911 F.3d 260
United States Court of Appeals, Fifth Circuit.

Kimberly MEADOR, Agent of Individually, and as Guardian for L.M. a Minor; Amos Standard, on Behalf of Individually, and on Behalf of the Estate of Shari Standard, Deceased; Russell Jones, on Behalf of Individually, and on Behalf of the Estate of Sandra Jones, Deceased, Plaintiffs - Appellants

v.

APPLE, INCORPORATED, Defendant - Appellee

No. 17-40968
FILED December 18, 2018

Appeal from the United States District Court for the Eastern District of Texas, Robert William Schroeder, III, U.S. District Judge

**Attorneys and Law Firms**

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Before STEWART, Chief Judge, and WIENER and HIGGINSON, Circuit Judges.

**Opinion**

STEPHEN A. HIGGINSON, Circuit Judge:

This case asks us to decide whether, under Texas law, a driver's neurobiological response to a smartphone notification can be a cause in fact of a car crash. Because answering in the affirmative would entail an impermissible innovation or extension of state law, we answer in the negative. Accordingly, we AFFIRM.

I

According to Appellants' amended complaint, Ashley Kubiak was driving her pick-up truck on April 30, 2013 when she received a text message on her iPhone 5. Appellants allege that Kubiak looked down to read the text, after which she turned her attention back to the road. At that point it was too late to avoid colliding with a vehicle carrying two adults and a child. The adults died, while the child survived but was rendered paraplegic. Kubiak was convicted of two counts of criminally negligent homicide.

In 2008, Apple had secured a patent covering "[l]ock-out mechanisms for driver handheld computing devices."[1] The patent included the following language:

Texting while driving has become a major concern of parents, law enforcement, and the general public. An April 2006 study found that 80 percent of auto accidents are caused by distractions such as applying makeup, eating, and text messaging on handheld computing devices (texting). According to the Liberty Mutual Research Institute for Safety and Students Against Destruct[ive] Decisions, teens report that texting is their number one distraction while driving. Teens

understand that texting while driving is dangerous, but this is often not enough motivation to end the practice.

New laws are being written to make texting illegal while driving. However, law enforcement officials report that their ability to catch offenders is limited because the texting device can be used out of sight (e.g., on the driver's lap), thus making texting while driving even more dangerous. Texting while driving has become so widespread it is doubtful that law enforcement will have any significant effect on stopping the practice.[2]

Apple did not implement any version of a "lock-out mechanism" on the iPhone 5, which Kubiak was using at the time of the accident.

Representatives of the victims of Kubiak's accident sued Apple in federal court. They asserted claims under Texas common law for general negligence and strict products liability. They alleged that the accident was caused by Apple's failure to implement the patent on the iPhone 5 and by Apple's failure to warn iPhone 5 users about the risks of distracted driving. In particular, the plaintiffs alleged that receipt of a text message triggers in the recipient "an unconscious and automatic, neurobiological compulsion to engage in texting behavior." They supported this allegation with various studies and reports, including a proposed expert report. The plaintiffs' complaint also extensively analyzed the hazards of distracted driving.

Apple moved to dismiss the complaint for failure to state a claim,[3] and a magistrate judge issued a report and recommendation that the motion be granted. Following objections, supplemental briefing, and a thorough hearing, the district court issued an opinion granting the motion to dismiss, denying the plaintiffs'

motion for leave to amend, and dismissing the complaint with prejudice. This appeal followed.

II

We review the grant of a motion to dismiss under Rule 12(b)(6) de novo, "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiffs." *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008) (quotation omitted). A complaint survives a motion to dismiss only if it "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). Denial of a motion to amend is reviewed for abuse of discretion. *Stem v. Gomez*, 813 F.3d 205, 209 (5th Cir. 2016). When an amended complaint would still fail to survive a Rule 12(b)(6) motion, it is not an abuse of discretion to deny the motion. *Id.* at 216.

III

When our jurisdiction is based on diversity, we apply the substantive law of the forum state. *James v. Woods*, 899 F.3d 404, 408 (5th Cir. 2018) (citing *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) ). When evaluating issues of state law, we look to the decisions of the state's highest court. *In re Franchise Servs. of N. Am., Inc.*, 891 F.3d 198, 209–10 (5th Cir. 2018). If no decision of that court resolves the matter, we make an "*Erie* guess" as to how the court would. *Id.* at 210. We may also look to the state's intermediate appellate courts, unless we have

reason to think the state's highest court would decide the issue differently. *Id.*

If guidance from state cases is lacking, "it is not for us to adopt innovative theories of recovery under state law." *Mayo v. Hyatt Corp.*, 898 F.2d 47, 49 (5th Cir. 1990). "Even in the rare case where a course of Texas decisions permits us to extrapolate or predict with assurance where that law would be had it been declared, we should perhaps—being out of the mainstream of Texas jurisprudential development—be more chary of doing so than should an inferior state tribunal." *Rhynes v. Branick Mfg. Corp.*, 629 F.2d 409, 410 (5th Cir. Unit A 1980).

Negligence and products liability claims both require proof of causation. Under Texas law, "[n]egligence requires a showing of proximate cause, while producing cause is the test in strict liability." *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 775 (Tex. 1995), *abrogated on other grounds by Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007). "Proximate cause consists of both cause in fact and foreseeability." *Id.* "Cause in fact means that the defendant's act or omission was a substantial factor in bringing about the injury which would not otherwise have occurred." *Id.* "Producing cause" has the same meaning as cause in fact, with no showing of foreseeability required. *See Ledesma*, 242 S.W.3d at 46 (defining "producing cause" as "a substantial factor in bringing about an injury, and without which the injury would not have occurred"); *Union Pump*, 898 S.W.2d at 775 ("[F]oreseeability is an element of proximate cause, but not of producing cause.").

Causation for both negligence and products liability therefore turns on whether an alleged cause of an injury may be recognized as a "substantial factor."

The Texas Supreme Court has found the following passage from the Restatement instructive:

> The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes every one of the great number of events without which any happening would not have occurred. Each of these events is a cause in the so-called "philosophic sense," yet the effect of many of them is so insignificant that no ordinary mind would think of them as causes.

Restatement (Second) of Torts § 431, cmt. a (1965) (quoted in *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471–72 (Tex. 1991) ). With its references to reasonable persons, popular meanings, and ordinary minds, Texas law makes clear that the identification of substantial factors is meant to be "a practical test, [a] test of common experience." *Union Pump*, 898 S.W.2d at 775 (quotations omitted). Ultimately, the Texas Supreme Court has said, this inquiry "mandates weighing of policy considerations." *City of Gladewater v. Pike*, 727 S.W.2d 514, 518 (Tex. 1987).

Appellants focus their briefing on issues of concurrent and superseding causation, arguing that Appellee's device and Kubiak's negligence were concurrent causes of the accident. But such issues arise when more than one legally recognized cause is present. *See Stanfield v. Neubaum*, 494 S.W.3d 90, 97–98 (Tex. 2016). We must first determine whether Texas law

would recognize a smartphone's effect on its user as a cause at all.

