THE SUPREME COURT

OF THE STATE OF NEVADA

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Elizabeth A. Brown
Clerk of Supreme Court

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

REPLY TO PLAINTIFF'S RESPONSE TO SUPPLEMENTAL AUTHORITIES

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I. INTRODUCTION

Nevada's strict products liability law is intended to "encourag[e] manufacturers to make products safe without unduly burdening them with excessive liability without fault." *Robinson v. G.G.C., Inc.*, 107 Nev. 135, 139 (1991). The risk-utility test accomplishes this goal by imposing liability where a safer design was feasible and practical.

The consumer expectations test *may* also accomplish that goal if carefully applied, *but not as envisioned by plaintiff.* Ford's authorities—including those from California—show that the consumer expectations test is unworkable where the adequacy of a product's design raises complex performance questions with which an ordinary consumer has little or no experience, and about which an ordinary consumer would form no affirmative expectation. (*See* ARB 15-17.) In a case like this one involving claims of nonobvious design elements in unfamiliar circumstances, the consumer expectations test can be manipulated to transform strict liability into absolute liability. *See Trejo v. Johnson & Johnson*, 220 Cal. Rptr. 3d 127, 167–68 (2017). California shares Nevada's interest in ensuring consumer products are reasonably safe

while also ensuring a fair and logical rule of law applicable to actions against manufacturers. California cases highlighting limitations on the consumer expectations test are therefore persuasive.

II. THE RISK-UTILITY TEST IS CONSISTENT WITH NEVADA LAW AND NOT UNDULY BURDENSOME ON PLAINTIFFS.

Plaintiff argues the balancing inherent in the risk-utility test conflicts with longstanding Nevada law designed to compensate those injured by defective products "without regard to the feasibility, practicality risks and benefits of alternatives." (Respondent's Response to Appellant's Second Notice of Supplemental Authorities [hereinafter, "Resp."] 2.) Not so. This Court has recognized (citing California law with approval) that factfinders must consider "existing technology and commercial feasibility" when evaluating whether a product is defective for failure to include a safety device. *Robinson,* 107 Nev. at 138–140. Those considerations should be an express part of the jury instructions so the jury knows it can and should consider them.

Plaintiff also argues the risk-utility test should be rejected because plaintiffs lack the resources to offer expert evidence of design

alternatives. (Resp. 7–8.) First, that is plainly untrue given that plaintiff here presented extensive expert testimony, complete with experiments on exemplar vehicles. (*See* AOB 9–12.) Second, it is not unfair to hold a plaintiff to her burden of proof. Where, as here, the plaintiff claims the engineers improperly designed a technologically-sophisticated product, she should have to prove the point through reliable engineering evidence of the sort that manufacturers rely on when designing such products, not jurors' amorphous "expectations."

III. CALIFORNIA LAW IS PERSUASIVE BECAUSE IT IS NOT MATERIALLY DIFFERENT FROM NEVADA LAW.

Both Nevada and California impose strict liability for products that are shown to be unreasonably dangerous. They use different terminology in their jury instructions, but nothing about Nevada law supports a departure from the shared values of California and Nevada in not imposing absolute liability. *See Ward v. Ford Motor Co.*, 99 Nev. 47, 48 n.1 (approving jury instruction that Ford's products are not required to be "accident proof"). California cases are thus instructive on when application of a consumer expectations test goes too far down the

path to absolute liability, by allowing a plaintiff to meet her burden merely by showing she "didn't expect an injury."

