IN THE SUPREME COURT

OF THE STATE OF NEVADA

FORD MOTOR COMPANY,

Appellant,,

v.

THERESA GARCIA TREJO, AS THE SUCCESSOR-IN-INTEREST AND SURVIVING SPOUSE OF RAFAEL TREJO, DECEASED

Respondent.

Supreme Court Case No. 67843

District Court Case No. A-11-641059-C

RESPONDENT'S ANSWERING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Respondent is Theresa Garcia Trejo, as the successor-in-interest and surviving spouse of Rafael Trejo, deceased.

Dated this 25th day of January 2016.

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TABLE OF CONTENTS

Page:

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TABLE OF AUTHORITIES

Cases **Brief Page:**

MAUPIN • NAYLOR • BRASTER
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State Rules and Regulations

Secondary Sources

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I. INTRODUCTION

In this appeal, appellant Ford Motor Company ("Ford") continues in its quest to avoid responsibility for the death of Rafael Trejo ("Rafael"), who was killed in a December 2009 rollover accident in a defectively designed, engineered and marketed Ford "Excursion" SUV. Rafael's widow, Theresa Garcia Trejo ("Ms. Trejo"), successfully brought this products case below against Ford to obtain redress for the loss of her husband. The judgment on the verdict should be affirmed because it is clearly supported by substantial evidence and is based upon correct legal principles.

Predictably, Ford protests with great force that no competent evidence was submitted in support of the claim; that as a matter of physics the accident could not have occurred as Ms. Trejo's experts have concluded; that the jury misunderstood the case; and that, therefore, the verdict rendered under current Nevada products liability law was not supported by any substantial evidence. These arguments are part of an undisguised attempt to improperly retry this case on carefully "spun" facts here on appeal. The outcome of this attempt hinges on a very delicate and tenuous proposition – that Ford must be right and any claimant with regard to the defect alleged in this case must be wrong.

The claims that no evidence supported the verdict below are, of course, specious. Ford's defense to this case is simply its own forensic invention. First, Ford's defense depends upon its highly speculative theory that Rafael died

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instantly from a broken neck in the rollover when his head struck the Excursion's intact roof during a 30 millisecond period ***before*** the roof failed. This theory hangs on the opinion of Ford's paid forensic expert who admitted that his conclusions were based upon a unique "perfect storm" of circumstances. The facts upon which this opinion relied were clearly refuted by the only eyewitness to the accident – Ms. Trejo herself. She testified that her husband was still alive ***after*** the vehicle reached its final point of rest. And, most importantly, evidence given by a completely neutral medical expert – the actual coroner that performed the autopsy on Rafael's body – supported Ms. Trejo's testimony and thus her theory of roof crush and ***subsequent*** asphyxiation ***after*** the roof had failed. With that testimony in hand, Rafael's death could not have been instantaneous as Ford suggests. At any rate, the jury could certainly have come to the same conclusion as the coroner based upon Ms. Trejo's testimony. Second, Ms. Trejo's retained experts came to competent conclusions based upon examination of the vehicle, Rafael's injuries documented post-mortem, extensive testing, institutional materials regarding the design and manufacture of Ford Excursions, the laws of physics and biophysics, and Ms. Trejo's testimony. In short, Ms. Trejo's testimony fully supported the coroner and the other witnesses called on her behalf. No one has accused her of fabricating these events and Ford's theories cannot be reconciled with her evidence. Ford's defense hangs by a thread because it is based upon speculation

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that only one chain of events can be sustained – that Rafael died within a 30 millisecond window of time and thus did not survive the rollover as he clearly did.

What Ford has carefully avoided in its Opening Brief in this appeal is that its defense was simply a forensic exercise – Ford took a "party line" approach to the defense and it lost. Putting the best face on the trial from Ford's viewpoint, the jury was tasked with resolving conflicting lay and expert testimony. Simply stated, the jury rejected Ford's rigid and dogmatic approach to the case. On this ground alone, the judgment on the verdict of $4.5 million should be affirmed.

Clearly realizing its predicament, Ford renews its condescending trial argument that the Excursion SUV is much too complex a product to be legally evaluated under what it feels is outdated and antiquated Nevada product liability doctrine, which is based upon the Restatement (Second) of Torts § 402A, and which has been applied without "incident" for the last 46 years. In summary, existing doctrine imposes strict tort liability for design or manufacturing defects that render a product "unreasonably dangerous." A determination of unreasonable dangerousness rests upon an assessment of whether a product failed to perform in a manner reasonably expected by the ordinary user having the ordinary knowledge available in the community. This is known as the "consumer expectation test."

Rather, Ford claims that the trial court should have had the prescience to assume that this Court would fundamentally alter its own legal landscape in these matters, reject 46 years of successful processing of products cases, and apply a new

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Restatement (Third) of Torts: Products Liability § 2(b) in such matters. Not surprisingly, the new formulation for imposition of products liability is dramatically and unfairly more favorable to manufacturers than the tried and true considerations of the Second Restatement. The new test for liability goes by the magical moniker: "risk versus utility" or "risk versus benefit." The elements or "factors" of this test as relied upon by Ford are perversely skewed in favor of the manufacturer:

1. The likelihood that the product will cause injury considering the product as sold with any instructions or warnings regarding its use;
2. The ability of the plaintiff to have avoided injury;
3. The plaintiff's awareness of the product's dangers;
4. The usefulness of the product as designed as compared to a safe design;
5. The functional and monetary cost of using the alternative design; and,
6. The likely effect of liability for failure to adopt the alternative design on the range of consumer choice among products. 14 JA 3206-07.

Aside from sweeping away the Nevada doctrine that comparative negligence is not a defense to strict liability (see points 2 and 3), all of the other criteria assume that economic considerations known to and controlled by the defendant must be satisfied. This test, properly rejected at trial, substitutes the "reasonableness" of the manufacturer's decision-making process for the "reasonableness" of the product's safety, thereby wiping out strict liability for

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design defects altogether. The change urged by Ford would turn back the clock on products liability litigation to a half-century ago when plaintiffs had to demonstrate fault via negligence on the part of the manufacturer in making design choices to recover compensation for injuries caused by unreasonably dangerous product design.

The irony of Ford's all-court press for a new formula for products liability cannot be overlooked. After systemic indifference to the safety of purchasers of Ford Excursions, which is discussed at length in this brief, it now seeks a change in the rules of legal engagement on the grounds that protection against that indifference is no longer necessary. This irony demonstrates why this case is a very poor vehicle for this court to examine a profound shift in products liability law back to the pre-strict liability protectionism that favored the manufacturer over the consumer. Moreover, the discrete facts of this case are easily resolved under existing law.

The judgment below should be affirmed – substantial evidence supports the verdict and the Nevada strict liability doctrine provides a more than adequate legal framework for evaluating the safety of any American product, regardless of its complexity.

II. JURISDICTIONAL STATEMENT

Respondent Theresa Garcia Trejo agrees with the Jurisdictional Statement in Appellant's Opening Brief.

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III. ROUTING STATEMENT

Respondent Theresa Garcia Trejo also agrees with the Routing Statement in Appellant's Opening Brief and further believes that the Supreme Court should not only retain this appeal, but should hear and decide this appeal en banc.

IV. STATEMENT OF THE CASE

Ford has appealed a judgment upon a jury verdict awarding Ms. Trejo, the surviving spouse of Rafael, $4.5 million (plus prejudgment interest of $518,376.70) against Ford for the wrongful death of Rafael due to the fatal collapse of the roof of their 2000 Ford Excursion XLT (the "vehicle") during a rollover accident in New Mexico. Ms. Trejo watched helplessly as Rafael, alive and conscious when the vehicle came to rest on its collapsed roof, died from positional asphyxia due to being pinned in the vehicle by its crushed roof with his airways compromised and unable to breath.

Ford's Opening Brief tries to avoid responsibility for Rafael's death by ignoring, suppressing, excluding and disparaging all evidence against it; demanding judgment as a matter of law from this Court based solely on industry expertise and the testing methods of its expert witnesses; and demanding that the Court repudiate a half-century of strict liability jurisprudence and adopt controversial legal doctrines favored by industry experts and their academic advocates. Under those doctrines a manufacturer would avoid liability for damages caused by unreasonably dangerous products if the risk of death or serious bodily

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injury was outweighed by the greater utility – marketability and profitability of the product without commercially feasible changes.

None of these appellate contentions have merit and all should be firmly rejected by this Court. Taken together, they evince a concerted effort on the part of manufacturing industries in general, and the automotive industry in particular, to use appeals such as this one to effectively seize control of the judicial resolution of product liability cases to their advantage. Ford and its amici ignore altogether the original and fundamental purpose of strict liability in tort – to provide compensation for injuries caused by the marketing of unreasonably dangerous products without regard to fault and spread the real costs of such products through price adjustments and liability insurance.

The Court should reject Ford's arguments on appeal, affirm the judgment as amply supported by the evidence found credible by the jury, and reaffirm the Court's long-standing strict liability jurisprudence, the purpose of which is to provide compensation to consumers injured by unreasonably dangerous products.