No Texas case has addressed whether a smartphone manufacturer should be liable for a user's torts because the neurobiological response induced by the phone is a substantial factor in her tortious acts. To our knowledge, informed by submissions to us, no court in the country has yet held that, and numerous courts have declined to do so.[4] As such, no authority indicates to us that Texas courts, contemplating reasonable persons and ordinary minds, would recognize a person's induced responses to her phone as a substantial factor in her tortious acts and therefore hold the phone's manufacturer responsible.

The Texas cases on which Appellants rely make clear that acceptance of their causation theory would work a substantial innovation in Texas law. These cases present garden-variety theories of causation that ordinary minds would readily accept, so they have little to say about the present case. One is *Dover Corp. v. Perez*, which concerned a heater pumping carbon monoxide into an apartment due to its negligent manufacture and installation. 587 S.W.2d 761, 763–64 (Tex. Civ. App.—Corpus Christi 1979). No useful analogy exists between a smartphone's effect on users and a heater generating carbon monoxide. Others are *Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448, 449–50 (Tex. 2006), about a worker who fell through an opening in an oil derrick platform left unprotected, and *Rio Grande Regional Hospital, Inc. v. Villareal*, 329 S.W.3d 594, 603–04 (Tex. App.—Corpus Christi 2010), about a nurse who left a psychiatric patient unattended with razor blades. No worthwhile analogies suggest themselves here either. Appellants also cite a case about Ford's decision not to install a seatbelt for the

middle seat in the Ford Bronco's rear row. *Ford Motor Co. v. Cammack*, 999 S.W.2d 1, 8–9 (Tex. App.—Houston [14th Dist.] 1998). An analogy may perhaps be drawn between a distracting phone and a car seat without a seatbelt, but it does not get us very far. A user of the former can make it safe for driving by silencing or switching it off; no such simple fix exists for the latter.[5]

To our minds, the closest analogy offered by Texas law is so-called dram shop liability: the liability of commercial purveyors of alcohol for the subsequent torts or injuries of the intoxicated customers they served. *See* Tex. Alco. Bev. Code §§ 2.01–03; *Smith v. Sewell*, 858 S.W.2d 350 (Tex. 1993). Under that law, a person remains liable for her own negligent acts, but the incapacitating qualities of the product, which contribute to the person's negligence, can subject the seller to liability as well.

The recognition of dram shop liability in Texas came about in a noteworthy way. The common law did not make an alcohol seller liable for harms caused by intoxicated patrons, but, noting developments in other states, the Texas Supreme Court saw it as its duty "to recognize the evolution" in the law. *El Chico Corp. v. Poole*, 732 S.W.2d 306, 310 (Tex. 1987). It held that "an alcoholic beverage licensee owes a duty to the general public not to serve alcoholic beverages to a person when the licensee knows or should know the patron is intoxicated." *Id.* at 314. Concurrently, the Texas Legislature passed the Dram Shop Act, which created a cause of action with different contours. *See F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 683–84 (Tex. 2007) (explaining the history). In the years that followed, a productive exchange between judicial and legislative branches unfolded, gradually resolving

various further questions, large and small. *See* H.B. 2868, 79th Leg. Sess. (Tex. 2005); *Reeder v. Daniel*, 61 S.W.3d 359 (Tex. 2001); *Smith v. Merritt*, 940 S.W.2d 602 (Tex. 1997); *Graff v. Beard*, 858 S.W.2d 918, (Tex. 1993); *Smith v. Sewell*, 858 S.W.2d 350 (Tex. 1993). The result was a comprehensive regulatory scheme reflecting the two branches' extensive deliberations and considered judgments.

That is the form of state law development contemplated by *Erie*, under which "the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word" on state law. 304 U.S. at 79, 58 S.Ct. 817 (quotation omitted). To the extent there is a meritorious analogy between smartphone manufacturers and dram shops, it is for the state to explore, not us.[6]

With the state not yet speaking directly to this issue, we note that the debilitating effects of alcohol have been recognized much longer than the effects of smartphones, and the proper regulation of the former has been debated much longer than the latter. Moreover, the law development that has occurred places the onus of distracted driving on the driver alone. *See* Tex. Transp. Code § 545.4251; H.B. 62, 85th Leg. Sess. (Tex. 2017) (making it a criminal offense to read, write, or send a text message while driving).

We therefore cannot say that Texas law would regard a smartphone's effect on a user as a substantial factor in the user's tortious acts. To say otherwise would be an innovation of state law that *Erie* does not permit us to make. Because we decline to consider "neurobiological compulsion" a substantial factor under Texas law, we conclude that the iPhone 5 could not be a cause in fact of the injuries in this case. Consequently, it is unnecessary to consider the issues of concurrent

and superseding causation on which Appellants have focused their arguments.

IV

The district court was correct to dismiss Appellants' claims and to deny Appellants' motion for leave to amend. The judgment of the district court is AFFIRMED.

**Footnotes**

1U.S. Patent No. 8,706,143.

2*Id.*

3While the motion was pending, Plaintiffs amended the complaint and the parties stipulated that the motion to dismiss would be deemed to apply to the amended complaint.

4*See* *Durkee v. C.H. Robinson Worldwide, Inc.*, 765 F.Supp.2d 742, 749 (W.D.N.C. 2011), *aff'd sub nom.*, *Durkee v. Geologic Sols., Inc.*, 502 F. App'x 326 (4th Cir. 2013); *Coal. Against Distracted Driving v. Apple Inc.*, 2018 WL 2016665, at *1 (Cal. Ct. App. May 1, 2018) (unpub.), *rev. denied* (Aug. 15, 2018); *Estate of Doyle v. Sprint/Nextel Corp.*, 248 P.3d 947, 951–952 (Okla. Civ. App. 2010); *Williams v. Cingular Wireless*, 809 N.E.2d 473, 478–79 (Ind. Ct. App. 2004).

5At oral argument, the parties discussed *Flock v. Scripto-Tokai Corp.*, 319 F.3d 231 (5th Cir. 2003), about the defective child-safety features of a lighter. A prior decision of ours offers only so much insight into Texas courts' likely treatment of a novel issue. In any event, the case is distinguishable. Lighters are meant to produce fire, so we have no trouble recognizing them as a cause when blazes occur. The causal potential of

smartphones via neurobiological pathways is not so clearly recognized. Moreover, *Flock* was about a small child's use of a device, while the present case is about an adult's. Appellants also brought three cases to our attention through a Rule 28(j) letter shortly before oral argument. None changes our picture of Texas law either. *Critical Path Resources, Inc. v. Cuevas*, 2018 WL 1532343 (Tex. App.—Houston [14th Dist.] Mar. 29, 2018), concerned a flare line at an oil refinery filled with flammable substances that a defendant neglected to clear before repair work was done. *Garcia v. Pruski*, 2018 WL 4096392 (Tex. App.—San Antonio Aug. 29, 2018), addressed the negligence of a person whose bull, left unattended, had strayed onto a public highway. *Choctaw Nation of Oklahoma v. Sewell*, 2018 WL 2410550 (Tex. App.—Dallas May 29, 2018), concerned a passenger distracting a bus driver, leading to an accident. None of the causes alleged in these cases strains the sensibilities of a reasonable person, nor does any resemble the cause advanced by Appellants here.

