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RICHARD T. BERKOSKI, Individually and as Administrator of the Estate of Ann L. Ramage, M.D., deceased,

Plaintiff-Appellant,

v.

HONDA MOTOR COMPANY, LTD., AMERICAN HONDA MOTOR CO., INC., HONDA OF TURNERSVILLE, and JOHN MACNAMARA, as Administrator of the Estate of Elizabeth MacNamara, deceased,

Defendants-Respondents.

SUPERIOR COURT
OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-002887-22T4

CIVIL ACTION

On Appeal from the Law Division, Camden County

Docket No. CAM-L-001463-20

Sat Below:

Hon. Daniel A. Bernardin, J.S.C.

BRIEF IN SUPPORT OF THE APPEAL

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PRELIMINARY STATEMENT

This matter arises out of a head-on collision where both drivers suffered fatal injuries. Plaintiff, Richard T. Berkoski, individually and as Administrator for the Estate of Ann L. Ramage, M.D., his wife, alleges that the 2016 Honda CR-V that crossed the center line and caused the collision was defective because defendant, American Honda Motor Co., Inc. (AHM), failed to install available technology that would have warned the driver her CR-V was crossing the center line and that would have avoided the accident. AHM failed to incorporate in the design technologically and economically feasible safety systems that were indisputably available at the time of manufacture. Despite both affirmative evidence to support plaintiff's contentions and the inferences to be afforded plaintiff on summary judgment and under the applicable product liability laws, the trial court took from the jury the determination whether the failure to include the safety systems was reasonable and whether their absence rendered the vehicle not reasonably fit, suitable and safe under the circumstances.

The trial court's decision, as a matter of law on summary judgment, that the vehicle was not defective usurped the jury's responsibility and violated plaintiff's constitutional right to trial by a jury. In determining whether a product is defective, a jury must assess the risks and alternatives known to the manufacturer and then determine whether the manufacturer discharged its duty to provide a reasonably fit,

suitable and safe product. A driver's responsibility to drive safely does not insulate a vehicle manufacturer from that risk/utility analysis. Nor does the known risk that a vehicle that fails to stay in its lane could cause harm negate the manufacturer's responsibility to produce a reasonably safe product.

Plaintiff produced evidence that the technology was available – in fact, it was made available by defendant at the time of manufacture on other models of the same vehicle – and that defendant failed to notify the owner of the subject vehicle of its availability. Plaintiff produced evidence that the driver was a cautious driver and would have used the technology if available. Plaintiff produced evidence and expert testimony that had the necessary safety systems been in place and operating that they would have avoided the head-on collision by keeping the vehicle in its lane and by alerting the driver. Based on the proofs and the applicable law, plaintiff was entitled to have a jury determine whether the vehicle was defective.

Defendant denied responsibility by claiming a manufacturer is not under the duty to produce an accident-proof product or to provide every safety device. A manufacturer is, however, subject to a duty to produce a product that is fit, suitable and safe for its intended purpose as assessed by a jury applying the risk-utility analysis required by New Jersey caselaw and the Product Liability Act. On the record presented, determining whether the product was defective, as a matter of law on summary judgment, was erroneous and requires reversal.

PROCEDURAL HISTORY

Plaintiff Richard T. Berkoski, individually and as the administrator of the Estate of Ann L. Ramage, M.D., filed suit in April 2020. Pa5. He named as defendants Honda Motor Company, Ltd., American Honda Motor Company, Inc. (AHM), Honda of Turnersville and John MacNamara, the Administrator of the Estate of Elizabeth MacNamara, the driver of the Honda CR-V EXL at the time of the collision. Ibid. Plaintiff asserted negligence and strict liability claims against the Honda defendants, alleging that the subject CR-V, as sold, was defective because it failed to include technologically and economically feasible safety features that would have prevented the crash. Defendant McNamara filed his Answer with Cross-Claims in June 2020. Pa41. Defendant AHM filed its Answer with Cross-Claims in June 2020. Pa50. Defendant Honda of Turnersville filed its Answer with Cross-Claims in July 2020. Pa77.

In August 2020, plaintiff dismissed all claims against defendant Honda Motor Company, Ltd., based on the parties agreement that AHM would stand in the shoes of its parent company. In January 2021, plaintiff's claims against Honda of Turnersville were dismissed. The parties engaged in extensive fact discovery, AHM produced a corporate representative to testify regarding development of its LDW and LKAS systems, and experts issued reports and were deposed. In October 2022, defendant, AHM, moved for summary judgment. Pa106. The trial

court granted summary judgment, dismissing all claims against AHM with prejudice. Pa1. Plaintiff moved for reconsideration, which was denied in January 2023. Pa3. Pursuant to a Stipulation of Dismissal filed April 28, 2023, the claims against the remaining defendant, John MacNamara, were dismissed with prejudice. Pa723. All claims as to all parties now being resolved, plaintiff filed his Notice of Appeal on May 25, 2023. Pa723.

STATEMENT OF FACTS

On Saturday, August 4, 2018, at approximately 11:45 a.m., Elizabeth McNamara was driving her 2016 Honda CR-V EXL, southbound on Cape May County Route 657, near mile marker 7.5. Pa429. County Route 657 is a two-lane road which is divided by a single dotted white line, with a 50-m.p.h. speed limit. Pa458. The sky was overcast. Pa431. The road was flat and mostly straight with occasional slight curves. Ibid. An eyewitness driving behind the CR-V noticed the CR-V was drifting back and forth within the lane for about five minutes before the collision. Pa463 at 11:04-11.

The CR-V was traveling between 47 and 50 m.p.h. as it approached mile post 7.5 on a straightaway. Pa458; Pa479. The road was clearly marked and without obstructions. Pa431; Pa458. The CR-V started a slight leftward drift towards the dotted center line of the road. Pa463 at 13:11 – 14:05; Pa471 at 11:18 – 13:03. The CR-V continued its "drift" across the center line, directly into

oncoming traffic. Ibid. A pickup truck coming northward swerved onto the shoulder to avoid the CR-V. Pa464 at 15:25 – 16:08. The car traveling behind the pickup truck, a Ford Escape driven by Dr. Ann Ramage, swerved but could not avoid being struck head-on. Pa431; Pa464 at 16:02-08. The collision killed the CR-V driver, Elizabeth MacNamara. Pa429-30. Dr. Ann Ramage was severely injured and succumbed to her injuries fifty-seven days later. Pa430; Pa565.

The crash data from the CR-V revealed that for the five (5) seconds immediately prior to the crash, the steering torque exerted on the CR-V was zero (0), i.e., there was no measurable steering input. Pa128; Pa479. The crash data confirmed that turn signals were not engaged and the brake pedal was not depressed. Pa128; Pa479. The witnesses to the collision also did not observe any braking or attempt to steer back to the proper lane. Pa430-31.

Defendant AHM had developed Lane Departure Warning (LDW) and Lane Keep Assist systems (LKAS) prior to 2016. Pa145; Pa345-46. AHM did not include those systems on the model of the 2016 CR-V sold to the MacNamaras. Pa163; Pa345-46. Those available and appropriate warning and safety devices would have (1) alerted Ms. MacNamara of her "drifting" and (2) applied torque to the steering to keep the vehicle in its lane. Pa159-70. "The LKAS/RDM system available as optional equipment on the 2016 Honda CR-V would have prevented MacNamara's lane departure and the collision with Ramage's Ford." Pa150. Due

to the lack of those warning and safety systems, the subject CR-V failed to warn or otherwise to alert Ms. McNamara of her "drifting," or to the crossing of the center line and did not take measures to avoid crossing the centerline and into oncoming traffic. Pa154.

Lane Departure Warning uses audible "beeps" and visual alerts to warn the driver when the system determines that the vehicle is getting too close to detect right or left lane markings, without a turn signal. Pa159-60. The system, as designed by Defendant AHM, activates when the vehicle is traveling between 45 and 90 m.p.h., on a road that is straight or slightly curved, with turn signals off, a non-depressed brake pedal, and wipers that are not in continuous operation. Pa160. If the warning system detects the vehicle getting too close to the lane markings, the system will beep and flash a warning on the driver's console. Ibid. The purpose of the Lane Departure Warning system is to warn the driver into taking corrective action. Pa145; Pa159.

Defendant AHM's Lane Keep Assist System is similar to LDW in that it provides audio and visual warnings if the vehicle is detected drifting out of its lane. Pa163. In addition to the warnings, the system applies steering torque to return the car back to the middle of its lane. Ibid. The applied torque becomes stronger as the vehicle gets closer to either of the lane lines. Ibid. The LKAS activates under the same conditions as the LDW with the added requirement that the lane markers

are detectable on both sides and the vehicle is in the middle of the lane. Pa161-62; Pa169-70.

On the morning of August 4, 2018, all conditions for the LDW and LKAS systems to activate were satisfied. Pa149; Pa161-62; Pa169-70; Pa429-30. None of the environmental, roadway, or vehicle conditions that might limit the effectiveness of the systems were factors in the crash. Pa149.

Plaintiff retained expert Shawn Harrington to test the performance of the AHM warning and safety systems available in 2016 under conditions resembling those of the subject crash. Pa118-34. Mr. Harrington tested the responses of two (2) 2017 Honda CR-V's, equipped with defendant AHM's LDW and LKAS systems on February 20, 2020, April 22, 2022, and April 26, 2022. Pa128. Mr. Harrington drove the CR-V's at approximately 45 – 50 mph at the site of the collision with the LKAS system on. Pa129. Mr. Harrington evaluated the Honda warning and safety systems' responses to various parametric angles of attack, steering wheel angles, accelerator pedal percentages, and lateral velocities. Pa132. Of the 37 valid tests across the three (3) different test series, the LKAS successfully steered the CR-V back into the correct lane of travel 36 times. Ibid. According to Mr. Harrington, his testing accounted for the zero (0) to four (4) degrees of steering input possibly exerted by Mrs. MacNamara, consistent with the crash data that recorded zero. Pa128; Pa516-18.

Based on the extensive testing, Mr. Harrington concluded to a reasonable degree of certainty that "[h]ad the subject Honda been equipped with the available LKAS, the subject collision would not have occurred. Pa518. The AHM systems would have warned Mrs. MacNamara to take action and/or steered the CR-V back into the southbound lane without driver input, completely avoiding the Ramage collision. Pa134 ("The Honda CR-V's LKAS would have steered Ms. MacNamara's Honda CR-V back into the southbound lane of County Route 657 without driver input. A collision with Dr. Ramage's Ford would have been avoided."); Pa518.

Plaintiff retained Peter J. Leiss, P.E., as his design expert. Pa136-58. Mr. Leiss was retained to determine (1) "if MacNamara's Honda was defective in a manner that caused the collision" and (2) "if a safer alternative design or designs existed that would have prevented the collision." Pa137. Mr. Leiss investigated defendant AHM research and proposals, National Highway Transportation Safety Agency reports, Insurance Institute for Highway Safety reports, including test reports of the performance of defendant AHM's system in a 2017 Accord, and Consumer Reports Auto Safety reports, among other sources. Pa155-57. He reviewed and relied on the testimony of defendant AHM's own engineer, Shoji Hamada. Pa145-46; Pa156. Mr. Hamada testified to the availability of the LDW and LKAS systems on the 2016 model year CR-V – but only with the most

expensive trim package. Pa145-46. Mr. Hamada testified that both LDW and LKAS were made available on defendant's vehicles sold in Japan as early as 2003 and vehicles marketed in Europe as early as 2006. Pa145. Based on the testimony of defendant's engineer, his own investigation and Mr. Harrington's testing, Mr. Leiss concluded, to a reasonable degree of certainty, that equipping the subject CR-V with LDW and LKAS was a technologically and economically feasible alternative that when omitted made the vehicle unsafe. Pa146-50.

> The addition of a LDW and LKA system would have prevented MacNamara's Honda from entering the oncoming traffic and the collision with Ramage's Ford. These systems, as demonstrated in the study's cited previously in this report, have the ability to reliably prevent lane departures, such as occurred in this case, by alerting the driver to an impending lane departure and autonomously redirecting the vehicle into its lane of travel. These systems, as demonstrated in the references cited previously in this report, were technologically and economically feasible for several years prior to MacNamara's Honda being produced.

Pa145.

Defendant AHM conceded that had the subject vehicle been equipped with LDW/LKAS/RDM and on, those systems would have provided some alerts. However, the controversy vis-à-vis the LKAS boiled down (in expert analyses) to whether the system would have been activated and how MacNamara would have responded to it—fact questions. The LKAS system as designed by defendant AHM defaults to "off" whenever the vehicle is turned off and, therefore, must be manually turned on by the driver every time the driver decides to use the system.