V. COURSE OF PROCEEDINGS BELOW

Ms. Trejo's complaint initiating this action was filed on May 11, 2011, alleging claims for, inter alia, strict liability in tort, and seeking damages from Ford for the wrongful death of Rafael. The complaint alleged that the 2000 Ford Excursion XLT in question suffered from defects in design, marketing, warnings, crashworthiness, and occupant protection that failed to provide reasonable and

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necessary protection and occupant containment in the event of a rollover accident. The complaint further alleged that these defects caused the product to unexpectedly fail to function in a manner reasonably expected by an ordinary consumer and user, thereby causing the wrongful death of Rafael, and that there was a safer alternative design that was economically and technologically feasible that would have prevented or significantly reduced the risk of the injury in question without substantially impairing the vehicle's utility. 1 JA 8-10.

On August 6, 2014, Ford filed a motion to limit the testimony of Dr. Ross Zumwalt, the chief New Mexico Medical Investigator who performed the post-mortem examination of Rafael and who was charged by his official position with determining the case of Rafael's death. Ford complained that Dr. Zumwalt had provided plaintiff with specific pathology opinions not contained in his original autopsy report, including his diagnosis of asphyxia as an additional cause of death. Ford argued that plaintiff would have had to disclose Dr. Zumwalt as a "retained expert witness" for Dr. Zumwalt to testify at trial to opinions other than those contained in his original autopsy report and sought to limit Dr. Zumwalt's trial testimony to the contents of his original autopsy report. 2 JA 244-254.

Plaintiff's response noted that Ford had chosen not to interview Dr. Zumwalt or take his deposition, demonstrated that disclosure of Dr. Zumwalt and his opinions was timely, and provided argument and authority showing that, since his

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opinions were formed in the exercise of his responsibilities as a coroner, he was not subject to the requirements for retained expert witnesses. 3 JA 687-720.

Ford also filed motions seeking to exclude plaintiff's expert Brian Herbst and evidence of so-called "drop tests," in which a vehicle is inverted and dropped on its roof from a height of as little as 12 inches to illustrate the effect of forces encountered in a rollover on the vehicle's roof. Ford complained that Herbst was not an expert in "automotive roof design" or the "standard of care" for roof strength in comparable vehicles, that "drop tests" do not duplicate a vehicle rollover and did not include dummies, and otherwise simply quarreled with the content of Herbst's opinions. 1 JA 68-75, 94-107.

Plaintiff's response included Mr. Herbst's extensive experience and recognized qualifications in automotive safety engineering and crash analysis, including accident reconstruction, automotive safety research, vehicle crashworthiness analysis, and roof structure and restraint system design, analysis and testing. Plaintiff's response also demonstrated that inverted drop testing is not intended to replicate the accident or its effect on a human being inside the vehicle, but is widely accepted in the car manufacturing, governmental and scientific community (and was used by Ford's own experts for this case) as relevant to roof resistance to the dynamic forces involved in a rollover accident. This testing has been accepted for these purposes by both the National Highway Traffic Safety

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Administration ("NHTSA") and courts elsewhere on such issues. 2 JA 275-491; 3 JA 492-686.

Ms. Trejo submitted her claim for damages for the wrongful death of Rafael to the jury solely on the basis of strict liability in tort for the lack of crashworthiness and occupant protection due to the insufficient roof strength of the vehicle. 4 JA 904-12; 10 JA 2391-98. In accordance with present Nevada law, the jury was instructed that a product is defective if, as a result of its design, the product is unreasonably dangerous, and that a product is unreasonably dangerous if it failed to perform in the manner reasonably to be expected in light of its nature and intended function and was more dangerous than would be contemplated by the ordinary user having the ordinary knowledge available in the community. 14 JA 3370-73.

Ford unsuccessfully requested instructions based on the Restatement (Third) of Torts: Products Liability § 2(b) that would have told the jury a product is defective in design when, among other things, the manufacturer has effected an appropriate balancing of economic considerations against the risk of harm presented by the design. This test largely leaves the question of defect to the internal analysis of the manufacturer based only upon its own economic considerations, which are unquestionably geared toward its competitive advantage in the marketplace. This, of course, leaves important elements of proof in the hands of the manufacturer – in short, the manufacturer makes the rules and the

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consumer takes the hindmost.[1] Naturally, the District Court rejected this standard for liability.

On September 23, 2014, the jury returned a special verdict finding the 2000 Ford Excursion's roof was defective in design and the design defect was a proximate cause of Rafael's death, and awarding Ms. Trejo $2,000,000 for past loss of probable support, companionship, society, comfort, and consortium; $500,000 for future loss of probable support, companionship, society, comfort and consortium; $500,000 for past grief or sorrow; $1,000,000 for future grief or sorrow, and $500,000 for pain, suffering or disfigurement of Rafael. 14 JA 3396-97. On October 7, 2014, the District Court entered its Judgment on Jury Verdict awarding Ms. Trejo $4,500,000 plus prejudgment interest of $517,376.70. 14 JA 3396-97.

On October 21, 2014, Ford filed its Renewed Motion for Judgment as a Matter of Law or in the Alternative, for a New Trial arguing, inter alia, that (1) Dr. Zumwalt should not have been allowed to testify to opinions not contained in his original autopsy report; (2) Brian Herbst's expert opinions should not have been admitted and should be disregarded because his tests did not address what happens to vehicle occupants during a rollover and differed from tests preferred by Ford's

[1] The Third Restatement test, as noted below, would also re-introduce admissibility of comparative negligence evidence that has been discredited in Nevada for decades. Liability without fault means just that – principles of comparative negligence have no place in the analysis of a strict tort liability claim in this State.

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experts and others in the industry; (3) no evidence supports the jury's causation finding because portions of plaintiff's experts' opinions suggest the roof crush was insufficient to pin Rafael in the vehicle with his airways compromised; and (4) the District Court should have applied the new risk-utility balancing test in the new Restatement § 2(b). 15 JA 3533-64.

After full briefing and argument, the District Court denied Ford's motion on March 19, 2015, 15 JA 3672-75, and Ford filed its Notice of Appeal on April 16, 2015, 15 JA 3683-84.

VI. STATEMENT OF FACTS

Ford has known for decades that its vehicles would be involved in rollover crashes and that roof crush resistance plays an integral role in providing adequate occupant protection. 5 JA 1173. Nevertheless, Ford chose to design and sell the 2000 Ford Excursion without ever performing a single test to see how the Excursion's roof would perform in the event of a rollover crash. 11 JA 2792-93; 13 JA 3099-3100. Ford then marketed the Excursion as being a safe family vehicle engineered to provide "safety cell construction," even going so far as to emphasize the safety of its "reinforced" roof pillars. 5 JA 1180-81; 11 JA 2810.

On December 16, 2009, the Trejo family discovered that Ford's marketing of the 2000 Excursion as providing its customers "safety cell protection" was not true. In a low speed accident in which the vehicle began to roll over at a "trip" speed of 27 mph, the roof of the Trejo's 2000 Excursion completely collapsed into

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Rafael's occupant space. 6 JA 1451-52; 9 JA 2079-84. As a result of this severe roof crush, Rafael's neck was hyper-flexed (bent forward) to the point where he sustained a neck fracture and a severe spinal cord injury. 8 JA 1988. When the vehicle came to rest, Rafael's occupant space was so compromised by the roof collapse that he was pinned and trapped in a position that severely restricted his airways such that he died from positional asphyxia. 8 JA 1954-57.

In 2002, Ford conducted an engineering study to examine the performance of the Excursion's roof against its design criteria for roof crush resistance. 17 JA 4032-35. The study was based on computer modeling and a comparison with the roof crush resistance offered by the Ford Expedition sport utility vehicle ("SUV"). 17 JA 4040, 4042, 4043. ***The study unequivocally concluded that the Excursion's roof failed to meet Ford's own roof strength design criteria.*** 13 JA 3106; 17 JA 4037. ***In fact, the vehicle in which Rafael was killed did not even come close to meeting Ford's own standards***. 5 JA 1189-1200; 17 JA 4044. The study further concluded that adoption of the roof design of the Expedition and best practices would result in an improvement such that the Excursion would likely then meet Ford's performance standards. 17 JA 4040, 4042, 4043-44.

By the time of the 2002 roof study, the Trejo vehicle had already been manufactured and sold into the stream of commerce. 12 JA 2816. Ford took no action whatsoever to act on the information provided by the roof study. It did no physical testing to correlate the findings of the study. 12 JA 2815-16. Moreover,

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Ford did nothing to either correct consumer expectations arising from its deceptive and misleading claims of "safety cell protection" and "reinforced" roof pillars, or implement any design changes to bring the Excursion in line with its own minimum standards. 12 JA 2811-16. Despite knowing its Excursion had a weaker roof than would be acceptable with any other vehicle in its lineup for three more years, Ford continued to sell thousands more Excursions with the claim of "safety cell protection."

