Case No. 67843

IN THE
SUPREME COURT OF NEVADA

FORD MOTOR COMPANY,
Appellant,

vs.

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

Appeal from the Eighth Judicial District Court, Clark County, Nevada
Judge Valerie Adair, Case No. A-11-641059-C

AMICI CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC. IN SUPPORT OF APPELLANT

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November 19, 2015

NRAP 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Nevada Rules of Appellate Procedure, *Amici Curiae,* the National Association of Manufacturers and the Alliance of Automobile Manufacturers, submit this Disclosure Statement:

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

1. *Amici Curiae* National Association of Manufacturers and Alliance of Automobile Manufacturers have no parent corporations, and there are no publicly held companies that own 10% or more of the organizations' stock.

2. Counsel for *Amici Curiae* National Association of Manufacturers and Alliance of Automobile Manufacturers are:

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3. *Amici Curiae* National Association of Manufacturers and Alliance of Automobile Manufacturers are not using pseudonyms for the purposes of this brief.

DATED this 19th day of November, 2015.

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By: */s/ Dennis L. Kennedy*
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INTEREST OF *AMICI CURIAE*

Amici curiae are organizations representing a wide range of manufacturers that contribute to Nevada's economy. This case is of importance to *amici* because continued application of the consumer expectations test in complex product liability cases may result in imposing liability on manufacturers even where their products achieve the optimal level of safety.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly $2.1 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. NAM's mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping an environment conducive to U.S. economic growth.

The Alliance of Automobile Manufacturers, Inc. ("the Alliance"), formed in 1999 and incorporated in Delaware, has twelve members: BMW Group, FCA US LLC, Ford Motor Company, General Motors, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars North America, Toyota, Volkswagen Group of America, and Volvo Car Corporation. Alliance members are responsible for 77% of all car and light truck sales in the United States. The

Alliance's mission is to improve the environment and motor vehicle safety through the development of global standards and the establishment of market-based, cost-effective solutions to meet emerging challenges associated with the manufacture of new automobiles. The Alliance files *amicus curiae* briefs in cases such as this one that are important to the automobile industry.

ISSUE PRESENTED

Amici curiae solely address the question of whether the "risk v. benefits" test, rather than the consumer expectations test, should govern complex product liability cases where ordinary consumers cannot reasonably evaluate a product's expected performance in unfamiliar circumstances.

STATEMENT OF THE CASE AND FACTS

Amici curiae adopt Appellant's Statement of the Case and Facts to the extent relevant to *amici's* arguments in this brief.

SUMMARY OF ARGUMENT

The risk-utility test provides the factfinder with an objective standard for evaluating whether a proposed alternative design for a complex product would have resulted in an overall safer product. This standard encourages manufacturers to use available technology to design products to optimize safety without compromising the benefits of the product or rendering it unaffordable for consumers.

These public policies are the fundamental reasons why the American Law Institute (ALI) adopted Section 2 of the Restatement Third of Torts, Products Liability (1998) (hereinafter "Restatement Third"). Indeed, most now courts apply a risk-utility test that considers the risks and benefits of the product as a whole, with and without the proposed modification, before a product can be deemed "defective." *See* Victor E. Schwartz et al., Prosser, Wade & Schwartz's Torts 804-05 n.4 (13th ed. 2015).

By contrast, as this case shows, the "consumer expectations" test can lead to unsound results for both consumers and manufacturers. First, it assumes that the ordinary consumer knows the degree of safety to expect in a complex product even when operating in extraordinary circumstances. As product technology has advanced, this assumption has become particularly unjustified. Consumers may expect products to provide greater or less protection than technology allows. Second, the consumer expectations test fails to account for balancing the interests of other consumers who are not injured (and may have benefited from the challenged design) and, therefore are not before the court. Under the consumer expectations test, a court may impose liability even when a manufacturer responsibly designed a product to provide the greatest level of safety for the greatest number of people. A plaintiff may offer a hypothetical "fix" that may

have reduced the specific harm alleged, but, if the manufacturer adopted that "fix," the result could seriously jeopardize the safety of many other people.

A risk-utility test addresses these deficiencies by requiring courts and juries to evaluate the overall safety of a proposed alternative design, not just whether a manufacturer could have designed a product to avoid the specific injury alleged, which may be relatively rare. A reasonable alternative design benefits the public because it must reduce or prevent the harm suffered by the plaintiff without exposing other people to dangers of equal or greater magnitude. A risk-utility test also benefits consumers because a manufacturer cannot avoid liability by arguing that consumers expected a certain level of risk when using a product when a reasonable alternative design would have eliminated that risk.

