IN THE

SUPREME COURT OF VIRGINIA

Record No. 150391

HOLIDAY MOTOR CORPORATION,
MAZDA MOTOR CORPORATION,
MAZDA MOTOR OF AMERICA, INC. a California corporation
a/k/a MAZDA NORTH AMERICAN OPERATIONS (MNAO)

Appellants,

v.

SHANNON B. WALTERS,

Appellee.

AMICI CURIAE BRIEF OF ALLIANCE OF AUTOMOBILE MANUFACTURERS AND ASSOCIATION OF GLOBAL AUTOMAKERS IN SUPPORT OF APPELLANT

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INTEREST OF *AMICI CURIAE*

Amici are non-profit associations whose members operate in Virginia, throughout the United States, and in many other countries. Accordingly, *amici* have an interest in ensuring that Virginia's tort law is fair, follows traditional principles, and reflects sound public policy.

The Alliance of Automobile Manufacturers ("the Alliance") is a nonprofit trade association of car and light truck manufacturers, whose members include BMW Group of North America, FCA US LLC, Ford Motor Company, General Motors, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars North America, Toyota, Volkswagen Group of America, Inc., and Volvo Car Corporation.

The Association of Global Automakers ("Global Automakers"), formerly known as the Association of International Automobile Manufacturers (AIAM), is a nonprofit trade association whose members include the U.S. manufacturing and distribution subsidiaries of 13 international motor vehicle manufacturers, including: American Honda Motor Co., Inc., Aston Martin Lagonda of North America, Inc., Ferrari North America, Inc., Hyundai Motor America, Inc., Isuzu Motors America, LLC, Kia Motors America, Inc., Maserati North America, Inc., McLaren Automotive, Ltd., Nissan North America, Inc., Peugeot Motors of America,

Subaru of America, Inc., Suzuki Motor of America, Inc. and Toyota Motor North America, Inc.

Amici's members would be adversely impacted were this Court to allow a defendant to be subject to liability for an inherent feature of a car that Plaintiff chose to drive. Plaintiff's case was based on a factual theory solely supported by speculation of expert witnesses, not reliable scientific testimony. Allowing trial courts to bend traditional tort law and evidentiary principles in this manner would place *amici*'s members in the position of being subject to liability without fault and should not be the law in this Commonwealth. Counsel for Petitioners and Respondents have filed a blanket consent for the filing of amici briefs. See 5:30(b)(2).

STATEMENT OF THE CASE

Amici adopt Petitioners/Defendants' statement of the case to the extent necessary for the arguments in this brief.

ASSIGNMENTS OF ERROR & STANDARDS OF REVIEW

Amici adopt Petitioners/Defendants' assignments of error and standards of review as relevant to *amici*'s argument.

SUMMARY OF THE ARGUMENT

The trial court, through its evidentiary rulings, allowed Plaintiffs' counsel to create a legal fiction: that the failure of Plaintiff's ragtop

convertible to provide rollover protection here represented a design defect in the car, not an obvious, accepted limitation of the product. The trial court's clear sympathy toward this Plaintiff is understandable; she suffered severe debilitating injuries at the hands of an unknown motorist. However, the desire to provide her with compensation, here $20 million from Mazda Motor Corporation ("Mazda"), does not justify bending the Commonwealth's tort law and evidentiary rules. This Court should overturn the rulings below to assure that Virginia courts follow sound tort law and evidentiary rules so that the courts can continue to be relied upon to produce just outcomes.