Plaintiff's roof design expert, Brian Herbst, showed through drop testing how the forces of the Trejo accident could be replicated in an exemplar vehicle. 5 JA 1263-67. Then, Mr. Herbst modified and reinforced the roof of a second exemplar Excursion. The reinforced Excursion was drop tested and suffered almost no roof crush and/or intrusion into the occupant space. 5 JA 1303-16. Mr. Herbst showed the jury that for a cost of $70 per vehicle and 70 lbs. of added weight to a 7000 lb. vehicle, Ford could have tripled the Excursion's roof strength. 5 JA 1273-75; 1312-13. Had Ford done any testing at all, it could have adopted a feasible alternative design that would have prevented the roof collapse experienced by the Trejo family when Rafael Trejo died due to the failure of its roof during a very low speed accident. 17 JA 4086.

Ford defended this case by insisting that **roof crush does ***not*** matter**. 12 JA 2740-41, 2755. ***In this, Ford claimed that Rafael had instantaneously experienced a fatal neck injury during a 30 millisecond period of time preceding***

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the failure of the roof structure. More specifically, Ford claimed that Rafael's head had contacted the roof during the rollover and that his neck injury had occurred when his torso jammed into his neck before the roof crushed. 11 JA 2618-19. Ford calls this novel theory of injury "torso augmentation" (11 JA 2618-2619), but it is also commonly referred to as the "diving" theory of injury. 8 JA 1745. Whatever testing Ford has conducted has required test dummies to be tethered and rigged in such a way as to assure that the head is fixed very close to the roof with the torso and head in perfect alignment. 13 JA 3097-98, 3118-19, 3121-22. Given the dynamics of the rollover in this case, it was not even possible for Rafael to have been perfectly aligned to "dive" into the roof. 9 JA 1781-82. ***Ford's own expert, Jeff Croteau, who has conducted most of the testing relied upon by Ford to support the "diving" theory, admitted that for this type of mechanism to occur, you needed a "perfect storm" of circumstances.*** 13 JA 3142-44.

Plaintiff presented the testimony and reports of Dr. Joe Peles, an expert in biomechanics, and Dr. Ross Zumwalt, the Chief New Mexico Medical Investigator, to prove that the roof collapse was the cause of Rafael's neck injury and resultant ***subsequent*** death by positional asphyxia. 8 JA 1940-41; 9 JA 1729. Both witnesses agreed that the nature of the injury, a single lever neck injury to the lower cervical region, was consistent with a bending/hyper flexion mechanism of injury, not from a sudden compression/diving. 8 JA 1953; 9 JA 1998-2000; 9 JA 1753-54, 1757, 1765. This excessive bending could only reasonably be explained

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by the collapse of the roof forcing Rafael's head forward and excessively bending his neck until it fractured. 9 JA 1998-2000; 9 JA 1753-54. Both witnesses agreed that a compression-diving type injury would have produced a different injury pattern, including a higher level fracture and multiple level injuries, none of which were present in this case. 8 JA 1953; 9 JA 1996-2000; 9 JA 1753-54, 1765, 1775-76, 1786-87.

Additionally, Dr. Zumwalt opined that Rafael had been pinned and trapped inside the vehicle, which caused his airway to become restricted after the accident. 8 JA 1954-57. This supported the testimony of Ms. Trejo that her husband was alive, with his eyes open and moving and looking at her, in the minutes following the accident, but that he could not move because of the condition of the vehicle with its flattened roof. 9 JA 2079-84. According to Dr. Zumwalt, the presence of petechial hemorrhaging around Rafael's eyes and gastric contents in his lungs confirmed that ***he had died from positional asphyxia following the first impact with the roof.*** This testimony negated the notion that he had died instantly from spinal shock coming from a compression type injury before the roof failure as Ford claims. 8 JA 1954-57, 1989-90, 1998-2000. ***According to this testimony, the failure of the roof and the resulting crush injury does matter.*** Again, the jury below could certainly make such a finding.

Hence, there is ample evidence supporting the jury's conclusion that, had the roof not crushed and pinned Rafael in his seat in the vehicle with his airway

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compromised, his wife could have come to his aid such that he could breathe while waiting for medical help to arrive. The Excursion's defective and unreasonably dangerous roof – measured by Ford's own standards and design choices for other vehicles – made that impossible and proximately caused Rafael's wrongful death.

VII. SUMMARY OF ARGUMENT

The parties submitted conflicting evidence on the question of defect and causation. The jury was entitled to adopt plaintiff's theories of recovery based upon plaintiff's evidence and the testimony of the New Mexico coroner. Both belied Ford's instantaneous death theory. Beyond that, Ford grasps at the proverbial straw when it claims that the District Court should have foreseen a change in the basic rules for strict tort liability that have been working successfully for over 40 years.

A. Substantial Evidence Supports the Jury Verdict

Ford tries to retry this case on appeal, claiming there is no "competent evidence" that the 2000 Excursion's unquestionably substandard roof – by Ford's own standards and conduct regarding its other vehicles – caused Rafael's death. However, as the District Court observed, there is "plenty of evidence" supporting the jury verdict, once the evidence as a whole is considered. 15 JA 3646-3648.

Ford ignores altogether Ms. Trejo's eyewitness testimony that Rafael was alive and conscious, with his eyes open and moving and looking at her, when the vehicle came to rest on its flattened roof with Rafael pinned inside. Her testimony

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squarely controverts the speculative opinion of Ford's experts that Rafael died in a "perfect storm" of circumstances within milliseconds of the roof first contacting the ground and before any roof crush occurred. Expert opinions are admitted to help the jury understand the evidence; they are not competent evidence of facts and cannot take the place of factual evidence, as Ford hopes. Perez v. State, 129 Nev. Adv. Op. 30, 313 P.3d 862, 866 (2013).

Ford tried to suppress the trial opinions of Dr. Zumwalt, the Chief New Mexico Medical Investigator, and the only disinterested expert to testify at trial, claiming he needed to be treated as a "retained expert witness," citing cases involving physicians treating patients. However, Dr. Zumwalt is not like a physician retained first to treat a patient and who then gives expert testimony after treatment has ended. Dr. Zumwalt's responsibility for determining Rafael's death resulted from his official duties. Since Dr. Zumwalt's official responsibility for determining Rafael's cause of death never ended, Ford cannot insist that Dr. Zumwalt's initial autopsy report be cast in stone by falsely claiming he became a "retained expert witness" thereafter. The District Court vigorously voir dired Dr. Zumwalt to ensure his trial opinions were solely the result of his own work; hence Ford has no cause for complaint. To the extent Ford challenges the coroner's evidence based upon perceived differences between his evidence and his report, that challenge was resolved by the jury below as it was the sole judge of witness credibility in this case.

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Ford tried to exclude the expert testimony of Brian Herbst by mischaracterizing the scope, purpose, relevance and substance of his opinions and then quarrelling with the content of his opinions under the guise of attacking his "competence" and their "foundation." Herbst's opinions and testing methods were intended to illustrate the forces involved in a rollover by replicating the resulting roof crush and show how the roof crush could be eliminated or substantially reduced by a commercially feasible alternative roof structure such as the one Ford used on its Expedition SUV. Herbst never intended to replicate the "conditions" of the accident or its effect on a human being inside the vehicle, since the jury learned all it needed to know about those issues in this accident from Ms. Trejo's eyewitness testimony, Dr. Zumwalt's disinterested testimony, and Dr. Joe Peles' expert opinion (discussed below) that explained their testimony. Ford complains that Herbt's drop tests did not use instrumented dummies, but dummies were irrelevant to the scope, purpose, relevance and substance of his opinions, and Ford rigged the dummies used in its experts' drop tests so they would remain in the position required by their theory of how people are injured in rollover accidents. 13 JA 3097-98, 3118-19, 3121-22.

Ford claims no substantial evidence supports the jury verdict because there is a "gap" between Herbst's testimony and Peles' assumptions as to whether all or "more than half" of the roof crush occurred when the roof first contacted the ground during the rollover. The jury could have reconciled any alleged "gap" in

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the expert testimony, since the evidence at trial established that the "static" roof crush measured after the accident is significantly less than the "dynamic" roof crush that occurs during the rollover. More important, the credibility of expert testimony is for the jury. Houston Expl. Inc. v. Meredith, 102 Nev. 510, 513, 728 P.2d 437, 439 (1986); Allen v. State, 99 Nev. 485, 488, 665 P.2d 238, 240 (1983). Here, the jury could have reasonably concluded that Dr. Peles' opinions credibly explained Ms. Trejo's eyewitness testimony and Dr. Zumwalt's disinterested testimony despite the self-interested nitpicking of Ford's litigation team.

B. The Jury Was Properly Instructed on the Law

Ford further complains that the jury was instructed on the "consumer expectations" test that has governed products liability law in Nevada for nearly half a century. See Ginnis v. Mapes Hotel Corp., 86 Nev. 408, 470 P.2d 135 (1970). This protest largely stems from the fact that Ginnis and its precedential prodigies compelled a jury decision against Ford. To demonstrate, here, Ford deliberately sought to create favorable consumer expectations for the roof strength of the 2000 Ford Excursion with marketing materials that touted its "safety cell construction" and "reinforced" roof pillars, with no test results whatsoever to support such claims. Ford did nothing to either adopt a commercially feasible alternative design or correct consumer expectations when subsequent testing established that the roof strength of the 2000 Excursion fell well below Ford's own standards, that the roof strength of the Ford Expedition SUV met those standards,

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and that, with a commercially feasible modification, the Excursion could have met those standards.