Nevada courts, when applying the consumer expectations test, have regularly looked to the risks, benefits, and feasibility of alternative designs in cases involving complex products. This case presents an opportunity for the Court to clarify the law and meet the needs of Nevada citizens by affirmatively adopting the risk-utility test for evaluating the reasonableness of a proposed alternative design in complex design defect cases. It can provide needed guidance to juries weighing expert testimony on alternative designs so that they can reliably reach decisions that are consistent with science, technology, and public safety.

ARGUMENT

I. THE CONSUMER EXPECTATIONS TEST WAS DEVELOPED TO ADDRESS MANUFACTURING FLAWS, NOT EVALUATE COMPLEX PRODUCT DESIGN ISSUES

The ALI's adoption of the Restatement (Second) of Torts § 402A was a major step in the development of product liability law. This section of the Restatement, however, primarily addressed manufacturing flaws and products that failed to meet their basic purpose. The "consumer expectations test" derived from Section 402A was not intended, and has proven ill-suited, for addressing complex design issues.

A. Early Key Product Liability Cases Involved Manufacturing Flaws and Core Product Failures

The principles behind Section 402A, including the consumer expectations test, can be traced to several developments in product liability law. Each involved a product that was either mismanufactured or otherwise failed in its basic purpose.

In 1916, Justice Cardozo eliminated the privity rule for negligence actions in a case in which a wooden wheel of a 1909 Buick Runabout suddenly collapsed while operating, throwing the plaintiff from the vehicle. *See MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). Justice Cardozo found a person can reasonably expect that a wheel will not come off a moving car, and when it does, it may indicate a lack of reasonable care in constructing the vehicle. *See id.* at 1051.

Product liability law made another step forward in 1960 when the New Jersey Supreme Court established a warranty-based cause of action, beyond food products, without the need for privity. *See Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 83-87 (N.J. 1960) ("We see no rational doctrinal basis for differentiating between a fly in a bottle of beverage and a defective automobile."). There, an almost new car went wildly out of control after "something went wrong" with the steering gear. *See id.* at 75 (finding that an implied warranty of merchantability guaranteed against defects in manufacturing or installation of parts).

To address the limitations of fairly addressing product defects through contract and warranty law, Chief Justice Roger Traynor of the California Supreme Court cast aside this doctrinal mix of tort and contract law and endorsed a new pure tort law theory of strict liability for defective products in *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963). The California Supreme Court did so in the context of a power tool that ejected a piece of wood, hitting the plaintiff in the forehead. *See id.* at 898. It held that a plaintiff could establish liability by showing that "he was injured while using the [product] in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the [product] unsafe for its intended use." *Id.* at 901.

B. The ALI Adopted Section 402A With Mismanufactured Products Principally in Mind, But Its Failure to Distinguish Manufacturing, Design, and Warning Defects Created Confusion in the Courts

The Restatement (Second) of Torts § 402A (1965) closely paralleled the *Greenman* rule. The ALI developed the "strict liability" Section 402A with manufacturing defects and product malfunctions in mind, not complex design issues.

Section 402A provides for "strict liability" whenever a "defective condition unreasonably dangerous to the user or consumer" exists and causes injury when the product reaches that user or consumer without substantial change in the condition in which it was sold. Section 402A does so irrespective of whether the seller exercised all possible care or the need for privity. Although Restatements ordinarily state "black letter" law based on the majority of case law, the ALI took a different approach when it adopted Section 402A. At the time, *Greenman* was the only decision of its kind.

In adopting Section 402A, the Reporters, Deans John W. Wade and William L. Prosser, were focused principally on mismanufactured products – a bicycle that had a missing spoke, a cosmetic that contained glass, or a beverage containing a foreign object. *See* John W. Wade, *On the Nature of Strict Liability for Products*, 44 Miss. L.J. 825, 825 (1973) ("The prototype case was that in which something went wrong in the manufacturing process, so that a product had a screw

loose or a defective or missing part or a deleterious element, and was not the safe product it was intended to be."); *see also* U.S. Dep't of Commerce, Model Uniform Product Liability Act, 44 Fed. Reg. 62,714, 62,711 (Oct. 31, 1979) ("[T]he authors of Section 402A . . . were focusing on problems relating to product mismanufacture or defective construction, and not on problems relating to defective design or duty to warn.").[1] Strict liability provided an incentive for manufacturers to implement proper quality control and keep mismanufactured dangerous products from entering the market. *See* Restatement Third of Torts, Products Liability, § 2 cmt. a (1997).

