kennedy, J.). The jury followed those instructions. Its finding of liability should be sustained.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1332. On October 1, 2015, the jury returned a verdict finding GM liable to Dr. Bavlsik for $1 million in past damages, but $0 in future damages. On January 29, 2016, the court entered final judgment as a matter of law for GM. On February 24, the plaintiffs filed a notice of appeal under Federal Rule of Appellate Procedure 4(a)(1)(A). On March 9, GM filed a notice of cross appeal from the district court's conditional grant of a new trial on damages. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Did the district court err by overturning the jury's negligence and causation findings—and entering judgment for GM—based on other findings that the jury made, even though (1) GM did not raise this argument in its original motions for judgment as a matter of law, (2) GM did not object to the jury instructions or the verdict form that allowed for liability to be premised on the jury's findings, (3) ample evidence supports the negligence verdict, and (4) the jury's findings can be harmonized in any event?

Apposite cases are *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000); *Chaney v. City of Orlando*, 483 F.3d 1221 (11th Cir. 2007); *Jarvis v. Ford Motor Co.*, 283 F.3d 33 (2d Cir. 2002) (Sotomayor, J.); *Toner for Toner v. Lederle Labs.*, 828 F.2d 510 (9th Cir. 1987) (Kennedy, J.).

STATEMENT OF THE CASE AND OF THE FACTS

I. Factual background

A. The unique injuries caused by rollover accidents, and the importance of seat-belt design in preventing them

At the beginning of the 1990s, fewer than half of all Americans used seat belts in automobiles; by the end of the decade, roughly 70% did. *See* NHTSA, *Trends in Occupant Restraint Use and Fatalities*, http://1.usa.gov/1UHrYcL. But this welcome news was accompanied by a troubling trend, for it "occurr[ed] alongside rising numbers of motor vehicle fatalities" and life-altering injuries. Public Citizen, *Rolling Over on Safety: The Hidden Failures of Belts in Rollover Crashes* 5 (Apr. 2004), http://bit.ly/1TZuPOP.

The increase in casualties was largely attributable to a small subset of crashes known as rollovers, which disproportionately affect large vehicles with high centers of gravity—like trucks, vans, and sport-utility vehicles, which were gaining popularity at the time. *See id.* at 6 (noting that rollover fatalities were responsible for 82% of the rising death toll over a two-year period). "Only 3 percent of crashes are rollovers," yet by the end of the 1990s "rollover crashes [were] responsible for a full *third* of all vehicle occupant fatalities," or "more than 10,000 fatalities each year." *Id.* And that does not account for those people who suffered serious injuries in rollover accidents, but did not die. "By the late 1990s, rollover crashes were

inflicting 12,000 head injuries every year, about 3,000 spinal cord injuries, and annually leaving 500 occupants quadriplegics for life." *Id.*

The reason for these injuries—the reason why nearly a third of all harm in rollovers involves the head and neck area, *id.*—is no mystery. When a van or SUV rolls over, gravity pushes the occupants' bodies toward the ground. If their heads are allowed to hit the roof, their torsos can push down with enough force to break their necks and paralyze them.

This risk means that seat-belt design is critically important in a rollover. If it keeps the occupant in place when the vehicle rolls over, a belt can greatly reduce the chances of a debilitating neck or spinal injury. But if it allows for a lot of slack (or worse, spools out when the vehicle turns over), then the belt will not keep the occupant in place, and there will be a far greater risk of terrible injury. *Id.* at 1, 18.

B. General Motors confirms the inadequacy of its seat-belt design, but refuses to make changes that it knows will prevent injuries in rollovers

For much of the 1990s, seat belts did a poor job of keeping people in place during rollovers. "Federal data show that 22,000 people who were wearing a safety belt died in rollover crashes in the U.S. between 1992 and 2002." *Id.* at 2. Most of these people—some 1,600 per year—died "inside the vehicle from roof crush and other hazards in rollovers." *Id.* at 9. Thousands more per year were permanently injured despite wearing a seat belt during the rollover. And many of these deaths

and injuries were preventable: According to a series published in the *Detroit News* in early 2002, design improvements could have prevented thousands of deaths and tens of thousands of injuries every year. *Id.* at 2–3.

Automobile manufacturers, including General Motors, were aware of the unique risks posed by rollovers. In the late 1980s, GM conducted eight rollover tests on a Chevrolet Malibu and found that in each test—eight out of eight—the seat belt allowed the driver dummy to come far enough out of the seat that it hit its head on the roof with enough force to break a person's neck. JA 164. Each of these tests produced a force on the neck that exceeded the company's own injury threshold of 4,000 newtons, with the highest registering a force of 13,200 newtons—over three times GM's safety standard. *Id.*; *see* JA 259. These results were later published in a paper in 1990. *See* G.S. Bahling, et al., *Rollover and Drop Tests—The Influence of Roof Strength on Injury Mechanics Using Belted Dummies* (Society of Automotive Engineers 902314), 34th Stapp Conference, Nov. 1990, *available at* http://bit.ly/1WMD0nu.

It "soon became apparent," however, that "vehicles could improve their test results by adding" certain safety features, such as devices known as "pretensioners and load limiters[,] to their belt systems." Charles Kahane, NHTSA, *Effectiveness of Pretensioners And Load Limiters for Enhancing Fatality Reduction By Seat Belts* 2 (Nov. 2013), *available at* http://1.usa.gov/28q4JOL. Although many seat belts at the time

were already equipped with technology that prevented belt spooling by locking the belt in place during a collision, pretensioners go a step further: they are designed to "retract the safety belt almost instantly in a crash to remove excess slack," which helps keep the occupants more firmly attached to their seats, and thus less likely to hit the roof and injure their necks. *Id.* at 1. The first manufacturer to implement this technology was Mercedes-Benz, which "introduced pretensioners in the front seats of their S-class cars in 1981." *Id.*

Manufacturers quickly discovered that adding pretensioners and other safety features to seat belts greatly improves their effectiveness at preventing head and neck injuries during a rollover. When GM conducted another round of tests in the mid-1990s—this time measuring the effects of pretensioners—the results were dramatic: Adding that feature alone caused a 50% drop in vertical excursion (a technical term referring to how far an occupant is allowed to fall away from the seat while upside down). *See* JA 54; *see also* JA 275. This feature reduced the amount of excursion to 1.9 inches. JA 278. Adding a pretensioner in combination with another improvement to the seat belt's design—ensuring that the belt is mounted to the seat rather than the body of the vehicle (called an "all-belts-to-seat" design)—resulted in an even bigger reduction in vertical excursion (63%), thus limiting the excursion to under 1.4 inches. JA 276, 278. The upshot was that, with these features, a person whose head was several inches clear of the roof while

driving would stand a much better chance of being kept safe in a rollover. And there is no evidence that adding any of these features makes vehicles less safe in other types of collisions. JA 271–73.

