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

APPEAL FROM THE EIGHTH JUDICIAL DISTRICT, COUNTY OF CLARK
THE HONORABLE VALERIE ADAIR, DISTRICT JUDGE
DISTRICT COURT CASE NO. A-11-641059-C

APPELLANT'S REPLY BRIEF

HORVITZ & LEVY LLP
LISA PERROCHET (*PRO HAC VICE*)
EMILY V. CUATTO (*PRO HAC VICE*)
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800 • FAX: (818) 995-3157
lperrochet@horvitzlevy.com
ecuatto@horvitzlevy.com

SNELL & WILMER L.L.P.
VAUGHN A. CRAWFORD (SBN 7665)
JAY J. SCHUTTERT (SBN 8656)
MORGAN T. PETRELLI (SBN 13221)
3883 HOWARD HUGHES PARKWAY,
SUITE 1100
LAS VEGAS, NEVADA 89169
(702) 784-5200 • FAX: (702) 784-5252
vcrawford@swlaw.com
jschuttert@swlaw.com
mpetrelli@swlaw.com

THOMPSON COE COUSINS & IRONS, L.L.P.
MICHAEL W. EADY (*PRO HAC VICE*)
701 BRAZOS STREET, 15TH FLOOR
AUSTIN, TEXAS 78701
(512) 708-8200 • FAX: (512) 708-8777
meady@thompsoncoe.com

ATTORNEYS FOR APPELLANT
FORD MOTOR COMPANY

DISCLOSURE STATEMENT (NRAP 26.1)

Defendant Ford Motor Company has no parent corporation. State Street Corporation, a publicly traded company whose subsidiary State Street Bank and Trust Company is the trustee for Ford common stock in the Ford defined contribution plans master trust, has disclosed in filings with the U.S. Securities and Exchange Commission that as of

December 31, 2014, it holds 10% or more of Ford's common stock, including 5.9% of such stock beneficially owned by the master trust.

Dated: April 11, 2016

HORVITZ & LEVY LLP
LISA PERROCHET (*Pro Hac Vice*)
EMILY V. CUATTO (*Pro Hac Vice*)
SNELL & WILMER L.L.P.
VAUGHN A. CRAWFORD (SBN 7665)
JAY J. SCHUTTERT (SBN 8656)
MORGAN T. PETRELLI (SBN 13221)

By: s/Emily V. Cuatto
Emily V. Cuatto
Horvitz & Levy LLP
15760 Ventura Blvd., 18th Floor
Encino, California 91436

By: s/Jay J. Schuttert
Jay J. Schuttert
Snell & Wilmer L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169

Attorneys for Appellant
FORD MOTOR COMPANY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Miscellaneous

INTRODUCTION

Ford cannot be held responsible for Rafael Trejo's death simply because he was riding in a Ford vehicle when the crash occurred. Ford may be held responsible only if a defect in the vehicle made it unreasonably dangerous in an accident, resulting in an injury to Mr. Trejo that a reasonably safe design would not have produced. The verdict against Ford should be reversed because plaintiff did not prove either of the two essential elements of her liability theory: that the vehicle was defectively designed, or that the defect caused Mr. Trejo's death.

Plaintiff failed to establish that a defect caused her husband's death because her causation theory depended on eleven inches of roof crush occurring on the first roll—a fact assumed by her expert Joseph Peles without any foundation, and contradicted by her expert Brian Herbst. Plaintiff argues that the evidence established that Mr. Trejo died of asphyxia, but no competent evidence linked that purported cause of death *to the roof*. Without sufficient evidence of causation, judgment for Ford is required.

Plaintiff also failed to establish the roof was defective under proper legal principles, because she relied on the consumer expectations test rather than the risk vs. benefit test. Plaintiff argues the trial court correctly applied the consumer expectations test because that test has historically protected the public against unreasonable dangers. That analysis is circular. The question is: what makes a product unreasonably dangerous? As products liability law has developed, the majority of jurisdictions have come to recognize that when a product's safety performance under the circumstances is beyond the ordinary consumer's everyday experience, such as a multiple rollover event, the consumer expectations test fails to guide the jury properly in answering that question. Because the ordinary consumer does not experience rollover events, the correct test to evaluate whether a vehicle's roof is unreasonably dangerous is the risk vs. benefit test. This test allows the ordinary consumer to take into account the same engineering principles that the industry uses to analyze the relative utilities of the existing versus a different roof design.

Despite pleading a risk vs. benefit case in her complaint, plaintiff abandoned any reliance on that test by opposing Ford's request to have

the jury instructed on it. Additionally, her only evidence of the existence of a defect under a risk vs. benefit analysis was Herbst's improperly admitted opinion that a stronger roof would have protected Mr. Trejo. Once the correct risk vs. benefit test is applied, Ford should be entitled to judgment. At the very least, Ford deserves a new trial in which the jury is properly instructed on the test for design defect.

LEGAL ARGUMENT

I. NONE OF THE EVIDENCE PLAINTIFF DESCRIBES CLOSES THE EVIDENTIARY GAP IN HER CAUSATION THEORY.

A. Even according to plaintiff, the jury could not have accepted her causation theory without speculating.

The Court should conclude that the evidence of causation is insufficient to support the verdict. Although plaintiff twice quotes the district court as having said there was "'plenty of evidence'" of causation (AB 17, 38), the court actually said plaintiff's theory made no sense, but reluctantly held there was "enough" evidence from Peles and Dr. Ross Zumwalt (15 JA 3634–35). But neither Peles's nor Zumwalt's testimony actually established a causation theory that could support the verdict.

As the opening brief established, plaintiff's theory of causation required her to prove that eleven inches of roof deformation happened all on the first roll, pinning Mr. Trejo in place and pushing his neck into a hyperflexion. (AOB 20-22.) But there was no evidence that happened. (AOB 22; 6 JA 1359 (Herbst: something more than *half* of the crush occurred during the first roll).)