To the extent that the drafters considered design defects, those cases involved products that manifestly failed to perform their intended function, making the defect functionally equivalent to cases involving a manufacturing defect. *See* Aaron Twerski & James A. Henderson, Jr., *Manufacturer's Liability for Defective Product Designs: The Triumph of Risk-Utility*, 74 Brook. L. Rev. 1061, 1064 (2009).

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[1] *See also* James A. Henderson, Jr., & Aaron Twerski, *Arriving at Reasonable Alternative Design: The Reporters' Travelogue*, 30 Univ. of Mich. J.L. Reform 563, 572 (1997) (observing that "[t]he simple explanation for the drafters' reliance on the consumer expectations test in Section 402A comments g and i is that the drafters were not addressing design defect litigation" but focused on overruling privity and imposing strict liability in manufacturing defect cases); Richard L. Cupp, Jr. & Danielle Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, 77 N.Y.U. 874, 890 (2002) ("Most of the early cases did not entail claims of defectiveness that could even in retrospect be classified as design claims.").

In addition, the "black letter" of Section 402A did not provide a test for determining whether a product was in "defective condition unreasonably dangerous" to the user. As courts adopted Section 402A, however, many narrowly focused on comment *i*, which states that "[t]he article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." That narrow view was understandable as courts were familiar with consumer expectations. As Dean Wade recognized, language regarding the expectations of the parties drew from warranty law and was "essentially . . . a contract approach," basing an action on whether a buyer received the product for which he or she contracted. *See* Wade, 44 Miss. L. J. at 833. It was, in essence, as Dean Wade observed, a manufacturing defects approach, assessing whether a product conformed to offered and accepted specifications. *See id.*; *see also* Twerski & Henderson, 74 Brook. L. Rev. at 1066 (finding that "manufacturing defects and self-defeating designs trigger product malfunctions that disappoint expectations of safe product performance" and are "clearly what the drafters had in mind when they authored comment i"); Douglas A. Kysar, *The Expectations of Consumers*, 103 Colum. L. Rev. 1700, 1713 (2003) (observing that the consumer expectations test was developed based on "a type of catastrophic product failure

that subsequently has come be known as a manufacturing defect," not evaluating a design defect).

Even at the time of adoption of the Restatement (Second) of Torts, however, there was significant authority supporting a risk-utility test, including the need to show a reasonable alternative design, outside of manufacturing defect cases. For example, *Greenman*, the sole product liability authority for Section 402A, involved a plaintiff who had offered evidence of a reasonable alternative design to show negligence—an expert witness who testified that "there were other more positive ways of fastening the parts of the machine together, the use of which would have prevented the accident." 377 P.2d at 899. As the consumer expectations test advanced in the courts, Dean Wade proposed that courts "abandon the warranty way of thinking" and adopt a "tort way of thinking" in his highly influential 1973 article. *See* Wade, 44 Miss. L.J. at 834. Instead, he proposed risk-utility factors to evaluate whether a product is unreasonably dangerous. *See id.* at 837-38.

C. Nevada Adopted the Consumer Expectations Test Based on Classic Mismanufacturing and Product Malfunction Cases, Not Situations Involving Complex Technology

This Court's adoption of strict liability follows the path of the Restatement (Second), originating in cases involving mismanufactured or malfunctioning products.

The Court first adopted strict liability in food cases in a classic case involving a person becoming ill after drinking a beverage with a decomposed mouse at the bottom of the bottle. *See Shoshone Coca-Cola Bottling Co. v. Dolinski*, 82 Nev. 439, 420 P.2d 855 (1966). The Court then extended strict liability to all products in *Ginnis v. Mapes Hotel Corp.*, where an automatic door malfunctioned, trapping a hotel guest. 86 Nev. 408, 413, 470 P.2d 135, 138 (1970) (holding that a jury should be instructed that the manufacturer is liable if the door "failed to perform in the manner reasonably to be expected in light of its nature and intended function and was more dangerous than would be contemplated by the ordinary user having the ordinary knowledge available in the community"). In adopting the consumer expectations test, the Court relied on an Illinois Supreme Court case involving a hammer that splintered when striking a nail, and a Washington Supreme Court case in which a bolt came loose in a car, making it impossible for the driver to steer. *See Ginnis*, 86 Nev. at 413-14, 470 P.2d at 138-39 (citing *Dunham v. Vaughan & Bushnell Mfg. Co.*, 247 N.E.2d 401 (Ill. 1969) and *Ulmer v. Ford Motor Co.*, 452 P.2d 729 (Wash. 1969)).

