

**ORAL ARGUMENT – 02-0932**  
**12-03-03**  
**GENERAL MOTORS V. IRACHETA**

**CALLAWAY:** This is a crash-worthiness case where the central issue is, was there legally sufficient evidence of producing cause when the CA has based its holding solely on the existence of a defect? And here that defect is that the vehicle was syphoned.

Both, Iracheta's proof at trial and the CA's legally sufficiency review, focuses solely on the existence of a defect, and, therefore, omits a very critical element of producing cause, and that is causation. Did the defect cause an injury producing event? And here the injury producing event is the second fire, the gasoline fire that we've all called the whoosh because of the sound it makes.

Here the defect quite simply did not cause the injury producing event, because according to the only expert qualified to testify, at least plaintiff's expert, qualified to testify on syphoning on fuel system defects, the defect and the syphoning is in the front of the vehicle, and according to plaintiff's only expert qualified to testify on fire and causation, origin the fire, the injury producing event is in the rear of the vehicle. And the fire causation expert says the syphoning in the front absolutely cannot cause the defect in the rear. So you can't get the two together.

**PHILLIPS:** The operative word of your statement is qualified to testify. And I believe the argument was over Mr. Sanchez's testimony. So should we just turn to that on whether or not you've properly preserved any objection that you might have had to his qualifications and whether he was qualified or not?

**CALLAWAY:** Certainly as the CA noted and held, GM both in a motion and at a hearing that was held before trial, moved first to exclude Ed Sanchez testimony totally saying he wasn't qualified on fire and causation. That's not at issue here. In the same motion and at the same hearing they made the argument, in his deposition he had given some opinion saying Well, I think the car syphoned. I feel like it syphoned at the rear, but I don't know. I don't know where it syphoned. And we said he's not qualified to give any opinion on syphoning. And at trial it's clearly established by his own testimony that he's not qualified to do so. He said, I don't know anything about automobile design. I don't know anything about fuel systems. I don't know anything about the principles of syphoning. And he in fact demonstrates that he doesn't know anything about the principles of syphoning. And so we say he's not qualified to do that.

Iracheta argues, well you withdrew that objection. And the court overrules our motion and our objection. And Iracheta says well you withdrew that objection, because in the course of the hearing Iracheta has responded to our argument about exclusion because he's not qualified on the fire causation. And the judge says well does he need to talk about syphoning? And GM counsel says no. And the reason is, we could never have excluded his testimony entirely on just the fact that

he couldn't give evidence as to syphoning. He was there to talk about fire causation and so that's what we're saying. We're absolutely right. That's not a withdrawal. You look to that entire transcript of the hearing. And there's no word of well we withdraw our whole objection. It was just that no, we're not moving to exclude him on the basis of his syphoning. But that doesn't change it. And in Ellis this court says so long as you raise an objection to the qualifications, and we did. And moreover he establishes at trial by his very own evidence. And I would say to the court that whether he's qualified or not doesn't end the complete inquiry.

Let's say his evidence comes in. Let's say the CA for purposes of this argument, let's say that the CA is wrong, that that evidence comes in. We've now got to apply a circumstantial evidence, no evidence standard of review to that evidence. It's not direct evidence. Because remember what Sanchez's opinion on the defect is, is that the rear rubber hose did not burn through. That's what the fuel expert says: I think it burned through.

O'NEILL: Well he didn't actually say that. He said it could have.

CALLAWAY: He says there's one explanation...

O'NEILL: He said a possible explanation. Here's why I'm confused. It seems to me that the witnesses seem to agree that it doesn't matter where the line opened up. And that's what the CA turned its opinion on, whether it opened up at the front or the back doesn't matter because the defect is syphoning.