The "consumer expectations" test is the proper test for strict liability in tort, regardless of whether the cause of the plaintiff's injury is a manufacturing defect, a design defect, or an unidentified defect that cannot be pigeonholed. See Aubin v. Union Carbide Corp., 177 So.3d 489 (Fla. 2015); Ginnis, 86 Nev. 408, 470 P.2d 135. Consumers purchase and use the product and bear the risk of being killed or seriously injured by "unreasonably dangerous" products regardless of how the judicial system classifies defects. Conversely, manufacturers are largely if not exclusively in control of the information available to the ordinary consumer from which reasonable consumer expectations can be determined and can affect those expectations through advertising and marketing materials, directives to dealers, bulletins to regulatory agencies and testing services and recall notices, should the manufacturer choose to do so. Ford did not do so in this case.

Nevertheless, Ford and its amici insist that the Court should repudiate nearly a half-century of consumer protection under strict liability in tort and instead, require risk-utility balancing among feasible alternative designs before a consumer can obtain compensation for injuries caused by a manufacturer choosing to market unreasonably dangerous products, under the new Restatement § 2(b). Ford's principal basis for making this demand in this and other cases is its contention that the "ordinary consumer" does not know enough to form "reasonable expectations"

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about "complex" products they use every day. However, under the "consumer expectations" test, the source of "reasonable expectations" is not technical expertise, but the nature and intended function of the product (including its appearance) and the information available to the ordinary consumer in the community. If – as noted above – the manufacturer fails to make available sufficient accurate and truthful information to permit reasonable consumer expectations regarding a product's safety and use – as Ford failed to do here – the manufacturer has nobody to blame but itself.

Moreover, risk-utility balancing under new Restatement § 2(b) is fundamentally in conflict with Nevada law in at least three major respects.

First, new Restatement § 2(b) requires proof of a feasible alternative design before a manufacturer can be held liable for injuries caused by its marketing of an unreasonably dangerous product. As the Court recognized long ago, that requirement is wholly inconsistent with the original and fundamental purpose of strict liability in tort – to compensate those injured by unreasonably dangerous products and spread the real costs of such products through price adjustments and liability insurance. See Allison v. Merck & Co., Inc., 110 Nev. 762, 878 P.2d 948 (1994); see also, Aubin, 177 So.3d 489.

Second, the Comments to new Restatement § 2(b) make liability for damages dependent upon balancing the risks of death or serious bodily injury against factors such as the greater usefulness and consumer choice provided by the

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product without a safer feasible alternative design. In contrast, under this Court's precedents, reasonable consumer expectations on the one hand, and commercially feasible alternatives on the other, form the outer parameters within which manufacturers must satisfy reasonable consumer expectations regarding safety, by only marketing products with the safest commercially feasible design. See Robinson v. G.G.C., Inc., 107 Nev. 135, 808 P.2d 522 (1991).

Third, new Restatement § 2(b) shifts the relevant inquiry from the "reasonableness" of the product's safety to the "reasonableness" of the manufacturer's conduct in marketing the product and injects factors into that decision-making that go far beyond safety considerations. As numerous courts have recognized, by doing so, the new Restatement § 2(b) effectively wipes out strict liability in tort (and seriously threatens crashworthiness claims) for design defects, by requiring that the plaintiff prove fault, i.e. negligent decision-making. See Banks v. ICI Americas, Inc., 450 S.E.2d 671 (Ga. 1994). Moreover, the factors made relevant by new Restatement § 2(b) resurrect contributory negligence as a defense to the manufacturer's liability, contrary to this Court's longstanding strict liability precedents. See Andrews v. Harley Davidson, Inc., 106 Nev. 533, 796 P.2d 1092 (1990).

The remarkable proposition that Ford's products and practices have eclipsed the capabilities of this Court's current binding precedents to provide a proper framework for determining liability in products cases ignores that fact that the

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Second Restatement position has protected consumers and product producers alike since this court handed down Ginnis v. Mapes Hotel, supra, in 1970. Moreover, it also ignores the fact that the Third Restatement position simply cedes control over products liability to the producer based primarily on its own internal economic considerations. This new "rule" then works primarily to protect the manufacturer rather than the consumer. Its adoption would essentially return the court system to its pre-strict tort liability era, where purchasers of important products could only bring negligence claims and simply had to accept and endure defective and dangerous manufacturing practices without any real practical redress. Caveat emptor – let the buyer beware.

This is not to say Ford is "anti-consumer." Ford's products have improved greatly since the days of "Pinto" litigation. But those improvements did not happen because the company had some altruistic epiphany that was merely coincidental to that watershed victory for automobile consumers. This occurred because the test for strict liability in tort recovery was geared to the reasonable expectations of consumers that a product was not unreasonably dangerous in normal and foreseeable use. In short, it was the court system that forced that change of view.

Ginnis v. Mapes Hotel Corp., Robinson v. G.G.C. Inc., Allison v. Merck & Co., Inc., etc. have provided and developed essential consumer protection in our State. The view offered from the new Restatement § 2(b) simply regresses products protection back to the ***absurd*** premise that modern design and manufacturing

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practices have eliminated the need for the protection provided by the now traditional Second Restatement approach, and that modern products like the Ford Excursion are just too complex and sophisticated for evaluation by jurors based upon a reasonable consumer expectations formula.

C. Ford's Requests for Relief on This Appeal Have No Merit

Finally, Ford demands JNOV from this Court relying solely on the opinions, testing methods, and conclusions of its own expert witnesses. However, as discussed above, Ms. Trejo's eyewitness testimony squarely controverts Ford's experts' opinions on the time and manner of Rafael's death and Dr. Zumwalt's disinterested expert testimony squarely controverts Ford's experts' opinions on the cause of Rafael's death – as the District Court expressly recognized in denying Ford JNOV. 15 JA 3676-82. Moreover, the central premise of Ford's defense – that roof crush doesn't matter because its testing methods show no correlation between roof crush and occupant injury – is squarely refuted by the facts of this very case as found by the jury from the credible evidence at trial. Hence, Ford's continuing demand for JNOV simply exposes its utter contempt for, not only consumer safety, but also the judicial process and the role of the jury in resolving factual disputes.

Ford makes only passing references to "at least" being entitled to a new trial, but does not even attempt to satisfy its heavy burden of showing that, but for prejudicial error below, a different result was probable such that it might

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reasonably have been expected. See Cook v. Sunrise Hosp. & Med. Ctr., LLC, 124 Nev. 997, 1009-10, 194 P.3d 1214, 1221-22 (2014). Specifically, Ford and its amici attempted to make new Restatement § 2(b) the central issue on this appeal, but the evidence at trial would have satisfied that test as well. Ford could have reinforced the roof strength of the Excursion for $70/vehicle and used stronger roof support as in its Expedition SUV. Ford never claimed, much less demonstrated, that doing so would have reduced either its utility or consumer choice. Hence, Ford had no evidentiary basis for requesting jury instructions on risk-utility balancing.

Ford argues that increasing roof strength would have "zero" safety benefits – based on its "no correlation between roof crush and occupant injury" argument – and doing so "might" reduce the overall safety of the vehicle. Again, Ford's "no correlation" argument is squarely refuted by the facts of this case, and Ford's experts did not identify even one specific circumstance, much less a majority of specific circumstances, in which increasing roof strength would have resulted in more injuries, there being no more severe injury than death. In short, Ford and its amici create a massive strawman by demanding risk-utility balancing with nothing but expert speculation supporting lesser "benefits" on a risk-benefit analysis. That speculation is squarely refuted by Ford's own conduct in using stronger roof supports satisfying Ford's own standards on its other vehicles such as the Expedition SUV. Thus, Ford has not, and cannot, show that a different result was

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probable, had the jury been instructed on new Restatement § 2(b), and Ford has no basis for demanding a new trial.

The jury verdict is supported by substantial evidence when the evidence is considered as a whole. Ford has failed to demonstrate prejudicial error or abuse of discretion in the District Court's evidentiary rulings. The district court in no way abused its discretion when it instructed the jury on the "consumer expectation" test under Nevada law, particularly in light of Ford's conduct in marketing the vehicle. The Court should firmly reject the new Restatement § 2(b) and its comments as inconsistent with well-settled Nevada law and contrary to Nevada public policy as embodied in strict liability in tort. In all this, Ford is not entitled to either JNOV or a new trial.

VIII. ARGUMENT

A. The Jury Verdict Is Supported by Substantial Competent Evidence When the Evidence Is Considered as a Whole

Ford, its amici, and the drafters and defenders of new Restatement § 2(b) live in a self-interested fantasy world in which industry expertise and promoting product utility are the only things that matter, not consumer expectations and maximizing product safety. The real world evidence in this case not only demonstrates that the opinions of Ford's expert witnesses regarding Rafael's death are wrong, but also raises disturbing questions about Ford's use of industry expertise and testing methods in litigation. Ford tries to ignore, suppress, exclude

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and disparage all evidence against it and then demands – not just "at least" a new trial – but judgment as a matter of law relying on the very same industry expertise that was not only found not credible by the jury, but proved wrong by the facts and circumstances of this case.