In such cases, which allege manufacturing flaws or involve a product that otherwise failed in fulfilling its basic purpose, the consumer expectations test can apply without difficulty. *See* Restatement Third, § 2 cmt. c ("More distinctly than any other type of defect, manufacturing defects disappoint consumer

expectations."); Twerski & Henderson, 74 Brook. L. Rev. at 1106-08 ("The overwhelming majority of cases that rely on consumer expectations as the theory for imposing liability do so only in *res ipsa*-like situations in which an inference of defect can be drawn from the happening of a product-related accident."); *see also* Restatement Third § 3 (permitting an inference that a product is defective without proof of a specific defect when the harm that occurred "was of a kind that ordinarily occurs as a result of a product defect" and was not solely the result of causes other than a product defect). For example, consumer expectations may establish a design defect if the driver's seat in a new car suddenly collapses backward at a red light or a steering mechanism fails during operation at the speed limit on a well-maintained road. *See* Restatement Third, § 3 cmt b., illus. 3, 5 (also providing example of a blender that shatters during operation).

Moreover, the thinking that led to the formation of the consumer expectations test was comparatively narrow when one considers how product liability law has developed since the adoption of Section 402A. As the next section shows, the consumer expectations test does not work well and is unsound public policy when applied to complex design defect cases.

II. APPLYING THE CONSUMER EXPECTATIONS TEST TO DESIGN DEFECT CASES, PARTICULARLY WHEN INVOLVING COMPLEX PRODUCTS, LEADS TO BOTH UNSOUND RESULTS AND UNWISE PUBLIC POLICY

Relying on "consumer expectations" to determine whether the manufacturer could alter a complex product's design in some way to reduce foreseeable risks of harm may not result in safer products. Further, it may unfairly impose liability on manufacturers that responsibly design products to optimize user safety.

Consumers reasonably expect a hammer to not break when hitting a nail. They reasonably expect wheels to not fall off a moving car. They reasonably expect a bottle of soda to not include the remnants of a dead mouse. As shown above, these were the types of cases underlying adoption of the consumer expectations test. Applying the consumer expectations test does not work, however, when the ordinary consumer (or juror) would not through common life experience have developed an informed expectation about the technical characteristics of a complicated product.

In some situations, consumer expectations may be unacceptably low. Consumer safety demands may lag behind technological improvements, for example. *See* Kysar, 103 Colum. L. Rev. at 1716. Consumers may also be aware of a danger associated with a product because it is obvious or because the manufacturer warned of the risk, making that level of danger in accord with their expectations. Precluding recovery in accordance with consumer expectations in

such circumstances is not sound policy where the risk of harm can be eliminated with the implementation of a simple, relatively low-cost safety feature. *See* David G. Owen, Owen's Hornbook on Products Liability § 8.3 (2d ed. 2008) ("[A] dire consequence of the consumer expectations test . . . is that it effectively rewards manufacturers for failing to adopt cost-effective measures to remedy obviously unnecessary dangers to human life and limb."); Mary J. Davis, *Design Defect Liability: In Search of a Standard of Responsibility*, 39 Wayne L. Rev. 1217, 1236-37 (1993) (criticizing the consumer expectations test as discouraging product improvements that could easily and cost effectively alleviate apparent or obvious dangers); Restatement Third § 2 cmts. d, l (recognizing that warnings are not a substitute for providing a reasonable alternative design, nor does the obviousness of a risk obviate this requirement).

In other instances, consumer expectations may be unrealistically and unreasonably high. In such circumstances, a manufacturer may be subject to liability for injuries it did not or could not have reasonably foreseen, or when a safer alternative design was not feasible. For example, consumers may unrealistically expect that a car that falls off a bridge into a lake should not immediately sink or that a medical device should benefit every patient without complications.