CALLAWAY: You're absolutely right about what the CA said and what Stilson said. Stilson gets confronted with well Sanchez says it's syphoned at the back and you say it's syphoned at the front. How do you explain that? He said, well it doesn't make any difference because it syphons. That's the defect. And keep in mind that Stilson is the defect expert. He has put his defect blinders on and that's all he's looking at. And rightly so. That's all he should be looking at. But the finding of a defect, and that is GM's whole point about the CA's holding is that all it does it say that it's a defect. And as far as a defect it doesn't matter whether it syphons at the front or the back. But to get that the defect produces the fire, it does matter.

O'NEILL: It seems like they say whether it opened at the front or the back, the syphoning caused there to be fuel that shouldn't have been there. So it doesn't matter where it ignited. The defect caused the fuel to be there.

CALLAWAY: Well staying with the circumstantial evidence review, the thing the courts got to do is look at the reasonableness of that opinion. At the same time even in a traditional no evidence standard of review, the court does not disregard undisputed evidence that has only one logical inference. And there's a body of evidence in this case that nobody disagrees with, and that's basic fluid mechanic principles.

O'NEILL: It seems like the experts say it doesn't matter where it opened up. It allowed

gas to be around. It allowed gas out of the fuel system. Eyewitness testimony - ignition in the rear. Why is that not enough?

CALLAWAY: That's what I'm headed to with this basic physics principles, basic syphoning principles. And the first one is, to syphon you've got to have a closed line. And it's got to open up in one place, and only one place. If it opens up in two places, you don't have the necessary pressure differential so that it will syphon. Because remember to syphon it's got to draw gasoline out of the tank. And here's a second principle why that will not work, and nobody in the trial disputes that fact. And in fact it's the whole principle behind \_\_\_\_\_. If you put a hole in a straw it won't syphon liquid up.

Here under the evidence as it stands, remember that in the crash the vehicle hits the 18-wheeler with its left side. The fuel system lines (these return lines that we are concerned with) are going down the left side. So that part of the system bears the brunt of the crash.

Stillson's evidence says, well there's damage here and that's why he comes to the conclusion it's syphoned in the front. He says there's no crimping, there's no damage in the back. GM's expert again undisputed says, it would take a 1,000 lbs of pressure to compromise that hose, to make it break or come off. And if there had been a 1,000 lbs of pressure back here like there was up at the front to crimp the lines, then you would have had damage to the lines. And it's undisputed in the record, there's no damage to these fuel lines back here.

The second principal of syphoning, which means that Sanchez's opinion that it syphoned in the rear won't work is, at the crash there's damage here.

O'NEILL: You're making a leap here. Let's presume that it did syphon in the front. How does that make you win? I mean my understanding of their testimony is whether it syphoned in the front or back doesn't matter. Let's presume it syphoned in the front. That allowed gas out of the system.

CALLAWAY: Here's why. There are two reasons. The first reason is, Sanchez's opinion is the hose compromised at impact. You know you've got damage up here if you have simultaneous impact, and impact is like that and over, you have simultaneous opening of that fuel line, there's no pressure to syphon. So it's can't syphon. If it's compromised at both ends it can't syphon.

The second reason that we win, and that this theory doesn't work, and it's the reason that Sanchez changes his testimony and moves the syphoning. You recall the 18-wheeler's diesel spilled, there's a huge diesel fire, so much so that three grown men can't get Edgar out of the car, because the seatbelt is too hot, the doors are too hot, there's fire on the console, the fire wall has been broken down, there's fire coming into the vehicle. There's a huge diesel fire going on right near where those fuel lines come into the engine.

So if the syphoning takes place there under the fire causing origin expert, if

the syphoning is right there, you have got an explosion or a whoosh much, much, much faster than the 5-10 minutes. And it's undisputed everyone accepts that there was a 5-10 minute delay, and you're not going to get that if gasoline is leaking out right next to this fire. And that's why Sanchez's opinion under a circumstantial evidence review, even if it comes in, even if you decide the CA was wrong and he was qualified to say that, it doesn't work. It's not a reasonable inference. It's not a reasonable inference under the evidence, because a second thing you've got to look at when you do a circumstantial evidence review is what did the jury have to disbelieve in order to reach this opinion? Well Stillson will never back off of his testimony. He will say it opened up in the rear. Opening up is not the same. Opening up just means that there is a hole in it. It does not mean that gas is coming out of that hole. Iracheta's sole theory of this case is that gas had to syphon out for a period of 5-10 minutes. And that's a good period of time that it had to syphon out that long.