Pa190; Pa234-35. Rather than absolving defendant AHM of responsibility because it designed the safety systems to be disabled unless manually enabled, plaintiff's experts have identified that default as an additional defect in the product such that it is not fit, suitable or safe. Pa401 ("it is improper to have a safety system, such as LDW/LKAS/RDM default to Off every time the vehicle is started."). Plaintiff's experts opined that a properly designed safety system should be automatically enabled and require manual override to be disabled, similar to seat belts, air bags and other safety devices. That AHM's LDW/LKAS/RDM safety systems as implemented were defective does not make the CR-V without any systems at all reasonably fit, suitable or safe. Plaintiff's experts concluded that "[t]he LKAS/RDM system available as optional equipment in the 2016 Honda CR-V would have prevented MacNamara's lane departure and the collision with Ramage's Ford. * * * [T]hese systems would have prevented the lane departure which caused this collision." Pa154.

LEGAL ARGUMENT

A. Standard of Review.

In reviewing an order granting summary judgment, an appellate court uses the same standard as the trial court. Templo Fuente De Vida Corp. V. Nat'l Union Fire Ins. Co., 224 N.J. 189, 199 (2016) ("we review the trial court's grant of

summary judgment de novo under the same standard as the trial court," and we accord "no special deference to the legal determinations of the trial court").

B. Summary Judgment Standard.

Rule 4:46-2(c) dictates the summary judgment procedure and standard as follows:

> The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact. The court shall find the facts and state its conclusions in accordance with R. 1:7-4.

Rule 1:7-4(a) provides that the court hearing the motion "shall, by an opinion or memorandum decision, either written or oral, find the facts and state its conclusions of law thereon * * * ." "[A] determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The 'judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a

genuine issue for trial.' Anderson v. Liberty Lobby, 477 U.S. 242, 249 (1986)." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 538 (1995).

In deciding whether a genuine issue of material fact exists, the court must "draw[] all legitimate inferences from the facts in favor of the non-moving party." Friedman v. Martinez, 242 N.J. 449, 472 (2020). The trial court must not decide issues of fact; it must decide only whether any such issues exist. Brill, supra, 142 N.J. at 540; Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 75 (1954); R. 4:46-5. Summary judgment should not be granted where the decision of such a motion would constitute what is in effect a trial by pleadings and affidavits involving issues of fact. Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 211-12 (App. Div. 1987). Summary judgment is not a substitute for a full plenary trial. United Advertising Corp. v. Metuchen, 35 N.J. 193, 195-96 (1961).

Accordingly, summary judgment should be denied unless the right thereto appears so clearly as to leave no room for controversy. Sisselman, supra, 215 N.J. Super. at 212. The nature of the inquiry is no different to that of a criminal proceeding and the application of a "beyond a reasonable doubt," standard. Brill, supra, 142 N.J. at 533 (quoting Anderson, supra, 477 U.S. at 247). Only where the evidence and inferences, when viewed in the light most favorable to the plaintiff, cannot reasonably support plaintiff's proposed design as a practical and feasible alternative may the court decide that plaintiff's design defect claim fails as a matter

of law. Lewis v. American Cyanamid Co., 155 N.J. 544, 577-578 (1998). When material facts are in dispute, it is up to the jury to decide whether a reasonable alternative could be practically adopted. Id. at 576 (citing Restatement (Third) of Torts: Products Liability, § 2, cmt. f). Breach of duty and proximate cause are questions of fact to be left to the jury. Townsend v. Pierre, 221 N.J. 36, 59 (2015); Soler v. Castmaster, Div. of H.P.M. Corp., 98 N.J. 137, 153 (1984).

POINT I

GRANTING SUMMARY JUDGMENT ON PLAINTIFF'S DESIGN DEFECT CLAIMS WAS ERRONEOUS BECAUSE THERE WAS SUFFICIENT EVIDENCE ON THE ISSUE OF WHETHER THE VEHICLE WAS DEFECTIVE TO BE SUBMITTED TO THE JURY. (1T24:17-18)

In the instant case, the trial court decided, despite the disputes between the parties and their respective experts about the foreseeable risks and safety benefits of lane departure technology, that as a matter of law, the Honda CR-V was not defective in design without including the available safety technology. The trial court effectively ruled as a matter of law that Honda had no duty to provide that safety technology as standard equipment. That conclusion was based not on the absence of available and reasonable alternative technology but on the notion that the driver of the CR-V had a duty to keep her vehicle in her lane of travel. In reaching its conclusion, the court substituted its judgment for the judgment of the jury, who by constitution and caselaw is the arbiter of disputed facts.

The evidence before the court on summary judgment showed that defendant AHM had developed needed accident-avoidance safety systems over a decade before the crash that, if installed in the CR-V, would have alerted the driver and mechanically redirected the CR-V back into its lane of travel, avoiding this collision. AHM's documents prove that its engineers perfected those safety features, included it in some of its vehicles marketed in Japan, Europe, and the United States, but chose not to include it as standard equipment in the 2016 model CR-V. The systems were available in other CR-V models or at an additional cost. The technological and economic feasibility of the alternative safer design at the time of marketing the vehicle is undisputed. The failure to incorporate that design in the 2016 CR-V sold to the MacNamaras resulted in the marketing of a defectively designed product.

Defendant's published admissions prove the technological feasibility, availability and functionality of the safety features that should have been included but were not included in the CR-V that defendant sold to Ms. MacNamara.

> **2015 Honda CR-V - Overview**
> The Honda CR-V, a perennial favorite of American car buyers and the bestselling entry-SUV of all time, receives the most significant mid-model cycle redesign in its 17-year history, with a new Earth Dreams Technology™ engine and transmission, significantly enhanced exterior and interior styling, and a long list of new standard and available features. A new top-of-the-line Touring trim includes the first-ever Honda application of Collision Mitigation Braking System™ (CMBS™) and Lane Keeping Assist System (LKAS), and the first CR-V adoption of Adaptive Cruise Control (ACC) and Forward

Collision Warning (FCW). These systems are a part of the new Honda Sensing™ suite of safety and driver assistive technologies that, together with other high-end features such as a power tailgate, bring a new level of sophistication to the benchmark compact SUV.

Honda LaneWatch™

New to the CR-V, the EX, EX-L and Touring trims include Honda's LaneWatch™ display that uses a camera located at the bottom the passenger-side exterior mirror to display a wide-angle view of the passenger side roadway on the Display Audio screen. The image appears when the right turn signal is activated, or when a button on the end of the turn signal stalk is pressed.

The typical field of view for a passenger-side mirror is approximately 18 to 22 degrees, but the LaneWatch™ display field-of-view is about four times greater, or approximately 80 degrees. The system helps the driver to see traffic, pedestrians or objects in the vehicle's blind spot. To help make judging distance easier, three reference lines are shown. Drivers should visually confirm roadway conditions prior to changing lanes.

LaneWatch™ can be customized to suit the driver's preferences. Turn-signal activation of the LaneWatch™ system can be switched on or off, as can the three on-screen reference lines. Screen brightness, contrast and black level are also adjustable.

* * *

Lane Keeping Assist System (LKAS)

Lane Keeping Assist System (LKAS) on the CR-V Touring trim provides a less stressful driving experience by reducing steering correction movements and driving effort on the highway. LKAS uses a camera to read lane markings and uses Electric Power Steering to assist the driver in maintaining their position within the lane.

Designed for the U.S. road structure, the system uses a Monocular Camera mounted on the upper portion of the windshield to identify painted lanes, Botts' Dots and Cat Eye markers at speeds between 45 mph and 90 mph. When LKAS senses that the driver is drifting from

> the middle of a detected lane, the system generates corrective steering torque to assist the driver in maintaining lane position.

Pa345; Pa360-61.

As of 2016, Honda sold those vital safety features as standard only on the CR-V Touring model (its most expensive model). Pa360-61. The other three "trim lines" (CR-V LX, EX and EX-L – the MacNamara's bought the EX-L trim model) did not include those systems as standard. They were, however, "silently" available as options for an added cost. In other words, AHM made safety optional. That was a deadly decision.

In a design/warning defects strict liability case, a plaintiff must prove the existence of a defective condition, that is that the product was defective, that the defect existed when the product left the defendant's control, and that the defect caused injury to a foreseeable user. Zaza v. Marquess & Nell, Inc., 144 N.J. 34, 49 (1996). The defect in a product giving rise to strict liability may take the form of a manufacturing flaw, a design defect, or an inadequate warning. The term "defect" is not self-defining; there is no universally accepted meaning suitable for all strict products liability cases. Ibid.; see Soler, supra, 98 N.J. at 145.

To prevail on a design defect claim, the plaintiff must prove that a practical and feasible alternative design existed that would have reduced or prevented harm and that due to the omitted safer alternative, the product was not reasonably safe as manufactured or sold. Lewis, supra, 155 N.J. at 560. The question of whether a

defect exists requires consideration of numerous factors encompassed by the risk-utility standard. They include whether the manufacturer acted as a reasonably prudent person by designing the item as he did and by placing it on the market in that condition and whether he should have incorporated an alternative design, e.g., to incorporate available safety features. See Soler, supra, 98 N.J. at 146; Feldman v. Lederle Labs., 97 N.J. 429, 451 (1984).

> Did the manufacturer act as a reasonably prudent person by designing the item as he did and by placing it on the market in that condition, or should he have designed it to incorporate certain safety features or some other modifications? Depending upon the proofs, some factors which may be considered by the jury in deciding the reasonableness of the manufacturer's conduct include the technological feasibility of manufacturing a product whose design would have prevented or avoided the accident, given the known state of the art; and the likelihood that the product will cause injury and the probable seriousness of the injury.

Soler, supra, 98 N.J. at 146.

That the manufacturer may have complied with industry standards is **not** dispositive. The law has long recognized that reliance on custom alone is inadequate because "a whole [industry] may have unduly lagged in the adoption of new and available devices." The T.J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932), cert. den. sub nom., 287 U.S. 662 (1932). A manufacturer "may have a duty to make products pursuant to a safer design even if the custom of the industry is not to use that alternative." O'Brien v. Muskin Corp., 94 N.J. 169, 183 (1983). A manufacturer is obligated to produce a reasonably fit, suitable and safe product

regardless of what prevailing industry standards may be. Ibid.; see Michalko v. Cooke Color & Chemical Corp., 91 N.J. 386, 397-398 (1982); Freund v. Cellofilm Props., 87 N.J. 229, 242-243 (1981) (duty to provide sufficient warnings is one that includes directions, communications and information essential to make the use of a product safe, regardless of prevailing industry standards).

To prove the existence of a defect, a plaintiff may rely on the testimony of an expert who has examined the product and offers an opinion on the product's design. See Soler, supra, 98 N.J. at 146 (testimony of the plaintiff's expert that the absence of available and feasible safety features (an interlock and safety gate) rendered the product (a die-casting machine) defective was sufficient to overcome summary judgment); Crispin v. Volkswagenwerk AG, 248 N.J. Super. 540, 560 (App. Div. 1991) (expert testimony that manufacturer could have improved structural strength of seat by using steel alloys at minimal increased cost established that safer, alternative design was feasible in design defect/failure to warn strict liability case involving safety of vehicle seat in collision).

Plaintiff retained Shawn Harrington and Peter J. Leiss, P.E., to test, to research and to investigate whether there was a safer and feasible alternative to the CR-V as marketed and sold to the MacNamaras and, if so, whether it would have prevented the fatal collision. Defendant AHM did not contest those experts' qualifications. Rather they quibble with methodology or assumptions necessitated

by the defects in the design implemented by defendant. AHM's argument is more of a state of the art/industry custom – that defendant had no duty to incorporate the technologically and economically feasible safety systems because they were not standard in the industry. That argument is inadequate to prevail as a matter of law under the applicable caselaw. See supra at 17-18.

Regardless, Mr. Leiss confirmed that the failure to equip the subject CR-V with LDW and LKAS did **not** meet industry standards. Pa151-52.

> There is no evidence in this case that any of these analyses were performed on MacNamara's Honda regarding warning the driver of and/or guarding against impending lane of travel departures. Had they been done in a proper manner, [AHM] would have realized **the lack of a standard LDW and LKA system on the 2016 Honda CR-V was improper, did not meet the current industry standard of care**, and exposed their vehicle's occupants, and the occupants of other vehicles sharing the roadway, to the hazards of collisions resulting from a vehicle departing the lane of travel.
>
> [AHM]'s lack of proper engineering analysis and testing lead to a defective product entering the marketplace.

Ibid. (emphasis added).