Plaintiff responds by drawing a distinction between "dynamic" and "static" crush. In particular, she insists that the jury could have found that the "dynamic" crush *during* the accident exceeded eleven inches, even though the "static" crush (the eleven inches of crush measured *after* the accident) did not. (*See* AB 19-20.) But that theory still requires showing eleven inches of "dynamic" crush happened *all at once* on the first roll, as Peles had assumed. Without any evidence from Herbst or otherwise to that effect, the jury could only speculate that roof crush caused Mr. Trejo's neck fracture in the manner Peles described.

Plaintiff also argues the jury could have accepted Peles's causation opinion *despite* Herbst's testimony. Or, plaintiff proposes, the jury could have decided that Peles's assumption about when the roof crush

occurred was unnecessary to his causation opinion. (AB 37.) But either hypothetical is just speculation by another name. In either scenario, the lay jury would have departed from the expert evidence about the cumulative roof deformation over multiple rolls and substituted its own speculation to fill the gaps in plaintiff's causation evidence. Speculation is not substantial evidence. *See Gramanz v. T–Shirts & Souvenirs, Inc.*, 111 Nev. 478, 485, 894 P.2d 342, 347 (1995); *see also Truckee-Carson Irrigation Dist. v. Wyatt,* 84 Nev. 662, 665, 448 P.2d 46, 49 (1968) (finding causation by speculation is impermissible; it is "where the evidence favorable to the party seeking recovery tends equally to sustain either of two inconsistent propositions that neither of them can be said to have been established by legitimate proof").

Rather than explain how the evidence supports Peles's opinions, plaintiff disparages Ford's causation theory. (*E.g.,* AB 2, 15, 18, 34, 55–56 (Ford's theory is implausible because it depends on a "'perfect storm'" of circumstances); *see also, e.g.,* AB 15, 19, 34 (Ford's theory is implausible because it is proved by tests with "rigged" dummies).) But plaintiff bore the burden of proof on causation, *Shoshone Coca-Cola Bottling Co. v. Dolinski*, 82 Nev. 439, 443, 420 P.2d 855, 857–58 (1966);

she can't defend her failed theory by pointing to weaknesses in Ford's.[1] Plaintiff's evidence failed to meet her burden, requiring judgment for Ford.

B. Neither plaintiff's nor Zumwalt's testimony supports the jury's causation finding.

Plaintiff argues that Mr. Trejo died of positional asphyxia. That cause of death is unsupported by the medical evidence in this case. But even if Mr. Trejo did die of positional asphyxia, *that does not prove a defective roof caused it*.

Plaintiff's testimony never established that roof crush caused any positional asphyxia. At trial, plaintiff testified that Mr. Trejo was alive

---

[1] Moreover, the fact it takes a "perfect storm" of circumstances to cause injuries like Mr. Trejo's (13 JA 3144) is a strength, not a weakness, in Ford's theory. Belted occupants in rollovers walk away ninety-seven percent of the time. (12 JA 2740, 2742.) If plaintiff's theory that roof crush causes injury were correct, rollovers would result in many more serious injuries. The statistics support Ford's evidence that such injuries occur only when the occupant is in a particular position as the vehicle inverts. (12 JA 2740–43.) Using "rigged" dummies to test whether increasing roof strength prevents neck injuries is the only way to create a repeatable test that ensures the dummy will be in the same, perilous position in every test. (13 JA 2992–96.)

after she exited the Excursion and went to her husband's side of the vehicle.[2] But that testimony does not establish a causal relationship between any positional asphyxia and roof crush.[3] On appeal, plaintiff now says she testified the roof trapped her husband. (AB 16.) But that mischaracterizes her testimony, during which she said only that her husband could not move after the accident. (9 JA 2082.) The record contains an obvious explanation for Mr. Trejo's lack of movement: he suffered a paralyzing neck fracture. (8 JA 1955.) Only by speculating could the jury have inferred from plaintiff's testimony that Mr. Trejo was unable to move *due to the roof*.[4] And, even if the roof in its final position limited movement, that (again) does not indicate that the crush

---

[2] The autopsy report's statement that Mr. Trejo died in "seconds" (16 JA 3737) contradicts that recollection.

[3] Nor does the notion that Mr. Trejo was alive after the accident discredit Ford's theory of the case, as plaintiff argues. (AB 16.) Ford explained that Mr. Trejo suffered his fatal injury instantaneously upon diving into the roof (AOB 42–43); that is consistent with him surviving for a short while and asphyxiating due to his inverted position.

[4] Plaintiff further argues that had the roof not pinned Mr. Trejo, Mrs. Trejo "could have come to his aid such that he could breathe while waiting for medical help." (AB 16–17.) That, too, is pure speculation. Mrs. Trejo testified she could not extricate Mr. Trejo because she was not strong enough and her brother was too injured to help. (9 JA 2083.)

occurred during the first roll, as plaintiff's theory of causation necessarily required.

Zumwalt's testimony about hyperflexion and positional asphyxia likewise failed to establish causation. Plaintiff attempts to create evidence on appeal by again mischaracterizing the evidence at trial. Zumwalt never opined that Mr. Trejo was trapped by roof deformation (*see* AB 16); he merely said "yes" to plaintiff's counsel's question whether Zumwalt believed "Mr. Trejo had some period of time after he was trapped inside the vehicle where he would have been alive" (8 JA 1954). He also never "confirmed" that Mr. Trejo died from positional asphyxia following the first roof-to-ground impact (AB 16); he testified only that it was probable that Mr. Trejo's death had an asphyxia "component" from the neck fracture and his inability to move into a position where he could breathe (8 JA 1955–57). Simply put, the jury could not have blamed hyperflexion and positional asphyxia *on the roof* based upon Zumwalt's testimony.