The accident in this case occurred because a plastic pool fell off the roof of the vehicle on the highway in front of Plaintiff. When Plaintiff swerved hard out of the way of the pool, the force reportedly caused Plaintiff's car to flip and rollover. Plaintiff has fully acknowledged that she knew that ragtop convertibles do not provide rollover protection comparable to sedans or other hardtop vehicles. *See* App. 1294-1295. The Federal Motor Vehicle Safety Standard ("FMVSS") 216, which sets roof crush resistance standards for vehicles, specifically exempts ragtop convertibles. 49 C.F.R. § 571.216; *see also Death Rates Aren't Higher in Convertibles, But a Roof Still Is Safer*, Status Report, Vol. 42, No. 6, Special Issue: Crashworthiness of Convertibles, Highway Loss Data Inst., Ins. Inst. for

Highway Safety (May 31, 2007), http://www.iihs.org/iihs/sr/statusreport/article/42/6/3. Without the frame of a hardtop roof, the essential structure for such protection is missing. This is a known trade-off inherent to ragtop convertibles. *See Chrysler v. Dep't of Transp.*, 472 F.2d 659, 679 (6th Cir. 1972) ("[I]t is obvious that a soft top convertible is inherently incapable of passing" a rollover test.).[1]

As a result of the accident, Plaintiff sustained major injuries. The driver of the vehicle who caused this accident remains unknown; he or she did not stop to recover the pool, see if there was any damage, or help the injured. In an effort to receive money for her extensive injuries, Plaintiff is suing Mazda. Recovering from Mazda, though, requires the courts to legally undo her choice to drive a ragtop convertible; it must determine that

[1] Automobiles, like many products, provide consumers with choices. For example, a consumer can choose to drive a traditional sedan, a sports utility vehicle, a pick-up truck, a minivan, or a convertible. *See Top Ten Reasons Why Car Buyers Choose a Specific Vehicle Model*, J.D. Power Automotion Blog (Mar. 12, 2013), http://autos.jdpower.com/content/blog-post/jNFvVBH/top-10-reasons-why-car-buyers-choose-a-specific-vehicle-model.htm. Each vehicle comes with its own safety profile based on many factors, including the height and weight of the vehicle, the width of the wheel base, and the vehicle's center of gravity. Within these choices, and sometimes within the same car model, a consumer can choose among additional safety features, such as four-wheel drive, side curtain airbags, anti-lock brakes, and back-up warning systems. With respect to convertibles, some have hard tops and others have ragtops.

the failure of the Miata to provide rollover protection here was from an unreasonable defect in the car. Her expert's sole theory was that the two small latches connecting the ragtop roof to the windshield when closed were somehow supposed to provide rollover protection. The latches do not and were never intended to provide structural support in rollovers. Yet, the expert was allowed to use the fact that the latches came undone during the crash as a talisman for rationalizing an award.

This expert testimony was legally deficient and should not have been admitted into evidence. Contrary to this Court's ruling in *Hyundai Motor Co. v. Duncan*, 289 Va. 147, 766 S.E.2d 893 (2015), the expert was not required to show how the Miata was defective, how the defect could have been cured, or how the defect was a proximate cause of Plaintiff's injuries. The expert also never tested or proved his hypothesis, as required by this Court's precedent. *See id.*; *Keesee v. Donigan*, 259 Va. 157, 161-62, 524 S.E.2d 645, 647-48 (2000).

By admitting inappropriate expert testimony, the trial court imposed an impossible duty on manufacturers of ragtop convertibles: design a ragtop roof that provides rollover protection. Again, not even Plaintiff's expert offered a means by which a ragtop convertible *could* have provided such protection. *Amici* urge the Court to reverse the evidentiary rulings

below and require Virginia courts to uphold their responsibility to ensure that expert testimony adheres to reliable standards. Expert testimony must help courts to reach just results. The proper party for Plaintiff to sue was the driver of the vehicle whose pool was not secured properly. It is improper to hold responsible for Plaintiff's injuries the manufacturer of a car that was not shown to have any actual defects causing her harm.

ARGUMENT

I. RAGTOP CONVERTIBLES ARE NOT DEFECTIVE, OR "UNREASONABLY DANGEROUS," BECAUSE THEY DO NOT PROVIDE ROLLOVER PROTECTION

Plaintiff brought her claims under negligent design and implied warranty of merchantability, both of which require a showing that it was unreasonable for her ragtop convertible to not provide rollover protection. *See Logan v. Montgomery Ward & Co., Inc.*, 216 Va. 425, 428, 219 S.E.2d 685, 687 (1975) (setting elements and standards for negligent design and implied warranty of merchantability). Plaintiff, though, never put forward enough evidence to prove either cause of action, thus, failing to meet her burden of proof under Virginia law for establishing liability against Mazda.

