IN THE SUPREME COURT OF THE STATE OF NEVADA

FORD MOTOR COMPANY, Appellant, v. THERESA GARCIA TREJO, Respondent.	Supreme Court Case No. 67843 District Court Case No. A-11-641059-C

RESPONDENT'S RESPONSE TO APPELLANT'S SECOND NOTICE OF SUPPLEMENTAL AUTHORITIES

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INTRODUCTION

Appellant Ford Motor Company ("Ford") has filed a second Notice of Supplemental Authorities and Change of Attorney ("SA"), this time directing the Court to a California Court of appeals decision, *Trejo v. Johnson & Johnson*, 2017 WL 2825803 (Cal. App. 2017),[1] and the Ninth Circuit's unpublished disposition in *Edwards v Ford Motor Company*, 2017 WL 1046188 (9th Cir. Mem. 2017), both decided under California law. However, Ford's California cases are not pertinent to the Court's resolution of this appeal for at least three reasons.

I.

Ford's California Cases Conflict with Nevada's Compensation of Consumers Injured by Unreasonably Dangerous Products Under Strict Liability in Tort

For nearly half a century, Nevada law has compensated persons injured by products a manufacturer has chosen to market that prove to be unreasonably dangerous to particular consumers, without regard to the feasibility, practicality risks and benefits of alternatives to other consumers under strict liability in tort, as reflected in the Restatement (Second) of Torts, Section 402A and the Comments thereto. *Ginnis v Mapes Hotel Corp*., 86 Nev. 408, 414, 470 P.2d 135, 138 (1970); *see also*, *Allison v Merck and Co.*, 110 Nev. 762, 770, 878 P.2d 948, 953 (1994).

[1] There is no known relationship between Christopher Trejo, Plaintiff and Respondent in the *Johnson & Johnson* case, and Theresa Garcia Trejo, Plaintiff and Respondent in this case or Rafael Trejo, her deceased spouse.

Under Nevada strict liability law, a product is defective if it is unreasonably dangerous, i.e. 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. *Ginnis*, 86 Nev. at 413, 470 P.2d at 138. Reasonable consumer expectations properly measure whether a product is unreasonably dangerous because consumer expectations drive the parties' every interaction with the product, from the manufacturer's design and marketing of the product to the consumer's selection and use of the product. *See* Respondent's Answering Brief ("RAB") at 38-46; *Aubin v Union Carbide Corp.*, 177 So.3d 489, 503, 507 (Fla. 2015).

Ford cites *Johnson & Johnson's* complaint that the consumer expectations test turns strict liability into absolute liability because the ordinary consumer never expects to be injured by an intended or foreseeable use of the product. SA 2. That complaint could only be made under California law because of California's rejection of strict liability's "unreasonably dangerous" requirement for both design and manufacturing defect cases. *See Barker v Lull Engineering Co.*, 573 P.2d 443, 446 (Cal. 1978); *Cronin v J.B.E. Olson Corp.*, 501 P.2d 1153, 1163 (Cal. 1972). Nevada's strict liability requirement that the product be unreasonably dangerous not only permits the jury to properly determine whether the risk of injury or loss should rest with the manufacturer's design and marketing of the product or the consumer's

selection and use of the product in each particular case, it also prevents the manufacturer from being held absolutely liable as a guarantor of product safety, and keeps the jury's attention focused on the reasonableness of the product injuring the plaintiff, rather than the reasonableness of the manufacturer's design choices. *See* RAB 3-4, 23, 41, 43, 47-48, 53.

II.

Ford's California Caselaw Allows Manufacturers To Escape Responsibility for Consumer Expectations They Create in Marketing, Selling, and Delivering The Product

Ford's California caselaw reflects not only California's rejection of the "unreasonably dangerous" requirement for strict liability, but also California's restriction of the consumer expectations test to situations where the everyday experience of ordinary consumers shows the product fails to meet minimum safety expectations arising from the objective features of the product. *See Soule v. General Motor Corp.*, 882 P.2d 298, 306 (Cal. 1994); *Mansur v. Ford Motor Corp.*, 129 Cal. Rptr.3d 200, 208 (Cal. App. 2011). California thus not only effectively prevents injured consumers from relying on the consumer expectations test for products such as automobiles, it ignores reasonable consumer expectations arising from the manufacturer's advertising and marketing of the product, as well as the warnings and instructions given – and not given – with it. *See* RAB 41-46.