If Zumwalt *had* testified that Mr. Trejo died of positional asphyxia due to being trapped by the roof (*see* AB 16), that opinion should have been excluded. First, in his role as coroner, Zumwalt had no knowledge

of the dynamics of the accident or the roof crush; rather, he examined Mr. Trejo's fatal injuries. Second, Zumwalt's autopsy records show Mr. Trejo died of a blunt force trauma causing a neck injury and death in "seconds." (16 JA 3724, 3737.) Because he examined Mr. Trejo's body to diagnose the cause of death, Zumwalt's testimony was admissible percipient expert medical testimony to the extent it was based on his autopsy. Zumwalt admitted, however, that his revised testimony on which plaintiff now relies was *not* based on his recollection of the autopsy. (9 JA 1963–64 (while answering a question about whether he had specifically considered during the autopsy how Mr. Trejo's neck purportedly bent during the accident, Zumwalt responded, "I just don't remember back in 2009 what I had considered on this case").) Thus, although the district court did, as plaintiff states (AB 31), originally conclude Zumwalt was credible in his belief that he was not rendering new opinions, that is a legal conclusion for the judge, who later found Zumwalt's new asphyxia opinions post-dated the autopsy after all (*see* 9 JA 2061). To provide opinions that were not based on his autopsy, Zumwalt needed to be (but was not) designated as a retained expert.

See FCH1, LLC v. Rodriguez, 130 Nev. Adv. Op. 46, 335 P.3d 183, 189 (2014).

Plaintiff responds that Zumwalt had a *continuing duty to investigate* death, which she says removes him from the definition of a retained expert. (AB 31.) Plaintiff cites nothing to support that characterization of Zumwalt's role, or the proposition that coroners are exempt from complying with Nevada Rule of Civil Procedure 16.1(a)(2). Under this Court's precedents, *see FCHI, LLC*, 130 Nev. Adv. Op. __, 335 P.3d at 189, Zumwalt's post-autopsy opinions gave rise to *retained* expert testimony that had to be properly disclosed.

In sum, plaintiff's causation theory is not supported by evidence from Peles, plaintiff, or Zumwalt. Peles's opinion depends on assumptions that are contrary to Herbst's testimony and all other competent evidence on the timing of the roof deformation. Plaintiff's testimony is consistent with both parties' theories, and says nothing about roof causation. And Zumwalt's testimony about asphyxia does not establish a causal link to roof crush, and should have been excluded,

as it was developed and offered outside Zumwalt's role in performing the autopsy.

Ford is entitled to judgment.

II. THE JURY SHOULD HAVE BEEN INSTRUCTED ON THE RISK VS. BENEFIT TEST FOR DEFECTIVE DESIGN.

A. This case calls for the risk vs. benefit test.

1. Decades of strict products liability law shows different theories of design defect call for different tests for defectiveness.

Plaintiff argues the principles of strict liability first developed in California and then adopted by Nevada nearly half a century ago require continued adherence to the consumer expectations test. This argument ignores that products liability law throughout the country has evolved over time to require application of the risk vs. benefit test to this case, as the *current* body of California law well illustrates.

As plaintiff states, California adopted strict liability for defective products in *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963), holding that a plaintiff could recover in strict liability for injuries

from using a machine "'in a way it was intended to be used.'" (AB 39.) This Court adopted strict liability for all products in *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408, 413, 470 P.2d 135, 138 (1970), holding that a plaintiff could recover for injuries caused by an automatic door's failure "to perform in the manner reasonably to be expected in light of [its] nature and intended function." In both *Greenman* and *Ginnis*, whether the defect was in the product's manufacture or design, the product caused injury when used normally for its designed purpose. This case is different, as the claimed defect here allegedly failed to protect the user from the consequences of accidental *misuse* outside any ordinary consumer's experience. In other words, the Excursion's "nature and intended function" was to drive. It did that just fine. Mr. Trejo's injuries occurred during *a rollover accident*, among the rarest of accidental misuse events. Therefore, *Greenman* and *Ginnis* (and the Second Restatement generally) did not articulate the test for a case like this. (*See* AOB 35); *see also Robinson v. G.G.C., Inc.*, 107 Nev. 135, 138, 808 P.2d 522, 524 (1991) ("When the defect in the product is the lack of a safety device, the misuse is often an accidental misuse.").

The different nature of plaintiff's defect theory calls for a different test for defect. The test should not ask the jury to decide whether the product failed to perform properly "in light of its nature and intended function," as that becomes a meaningless inquiry in an accidental misuse case involving unintended functions. Rather, the test must ask whether it was unreasonable to employ a design that allowed the plaintiff's particular injury to occur, accounting for commercial realities and product efficiency. *See Robinson*, 107 Nev. at 138, 808 P.3d at 524 (endorsing view that in foreseeable misuse cases, a manufacturer may be liable for failure to include a safety device if it is "commercially feasible, will not affect product efficiency, and is within the state of the art at the time the product was placed in the stream of commerce").

Plaintiff and amicus Nevada Justice Association (NJA) misunderstand Ford's position. Ford does not ask this Court to confine the consumer expectations test to manufacturing defect cases, or to overturn cases like *Ginnis* and *Stackiewicz v. Nissan Motor Corp. in U.S.A.*, 100 Nev. 443, 448, 686 P.2d 925, 928 (1984), where the consumer expectations test applied to defects that affected ordinary use of the product. (AB 40; NJA ACB 15–16.) Instead, Ford is asking this

Court to perform a routine task in an appellate court's work: to recognize a relevant distinction between this case and those decided before it. That distinction should lead the Court to apply the Third Restatement risk vs. benefit approach to the subset of design defect cases where the design and performance issues are far outside the normal user's daily experience. (*See* AOB 28-41.)