Mr. Leiss stated his opinions to a reasonable degree of automotive engineering probability, relying on engineering, science, and automotive industry principles. Pa138. In reaching his conclusions as to the availability and feasibility of equipping the McNamara CR-V with warnings and safety systems such as LDW and LKAS, Leiss relied, inter alia, on numerous automotive industry sources and defendant AHM's own engineer and internal documents. Pa155-57. Such reports,

studies and internal corporate documents are commonly relied on by experts in the field while forming their opinions. See Crispin, supra, 248 N.J. Super. at 549; Pa138. Mr. Leiss noted that numerous organizations, including NHTSA, IIHS and Consumer Reports, and manufacturers recognize LDW and LKAS as "safety systems." Pa141-42. Mr. Leiss further noted specific testimony from defendant's own engineer confirming the availability of LDW and LKAS systems, in Japan, over a decade before the collision. Pa145. That testimony also made clear that defendant withheld LDW and LKAS for all but the most expensively trimmed CR-Vs. Ibid.

For AHM, the safety decision was a financial decision. That decision to omit available safety systems based on the price a consumer is willing to pay is exactly the type of factor that must be considered by a jury in performing the requisite risk/utility analysis. Mr. Leiss's exhaustive research into the development of LDW and LKAS in the industry and specifically within AHM led him to conclude that equipping the subject CR-V with LDW and LKAS was both a technologically and economically feasible alternative safer design. Pa154. AHM's failure to equip the subject CR-V with such warning and safety devices made it "defective and unsafe." Ibid.

Plaintiff also retained Shawn Harrington to test the performance of defendant's LDW and LKAS system under conditions similar to those in the

subject crash. Pa132-33. Mr. Harrington tested the responses of two (2) 2017 Honda CR-V's, equipped with LDW and LKAS systems on February 20, 2020, April 22, 2022, and April 26, 2022, to conditions and circumstances similar to those of the subject crash, 37 different times. Ibid. Mr. Harrington tested defendant AHM's warning and safety systems' performance to various parametric angles of attack, steering wheel angles, accelerator pedal percentages, and lateral velocities. Ibid. Of the 37 valid tests across the three (3) different test series, defendant's LKAS successfully steered the test vehicle back into the correct lane of travel 36 times. Ibid.

Based on that testing, plaintiff's experts concluded, to a reasonable degree of engineering certainty, that had the MacNamaras' Honda been equipped with available LKAS, defendant's LKAS system would have actively steered the CR-V back into the middle of the southbound lane without driver input, avoiding the collision and that a 2016 CR-V, with LDW and LKAS, was a technologically and economically available alternative safer design than the MacNamara CR-V as sold. Pa134 ("Had the subject Honda been equipped with the available LKAS, the subject collision would not have occurred."); Pa154 ("Despite the fact that a safer alternate design was feasible and implemented as an extra cost option on the 2016 Honda CR-V, [AHM] chose not to implement such a system on MacNamara's Honda, rendering it defective and unsafe.").

Plaintiff's experts' proffered opinions and the evidence on which they were based were sufficient and, in fact, compelling proof of the availability and feasibility of an alternative safer design. They presented, at a minimum, a sufficient basis for a jury to consider whether defendant breached its duty to market a reasonably fit, suitable and safe product. Defendant may contest those opinions and seek to justify its decision to make those available safety systems optional. It is free to argue its risk/utility analysis before a jury. For purposes of summary judgment, however, plaintiff came forward with sufficient evidence to present to a jury the factual issue of whether there was a defect. Defendant was not entitled to judgment as a matter of law, and summary judgment should have been denied.

POINT II

DEFENDANT'S ALTERNATE ARGUMENTS THAT PLAINTIFF CANNOT PROVE CAUSATION FAIL BECAUSE THERE IS SUFFICIENT EVIDENCE THAT THE DEFECTIVELY DESIGNED CR-V FAILED TO PREVENT THE AVOIDABLE COLLISION. (1T19:5-25)

Defendant also argued below that plaintiff could not establish causation. Defendant's argument focused on plaintiff's experts' alleged failures to test the override susceptibility of defendant AHM's LKAS system and/or due to an inability to prove that MacNamara would have turned on and/or responded to her warning devices. Those arguments fail foremost because they involve questions of

fact for a jury and should not be decided on motion based on disputed evidence. Only where the evidence and inferences, when viewed in the light most favorable to the plaintiff, cannot reasonably support plaintiff's position may the court decide that plaintiff's design defect claim fails as a matter of law. Lewis, supra, 155 N.J. at 577-578. Breach of duty and proximate cause are questions of fact to be left to the jury. Townsend v. Pierre, supra, 221 N.J. at 59; Soler, supra, 98 N.J. at 153.

The alleged issue of steering torque is a non-issue as a matter of both law and fact. Plaintiff is entitled to the presumption and inference that had the safety systems been incorporated in the product that Mrs. MacNamara would have used them. Coffman v. Keene Corp., 133 N.J. 581 (1993); Theer v. Philip Carey Co., 133 N.J. 610 (l993). There was testimony presented that Mrs. MacNamara was a cautious person generally and particularly as a driver. There also was expert opinion presented that a proper design would have had the safety systems default "on," as opposed to AHM's faulty design. Defendant's evidence justifying its refusal to incorporate the safer alternative design is an argument for the jury to weigh. On motion for summary judgment, the burden is on AHM as the movant to negate any issue why Mrs. MacNamara would not have had the warning devices on and why she would not have responded to warning signals provided by the systems. Defendant's arguments are only that – argument, not fact.

To prove causation, plaintiff must prove that the defect was a substantial factor which singly, or in combination with another cause, brought about the accident. See, e.g., Soler, supra, 98 N.J. at 149; Michalko, supra, 91 N.J. at 400. A substantial factor is one that is not a remote, trivial, or inconsequential cause. Komlodi v. Picciano, 217 N.J. 387, 423 (2014); see Model Jury Charge (Civil) 5.40I "Proximate Cause" (Feb. 1989). So long as the plaintiff proves that the product in question added to the risk of the occurrence of the particular accident, then the plaintiff has established that the product defect was a proximate cause of the accident. Model Jury Charge (Civil) 5.40I "Proximate Cause" (Feb. 1989); see Soler, supra, 98 N.J. at 150. Once plaintiff comes forward with that proof, the issue of causation is for a jury to decide. Townsend, supra, 221 N.J. at 59-60.

Expert opinion must be grounded in "facts or data derived from (1) the expert's personal observations, or (2) evidence admitted at trial, or (3) data relied upon by the expert, which is not necessarily admissible in evidence, but which is the type of data normally relied upon by experts. Townsend, supra, 221 N.J. at 53. "The net opinion rule is a corollary of N.J.R.E. 703 * * * which forbids the admission into evidence of an expert's conclusions that are not supported by factual evidence or other data." Id. at 53-54. An expert's proposed testimony should not be excluded merely because it fails to account for some particular condition or fact that the adversary considers relevant. Id. at 54.

In defect/warnings cases, establishing that the absence of a warning was a substantial factor in the harm alleged to have resulted from exposure to the product is particularly difficult. Coffman, supra, 133 N.J. at 598-600. A rule requiring proof that a warning would have been heeded undermines "the purpose of strict tort liability since any such testimony would be speculative at best." Id. at 599; see Nissen Trampoline Co. v. Terre Haute First Nati'l Bank, 332 N.E. 2d 820, 826-27 (Ind. Ct. App. 1975) (holding that heeding presumption would discourage manufacturers who would rather risk liability than provide a warning which would impair the marketability of the product) (cited with approval in Coffman).

With respect to the issue of product-defect causation in a product-liability case sounding in warning defect or failure to warn, the plaintiff is afforded a "heeding presumption" that he or she would have followed an adequate warning had one been provided, and, to rebut that presumption, the defendant must produce affirmative evidence that such a warning would not have been heeded. Coffman, supra, 133 N.J. at 602-603. Otherwise, a plaintiff would be forced to prove that which a defendant's malfeasance did not allow to come to pass.

Regarding causation, AHM's argument hinges entirely on Mrs. MacNamara's alleged lack of active steering and exertion of steering torque. As a matter of fact, however, the vehicle recorded the steering torque for the five (5) seconds immediately preceding the crash at zero (0) degrees. Pa479; Pa509;

Pa517. Zero (0) degrees means no driver steering input, i.e., no torque applied either to the left or to the right. Pa517. The CDR records steering input in five (5) degree increments, so a zero (0) degree reading reflects steering torque of less than five (5) degrees, i.e., steering input between zero (0) and four (4) degrees. Ibid. Mr. Harrington's testing "accounts for the possibility of steering input in the range of 0-4 degrees" consistent with the recorded crash data. Pa518.

Plaintiff's reconstruction expert, George Meinschein, confirmed the lack of steering input by Mrs. MacNamara through an examination of the collision site, evaluation of the crash data, examination of the vehicles, photographs and police reports. Pa538 ("The pre-crash data indicates that the vehicle's indicated speed increased from 47 mph to 50 mph, there was no service brake application, **and no change from a straight-ahead steering wheel position in the five second period that preceded the crash**." (emphasis added)).

AHM claims that Mrs. MacNamara could have overridden the steering torque applied by the LKAS so the system would not have redirected the vehicle back to its intended lane of travel. First, AHM's argument is illusory. The steering torque measured by the CDR pre-collision was zero (0). If the AHM system could be overridden by steering input that registers internally as zero (0), then there is no instance where the LKAS would not be overridden, making the LKAS system entirely ineffective. Pa 401 at ¶16 ("An LKAS system that cannot direct a slowly

drifting vehicle back into its intended lane of travel or prevent an unintended lane departure on a section of straight roadway when the measured steering torque input is near or at zero is meaningless and defective."). Given that AHM touts its safety system as part of a premium package, to suggest that it would not perform its intended function is contradictory and suspect. Steering torque allegedly exerted by Mrs. MacNamara is not only contrary to the evidence but also irrelevant to the intended and actual performance of the system as tested.

Second, Mr. Harrington's testing accounted for the possibility of steering input in the range of zero (0) to four (4) degrees, as indicated in the five (5) seconds of pre-impact crash data. Pa517-18. He testified as follows:

> Q. Okay. Did you ever establish a specific torque that would be applied to the steering wheel to cause the lane departure?
>
> A. I did not establish a specific torque, no.
>
> Q. What about a specific steering rate?
>
> A. Not a specific steering rate. The methodology was to try and approximate you know about five degrees or less of steering input to move the vehicle over the centerline. There was no torque or steering velocity as part of that.
>
> Q. Was the steering input consistent between tests?
>
> A. It varied parametrically.
>
> Q. What do you mean by that?
>
> A. There were some tests with one degree of max steering input to move it towards the centerline. There were some tests where there were four

> degrees max steering to move it towards the centerline. There was some with over five degrees of max steering input to move it over the centerline. So the goal was to collect a number of different tests under a number of different conditions to see how it performed.

Pa224-25 at 66:12 – 67:11. The issue of steering torque is one of smoke and mirrors. It is not a material fact and even if it was, Mr. Harrington's testing procedures accounted for it.

AHM also claimed that plaintiff could not prove that Mrs. MacNamara would have turned on her LDW and LKAS systems on the morning in question. Essentially, defendant sought to avoid responsibility because it designed a defective safety system that defaults to "off" every time the car is turned off and requires the driver to enable the system manually every time the driver starts the car. Pa160; Pa165. As disclosed by Mr. Leiss's investigation, other manufacturers in the automotive industry design their systems to default to "on" whenever the car starts. Pa400-01 at ¶14-20. Such a system design was clearly feasible. Plaintiff's expert, Mr. Leiss, concluded and testified that a properly designed LDW and/or LKAS system should default to "on" and not rely on a driver manually activating it. Pa154; Pa401 at ¶20.

> Q. Do you think it is appropriate for drivers to have the ability to turn off LDW?
>
> A. Yeah, I think there could be some circumstance where somebody may want it off. But I don't think it is proper that it would be turned off, LDW, LKAS, any of these systems, that they would always be off every time you start the vehicle."

Pa187 at 37:04-16.

A plaintiff is not required to demonstrate to an absolute certainty what would have happened in the circumstances that the wrongdoer does not allow to come to pass. See, e.g., Hake v. Manchester Twp., 98 N.J. 302, 306 (1985) (where Court held that a plaintiff may establish causation by showing that the defendants' negligence negated a substantial possibility of avoiding harm, thereby constituting a substantial factor in causing death). The concepts of causation for failure to act are generally expressed in terms of whether the conduct may be viewed as a "substantial factor contributing to the loss." Hake, supra, 98 N.J. at 311; Francis v. United Jersey Bank, 87 N.J. 15, 44 (1981); see Soler, supra, 98 N.J. at 152 (whether original design defect constituted either the sole, independent cause of the accident or a concurrent or contributing proximate cause is a question for the jury).