6It is worth observing that the two paths for law development that led to dram shop liability—state common-law courts and legislatures—may not be equally open in the present case. Those urging new forms of liability under state law may of course go to their legislatures. But where defendants operate nationwide in highly consolidated industries, like Apple in the smartphone industry, the rules governing federal courts in diversity cases may substantially close state courts to novel claims. Sued anywhere outside of their home states, the defendants can remove to federal courts. Those courts will then decide the cases under *Erie* precedents that require resort to state case law and likely prohibit acceptance of innovative theories. Provided the defendants diligently exercise their right

to remove, cases may never progress through state courts outside of the defendants' home states. Even if cases do progress in the defendants' home states, decisions of those states' courts will have little significance for federal courts in the rest of the country. The result may be a legal system less generative than normal. Certification of questions to the state's highest court is perhaps a way out of this bind. Appellants did not request that here, and their theory of causation is too great an extension beyond existing Texas law for us to consider *sua sponte* certification.

United States District Court,
E.D. Texas, Tyler Division.

Kimberly MEADOR, Amos Standard and Russell Jones, Plaintiffs,
v.
APPLE, INC., Defendant.

CAUSE NO. 6:15-CV-00715-RWS-KNM

Signed 08/17/2017

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## ORDER ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

ROBERT W. SCHROEDER III, UNITED STATES DISTRICT JUDGE

The Report and Recommendation of the Magistrate Judge ("Report"; Docket No. 54), which contains her findings, conclusions and recommendation regarding Defendant Apple, Inc.'s ("Apple") Motion to Dismiss ("Motion"; Docket No. 7), has been presented for consideration. The Report recommends that

Defendant's Motion be granted and that Plaintiffs' claims be dismissed with prejudice. Plaintiffs Kimberly Meador, Amos Standard and Russell Jones (collectively "Plaintiffs" or "Meador") filed objections to the Report (Docket Nos. 60, 66). Plaintiffs also filed a Motion for Leave to File Second Amended Complaint (Docket No. 58). Defendant responded to Plaintiffs' objections (Docket No. 64) and Motion for Leave (Docket No. 65). The Court held a hearing on the objections on July 12, 2017 and requested supplemental briefing on the issue of concurrent causation (Docket Nos. 77 (Meador), 78 (Apple)).

Having reviewed the parties' submissions and the record, and having made a *de novo* review of the objected-to portions of the Report, the Court concludes that the findings of the Magistrate Judge are correct and that the objections are without merit. For the reasons below, Plaintiffs' objections are **OVERRULED**, Defendant's Motion to Dismiss is **GRANTED** and Plaintiffs' Motion for Leave is **DENIED**.

## DISCUSSION

In this case, Plaintiffs allege that a non-party, Ashley Kubiak, used her iPhone to check messages while driving, was inattentive to the road and, therefore, caused injury to Plaintiffs. Report at 1–2. Plaintiffs assert strict liability and negligence claims against Apple. *Id.* at 2. Plaintiffs allege that the iPhone, as designed and marketed, is defective and unreasonably dangerous because Apple failed to configure the iPhone to automatically disable a user's ability to operate the iPhone while driving and failed to warn users of the dangers of operating the iPhone while

driving. *Id.* The Report finds that Plaintiffs' allegations do not establish that the allegedly defective design or improper marketing of the iPhone is a cause in fact of the accident and Plaintiffs' injuries. *Id.* at 9. The Magistrate Judge found that any defective or negligent design was too attenuated from Plaintiffs' injuries because of Kubiak's neglect of her duty to safely operate her vehicle. *Id.* Thus, the Report recommends that Defendant's Motion to Dismiss be granted. *Id.* at 9, 10. The Report further recommends that Plaintiffs' Motion for Leave be denied because Plaintiffs' proposed amendment would not establish causation. *Id.* at 10.

Plaintiffs object to the Magistrate Judge's Report on six grounds: (1) that they have sufficiently alleged causation (Docket No. 60 at 1–3); (2) that it is improper to grant a 12(b)(6) motion to dismiss on the issue of causation (*id.* at 3); (3) that the Magistrate Judge's reliance on *Lier Siegler Inc. v. Perez*, 819 S.W.2d 470 (Tex. 1991), and *Union Pump Co. v. Allbritton*, 898 S.W.2d 773 (Tex. 1995), is improper because those cases are distinguishable (*id.* at 4–5); (4) that the Magistrate Judge's "misconstruction of [the doctrine of] attenuation [...] creates dangerous precedent for product liability and negligence cases (*id.* at 5–6); (5) that the Magistrate Judge overlooked well-pleaded allegations of derivative liability (*id.* at 6–7); and (6) that they should be given an opportunity to replead. *Id.* at 7–8. The Court addresses each objection below.

### A. First Objection: Causation

Plaintiffs' first objection to the Magistrate Judge's conclusion that Plaintiffs have not plausibly alleged causation in fact is without merit. "The test for

cause in fact is whether the [complained-of] act or omission was a substantial factor in bringing about the injury, without which the harm would not have occurred." *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995) (internal quotations omitted). "Cause in fact is not shown if the defendant's [alleged conduct] did no more than furnish a condition which made the injury possible." *Id.* (citation omitted).

In this case, Plaintiffs allege that "the technology behind the iPhone 5 as designed evokes a neurobiological response that bypasses judgment [and creates] a compulsion, an addiction, that a driver engages in without realizing." Docket No. 60 at 1. Even taking Plaintiffs' factual assertion as true, Plaintiffs have not shown that the injuries or damages complained of follow "in a natural sequence"[1] from the allegedly defective design of the iPhone. When a driver negligently operates her vehicle because she is engaging in compulsive or addictive behaviors such as eating food[2], drinking alcohol or smoking tobacco, it is the driver's negligence in engaging in those activities that causes any resulting injuries, not the cook's, distiller's or tobacconist's supposed negligence in making their products so enticing. Similarly, Kubiak's decision to direct her attention to her iPhone 5 and maintain her attention on her phone instead of the roadway is the producing cause of the injury to Plaintiffs.[3]

In their supplemental briefing, Plaintiffs argue that the allegedly defective design of the iPhone was a cause in fact of Plaintiffs' injuries. Docket No. 77 at 9. Specifically, Meador first contends that "the harmful forces of contemporaneous use and compulsive use of the iPhone 5 while driving at highway speed, still persisted, up until the time of impact between Kubiak's

vehicle and the Plaintiff's vehicle." *Id.* Second, Meador argues that "Kubiak's conduct in reading a message while driving at highway speed on her iPhone 5, was completely dependent upon a defectively designed iPhone 5 without an automatic 'lock-out' safety feature." *Id.*

First, the allegation that the iPhone exerted "forces" on Kubiak after she initially diverted her attention from the roadway fails for the same reason as the allegation that the iPhone caused Kubiak to divert her attention in the first place. The iPhone is an inanimate object. No matter how interesting the iPhone may be to its users, it cannot decide for a user how to allocate the user's attention among the various stimuli that may be present in a car.