WAINWRIGHT: The briefing indicates that the objection to Sanchez's changing opinion, if that's what it was, and failure to supplement just what you argue, wasn't made until after the close of your cross-examination of him. Was that too late?

CALLAWAY: In my opinion it was not. There are really two ways that we would go at Sanchez's opinion. We would go at it as CJ Phillips referred to with he's just not qualified, and then we also attack it under the duty to supplement.

WAINWRIGHT: The change in opinion that you're complaining about occurred during his direct examination?

CALLAWAY: It's about 77 pages into his direct. And the problem you have is that Sanchez testifies first. We've had depositions from both of them. Stillson says syphoning is in the front. Sanchez says I don't know. The fire is in the back. We get to trial and Sanchez testifies first. And one of the first things he says in his direct is well Stillson says it syphons in the rear. So we're sitting there thinking well I guess Stillson's going to change his testimony, so we don't know for a long period of time whether Stillson in deed is going to change his testimony.

Now I don't know if what Sanchez was trying to do was sort of play a slight of hand, which I would say to you the CA bought into, and that was opening up is the same as syphoning, and it is not. That's our problem there. If Stilson had gone on first and we had known that Stilson's opinion was it syphoned in the front, yes, it opened up in the rear, but it syphoned, and he uses the word "initially". And as I said earlier, that's almost a redundant thing to say because there is no initial and secondary syphoning. There is one syphoning. It happens one time. If you put another hold in that line syphoning stops.

WAINWRIGHT: Do you know what page in the record Sanchez's statement that you just mentioned is? There are excerpts from some of the examination of cross in here. Do you know what page that specific reference is?

CALLAWAY: I don't recall but I will get it to you on rebuttal.

WAINWRIGHT: You said that Sanchez's statement about what Stilson was going to testify to has confused you a little bit, made you wonder was happening. But then you still continued through your entire cross examination before raising that objection. Talk about why there was the wait until the end of cross to object on that basis?

CALLAWAY: Because we've got to try to figure out is our objection to duty to supplement more properly focused on Stilson. And we're trying to figure that out. And there's case law that says that you've got to make an objection, and just because the witnesses's testimony is over does not change the fact. And when you step back and look at all the circumstances of it, he has definitely changed his opinion from that, and it's not what he told us. Stilson has not changed his opinion.

WAINWRIGHT: If your quandary was trying to decide whether your objection should be to Stilson's testimony rather than Sanchez's, wouldn't that suggest that the objection would have waited until Stilson testified then so you could see exactly what Stilson was going to say?

CALLAWAY: I suppose we could have.

WAINWRIGHT: Wouldn't that have provided the answer to the quandary that you raised?

CALLAWAY: I suppose it would have.

WAINWRIGHT: So why did you raise the objection at the end of Sanchez's cross rather than Stilson's testimony?

CALLAWAY: I quite frankly can't answer that because all I've seen is the record. I don't know what was going through the litigator's mind. But they are trying to deal with a change, a complete and different change in the theory of the defect.

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RESPONDENT

SOULES: There are three features of this case that are predicate features that are at this point undisputed for any purpose of further progress of this case. One, that there was a product defect in the failure of GM to provide anti-syphoning mechanism in the fuel return line. Two, that the fire that killed Edgar Iracheta was a gasoline fire. And three, that that gasoline came from the Toronado.