Plaintiff argues that Nevada's jury instruction that incorporates the "unreasonably dangerous" standard is sufficient to protect against imposing absolute liability under the consumer expectations test, whereas California does not use that phraseology in jury instructions. (Resp. 3–4.) The lack of an "unreasonably dangerous" instruction, however, has never been articulated by California cases as a reason for carefully limiting use of the consumer expectations test. Rather, California courts have expressed concern that the "unreasonably dangerous" instruction, when offered *in addition to* an instruction on "defect," may cause confusion, imposing a *higher* burden on the plaintiff to prove the product was unreasonably dangerous. *See Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153, 1162–63 (Cal. 1972). Nevada's "unreasonably dangerous" instruction simply tells the jury that "defective" and "unreasonably dangerous" are the same thing, thereby apparently avoiding the concerns the California courts expressed. (*See* 14 JA 3372.) There is nothing about the Nevada instruction's

phraseology that would lead the jury to evaluate the consumer expectations test differently in Nevada than in California.

More to the point, Nevada's "unreasonably dangerous" instruction does nothing to cure the problems with instructing the jury on a consumer expectations theory (a) where there is no evidence an ordinary consumer would form expectations about the product's performance in the situation at hand, or (b) where there is such evidence, but the test is given in isolation, divorced from the considerations found in the risk-utility test. In either situation, the instructions will leave the jury free to believe that any departure from what the consumer "expected" is, by definition, "unreasonably dangerous." Because no one ever "expects" to be injured, that's absolute liability. Nevada, like California, should push back against such a result.

Finally, plaintiff's argument that Nevada's "unreasonably dangerous" standard sufficiently protects against imposition of absolute liability is defied by plaintiff's closing argument to the jury in this case, in which she relied on the consumer expectations test to argue for absolute liability in the same way that the *Trejo* court criticized. She

reduced the case to this concept: "If you think that a 5-foot-4 man should be able to walk away from a 27-mile-an-hour crash, you will return a verdict for Ms. Trejo." (14 JA 3348.) And the way the jury instructions were written, the jury could (improperly) accept that argument as the basis for finding in plaintiff's favor.

IV. THE RISK-UTILITY TEST DOES NOT IGNORE EVIDENCE-BASED CONSUMER EXPECTATIONS ABOUT SAFETY.

Plaintiff argues California law is unpersuasive because it relieves manufacturers of responsibility for representations made to consumers. (Resp. 3, 4.) On the contrary, if a manufacturer makes representations that give rise to objective consumer expectations about the product's safety performance under the circumstances, the consumer expectations test may be given in addition to the risk-utility test under California law. *See McCabe v. Am. Honda Motor Co.*, 123 Cal. Rptr. 2d 303, 306, 313–14 (2002). But where, as here, there are no such representations or other grounds for finding that ordinary consumers would form affirmative expectations about how a design should perform in the circumstances of the case, the test has no mooring. (See ARB 22–23.)

Contrary to plaintiff's argument, accepting Ford's position in this case would not require ignoring expectations created during the parties' transaction. (*See* Resp. 3.) This Court could, as other jurisdictions have done and Ford's proposed instructions would have done, account for such expectations by including them as part of the risk-utility analysis. *E.g.*, *Mikolajczyk v. Ford Motor Co.*, 231 Ill. 2d 516, 569 (2008); (*see* 14 JA 3207 (risk-utility factors include "the likelihood that the product will cause injury considering the product as sold with any instructions or warnings regarding its use")).

Whether consumer expectations (when supported by the evidence) are melded into a combined instruction, or are addressed in a separate instruction along with a risk-utility instruction, the jury is still properly advised about the other important considerations relevant to the design defect analysis, such as technological and commercial feasibility. What this court should *not* do is approve, for cases like this one, the giving of a consumer expectation instruction in isolation, without reference to the weighing of risks and utilities that help evaluate whether the product was unreasonably dangerous.

Dated: August 21, 2017

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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 3601 West Olive Avenue, 8th Floor, Burbank, California 91505-4681.

On August 21, 2017, I served true copies of the following document(s) described as **REPLY TO PLAINTIFF'S RESPONSE TO SUPPLEMENTAL AUTHORITIES** on the interested parties in this action as follows:

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BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope 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:

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

Executed on August 21, 2017, at Burbank, California.

s/ Cassandra St. George

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