California courts, for example, have recognized the need for different tests in different cases. In the years following *Greenman*, it became clear that strict products liability cases have many permutations that call for different tests. The "defectiveness concept has embraced a great variety of injury-producing deficiencies" and "the term defect as utilized in the strict liability context is neither self-defining nor susceptible to a single definition applicable in all contexts." *Barker v. Lull Eng'g*, 573 P.2d 443, 453 (Cal. 1978). In *Barker*, the California Supreme Court synthesized the case law into a two-pronged test, permitting both the consumer expectations and risk vs. benefit tests as alternatives. *Id.* at 454-55. The court deemed its approach consistent with "the rationale and limits of the strict liability doctrine" because "it subjects a manufacturer to liability whenever there is

something 'wrong' with its product's design" but avoids "making the manufacturer an insurer for all injuries which may result from the use of its product." *Id.* at 456; *see also Robinson*, 107 Nev. at 139, 808 P.2d at 524 (products liability has "a compound goal of encouraging manufacturers to make products safe without unduly burdening them with excessive liability without fault"); *Worrell v. Barnes*, 87 Nev. 204, 206, 484 P.2d 573, 575 (1971) ("The manufacturer and seller are not held liable as insurers and their liability is not absolute simply upon evidence of injury alone."), *overruled on other grounds by Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000).

Over time, however, the consumer expectations prong gained criticism as an "'unworkable, amorphic, fleeting standard.'" *Soule v. General Motors Corp.*, 882 P.2d 298, 309 (Cal. 1994). Accordingly, the California Supreme Court limited its application. Recognizing the rationale behind the consumer expectations prong was that "[t]he purposes, behaviors, and dangers of certain products are commonly understood by those who ordinarily use them," *id.* at 307, the court directed that the consumer expectations test be "reserved for cases in which the *everyday experience* of the product's users permits a

conclusion that the product's design violated *minimum* safety assumptions, and is thus defective *regardless of expert opinion about the merits of the design*," *id.* at 308. By contrast, where the design and performance issues can be understood only through expert testimony about the design's relative merits and its performance under the circumstances giving rise to the plaintiff's injury, the risk vs. benefit test should apply. *Id.* at 310. *Soule* thus limited the consumer expectations test to cases where a reasonable consumer can and does form an expectation about how the design feature at issue will function under the circumstance leading to the injury.

Thus, in *Soule*, where the plaintiff's theory of defect was that the vehicle's wheel improperly collapsed in a frontal crash and both parties debated the defect theory with expert testimony, *id.* at 301, 310, the court held that risk vs. benefit, not consumer expectations, applied. The court explained, "An ordinary consumer of automobiles cannot reasonably expect that a car's frame, suspension, or interior will be designed to remain intact in any and all accidents" and a consumer has no understanding of "how safely an automobile's design should perform under the esoteric circumstances of the collision at issue." *Id.* at 310;

see also, e.g., *Pruitt v. Gen. Motors Corp.*, 86 Cal. Rptr. 2d 4 (1999) (risk vs. benefit applied to injury from airbag deployment); *Kim v. Toyota Motor Corp.,* 197 Cal. Rptr. 3d 647 (2016) (risk vs. benefit applied to claim that car should have had an electronic stability control safety device).

This case, like *Soule*, turns on technical and mechanical details about how the vehicle performed under the circumstances of an unusual crash. A modern understanding requires the Third Restatement risk vs. benefit test for a crashworthiness case like this one. Should Nevada apply the risk vs. benefit test in a case like this one, it would find itself in good company. Courts in many other jurisdictions apply nuanced approaches to determining design defect, with the great majority applying some form of risk vs. benefit. *See Branham v. Ford Motor Co.*, 701 S.E.2d 5, 14–15 n.11 (S.C. 2010) ("[b]y our count, 35 of the 46 states that recognize strict products liability utilize some form of risk-utility analysis"). In fact, many of the cases plaintiff and NJA cite hail from jurisdictions that either (1) apply the risk vs. benefit test as an alternative to the consumer expectations test or (2) adopt a hybrid approach in which risk vs. benefit balancing is part of the consumer

expectations analysis. (*See* AB 47, 50, 53; NJA ACB 6–8); *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 401 (Pa. 2014) (risk vs. benefit test must be given once the defendant presents evidence to support it, even if the consumer expectations test continues to play a role in the risk vs. benefit analysis); *Vautour v. Body Masters Sports Indus.,* 784 A.2d 1178, 1182 (N.H. 2001) ("whether a product is unreasonably dangerous to an extent beyond that which would be contemplated by the ordinary consumers is determined by the jury using a risk-utility balancing test"); *Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319, 1333 (Conn. 1997) (adopting "modified consumer expectation test" that asks the jury to balance the utility of the products design with the magnitude of its risks); *see also McCathern v. Toyota Motor Corp.*, 23 P.3d 320, 331 (Or. 2001) (court adopted parties' agreement that risk-utility balancing was required to show product failed to perform as an ordinary consumer would expect); *Delaney v. Deere & Co.*, 999 P.2d 930, 944–45 (Kan. 2000) (recognizing the weaknesses of the consumer expectations test and "the validity of risk/utility analysis as a guide in determining the expectations of consumers in complex cases").

The cases plaintiff and NJA cite that reject the Third Restatement risk vs. benefit approach and instead apply a pure Second Restatement consumer expectations test reflect a "decided minority" view. *Branham,* 701 S.E.2d at 14–15 n.14; Mike McWilliams & Margaret Smith, *An Overview of the Legal Standard Regarding Product Liability Design Defect Claims and a Fifty State Survey on the Applicable Law in Each Jurisdiction,* 82 Def. Counsel J. 80, 83–85 (Jan. 2015) (Kansas, Nebraska, New Hampshire, North Dakota, Rhode Island, Vermont, and Wisconsin are the only states applying a pure consumer expectations test and not requiring an alternative design); *see also Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727, 848–49 (Wis. 2001) (Sykes, J., dissenting) (retaining a pure consumer expectations test is "seriously out of step with product liability law as it has evolved"). Nevada should not follow the minority approach that plaintiff advocates.