Second, the allegation that Kubiak's conduct depended on the defective design of the iPhone shows why the allegedly defective design of the iPhone is not a cause in fact of Plaintiffs' injuries. Another way of saying that the iPhone did not lock Kubiak out of using it (i.e., create a condition in which Kubiak could not use it) is to say that the iPhone permitted Kubiak to use it (i.e., created a condition in which Kubiak could use it). This Court concurs in the Magistrate Judge's finding that the iPhone "did nothing more than create the condition that made Plaintiffs' injuries possible." Docket No. 54 at 9.

The Court also agrees with the Magistrate Judge that Apple's alleged conduct is not a cause in fact of Plaintiffs' injuries. Cause in fact is an element of proximate cause, which is an element of Meador's claim for negligence. *See* *Doe*, 907 S.W.2d at 477 (citing *Travis v. City of Mesquite*, 830 S.W.2d 94, 98 (Tex. 1992)); *see also* Docket No. 33 (First Amended Complaint) at ¶ 38 (pleading proximate causation).[4]

When an injury has two causes in fact, those causes may be concurrent, meaning they are both proximate causes, or one cause may supersede the other, meaning only the superseding cause is proximate. *See* *Travis*, 830 S.W.2d at 98. If, as here, the injury has only one cause in fact, then only that cause may be (but is not necessarily) the proximate cause of the injury.

Plaintiffs argue that the Magistrate Judge erred by not considering concurrent causation in her Report. Docket No. 75 at 21:4–16 ("When we talk about the R and R not applying the appropriate law in Texas, [the failure to analyze concurrent cause is] what we're referring to."). Plaintiffs' objection conflates the Magistrate Judge's evaluation of the remoteness or attenuation of the injury from Apple's alleged conduct, which is an appropriate part of the cause in fact inquiry,[5] with the inquiry into concurrent or superseding cause, which the Magistrate Judge would have reached only had she determined that Apple's alleged conduct was a cause in fact of the injury. Because the Magistrate Judge properly found that Apple's alleged conduct is not a cause in fact of the injury, she was correct not to evaluate whether the same conduct was also a proximate cause of the injury.

**B. Remaining Objections**

Plaintiffs' second objection is that causation is "generally" a question of fact for the jury,[6] but the Court finds that is not so in this particular case. Plaintiffs claim that the Report made an impermissible decision on the factual merits when it decided Apple's conduct was not a legal cause of Plaintiffs' injuries. *Id.* (citing *Intercon Solutions Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026, 1046 (N.D. Ill. 2013); *Twombly*,

550 U.S. at 563 n.8). However, the Report found Plaintiffs failed to allege causation as a matter of law. In other words, the Magistrate Judge held that even if the iPhone 5 permitted Kubiak to use it while driving and the iPhone 5's design engenders a neurobiological response in its users, those facts together are still too far removed from Kubiak's decision to take her attention off of the roadway for the allegedly defective design to be the legal cause of Plaintiffs' injuries. Thus, the Report did not resolve any question of fact in finding the causation allegations legally deficient.

Plaintiffs' third objection, that *Lear Siegler* and *Union Pump* are distinguishable from the present case, also fails. First, Plaintiffs contend that *Lear Siegler* and *Union Pump* are inapposite because they were decided on motions for summary judgment. Docket No. 60 at 4. Regardless of the procedural posture of those cases, they establish the failure of causation when an injury is attenuated from the accused design. Plaintiffs' second contention is that the "daisy chain of events" that occurred in *Lear Siegler* and *Union Pump* is distinguishable from the "simple and simultaneously occurring" causation in this case. *Id.* at 4–5. The chain of events in this case is complicated by Kubiak's negligence in diverting her attention away from the road and maintaining her attention on her iPhone, and the Magistrate Judge did not err in analogizing the facts of this case to those in *Lear Siegler* and *Union Pump*.

Plaintiffs finally contend that their theory of causation is analogous to *Flock v. Scripto-Tokai Corporation*, 319 F.3d 231 (5th Cir. 2003); *Wright v. Ford Motor Company*, 2005 U.S. Dist. LEXIS 47676; and *Hinson v. Dorel*, Case No. 2:15-cv-713-JRG-RSP at Docket No. 41 (E.D. Tex. April 1, 2016). Docket No. 60

at 2–3, 6. Each of these cases is distinguishable. *Flock* held that the lack of a child-resistant mechanism on a lighter was a "substantial factor" in a four-year-old child accidentally starting a house fire that resulted in his and his mother's death. *Flock*, 319 F.3d at 235. *Flock* is distinguishable because Kubiak is not a child. In *Wright*, a driver accidentally backed over and killed a child, despite exercising due care, because the vehicle she was driving had a large blind spot and did not include a sufficient back-up alarm. *Wright*, 2005 U.S. Dist. LEXIS 47676, at *2. This case is distinguishable because Kubiak failed to exercise due care in operating her vehicle while using her iPhone. *Hinson* involved a failure to give appropriate warnings with a front-facing car seat that allegedly resulted in injury to a child. *Hinson*, Case No. 2:15-cv-713, Docket No. 41 at ¶¶ 6–9, 13–15. Like the driver in *Wright*, the parent in *Hinson* used the car seat as they (incorrectly) thought was proper. *See id.*, Docket No. 183 at 223:25–227:23 (mother testifying to installing car seats and buckling-in child as she thought proper in light of reading the manual). Again, this case is distinguishable because Kubiak did not exercise ordinary care. In sum, the Magistrate correctly identified and relied on the most analogous cases.

Plaintiffs' fourth objection fails because it misunderstands the nature of this case. In arguing that the Report will have a damaging precedential effect on the law of products liability, Plaintiffs specifically object to the Magistrate Judge's conclusion that Apple's influence "came to rest after the incoming message was delivered to Kubiak's iPhone." Docket No. 60 at 5 (citing Report at 9). Plaintiffs compare this case to another involving Takata airbags, implying that airbags "come to rest" before any defect in the airbags can

cause harm. Airbag defects are hidden, and the operation of an airbag occurs during a collision (i.e., the force of the defect does not "come to rest" before the crash); by contrast, the dangers of texting while driving are readily apparent and the normal text-messaging operation of a cellphone is not while driving. Plaintiffs re-allege "that Kubiak's neglect is inextricably intertwined with" the alleged tendency of the iPhone 5 to compel driver reaction to and interaction with incoming messages. Even if the technology in the iPhone 5, like food, alcohol or tobacco, may give rise to compulsive or addictive behaviors, Kubiak's negligence in choosing to indulge in such behavior *while driving* does not redound to Apple.