GM's argument today focuses on the question of causation. And the entire testimony of Stilson and Sanchez of course needs to be reviewed very carefully in that regard. I would like to start with Stilson because that sets us the defect which is no longer disputed. Stilson testified that the return line opened at both ends. Now this was a 10-year old vehicle where rubber hoses connected a steel line that ran along the lefthand side of the car frame, and one end was connected by that rubber hose to a device that entered into the fuel tank, the other end was connected

by a rubber hose to the engine system to return unused fuel backwards.

He then testifies of course that the - he doesn't say that if it opens at both ends there can't be syphoning, because of course there can be. If there were only one opening it would syphon it only one place, but it's going to syphon at the earliest place wherever it finds an opening. And that's going to be at the rear where Sanchez testified the fire occurred, and where Stilson says the return line opened at both ends.

This is not a circumstantial evidence case on causation. We do see cases where when all the evidence there is circumstantial you have to look at all the circumstantial evidence to see whether an inference has been drawn by the jury is a reasonable one. Here we have not only circumstantial evidence, and that really goes to the hoses because they were burned and destroyed and there was no way to visualize and recreate what they were. You had to go to circumstantial evidence to determine where the spill occurred.

O'NEILL: Does causation depend on whether syphoning occurred at the rear?

SOULES: In this case I think the answer to that is yes and no. The whoosh that did occur was the result of vapors according to Mr. Sanchez's testimony. And there was fire in the engine compartment. Whether or not vapors could have formed in the front had there been syphoning in the front is a question that's unresolved in this record. Now GM's own expert Guerrera testified that the crimps in the front of the fuel return line would preclude the fuel passing through the front of that line. GM's own testimony.

O'NEILL: You do have to show syphoning occurred at the rear to get causation here on this record, because it would be inconclusive if there were only syphoning at the front?

SOULES: We have to present evidence that a jury could reasonably find that the syphoning caused a spill at the rear of the car. Yes.

O'NEILL: Does it matter how the rear opened up? Does it matter whether it burned through or whether it was caused by the collision?

SOULES: I think it may. And the reason for that is the whoosh. Again it comes back to how did this car suddenly after several minutes - from 10 to 20 minutes - become engulfed in this cloud of flames that ultimately killed Edgar Iracheta? If the line burned there could have been just a jet stream of flame like at the end of a welding torch, which might not create that whoosh. And here the spill at the rear where there was no immediate fire, or no testimony that there was any immediate fire, falling on the ground, creating a vapor that spread until it found an ignition source, and then exploded is what Mr. Sanchez's testimony establishes. Also the eyewitnesses, they were at the vehicle, and that's why this is not a circumstantial evidence case altogether, testified that the fire came from the rear, the whoosh came from the rear. And Mr. Sanchez in his investigation in reaching his conclusions talked to all of those eyewitnesses, talked to Stilson, observed the replica

of the car, observed the car itself, the damage that went all down the side of the car, including the rear where the rear hose was broken, and that's how he came to his opinion that the rear hose was broken and that's where it syphoned.

BRISTER: But the defect you're claiming is the syphoning, not rubber hoses or anything like that?

SOULES: That's correct. The defect is the failure. Not only do we claim it, but now it's undisputed...

BRISTER: Anti-syphoning device.

SOULES: To provide an anti-syphoning device...

BRISTER: So since that's your defect you've got to have causation tied to that defect.

SOULES: Correct. And the way the causation is tied to that defect is by eyewitness testimony saying that the fire came from the rear of the car. And Sanchez's testimony that the way that cloud of vapor became established was that the spill occurred at the rear of the car and the vapors then spread to an ignition source that engulfed the car.

O'NEILL: Stilson says there was syphoning and that's a defect. But Stilson speculates that it occurred at the front end.

SOULES: Yes. Where there seems to be issues of confusion or perhaps disagreement among the experts of the plaintiff here is on the very outer reaches of their expertise. Stilson doesn't really know whether that hose burned or didn't burn. That's not his real area of expertise. Or how it opened up. The fire caused an origin, and propagation expert is Sanchez.