With respect to her negligent design claim, Plaintiff had to show that the ragtop convertible was "unreasonably dangerous either for the use to which [the product] would ordinarily be put or for some other reasonably

foreseeable purpose." *Logan*, 216 Va. at 428, 219 S.E.2d at 687; *Dreisonstok v. Volkswagenwerk*, A.G., 489 F.2d 1066 (4th Cir. 1974) ("In every case, the utility and purpose of the particular type of vehicle will govern in varying degree the standards of safety to be observed in design."). The fact that Plaintiff sustained serious injuries from the rollover does not establish the existence of a defect. *See CNH Amer. LLC v. Smith*, 281 Va. 60, 67-68, 704 S.E.2d 372, 375-76 (2011); *Besser Co. v. Hansen*, 243 Va. 267, 276, 415 S.E.2d 138, 143-44 (1992) (a product need not be "accident-proof").[2] Otherwise, a manufacturer would be subject to "liability for every conceivably foreseeable accident, without regard to common sense or good policy." *Jeld-Wen, Inc. v. Gamble*, 256 Va. 144, 149, 501 S.E.2d 393, 397 (1998). Here, in order to prevail, Plaintiff had to show *how* the Miata was negligently designed and that the negligent design caused her injuries.

One means for proving negligent design is through the consumer expectation test, though Plaintiff did not argue an automobile consumer would expect that a ragtop convertible would provide rollover protection.

[2] Virginia law is consistent with the law in other states. See, e.g., *Claytor v. Gen. Motors Corp.*, 286 S.E.2d 129, 132 (S.C. 1982) ("Academically, it may be argued that all products are defective because they can be made more safe," but that is not the law).

To the contrary, as Defendants point out, Plaintiff fully acknowledged at trial that she knew the ragtop roof was not a structural part of the car and would not support the car's weight in a rollover. App. 1294-1295; *cf. Chrysler*, 472 F.2d at 679 ("[O]wners of convertibles would not be disappointed to find that they are being afforded less protection in this area.").

Another path to prove negligence is to show that a reasonable alternative design would have prevented Plaintiff from being harmed. To succeed under this theory, Plaintiff would have had to show that a reasonable manufacturer would have designed latches that provide such rollover support. Plaintiff did not show this. Plaintiff's expert merely proffered, unsubstantiated by evidence, that the latches that connected the ragtop to the windshield were defective because they came undone during the rollover crash. The expert's testimony focused on comparing the construction of the Miata latches with latches used by Ford in its Mustang ragtop convertible, stating that the Ford design had longer pins inside the latch. App. 827, 848-849. The Ford latch, though, was a mere strawman. While Ford's latch may have had longer pins, Plaintiff's expert expressly declined to assert that the design used by Ford, or any other latch design for that matter, would have provided rollover protection. App. 933.

The fact of the matter is that there is no reasonable alternative design for providing rollover protection in ragtop convertibles. The latches at issue here operate like latches between the top and bottom panes of a double hung window. When the window is closed, they create a snug fit to keep the weather and other outside elements out. But, just as window latches do not stop a window from being blown in during a violent storm, a convertible's latches do not provide protection from the force of a rollover.

In concluding that it could not establish roof crush requirements for ragtop convertibles, the National Highway Traffic Safety Administration ("NHTSA") expressly stated that there is no ragtop convertible design that would "be strong enough" to withstand a rollover crash. 74 Fed. Reg. 22,348, 22,375 (May 12, 2009). The lack of rollover support is an inherent feature of a ragtop convertible and an understood trade-off consumers make when choosing these cars.