Plaintiffs' fifth objection, that the Report overlooked allegations of derivative liability, is also without merit. In support of their objection, Plaintiffs state, "Apple's conduct in placing into the stream of commerce a device that is the cause and conduit of distracted driving behavior, cannot be extricated from the act of using that device to engage in distracted driving behavior." Docket No. 60 at 7. Plaintiffs' allegation that Apple placed into commerce an unreasonably unsafe product sounds in products liability, not "derivative liability." *See* William D. Underwood & Michael D. Morrison, *Apportioning Responsibility in Cases Involving Claims of Vicarious, Derivative, or Statutory Liability for Harm Directly Caused by the Conduct of Another*, 55 BAYLOR L. REV. 617, 642 (2003) (listing examples of causes of action giving rise to derivative liability including negligent hiring, supervision, retention, security and entrustment).

## C. Supplemental Objections

Plaintiffs filed a Supplement to the objections to the Report (Docket No. 66), to which Defendants responded (Docket No. 67). Defendants objected to Plaintiffs' Supplement as procedurally improper. Docket No. 67 at 2. Although the Supplement was filed untimely under Local Rule CV-72(c), the Court addresses the arguments made in the Supplement below.

In their Supplement, Plaintiffs contend that the National Highway Traffic Safety Administration ("NHTSA") prepared voluntary guidelines that place the burden on phone manufacturers to reduce the effects of texting and driving. *See generally* Docket No. 66. Defendant responds that Plaintiffs' Supplement is irrelevant and mischaracterizes the proposed guidelines. *See generally* Docket No. 67.

It is unclear that the Court should consider guidelines proposed in 2016 in analyzing the cause in fact of the accident in this case, which took place in 2013. Even if the Court were to consider the proposed guidelines, it would credit the statement in the guidelines that "it remains the driver's responsibility to ensure the safe operation of the vehicle and to comply with all traffic laws." Docket No. 67 at 3 (quoting Docket No. 66-2 at 9). Moreover, to the extent Plaintiffs imply that Apple's alleged derogation from the guidelines constitutes negligence *per se*, such implication fails because of the voluntary and non-binding nature of the guidelines. *See id.* (citing Docket No. 66-2 at 8, 12, 73, 75).

Finally, to the extent that NHTSA has found that smartphones have a role in distracted driving and therefore traffic fatalities, that finding is (a) not specifically connected to the facts of this case and (b) does not establish causation in fact. The NHTSA

guidelines refer to smartphones generally, not specifically to the iPhone 5 alleged to be defectively designed in this case. More importantly, the guidelines do not establish that any smartphone does more than create the conditions in which a driver may choose to act negligently. Therefore, even if Apple could have had a role in preventing the conditions that permitted Kubiak's negligence in failing to pay appropriate attention to the roadway, Apple's alleged failure to do so is not a cause in fact of Plaintiff's injuries under the facts of this case.

**D. Leave to Amend**

Finally, the Court concurs with the Magistrate Judge that leave to amend should be denied in this case because "the proposed change clearly is frivolous or advances a claim or defense that is legally insufficient on its face...." *See* Docket No. 54 at 9 (quoting 6 Charles A. Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1487 (2d ed. 1990); *see also Ayers v. Johnson*, 247 Fed.Appx. 534, 535 (5th Cir. 2007)). In their proposed Second Amended Complaint, Plaintiffs mainly put forth more allegations concerning addiction and compulsion. *See generally* Docket No. 59. Specifically, Plaintiffs added summary opinions of their expert, Dr. David Greenfield. *Id.* at 11. Dr. Greenfield states that when Kubiak received a notification on her iPhone, she responded to an automatic neurobiological compulsion to read the message. *Id.* Therefore, Plaintiffs argue, Kubiak's inattentive driving is not the cause in fact of the collision. Docket No. 60 at 7. Instead, Plaintiffs contend, "the compulsion triggered by the iPhone 5, in conjunction with the compulsive act of reading the message delivered by Ms. Kubiak's

iPhone 5, caused the immediately subsequent collision in question." *Id.*

Even taking all factual allegations in the Second Amended Complaint as true, Plaintiffs do not state a plausible claim for relief. In order to be the cause in fact of a plaintiff's injuries, a "defendant's conduct [must have] such an effect in producing the harm as to lead reasonable men to regard it as the cause." Docket No. 54 at 8 (quoting Restatement (Second) of Torts § 431 cmt. a (1965); *see Union Pump*, 898 S.W.2d at 776; *Lear Siegler, Inc.*, 819 S.W.2d at 472). "A plaintiff cannot demonstrate cause in fact where 'the defendant's conduct or product does no more than furnish the condition that makes the plaintiff's injury possible.' "[7] *Id.* at 6–7 (quoting *Union Pump Co.*, 898 S.W.2d at 775). If a defendant's conduct only furnishes the condition that makes a plaintiff's injuries possible, then it is "too remotely connected with [that plaintiff's] injuries to constitute their legal cause." *Id.* at 9 (citing *Transcon. Ins. Co.*, 330 S.W.3d at 223).

Leave to amend should be denied in this case the proposed changes to the complaint advance a claim that is legally insufficient on its face. Plaintiffs ask the Court to hold Apple liable for providing a condition that made possible Kubiak's negligence, which in turn caused Plaintiffs' injuries. *See generally* Docket No. 59. Apple's conduct is too remotely connected to Plaintiffs' injuries to be their legal cause. *See Union Pump*, 898 S.W.2d at 775.

## CONCLUSION

Having conducted a *de novo* review of all objected-to portions of the Report, the Court finds no

error and accordingly **ADOPTS** as its own the findings and conclusions in the Report. Accordingly, it is

**ORDERED** that Defendant's Motion to Dismiss (Docket No. 7) is **GRANTED**;

**ORDERED** that Plaintiffs' Motion for Leave to File Amended Complaint (Docket No. 58) is **DENIED**; and

**ORDERED** that Plaintiffs' claims be **DISMISSED WITH PREJUDICE**.

**So ORDERED and SIGNED this 17th day of August, 2017.**

**Footnotes**

1*See* Docket No. 60 at 1 (citing *Wright v. Ford Motor Co.*, 2005 U.S. Dist. LEXIS 47676 (E.D. Tex. 2005)).

2Food addiction may lead to loss of control, chemical dependencies on food and distorted thinking. 1 Guide to Employee Medical Leave § 5:119 (West 2016).

3Plaintiffs do not allege that iPhones deprive their users of free will. *See* Docket No. 75 at 20:23–25 ("Now, are we saying that these iPhones cause users to become mindless zombies and control them? No, we're not saying that at all.").

4Legal conclusions in a complaint are not entitled to the assumption of truth. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1940 (2009).

5*See* *Doe*, 907 S.W.2d at 477 (citing *Boyd v. Fuel Distribs., Inc.*, 795 S.W.2d 266, 272 (Tex.App.—Austin 1990, writ denied); *Texas Am. Bank v. Boggess*, 673 S.W.2d 398, 402 (Tex.App.–Fort Worth 1984, writ dism'd by agr.); *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 776 (Tex. 1995); *Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 472 (Tex. 1991)).