The National Highway Traffic Safety Administration recommended that manufacturers implement pretensioners and other available designs, publishing annual documents from 1997 to 2004 that described pretensioners as one of several "additional features that improve seat belt performance." *Effectiveness of Pretensioners*, at 2. The agency also "encouraged their installation" in other ways, including through testing to determine the effectiveness of seat belts in specific vehicles. *Id.*

Many manufacturers heeded this advice. In the late 1990s and early 2000s, there was "a move to industry-wide application" of pretensioners and other safety features in automobiles—including those most susceptible to rollovers, like vans. *Id.* at iv. The full-size Ford E-Van and the Dodge Ram Van, for instance, were equipped with pretensioners beginning in model years 1998 and 2001, respectively. *Id.* at 38–39. And the Dodge Sprinter, introduced in model year 2002, has always had a pretensioner. *Id.* at 39. A slew of minivans (including the Chevrolet Venture and Uplander models, the Dodge Caravan, the Honda Odyssey, the Kia Sedona, the Nissan Quest, and the Toyota Sienna) adopted them between 1998 and 2002. *Id.* at 37–50. By 2003, "85 percent of all vans on the road had pretensioners." JA 267–68.

GM, however, took a different tack. After engaging in concerted efforts to undermine federal roof-crush-protection standards many years earlier—prompting one former GM engineer to tell federal regulators in 2001 that GM had "deceived both the agency and the public," *Rolling Over on Safety*, at 28—GM was slow and spotty in taking steps to improve seat-belt design to protect against the risks of rollovers. It "chose not to put a pretensioner" in many of its vans (including the model at issue in this case), without even testing that model to measure the effectiveness of design changes aimed at reducing injuries caused by rollovers. JA 268; *see* JA 227–28. These vans thus made up part of the tiny fraction of all vans—less than 15%—that were not equipped with pretensioners or other safety improvements when they were rolled out to consumers in 2002 and 2003.

C. Dr. Bavlsik suffers a paralyzing neck injury in a slow-speed rollover in a 2003 GM van that had not been adequately tested and that lacked critical safety features

One of those consumers was Dr. Michael Bavlsik, a 50-year-old St. Louis physician and father of eight. JA 231, 233. He purchased a 2003 GMC Savana van in August of that year. JA 246–47.

Nine years later, on a Saturday morning in July 2012, Dr. Bavlsik was driving a group of Boy Scouts back to St. Louis from summer camp in Minnesota. The group, which included two of his sons and eight others, was "driving to Itaska State Park to see the headwaters of the Mississippi and then to head home." JA

235. But on the way there, a towed boat collided with the van as it moved through an intersection. No one was hurt in the initial collision. But the van then tipped over at a slow speed—between 11 and 15 miles per hour—and took three seconds to roll less than a full revolution through the grass. JA 111, 114–15. It stayed in contact with the ground throughout, first rolling onto the passenger side, then onto the roof, and finally coming to rest on the driver side. Only Dr. Bavlsik was hurt. Despite wearing his seatbelt, he came far enough off the seat when the van rolled over that his neck hit the roof. And it did so with enough force to cause a cervical-spinal-cord injury that rendered him a quadriplegic. JA 236; JA 124–25.

As a result, Dr. Bavlsik has "no motor movement below [his] chest." JA 240. He "can't move [his] legs, arms, abdomen, [or] toes at all." *Id.* He was (and remains) "the sole support for [his] family," and he fears that he is now a burden on them. JA 244. "I worry about my wife," he says. "We were looking towards kids growing up and getting to a point where we could maybe travel a little bit together and spend more time together, and now she is reduced to being my nurse and helping me move my bowels every other night." *Id.*

Remarkably, despite these limitations, Dr. Bavlsik has resolved to continue seeing his patients to the extent possible, having returned to work in a motorized chair with the help of his staff. But the transition has not come without its difficulties: "You have to re-learn everything," he says. "It's sort of embarrassing to

drop a stethoscope on somebody's chest three or four times while you are trying to listen to their heart and at the same time hold the stethoscope." JA 241–43. And it is "very embarrassing" when nurses and therapists—his colleagues—have had to "come by and change" him after an accidental bowel movement, and "help [him] get up" and put on new clothing. JA 242. Although he has "lost a lot of patients," he continues to do whatever he can to keep serving those who remain. JA 243.

Beyond work, the injury has also affected his personal life. He misses "hiking, biking, swimming," and "going on Scout trips" with his kids—"doing the things we used to do." JA 244. He misses "playing the organ" at his church. *Id.* And he misses "the physical intimacy that is not there with [his] wife anymore." *Id.*

It did not have to be this way. When Dr. Bavlsik was driving the van, he had nearly five inches of clearance between the top of his head and the roof. JA 94. Safety features were available when the van was manufactured in 2003—and were commonly used in other vans—that would have reduced the excursion to under an inch and a half. *Id.* Had Dr. Bavlsik's van been equipped with one or more of those features, it "would have prevented" his injury. JA 88.

Not only did Dr. Bavlsik's van lack these features, but GM did not even perform any rollover testing on the van before selling it to him. It was not until 2007—more than ten years after GM started manufacturing Savana vans—that GM tested the van's seat-belt-restraint system in rollovers for the first time. And the

results failed the company's own safety criteria. JA 256–57 (test results showed 5,267 newtons of force); JA 260–64 (explaining that GM's injury threshold is 4,000 newtons). The dummy passengers came out of their seats and hit their heads on the roof with enough force to break their necks, just as Dr. Bavlsik did. *Id.* When GM conducted another round of testing in 2014, the results were even worse: the dummies came so far out of their seats that they pushed down with a force three times the company's injury threshold. JA 185–189; JA 257 (13,394 newtons); JA 261 (GM's expert admitting that the "production test is three times the threshold"). According to data compiled by NHTSA, GM ensured that the 2008 version of its Savana van—manufactured the year after GM first tested the van—was equipped with a pretensioner. *See Effectiveness of Pretensioners*, at 42.

II. Procedural background

Dr. Bavlsik and his wife Kathleen Skelly filed this case in March 2013. ECF No. 1. He brought strict-liability and negligence claims against GM, and she brought a claim for loss of consortium. *Id.* All parties agreed to allow a magistrate judge to exercise jurisdiction over the case. ECF No. 18. After discovery and some motions practice, the case culminated in a three-week jury trial in September 2015.

A. The plaintiffs press three liability theories at trial.

At trial, the plaintiffs advanced three theories of liability. *First*, they argued that GM was strictly liable because the van's seat-belt-restraint system was "in a

defective condition unreasonably dangerous" by lacking a pretensioner, an all-belts-to-seat system, and something known as a sliding-cinching latch plate (similar to the kinds found on airplanes). Add. 1–2.

Second, the plaintiffs argued that, even if GM was not strictly liable, it was nonetheless negligent in the design of the van's seat-belt system. They sought to prove negligence by focusing on GM's refusal to implement specific safety designs and its failure to test the seat belt for rollovers—testing that would have prompted GM to make improvements to the seat belt's design.