Plaintiff's cause of action for implied warranty of merchantability fails for similar reasons. This theory requires a showing that Mazda's design for its ragtop convertible made the car entirely unfit for the consuming public. *See* Va. Code § 8.2-314(2)(a), (c) (a product is merchantable if it "pass[es] without objection in the trade" and is "fit for the ordinary purposes for which such goods are used"); *Logan*, 216 Va. at 428, 219 S.E.2d at 687. This is

the minimal standard for putting a product on the market,[3] and is determined by looking at government regulations, trade standards, and industry customs.[4] *See, e.g., Bayliner Marine Corp. v. Crow*, 257 Va. 121, 128, 509 S.E.2d 499, 503 (1999) (assessing trade standards); *Alevromagiros v. Hechinger Co.*, 993 F.2d 417, 420 (4th Cir. 1993) (assessing government regulations).

Here, as discussed above, FMVSS 216 specifically exempts convertibles from its roof crush resistance standards, 49 C.F.R. § 571.216, and there is no industry custom or standard for somehow providing rollover protection in ragtop convertibles. As indicated, Plaintiff's expert did not point to a single latch in the industry that would have provided rollover protection. Because the Miata was consistent with federal regulations, trade standards, and industry custom, it was merchantable.

Finally, both of Plaintiff's negligent design and implied warranty of merchantability causes of action fail because Plaintiff's experts never

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[3] *See Am. Suzuki Motor Corp. v. Sup. Court*, 37 Cal. App. 4th 1291, 1296 (Cal. Ct. App. 1995) (the defect must be "so basic that it renders the vehicle unfit for its ordinary purpose of providing transportation").

[4] "Society does not benefit from products that are excessively safe – for example, automobiles designed with maximum speeds of 20 miles per hour – any more than it benefits from products that are too risky. Society benefits the most when the right, or optimal amount of product safety is achieved." *Restatement, Third of Torts: Prods. Liab.* § 2 cmt. a (1998).

showed that any aspect of the Miata's design was the cause-in-fact of Plaintiff's injuries. *See* Dan B. Dobbs, The Law of Torts § 180, at 443 n.2 (2001) ("proximate cause limitations are fundamental and can apply in any kind of case"); W. Page Keeton et al., Prosser & Keeton on Torts § 41, 263 (5th ed. 1984) (requiring a "reasonable connection between the act or omission of the defendant and the damage" alleged).

Plaintiff's expert provided no evidence that the roof or any component should have provided structural support. Rather, Plaintiff's expert placed rhetoric over reason, simply asserting that had the latches not disconnected, the ragtop roof would have worked as a "system" with the windshield. App. 832. Even if the latches in Plaintiff's car remained connected, there was no evidence that the windshield would have bent less or in any way lessened her injuries. The expert's hypothesis for how Plaintiff's injury *might have* occurred is insufficient for proving that it did, in fact, occur that way. *See Atrium Unit Owners Ass'n v. King*, 266 Va. 288, 296, 585 S.E.2d 545, 549 (2003) ("Proof of 'possibility' of causal connection is not sufficient" for establishing causation.) (internal citation omitted).

This case shares some similar themes with *Jeld-Wen, Inc. v. Gamble*, 256 Va. 144, 501 S.E.2d 393 (1998) where a child pushed through a screen window and suffered severe injuries. There, the plaintiff alleged

that the window screen should have been designed to prevent such injuries. Yet, this Court acknowledged that a window screen, like the ragtop here, is not a safety device, but a protection from outside elements. *Id.* at 148-50, 396-97. The Court overturned a finding of liability against the screen's manufacturer because, even though the plaintiff was injured, the product's design was not defective. *Id*. As this Court held in *Funkhouser v. Ford Motor Co.*, without requiring proof of defect and causation "there would be no requirement for the danger to be attributable to the manufacturer in any way." 285 Va. 272, 282, 736 S.E.2d 309, 314 (2013).

Thus, even under Plaintiff's creative theories in this case, she cannot make out any cause of action against Mazda. The Court should reinforce its rulings here to make sure Virginia trial courts follow well-established law.