6*See* Docket No. 60 at 3 (citing *DiSalvatore v. Foretravel, Inc.*, 2016 U.S. Dist. LEXIS 95246, at *39, 2016 WL 3951426 (E.D. Tex. June 30, 2016)).

7A clear definition of "condition" is not firmly established under Texas law, although the Texas Supreme Court held: "there may be a case in which a product defect or defendant's negligence exposes another to an increased risk of harm by placing him in a particular place at a given time." *Lear Siegler*, 819 S.W.2d at 472. Subsequent cases that interpret what a condition is generally relate to this holding by the Texas Supreme Court. *See IHS Cedar Treatment Ctr. of DeSoto, Texas, Inc. v. Mason*, 143 S.W.3d 794, 801 (Tex. 2004) (holding the act of discharging a patient merely created the condition for that patient to get into a car accident and, therefore, was not the proximate cause as a matter of law).

United States District Court,
E.D. Texas, Tyler Division.

Kimberley MEADOR, Individually and as Guardian for L.M., a Minor; Amos Standard, Individually and on Behalf of the Estate of Shari Standard, Deceased; and Russell Jones, Individually and on Behalf of the Estate of Sandra Jones, Deceased
v.
APPLE, INC.

Case No. 6:15-cv-715

Signed 08/16/2016

**Attorneys and Law Firms**

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Eric Hugh Findlay, Findlay Craft PC, Tyler, TX, for Apple, Inc.

**REPORT AND RECOMMENDATION**

K. NICOLE MITCHELL, UNITED STATES MAGISTRATE JUDGE

The above-styled matter is referred to the undersigned for all pretrial matters in accordance with 28 U.S.C. § 636. Pending before the Court is Defendant Apple, Inc.'s Motion to Dismiss (Doc. No. 7). Having considered the motion, responses, and reply briefs, the

Court recommends that the Motion to Dismiss be **GRANTED** and that Plaintiffs' claims be **DISMISSED WITH PREJUDICE**.

## BACKGROUND

The events giving rise to this products liability suit occurred on April 30, 2013, in Rusk County, Texas. Sandra Jones, Jones's grandson—L.M., and Shari Standard were traveling along Highway 43 near Henderson, Texas, in a Chevrolet Tahoe when they were rear-ended by a Dodge Ram truck driven by Ashley Kubiak, a non-party to this suit. Plaintiffs allege that immediately prior to the collision, Kubiak was operating her Apple iPhone to check an incoming message while driving, and thus was distracted from the safe operation of her vehicle. Kubiak's truck pushed the Tahoe into oncoming traffic, where it was again struck on the passenger side by a vehicle traveling the opposite direction. Jones and Standard were pinned inside the Tahoe and died at the scene of the collision. L.M. was air-lifted to a hospital in Dallas, Texas, where he was placed on life support and survived. Kubiak was subsequently indicted, and after a jury trial, convicted of two counts of criminally negligent homicide.

Plaintiffs filed this suit on July 28, 2015, against Defendant Apple, Inc. ("Apple"), asserting claims of strict products liability and negligence. Plaintiffs allege that the Apple iPhone, as designed and marketed, is defective and unreasonably dangerous in that Apple failed to configure the iPhone to automatically disable a user's ability to operate the iPhone while driving and failed to warn users of the dangers of operating the iPhone while driving. Furthermore, Plaintiffs allege that Apple holds a United States patent to a "lock-out

mechanism" which, if implemented in the iPhone, would prevent a driver from using certain features of the iPhone while traveling above a predetermined speed. Finally, Plaintiffs allege that Apple's conduct caused the injuries complained of here.

Apple filed the instant motion to dismiss for failure to state a claim upon which relief can be granted on September 17, 2015, arguing that the facts alleged in Plaintiffs' complaint establish that Apple's conduct was not the legal cause of Plaintiffs' injuries. After briefing on Apple's motion was complete, Plaintiffs filed an amended complaint (Doc. No. 33). On May 6, 2016, the parties filed a joint stipulation (Doc. No. 41) that Apple's motion and the briefing in response thereto would also apply to Plaintiffs' First Amended Complaint.

## APPLICABLE LAW

### *Dismissal under Rule 12(b)(6)*

The Court utilizes a "two-pronged approach" in considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). First, the Court identifies and excludes legal conclusions that "are not entitled to the assumption of truth." *Id.* Second, the Court considers the remaining "well-pleaded factual allegations." *Id.* The Court must accept as true all facts alleged in a plaintiff's complaint, and the Court views the facts in the light most favorable to the plaintiff. *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). A plaintiff's complaint survives a defendant's Rule 12(b)(6) motion to dismiss if it includes facts sufficient "to raise a right to relief above the

speculative level." *Id.* (quotations and citations omitted). Stated differently, the Court must consider whether a plaintiff has pleaded "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

***Products Liability Claims***

Texas products liability law governs in this diversity action. Under Texas law, a products liability suit may be grounded in one or more of three theories of recovery: (1) strict liability, (2) breach of warranty, or (3) negligence. *Lopez v. Delta Power Equip. Corp.*, No. EP-14-CV-00362-DCG, 2015 WL 3369335, at *2 (W.D. Tex. May 21, 2015) (citing *Syrie v. Knoll Intern.*, 748 F.2d 304, 306 (5th Cir. 1984)). As noted above, here, Plaintiffs assert strict liability and negligence claims.

In analyzing strict liability claims based on the sale of dangerously defective products, Texas courts have adopted Section 402A of the Restatement (Second) of Torts. *Disalvatore v. Foretravel, Inc.*, No. 9:14-CV-150, 2016 WL 3951426, at *9 (E.D. Tex. June 30, 2016) (citing *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 788–90 (Tex. 1967)), *adopted*, 9:14-CV-150, 2016 WL 3926575 (E.D. Tex. July 21, 2016). There are three types of defect claims: design defects, manufacturing defects,[1] and marketing defects. *Id.* To state a plausible claim under any of these theories, Plaintiffs must allege facts which, if true, establish that: (1) the Apple iPhone was defective; (2) the defect rendered the iPhone unreasonably dangerous; (3) the iPhone reached the ultimate consumer without substantial change in its condition from the time of the original sale; and (4) the iPhone was the producing cause of Plaintiffs' injuries. *Lopez*, 2015 WL 3369335, at

*2 (citing *McLennan v. Am. Eurocopter Corp.*, 245 F.3d 403, 427 (5th Cir. 2001)).

"A negligence cause of action requires a different showing from a strict liability claim, even when the action is against the manufacturer." *Syrie*, 748 F.2d at 307.

> The care taken by the supplier of a product in its preparation, manufacture, or sale, is not a consideration in strict liability; this is, however, the ultimate question in a negligence action. Strict liability looks at the product itself and determines if it is defective. Negligence looks at the act of the manufacturer and determines if it exercised ordinary care in design and production.