In a deposition played to the jury, GM's own expert and corporate representative on seat belts, James White, admitted that GM had not performed any rollover testing on the van's seat-belt system before 2003. JA 227–28. The plaintiffs presented the jury with the evidence showing that, when GM finally performed rollover testing on the van for the first time in 2007, the results exceeded the company's own injury threshold, causing enough force to break the passengers' necks. JA 256–57, 260–64. And the jury saw the 2014 tests, which GM admitted included results that were "three times" the company's injury threshold. JA 261; *see* JA 185–189. The plaintiffs' design expert, Larry Sicher, testified that these results demonstrate that the seat belt did not "provide a reasonable level of protection in a rollover." JA 166–180.

The jury also saw the results of the tests that GM performed before designing the 2003 van. These tests, performed on different vehicle models in the 1990s, showed that certain safety features—pretensioners and all-belts-to-seat systems—could reduce the amount of slack in the seat belt by up to 63%, limiting the total amount of excursion to less than 1.4 inches. *See* JA 49–60; *see also* JA 276, 278. And the jury heard testimony that the vast majority of vans had pretensioners at the beginning of 2003—including even the light-duty version of Dr. Bavlsik's van. JA 220–21. But the heavy-duty version did not. *Id.*

Third, the plaintiffs argued that GM's failure to provide a warning of the seat belt's inadequacy was "unreasonably dangerous." Add. 4. Dr. Bavlsik testified that he would not have purchased the van had he known about the flaws in its seat-belt design. JA 235.

The "central issue" at trial (as GM's counsel told the jury) was causation—that is, whether any of the alternative designs, if implemented, would have actually prevented Dr. Bavlsik's injuries. JA 299. The jury heard expert testimony that "there were designs available [in 2003] that would have prevented Dr. Bavlsik's injuries." JA 211. And this testimony was based on evidence showing that these designs performed well enough in testing to prevent injuries like those that Dr. Bavlsik suffered. JA 191–92, 197–202, 204–10.

B. The court denies GM's original motions for judgment as a matter of law.

At the close of the plaintiffs' case, GM moved for judgment as a matter of law under Rule 50(a). JA 248–49. It argued that the plaintiffs had "not demonstrated that any alternative design actually if put in this vehicle would have made any difference." JA 249. "With respect to testing," GM did not deny that it failed to conduct any rollover testing on the GMC van, but complained that the plaintiffs "haven't said what the test should have been." *Id.*

The plaintiffs responded by pointing out that GM could have done "the exact testing they did in 2007." JA 251. "Had they done that test," and seen the results, GM likely would have implemented "some alternative—some of the many alternative designs that were offered into evidence in this case." JA 251–52. And these designs "would have prevented Dr. Bavlsik's injuries," based on expert calculations, because he "had 5 inches of head clearance," and it "takes another inch and a half of torso moving toward the head to cause the injury." JA 253.

The court denied the motion. *Id.* At the close of all evidence, GM again moved for judgment as a matter of law, contending that "there is nothing feasible that could have been done that would have prevented the injury," and the court again disagreed and submitted the case to the jury. JA 281–83.

C. GM does not object to the jury instructions or the verdict form.

The jury was instructed on all three of the plaintiffs' theories of liability. *See* Add. 1–6 (Special Verdict Form). Both the instructions and the verdict form made clear that, even if the jury found for GM on strict liability, it would then have to consider whether GM was negligent in the seat belt's design—an independent basis for liability. *See* Add. 1–4, 7–8. And they made clear that negligent design would be established if the jury found that (1) GM was "negligent in the design" of the van because its seat-belt-restraint system "was not adequately tested by defendant," and (2) this negligence "directly cause[d] damage to plaintiff Michael Bavlsik." Add. 3–4. GM did not object to either the jury instructions or the verdict form. JA 284–88, 291, 294–96.

D. The jury finds GM negligent but not strictly liable, and GM does not challenge the verdict on inconsistency grounds.

After more than two hours of deliberations, the jury submitted a note to the court. Referring to the amount of past medical costs that the parties had agreed to ($576,701), the jury asked: "is Dr. Bavlsik getting this money regardless of our decision?" JA 300. The court explained that the answer was no, the jury first had to "find[] the defendant liable for past health and personal care expenses." JA 304. The jury then deliberated for another two hours and returned a verdict in favor of Dr. Bavlsik, finding GM negligent but not strictly liable, and awarding Dr. Bavlsik

exactly $1 million in past damages but $0 in future damages. Add. 5–6. GM did not challenge the verdict as inconsistent before the jury was dismissed. JA 305–306.

E. The court vacates the liability finding under Rule 50.

Following the jury's verdict, both sides sought to set aside part (or all) of it. GM again moved for judgment as a matter of law under Rule 50, but this time it argued that "the findings of the jury compel" judgment in its favor, ECF No. 199, at 9—even though the jury found that GM was negligent and that its negligence directly caused Dr. Bavlsik's injuries, Add. 3–4. GM relegated its original arguments for judgment as a matter of law to a separate one-page section that cited no evidence, *see* ECF No. 199, at 8–9, and its original argument for judgment based on a failure to test to a footnote, *see id.* at 6 n.2. GM also argued, in the alternative, that a new trial should be granted because the verdict was a compromise. *Id.* at 9–11. For their part, the plaintiffs moved for a new trial on damages, claiming that "[t]he jury's award of zero future damages is inconsistent and contrary to undisputed evidence." ECF No. 197, at 1. They also made the alternative argument that the verdict was a true compromise, requiring a new trial on all issues. *Id.* at 7–8.

The court denied the parties' motions for a new trial based on a compromise verdict, concluding that "there is no question regarding the jury's limited finding of liability" because "[s]ubstantial evidence supports this finding." Add. 19. Yet the

court nevertheless vacated that liability finding and granted judgment to GM because it thought that the jury—by declining to impose strict liability—must have "found that the plaintiffs' van was not defective in its seat belt restraint system." Add. 13. Relying on this Court's decision in *McIntyre v. Everest & Jennings, Inc.*, 575 F.2d 155 (8th Cir. 1978), the district court determined that "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." Add. 14. For that reason alone, the court found that "there is insufficient evidence to support a verdict for plaintiffs for negligent design based upon a failure to test." Add. 15. The court did not, however, actually review any evidence.

As required by Rule 50(c)(1), the court proceeded to conditionally grant the plaintiffs' motion for 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." Add. 18. The court found that "the award of zero dollars for future health and personal care expenses is shockingly inadequate." *Id.* "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." *Id.* And GM itself suggested that Dr. Bavlsik "would need approximately $2.1 million in future care costs." Add. 17. The court

determined that it was "unjust" for the jury to "totally eliminate medical expenses" in light of this uncontroverted evidence." Add. 18.