In many situations, consumers will not have the expertise to have developed a reasonable expectation regarding product safety at all. *See* Wade, 44 Miss. L.J. at 829 ("In many situations . . . the consumer would not know what to expect, because he would have no idea how safe the product could be made."). This problem is particularly apparent in cases involving automobile crashworthiness. Consumers will not have an expectation as to whether safety features of a vehicle should protect a person in a fifty mile per hour crash into a tree, a twenty-foot plunge into a ravine, or a head-on collision with another vehicle. They will not have an informed expectation as to whether a vehicle can be built to protect an occupant in a rollover involving one, two, or three flips and under what circumstances, as was the situation in the case below. *See Barker v. Lull Eng'g Co.*, 573 P.2d 443, 451 (Cal. 1978) (recognizing that relying on consumer expectations alone can lead to an underprovision of safety incentives for product manufacturers, particularly in cases where consumers lack concrete safety expectations or where product dangers are known, and that the test treats consumer expectations as a "ceiling" rather than a "floor").[2]

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[2] The California Supreme Court held that a finding of design defect may result from a demonstration either that the product failed to perform as safely as an ordinary consumer would expect *under normal operating circumstances*, or that the risks inherent in the product's design outweigh the benefits of that design. *See Barker*, 573 P.2d at 455-56. This approach is functionally equivalent to that taken by the Restatement Third. *See* Kysar, 103 Colum. L. Rev. at 1728.

It is unclear how general consumer expectations of safety can be converted into specific design criteria that account for the risk-benefit and risk-risk tradeoffs that occur in product design. *See* Kysar, 103 Colum. L. Rev. at 1716. The test provides no predictability. Different consumers may have different expectations, especially in foreseeable but rare circumstances outside the ordinary operation of the product. Liability exposure may also discourage innovation, as manufacturers may be concerned as to how juries would gauge "expectations" as to new and unfamiliar products.

As a result of these and other criticisms, legal scholars and courts expressed dissatisfaction with the consumer expectations test. *See id.* at 1715-18. Deans Prosser and Keaton came to view the consumer expectations as too vague a concept to provide meaningful guidance to a jury, finding that "[t]he test can be utilized to explain most any result that a jury chooses to reach." Prosser & Keeton, The Law of Torts 699 (5th ed. 1984). Professors Henderson and Twerski observed that after "tumultuous years" following the adoption of section 402A, "[u]ltimately courts came to understand that the consumer expectations concept was too simplistic to work well for complex design defect litigation." 30 U. Mich. J.L. Reform at 575-76.

III. REQUIRING A REASONABLE ALTERNATIVE DESIGN PROVIDES NEEDED GUIDANCE TO JURIES, ADVANCES PUBLIC SAFETY, AND PROTECTS CONSUMER CHOICE

The risk-utility test, including the need to show a reasonable alternative design, addresses the shortcomings of the consumer expectations test when applied in complex design cases. As explained, "Section 402A and the scholars and courts that crafted it were concerned about easy cases in which products failed in performing at a minimum level of safety." Michael D. Green, *The Unappreciated Congruity of the Second and Third Restatements on Design Defects*, 74 Brook. L. Rev. 807, 836 (2009). At the time of adoption of the Restatement Third, "virtually every major torts scholar who had looked carefully at the issue of design defect over the past several decades had embraced risk-utility balancing and had rejected the consumer expectations test as unworkable and unwise." Twerski & Henderson, 74 Brook. L. Rev. at 1067. Now, fifty years later, there is a much better understanding that courts should decide complex design defect cases very differently than manufacturing defect cases. The risk-utility test has gained widespread acceptance. *See Branham v. Ford Motor Co.*, 701 S.E.2d 5, 14 (S.C. 2010) ("Some form of a risk-utility test is employed by an overwhelming majority of jurisdictions in this country.").

A. The Restatement Third Adopted the Consensus View Requiring a Reasonable Alternative Design

The Restatement Third provides that a product is defective in design "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe."[3] Restatement Third § 2(b). The Restatement Third uses a reasonableness-based, risk-utility balancing test as the standard for evaluating the defectiveness of product designs. *See id.* cmt. d. It is not sufficient that an alternative design would have reduced or prevented the harm suffered by the plaintiff if it would also have introduced into the product other dangers of equal or greater magnitude. *See id.* cmt. f.