II. THE TRIAL COURT ALLOWED PLAINTIFF TO BASE THE ALLEGATIONS ON EXPERT TESTIMONY THAT WAS NOT GROUNDED IN FACT OR SOUND SCIENTIFIC PRINCIPLES

The jury's $20 million liability award against Mazda exposes the fundamental error in this case: the trial court's improper evidentiary decisions. Plaintiff's expert hypothesized about the latch design and causation, but this testimony was nothing more than mere "[s]peculation in the guise of scientific opinion" and should have been ruled inadmissible. *Brown v. Corbin*, 244 Va. 528, 533, 423 S.E.2d 176, 180 (1992); *CNH*

Amer. LLC, 281 Va. at 67, 704 S.E.2d at 375 (determining expert testimony not based in fact "is inadmissible").

As this Court appreciated in *Duncan*, the fact that a Plaintiff sustains major injuries does not justify subverting established evidentiary rules. *See Funkhouser*, 285 Va. at 272, 736 S.E.2d at 309 (involving other evidence testimony over negligent design); *Duncan*, 766 S.E.2d at 893 (involving expert testimony for implied warranty of merchantability). An expert must provide more than *ipse dixit* testimony that a plaintiff's injuries were caused by a defect in a car. *See Duncan*, 766 S.E.2d at 897 (holding that expert testimony is not admissible when "connected to existing data only by the *ipse dixit* of the expert") (citation omitted). Expert testimony, in order to be admissible, must be founded upon more than mere "assumptions that have no basis in fact." *Duncan*, 766 S.E.2d at 897 (citing *CNH Amer. LLC v. Smith*, 281 Va. 60, 67, 704 S.E.2d 372, 375 (2011)).

Yet, the trial court allowed Plaintiff's expert to testify that the Miata ragtop convertible was unreasonably dangerous even though he did not provide any evidentiary support for that conclusion. He did not test the Miata latches to see what, if any, support they could have given to the windshield if the "system" he testified would have existed had remained intact. He did not test the Ford Mustang latches that he suggested

provided a more stable design. He did not provide any empirical analysis of the force put on the windshield during the rollover, how much the windshield allegedly bent during the rollover, or how any design change would have prevented Plaintiff's injuries.

As in *Duncan*, the expert's testimony was solely "premised upon his assumption" that a differently designed latch would have resulted in lesser injuries to Plaintiff – "an assumption that clearly lacked a sufficient factual basis." *Id*. This "analytical gap" between the facts and this expert's conclusions is simply too great. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997). There are "too many missing variables to permit [the] expert to give his opinion." *Mary Washington Hosp., Inc., v. Gibson*, 228 Va. 95, 99, 319 S.E.2d 741, 743 (1984) (internal quotation omitted).

In an effort to bridge this "analytical gap," Plaintiff's expert was allowed to improperly influence the jury in two important ways. First, he impermissibly told the jury that "the crash spoke for itself." App. 872. In doing so, he told the jurors that they could draw inferences not supported by the facts. Second, he engaged in a highly prejudicial in-court test by jiggling the Miata's latches in his hand to convey that the latches were not sturdy. This in-court demonstration, though, had no relation to how the latches would have operated in Plaintiff's accident, where one side of the

latch was secured to the ragtop roof's bar and the other to the bar across the windshield. Defendant also observed that the in-court test used mismatched parts and the latches were not in a proper locked position. App. 1569-1574.

This Court has appreciated that demonstrations involving products at issue in a design case can be highly prejudicial when "conditions existing at the time of the tests and at the time relevant to the facts at issue" are not substantially similar. *Tittsworth v. Robinson*, 252 Va. 151, 154, 475 S.E.2d 261, 263 (1996). Such testimony has no probative value, but the visual from the test can improperly influence jurors. *See Featherall v. Firestone Tire & Rubber Co.*, 219 Va. 949, 961, 252 S.E.2d 358, 366 (1979) (explaining defendants must be provided "reasonable time to evaluate any conclusions of plaintiff's expert"). Plaintiff's factual theory in this case – from the design of the latches straight through to the causation of Plaintiffs injuries – were not "based on an adequate foundation" and should have been ruled inadmissible for not meeting the "basic requirements" for expert testimony. *John v. Im*, 263 Va. 315, 319-20, 559 S.E.2d 694, 696 (2002).