Defendant similarly argues that plaintiff cannot prove that Mrs. MacNamara would have been capable of responding to the warnings provided by the LDW system. New Jersey law, however, provides plaintiff a heeding presumption that places the burden of proof on defendants and requires them to show that a plaintiff was incapable of responding to the warnings if defendant's system had been installed. See Coffman, supra, 133 N.J. 581. There is no evidence that Mrs. MacNamara was stricken with a medical emergency or otherwise incapacitated when the CR-V began its fatal drift. Pa566. Moreover, had the available LKAS

safety system been incorporated in the design of this model CR-V, that system would have moved the vehicle back toward the center of its lane regardless of Mrs. MacNamara's response, again preventing the underlying unnecessary and fatal collision.

AHM's speculation regarding Mrs. MacNamara's ability to respond does not save it from responsibility for producing a fit, suitable and safe product. Cf. Johansen v. Makita USA, Inc., 128 N.J. 86, 95 (1992) ("In determining a manufacturer's liability for an allegedly defective product, the inquiry should focus on the condition of the product, not the plaintiff's use of care in operating the product."). Product safety can be judged only in the context of the average consumer. Id. at 101. "A design defect does not come into being at the time of an accident." Green v. General Motors Corp., 310 N.J. Super. 507, 516 (App. Div.), certif. denied, 156 N.J. 381 (1998). Mrs. MacNamara's conduct is not a factor in determining whether the CR-V as sold was defective. Moreover, on summary judgment, the inference from the evidence that Mrs. MacNamara would have responded if alerted must resolve in plaintiff's favor.

CONCLUSION

Plaintiff acknowledges conceptually that the court in the first instance is responsible to determine whether a legal duty exists. See, e.g., Soler, supra, 98

N.J. at 153; Michalko, supra, 91 N.J. at 398. Whether a duty exists, however, is not at issue here.

> In this case, the recognition and imposition of such a duty founded in strict liability principles are clearly settled as a matter of law. See Suter [v. San Angelo Foundry & Mach. Co.], 81 N.J. [150,] 172 [(1979)]. That duty is to manufacture a machine that is suitably safe for its intended or anticipated purposes by foreseeable users under the risk-utility standard. Ibid. On the other hand, given the duty, it is the jury that must then determine whether that duty has been breached. In making this determination the jury in effect resolves the issues so as to achieve the "just result between the parties." Id. at 173.

Soler, supra, 98 N.J. at 153-54. The questions presented on summary judgment – whether the product is defective and proximate causation – are properly considered jury questions. "None as such calls for the creation, recognition and imposition of a basic duty as a matter of public policy." Soler, supra, 98 N.J. at 153-54. They are questions of fact, of reasonable conduct under the circumstances, of breach of a standard of care and of causation. Those factual issues require reversal, remand and determination by a jury.

Respectfully submitted,

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Dated: August 23, 2023

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Plaintiff/Appellant,

v.

HONDA MOTOR COMPANY, LTD., AMERICAN HONDA MOTOR CO., INC., HONDA OF TURNERSVILLE AND JOHN MACNAMARA, as Administrator of the Estate of Elizabeth MacNamara, deceased

Defendants/Respondents.

SUPERIOR COURT
OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-002887-22
CIVIL ACTION

On Appeal from the Law Division, Camden County

Docket No. CAM-L-001463-20

Sat Below:
Hon. Daniel A. Bernardin, J.S.C.

BRIEF OF RESPONDENT AMERICAN HONDA MOTOR CO., INC.

ON THE BRIEF: Paul G. Cereghini, Esq.
Wendy F. Lumish, Esq.
C. Brian Kornbrek, Esq.
Thomas K. Murphy III, Esq.

October 30, 2023

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PRELIMINARY STATEMENT

Elizabeth MacNamara drove into oncoming traffic and caused a head-on collision resulting in the death of Plaintiff's wife, Ann Ramage. There is indisputably nothing wrong with the design of the subject vehicle. It was reasonably fit, suitable, and safe as designed. It complied with all relevant government standards, and Plaintiff's own expert admitted it did not have any mechanical failure that caused the crash.

The issue presented by this case is whether the subject vehicle is defective under New Jersey law simply because MacNamara was required to maintain control of the vehicle and keep it from crossing into oncoming traffic without the aid of driver assistance features like "Lane Keeping Assist System" (LKAS) and "Lane Departure Warning" (LDW). The trial court correctly found that it was not defective:

> [I]t's almost universally understood that the safe operation of a motor vehicle is entirely dependent -- or almost entirely -- upon the driver's diligence in use of the vehicle's braking and other systems. A driver's responsibility for avoiding collisions by limiting speed, braking and steering, have been an inherent and well-understood characteristic of automobile operation for over a century.

2T at 26.

Plaintiff's claim fails because he never presented evidence that a vehicle that was otherwise reasonably fit, suitable, and safe as designed, becomes unreasonably unsafe simply because it did not include LKAS and LDW. As the

trial court correctly explained, there is no duty to incorporate every possible technology on the vehicle or to design an accident-proof vehicle. And the mere occurrence of a crash and resulting injuries does not imply that the vehicle was defective—manufacturers are not subject to absolute liability. The bottom line is that every driver knows it is imperative to control his or her vehicle. Driver assist features were designed to assist the driver; they are indisputably not designed as a substitute for the driver exercising control over the operation of the vehicle. Drivers may not abdicate or transfer that responsibility.

Consistent with this, the New Jersey Product Liability Act, section 2A:58C–3a(2), precludes liability where the allegedly unsafe characteristics of the product are well known to the ordinary consumer and the alleged harm was caused by an inherent characteristic of the product. Here, the ordinary consumer is well aware of the need to control a vehicle and the potentially fatal consequences of failing to do so. Throughout this litigation, Plaintiff has never responded to this argument.

Finally, Plaintiff spends considerable time arguing about the issue of causation, and attempting to respond to AHM's arguments that Plaintiff failed to present any non-speculative evidence that LKAS or LDW would have made a difference in the outcome of the crash. However, this issue is not properly before the Court because it was never ruled upon below.

PROCEDURAL HISTORY

On April 21, 2020, Richard T. Berkoski, individually and as the administrator of the Estate of Ann L. Ramage, M.D., filed a Complaint against American Honda Motor Co., Inc. (AHM), Honda Motor Co., Ltd., Honda of Turnersville, and John MacNamara, Administrator of the Estate of Elizabeth MacNamara. Pa5.[1] Plaintiff's claims against AHM were based upon strict liability and negligence both premised on the allegedly defective design of the subject vehicle without certain technology. Pa8-25.

On October 7, 2022, AHM filed its motion for summary judgment. Pa106. AHM also filed a motion to exclude Plaintiff's experts' causation opinions. 2T at 12-15. Plaintiff opposed AHM's motions.[2] *Id.* at 4. After a hearing, the court entered an order granting AHM's motion on the issue of defect, but did not rule on the issue of causation. *Id.* at 26-27. The court placed its oral opinion on the record. *Id.* It denied as moot AHM's motion to exclude causation opinions. Pa1.

Plaintiff filed a motion for reconsideration, which AHM opposed. Pa673. After a hearing, the court denied Plaintiff's motion for reconsideration. Pa3. On May 25, 2023, Plaintiff filed its notice of appeal. Pa723.

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[1] Plaintiff voluntarily dismissed all claims against Honda Motor Co., Ltd., and the Estate of MacNamara. The court dismissed Honda of Turnersville pursuant to the seller immunity provision of the New Jersey Product Liability Act.

[2] Plaintiff did not oppose summary judgment on his negligence claims. 2T at 4.

STATEMENT OF FACTS

A. The Crash

On August 4, 2018, Elizabeth MacNamara was driving the subject 2016 Honda CR-V southbound on CR 657, a two-lane road. Pa6-7; Pa431. In the five seconds before the crash, she was driving between 47 and 50 mph. Pa479. MacNamara veered to the left, crossed over the center line into northbound traffic, and crashed head-on with a 2011 Ford Escape driven by Dr. Ann Ramage. Pa431, 471. Both MacNamara and Ramage died as a result of injuries sustained in the crash. Pa7-8; Pa429-32.

The 2016 Honda CR-V complied with all relevant government standards. Pa194-95. Plaintiff's expert conceded that there is no "federal or state law that requires the inclusion of every possible technology, even those that may be considered safety systems on every vehicle." Pa192. Further, Plaintiff's expert admitted that he could not identify any "mechanical failure" in the subject vehicle that caused the crash. Pa179.

B. The Lawsuit And Driver Assistance Features

Plaintiff filed a complaint against AHM, among others, on the basis of strict liability and negligence. Pa5. Plaintiff alleged the subject vehicle was defectively designed because it was not equipped with two advanced driver assistance systems: "Lane Keeping Assist System" (LKAS) and "Lane

Departure Warning" (LDW). Pa8-25. He claimed these technologies would have prevented the crash. Pa9-13.[3] These technologies function as follows:

Lane Keeping Assist System: When activated by the driver, LKAS may assist the driver to maintain his or her vehicle's position within the center of a detected lane. Pa163. If the vehicle crosses a detected lane line, a message appears in the Multi-Information Display and an audible alert occurs. Pa163. Additionally, the vehicle may apply steering torque to help the driver keep the vehicle within the center of the lane. Pa163.[4]

Lane Departure Warning: If the LDW system has been activated by the driver and the system determines that the vehicle is leaving a detected lane, it will alert the driver by illuminating a lane departure message on the Multi-Information Display and sounding an audible alert. Pa159. LDW does not provide any braking or steering assistance. *See id*.

The owner's manual states that LKAS and LDW are ***driver assistance technologies***, and the driver is ultimately responsible for control over the vehicle. Pa159, 163.

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[3] Plaintiff also alleged that the vehicle should have been equipped with "Road Departure Mitigation." Pa9. However, Plaintiff has not presented any argument contesting the entry of summary judgment with respect to RDM. Pb13-21.

[4] For LDW or LKAS to function, the vehicle must be traveling between 45 and 90 mph on a straight or slightly curved road, without a turn signal activated, without the brake pedal depressed, and without the wipers in continuous operation. Pa159-62, Pa163-70.

With respect to LDW and LKAS, Plaintiff's design expert, Peter Leiss testified as follows:

> Q. For all the systems, the driver remains responsible for safely operating the vehicle and avoiding collisions, correct?
>
> A. Well, again, these systems are there to assist the driver in the event that they, for whatever reason, don't have the overarching control of the vehicle to prevent this lane departure, and that is why the system is there.
>
> So, sure, it assists the driver in keeping the vehicle out of trouble. ***These aren't autonomous vehicles.*** . . . And, you know, the driver still to some extent has control of the vehicle.
>
> . . .
>
> Q. So, do you disagree with the owners' manuals warnings that the driver remains responsible for safely operating the vehicle?
>
> A. ***Again, overall, I would say no.***

Pa186.[5]

Likewise, Plaintiff's causation expert, Shawn Harrington testified as follows:

> Q. Do you agree with me that these systems that we just spoke about, LDW, LKAS, and RDM, are driver-assist systems?
>
> A. They assist the driver in the driving task, yes.
>
> Q. The driver remains responsible for safely operating the vehicle and avoiding collisions, correct?
>
> A. Well, ultimately, these aren't SAE Level 3 and above systems where what I call the robot has ultimate responsibility. ***Here, the human is the driver and in control of the vehicle.*** But these systems

[5] All emphasis is added unless otherwise indicated.

> are designed to be a backstop for when the driver inevitably isn't paying attention or needs additional assistance with the driving task.
>
> Q. But they're definitely not automated systems that would take over the driving task, correct?
>
> A. These systems are not, Hey, human, you can start reading a book; I've got this.

Pa220-21.

C. AHM's Motion For Summary Judgment

AHM moved for summary judgment on numerous grounds, including that under settled New Jersey law, there was nothing defective about the product. 2T at 8. And there is no duty to equip every vehicle with every possible technology, or to design an accident-proof vehicle. *Id.* at 9. Indeed, LDW and LKAS are designed to assist with driving the vehicle; they do not replace the driver's need to exercise common sense control over the vehicle. *Id.* at 10. Additionally, AHM argued that, under New Jersey law, manufacturers are not liable if the allegedly unsafe characteristic of the product is known to the ordinary consumer or user, and here, the ordinary consumer is well aware of the need to control her vehicle and of the potentially fatal consequences from not doing so. *Id.* at 9-10 (citing N.J. Stat. § 2A:58C–3a(2)).

Plaintiff conceded that he was required to show not only that there was an alternative design, but that ***the omission of the design transformed the otherwise reasonably safe product into one that was unreasonably dangerous***.