O'NEILL: So Stilson says that the vehicle syphons and is defected. I think it syphoned at the front. He doesn't say I think it syphoned at the back. Would that be right?

SOULES: That would be right except we need to add to that his testimony that the system opened at both ends. That the fuel return line that runs along the frame of the car was disconnected at both ends.

O'NEILL: So he says he thinks it syphoned at the front. There's no direct testimony from him it syphoned at the back, but his testimony doesn't exclude it syphoning at the back. So in order to get syphoning at the back you've got to have Sanchez say that's where it happened?

SOULES: That is correct. And Stilson in his testimony says exactly that. In slightly different words of course.

O'NEILL: It's up to the origin expert.

SOULES: That I defer to Mr. Sanchez. He knows more about that than I do.

O'NEILL: So if Sanchez is not qualified to testify on where syphoning occurred, is there any other way you can get to the causation piece here? In other words does their opinion depend upon whether he's qualified on syphoning or not?

SOULES: No. It does not. If the court reads the very last page of Tab 2 of our brief, it becomes very clear that what was said at the \_\_\_\_ hearing was we do not challenge Mr. Sanchez on syphoning.

HECHT: But he himself says he doesn't know anything about it.

SOULES: He himself says he does not know the mechanics of syphoning, but he does know where the fuel spilled. So we have to have Stilson testify about the mechanics of syphoning and how it can occur. Stilson then says it opened at both ends. We put that together with Sanchez's testimony that the fuel spilled at the rear, and the eyewitness testimony that the explosion began at the rear, and that place is where the syphoning occurred.

HECHT: But the problem that we're struggling with, it's not quite hooked up is whether the gas at the rear (gasoline fumes at the rear) came from syphoning.

SOULES: Mr. Stilson ran experiments with a replica car, set the car up exactly at the same angles, he used water instead of gasoline, and established that in the circumstances of this accident that fuel system will syphon.

HECHT: It's essential to your position that the gasoline at the back of the car came from syphoning?

SOULES: Of course, because that connects it to the defect, which is the only exposure that GM has in this case, which they admit.

O'NEILL: Does Stilson say it could have happened at each end? I know he says it doesn't matter whether it did or not, but does he ever say I think it was the front, but it could have happened at the back as well? I will leave that to Sanchez to determine where the flashpoint was.

SOULES: He does not say that exactly. He said in his opinion the return line fuel system opened at both ends.

BRISTER: Does gas vapors travel up hill?

SOULES: It would depend on the atmospheric conditions. They would be contained to



some extent by the structure that surrounds the vapors, which was of course the car.

BRISTER: We can't have clients standing up talking to the jury during closing arguments. Correct? In other words, OJ stands up during closing argument and says I didn't kill her. That's got to be error doesn't it?

SOULES: It may be error.

BRISTER: We will get to harmful and objection later. But that's got to be wrong. I mean closing argument is not the time for clients to talk to the jury. Right?

SOULES: I would agree with that.

BRISTER: Now at closing argument, a client stands up and speaks to an all Hispanic jury in Spanish. What happens when the defense attorney objects to them speaking in Spanish? That puts the defense attorney in a very ticklish position.

SOULES: What happened here of course was that the only objection was made - there was no objection made until later.

BRISTER: What's an all Hispanic jury - I'm thinking I've got an all Hispanic jury, somebody just says something to them in Spanish, assume I don't speak Spanish, and I object to anybody saying anything in Spanish. That's a minefield. Right?

SOULES: I don't know about a minefield, but they obviously knew...

BRISTER: There is the potential that the jury is going to think, I think there's something wrong with Spanish.

SOULES: Unless there's going to be objection, preservation of error, and so forth which you've indicated we are going to get to, can be handled in many ways. And it was handled in this case by GM's counsel arguing to the jury in Spanish.

PHILLIPS: I'm concerned about the jury charge, the limiting instruction. And your brief seems to focus on the fact that there was no objection to it, or it was invited, etc. I'm interested in the underlying legal point. I don't know if we will get to that, but do you have cases that say that it's permissible to essentially remove from the jury the plaintiff's conduct in causing the accident where the mother is clearly at fault, to remove that in looking at the product defect?