*Id.* (quoting *Gonzales v. Caterpillar Tractor Co.*, 571 S.W.2d 867, 871 (Tex. 1978)). To state a plausible products liability claim under a negligence theory, Plaintiffs must allege facts which, if true, establish: (1) the existence of a duty owed by Apple to Plaintiffs; (2) a breach of that duty; and (3) injury to Plaintiffs as a proximate result of the breach. *Disalvatore*, 2016 WL 3951426, at *13 (citing *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 309 (Tex. 1983)).

## DISCUSSION

In its motion to dismiss, Apple challenges only the causation element of Plaintiffs' strict liability and negligence claims. Apple contends that Plaintiffs have not pleaded and cannot show under any set of facts that the iPhone, and Apple's conduct in designing and marketing the iPhone, was the producing or proximate

cause of Plaintiffs' injuries. Instead, Apple contends that Ashley Kubiak's negligent behavior while driving was the sole legal cause of the traffic accident giving rise to this case. Citing similar cases from various jurisdictions, Apple also asserts that no court in the nation has imposed liability on a device manufacturer when the plaintiffs alleged they were injured by a user distracted by the device while operating a vehicle. *See* *Durkee v. C.H. Robinson Worldwide, Inc.*, 765 F. Supp. 2d 742, 749–50 (W.D.N.C. 2011), *aff'd sub nom.* *Durkee v. Geologic Sols., Inc.*, 502 Fed.Appx. 326 (4th Cir. 2013); *Am. Winds Flight Acad. v. Garmin Intern.*, No. 5:07-CV-3401, 2010 WL 3783136, at *7–9 (N.D. Ohio Sept. 17, 2010); *Ford v. Hertz Corp.*, No. G045714, 2012 WL 1238489, at *4–5 (Cal. Ct. App. Apr. 13, 2012); *Estate of Doyle v. Sprint/Nextel Corp.*, 248 P.3d 947, 949–51 (Okla. Civ. App. 2010); *Williams v. Cingular Wireless*, 809 N.E.2d 473, 476–79 (Ind. Ct. App. 2004). Plaintiffs respond that the facts as alleged are sufficient to establish causation. Additionally, they contend that every similar case proffered by Apple is distinguishable on both the facts and the applicable law.

Because Apple's motion takes issue with the causation element of Plaintiffs' claims, the decisions Apple cites are largely unhelpful in this case, which appears to be one of first impression in Texas. Each of the strict liability cases upon which Apple relies turns on either the product defect or proximate causation. *See* *Ford*, 2012 WL 1238489, at *4–5 (holding that navigation system in rental car was not defective when plaintiff "did not allege facts showing that the navigation system failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner" and alleged defect "was not a hazard inherent to the

navigation system"); *Am. Winds*, 2010 WL 3783136, at *7–9 (holding that navigation system in airplane was not defective when risk associated with using the system in the manner alleged was open and obvious and alleged use was unforeseeable to system manufacturer). Texas strict products liability law, however, requires that the product be the producing cause of the plaintiff's injuries, not the proximate cause; foreseeability is not a consideration. *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 775 (Tex. 1995).

Similarly, two of the negligence cases Apple cites turn on whether the manufacturer owed a duty to the plaintiffs. *See* *Williams*, 809 N.E.2d at 476–79 (holding that cell phone manufacturer owed no duty to plaintiffs in part because third party's negligent use of cell phone while driving was not reasonably foreseeable); *Doyle*, 248 P.3d at 949–51 (same). And although the discussion of proximate cause in *Durkee* has at least some persuasive value as to Plaintiffs' negligence claim, Apple references portions of the opinion devoted to the element of duty, not causation. *See* 765 F. Supp. 2d at 749–50 (holding that manufacturer of vehicle text message system owed no duty to plaintiffs when driver of vehicle negligently used system while driving). Because these cases do not speak directly to the issues raised by the parties here, there is more guidance to be found in Texas products liability cases addressing causation.

As mentioned previously, producing cause is the test in strict liability, whereas negligence requires a showing of proximate cause. *Union Pump*, 898 S.W.2d at 775. Proximate cause consists of both cause in fact and foreseeability. *Id.* "Proximate and producing cause differ in that foreseeability is an element of proximate cause, but not of producing cause." *Id.* The producing

cause inquiry, therefore, "is conceptually identical to that of cause in fact." *Transcon. Ins. Co. v. Crump*, 330 S.W.3d 211, 223 (Tex. 2010). The common element, then, to both proximate cause and producing cause is causation in fact. *See id.* (citing *Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 161 (Tex. 1995)). This requires proof that the conduct complained of was "a substantial factor in bringing about an injury, and without which the injury would not have occurred." *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 46 (Tex. 2007). A plaintiff cannot, however, demonstrate cause in fact where "the defendant's conduct or product does no more than furnish the condition that makes the plaintiff's injury possible." *Union Pump*, 898 S.W.2d at 776. "In other words, the conduct of the defendant may be too attenuated from the resulting injuries to the plaintiff to be a substantial factor in bringing about the harm." *IHS Cedars Treatment Center of DeSoto, Texas, Inc. v. Mason*, 143 S.W.3d 794, 799 (Tex. 2004); *see also Union Pump*, 898 S.W.2d at 775 ("At some point in the causal chain, the defendant's conduct or product may be too remotely connected with the plaintiff's injury to constitute legal causation."). Causation may be considered a question of law when the relationship between the plaintiff's injuries and the defendant's conduct or product is attenuated or remote. *Ambrosio v. Carter's Shooting Ctr., Inc.*, 20 S.W.3d 262, 266 (Tex. App.—Houston [14th Dist.] 2000, pet. denied) (citing *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995) and *Union Pump*, 898 S.W.2d at 776).

The Supreme Court of Texas has twice addressed attenuation in the context of products liability cases. In *Lear Siegler, Inc. v. Perez*, an employee of the Texas Highway Department—Perez—

stopped his truck on the highway when the flashing arrow sign he was pulling behind a sweeping operation malfunctioned. 819 S.W.2d 470, 471 (Tex. 1991). As Perez was working on the sign, a driver who had fallen asleep at the wheel struck the sign, which in turn struck Perez, causing severe injuries that later resulted in Perez's death. *Id.* Perez's survivors sued the manufacturer of the sign, arguing that the defective sign caused Perez's death. *Id.* at 472. Based on the facts of the case, the Supreme Court held that the connection between the defendant's conduct was too attenuated to constitute the legal cause of Perez's death. *See id.* The fact that Perez would not have been at the place where the accident occurred "but for" the malfunction was insufficient to establish cause in fact. *See id.*

In *Union Pump*, a pump manufactured by the defendant caught fire and ignited the surrounding area. 898 S.W.2d at 774. The plaintiff and her supervisor assisted in putting out the fire, which left the area near the pump wet with water or firefighting foam. *Id.* The two employees left the area, but two hours later came back to shut off a valve near the pump. *Id.* After checking the valve, the employees chose to return along an unsafe route by walking over a pipe rack. *Id.* In doing so, the plaintiff slipped and fell, thereby injuring herself. *Id.* The plaintiff sued the pump manufacturer under negligence and strict liability theories of recovery and claimed that but for the pump fire, she would not have walked over the wet pump rack and fallen. *Id.* In holding that the plaintiff's injuries were too remotely connected with the defendant's conduct or the pump to constitute the legal cause of the injuries, the supreme court reasoned that the pump fire did no more than create the condition that made the plaintiff's injuries possible. *Id.* at 776. The court elaborated that

"the forces generated by the fire had come to rest when she fell off the pipe rack. The fire had been extinguished, and [the plaintiff] was walking away from the scene." *Id.*

In both of these cases, the supreme court found a comment to Section 431 of the Restatement (Second) of Torts instructive on the issue of legal causation:

> In order to be a legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent.... The negligence must also be a substantial factor in bringing about the plaintiff's harm. The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes every one of the great number of events without which any happening would not have occurred.