The lack of a systematic approach to Plaintiff's presentation of the facts and scientific theories in this case is not surprising given that there is no body of science that can prove that a ragtop convertible could

reasonably provide rollover protection. It also is likely a reflection of the trial court's decision to allow Plaintiff to change her factual theory between the first trial, which was non-suited, and the second trial, which resulted in a $20 million verdict against Mazda. In the first trial, Plaintiffs introduced an expert who was prepared to testify that Plaintiff's neck injuries were caused by her head striking the soft-top roof and the ground, not the windshield.

This Court should assure that Virginia trial courts are not places where the facts can change from trial to trial and experts can offer testimony that directly contradicts scientific principles and common sense.

III. THE COURT SHOULD ASSURE THAT VIRGINIA TRIAL COURTS PROPERLY MONITOR EXPERT TESTIMONY

Overturning the trial court's evidentiary rulings in this case is an important step toward assuring that expert scientific testimony in Virginia courts remains systematic, reliable, and predictable. The designation of someone as an "expert" provides the witness with a cloak of authority. There is a particular danger in cases, such as this one, where a plaintiff is seriously injured, the party at fault is not before the court, and the expert devises a plausible-enough-sounding theory for finding an alternative source for compensation. *See*, *e.g.*, *Oregon v. O'Key*, 899 P.2d 663, 678 n.20 (Or. 1995) (observing expert evidence "that does not meet the judicial standard for scientific validity can mislead, confuse, and mystify the jury.");

E. Bright Wilson, Jr., An Introduction to Scientific Research 26 (1952) ("Plausibility is not a substitute for evidence, however great may be the emotional wish to believe.").

This Court has made clear that, in every case, trial courts are required to make "a threshold finding of fact with respect to the reliability of the scientific method" before allowing the expert evidence from going to the jury. *See Spencer v. Commonwealth*, 240 Va. 78, 97, 393 S.E.2d 609, 621 (1990).[5] Because experts are permitted to reach conclusions on the ultimate issue in a case, their conclusions must flow from a well-articulated methodology. This "reliability analysis applies to all aspects of an expert's testimony: the methodology, the facts underlying the expert's opinion, the link between the facts and the conclusion, *et alia*." *Heller v. Shaw Indus. Inc.*, 167 F.3d 146, 155-58 (3d Cir. 1999).

[5] Courts around the country, along with legal observers, have broadly found that proper screening of expert testimony by the trial judge is essential because "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." Jack B. Weinstein, Rule 702 of the Federal Rules of Evidence is Sound, 138 F.R.D. 631, 632 (1991); *see also* Victor E. Schwartz & Cary Silverman, *The Draining of* Daubert *and the Recidivism of Junk Science in Federal and State Courts*, 35 Hofstra L. Rev. 217 (2006); Richard O. Faulk & Robert M. Hoffman, *Beyond* Daubert *and* Robertson*: Avoiding and Exploiting "Analytical Gaps" in Expert Testimony*, 33 Advoc. 71, 71 (2005).

The failure of Plaintiff's expert in this case to test any of his theories is fatal to the admissibility of his testimony. As a well-respected scientific research text states, "[t]he most important feature of a hypothesis is that it is a mere trial idea, a tentative suggestion concerning the nature of things. Until it has been *tested*, it should not be confused with *law*." E. Bright Wilson, Jr., An Introduction to Scientific Research 26 (1952) (emphasis in original); Frank Wolfs, Laboratory Experiments 1996-1997, Appendix E: Introduction to the Scientific Method ("The most fundamental error is to mistake the hypothesis for an explanation of a phenomenon, without performing experimental tests.").