(1) Ms. Trejo's Testimony

Ms. Trejo testified that the vehicle came to rest upside down after the rollover. She unlatched her seatbelt, escaped from the vehicle through the driver-side window and went around to the passenger side, but could not see her husband because the roof was flattened. She then went back to the driver-side, saw Rafael in his seat, ***definitely alive***, moving his eyes and looking at her, but unable to move under a crushed roof so severe that she had not even been able to see him from the passenger side. 9 JA 2079-84. Ms. Trejo's eyewitness testimony thus demonstrated that Ford's experts were simply wrong in opining that Rafael died during the rollover, within milliseconds of the roof first contacting the ground, and before any significant roof crush could occur.

Ford's opening brief ignores Ms. Trejo's eyewitness testimony altogether. Not a single word in Appellant's Opening Brief addresses her testimony despite the fact that her testimony both squarely refuted Ford's expert opinions on Rafael's death and provided the factual basis from which the jury could conclude that Rafael died while pinned in the vehicle by its crushed roof unable to move. Apparently Ford believes that if Ford says nothing about her eyewitness testimony,

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the Court should simply substitute the erroneous opinions of Ford's experts regarding Rafael's death and grant Ford JNOV. However, expert testimony is admissible to assist the jury in understanding the evidence; expert opinions are not evidence of facts and cannot provide evidence of facts. See Perez v. State, 129 Nev. Adv. Op. 90, 313 P.3d 862, 866 (2013). Hence, Ford's insistence it should prevail as a matter of law based solely on industry expertise has no merit whatsoever.

(2) Dr. Zumwalt's Testimony

Dr. Zumwalt is and has been the Chief Medical Investigator for the State of New Mexico for 23 years. He performed the autopsy on Rafael in the exercise of his responsibilities as a forensic investigator for the State of New Mexico to determine the cause of Rafael's death. His opinions are based solely on the matters contained in his file, he was not provided with any additional materials by anyone, and he received no personal compensation for appearing to testify in the case. 8 JA 1940-41. Hence, Dr. Zumwalt was a percipient expert witness, not a retained expert witness proffered by either party to testify on their behalf.

Dr. Zumwalt testified that Rafael suffered an isolated single level injury to the lower cervical spinal cord that was associated with "a bending or stretching" type of trauma. 8 JA 1953. He testified that it was most likely that Rafael's head bent or flexed so far forward and downward that it cracked his spine and pinched his spinal cord, based on the injury on the back of his head, the location of the

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fracture, and the circumstances of the car collapsing with him upside down in the vehicle in his seatbelt. 9 JA 1996-98. Dr. Zumwalt testified that Rafael was trapped in the vehicle alive, with a broken neck, his airway compromised, and trying to suck in air for some period of time after the accident. 8 JA 1955-57. These circumstances, together with aspirated gastric contents in his lungs and the presence of petechial hemorrhages led him to the conclusion Rafael died due to "positional asphyxia." 8 JA 1948, 1954-57. This, of course, raises the question as to whether Ford's instantaneous death theory is at odds with Ms. Trejo's eyewitness account and the conclusions reached by the coroner. The answer is obvious, Rafael could not aspirate gastric contents after the initial impact (the "dive") if he was dead. The jury was more than justified in so finding.

Ford tried to suppress Dr. Zumwalt's percipient witness testimony at trial by arguing he had to be treated as a "retained expert witness" and his testimony limited to the contents of his original autopsy report, because his trial testimony extended beyond his original autopsy report, citing FCH1 LLC v. Rodriguez, 130 Nev. Adv. Op. 46, 335 P.3d 183, 189 (2014) (finding if a treating physician's opinions exceed the opinions formed during treatment, the physician is testifying as a retained expert and proponent of his opinions, and he must comply with NRCP 16.1(a)(2)).

However, a state medical investigator performing an autopsy in the exercise of his official responsibilities is not like a physician who testifies to opinions

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formed after treatment ceases on behalf of a party in litigation. The state medical investigator's responsibility is to the state and that responsibility does not stop with the filing of an autopsy report. As the Court held in Boorman v. Nevada Mem'l Cremation Soc'y, "the county coroner's duty is to investigate the cause of death…" 126 Nev. 301, 309, 236 P.3d 4, 9 (2010). Representatives and relatives of a decedent sometimes request that a coroner review his findings from an autopsy conducted in his official capacity, and it would seriously taint the investigative process to hold that by doing so and by receiving a copy of the coroner's amended findings, they have "retained" the coroner to testify as an expert witness on behalf of one of the parties in contested litigation.

Regardless of who makes such a request, the coroner's responsibility to the state never ceases, and if the coroner later testifies in contested litigation between private parties, it is as a disinterested percipient expert witness, not as a retained expert witness testifying on behalf of one of the parties. The District Court vigorously voir dired Dr. Zumwalt to make certain his opinions at trial came solely from his coroner's file and no other source. 8 JA 1923-25. Hence, Ford's attempt to suppress Dr. Zumwalt's trial testimony properly failed -- the jury could have easily concluded that Rafael was asphyxiated by the roof crush due to being pinned in the vehicle with his head flexed so far forward and down that his airway was compromised and he was unable to breath. See 16 JA 3718-37.

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(3) Brian Herbst's Testimony

Ford demands that Brian Herbst's expert testimony be excluded, but its arguments are simply a rerun of those Ford unsuccessfully made in the District Court where the issues were briefed at length, and Ford has failed to show any abuse of discretion in the District Court's admission of Herbst's testimony.

This Court has rejected rigid requirements for the admissibility of expert testimony that have been imposed by some federal courts in favor of a "flexible" approach under which factors relied on in prior cases may or may not be applicable, and other factors may take precedence, depending on the totality of circumstances in a particular case. Higgs v. State, 126 Nev. Adv. Op. 1, 222 P.3d 648, 655-59 (2010). The District Court proceedings established that Herbst was eminently qualified as an expert and that his expert testimony would assist the jury and was within the scope of his expertise, thereby ensuring reliability and relevance. Id. Ford's arguments simply quarrel with Herbst's methods, analysis and content of his opinions, which are questions of credibility and weight, not admissibility. See Allen v. State, 99 Nev. at 488, 665 P.2d at 240.

Ford argues that Herbst did not attempt to replicate the "conditions" of the accident and did not address the effect of the rollover on human occupants of the vehicle. Ford thus continues its deliberate mischaracterization of the scope, purpose, substance and basis for Herbst's testimony in this and other cases and its meritless attack on the strawman that Ford thereby tries to create. Neither side

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replicated the "conditions" of the accident, and the percipient eyewitness and expert testimony discussed above told the jury all it needed to know about the effect of this rollover accident on Rafael. Herbst's expert testimony addressed and illustrated the effect of the forces involved in this rollover by replicating the resulting roof crush and then established the availability of commercially feasible alternatives that Ford used in other vehicles by which Ford could have eliminated or greatly reduced the roof crush killing Rafael at relatively minimal cost. 6 JA 1263-67, 1273-75, 1303-16.

Herbst's used "drop tests," which are used by numerous motor vehicle manufacturers – including Ford in this litigation – and respected by NHTSA, despite no longer being termed a "recommended practice" by the Society of Automotive Engineers, undoubtedly because – as in this case – they prove far too much for some automobile manufacturers. 2 JA 0280-81, 300-09. Ford complains that Herbst's tests did not include dummies, but Herbst's expert testimony addressed defect and feasible alternatives, not causation of Rafael's injuries, and dummies are not a suitable surrogate for occupants in rollovers and drop tests. 2 JA 0302-03. Hence, Herbst's expert testimony did not, and was never intended to, address the effect of this rollover on Rafael.

Moreover, Ford's references to its use of drop tests with dummies in this litigation provide a timely example of the dangers inherent in substituting industry expertise for forensic expertise in determining whether a manufacturer is liable in

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damages for marketing an unreasonably dangerous product that kills or seriously injures a particular consumer/user. Ford's roof design expert witness and the creator of most of Ford's test protocols admitted that Rafael's death from a "compression" injury as Ford claims, would have required a "perfect storm" of circumstances in which the head, neck and torso were in perfect alignment, there was close contact of the head with the roof, and no roof deformation taking the occupant out of alignment occurred during a 30 millisecond time period before roof crush occurred. 13 JA 3142-3144. However, Ford's testing protocol required that dummies be tethered and rigged so as to assure that the head was fixed very close to the roof and the torso and head were in perfect alignment. 13 JA 3097-98, 3111-13, 3118-19, 3121-22.

Even if such industry testing might be proper in comparing different forms of overhead protection under identical circumstances, it says nothing about what happened to Rafael during this real world rollover. Ford rigged the dummies so as to create and preserve the "perfect storm" of circumstances that Ford's expert admits would have had to occur during the rollover for Rafael to have died as Ford claims. Hence, Ford's suggestion that Herbst had to use drop testing with dummies for his expert testimony to be sufficiently "reliable" to be admissible is not only patently false, it evidences a calculated attempt to "game" the judicial system with industry tests that were quite literally "rigged" to reproduce the "perfect storm" of circumstances that Ford claims killed Rafael.

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Ford's evidence here shows why industry expertise should not be the basis for resolving strict liability in tort claims for real-world injuries as Ford and its amici hope to achieve through new Restatement § 2(b).