Id. at 17. However, his response focused on expert testimony that LDW and LKAS were available and feasible alternative designs, and that if the subject vehicle would have been equipped with these technologies, the crash would have been avoided. *Id.* at 15-17. He also argued that manufacturers are required to provide available technology regardless of the industry standard. *Id.* at 15-16.

D. The Court's Ruling

After considering the parties' briefing and oral argument, the Court concluded that under New Jersey product liability law, summary judgment was warranted. *Id.* at 20-27. In doing so, the Court correctly honed in on the dispositive issue: "whether the omission of the alternative design renders the product . . . not reasonably safe." *Id*. at 20; *see also id.* at 23 ("[I]f it's determined that . . . the product, as designed, was reasonably safe, then the product was not designed in a defective manner.").

The Court explained that the manufacturer's "duty" is "to provide a reasonably fit, suitable and safe" product. *Id.* at 20-21. The manufacturer does not have a duty to install every technology on a vehicle, and there is no requirement for it to produce an accident-proof vehicle. *Id*. at 26. And even if a proposed alternative design "is, on balance, better than the chosen design," that does not mean the product is "per se defective" because "[t]here can be multiple reasonably safe designs." *Id.* at 20. To meet his burden, a plaintiff must show

that the alternative design was not only reasonable, but that "***its absence*** renders the product ***not reasonably safe***." *Id*. at 20-21.

Applied here, the Court concluded that the vehicle "was reasonably safe for its intended use," and that there was no evidence of a defect despite Plaintiff's claim that the subject vehicle was defective because it lacked certain advanced driver assistance systems that were allegedly feasible. *Id*. at 26.

The Court explained how the absence of these technologies did not render the vehicle unreasonably dangerous merely because the driver had to control their vehicle:

> [I]t's almost universally understood that the safe operation of a motor vehicle ***is entirely dependent -- or almost entirely -- upon the driver's diligence in use of the vehicle's braking and other systems.*** A driver's responsibility for avoiding collisions by limiting speed, braking and steering, have been an inherent and well-understood characteristic of automobile operation for over a century.

Id.[6]

[6] AHM also moved for summary judgment on the issue of causation because Plaintiff could not meet his burden of establishing that equipping the vehicle with LDW and LKAS would have made a difference. *Id*. at 6-8, 12-15. AHM simultaneously moved to exclude Plaintiff's experts' speculative and baseless causation opinions. AHM argued that without those opinions, Plaintiff provided no evidence of causation, and summary judgment was proper. *Id.* at 12-13. However, the Court did not decide the issue of causation because it found that there was no evidence of a defect, which rendered all motions related to causation moot. *Id.* at 27.

ARGUMENT

This Court reviews orders granting summary judgment *de novo*, utilizing the same standards applied by the trial courts. *Est. of Brust v. ACF Indus., LLC*, 443 N.J. Super. 103, 112 (App. Div. 2015).

Under New Jersey Court Rule 4:46-2(c), trial courts must grant summary judgment if the pleadings and evidence show there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. The court must consider the elements of the cause of action and the governing evidentiary standard. *Bhagat v. Bhagat*, 217 N.J. 22, 38 (2014). If the plaintiff fails to meet an essential element of the claim, then summary judgment is required. *See Durando v. Nutley Sun*, 209 N.J. 235, 254 (2012).

Under these standards, the trial court correctly granted AHM's motion for summary judgment.

I. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT ON THE ISSUE OF DESIGN DEFECT. (2T at 26)

Product liability claims, like those alleged here, require plaintiff to show that the vehicle "was ***not reasonably fit, suitable or safe*** for its intended purpose" because it was designed in a defective manner. N.J. Stat. § 2A:58C-2. To meet this burden, plaintiff must show that the product poses a foreseeable risk of harm that could have been reduced or avoided by the adoption of a reasonably safer design, and that ***the omission of his proposed alternative***

design renders the product not reasonably safe. Model Jury Charge (Civil) 5.40D-3(2)(a).

Without evidence of a defect, summary judgment is warranted. *Ixcopal v. Crown Equip. Corp*., No. A-2208-14T3, 2017 WL 1456965, at *3 (N.J. Super. Ct. App. Div. Apr. 25, 2017) (unpublished) (granting summary judgment where plaintiff failed to prove that a forklift was defectively designed) (attached at Pa280). Here, the undisputed evidence reflects that Plaintiff failed to meet his burden to show that there was a defect in the subject vehicle.

A. The Subject Vehicle Was Not Defective As A Matter Of Law.

Plaintiff did not claim and did not offer proof that there was anything wrong with the design of the subject vehicle that caused it to leave its proper lane and crash head-on into Dr. Ramage's vehicle. *See Macri v. Ames McDonough Co.*, 211 N.J. Super. 636, 641 (App. Div. 1986) (granting involuntary dismissal at the close of the evidence on plaintiff's design defect claim because the risk of a hammer chipping during use did not amount to evidence that it was defective); *see also Myrlak v. Port Auth. of N.Y. & N.J.*, 157 N.J. 84, 98 (1999) (plaintiff is required to show that "something was wrong with the product"). Indeed, as Plaintiff concedes, the 2016 Honda CR-V complied with all relevant government standards. Pa194-95. Further, Plaintiff's expert

could not identify any "mechanical failure" of the subject vehicle that caused the crash. Pa179.

In short, Plaintiff offered no evidence that the subject vehicle, which – like all other vehicles – requires its driver to maintain control over it, is somehow unreasonably unsafe. The bottom line is, as the court correctly concluded, that there was no defect in the subject vehicle, and "it was reasonably safe for its intended use." 2T at 26.

B. A Vehicle That Is Safe As Designed Does Not Become Unreasonably Unsafe Because It Did Not Include Driver Assistance Features.

Notwithstanding that the CR-V at issue here was reasonably "fit," "suitable," and "safe," as designed, Plaintiff's entire argument is premised on the theory that because LKAS and LDW were available and feasible, the subject vehicle was defective for not including them. Plaintiff's position is directly contrary to law.

First, a vehicle that was otherwise reasonably fit, suitable, and safe as designed does not become unreasonably unsafe because it did not include certain driver assistance features. *See Grzanka v. Pfeifer*, 301 N.J. Super. 563, 579 (App. Div. 1997) (the fact that plaintiffs have an alternative design does not mean that "the omission of the alternative design renders the product not reasonably safe"); *see also* Model Jury Charge (Civil) 5.40D-3(2)(a) (plaintiff

must show that the product poses a foreseeable risk of harm that could have been reduced or avoided by the adoption of a reasonably safer design, and that the omission of his proposed alternative design renders the product not reasonably safe).

In fact, Plaintiff's cases underscore the point that to impose liability, the product ***as designed*** must be ***unreasonably dangerous***. For example, in *Crispin v. Volkswagenwerk AG*, 248 N.J. Super. 540, 544 (App. Div. 1991), plaintiff claimed a car seat was defective ***because its design was not strong enough to prevent its collapse*** upon impact, and there was a stronger available seat design that would have. *See also Soler v. Castmaster, Div. of H.P.M. Corp*., 98 N.J. 137, 146 (1984) (die-casting machine was unreasonably dangerous without safety device because ***as designed,*** it could malfunction and start up while a person's hands were in contact with its movable parts).

Here, the court correctly found that the danger posed by failing to correct a vehicle's steering while veering into oncoming traffic does not make it defective; rather, it is a universally understood characteristic of a vehicle:

> [I]t's almost universally understood that the safe operation of a motor vehicle ***is entirely dependent -- or almost entirely -- upon the driver's diligence in use of the vehicle's braking and other systems.*** A driver's responsibility for avoiding collisions by limiting speed, braking and steering, have been an inherent and well-understood characteristic of automobile operation for over a century.

2T at 26.

Indeed, the ***undisputed evidence*** is that LKAS and LDW systems are, by definition, designed to ***assist*** the driver—they do not replace the commonsense requirement that the driver should exercise control over the vehicle. Both the vehicle's owner's manual and Plaintiff's experts' testimony confirm this fact. *See* Pa159, 163, 186, 220-21. With or without LKAS or LDW on the subject vehicle, MacNamara was required—as every driver is—to safely operate it.[7]

Second, as the trial court correctly explained, AHM did not have a duty to incorporate every possible technology on the vehicle. *See* 2T at 26 (citing *Sanner v. Ford Motor Co*., 144 N.J. Super. 1, 5 (Law Div. 1976) ("[a] manufacturer is not under a duty to provide every 'known safety device'"), *aff'd*, 154 N.J. Super. 407 (App. Div. 1977)). ***Plaintiff's expert*** admitted as much, stating: there is no "federal or state law that requires the inclusion of every possible technology, even those that may be considered safety systems on every

[7] This is consistent with New Jersey law. *See* N.J. Stat § 39:4-88 ("When a roadway has been divided into clearly marked lanes for traffic, ***drivers of vehicles*** shall obey the following regulations … [(b)] A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from that lane until ***the driver*** has first ascertained that the movement can be made with safety. . . ."); *see also State v. Woodruff*, 403 N.J. Super. 620, 625 (Law Div. 2008) ("Section 88(b) imposes two requirements. First, a driver must, as nearly as practicable, drive within his single lane, in other words, maintain his lane. Second, a driver may not change lanes until he can do so safely. The first clause of section 88(b) proscribes deviation from a lane. Thus, it covers situations where the driver has no intention to change lanes, or where the driver does not or cannot change lanes.").

vehicle." Pa192. There is simply no duty to design a vehicle that is accident-proof. *Huddell v. Levin*, 537 F.2d 726, 735 (3d Cir. 1976) (applying New Jersey law; "the manufacturer is not required to produce an accident-proof vehicle"). For this reason, Plaintiff's focus on the feasibility of LKAS and LDW, or his experts' claim that it is safer, or that it may or may not be industry standard, (Pb13-16), does not change the result.[8]

Third, under New Jersey law, "[t]he occurrence of an accident and the fact that someone was injured are not sufficient to demonstrate a defect." *See Lauder v. Teaneck Volunteer Ambulance Corps*, 368 N.J. Super. 320, 332 (App. Div. 2004). Manufacturers are not subject to "absolute liability." *Myrlak v. Port Auth. of N.Y & N.J.*, 157 N.J. 84, 98 (1999).

Fourth, other courts have held that the absence of advanced driver assistance features is insufficient, as a matter of law, to establish that a vehicle was defectively designed. For example, in *Butler v. Daimler Trucks North America, LLC*, No. 19-CV-2377-JAR, 2022 WL 2191755, at *12 (D. Kan. June 16, 2022), *aff'd*, 74 F.4th 1131 (10th Cir. 2023) (attached at Pa286, cited at 2T

[8] Plaintiff also claims that Honda made the decision not to include LKAS and LDW for "financial" reasons. Pb16, 20. Plaintiff provides no evidence to support this statement. Indeed, this is nothing but an emotional ploy to distract from the fact that Plaintiff has presented no evidence that the subject vehicle was unreasonably dangerous. A product is either defective or it is not – financial motives have nothing to do with defect.

at 11-12), the District Court granted summary judgment on plaintiff's claim that a truck should have had forward collision warning and automatic emergency braking technology, and that such technologies would have prevented a fatal crash. *Id.* The court noted that there was nothing wrong with the truck's brakes, and the ordinary consumer would not have contemplated that a vehicle without such technologies was unreasonably dangerous. *Id.* Indeed, as is true in the instant case, it was undisputed that they "were merely aids to a driver accomplishing a timely stop, not the means upon which a driver could rely to do so." *Id.*

Similarly, in *Youngberg v. General Motors LLC*, No. 20-339-JWB, 2022 WL 3925272, at *4 (E.D. Okla. Aug. 24, 2022) (attached at Pa303, cited at 2T at 11-12), the court granted summary judgment where plaintiff claimed that his vehicle should have been equipped with advanced driver assistance systems. It explained:

> [I]t would have been almost universally understood by a user in 2013 that safe operation of the van was entirely dependent – or almost entirely – upon the driver's vigilance and use of the vehicle's braking and other systems. ***A driver's responsibility for avoiding collisions by limiting speed, braking, and steering has been an inherent and well-understood characteristic of automobile operation for over a century.***

Id.

Although the subject vehicle is model year 2016, instead of 2013, the same fundamental logic holds true. Every driver knows that he or she must control their vehicle at all times. Thus, the absence of LDW or LKAS—***driver assistance*** technologies—in the subject vehicle is insufficient, as a matter of law, to establish that it was defectively designed. *See Sanner*, 144 N.J. Super. at 5; *Grzanka*, 301 N.J. Super. at 579.