Further, testing is particularly important in product liability cases, such as here, where the relative safety of an alternative design is the core issue. *See Dhillon v. Crown Controls Corp.*, 269 F.3d 865, 870 (7th Cir. 1996) ("In deciding whether an alternative design is appropriate, an expert needs to look at a number of considerations.") Other designs, such as the Ford latches, cannot be looked at in isolation because "[m]any of these considerations are product- and manufacturer-specific and cannot be readily determined without testing." *Id.* Thus, by failing to test any part of his hypothesis, Plaintiff's expert "proffered opinions [that] cannot fairly be characterized as scientific knowledge" and amount to "nothing more than

unverified statements unsupported by scientific methodology." *Chapman v. Maytag Corp.*, 297 F.3d 682, 686 (7th Cir. 2002).

The Federal Court of Appeals for the Seventh Circuit addressed these issues in a highly comparable case. *See Zaremba v. Gen. Motors Corp.*, 360 F.3d 355 (2d Cir. 2004). In *Zaremba*, passengers in a car hit by a drunk driver sued the manufacturer claiming that the car's "T-top" design was defective. As here, the plaintiff's expert witness alleged design defect, but had not examined or tested the car, had not created a drawing or prototype of an alternative design that would have prevented the injuries, and had not tested any such alternative design. *See id.* The doctor was "on even shakier ground" in testifying as to how the plaintiffs might have fared in the theoretical car. *Id.* There, the trial court properly ruled the testimony inadmissible and the Seventh Circuit affirmed. *Id.* at 358-59. The Seventh Circuit also listed many examples where courts have excluded testimony "regarding a safer alternative design where the expert failed to create drawings or models or administer tests." *Id.* at 358-59. These cases uphold the core function of courts, which is to seek the truth.

IV. THE COURT SHOULD OVERTURN THE LOWER COURT'S DECISION FOR SOUND PUBLIC POLICY REASONS

This Court should also condemn any hint of "[d]eep-pocket jurisprudence" by opposing liability on a party simply because it is able to

pay a judgment when the true culprit either cannot pay or is not available for litigation. *See Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 380 (Iowa 2014) (using this term in rejecting an attempt to subject a company to liability when its product did not cause the alleged injury). As the Supreme Court of Iowa observed last year, "deep pocket jurisprudence" has no place in product liability law. *Id*. Product manufacturers should not be subject to liability for inherent risks of their products. For example, above-ground swimming pools are not safe for diving, and motorcycles do not provide the same safety features as cars. Judicial decisions should not directly or indirectly, as in this case, require a design standard that cannot be met.

When there is no reasonable alternative design for a manufacturer to choose, design-related liability can cause the manufacturer to limit the availability of a product and deny consumer beneficial choices. The manufacturer would not be able to take the corrective action necessary to avoid liability in the future. Ragtop convertibles should continue to be, as was true in the instant case, a matter of consumer choice.[6] Whether the

[6] Congress made clear in adopting the National Traffic and Motor Vehicle Safety Act of 1966 that safety standards should not infringe on "affording consumers continued wide range of choices in the selection of motor vehicles," particularly when such standards "will eliminate or necessarily be the same for small cars or such widely accepted models as convertibles." S. Rep. No. 1301, at 2 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2714.

product at issue is a car, prescription medicine or an important safety device, improper design liability can have significant adverse impacts on consumers who want or need these products and are not before the court.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the trial court and enter judgment in favor of Defendants.

Respectfully submitted,

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Dated: November 10, 2015

CERTIFICATE

The undersigned hereby certifies that the foregoing Brief, containing 4,182 words, complies with Rules 5:17 and 5:30 of the Rules of the Supreme Court of Virginia, and further certifies as follows:

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(1) On this 10th day of November, 2015, ten copies of the foregoing Brief were delivered to Clerk's Office of the Supreme Court of Virginia for filing, and an electronic copy filed via VACES. Electronic copies of the foregoing Brief were delivered to counsel for the Respondent/Plaintiff via email.

(2) Counsel for *amici curiae* do not desire oral argument

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