2. The risk vs. benefit test applies here because consumers do not have expectations about how a roof will perform in an accident like this one.

Consistent with this Court's analysis in *Robinson*, 107 Nev. at 138–39, 808 P.2d at 524–25, and the products liability law developed in the majority of other jurisdictions, this Court should hold that the risk vs. benefit test applies in design defect cases like this one. Ordinary consumers simply have no expectations about how a roof will perform in a multiple rollover event or whether a roof designed as plaintiff's expert proposed would have performed more safely. As plaintiff recognizes, technical expertise is not the source for determining ordinary consumer expectations. (AB 43.) The corollary to this is that when, as here, technical expertise *is* required to illuminate the nature of the claimed defect because ordinary consumers would not know how safely the product could be made, the existence of a design defect cannot be evaluated based on ordinary consumer expectations.

Plaintiff argues the Second Restatement consumer expectations test should be retained for all strict products liability cases because consumer expectations drive the consumer-manufacturer relationship.

(AB 40-41.) However, a consumer's decision to purchase a product involves many considerations, reflecting a balance that includes cost, performance, efficiency, and styling. If the consumer-manufacturer relationship is what matters, then the risk vs. benefit test is the superior choice. Only that test takes into account a variety of different considerations relevant to the terms on which products are provided to the consuming public.

Plaintiff also cites a variety of incomparable situations to argue that consumers can form expectations here. (AB 41–42.) It may well be that consumers can form expectations that an automatic door won't close on them based on their everyday experience going through such doors. *See Ginnis*, 86 Nev. at 413, 470 P.2d at 138 (applying consumer expectations test). Consumers may also have some expectation that a seat belt won't unlatch, although that is a close question depending on the circumstances. *See Force v. Ford Motor Co.*, 879 So. 2d 103, 110 (Fla. Dist. Ct. App. 2004) (applying consumer expectations test *along with* the risk vs. benefit test, and expressly avoiding deciding whether *other* types of crashworthiness issues are too complex to permit use of

the consumer expectations test). But those two cases merely illustrate that different design defect cases call for different tests for defect.

The roof is a complex structural component that holds the car together and shields the occupants from the elements. The vast majority of drivers never experience or even witness a rollover crash. Consumers have no basis for drawing the line between roofs that do, and do not, deform to an acceptable degree. If in *Force* it was a close question whether the consumer expectations test could apply in addition to the *undisputedly* applicable risk vs. benefit test, the risk vs. benefit test plainly should apply here, and should apply exclusively.

Plaintiff argues that consumers could form relevant expectations about the roof here because Ford advertised the vehicle as having a "'safety cell construction,'" such that consumers could conclude they would be "at least minimal[ly]" protected in a low-speed crash. (AB 44-45.) That argument fails for at least two reasons.

First, this highway-speed multiple rollover was an unusual and serious crash (*see* 11 JA 2597), not a low-severity collision that ordinary users would expect to result in no intrusion into the vehicle (*see* AOB 46–47).

Second, a vague reference to "safety cell construction" is not enough to guide beliefs about how much roof deformation a design should allow. *See Mansur v. Ford*, 129 Cal. Rptr. 3d 200, 210 (2014) (evidence that the Explorer was marketed as a "family vehicle" did not provide information from which consumers could form expectations about safety and was too vague to establish any objective features of the vehicle). Does safety cell construction promise less than ten inches of roof intrusion in all multiple rollover accidents? Five inches? No reasonable consumer could point to such a number. *See* 1 Owen & Davis on Prod. Liab. § 8:5 (4th ed.) ("consumers comprehend that automobiles are not completely crashproof, but they have no meaningful expectations as to the extent to which a vehicle may be compromised in the event of a collision or rollover at substantial speeds"). Hence, plaintiff had to rely on her expert Herbst to identify what she claimed was an acceptable amount of deformation. And even he, with all his research and experience, admitted that no one can expect to be safe from harm in all crashes, no matter how well a car is designed. (*See* 6 JA 1234.)

Moreover, even if such advertising could create relevant consumer expectations about roof design, that would not compel the exclusive use of the consumer expectations test, as the trial court did here. Rather, it would at best require a risk vs. benefit analysis *in addition to* the consumer expectations test. *See Force*, 879 So. 2d at 110 (applying both tests); *see also Tincher*, 104 A.3d at 401; *McCabe v. Am. Honda Motor Co.*, 23 Cal. Rptr. 2d 303, 306, 313–14 (2002) (where parties disputed severity of crash and proper airbag performance under the circumstances in light of representations in the owner's manual, consumer expectations test *might* apply, but only *in addition to* risk vs. benefit test).

Because consumers could not reasonably form expectations as to the roof performance in this multiple-rollover crash, the jury should have been instructed using the risk vs. benefit test alone. At the very least, the instruction should have been offered in addition to the consumer expectations test, so as to guide the jury in evaluating the reasonableness of a consumer's expectations. The trial court's decision to instruct exclusively on the consumer expectations test was error.

3. The risk vs. benefit test is consistent with Nevada public policy.

Plaintiff acknowledges that "reasonable consumer expectations on the one hand, and technologically and commercially feasible alternative on the other, frame the manufacturer's duty to design" products. (AB 46–47, citing *Ginnis*, 86 Nev. 408, 470 P.2d 135, *Allison v. Merck & Co.*, 110 Nev. 762, 878 P.2d 948 (1994), and *Robinson,* 107 Nev. 135, 808 P.2d 552.) But even so, plaintiff argues that the Third Restatement risk vs. benefit test is in "direct conflict" with Nevada public policy. To the contrary; the risk vs. benefit factors—which include analysis of the functional and monetary cost of an alternative design (*see* 14 JA 3207)—align directly with the concepts of technological and commercial feasibility of alternative designs endorsed as relevant by this Court. *See Robinson*, 107 Nev. at 139, 808 P.2d at 524–25.