SUMMARY OF ARGUMENT

I.A. The district court's grant of judgment as a matter of law to GM must be reversed because the district court failed to apply the correct standard under Rule 50(b). The grounds for a renewed motion under Rule 50(b) are limited to those asserted in an earlier Rule 50(a) motion. Thus, a party cannot use a Rule 50(b) motion as a vehicle to introduce a legal theory not raised in a motion for a directed verdict. And a jury's findings, of course, could not have been raised in a motion made before the jury's deliberations.

Here, "[b]y placing an undue emphasis on the jury's particular findings as to [strict liability]—and by repeatedly making decisions on the Rule 50 motion through the lens of what the jury found—the court engaged in an erroneous analysis." *Chaney*, 483 F.3d at 122. The court further compounded that error by granting judgment without resort to the evidence. As the Supreme Court has made clear, "in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record" and "draw all reasonable inferences in favor of the nonmoving party." *Reeves*, 530 U.S. at 150. Because the district court here did the opposite, its judgment must be reversed.

I.B. There is enough evidence to support the jury's liability findings. The plaintiffs had to persuade the jury that GM breached its "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"—which includes "a duty to inspect and to test for designs that would cause an unreasonable risk of foreseeable injury." *Larsen v. Gen. Motors Corp.*, 391 F.2d 495, 502, 505 (8th Cir. 1968). The key questions were (1) whether GM fell short of this duty in designing and testing the seat-belt system, and (2) whether that negligence caused Dr. Bavlsik's injuries. The jury answered yes to both, and ample evidence supports those answers.

As to the jury's finding of negligence, the district court itself recognized that "[s]ubstantial evidence supports this finding." Add. 19. GM's own representative admitted that GM "never tested the van's seat belt restraint system regarding driver movement during rollover events." Add. 15. And when GM finally did test the van, the belt flunked GM's own standards: Both crash-test dummies hit their heads on the roof, one with enough force to break its neck and cause paralysis.

As to the jury's finding of causation, the jury heard expert testimony that "there were designs available [when the 2003 van was created] that would have prevented Dr. Bavlsik's injuries." This was based on evidence showing that these designs performed well enough in testing to prevent injuries like Dr. Bavlsik's. That

is more than enough to sustain the jury's causation finding. In short, the district court did not err by submitting the negligence claim to the jury.

II. Finally, the liability findings are not internally inconsistent, and GM has waived any argument to the contrary. "It is well established, at least in this circuit, that a party waives any objection to an inconsistent verdict if [it] fails to object to the inconsistency before the jury is discharged." *Williams*, 26 F.3d at 1443. Here, any inconsistency would have been "caused by an improper jury instruction or verdict sheet," which "could have been corrected prior to submission of the case to the jury." *Kosmynka v. Polaris Indus., Inc.*, 462 F.3d 74, 84–85 (2d Cir. 2006). But GM never objected to either the negligence instruction or the verdict form.

Even setting aside GM's waiver, this Court has an obligation to "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). Under Missouri law, negligence and strict liability are "two distinct claims requiring proof of different legal elements." *Stanley v. Cottrell, Inc.*, 784 F.3d 454, 463 (8th Cir. 2015). "The difference between negligence and strict liability in tort is in strict liability we are talking about the condition (dangerousness) of an article which is designed in a particular way, while in negligence we are talking about the reasonableness of the manufacturer's actions in designing and selling the article as he did." *Blevins v. Cuhman Motors*, 551 S.W.2d 602, 608 (Mo. 1977).

In strict liability, "design defect theories address the situation in which a design is itself inadequate, rendering the product unreasonably dangerous." *Moore v. Ford Motor Co.*, 332 S.W.3d 749, 757 (Mo. 2011). And Missouri courts consistently reject attempts "to judicially define the terms 'defect' and 'unreasonably dangerous,'" instead opting to let the jury decide. *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 65 (Mo. 1999). So it would be wrong to conclude that the jury found that the seat-belt system was defect-free when it declined to impose strict liability. Instead, the jury could have rationally concluded that the problems with the belt's design—although serious enough to cause Dr. Bavlsik's injuries in this case—did not render the vehicle unreasonably dangerous per se.

Nor is the negligence verdict inconsistent with itself. The jury did not find that GM was negligent by failing to implement a *specific* improvement to the seat belt's design. But that does not mean that the seat belt was adequately designed—as the jury's causation finding confirms. The design, when it was tested, failed GM's *own safety standards,* meaning that it was defective by GM's own definition.

Because the district court erred in granting judgment as a matter of law, the correct course is to affirm the district court's conditional grant of a new trial on damages. *See Dominium Mgmt. Servs., Inc. v. Nationwide Housing Grp.*, 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).

LEGAL STANDARDS

Rule 50 standards. Subsection (a) of Rule 50 permits a party to move for judgment as a matter of law "at any time before the case is submitted to the jury," and allows the district court to grant the motion only if "a reasonable jury would not have a legally sufficient evidentiary basis to find for the [non-moving] party." Subsection (b) permits a party to "file a renewed motion for judgment as a matter of law" after the jury's verdict.

"The fact that Rule 50(b) uses the word 'renew[ed]' makes clear that a Rule 50(b) motion should be decided in the same way it would have been decided prior to the jury's verdict, and that the jury's particular findings are not germane to the legal analysis." *Chaney v. City of Orlando*, 483 F.3d 1221, 1228 (11th Cir. 2007). As this Court has put it: "The grounds for the renewed motion under Rule 50(b) are limited to those asserted in the earlier Rule 50(a) motion," meaning that "the movant cannot use a Rule 50(b) motion 'as a vehicle to introduce a legal theory not distinctly articulated in its close-of-evidence motion for a directed verdict.'" *Conseco Fin. Servicing Corp. v. N. Am. Mortg. Co.*, 381 F.3d 811, 821 (8th Cir. 2004); *see also Nassar v. Jackson*, 779 F.3d 547, 551 (8th Cir. 2015).

Hence, "the district court should not base its Rule 50(b) conclusions, in whole or in part, on the jury's determinations or attempt to apply or refute particular findings of the jury." 9 *Moore's Fed. Practice* § 50.63 (3d ed. 2009); *see* 9B

Wright & Miller, *Fed. Practice & Procedure Civil* § 2524 (3d ed.) ("The court [facing a Rule 50(b) motion] should not rely on the jury's findings but must make an independent assessment of the sufficiency of the nonmovant's evidence."). Instead, "the court should review all of the evidence in the record"—without "mak[ing] credibility determinations or weigh[ing] the evidence"—and "must draw all reasonable inferences in favor of the nonmoving party." *Reeves*, 530 U.S. at 150.

A "party seeking to overturn a jury verdict based on the insufficiency of the evidence [thus] faces an onerous burden." *Henderson v. Simmons Foods, Inc.*, 217 F.3d 612, 615 (8th Cir. 2000); *see Eich v. Bd. Of Regents for Cent. Mo. State Univ.*, 350 F.3d 752, 761 (8th Cir. 2003). "Post-verdict judgment as a matter of law is appropriate only where the evidence is entirely insufficient to support the verdict." *Belk v. City of Eldon*, 228 F.3d 872, 878 (8th Cir. 2000); *see also McKnight v. Johnson Controls*, 36 F.3d 1396, 1400 (8th Cir. 1994). This Court reviews *de novo* the district court's grant of a motion for judgment as a matter of law under Rule 50(b). *See Belk*, 228 F.3d at 877.