Restatement (Second) of Torts § 431 cmt. a (1965); *see Union Pump*, 898 S.W.2d at 776; *Lear Siegler*, 819 S.W.2d at 472.

Plaintiffs' claims here do not clear the attenuation hurdle set forth in *Lear Siegler* and *Union Pump*. In Plaintiffs' own words:

> The natural sequence of events alleged by Plaintiffs can be summarized as follows: (1) Apple fails to implement its own patented technology to provide a "lock-out" mechanism for the iPhone to prevent texting and driving at

> highway speeds; (2) Kubiak's iPhone delivers a message to her while driving at highway speeds; (3) Kubiak's attention is drawn away from the roadway by the iPhone to check said message; (4) Kubiak fails to see Plaintiffs' vehicle slowing to make a left-hand turn; and (5) Kubiak's vehicle collides with Plaintiffs vehicle and thereafter injury results.

Doc. No. 11 at 23. Even taking these factual allegations as true, the forces generated by the iPhone's alleged defect and by Apple's conduct in designing and marketing the iPhone came to rest after the incoming message was delivered to Kubiak's iPhone. *See* *Union Pump*, 898 S.W.2d at 776. At that point, " 'no one was in any real or apparent danger' " based simply on the delivery of the message. *Id.* (quoting *Bell v. Campbell*, 434 S.W.2d 117, 122 (Tex. 1968)). Instead, a real risk of injury did not materialize until Kubiak neglected her duty to safely operate her vehicle by diverting her attention from the roadway. In that sense, Apple's failure to configure the iPhone to automatically disable did nothing more than create the condition that made Plaintiffs' injuries possible. Because the circumstances here are not "such that reasonable jurors would identify [the iPhone or Apple's conduct] as being actually responsible for the ultimate harm" to Plaintiffs, the iPhone and Apple's conduct are too remotely connected with Plaintiffs' injuries to constitute their legal cause. *See* *Crump*, 330 S.W.3d at 224. Accordingly, Plaintiffs have failed to state a plausible products liability claim under either a strict liability or negligence theory. *See* *Twombly*, 550 U.S. at 570. Plaintiffs' claims should, therefore, be dismissed with prejudice.

When a plaintiff's complaint fails to state a claim, the court should generally give the plaintiff at least one chance to amend the complaint under Rule 15(a) before dismissing the action with prejudice. *See Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002) ("[D]istrict courts often afford plaintiffs at least one opportunity to cure pleading deficiencies before dismissing a case, unless it is clear that the defects are incurable or the plaintiffs advise the court that they are unwilling or unable to amend in a manner that will avoid dismissal."). Leave to amend should be denied, however, if the court determines that "the proposed change clearly is frivolous or advances a claim or defense that is legally insufficient on its face...." 6 Charles A. Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 1487 (2d ed. 1990); *see also Ayers v. Johnson*, 247 Fed.Appx. 534, 535 (5th Cir. 2007) (per curiam) ("[A] district court acts within its discretion when dismissing a motion to amend that is frivolous or futile."). Here, Plaintiffs have not requested leave to amend in the event the Court determines their claims should be dismissed. Even if they had, though, an amendment would not cure the deficiencies identified above. Plaintiffs' First Amended Complaint sets forth their best case on the causation element of their claims, but still falls short of stating legally cognizable claims of strict products liability and negligence. Accordingly, allowing Plaintiffs to amend their complaint would be futile under the facts presented in this case.

**RECOMMENDATION**

For the foregoing reasons, the Court recommends that Defendant Apple, Inc.'s Motion to Dismiss (Doc. No. 7) be **GRANTED** and that Plaintiffs' claims be **DISMISSED WITH PREJUDICE**.

Within fourteen days after receipt of the Magistrate Judge's report, any party may serve and file written objections to the findings and recommendations of the Magistrate Judge. 28 U.S.C. § 636(b).

A party's failure to file written objections to the findings, conclusions, and recommendations contained in this Report within fourteen days after service shall bar that party from de novo review by the District Judge of those findings, conclusions, and recommendations, and except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United Services Auto. Assn.*, 79 F.3d 1415, 1430 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1) (extending the time to file objections from ten to fourteen days).

So ORDERED and SIGNED this 16th day of August, 2016.

## Footnotes

1Although Plaintiffs' First Amended Complaint asserts a strict liability claim under a manufacturing defect theory, Plaintiffs indicate in their response to Apple's motion to dismiss that they no longer wish to pursue their claims under that theory. *See* Doc. No. 11 at 9 n.2.

Filed: 01/17/2019

United States Court of Appeals, Fifth Circuit.
No. 17-40968

KIMBERLY MEADOR, agent of Individually, And as Guardian for L.M. aminor; AMOS STANDARD, on behalf of Individually, and on behalf of the Estate of Shari Standard, deceased; RUSSELL JONES, on behalf of Individually, and on behalf of the Estate of Sandra Jones, deceased,
Plaintiffs -Appellants
v.
APPLE, INCORPORATED, Defendant -Appellee

Appeal from the United States District Courtfor the Eastern District of Texas

ON PETITION FOR REHEARING

Before STEWART, Chief Judge, WIENER, and HIGGINSON, Circuit Judges. PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:
/s/ STEPHEN A. HIGGINSONUNITED STATES CIRCUIT JUDGE

Filed: 01/17/2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-40968

KIMBERLY MEADOR, agent of Individually, And as Guardian for L.M. aminor; AMOS STANDARD, on behalf of Individually, and on behalf of the Estate of Shari Standard, deceased; RUSSELL JONES, on behalf of Individually, and on behalf of the Estate of Sandra Jones, deceased,
Plaintiffs -Appellants
v.
APPLE, INCORPORATED, Defendant -Appellee

Appeal from the United States District Courtfor the Eastern District of Texas

Before STEWART, Chief Judge, WIENER, and HIGGINSON, Circuit Judges. PER CURIAM:

IT IS ORDERED that appellants' opposed motion to certify questions to the Texas Supreme Court is DENIED.