Relying on *Aubin v. Union Carbide Corp.*, 177 So. 3d 489 (Fla. 2015), plaintiff and NJA suggest this Court should reject the risk vs. benefit approach merely because it requires proof of a reasonable alternative design. But "in many instances, it is simply impossible to eliminate the balancing or weighing of competing considerations in

determining whether a product is defectively designed." *Barker,* 573 P.2d at 456–57; *see also id.* at 457 ("weighing the extent of the risks and the advantages posed by alternative signs is inevitable in many design defect cases"); *e.g., Ginnis,* 86 Nev. at 411, 470 P.2d at 137 (plaintiff proposed alternative designs).[5]

---

[5] *Aubin*, 177 So. 3d at 512, which was an asbestos case, does not help plaintiff. In a crashworthiness case, the manufacturer is liable for only those injuries caused by the defective design over and above the injuries that would have occurred as a result of the impact or collision *absent the defective design. D'Amario v. Ford Motor Co.*, 806 So. 2d 424, 427 (Fla. 2002.; *see also Ford Motor Co. v. Evancho*, 327 So. 2d 201, 202, 204 (Fla. 1976) (to hold an automaker liable "for a design or manufacturing defect which causes injury but is not the cause of the primary collision," plaintiff must show automaker failed to "use *reasonable care* in design and manufacture of its product to eliminate unreasonable risk of foreseeable injury" (emphasis added)). In that context, then, the alternative design that would have prevented the injury, i.e. the safer alternative design, is an integral part of the plaintiff's proof. Accordingly, *Aubin* does not answer the question here. Notably, in *Force*, 879 So. 2d at 110, which *was* a crashworthiness case, the court found both the consumer expectations and risk vs. benefits tests appropriate. Similarly, the Pennsylvania Supreme Court's decision in *Tincher,* 104 A.3d 328, does not support plaintiff's contention that requiring a plaintiff to prove an alternative design is unduly burdensome. Pennsylvania applies a crashworthiness doctrine requiring proof of a reasonable alternative design. *See Parr v. Ford Motor Co.*, 109 A.3d 682, 689 (Pa. 2014) *appeal denied*, 123 A.3d 331 (Pa. 2015) *cert. denied*, 136 S. Ct. 557 (2015). Thus, both *Aubin* and *Tincher* are consistent with adopting the risk vs. benefit approach for *this* crashworthiness case.

Here, plaintiff's case was premised on the notion the roof should have been stronger. That theory of design defect depended on analyzing vehicle designs with different roof strengths in different foreseeable circumstances. Contrary to suggestions that the task is too burdensome to undertake, plaintiff here actually presented expert testimony and testing on the subject of alternative design. The jury should have been instructed on the risk vs. benefit test allowing them to compare the relative merits of the designs, rather that deciding whether Ford's design, in a vacuum, met an ordinary consumer's expectations about how the roof should have performed in this rare multi-rollover event. *See McCourt v. J.C. Penney Co.*, 103 Nev. 101, 103–04, 734 P.2d 696, 698 (1987) (where both parties' experts disputed the feasibility of using alternative fabric for clothing, the jury was entitled to see the fabric choices; "[a]lternative design is one factor for the jury to consider when evaluating whether a product is unreasonably dangerous").

Plaintiff and NJA criticize the Third Restatement for introducing negligence concepts into strict liability. (AB 48–49; NJA ACB 12.) Yet none of the risk vs. benefit factors focus on the manufacturer's *conduct*; they all focus on the *product's design*. *See Barker*, 573 P.2d at 447 (dual

test "reflects our continued adherence to the principle that, in a product liability action, the trier of fact must focus on the product, not on the manufacturer's conduct"). The reason courts adopted strict liability was to relieve plaintiffs *of the burden of proving* negligence. *See Aubin*, 177 So. 3d at 511. Although some courts have identified the risk vs. benefit analysis as deriving from negligence concepts (*see* AB 48, citing *Banks v. ICI Americas, Inc.*, 450 S.E.2d 671, 673 (Ga. 1994) (*approving* Third Restatement approach to design defect cases)), that does not mean the risk vs. benefit test requires plaintiff to *prove* negligent conduct.[6]

Similarly, plaintiff complains that the risk vs. benefit factor that examines the injured party's ability to avoid injury improperly introduces concepts of contributory or comparative negligence into strict

---

[6] If anyone is trying to inject improper negligence concepts into this case, it is plaintiff. Plaintiff repeatedly asserts that the Excursion was unreasonably dangerous because Ford failed to test it (AB 12, 13, 14, 20, 44, 50, 52). But Ford's testing is irrelevant to plaintiff's strict liability claim, which depends entirely on the product design. Plaintiff is also wrong about the lack of and importance of testing. Ford tested a structurally interchangeable vehicle. (12 JA 2728–30; 13 JA 3052–56.) And Ford did not need to do any of the testing plaintiff described at trial to know how strong the roof was. The engineering told them that. (12 JA 2728–30.) Plaintiff's emphasis at trial on Ford's testing practices, before plaintiff abandoned her negligence theory, likely confused the jury about what it meant for a product to be "unreasonably dangerous."

liability. (AB 49.) But asking the jury to consider the plaintiff's ability to avoid injury as one factor among many is not the same thing as barring or reducing a plaintiff's recovery based on the plaintiff's fault. It is appropriate for the jury to take the user's failure to take simple precautions into account when deciding whether the manufacturer should have designed the product differently. After all, "responsibility for injuries caused by defective products is properly fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products." *Allison*, 110 Nev. at 767–68, 878 P.2d at 952.