Rule 59 standards. By contrast, the district court's conditional grant of a new trial on damages under Rule 59 (and its denial of a new trial on all issues) is "reviewed with great deference" and "will not be reversed in the absence of a clear abuse of discretion." *Id.* at 878. "The key question is whether a new trial should have been granted to avoid a miscarriage of justice." *McKnight*, 36 F.3d at 1400.

ARGUMENT

I. The district court erroneously granted judgment as a matter of law under Rule 50(b)—vacating the jury's negligence finding—based on the jury's rejection of strict liability.

The district court failed to apply the correct standard under Rule 50(b). Rather than review the evidence and ask whether it could rationally support the jury's negligence and causation findings, the court did something else entirely: It vacated the jury's liability finding and entered judgment for GM based on *other* findings that the jury made—a clear violation of Rule 50(b). Had the court stayed on the right path, and asked the same question that it had already asked in deciding GM's original motions under Rule 50(a)—can the record support a negligence verdict?—it would have reached the same conclusion: yes.

A. In granting GM's post-verdict motion for judgment as a matter of law, the district court improperly relied on the jury's findings rather than reviewing the evidence.

The district court vacated the jury's negligence and causation findings for one reason: because the jury declined to impose strict liability, finding that Dr. Bavlsik's van was not "in a defective condition unreasonably dangerous." Add. 1; *see* Add. 13. The court reasoned that "[t]he jury's finding of no defect rendered the other finding of negligent failure to adequately test a legally insufficient basis for liability," and held—without reviewing the evidence—that there was "insufficient

evidence to support a verdict for plaintiffs for negligent design based upon a failure to test." Add. 15.

That was error. Even assuming that the jury's negligence and strict-liability findings cannot be reconciled (a point discussed in Part II), "[t]he 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." *In re Vivendi Universal, S.A. Sec. Litig.*, 765 F. Supp. 2d 512, 546 (S.D.N.Y. 2011). Rather, it is "to look at the trial evidence and assess whether that evidence was sufficient to support the verdict." *Id.*; *see Belk*, 228 F.3d at 878 ("Post-verdict judgment as a matter of law is appropriate only where the evidence is entirely insufficient to support the verdict."). Because "the jury's particular findings are not germane to the legal analysis," *Chaney*, 483 F.3d at 1228, 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. 9B Wright & Miller, *Fed. Practice & Procedure Civil* § 2524.

As the Eleventh Circuit explained in reversing a Rule 50(b) order that failed to apply this standard: "The court's order granting [the] renewed motion for judgment as a matter of law was predicated almost entirely on the special findings that the jury had made on the verdict form, and not on an assessment of whether there was sufficient evidence from which a reasonable jury could have rendered a verdict in [the non-movant's] favor." *Chaney*, 483 F.3d at 1228. "In doing so, the

court failed to comport with the proper legal standard for ruling on a motion pursuant to Rule 50 and impermissibly credited the jury's findings." *Id.*

Likewise here. Because GM did not (and could not) rely on any part of the jury's finding in its original Rule 50(a) motion, it could not do so in its renewed motion either. Thus, as in *Chaney*, "[t]he jury's findings should be excluded from the decision-making calculus," except "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.* "By placing an undue emphasis on the jury's particular findings as to [strict liability]—and by repeatedly making decisions on the Rule 50 motion through the lens of what the jury found—the [district] court engaged in an erroneous analysis in deciding [GM's] renewed motion for judgment as a matter of law." *Id.*; *see also Hubbard v. BankAtlantic Bank Corp.*, 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."). "Instead of considering whether the evidence was sufficient to support a verdict in favor of [Dr. Bavlsik], the court relied on the perceived inconsistency of two of the jury's [findings]." *Id.*

To the extent that the magistrate judge believed those findings to be inconsistent, the remedy would have been to have the jury "further consider its

answers and verdict," or to "order a new trial," Fed. R. Civ. P. 49(b)(4)—not to enter judgment in GM's favor (as discussed more fully in Part II). There is "no authority that authorizes a district court to grant judgment as a matter of law based on the jury's inconsistency on different claims." *Mosley v. Wilson*, 102 F.3d 85, 89 (3d Cir. 1996) (reversing district court's entry of judgment as a matter of law based on a perceived inconsistency in the verdict). "Indeed, the inappropriateness of entering judgment as a matter of law solely on the basis of inconsistent verdicts is evident in [Rule 50's] procedural requirements." *Id.* at 90. To repeat: "A motion for judgment as a matter of law rendered after trial must be made on grounds that were previously asserted in [the original] motion." *Id.* "Obviously the inconsistency of the verdicts could not have been raised in a motion for directed verdict prior to jury deliberations." *Id.*

The district court tried to justify its contrary approach not by grappling with any of this authority (none of which it cites), but by dusting off a nearly 40-year-old case, *McIntyre v. Everest & Jennings*, 575 F.2d 155 (8th Cir. 1978), in which a negligence verdict appears to have been vacated based in part on the jury's rejection of strict liability. *See* Add. 13–14. Although *McIntyre* admittedly has some superficial similarities to this case, it cannot authorize the district court's violation of Rule 50 here.

For starters, the plaintiff there apparently never argued that the jury's findings could not be credited in determining whether to grant a Rule 50 motion, and the court did not address this critical point, instead simply assuming that they could be. A "drive-by" ruling of this sort—where a question is simply "assumed without discussion by the Court"—has "no precedential effect" as to that question. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). Moreover, *McIntyre* rested on an understanding of state tort law that (as discussed at page 40 n.1, *infra*) has been outstripped by intervening developments. Finally, *McIntyre* did not involve the existence of a potential compromise verdict—which makes reliance on the jury's findings here especially improper. Here, as the district court found, "the award of zero dollars for future health and personal care expenses is shockingly inadequate." Add. 18. Indeed, true compromise verdicts by their very nature cannot be credited; they require a new trial on all issues, at least where the district court has committed a clear "abuse of discretion" in sustaining such a verdict. *See Boesing v. Spiess*, 540 F.3d 886, 890 (8th Cir. 2008).