(4) Dr. Peles' Testimony

Dr. Peles was plaintiff's biodynamics expert, who addressed what Mr. Herbst never intended to address – the effect of the roof intrusion into Rafael's occupant space in causing his death. 9 JA 1729.

Dr. Peles testified that, as the roof deformed during the rollover, Rafael was pinned between his seat and the crushed roof, pushing his neck into hyperflexion and compromising his airways due to the limited space after the roof crush relative to Rafael's height and weight and trapping him inside the vehicle after the accident with his airways compromised. 9 JA 1735, 1738. Dr. Peles then detailed the reasons why Rafael suffered a hyperflexion injury during the roof crush and not a compression injury before any roof crush occurred, as Ford claims. 9 JA 1749-87. Dr. Peles also built an exemplar seat which replicated the exact amount of post-accident static roof crush and used a surrogate of Rafael's height to show the jury how being pinned in the seat severely restricted breathing even without a broken neck and thus without regard to whether Rafael suffered a hyperflexion or a compression injury. 9 JA 1833-46.

Ford claims that Dr. Peles' expert testimony "lacks foundation" but in fact only quarrels with the basis for and the content and credibility of his expert

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opinions, which was for the jury to decide. See Houston Expl. Inc., 102 Nev. at 513, 722 P.2d at 439.

Specifically, Ford argues that Dr. Peles assumed that all of the roof crush occurred when the roof first contacted the ground on the first roll and that assumption is essential to the validity of his expert opinions, but that Herbst only testified that "more than half" of the roof crush occurred on the first roll. Ford then argues that this "gap" in plaintiff's experts' testimony made it "physically impossible" for Rafael to have died as Dr. Peles testified due to insufficient roof crush, resulting in an insufficient "factual foundation" for his opinions. AOB 20-22.

These arguments clearly seek a retrial of the evidence at trial in this appeal. ***There are a host of reasons why Ford's attempt to retry the case in this Court has no merit, the most basic of which is that expert opinions are not facts and the credibility of an expert's opinion is for the jury, not opposing counsel.*** Perez v. State, 129 Nev. Adv. Op. 30, 313 P.3d at 866; Allen v. State, 99 Nev. at 488, 665 P.2d at 240.

First, Dr. Peles used an exemplar seat that replicated the exact amount of "static" roof crush measured after the accident to show the jury how being pinned in the seat would have severely restricted Rafael's breathing even without a broken neck. 9 JA 1833-46.

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Second, the accident scene photos show a greater roof crush than was measured later because the "dynamic" roof crush occurring during a rollover is several inches more than the "static" roof crush measured long after the accident. 5 JA 1239-42.

Third, since Herbst could not say how much more than half of the roof crush occurred after the first roll, (6 JA 1359), the jury could have decided that Herbst's testimony was not enough to prevent the jury from accepting Dr. Peles' assumption.

Fourth, conversely, the jury could have rejected Dr. Peles' assumption but concluded from the other evidence at trial that his assumption was not essential to the validity of his ultimate opinions. 9 JA 1875-1904.

Fifth, the jury could have concluded that what proportion of the roof crush occurred on the first roll as opposed to the second roll simply didn't matter, given Ms. Trejo's eyewitness testimony and Dr. Zumwalt's disinterested expert testimony. That testimony demonstrated that, when the vehicle came to rest upside down with the roof on the passenger side so severely crushed that Ms. Trejo could not even see her husband, Rafael was pinned in his seat unable to breathe due to his airway being compromised. 8 JA 1954-57; 9 JA 2079-84. The jury needed nothing more to conclude that Ford's marketing of the 2000 Excursion before testing of what proved to be a substandard roof by Ford's own standards had caused Rafael's death in an eminently foreseeable accident.

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Hence, as the District Court observed, there is "plenty of evidence" supporting the jury verdict, once the evidence supporting the jury verdict is considered as a whole, including the evidence Ford tries to ignore, suppress, exclude and discredit for no justifiable reason. Ford's response is to blindly insist that the jury was wrong and Ford is entitled to JNOV, spending pages extolling the opinions of its industry experts. AOB 41-44. Ms. Trejo's eyewitness testimony – which Ford ignores – proves Ford's industry experts were wrong in claiming that Rafael died before any roof crush occurred. The jury verdict in this case – which Ford insults – proves Ford's industry experts are equally wrong in claiming that there is no correlation between roof crush and occupant injury, a nonsensical suggestion that the facts of this real-world case prove to be dangerously wrong.

B. The Jury Was Properly Instructed on Consumer Expectations, Especially in Light of the Evidence in This Case

Strict liability in tort began more than 50 years ago with the seminal decision in Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1963), where Justice Traynor observed for the California Supreme Court:

> A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. . . .
>
> The purpose of such liability is to ensure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured person who are powerless to protect themselves. . . .

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> Implicit in the machine's presence on the market. . .was a representation that it would safely do the jobs for which it was built. Under these circumstances, it should not be controlling whether plaintiff selected the machine because of the statements in the brochure, or because of the machine's own appearance of excellence that belied the defect lurking beneath the surface, or because he merely assumed that it would safely do the jobs it was built to do. . . To establish the manufacturer's liability it was sufficient that plaintiff proved he was injured while using the [machine] in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the [machine] unsafe for its intended use.

377 P.2d at 900-01.

In Ginnis, where the plaintiff was injured when she was pinned in an automatic door, this Court adopted strict tort liability for "the design and manufacturer of all types of products," 86 Nev. at 413, 470 P.2d at 138, and then observed:

> After examining a multitude of cases and legal writers, we think the most accurate test for a "defect" within strict tort liability is set forth in Dunham v. Vaughan & Bushnell Mfg. Co., 247 N.E.2d 401, 403 (Ill.1969), where it was held: "Although the definitions of the term 'defect' in the context of products liability law use varying language, all of them rest upon the common premise that those products are defective which are dangerous because they fail to perform in the manner reasonably to be expected in light of their nature and intended function."

Id. Notably, this Court then held that the plaintiff had "adduced sufficient proof to be entitled to instruction of the jury on the doctrine of strict tort liability for defect in design of the door. . ., because it failed to perform in the manner reasonably to be expected in light of its nature and intended function and was more dangerous

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than would be contemplated by the ordinary user having the ordinary knowledge available in the community." Id.

Thus, contrary to the suggestions by Ford and its amici that the "consumer expectations" test was developed in what courts and commentators have come to call "manufacturing defect" cases and should be confined to those types of cases, consumer expectations have been the basis for strict liability in tort for both the design and manufacture of unreasonably dangerous products from the outset, both generally under Greenman and, at least in this State, under Ginnis. The reason is fundamental and straightforward: As Greenman itself makes clear, the purpose of strict liability in tort is to compensate consumers injured by products that are "defective" because they are unreasonably dangerous. It does not, and should not, matter whether the "defect" that injures an "ordinary" consumer/user is what courts and commentators call a design defect, a manufacturing defect, or a defect that is never specifically identified -- and thus cannot be compartmentalized as the new Restatement attempts to do. See Stackiewicz v. Nissan Motor Corp. in U.S.A., 100 Nev. 443, 686 P.2d 925 (1984).

The "reasonable consumer expectations" standard is the proper one for strict liability in tort litigation because consumer expectations drive literally every aspect of the relationships among consumer plaintiffs, manufacturing defendants, and potentially dangerous products. See Aubin, 177 So.3d at 507 ("The consumer expectations test intrinsically recognizes a manufacturer's central role in crafting

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the image of a product and establishing the consumers' expectations for that product – a portrayal which in turn motivates consumers to purchase that particular product."). Manufacturers design, manufacture, and market consumer products so as to first engender and then profit from satisfying consumer expectations. Conversely, ordinary consumers choose, purchase and use potentially dangerous products based on expectations arising from the nature and intended function and the design and marketing of such products.

Since the common element in these interactions is consumer expectations, the question whether an injured consumer should be compensated for physical harm resulting from his use of such products should be determined by whether the product is "unreasonably dangerous" as measured by reasonable consumer expectations. See Aubin, 177 So.3d at 503 ("The [Second Restatement's consumer expectations] test intrinsically recognizes that a manufacturer plays a central role in establishing the consumers' expectations for a particular product, which in turn motivates consumers to purchase the product.").

Ford, its amici, and their academic advocates focus their attack on the consumer expectations test in this and other cases based upon their assertion that the "ordinary consumer" does not know enough to form "reasonable expectations" about "complex" products ***like*** automobiles. However, the "ordinary consumer" need not be a mechanical engineer to "reasonably expect" that an automatic door would not be designed so that it might unexpectedly pin a person in it. Ginnis, 86

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Nev. 408, 470 P.2d 135. And the "ordinary consumer" need not be an automotive engineer to "reasonably expect" that an automobile restraint system would not be designed so that it might unlatch during an accident thereby completely defeating the intended function of the restraint system. Force v. Ford Motor Co., 879 So.2d 103 (Fla. App. 2004). Likewise in this case, the jury could properly recognize that Ms. Trejo and Rafael did not have to be experts in roof strength specifications to "reasonably expect" that the 2000 Ford Excursion would not be so designed that it would suffer a roof crush so severe as to pin Rafael in his seat unable to breathe in a readily foreseeable rollover beginning at a speed of only 27 mph.