In *Edwards*, the Ninth Circuit affirmed a jury verdict in favor of Ford under California law, rejecting the plaintiff's contention the jury should have been instructed on the consumer expectations test, citing *Soule's* limitations on the availability of that test and the plaintiff's need for expert testimony from a structural engineer. The Ninth Circuit asserted that plaintiffs "may introduce, for example, owner's manuals or advertisements to show what consumers expect of a particular vehicle" but they had no such evidence. Here, the jury below had before it Ford's marketing materials in which Ford touted the vehicle's "safety cell construction" and "reinforced" roof pillars as well as expert evidence regarding the dangers posed by the vehicle's substandard roof and the ways Ford could have reinforced it. *See* RAB 12-14; 5 JA 1180-81; 12 JA 2910-12. Consequently, in this case, the evidence fully supports the jury's finding the vehicle was "unreasonably dangerous" under Nevada law.

III.

Ford's California Cases Cannot Assist The Court in Deciding Whether to Throw Out the Jury Verdict and Subject Plaintiff To A New Trial to Obtain Compensation

Ford's California cases illustrate the differences between Nevada's strict liability in tort law for injuries caused by a manufacturer's unreasonably dangerous products and California law effectively requiring risk/utility balancing among available alternatives before an injured consumer can obtain compensation for

injuries caused by products such as automobiles. However, Ford's California cases cannot assist the Court in deciding whether the verdict plaintiff obtained under Nevada law should be thrown out and Ford granted a new trial, given the totality of the evidence below, the objections Ford made – and did not make – to the instructions given, and the specific instructions Ford requested in this case. *See* RAB 4, 25-27, 50-55.

Theresa Trejo alleged and tried her case with a view toward not only Nevada's strict liability in tort precedents, but also Ford's demand for risk/utility balancing such as that reflected in Ford's California cases. *See* RAB 7-8. There is no dispute in the evidence regarding the availability and practicality of alternatives that would have strengthened the 2000 Excursion's substandard roof support; Ford had used such alternatives in its other full-sized SUV (the Ford Expedition) that met Ford's own standards, and Ford did not contest the commercial feasibility of using a comparable system in the 2000 Excursion at an additional cost of $70/vehicle. *See* RAB 12-14. Ford also produced no evidence that doing so would reduce either the "usefulness" or the "consumer choice" provided by the vehicle, even though Ford's requested instructions would have asked the jury to consider such factors. *See* RAB 4.

Finally, Ford's requested instructions included few of the factors identified in *Johnson & Johnson* as relevant to risk/utility balancing; instead, Ford's requested

instructions asked the jury to consider, not only the "likely effect of liability. . . on the range of consumer choice," but also Plaintiff's "awareness of the product's dangers" and "ability of the plaintiff to have avoided injury," thereby attempting to use a demand for risk/utility balancing to both obtain and preserve marketing advantages and resurrect contributory negligence as a defense to strict liability. *See* RAB 4, 49; *Andrews v. Harley Davidson*, 106 Nev. 533, 538, 796 P2d 1092, 1095 (1990). Hence, Ford's California cases fail to remedy Ford's inability to make the requisite showing for a new trial, i.e. that it is "probable" that a different result might have been reached such that a different verdict "might reasonably have been expected." *See* RAB 25-27; *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1009, 194 P.3d 1214, 1221-22 (2014); *accord*, *Soule v. General Motors Corp., supra*, 882 P.2d at 316 (holding the trial court erred in instructing the jury on consumer expectations, but refusing to hold the error was "inherently" prejudicial or required "automatic" reversal, and affirming a jury verdict for plaintiff).

CONCLUSION

As *Edwards* illustrates, California law effectively permits manufacturers to prevail by default by conditioning a consumer's right to obtain compensation for injuries caused by an automobile on risk/utility balancing for not only the vehicle the manufacturer chose to market, but also the feasibility, practicality, risks and benefits of all alternatives for all consumers in all possible situations. Few, if any,

plaintiffs and their counsel have the time and resources needed to match salaried industry expertise and re-engineer the manufacturer's vehicle in the courtroom, and courts and their staffs simply do not have the time, the expertise, and the resources necessary to conduct the referendum on the manufacturer's design decision making that Ford, its amici, and their academic advocates demand through risk/utility balancing.

Hence, Ford's California cases provide no support for Ford's demand that the Court throw out the jury verdict, order a new trial, and require risk/utility balancing with respect to the substandard roof strength of the 2000 Ford Excursion that killed Rafael. Instead, Ford's California cases illustrate reasons why the Court should affirm the jury verdict as fully supported by the evidence under strict liability in tort

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and deny Ford a new trial as unwarranted by the totality of the evidence at trial and Ford's requested instructions.

DATED this 1st day of August 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Naylor & Braster and that on the 1st day of August 2017, I electronically filed and served a true and correct copy of the above and foregoing **RESPONSE TO APPELLANT'S SECOND NOTICE OF SUPPLEMENTAL AUTHORITIES** to be served as follows:

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