B. Ford was prejudiced by the court's failure to give a risk vs. benefit instruction.

As explained in the opening brief, the jury needed to be instructed, as Ford asked, with a test for defect that would have focused the deliberations on all the expert testimony presented, including Ford's. (AOB 31, 41–44.) Without such instruction, plaintiff's counsel was able in closing argument to abandon any reference to the *design evidence* the jury had heard at trial. Instead, counsel simply argued that the jurors should find for plaintiff if they thought Mr. Trejo should have been able

to walk away from the accident. (14 JA 3348.) Plaintiff acknowledges her counsel engaged in "overly pointed" argument. (AB 53.) The consumer expectations test invites precisely that sort of argument in cases like this one, allowing the jurors to be told, incorrectly, that the product is defective because the injury was unexpected.

Plaintiff admits she had the opportunity to try this case under a risk vs. benefit theory. (AB 8, 20, 54–55.) Having decided not to place that theory before the jury, even as an alternative basis for recovery, plaintiff abandoned any right to pursue the claim. And because that is the only test that should apply, this Court should reverse with directions to enter judgment for Ford. If the Court chooses to relieve plaintiff from her strategic choice to pursue only a consumer expectations theory, the Court should at least order a new trial in which the jury is properly instructed on the correct test for defect. *See Mikolajczyk v. Ford Motor Co.*, 901 N.E.2d 329, 359 (Ill. 2008) (defendants "were prejudiced by the failure to give an instruction that would have caused the jury to apply the risk-utility test in addition to the consumer-expectation test" because the lack of the risk vs. benefit

instruction prevented defendants from obtaining "a full, fair, and comprehensive review of the issues by the jury").

Plaintiff argues Ford was not prejudiced by the instructions because the evidence did not show that a stronger roof would have decreased the product's utility. (AB 51.) There are at least two problems with that argument. First, having lost its bid to instruct the jury on risk vs. benefit, Ford had to shift the focus of its defense. Ford cannot be faulted for declining to try the case under instructions that were not given. Second, Ford *did* provide some of its evidence that reinforcing the roof (as Herbst proposed) would interfere with the manufacturing process, and that rigidizing the roof could create safety problems. (*See* 12 JA 2736–39, 2746–47.) Ford also introduced evidence that a stronger roof would not have made the vehicle safer. (*See* AOB 43 n.5.) A properly instructed jury would have considered that evidence in deciding whether the existing roof was reasonably designed.

Plaintiff also dismisses Ford's prejudice by presenting on appeal a jury argument about feasibility. Specifically, plaintiff argues that Ford created stronger roofs for other cars, so it could have created a stronger

roof for the Excursion without decreasing utility.[7] (AB 51–52.) This is beside the point, given Ford's evidence that a stronger roof would not have been *safer*. Moreover, Ford agreed that building a stronger roof is feasible, but showed it is far more complicated than Herbst assumed and should not be done without careful analysis of the costs and benefits—benefits which have not been shown in decades of automotive research. (*See* AOB 20–22.) And most importantly, an argument like this one is not in the ken of appellate courts—it's a question that should be decided by a properly instructed jury. Should the Court determine that judgment for Ford is not warranted yet, the Court should at least order a new trial.

[7] Plaintiff also emphasizes that the Excursion failed Ford's own internal standards. (AB 13.) That is misleading. The internal standards applied to lighter passenger cars and trucks, *not* heavy-duty vehicles like the Excursion, which had its own set of strength targets. (12 JA 2719–21, 2750; *see also* 6 JA 1366; 19 JA 4459.)

III. BRIAN HERBST'S OPINION THAT A STRONGER ROOF WOULD HAVE BEEN SAFER FOR RAFAEL TREJO SHOULD HAVE BEEN EXCLUDED.

Herbst relied on drop testing to support his opinion that a stronger roof would have protected Mr. Trejo. (6 JA 1330–31.) But Herbst had no foundation for his opinion, so it should have been excluded. The drop test experiments he performed did not use dummies or replicate the forces acting on occupants in a rollover, so they were not useful support. (AOB 45–49.)

Plaintiff admits that Herbst's drop testing was "not intended to replicate the accident or its effect on a human being inside the vehicle." (AB 9; *see also* AB 19 ("Herbst never intended to replicate the 'conditions' of the accident or its effect on a human being inside the vehicle."), 32 (same).) Likewise, plaintiff admits that Herbst's testimony "did not and was never intended to address the effect of this rollover on Rafael." (AB 33.) This is precisely Ford's point: Herbst's testimony could not properly be used to establish that "Ford could have eliminated or greatly reduced the roof crush *killing Rafael*." (*Id.*, emphasis added.) Herbst's testimony was thus irrelevant, because it

showed only the undisputed facts that the roof deformed and could have been made stronger—not that a stronger roof would have prevented Mr. Trejo's death.

To avoid that conclusion, plaintiff contradicts herself, arguing that Herbst's drop tests were indeed designed to replicate the forces of Mr. Trejo's accident. (AB 14 (Herbst "showed through drop testing how the *forces of the Trejo accident* could be *replicated* in an exemplar vehicle" (emphasis added)), 19 ("Herbst's opinions and testing methods were intended to *illustrate the forces* involved in a rollover by replicating the resulting roof crush.").) But Herbst's testimony lacked foundation on the relevant question: whether the roof deformed too much *to be safe for an occupant like Mr. Trejo* under the circumstances of this accident. Because the drop tests did not show how the occupants experienced the forces and roof deformation in this multi-roll crash, they had no probative value on the issues that mattered, and served no purpose other than to mislead the jury about the accident forces and their impact on Mr. Trejo.

Plaintiff does not deny that, without Herbst's testimony, Ford would be entitled to judgment under the applicable risk vs. benefit

analysis. Thus, if the Court determines that plaintiff did not abandon her opportunity to obtain a jury determination of her product liability claim based on the risk vs. benefit test, it should nonetheless determine that plaintiff's admissible evidence could not establish liability under the proper test and direct judgment for Ford. Alternatively, if the Court orders a new trial, it should direct the court to exclude from that retrial Herbst's unfounded opinions that a stronger roof is safer and would have prevented Mr. Trejo's death in this crash.