At any rate, intervening precedent makes clear that *McIntyre* cannot withstand the weight that the district court placed on it. Since that decision, this Court has squarely (and repeatedly) held that "[t]he grounds for [a] renewed motion under Rule 50(b) are limited to those asserted in the earlier Rule 50(a) motion." *Conseco Fin. Servicing Corp.*, 381 F.3d at 821. A party "cannot use a Rule

50(b) motion 'as a vehicle to introduce a legal theory not distinctly articulated in its close-of-evidence motion for a directed verdict.'" *Id.*; *see also Walsh v. Nat'l Computer Sys., Inc.*, 332 F.3d 1150, 1158 (8th Cir. 2003) ("[P]ost-trial motion for judgment 'may not advance additional grounds that were not raised in the pre-verdict motion.'"). The jury's strict-liability finding in this case, of course, was not known at the close of evidence, so GM did not rely on it in moving for judgment under Rule 50(a). JA 248–49, 281; *see Mosley*, 102 F.3d at 90. GM instead focused on the evidence supporting causation, contending that the plaintiffs had "not demonstrated that any alternative design . . . would have made any difference." JA 249. GM's failure-to-test argument was even more circumscribed: It was limited to a complaint that the plaintiffs "haven't said what the test should have been." *Id.* That was it.

By deciding GM's post-verdict motion based on a different theory than one that GM advanced in its pre-verdict motion, the district court violated this Court's precedents. And by deciding the motion without reviewing any evidence, the court went wrong again and violated the Supreme Court's decision in *Reeves* (issued long after *McIntyre*). *Reeves* leaves no doubt that, "in entertaining a motion for judgment as a matter of law, the court should review all of the evidence in the record" and "draw all reasonable inferences in favor of the nonmoving party." 530 U.S. at 150. The district court's failure to review the record and find that "there is a complete

absence of probative facts to support the verdict"—as this Court requires to set aside a jury verdict, *Walsh*, 332 F.3d at 1158—mandates reversal of the court's entry of judgment under Rule 50.

B. GM is not entitled to judgment under Rule 50 because there is enough evidence to support the jury's negligence finding.

Had the district court followed the correct approach, it would have held that GM is not entitled to judgment as a matter of law—as the court itself recognized in denying GM's original Rule 50(a) motions. JA 249, 281–82.

It was right the first time. "To prove a negligent design claim under Missouri law" (which governs this case), "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." *Stanley*, 784 F.3d at 463; *see Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76, 98 (Mo. Ct. App. 1995); *Morrison v. Kubota Tractor Corp.*, 891 S.W.2d 422, 425 (Mo. Ct. App. 1994). Although "[t]he particular standard of care that society recognizes as applicable under a given set of facts is a question of law for the courts," the Missouri Supreme Court has explained that "[w]hether a defendant's conduct falls short of the standard of care is a question of fact for the jury." *Harris v. Niehaus*, 857 S.W.2d 222, 225 (Mo. 1993).

The legal standard of care in this case is clear. An automobile 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."

Larsen, 391 F.2d at 502. "This duty of reasonable care in design rests on common law negligence that a manufacturer of an article should use reasonable care in the design and manufacture of his product to eliminate any unreasonable risk of foreseeable injury." *Id.* at 503 (footnote omitted). As a corollary to the duty to use reasonable care in design, "the manufacturer has a duty to inspect and to test for designs that would cause an unreasonable risk of foreseeable injury." *Id.* at 505.

Both this Court and Missouri courts have recognized these fundamental duties. *See id.*; *McKnight*, 36 F.3d at 1411 (affirming jury verdict in product-defect case based on a negligent failure to design and test, and observing that "[f]ailure to test is a viable theory of recovery under Missouri law"); *Polk v. Ford Motor Co.*, 529 F.2d 259, 263 (8th Cir. 1976) (affirming jury verdict in automobile-collision case based on "negligent failure to design and test" under Missouri law); *Ford Motor Co. v. Zahn*, 265 F.2d 729, 731 (8th Cir. 1959) (affirming jury verdict in automobile-collision case based on negligent failure to inspect for reasonably foreseeable safety risks); *Cohagan v. Laclede Steel Co.*, 317 S.W.2d 452, 454 (Mo. 1958) ("[W]here it is shown that [a potential latent] 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.").

So the two central questions for the jury in this case were (1) whether GM fell short of the standard of reasonable care in designing and testing the van's seat-

belt-restraint system, and (2) whether that negligence caused Dr. Bavlsik's injuries. The jury answered yes to both questions, and there is more than enough evidence in the record to support the jury's answers.

As to the jury's finding that GM failed to exercise reasonable care in designing and testing the van: The district court itself recognized that "[s]ubstantial evidence supports this finding." Add. 19. GM's own expert witness (and corporate representative) "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." Add. 15; *see also* Add. 19 (citing ECF No. 197-4, at 184:5–188:16).

And when GM finally did test the van, in 2007, the results were dismal: The belt flunked GM's own safety standards, with both passenger dummies coming out of their seat belts and hitting their heads on the roof, one of them with enough force to break its neck and cause a paralyzing injury. JA 256–57 (test results showed 5,267 newtons of force); JA 260–64 (explaining that GM's injury threshold is at most 4,000 newtons, probably less). The results of testing conducted for purposes of this litigation were even worse, producing a force on the passenger's neck that was more than three times GM's injury threshold. JA 185–89 (13,394 newtons); JA 261 (GM's expert admitting that the "production test is three times the threshold"). This testing, as the plaintiffs' design expert testified, demonstrates that the seat belt

did not "provide a reasonable level of protection in a rollover." JA 166–80. There was enough evidence for the jury to conclude the same.

Indeed, GM's own testing on different vehicle models, conducted in the 1990s, shows that additional seat-belt safety features like pretensioners and all-beats-to-seat systems substantially reduced neck and head injuries by doing a better job of keeping the passenger affixed to the seat in a rollover. *See* JA 49–60; *see also* JA 275–78. The vast majority of vans had one of these features in 2003, and GM itself had pretensioners in some of its vans in that year. JA 267–68; *see* JA 220–21.

The Missouri Supreme Court has noted that a jury may consider "evidence of the relative safety of alternative designs" in deciding a "negligent design claim," because that evidence (although not required in Missouri) can be quite "relevant" to the ultimate question of negligence. *Moore*, 332 S.W.3d at 768; *see McKnight*, 36 F.3d at 1411 (holding that expert testimony of a "safer alternative" "used in the [product's] industry" is "sufficient evidence that [the defendant] failed to meet standards of ordinary care," and "evidence that [the defendant] did not test" the product for a design flaw is sufficient to submit a failure-to-test theory of negligence to the jury). Here, GM failed to implement a safer design in the 2003 heavy-duty Savana van, even though it had implemented a pretensioner in the light-duty model in early 2003 and additional features that prevent rollover injuries were widely available. JA 220–21. And GM failed to conduct tests that would have

revealed the design's inadequacy. JA 227–28. There is thus sufficient evidence in the record to support the jury's negligence finding. *See McKnight*, 36 F.3d at 1411; *see also TRW Vehicle Safety Sys. Inc. v. Moore*, 936 N.E.2d 201, 209–10 (Ind. 2010) ("That Ford elected to equip its 1997 Ford Explorer with a seatbelt system without utilizing the pretensioner technology it used for Ford vehicles manufactured in Europe constitutes probative evidence as to the issue of Ford's use of reasonable care. For the purpose of appellate review for sufficiency, such evidence may support a reasonable inference of seatbelt system design negligence.").