Fifth, the New Jersey Product Liability Act, section 2A:58C–3a(2), establishes that manufacturers "shall not be liable" if: "characteristics of the product are known to the ordinary consumer or user" and the alleged harm was caused by "an unsafe aspect of the product that is an inherent characteristic of the product" and the alleged harm "would be recognized by the ordinary person who uses" the product "with the ordinary knowledge common to the class of persons for whom the product is intended." *Id*.

"[A] product that satisfies the [section] 3a(2) standard is, by statutory definition, not defectively designed." *Roberts v. Rich Foods, Inc.*, 139 N.J. 365, 378 (1995); *see generally Mathews v. Univ. Loft Co.*, 387 N.J. Super. 349, 356 (App. Div. 2006) (summary judgment should have been granted under § 2A:58C–3a(2) because the danger of falling out of a loft bed was open and obvious).

Applied here, the subject vehicle was not defectively designed because the ordinary consumer is well aware of the need to control her vehicle and of the potentially fatal consequences of not doing so.[9] ***Plaintiff has, to date, never provided any response to this argument,*** either before the trial court or in the initial brief.

Finally, Plaintiff's argument on the issue of "defect" repeatedly emphasizes the issue of "causation"—that LKAS and LDW would have allegedly prevented the crash. Pb14, 16, 20-21. But defect and causation are two separate elements, and the trial court did not reach the issue of causation because Plaintiff's claim failed on the threshold issue of defect.

II. THE ISSUE OF CAUSATION IS NOT RIPE FOR THIS COURT'S REVIEW. (2T at 27)

Plaintiff spends roughly half of his initial brief preemptively responding to AHM's arguments below seeking to exclude Plaintiff's expert's causation opinions, and corresponding argument that, without expert testimony, Plaintiff has no other evidence to meet the essential element of causation. For example, Plaintiff challenges AHM's arguments below that Plaintiff's experts had not engaged in the necessary analysis to offer reliable and admissible opinions as to

[9] While the trial court did not rule on this issue, it is settled law that a judgment may be affirmed if it is supported by the record, even if the reasons for affirmance differ from those given by the trial court. *Hayes v. Delamotte*, 231 N.J. 373, 387 (2018).

whether MacNamara would have overcome LKAS with her steering torque; whether MacNamara would have even turned on LKAS or LDW on the day of the crash; and whether LDW would have had any effect on MacNamara's driving at the time of the crash. Pb at 22-30. Without that evidence, AHM argued, Plaintiff's case was based on speculation.

While AHM stands by those positions, none of these issues can be properly resolved for the first time on appeal. To start, New Jersey has been clear that, ***the trial court's*** "gatekeeping role" when evaluating a motion to exclude expert testimony is "rigorous" and "difficult," involving a thorough analysis of the methodology and basis for expert opinions. *See In re Accutane Litig.*, 234 N.J. 340, 390 (2018). ***The appellate court's*** role, by contrast, involves ***reviewing the trial court's analysis*** for an abuse of discretion. *Id.* at 390-91. Because the trial court has not yet conducted its analysis of the admissibility of the experts' testimony, there is nothing yet for this Court to review.

Beyond that, pursuant to Rule 4:46-2(c), the trial court is required to provide its findings and conclusions of law when ruling on a motion for summary judgment. Here, the trial court's reasoning was based upon its conclusions regarding defect. The trial court did not rule on the merits of AHM's motion to exclude Plaintiff's experts' causation opinions and, in fact, ***expressly***

denied that motion as moot. As such, the issue of causation is simply undeveloped in the record.

If the Court were to reverse the trial court order as to defect, which it should not do, then it would be appropriate to remand to allow the trial court to consider AHM's expert challenges together with its motion for summary judgment as to causation.

CONCLUSION

There is no evidence the subject vehicle was defective. There is no duty to include every possible technology on every vehicle. Plaintiff's own expert recognizes this, and he opines that there was nothing mechanically wrong with the subject vehicle. A vehicle that was otherwise reasonably fit, suitable, and safe as designed, does not become unreasonably unsafe simply because the driver was required to control it. Based on the foregoing, AHM respectfully requests that this Court affirm the order granting its motion for summary judgment.

Dated: October 30, 2023 Respectfully submitted,

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Plaintiff-Appellant,

v.

HONDA MOTOR COMPANY, LTD., AMERICAN HONDA MOTOR CO., INC., HONDA OF TURNERSVILLE, and JOHN MACNAMARA, as Administrator of the Estate of Elizabeth MacNamara, deceased,

Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

DOCKET NO. A-002887-22T4

CIVIL ACTION

On Appeal from the Law Division, Camden County

Docket No. CAM-L-001463-20

Sat Below:

Hon. Daniel A. Bernardin, J.S.C.

REPLY BRIEF AND APPENDIX IN SUPPORT OF THE APPEAL

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PRELIMINARY STATEMENT

As it did below, defendant, American Honda Motor Co., Inc. (AHM), continues on appeal to frame the pertinent issue incorrectly. The issue is not, as defendant repetitively argues, whether an automobile manufacturer has a duty to incorporate every available safety technology to render a product fit, suitable and safe. The issue is who decides whether a product is fit, suitable and safe as placed in the stream of commerce. Under the New Jersey Constitution, the New Jersey Product Liability Act (NJPLA) and controlling caselaw, the determination of whether the designer/manufacturer fulfilled its duty to produce a product that is reasonably fit, suitable and safe for its intended purpose is a question of fact for a jury. Because the court below usurped the jury's role and denied plaintiff's right to a jury, the decision must be reversed.

The existence of defendant's duty is undeniable. AHM's product must be reasonably fit, suitable and safe for its intended purpose. Because manufacturers are driven by profits and not necessarily what is reasonable under the totality of the circumstances, they are not permitted to determine unilaterally that what they decide to market is adequate under the law. Nor is the court entitled to determine whether the manufacturer's cost-benefit analysis is correct as a matter of law. That determination is reserved for the factfinder. Whether applying the consumer expectations test or the risk-utility analysis, the issue is one of fact for a jury.

In years past, automobiles were considered safe with no seat belts, no air bags and no anti-lock brakes. In years past, at least one vehicle manufacturer decided that a dangerously located fuel tank was worth the cost savings spread over the volume of cars produced. That is why tort law generally, and product liability law specifically, exists. Motor vehicle manufacturers are free to make their profit-driven decisions. When the product results in harm, however, the factfinder, the jury, makes the determination based on all the evidence presented, whether the product as designed, manufactured and produced was reasonably fit, suitable, and safe for its intended purpose. Because the trial court denied plaintiff's right to have that factual determination made by a jury of his peers, the decision granting summary judgment must be reversed.

LEGAL ARGUMENT

POINT I

THE ISSUE ON APPEAL IS WHETHER DEFENDANT BREACHED ITS DUTY, NOT WHETHER A DUTY EXISTS.

The trial court erred – and defendant's argument errs – by relying on Sanner v. Ford Motor Company and Huddell v. Levin for the immaterial proposition that a manufacturer is not "under a duty" to provide every safety device or to produce an accident-proof product. The controlling issue is whether the foreseeable risks of harm posed by the product – here a motor vehicle – could have been reduced or

avoided by adoption of a reasonably safer design and the omission of the alternative design renders the product not reasonably safe. Green v. General Motors Corp., 310 N.J. Super. 507, 517 (App. Div.), certif. denied, 156 N.J. 381 (1998); Model Jury Charge (Civil) 5.40D-3 "Design Defect" (Apr. 1999). There is no dispute that a reasonable and safer design existed. Defendant offered Lane Departure Warning (LDW), Road Departure Mitigation (RDM) and Lane Keep Assist (LKAS) systems as part of a premium package and those safety systems had been available on defendant's vehicles outside the United States for many years. Pa145; Pa163; Pa345-46. The second part of the issue – whether the omission renders the product not reasonably safe – is a jury question based on a risk-utility analysis. It is not a matter of duty.

"Thus, in determining whether the product was defective, a jury must determine the risks and alternatives that should have been known to a reasonable manufacturer and then assess whether the manufacturer discharged its duty to provide a reasonably fit, suitable and safe" vehicle. Green, supra, 310 N.J. Super. at 517. The determination is not whether a duty exists but, rather, whether a breach of duty exists. The latter is a fact question and should not have been taken from the factfinder on summary judgment.

The proper analysis and the necessary distinction between law and fact, duty and breach, was recently set forth in Michael v. FCA US LLC, 4:22-cv-00254 (D.

Az. March 14, 2023) (a copy of the slip opinion is attached at Pra1). In Michael, the plaintiff alleged that a 2021 RAM 5500 chassis cab tow truck manufactured and distributed by the defendant was defective because it failed to incorporate "Drowsy Driver Detection and LaneSense Lane Departure Warning Plus/Lane-Keep Assist" technology as standard safety features. The defendant, as the defendant does here, argued that the plaintiff failed to establish the element of duty and that a manufacturer has no legal obligation to produce a product incorporating only the ultimate in safety features. The court denied summary judgment, holding that the defendant failed to appreciate the import of the unremarkable proposition on which it sought to rely.

> This illustrates the difficulty with Defendant's argument for why it is entitled to summary judgment—Defendant has confused the question of the duty it owed with the question of whether it breached that duty. One is a matter of law that the Court is apt to determine at summary judgment. The other is a highly fact-specific inquiry over which Plaintiff has raised a genuine dispute of material fact.
>
> In Arizona, "[t]he existence of a duty of care is a distinct issue from whether the standard of care has been met in a particular case" because "[a]s a legal matter, the issue of duty involves generalizations about categories of cases" whereas whether the defendant's conduct conformed to its duty involves the specific facts of the case at hand. *Gipson [v. Kasey]*, 150 P.3d [228, 230 (Ariz. 2007) (en banc)]. Defendant itself concedes that it owes a duty to all consumers "to make a product that is *reasonably* safe for its intended use." (Doc. 10 at 2.) This is precisely the duty that Plaintiff claims Defendant breached by not installing Drowsy Driver Detection and/or LaneSense. (*See* Doc. 19 at 2–3.) Even assuming her theory of breach is novel, Plaintiff is not seeking to impose a *new* duty on Defendant, contrary to what Defendant asserts.

Pra at 5. New Jersey law is consistent with Arizona on this point. The existence of a duty is a given for a product manufacturer, i.e., the duty is to produce a product that is reasonably fit, suitable and safe. Whether defendant has discharged that duty is a matter of fact, not law, and must be determined by a jury pursuant to the controlling caselaw, NJPLA, New Jersey Constitution and Rules of Court.

All of defendant's arguments rely on its presumption that "the CR-V at issue here was reasonably 'fit,' 'suitable,' and 'safe' as designed." Db12. Defendant, however, is not entitled unilaterally to demand any such presumption. The technology had been developed and was available. There is no indication that it was not feasible; it was, in fact, available and promoted as a premium safety system. Failure to make a product safer with warnings, lights, audible prompts, proximity sensors, cameras or even vibrations, when the technology is economically and technically feasible, may be the most common type of breach of duty in product liability jurisprudence.

A manufacturer "may have a duty to make products pursuant to a safer design even if the custom of the industry is not to use that alternative." O'Brien v. Muskin Corp., 94 N.J. 169, 183 (1983). A manufacturer is obligated to produce a reasonably fit, suitable and safe product regardless of what prevailing industry standards may be. Ibid.; see Michalko v. Cooke Color & Chem. Corp., 91 N.J. 386, 398 (1982) (the existence of a duty to make a product safe or to give adequate

warning must be said to attach without regard to prevailing industry standards); Freund v. Cellofilm Props., 87 N.J. 229, 242-243 (1981) (duty to provide sufficient warnings is one that includes directions, communications and information essential to make the use of a product safe, regardless of prevailing industry standards). "Unquestionably, it is in the public interest to motivate individuals in the context of commercial enterprise to invest in safety." Michalko, supra, 91 N.J. at 398 (citing Beshada v. Johns-Manville Corp., 90 N.J. 191, 207 (1982)). Whether the product is **reasonably** fit, suitable and safe under the totality of the circumstances is for a jury.

POINT II

DEFENDANT'S RELIANCE ON N.J.S.A. 2A:58C-3a(2) IS MISPLACED BECAUSE HAVING THE SAFETY SYSTEMS INSTALLED WOULD NOT IMPAIR THE USEFULNESS OF THE PRODUCT.

Defendant asserts that the defense provided in the NJPLA for harm caused by an inherent characteristic of the product applies here. It does not because defendant fails to address the limitation within the statutory language.

"(2) The characteristics of the product are known to the ordinary consumer or user, and the harm was caused by an unsafe aspect of the product that is an inherent characteristic of the product and that would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the class of persons for whom the product is intended, except that this paragraph shall

not apply to industrial machinery or other equipment used in the workplace and **it is not intended to apply to dangers posed by products such as machinery or equipment that can feasibly be eliminated without impairing the usefulness of the product**." N.J.S.A. 2A:58C-3a (Exemptions from liability) (emphasis added).