SOULES: The authority is actually in the Civ. Pract. & Rem. Code §23, where the liability of other responsible party can only be for any part of the damages caused by that other responsible party, or that is a way that the charge can be submitted under Ch. 33. Here Mrs. Iracheta's negligence was not excluded. There is a series of questions. Did her negligence

proximately cause the injury to Edgar Iracheta after the whoosh? The jury said no. Of course the definition of proximate cause includes the element of foreseeability is what we rely on. Could she reasonably foresee that there would be a syphoning because of a product defect in the car after that accident? The jury said no. They found that GM did have a product defect. And I think when you stitch together products liability and ordinary negligence and then a comparative question which did follow those, but was not answered because it was conditioned on being yes to Mrs. Iracheta and yes to GM, that that is the logical and simple way to instruct a jury. Otherwise, a single question on comparative is going to get pretty convoluted.

PHILLIPS: I understand the logic of your position. Is it fair to say there's no case authority in point with a situation like this, where you have an accident and then intervening time before something else happens that you can plausibly argue is related to the product and not to the initial negligence?

SOULES: I believe that we cite cases where that has been the case, where there is an event that occurs after the initial accident that causes damage in and of itself and that gets the courts attention and focus in and of itself.

O'NEILL: It's critical to your case that someone testifies the mechanics of syphoning when both ends of the line are opened up will allow syphoning at both ends?

SOULES: No. It won't allow syphoning at both ends because the syphoning is going to occur at the first break.

O'NEILL: So it would be critical then that someone testified the rear was the first break?

SOULES: That the rear is the first break, and that is established by circumstantial evidence in this case.

HECHT: The rear has to be the first break. Right?

SOULES: The rear would have to be the first break because it's the first opening from the gas tank forward. Or course.

WAINWRIGHT: You say that Mr. Stilson testified that there was an opening at the front end at the back. I see that in the excerpt in Ex. 4. Mr. Stilson in this excerpt, however, as I read it, is never able to say when both ends opened up. It just says by the end of the entire event both ends were opened. Isn't it important to determine when both ends opened up if it is as you've indicated critical that the syphoning occurred in the back and the gas fire occurred in the back?

SOULES: That is important, and the testimony of Mr. Sanchez doing his forensics establishes that.

WAINWRIGHT: But Mr. Stilson's never able to say when both ends were opened was he, or is there some additional testimony that I didn't see?

SOULES: Of course there's direct evidence that there was enormous trauma to the vehicle at the point of the rear hose. And then of course the fire originated there, and propagated from there. That is the evidence.

O'NEILL: Why does Stilson think syphoning occurred at the front end?

SOULES: I do not know. He gave that opinion again out on the outer reaches where his own expertise - he is not a fire caused origin and propagation expert.

O'NEILL: So he says it will syphon at the first point of rupture?

SOULES: He doesn't say that. Once you have the point of rupture, then of course the line will empty and that's the end of the gasoline that's going to go through the line going forward.

O'NEILL: So he just says this doesn't have an anti-syphoning device. That's the defect. And Sanchez will have to tell you where it accumulated?

SOULES: That's true.

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#### REBUTTAL

CALLAWAY: J. O'Neill if I can pick up on your question. Why does Stilson say it syphoned at the front? And the reason is, he says it opened up both places. Both hoses burned through. There is no evidence of compromising at the back. So Stilson is not qualified to talk about where it syphoned. He only talks about what caused the fire.

Back to the hoses point. He can't say what happened because it's burned away and there's no damage back here. The reason he can say it opened up at the front, and he can reasonably say that, is the fuel lines are damaged at the front. And that hose is gone to, but he knows the fuel lines are damaged there, and if they are damaged there it makes sense that that's where the hole was. And that is the reason Stilson, and that is not outside his expertise, that is precisely why he was there and the jury has to affirmatively disbelieve that in a circumstantial evidence review.