This disconnect between the academic critics and the real-world judicial application of the "consumer expectations" test is the result of a seemingly subtle but critical and decisive mischaracterization of both the source and the role of "reasonable consumer expectations" in determining whether a product is "unreasonably dangerous." Ford, its amici, and their academic advocates assume that the jury must decide whether the actual expectations of an "ordinary consumer" are "reasonable" and urge that the "consumer expectations" test be discarded for design defect cases because neither the "ordinary consumer" nor the "ordinary" juror possesses expertise comparable to that of industry design experts. That assumption then becomes the basis for their argument that often the "consumer expectations" test is unfair to either the consumer or manufacturer

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because the actual expectations of the "ordinary consumer" are too low or too high and thus are not "reasonable," given industry expertise.

However, under this Court's decision in Ginnis, the jury is to determine whether a product is defective in design by determining whether "it failed to perform in the manner reasonably to be expected in light of its nature and intended function and was more dangerous than would be contemplated by the ordinary user having the ordinary knowledge available in the community." 86 Nev. at 414, 470 P.3d at 138. (emphasis added). Hence, in Nevada, the jury determines the "reasonable expectations" the "ordinary" consumer/user is entitled to have, based on the "nature and intended function" of the product and – most important in this case – the "ordinary knowledge available in the community," and then decides whether the product is "unreasonably dangerous" as measured by those "reasonable expectations."

The reference to "ordinary knowledge" is telling; technical expertise is not the source for determining "reasonable consumer expectations" because, as Greenman recognized over 50 years ago, the "ordinary" consumer/user chooses, purchases, and uses the product based on its nature and intended function (including its appearance) and the information available to the consumer/user from brochures or otherwise. Manufacturers have no legitimate cause for complaint since both the nature and intended function of the product and its appearance – which, as Greenman recognized, may belie hidden defects – are entirely within the

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control of the manufacturer. The manufacturer also is the primary, if not the exclusive, source of the "ordinary information available in the community" regarding the product, through advertising, marketing materials, brochures, directives to dealers, disclosures to government regulators and independent testing services, and a host of other ways in which manufacturers deliberately promote and attempt to control "consumer expectations" in order to enhance sales of their products.

Thus, the District Court properly instructed the jury on consumer expectations in this case, not only because it is well-settled Nevada law under Ginnis and its progeny, but also because it was warranted by the evidence before the jury. See Atkinson v. MGM Grand Hotel, Inc., 120 Nev. 639, 642, 98 P.3d 678, 680 (2004) (explaining a party is entitled to jury instructions warranted by the evidence at trial). Without having tested the roof strength of the 2000 Excursion, Ford touted its "safety cell construction" and "reinforced" roof pillars in marketing materials that became part of the information available to the "ordinary consumer." From that information the "ordinary consumer" could reasonably expect that the 2000 Excursion would provide at least minimal roof protection in readily foreseeable rollover accidents initiated at low speeds. When its substandard roof failed to do so, the jury properly found the vehicle was unreasonably dangerous as measured by the "reasonable consumer expectations" arising from the appearance

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and the nature and intended function of the vehicle's roof and the "information" provided by Ford's marketing materials.

Ford adamantly demands that the "consumer expectations" test be repudiated entirely for design defect cases, while both Ford's amici and the reporters for the new Restatement § 2(b) recognize that the "consumer expectations" test has been properly used where a product fails to perform its intended function due to a design defect. Specifically, they acknowledge that where a product failed to perform its intended function due to a design defect, the drafters of the Restatement (Second) of Torts § 402A made such cases subject to the "consumer expectations" test because the design defect was "functionally equivalent to cases involving a manufacturing defect," for which even Ford's amici and its academic advocates admit "the consumer expectations test can apply without difficulty." AB 8, 11-12, citing Twerski & Henderson, Manufacturers' Liability for Defective Product Designs: The Triumph of Risk-Utility, 74 BROOK. L.REV. 1061, 1064, 1106-08 (2009). Here, assuming Ford meant what it said in its marketing materials, Ford intended that the "safety cell construction" and "reinforced" roof pillars of the 2000 Excursion protect vehicle occupants in readily foreseeable accidents at low speeds but the vehicle's substandard roof failed to do so. Thus, a further irony arises, the now traditional "consumer expectations" test was properly applied by the jury in this case on the arguments of Ford's amici and their academic advocates as well.

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C. The New Restatement § 2(b) is in Direct Conflict with Nevada Public Policy.

This Court's decisions as a whole, including Allison, Robinson, and Ginnis, created a framework for resolving strict liability in tort claims that is quite different than that offered by Ford. Under the current Nevada framework, reasonable consumer expectations on the one hand, and technologically and commercially feasible alternatives on the other, frame the manufacturer's duty to design, manufacture and market reasonably safe products. See Robinson, 107 Nev. at 138, 808 P.2d at 524 ("Therefore, we must require manufacturers to make their products as safe as commercial feasibility and the state of the art will allow.").

Moreover, the Court's holdings in Allison and Robinson establish that, so long as a manufacturer has made its product safe as technologically and commercially feasible, it will not incur excessive liability without fault if it provides an adequate warning, thereby making "ordinary information" available that limits "reasonable consumer expectations." See Robinson 107 Nev. at 139, 808 P.2d at 525 ("[W]arnings should shield manufacturers from liability unless the defect could have been avoided by a commercially feasible change in design that was available at the time the manufacturer placed the product in the stream of commerce.")

Thus, this Court's precedents provide a framework under the "consumer expectations" test that fairly balances the legitimate interests of both consumers

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and manufacturers in the safest possible products consistent with reasonable consumer expectations and technological and commercial feasibility. On the other hand, the new Restatement § 2(b) and Ford's requested instructions below sacrifice consumer safety to the manufacturer's bottom line by allowing manufacturers to use less safe designs if they provide greater "usefulness" and consumer choice, thereby enhancing the marketability and profitability of the manufacturer's product. The Court should reject the new Restatement § 2(b) and its risk-utility balancing approach as wholly inconsistent with strict liability in tort.

Nevada is not at all alone on these issues. The Florida Court in Aubin reaffirms that strict liability in tort continues to have the same public purpose it had more than 50 years ago when it was first adopted in Greenman – to ensure that the costs of injuries resulting from unreasonably dangerous products are borne by the manufacturers who choose to market them – and that the new Restatement § 2(b) with its reasonable alternative design requirement is fundamentally inconsistent with that purpose. 177 So.3d 489. This Court should reach the same conclusion and reject Ford's demand that the Court repudiate its consumer protection precedents and adopt the new Restatement § 2(b).

Strict liability in tort is liability without fault. It is liability determined by the "reasonableness" of the product's safety, not the "reasonableness" of the manufacturer's decision-making. The manufacturer is held liable for injuries caused by an unreasonably dangerous product, not because the manufacturer acted

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unreasonably in making tradeoffs between product safety and utility. While these tradeoffs may support proof of defect, they are not essential elements of this tort.

The new Restatement speaks more generally in terms of "products liability" and effectively sweeps away strict liability in tort for design defects sub silentio, by making liability dependent on the reasonableness of the manufacturer's conduct, rather than the reasonableness of the product's safety. In Banks, 450 S.E.2d 671, the court focused on the risk-utility test then in a draft of the Restatement § 2(b) and observed: "This risk-utility analysis incorporates the concept of 'reasonableness,' i.e. whether the manufacturer acted reasonably in choosing a particular product design, given the probability and seriousness of the risk posed by the design, the usefulness of the product in that condition and the burden on the manufacturer to take the necessary steps to eliminate the risk." 450 S.E.2d at 673. The court then continued:

> When a jury decides that the risk of harm outweighs the utility of a particular design (that the product is not as safe as it should be), it is saying that in choosing the particular design and cost trade-offs, the manufacturer exposed the consumer to greater risk of danger than he should have. Conceptually and analytically, this approach bespeaks negligence.

Id., (quoting Birnbaum, Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence, 33 VAND. L. REV. 593, 610 (1980)).

Specifically, the new Restatement § 2(b) replaces strict liability in tort for design defects with negligence in at least three major ways. First, as discussed

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above, consumers cannot recover compensation for injuries caused by unreasonably dangerous products unless they prove a reasonable alternative design that would have improved the "overall safety" of the product; the manufacturer must have been "at fault," i.e. made a "wrong" choice as to the consuming public as a whole. Second, in making that choice, the manufacturer can consider factors having nothing to do with product safety (e.g. product "usefulness" and "consumer choice"), thereby completely transforming the meaning of what is an "unreasonably dangerous" product. Third, the new Restatement § 2(b) then compounds the obstacles the injured consumer seeking to recover compensation must face, particularly in crashworthiness cases, by also allowing consideration of factors such as "the ability of the plaintiff to have avoided injury" and "the plaintiff's awareness of the product's dangers," thereby reviving contributory negligence as a defense, contrary to well-settled Nevada law. See Andrews, 106 Nev. 533, 796 P.2d 1092.