Defendant's position ignores the highlighted language. There is no dispute that the alternative design is feasible and does not impair the usefulness of the product. It is the very reason that safety systems are updated and marketed as newer technology becomes available. Defendant markets it as a superior safety system available as an upgrade. It does not impair the usefulness of the product in any way. The statutory limitation of liability does not apply to the circumstances of this case.

POINT III

BECAUSE THE TRIAL COURT INCORPORATED CONSIDERATIONS OF CAUSATION IN ITS ANALYSIS OF DUTY AND BREACH, THE PROPER CONSIDERATION OF CAUSATION ON REMAND SHOULD BE CLARIFIED.

Defendant's argument regarding causation seems to stem from a lack of familiarity with New Jersey law. The issue of causation was raised below, both as part of the court's duty analysis and separately. It was briefed by the parties and considered although not relied on in the trial court's analysis. The decision below is subject to de novo review. Because the appellate court, under New Jersey law,

may uphold a judgment on a different basis than the trial court, plaintiff addressed the issue in the event the court was inclined to consider it. Plaintiff also addressed it in the context that it was considered below, i.e., as a factor in the court's defect analysis. For the reasons previously set forth, whether the failure to incorporate the available lane-keeping technology was a proximate cause of the accident is a fact question reserved to the jury on the record presented.

CONCLUSION

The questions presented on summary judgment – whether the product is defective and whether it proximately caused the harm alleged – are properly considered jury questions. Soler v. Castmaster, Div. of H.P.M. Corp., 98 N.J. 137, 153 (1984). They are questions of fact, of reasonable conduct under the circumstances, of breach of a standard of care and of causation. Because plaintiff has presented sufficient evidence from which a reasonable jury may find in his favor, those factual issues require reversal, remand and determination by a jury.

Respectfully submitted,

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Dated: November 14, 2023

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v.

HONDA MOTOR COMPANY, LTD., AMERICAN HONDA MOTOR CO., INC., HONDA OF TURNERSVILLE, and JOHN MACNAMARA, as Administrator of the Estate of Elizabeth MacNamara, deceased,

Defendants-Respondents.

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

DOCKET NO. A-002887-22T4
CIVIL ACTION

On Appeal from the Law Division, Camden County

Docket No. CAM-L-001463-20

Sat Below:

Hon. Daniel A. Bernardin, J.S.C.

BRIEF ON BEHALF OF AMICUS CURIAE THE PRODUCT LIABILITY COUNCIL, INC.

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INTEREST OF AMICUS CURIAE

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of product manufacturers and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product-litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,200 briefs as amicus curiae in both state and federal courts, including this court, on behalf of its members, while presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.[1]

This case is important to PLAC because Plaintiff's theory, if accepted, would penalize manufacturers for introducing new technology unless they introduce that new technology on all products simultaneously, an approach that is often technologically and economically infeasible, that denies to consumers the right to make their own judgment about the costs and benefits of that technology, and that is contrary to sound public policy.

[1] A list of PLAC corporate members is available at https://plac.com/web/Amicus_Program/Corporate_Membership.aspx.

ARGUMENT

GRADUAL PHASE-IN OF NEW TECHNOLOGY IS A PRACTICAL AND ECONOMIC NECESSITY, IT PROTECTS CONSUMER CHOICE, AND IT IS CONSISTENT WITH SOUND PUBLIC POLICY

Plaintiff in this case alleges that a model-year 2016 Honda CR-V was defectively designed because it lacked two advanced driver-assistance features, Lane Keeping Assist (LKA) and Lane Departure Warning (LDW). As Honda explains in its brief, the vehicle was reasonably safe as sold; Honda had no duty to design and incorporate every possible technological improvement; and the mere fact that these features might (or might not) have prevented the injuries in this case is not sufficient to establish liability. Further, according to Plaintiff's expert, while LKA or LDW were standard on only 5% of new 2016 vehicles, they were optional on 60%. (Pa143a.) Thus, ordinary consumers had ready access to information relating both to the availability of these features and their cost.

There is nothing unusual about phasing in new driver-assistance technology. Motor vehicle manufacturers, and manufacturers of numerous other products, routinely phase-in new technology on a gradual basis rather than simultaneously introducing it across the board. And they do so for good reasons.

First, a gradual introduction is required because it is not possible, practically or economically, to introduce complex new technology across the board. A gradual introduction of new technology allows manufacturers to evaluate the performance of that technology in the real world, to make improvements based on actual performance in the field, and to adapt the technology for other models.

For example, according to Plaintiff's expert, the complex driver-assistance features at issue in this case require use of one or two sensors that can be forward-facing cameras, side cameras, or rear-view cameras, depending on the vehicle; some method of alerting the driver to departure from the lane, which can require separate motors in the steering wheel, seatbelt, or seat to provide haptic (physical) warnings; and computer software to ensure the warnings are accurate and timely. (Pa141a-142a.) Adapting each of these elements for each vehicle model takes time, equipment, and resources—and cannot always be done for all vehicles and all models simultaneously.

Second, a gradual introduction of new technology allows time to perfect new technology based on actual experience in the field. While vehicle manufacturers conduct extensive pre-release testing, there is no practical way to test for the infinite circumstances that will be encountered in actual on-the-road use. Actual experience with a limited number of vehicles allows manufacturers to make improvements before a larger scale introduction.

Third, a gradual introduction allows time for consumers to become familiar with, and accept, the benefits of the new technology. Driver-assistance technologies can be intrusive and may require some surrender of driver autonomy. A widespread, premature introduction of new features risks consumer dissatisfaction and rejection of potentially useful features.

Finally, a gradual introduction of new technology allows time for the manufacturer to reduce costs and ultimately reduce prices—which benefits consumers.

For these and similar reasons, regulatory agencies like the National Highway Traffic Safety Administration (NHTSA) often provide for new regulations, including new safety regulations, to be phased in over time. Federal Motor Vehicle Safety Standard (FMVSS) 208, which governs passive restraints, is a good example. The United States Supreme Court explained why NHTSA deliberately chose a gradual phase-in of passive restraints:

> The 1984 FMVSS 208 standard … deliberately sought a *gradual* phase-in of passive restraints. It required the manufacturers to equip only 10% of their car fleet manufactured after September 1, 1986, with passive restraints. It then increased the percentage in three annual stages, up to 100% of the new car fleet for cars manufactured after September 1, 1989. And it explained that the phased-in requirement would allow more time for manufacturers to develop airbags or other, better, safer passive restraint systems. It would help develop information about the comparative effectiveness of different systems, would lead to a mix in which airbags and other nonseatbelt passive restraint systems played a more prominent role than would otherwise result, and would promote public acceptance.

Geier v. Am. Honda Motor Co., 529 U.S. 861, 879 (2000). More recently, NHTSA explained that practical difficulties required a phase-in period for head-impact protection, even though head impacts with the upper interior components of vehicles are the leading cause of head injury for non-ejected occupants killed in a crash:

> NHTSA is convinced that because all vehicles will require some redesign to meet the new requirements, a phase-in is necessary and desirable. Manufacturers will have to design and make the necessary modifications to meet the new requirements for each of their models. However, the same engineering resources and testing facilities may be needed for all of the models and cannot be used simultaneously. Given this, NHTSA has decided that the phase-in period for these new requirements will begin September 1, 1998. In the first year of the phase-in, 10 percent of each manufacturer's vehicles will be required to comply with the new requirements. In the second year, 25 percent of all vehicles must comply; in the third year, 40 percent; and in the fourth year, 70 percent. All vehicles manufactured on or after September 1, 2002 must comply with the new requirements.

Final Rule, Head Impact Protection, 60 Fed. Reg. 43031, 43032, 43048-43049 (August 18, 1995); *see also, e.g.,* Final Rule, Electronic Stability Control*,* 72 Fed. Reg. 17236 (April 6, 2007) (adopting three-year phase-in period for electronic stability control).

Plaintiff insists that the 2016 Honda CR-V vehicle at issue in this case should be evaluated using the risk/utility test for design defects, but he ignores the role that consumer expectations play in applying that test. The Restatement (Third) of Torts: Products Liability, explains:

> [C]onsumer expectations about product performance and the dangers attendant to product use affect how risks are perceived and relate to foreseeability and frequency of the risks of harm, both of which are relevant under Subsection (b). See Comment f. Such expectations are often influenced by how products are portrayed and marketed and can have a significant impact on consumer behavior. Thus, although consumer expectations do not constitute an independent standard for judging the defectiveness of product designs, they may substantially influence or even be ultimately determinative on risk-utility balancing in judging whether the omission of a proposed alternative design renders the product not reasonably safe.

Id., § 2, comment g. Even so, the Restatement has been (mildly) criticized for creating the impression that the risk/utility test "undervalues individual choice." Mark A. Geisfeld, *The Value of Consumer Choice In Products Liability,* 74 Brooklyn L. Rev. 781, 783 (2009). According to Professor Geisfeld, however, "the impression is misleading." *Ibid.* In fact, he argues, the value of consumer choice actually explains why risk/utility balancing is the proper test for design defect:

> A liability rule that is supposed to address the safety problems created by uninformed consumer choice should require the amount of safety that would be chosen by consumers if they were fully informed. A fully informed consumer chooses the amount of product safety satisfying the risk-utility test.

> Consequently, the reasonable safety expectations of the ordinary consumer can be defined by the risk-utility test, a formulation of the liability rule that has been adopted by an increasing number of jurisdictions. This formulation does not simply convert consumer expectations into the risk-utility test, but instead relies on the value of consumer choice to justify the liability rule.

Id. at 783-784 (footnote omitted). Thus, the cases to which the Restatement alludes—where consumer expectations can be determinative on risk/utility balancing—are those cases where ordinary consumers can be fully informed about both the costs and the benefits.

This is such a case. The benefits of LKA and LDW are obvious, and the economic costs of those features in 2016 were also evident, because the features were optional on 60% of new vehicles. Ordinary consumers were perfectly capable of reaching their own conclusions about whether the costs of these systems in 2016 outweighed the benefits—particularly given that, as the trial court observed, "[a] driver's responsibility for avoiding collisions by limiting speed, braking and steering, have been an inherent and well-understood characteristic of automobile operation for over a century." (2T26.) As Professor Geisfeld observes, "[a] product satisfying the well-informed or reasonable safety expectations of the ordinary consumer is not defective." Geisfeld, 74 Brooklyn L. Rev. at 788.

Professor Geisfeld's analysis and the Restatement's comment are consistent with the New Jersey Product Liability Act (NJPLA), N.J.S.A. 2A:58C-3(a)(2). That section explicitly recognizes the importance of consumer choice, and provides that manufacturers are not liable if "characteristics of the product are known to the ordinary user or consumer," the alleged harm was caused by an "inherent characteristic of the product," and the alleged

harm would be recognized by the ordinary person who used the product "with the ordinary knowledge common to the class of persons for whom the product is intended."

Plaintiff argues that this provision of the NJPLA does not apply because, by its terms, it is not intended to apply to "dangers posed by products such as machinery or equipment that can feasibly be eliminated without impairing the usefulness of the product." (Pb7.) But there is no evidence that the danger posed by vehicles that depart from their lanes can be eliminated, either technologically or economically. According to Plaintiff's own expert, the "real-world data" shows only that LDW systems will "reduce"—not eliminate—"crashes due to unintended lane departure." (Pa143a.) Under these circumstances, N.J.S.A. 2A:58C-3(a)(2), precludes liability. *See Mercer Mut. Ins. Co. v. Proudman*, 396 N.J. Super. 309, 315 (App. Div. 2007) ("Because plaintiffs admittedly do not allege that self-extinguishing cigarettes can eliminate the danger, they fail to state a claim upon which relief can be granted.").

Any other result would be contrary to sound public policy, because the effect would be to penalize manufacturers who introduce new technology if they do not simultaneously implement that technology for all products, even if the cost of the new technology would be prohibitive for many consumers—new technology to which consumers would need to become accustomed and which manufacturers would need to adjust based upon on-the-road experience. To avoid this penalty, manufacturers would be required to delay introduction of new technology, including new safety technology, until it was feasible for

all products, adapted to on-the-road experience, and affordable to all consumers, a result that would have unacceptable consequences.

For example, according to Plaintiff's expert, the Insurance Institute for Highway Safety "determined that LDW systems caused an 11% decrease in single vehicle, sideswipe and head-on crashes overall, and a 21% decrease in injury causing crashes of the same types." (Pa142a-143a.) If Plaintiff is correct in attributing this decrease to LDW systems, and if manufacturers had delayed introduction of LDW systems until they were technologically and economically available for *all* vehicles, these accidents and injuries would not have been prevented. In other words, Plaintiff's theory, if adopted, would likely cause injuries, not prevent them, contrary to the intent of the NJPLA, the Restatement, and sound public policy.