I am going to disagree strongly with Iracheta here, that this is not a circumstantial evidence review.

If you go down to the only evidence of syphoning at the rear, which we've established this morning as critical, that's where it's got to syphon, and it's got to syphon there first because there's only one syphoning. It's gotta go there first. In order to establish that, we've got to

look at this record. What's the evidence of that? The only evidence of syphoning, not opening up, but syphoning at the rear is Sanchez. And then we apply a circumstantial evidence review, because that hose is burned through there is no \_\_\_ evidence.

O'NEILL: I thought it was undisputed the line opened up at the rear.

CALLAWAY: It's undisputed in the sense that both hoses burned away. And that's J. Wainwright's question precisely. Stilson can't say it's pure speculation because there's nothing back there that shows damage. So whether it burned away, or it compromised, if you could bring the hose in and say look there's a big crack in it.

O'NEILL: Regardless of how it opened up, it's undisputed it opened up at the rear.

CALLAWAY: According to Stilson.

O'NEILL: If that opening will allow syphoning mechanically, which Stilson testified it would, then why can't...

CALLAWAY: No. He didn't testify that in the rear it was syphoned.

O'NEILL: But he testified that syphoning can occur wherever the line opens up. And why can't Sanchez then being the fire origin expert say there was a lot of gas here and it exploded. And the only cause...

CALLAWAY: That's not what he says. He doesn't say there's a big pool of gas back here because we don't have that evidence. What he says is the fire started back here. And that's undisputed. Because there's no question, eyewitnesses and everything else, the gasoline fire is back and the rear. But he does not say I can see a big pool of fuel.

O'NEILL: No. But there's the whoosh at the rear which he says leads to the conclusion that it was a fuel fed fire, and the only source of that fuel is the rear.

CALLAWAY: Remember Stilson has said I think the rear rubber hose burned through because there...

O'NEILL: He didn't say that. He said it could have.

CALLAWAY: In his deposition he says, I think it burned through, but I don't know. Because he knows he's speculating. There's no evidence that it compromised. There's no direct evidence. So it's pure speculation. And he says I think it burned through. Remember there is grass fires. An eyewitness says we've got to stamp out the grass fire to get to the vehicle. There are grass fires under that vehicle at some point. Now Sanchez discounts them and says no they weren't enough to burn through the hoses. But that's a possibility. Or it may have just been the final whoosh is what

burned the hose. But that's not the equivalent of syphoning.

WAINWRIGHT: What's the basis of your earlier statement that syphoning can only occur if there's one opening?

CALLAWAY: It's undisputed, and that's in GM's Herrera's testimony. I don't recall the record reference, but it's of course given in the brief. And he testifies there are 70 principles of syphoning.

PHILLIPS: We're not weighing this evidence or retrying the case. Is that principle something that's so established that we have to accept it as a matter of physics?

CALLAWAY: This court in St. Joseph's Hospital v. Wolfe in 2002 says in a traditional no evidence review, that's what GM is standing here and saying. There is no evidence that the defect caused the whoosh in the rear. If there's no evidence this court is not precluded from looking at it. It does not have to disregard undisputed evidence. And there's no dispute in the record about these principles of fluid syphoning. Everyone agrees.

WAINWRIGHT: Did Stilson ever adopt your expert's position, or disagree with your expert's position that syphoning can occur only if there's just one opening? Did he ever object to that or take issue with that?

CALLAWAY: There's a point at which someone says another hole is going to prevent that. And he says, yes. There is in the record somewhere about the rear opening up.

WAINWRIGHT: The reason I ask is, if Stilson undisputedly said that syphoning occurred at the front and Stilson's opinion is that syphoning can only occur with one opening, that would necessarily preclude at the time the syphoning occurred a break in the back.

CALLAWAY: Precisely. And that's GM's claim.