CONCLUSION

This Court should grant the relief requested in the opening brief.

Dated: April 11, 2016

HORVITZ & LEVY LLP
LISA PERROCHET (*Pro Hac Vice*)
EMILY V. CUATTO (*Pro Hac Vice*)
SNELL & WILMER L.L.P.
VAUGHN A. CRAWFORD (SBN 7665)
JAY J. SCHUTTERT (SBN 8656)
MORGAN T. PETRELLI (SBN 13221)

By: s/ Emily V. Cuatto
Emily V. Cuatto
Horvitz & Levy LLP
15760 Ventura Blvd., 18th Floor
Encino, California 91436

By: s/ Jay J. Schuttert
Jay J. Schuttert
Snell & Wilmer L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169

Attorneys for Appellant
FORD MOTOR COMPANY

CERTIFICATE OF COMPLIANCE
(NRAP 28.2)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[×] This brief has been prepared in a proportionally spaced typeface using MS-Word in 14-point Century Schoolbook font type; or

[ ] This brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[×] Proportionately spaced, has a typeface of 14 points or more, and contains 7,000 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

[ ] Does not exceed _____ pages.

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 sanctions in

the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated: April 11, 2016

HORVITZ & LEVY LLP
LISA PERROCHET (*Pro Hac Vice*)
EMILY V. CUATTO (*Pro Hac Vice*)
SNELL & WILMER L.L.P.
VAUGHN A. CRAWFORD (SBN 7665)
JAY J. SCHUTTERT (SBN 8656)
MORGAN T. PETRELLI (SBN 13221)

By: s/ Jay J. Schuttert

Jay J. Schuttert
Snell & Wilmer L.L.P.
3883 Howard Hughes Parkway, Suite 1100
Las Vegas, Nevada 89169

Attorneys for Appellant
FORD MOTOR COMPANY

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On April 11, 2016, I served true copies of the following document(s) described as **APPELLANT'S REPLY BRIEF** on the interested parties in this action as follows:

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the indicated persons at the addresses listed in the Service List and placed the package for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY ELECTRONIC TRANSMISSION: Based on electronic transmission via the Nevada Supreme Court's Appellate Case Management System (ACMS) indicated as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 11, 2016, at Encino, California.

s/ Robyn Whelan

SERVICE LIST

Trejo v. Ford Motor Company
Nevada Supreme Court No. 67843

Attorneys	Party(s) Represented
Jay J. Schuttert Morgan T. Petrelli Snell & Wilmer LLP 3883 Howard Hughes Parkway, Suite 1100 Las Vegas, Nevada 89169	Appellant *Ford Motor Company* **Electronic Copy,** via Nevada Supreme Court's Appellate Case Management System (ACMS)
Vaughn A. Crawford Snell & Wilmer LLP 3883 Howard Hughes Parkway, Suite 1100 Las Vegas, Nevada 89169	Appellant *Ford Motor Company* **Hard copy, via U.S. Mail**
Michael W. Eady Thompson Coe Cousins & Irons, LLP 701 Brazos Street, 15th Floor Austin, Texas 78701	Appellant *Ford Motor Company* **Hard copy, via U.S. Mail**
Brian D. Nettles William R. Killip, Jr. Nettles Law Firm 1389 Galleria Drive, Suite 200 Henderson, Nevada 89014	Respondent *Teresa Garcia Trejo* **Electronic Copy,** via Nevada Supreme Court's Appellate Case Management System (ACMS)
Ricardo A. Garcia Jody R. Mask Garcia Ochoa Mask 820 South Main Street McAllen, Texas 78501	Respondent *Teresa Garcia Trejo* **Hard copy, via U.S. Mail**
Larry W. Lawrence, Jr. Lawrence Law Firm 3112 Windsor Road, Suite A234 Austin, Texas 78703	Respondent *Teresa Garcia Trejo* **Hard copy, via U.S. Mail**

A. William Maupin, Esq. Jennifer L. Braster Naylor & Braster 1050 Indigo Drive, Suite 112 Las Vegas, Nevada 89145	Respondent *Teresa Garcia Trejo* **Electronic Copy,** via Nevada Supreme Court's Appellate Case Management System (ACMS)
David N. Frederick, Esq. 43 Innisbrook Avenue Las Vegas, Nevada 89113	Respondent *Teresa Garcia Trejo* **Electronic Copy** via Nevada Supreme Court's Appellate Case Management System (ACMS)
Beau Sterling Sterling Law, LLC 228 South 4th Street, 1st Floor Las Vegas, Nevada 89101	Respondent *Teresa Garcia Trejo* **Electronic Copy** via Nevada Supreme Court's Appellate Case Management System (ACMS)
Dennis L. Kennedy Sarah E. Harmon Bailey ♦ Kennedy 8984 Spanish Ridge Avenue Las Vegas, Nevada 89148-1302	*Amicus Curiae* *The National Association of Manufacturers and Alliance of Automobile Manufacturers, Inc.* **Electronic Copy** via Nevada Supreme Court's Appellate Case Management System (ACMS)
Victor E. Schwartz Shook, Hardy & Bacon L.L.P. 1155 F Street, N.W., Suite 200 Washington, DC 20004-1305	*Amicus Curiae* *The National Association of Manufacturers and Alliance of Automobile Manufacturers, Inc.* **Hard copy, via U.S. Mail**
Robert T. Eglet Erica D. Entsminger Eglet Prince 400 South Seventh Street, 4th Floor Las Vegas, Nevada 89101	*Amicus Curiae* *Nevada Justice Association* **Hard copy, via U.S. Mail**

Matthew L. Sharp Matthew L. Sharp, Ltd. 432 Ridge Street Reno, Nevada 89501	*Amicus Curiae* *Nevada Justice Association* **Electronic Copy** via Nevada Supreme Court's Appellate Case Management System (ACMS)