As to the jury's finding that GM's negligence directly caused Dr. Bavlsik's injuries: The jury heard expert testimony that "there were designs available [when the 2003 van was created] that would have prevented Dr. Bavlsik's injuries." JA 211. This testimony was based on evidence showing that these designs performed well enough in testing to prevent injuries like those that Dr. Bavlsik suffered. JA 191–92, 197–202, 204–210. That is sufficient to sustain the jury's causation finding. In short, the district court did not err by submitting the negligence claim to the jury.

II. The jury's liability findings are not internally inconsistent, and GM has waived any argument that they are.

GM's real objection to the liability finding may be its view that "the jury rendered an inconsistent verdict, having found (on the one hand) that [GM] was negligent and (on the other) that there was no defect in the [van's] design or

warning." *Kosmynka*, 462 F.3d at 82; *see Jarvis*, 283 F.3d at 43 ("Ford claim[s] that the jury's verdict was inconsistent because Ford could not have negligently designed the cruise control if there was no defect in its design."). If that were true—if the verdict were in fact irredeemably inconsistent, and if GM had preserved that argument below—then the judgment should "be vacated and a new trial ordered." *Id.*; *see* Fed. R. Civ. P. 49(b)(4) ("When the answers are inconsistent with each other and one or more is also inconsistent with the general verdict, judgment must not be entered; instead, the court must direct the jury to further consider its answers and verdict, or must order a new trial.").

Waiver. But "[i]t is well established, at least in this circuit, that a party waives any objection to an inconsistent verdict if [it] fails to object to the inconsistency before the jury is discharged." *Williams*, 26 F.3d at 1443; *see Parrish v. Luckie*, 963 F.2d 201, 207 (8th Cir. 1992) ("If a party feels that a jury verdict is inconsistent, it must object to the asserted inconsistency and move for resubmission of the inconsistent verdict before the jury is discharged or the party's right to seek a new trial is waived."); *Lockard v. Mo. Pac. R.R. Co.*, 894 F.2d 299, 304–05 (8th Cir. 1990) ("[I]f trial counsel fails to object to any asserted inconsistencies and does not move for resubmission of the inconsistent verdict before the jury is discharged, the party's right to seek a new trial is waived.").

"The purpose of the rule is to allow the original jury to eliminate any inconsistencies without the need to present the evidence to a new jury." *Lockard*, 894 F.2d at 304. Because GM "did not object to the verdict form" and did not "move[] to have the inconsistencies resubmitted to the jury for reconciliation," it waived its objection to the verdict. *Id.*; *see also Yazdianpour v. Safeblood Techs., Inc.*, 779 F.3d 530, 538 (8th Cir. 2015) (finding waiver); *Vivendi*, 765 F. Supp. 2d at 549–54 (observing that the defendant's "real argument" in seeking to overturn the jury's verdict was "that [it] was inconsistent," but finding that this argument was waived and that it was "possible to reconcile the jury's finding[s]" in any event).

A finding of waiver is particularly appropriate here because any inconsistency would have been "caused by an improper jury instruction or verdict sheet," which "could have been corrected prior to submission of the case to the jury." *Kosmynka*, 462 F.3d at 84–85. But GM did not object "to either the instruction or verdict sheet prior to submission of the case." *Id.*; *see* JA 284–88, 291, 294. Although GM's "current contention" seems to be that, "after determining that [GM] was not strictly liable, the jury should not have considered whether [GM] was negligent," GM "did not object to instructing the jury on both theories of liability or to the instruction in the jury charge and on the verdict sheet that the jury could find [GM] negligent but not strictly liable." *Jarvis*, 283 F.3d at 54–65 (vacating the district court's grant of judgment as a matter of law and reinstating

the verdict that Ford was negligent but not strictly liable, holding that any potential inconsistency between these findings "related to the jury instructions and verdict sheet," to which Ford had not properly objected under Rule 51).

That dooms GM's challenge to the jury's verdict. "When a party fails to object to a jury instruction, this court reviews for sufficiency of the evidence." *Guyton v. Tyson Foods, Inc.*, 767 F.3d 754, 761 (8th Cir. 2014); *see* Fed. R. Civ. P. 51. It "will not reverse a jury verdict for insufficient evidence unless 'after viewing the evidence in the light most favorable to the verdict, [it concludes] that no reasonable juror could have returned a verdict for the non-moving party.'" *Guyton*, 767 F.3d at 761; *see also McGuire v. Davidson Mfg. Corp.*, 398 F.3d 1005, 1010 (8th Cir. 2005) ("When a party fails to object to the format of the jury verdict form, we review only for plain error"—an exception to Rule 51 "confined to the exceptional case where the error has seriously affected the fairness, integrity, or public reputation of judicial proceedings," resulting in "a miscarriage of justice."); *Greaser v. State, Dept. of Corrs.*, 145 F.3d 979, 984 (8th Cir. 1998). As already shown, there was sufficient evidence here to support the jury's negligence finding.

Inconsistency. Even had GM preserved the argument, this Court should refrain from invalidating the jury's liability findings as inconsistent because they can be reconciled. This Court has an obligation to "harmonize inconsistent verdicts, viewing the case in any reasonable way that makes the verdicts

consistent." *Anheuser-Busch, Inc.*, 89 F.3d at 1347; *see Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 119 (1963). In fact, this Court's reluctance to overturn a jury verdict on inconsistency grounds is so great that it will do so only on insufficiency-of-the-evidence grounds. *See United States v. Whatley*, 133 F.3d 601, 606 (8th Cir. 1998) ("The only relevant question when reconciling inconsistent verdicts, as we have already said, is whether there was enough evidence presented to support the [verdict]."). Here, there is enough evidence to support the negligence verdict, and the jury's findings can be harmonized under Missouri law.

"Missouri courts have continually held that '[n]egligence and strict liability cases, though viewed similarly in some jurisdictions, are distinguished in our state.'" *Hopfer v. Neenah Foundry Co.*, 477 S.W.3d 116, 128 (Mo. Ct. App. 2015).[1] Or as this Court recently put it: They are "two distinct claims requiring proof of different

[1] To be sure, in *McIntyre*, this Court predicted that a Missouri court would hold that, under Missouri law as it existed at the time, "the jury's finding in favor of the defendant on the issue of strict liability precludes a finding of negligent design of an unstable commode or a negligent failure to perform tests of the commode's stability characteristics." 575 F.2d at 159. Since *McIntyre*, however, Missouri appellate courts have removed any doubt that strict liability and negligence are distinct theories—one is not dependent on the other. *See, e.g.*, *Hopfer*, 477 S.W.3d at 128. And this Court's precedent now reflects that. *See Stanley*, 784 F.3d at 463. "In a diversity case, the decision of an earlier panel of this circuit binds a later panel" only "until either an intervening opinion of the state supreme court or an intervening opinion of the state court of appeals, which we find to be the best evidence of the state's law." *Gerdes v. Fed. Home Loan Mortg.*, 561 F. App'x 573, 575 n.2 (8th Cir. 2014); *see Washington v. Countrywide Home Loans*, 747 F.3d 955, 957–58 (8th Cir. 2014).