CONCLUSION

Plaintiff is seeking to establish a new and expanded rule of duty, one that would require manufacturers to homogenize their product lines, limit consumer choice, and increase overall product costs. The rule would tend to either rush the introduction of new safety features in some models before they are truly ready or delay their introduction in others. For the reasons stated above, this expansion is contrary to sound public policy. The order granting summary judgment should be affirmed.

Dated: November 16, 2023

Respectfully submitted,

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Plaintiff/Appellant,

v.

HONDA MOTOR COMPANY, LTD., AMERICAN HONDA MOTOR CO., INC., HONDA OF TURNERSVILLE AND JOHN MACNAMARA, as Administrator of the Estate of Elizabeth MacNamara, deceased,

Defendants/Respondents.

SUPERIOR COURT
OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-002887-22
CIVIL ACTION

On Appeal from the Law Division, Camden County

Docket No. CAM-L-001463-20

Sat Below:
Hon. Daniel A. Bernardin, J.S.C.

BRIEF OF RESPONDENT AMERICAN HONDA MOTOR CO., INC., IN RESPONSE TO PLAC'S AMICUS BRIEF

ON THE BRIEF: Paul G. Cereghini, Esq.
Wendy F. Lumish, Esq.
C. Brian Kornbrek, Esq.
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December 22, 2023

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Pursuant to the Court's order dated December 4, 2023, American Honda Motor Co., Inc. (AHM), submits the following response in support of the Product Liability Advisory Council's (PLAC) Amicus Brief.

PLAC's amicus brief provides context, and a practical perspective, as to why the trial court's order – which correctly applied established New Jersey products liability law – is consistent with the realities of a manufacturer's decision-making as to placing a product on the market.

The trial court recognized and properly applied New Jersey products liability law. First, a manufacturer has a duty "to provide a reasonably fit, suitable and safe" product. 2T at 20-21. Second, a manufacturer does not have a duty to install every technology on a vehicle or to produce an accident-proof vehicle. *Id*. at 26. Third, even if a proposed alternative design "is, on balance, better than the chosen design," that does not mean the product is "per se defective" because "[t]here can be multiple reasonably safe designs." *Id.* at 20. In other words, the fact that there is an alternative design does not establish a defect (or breach).[1]

The amicus brief explains how and why all manufacturers – not just vehicle manufacturers – make reasoned decisions and gradually phase-in the introduction of

[1] Plaintiff did not oppose summary judgment on his negligence claims. 2T at 4.

new technologies. *See* PLAC's Br. at 2-3. PLAC's brief establishes that this approach is also consistent with the framework adopted by the National Highway Traffic Safety Administration – the regulatory agency charged with vehicle safety. As such, PLAC's brief is directly supportive of AHM's position that the vehicle was not defective as a matter of law. And it directly refutes Plaintiff's principal theme that "manufacturers are driven by profits and not necessarily what is reasonable under the totality of the circumstances." Pb1.

Indeed, the practical necessity of a phased-in approach supports the principle that there is no duty to design a vehicle with every available technology. *See Sanner v. Ford Motor Co*., 144 N.J. Super. 1, 5 (Law Div. 1976). And while Plaintiff attempts to skip over the question of duty and reframe the issue as one of "breach," PLAC's brief shows how Plaintiff's theory of liability is fundamentally at odds with the practical reality of product design. The existence of an alternative design does not mean that it needs to be incorporated on every vehicle.

Ultimately, irrespective of how Plaintiff attempts to characterize the issue, Plaintiff's only argument is that there was an alternative design that would have (allegedly) prevented the crash. But, as a matter of New Jersey law, an alternative design does not create a jury issue. Simply stated, to reach a jury, there must be evidence that the omission of the alternative design rendered the

product not "reasonably fit, suitable and safe." N.J. Stat. § 2A:58C-2; Model Jury Charge (Civil) 5.40D-3(2)(a). Plaintiff has none.

Lastly, PLAC's brief provides context that refutes Plaintiff's eleventh-hour position that section 2A:58C–3a(2) is inapplicable.[2] This section precludes liability where the allegedly unsafe characteristics of the product are well known to the ordinary consumer and the alleged harm was caused by an inherent characteristic of the product. Plaintiff argues that this section is not intended to apply to "dangers posed by products such as machinery or equipment that can feasibly be eliminated without impairing the usefulness of the product." Pb7. But, as PLAC explains, Plaintiff has not presented any record evidence that the danger posed by vehicles that depart from their lanes can be eliminated, either technologically or economically. Thus, this statute is plainly applicable.

CONCLUSION

PLAC's amicus brief provides a practical perspective as to why Plaintiff's position in this action is untenable, and, in reality, would discourage manufacturers from incorporating technological advances. AHM submits that its

[2] AHM relied on this provision at the trial court level. Plaintiff never argued that the statute was inapplicable; he never addressed the statute at all. The first time Plaintiff opposed application of this statute is in his reply brief. *See Bouie v. New Jersey Dep't of Cmty. Affs.*, 407 N.J. Super. 518, 525 (App. Div. 2009) ("a party may not advance a new argument in a reply brief").

brief, together with PLAC's, fully supports the affirmance of the trial court's order granting its motion for summary judgment.

Dated: December 22, 2023 Respectfully submitted,

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SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

DOCKET NO. A-002887-22T4

CIVIL ACTION

On Appeal from the Law Division, Camden County

Docket No. CAM-L-001463-20

Sat Below:

Hon. Daniel A. Bernardin, J.S.C.

BRIEF IN RESPONSE TO THE AMICUS BRIEF

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POINT I

THE CONCEPT OF GRADUAL INTRODUCTION AS AN EXCUSE FOR FAILURE TO IMPLEMENT AN AVAILABLE SAFER DESIGN, RAISED FOR THE FIRST TIME BY AMICUS, HAS NO APPLICATION TO THIS CASE.

The amicus brief of the Product Liability Advisory Counsel, Inc. (PLAC or amicus), claims that "Plaintiff's theory, if accepted, would penalize manufacturers for introducing new technology unless they introduce that new technology on all products simultaneously, an approach that is often technologically and economically infeasible, that denies to consumers the right to make their own judgment about the costs and benefits of that technology, and that is contrary to sound public policy." Ab1. Although plaintiff disagrees that requiring defendant, American Honda Motor Co., Inc. (AHM), to produce a vehicle that is reasonably fit, suitable, and safe is novel or would have such dramatic effect, more fundamentally, amicus does not address the actual issue on appeal, i.e., is the determination of whether the vehicle manufacturer fulfilled or breached its established duty to plaintiff a question of fact for a jury under New Jersey law. The arguments of PLAC may be relevant to a jury's risk-utility analysis but fail to present any legal basis for immunizing the vehicle manufacturer's decision not to implement an available safer design generally and specifically in this case.

The concept of gradual introduction advocated by amicus is a new argument. As such, it should not be considered. Nieder v. Royal Indemn. Ins. Co., 62 N.J. 229, 234 (1973) (appellate courts ordinarily should not reach issues that were not argued below); Monek v. Borough of Saddle River, 354 N.J. Super. 442, 456 (App. Div. 2002). It also is fact specific. It expresses a general opinion on when and whether new technology is practical. It is not a law, regulation or rule. It is not, in any instance, a decision reserved to product manufacturers exclusively under New Jersey or federal law. If that were so, design defect claims would not exist. Product liability does exist under both state and federal law, so the opinion of amicus regarding gradual introduction may be worthy of consideration by a factfinder but is not relevant to the issue on appeal. We also would be remiss if we did not advise the Court that another appellate court has rejected this argument as a basis to deny consumers their day in court. See Varela v. FCA US LLC, 505 P. 3d 244 (Az. 2022).

The common law is recognized for its ability to spur the rapid implementation of safety technology, not delay available technology as amicus suggests. Often it is the potential exposure to tort liability that encourages advances and implementation of alternative safer designs. Ibid. Amicus's opinion to the contrary is nothing more than a self-serving net opinion. Again, phase-in is not a determination reserved to any product manufacturer. No one has suggested

that new safety systems must or should be held from the market until every make and model of every manufacturer can be simultaneously marketed with a system as standard equipment. Any arguments for delaying implementation of safety advancements are justifications to be considered in the jury's analysis of whether there was a breach of duty. They are not a defense as a matter of law.

Several of the arguments put forth by amicus are completely inapplicable to this case. For example, amicus asserts that the safety features at issue must be made available gradually because "[a]dapting each of these elements for each vehicle model takes time, equipment, and resources." Ab3. All of the safety systems at issue have been available for as much as a dozen years and were available on this vehicle model – at a cost. There is nothing in the record to support a claim that the available alternative safer design needed additional time, equipment or resources to be made available. That it was available at a cost suggests that it was held back for economic benefit, not because of need or an altruistic desire to protect consumers or public safety.

Similarly, amicus asserts that "regulatory agencies like the National Highway Traffic Safety Administration (NHTSA) often provide for new regulations, including new safety regulations, to be phased in over time." Ab4. There is no evidence of a desire, plan or intention to implement the available safety systems at issue here over time. Varela, supra, 505 P.3d at 255. Moreover, amicus

cites two examples for a gradual phase in. In one example, there was a 100% phase in of passive restraints in three annual stages across the entire car fleet. Ab4. In the second, there was a 100% phase in for all vehicles for head-impact protection over 4 years. Ab4. Here, defendant's engineer, Shoji Hamada, testified that the safety systems had been available on defendant's vehicles sold in Japan as early as 2003 and vehicles marketed in Europe as early as 2006. Pa145. A decade later, Lane Keeping Assist (LKA) and Lane Departure Warning (LDW) were standard on only 5% of vehicles. Pa143. There is nothing to support the suggestion that the alternative safer design had not been made available on the vehicle sold to plaintiff because they were still being phased in as part of a comprehensive or exclusive regulatory scheme.

In fact, the NHTSA has not established any phase in or regulatory framework for the safety systems at issue and has left the issue of allocation of liability to be addressed via state law. See Varela, supra, 505 P.3d at 255 ("As for Chrysler's assertion that the published guidance establishes a view by [NHTSA] that regulation of automated vehicles and automated driving systems is exclusively federal, we disagree. Nowhere in any of the four documents does the Agency make such a claim of exclusive regulatory authority. Instead, the published guidance acknowledges a continuing and collaborative role for states and explicitly encourages states to review tort liability in the automated vehicle and automated

driving system contexts."). The court in Varela upheld the constitutional right to seek redress for injury, noting that to the extent that the NHTSA records reflected a public policy regarding the safety system involved, i.e., automatic emergency braking, the plaintiff's claims advanced the NHTSA's policy in favor of innovation and deployment "more broadly and sooner rather than later." Id. at 262. That is, availability of state tort claims would hasten implementation of new safety technology, not delay it as amicus suggests.

Interestingly, amicus acknowledges that consumer expectations are part and parcel of the risk/utility analysis but claims that "[p]laintiff is seeking to establish a new and expanded rule of duty." Ab8. Plaintiff is asserting a duty that has existed for centuries as a bedrock principle of tort law: people must act reasonably under the totality of the circumstances. As amicus states, this is a case "where consumer expectations can be determinative on risk/utility balancing." Ab6 ("cases where ordinary consumers can be fully informed about both the costs and the benefits"). There is no reason to take from the factfinder, a jury of ordinary consumers, the risk/utility analysis of whether defendant breached its duty. Green v. General Motors Corp., 310 N.J. Super. 507, 517 (App. Div.), certif. denied, 156 N.J. 381 (1998) ("Thus, in determining whether the product was defective, a jury must determine the risks and alternatives that should have been known to a reasonable manufacturer and then assess whether the manufacturer discharged its duty to

provide a reasonably fit, suitable and safe vehicle.”). Rather than justify a limitation of AHM’s responsibility to market a product that is fit, suitable and safe, amicus acknowledges that a jury is fully capable of fulfilling its constitutional role as factfinder.

CONCLUSION

The arguments advanced by amicus fail to address the issue actually presented in this case: is whether the product is defective a fact question for a jury or a matter of law to be decided by the court. It is the former, and for that reason, the arguments raised by amicus are largely irrelevant to the determination to be made on this appeal. A reasonable juror may very well find that AHM was not reasonable or diligent in incorporating the available safer design into their vehicles. The decision below should be reversed and remanded for determination of that issue by a jury of ordinary consumers.

Respectfully submitted,

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Dated: December 22, 2023