Hence, adopting the new Restatement § 2(b) and its comments and replacing the longstanding "consumer expectations" test with risk-utility balancing thereunder would effectively wipe out over 50 years of strict liability in tort for design defects injuring consumers. See Jablonski v. Ford Motor Co., 955 N.E.2d 1138, 1153-55 (Ill. 2011). More critically, adoption of the new Restatement § 2(b) position would return Nevada to the days when a consumer injured by the manufacturer's marketing of an unreasonably dangerous product had to, not only

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prove negligence on the part of the manufacturer, but also avoid defenses such as contributory negligence that have nothing to do with whether the manufacturer chose to market a crashworthy vehicle.

Here, Ford chose to market an untested vehicle with a substandard roof (by Ford's own standards) that Ford touted as having "safety cell construction" and "reinforced" roof pillars, thereby giving rise to "reasonable consumer expectations" that proved fatally false in the accident below regardless of the "utility" of the vehicle. The Court should not turn its back on 50 years of consumer protection through strict liability in tort and the "consumer expectations" test for what constitutes an "unreasonably dangerous" product and should firmly reject new Restatement § 2(b) and risk-utility balancing thereunder. See Aubin, 177 So.3d at 505-12.

D. Ford Is Not Entitled To JNOV From This Court And Has Failed To Demonstrate That A Different Result Is Probable Should A New Trial Occur

Ford not only demands that the Court repudiate the "consumer expectations" test and replace it with risk-utility balancing under the new Restatement § 2(b) and the comments thereto as the exclusive test for whether a product is "unreasonably dangerous," Ford further demands that this Court then grant Ford judgment as a matter of law under that test, relying solely on industry expertise and the testimony of Ford's expert witnesses. AOB 49-52. However, the evidence that Ford tries to ignore, suppress, exclude and discredit not only amply supports the jury verdict, it

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also destroys the credibility of the industry expertise and testing methods upon which Ford relies and amply demonstrates the risk of death or serious bodily injury from Ford's marketing of a vehicle with a substandard roof – which Ford admits. 13 JA 3106. Since Ford does not claim, much less demonstrate that the vehicle's "utility" would have been significantly reduced by reinforcing its roof strength, Ford has not even made a prima facie case for risk-utility balancing under the new Restatement § 2(b) and the instructions Ford requested below, much less one entitling Ford to judgment as a matter of law.

Instead, Ford shifts ground, making its argument under a different form of "risk-benefit" analysis, arguing that "redesigning the roof as plaintiff proposed would have had zero safety benefits and potential safety drawbacks." AOB 44. The first half of that assertion is based on Ford's contention that industry expertise shows no correlation between roof crush and occupant injury. AOB 42-43 and n.5. But, Ford's assertion not only defies common sense, it is proved wrong by the facts and circumstances of this very case. The second half of Ford's new "risk-benefit" analysis not only consists of rank speculation by Ford's experts as to what "might" happen with a reinforced roof, it is proved wrong by Ford's use of stronger roof support that met Ford's own standards in its other vehicles such as the Ford Expedition. 17 JA 4037, 4040, 4042, 4043, 4044. In short, Ford's actions speak far louder than the self-interested opinions of its travelling team of expert witnesses.

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Perhaps most telling is Ford's assertion that "Ford could not reasonably reinforce the roof as Herbst proposed without evaluating the impact of those design changes on the vehicle's overall performance." AOB 44. Presumably, that evaluation would have included the testing that Ford admits it could have done but did not do before marketing the 2000 Excursion (13 JA 3099-3100) and the adoption of feasible alternatives that Ford used on its other vehicles -- which Ford could have incorporated into the Excursion for $70/vehicle. 6 JA 1273-75, 1312-13. Hence, Ford's assertion that it acted "reasonably" as a matter of law – as it would have had to have done to obtain judgment as a matter of law under the new Restatement § 2(b) – has no merit.

Ford also makes passing references to "at least" being entitled to a new trial, but Ford has not, and cannot, show that, had the jury been instructed as Ford requested, it is "probable" that a different verdict might have resulted, or a different verdict "might reasonably have been expected." Cook, 124 Nev. at 1009-10, 194 P.3d at 1221-22; see also FCH1, LLC, 130 Nev. Adv. Op. 46, 335 P.3d at 188 ("Inasmuch as it is probable that but for this erroneous ruling a different result might have been reached. . . a new trial is warranted."). Again, Ford marketed the 2000 Excursion without testing its substandard roof strength and thus without adopting commercially feasible alternatives that Ford used on other vehicles meeting its own standards, and there is no evidence that doing so would have impaired the utility of the 2000 Excursion. Hence, there is no reason to believe

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Ford would have obtained a verdict in its favor had the jury been instructed on the new Restatement § 2(b)'s risk-utility balancing test as Ford requested.

Ford also complains that the jury was not instructed that a manufacturer need not "produce the safest possible design" (14 JA 3219) and "is not a guarantor that no one will get hurt using the automobile." 13 JA 3178; 14 JA 3209. However, those requests were simply duplicative, negative, argumentative and confusing ways of telling the jury that the plaintiff had to prove the 2000 Excursion was "unreasonably dangerous." Finally, Ford repeatedly complains about the perhaps overly pointed ways in which plaintiff's trial counsel tried to suggest to the jury that it should find the 2000 Excursion that killed Rafael was "unreasonably dangerous" during closing arguments. AOB 14-15. However, as Ford admits, each time Ford objected, the objection was sustained, and the jury was admonished. AOB 15-16. Hence, Ford cannot show prejudice, since the supposed misconduct was not extreme, and the jury verdict is amply supported by the evidence. Lioce v. Cohen, 124 Nev. 1, 17, 174 P.3d 970, 981 (2008).

In Tincher v. Omega Flex, Inc., 104 A.3d 328 (Pa. 2014), the Pennsylvania Supreme Court made a thorough and in-depth analysis of the proper relationship among Restatements, the common law, prior precedents, legislative action and inaction, judicial authority and decision-making, the facts and evidence in each particular case, and both the judicial responsibility and judicial restraint in articulating and applying common law rules in the interests of justice. 104 A.3d at

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351-355, 395-400. The court then examined the purpose and history of strict tort liability in design defect cases in Pennsylvania and the Restatement (Third) of Torts: Products Liability. 104 A.3d at 355-81. The court then examined the strict tort liability cause of action, the consumer expectations standard, the risk-utility balancing standard, various alternative and combined standards, and the new Restatement § 2(b)'s reasonable alternative design requirement. Id. at 381-94. After this examination, the Pennsylvania Supreme Court then refused to adopt the new Restatement § 2(b)'s approach, questioning not only whether it is "consistent with the public policy that compensation is available for an injury caused by any type of defective product," and its reasonable alternative design requirement, but also the methodology used by its reporters in dismissing disfavored judicial pronouncements as "dicta" in favor of precise and categorical pronouncements that may or may not fit the facts of any particular case. Id. at 395-399. The Pennsylvania Supreme Court then adopted a "composite standard" under which a plaintiff could take his/her case to the jury under either "ordinary consumer expectations" or "the risk-utility of a product" in the factual circumstances presented. Id. at 399-406.

Here, Ms. Trejo's allegations in her complaint and her proof at trial embraced both consumer expectations and risk-utility balancing. She requested instructions on the "consumer expectations" test, not only because it is the well-settled law of the State, but also because of Ford's conduct in designing,

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manufacturing and marketing the 2000 Excursion that killed her husband. Ms. Trejo's proof at trial also established a commercially feasible alternative design that Ford could have used, and did use on other vehicles, most notably its other SUV, the Ford Expedition. Hence, the evidence at trial not only amply supports the jury verdict, it would have satisfied a risk-utility balancing process tailored to the facts and circumstances of this case. Ford has no legitimate cause for complaint.

IX. CONCLUSION

The judgment on the verdict below should be affirmed based upon the following: the verdict was based upon competent evidence; the verdict was clearly consistent with the trial court's liability instructions based upon the Restatement (Second) of Torts § 402A; Ford's complaints about the evidence presented merely attempt a forbidden retrial of the facts at the appeal stage of these legal proceedings; there was no abuse of discretion in applying 46 years of strict liability doctrine to the case; and, in any case, the record supports a verdict even under a risk-utility balancing approach.

Finally, Ford attempted to litigate its defense through its experts based upon an assumption that it had to invent for the purpose of this case – that Rafael was killed in a "perfect storm" of circumstances in which he had to die in only one particular 30 millisecond timeframe during the course of the accident. Of course, this assumption was not based upon the testimony of the percipient witnesses in this case, which would have to include Ms. Trejo and Dr. Zumwalt. Notably, Ford

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had to ignore this evidence as it has done for the "perfect storm" theory to have any conceptual "legs." The jury was absolutely entitled to reject Ford's theory based upon the percipient testimonial evidence. There is no ground to provide Ford any appellate relief in this case.

Dated this 25th day of January 2016.

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CERTIFICATE OF COMPLIANCE (NRAP 28.2)

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3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to

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I hereby certify that I am an employee of Maupin • Naylor • Braster and that on the 25th day of January 2016, I electronically filed and served a true and correct copy of the above and foregoing **RESPONDENT'S ANSWERING BRIEF** to be served as follows:

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