legal elements." *Stanley*, 784 F.3d at 463. "[T]he difference between negligence and strict liability in tort in defective design cases is in strict liability we are talking about the condition (dangerousness) of an article which is designed in a particular way, while in negligence we are talking about the reasonableness of the manufacturer's actions in designing and selling the article as he did." *Blevins*, 551 S.W.2d at 608; *see also Nesselrode v. Exec. Beechcraft, Inc.*, 707 S.W.2d 371, 375 (Mo. 1986) ("[T]he focus of a products liability suit brought under a theory of strict tort liability is on the condition or character of the product rather than on the nature of the defendant's conduct.").[2]

Strict-liability "design defect theories address the situation in which a design is itself inadequate, rendering the product unreasonably dangerous." *Moore*, 332 S.W.3d at 757; *see* Mo. Rev. Stat. § 537.760 (strict-liability statute); *Pree v. Brunswick Corp.*, 983 F.2d 863, 865 (8th Cir. 1993); *Walker v. Paccar, Inc.*, 802 F.2d 1053, 1056

[2] Consistent with this distinction, Missouri courts have routinely allowed both strict-liability and negligence claims to go to a jury, as the district court did here. *See, e.g.*, *Richcreek v. Gen. Motors Corp.*, 908 S.W.2d 772, 777 (Mo. Ct. App. 1995) ("The courts have held a plaintiff may submit on both strict liability and negligence so long as there is no double recovery, saying there is no inconsistency between the two."); *Clayton Ctr. Assocs. v. W.R. Grace & Co.*, 861 S.W.2d 686, 689 (Mo. Ct. App. 1993) (submitting claims for "negligent design or failure to warn" and "strict liability for a product defect" as distinct theories, noting that "'[u]nreasonably dangerous' is an element in [only] the strict liability submission[]"); *see also Groppel Co. v. U.S. Gypsum Co.*, 616 S.W.2d 49, 56 (Mo. Ct. App. 1981) (noting that the fact that Missouri law "preclude[s] a strict liability action where the product was not unreasonably dangerous" does not require "dismissal of the case sub judice, a negligence action").

(8th Cir. 1986) (explaining that the "key issue for the jury" in a strict-liability case under Missouri law is whether "a design defect render[ed] the [product] unreasonably dangerous"). "In other words, '[t]he 'heart and soul' of a strict liability design defect case is unreasonable danger and causation.'" *Hopfer*, 477 S.W.3d at 128. And Missouri has consistently rejected attempts "to judicially define the terms 'defect' and 'unreasonably dangerous,'" instead opting to let the jury decide. *Rodriguez*, 996 S.W.2d at 65; *see Fink v. Foley-Belsaw Co.*, 983 F.2d 111, 114 (8th Cir. 1993).

So it is not true that the jury necessarily found that the seat-belt system was defect-free when it declined to impose strict liability. "[T]he basis for the jury's determination that [Dr. Bavlsik] had failed to prove [his] strict liability theory remains unknown." *Randall v. Warnaco Inc., Hirsch-Weis Div.*, 677 F.2d 1226, 1231 (8th Cir. 1982). The jury could have rationally concluded that the problems with the seat belt's design—although serious enough to cause Dr. Bavlsik's injuries in this case—did not render the vehicle 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*, 677 F.2d at 1231–32 (applying North Dakota law and reversing the district court's grant of judgment as a matter of law on the plaintiff's negligence claim, notwithstanding the jury's verdict for the defendant on strict liability, explaining that "a jury verdict for the plaintiff on a negligence claim is not inconsistent with a verdict for the defendant on a strict liability claim").[3]

More fundamentally, "[i]t is not enough for [GM] to argue that the jury's finding of negligence concludes that [the van] was defective, while its finding on strict liability states a contrary view." *Toner for Toner v. Lederle Labs.*, 828 F.2d 510,

[3] Courts in other jurisdictions that similarly maintain a distinction between strict liability and negligent design, as Missouri does, reach the same conclusion. *See, e.g.*, *Connelly v. Hyundai Motor Co.*, 351 F.3d 535, 540–42 (1st Cir. 2003) (rejecting Hyundai's argument that it was "entitled to relief because the jury's verdicts finding negligence, but not strict liability, are inconsistent," and finding that "the jury, consistent with its instructions and the evidence, could have found negligence without finding Hyundai strictly liable"); *Phillips v. Cricket Lighters*, 841 A.2d 1000, 1008 (Pa. 2003) (observing that "negligence and strict liability are distinct legal theories," so "it would be illogical . . . to dispose of Appellee's negligence claim based solely on our disposition of her strict liability claim."); *Chaulk v. Volkswagen of Am., Inc.*, 808 F.2d 639, 641 n.4 (7th Cir. 1986) ("Under Wisconsin law, in this case it was possible for plaintiff to recover for the negligent design of the 1977 Volkswagen Rabbit passenger door latch system, even though that system was not found to be defective and unreasonably dangerous for the purpose of a products liability claim."); *Giese v. Montgomery Ward, Inc.*, 331 N.W.2d 585, 596 (Wis. 1983) ("The jury's answers to the strict liability questions are completely independent of and irrelevant to its answer to the negligence questions. . . . Therefore the submission of the two theories was not error and the jurors' negative answers to strict liability in tort questions did not render its affirmative answers to the negligence questions invalid.").

513 (9th Cir. 1987). Because negligence and strict liability pose different questions under Missouri law, the "law and the instructions required the jury to examine the case from two different points of view." *Id.* (applying Idaho law). "It is reasonable to read the special verdicts as saying that [GM's] failure to [test its seat-belt design] was unreasonable conduct, although the danger posed by the product itself was not greater than an ordinary consumer would reasonably expect." *Id.*

Nor is the negligence verdict somehow inconsistent with itself. True, the jury did not find that GM was negligent by failing to implement a *specific* improvement to the seat belt's design. But that does not mean that the seat belt was adequately designed—as the jury's causation finding confirms. (Indeed, the design failed GM's *own safety standards*, meaning that it was defective under GM's own standards.) Dr. Bavlsik's theory of liability, as argued to the jury, was that GM, had it tested the van's seat belt to see how it performed during a rollover, likely would have implemented "*some alternative*—some of the many alternative designs that were offered into evidence in this case"—and that its failure to do so played a substantial role in causing Dr. Bavlsik's injury. JA 252 (emphasis added). The jury agreed. There is no inconsistency in doing so.

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. *Jarvis*, 283 F.3d at 38, 64–65. The Court should also affirm the district court's conditional grant of a new trial on damages. *Dominium Mgmt. Servs.*, 195 F.3d at 361.

Respectfully submitted,

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June 17, 2016

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

I hereby certify that my word processing program, Microsoft Word, counted 11,658 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
Deepak Gupta

June 17, 2016

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2016, I electronically filed the foregoing 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.

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