By way of contrast, the Restatement Third looks to whether a product departs from its intended design to establish a manufacturing defect, a straightforward test consistent with a failure to satisfy consumer expectations. *See id.* § 2(a). Similarly, it finds that use of consumer expectations may be adequate to evaluate whether a product's design is defective when "common experience

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[3] This Restatement of the law was developed through a slow, democratic, and fair process, in which the Reporters were assisted by a twenty-person "advisory committee" comprised of distinguished judges, law professors, and experienced plaintiff and defense counsel. *See* Victor E. Schwartz, *The Restatement (Third) of Torts: Products Liability – The American Law Institute's Process of Democracy and Deliberation*, 26 Hofstra L. Rev. 743, 751-56 (1998). Counsel to *amici*, Victor Schwartz, served on the advisory committee of the Restatement Third.

teaches than an inference of defect may be warranted under the specific facts, including the failure of the product to perform its manifestly intended function." *See id.* § 2 cmt. b (explaining purpose of Restatement Third, § 3).

Even before adoption of the Restatement Third, "the overwhelming consensus among courts deciding defective design cases is in the use of some form of risk-utility analysis, either as an exclusive or alternative ground of liability." *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 183 (Mich. 1984). That growing consensus was recognized by the Reporters when they drafted the Restatement Third. *See* Restatement Third § 2 cmt. d Reporters' Note (finding that jurisdictions following the consumer expectations test represent a "distinct minority"). As a practical matter, jurisdictions following the consumer expectations approach typically allow the jury to consider some version of the risk-utility balancing and proof of a reasonable alternative design. *See* Twerski & Henderson, 74 Brook. L Rev. at 1072 ("Based on reported decisions, plaintiffs rarely, if ever, reach the jury in a classic design case without proof of a feasible alternative design."). This Court too has repeatedly recognized the importance of an alternative safer design that is technologically and commercially feasible in determining whether a product is defective, as is well documented in Appellant's Brief. *See* App. Br. at 32-33.

B. Requiring a Risk-Utility Test is Sound Public Policy

The risk-utility test, including the need to show a reasonable alternative design, has three primary benefits over the consumer expectations test, particularly for complex products. First and foremost, the risk-utility test is firmly rooted in the availability of technology to create a safer product, not intuition or ad hoc speculation. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Intuition and Technology in Product Design Litigation: An Essay on Proximate Causation*, 88 Geo. L.J. 659, 661 (2000). It does not lead to liability based on the hypothetical expectations of the ordinary consumer that may be too high, too low, or nonexistent. *See Banks v. ICI Americas, Inc.*, 450 S.E.2d 671, 674 (Ga. 1994) ("[R]isk-utility analysis incorporates the concept of 'reasonableness,' i.e., whether the manufacturer acted reasonably in choosing a particular product design, given the probability and seriousness of the risk posed by the design, the usefulness of the product in that condition, and the burden on the manufacturer to take the necessary steps to eliminate the risk"). It also helps avoid evaluating the safety of products in hindsight.

Instead, the risk-utility test provides juries with an objective guidepost to evaluate whether the design of a product is defective, directing them to consider the technology available to the manufacturer at the time and how the proposed modification would affect the usefulness, desirability, or affordability of the

product to consumers. *See Branham*, 701 S.E.2d at 15 (finding the risk-utility test's objective factors provides juries with "the best means for analyzing whether a product is designed defectively"). Without such guidance, juries are rudderless in steering through battling expert testimony.

Second, the risk-utility test encourages manufacturers to develop optimally safer products. *See* Restatement Third § 2 cmt. a. The Restatement Third does not subject a manufacturer to liability when it has done all it possibly can to create a safe product if consumers expect a product to be safer than technology allows or safer that can be produced without making the product unaffordable. *See, e.g.*, *Prentis*, 365 N.W.2d at 183 (recognizing that a risk-utility balancing approach encourages manufacturers to develop safer products and does not place an unfair burden on careful safety-oriented manufacturers). The risk-utility approach takes a holistic view of safety, requiring the factfinder to consider whether an alternative design might avoid harm to the specific person before the court, but, if adopted, would result in a product that poses a greater risk of more serious injuries to others.

Third, the risk-utility test protects consumer choice. It recognizes that ordinary consumers have no need for an armored car, even if it offers additional safety in rare circumstances. It allows consumers to decide to pay a premium for features that are not necessary to provide reasonable safety, while keeping the product affordable for those who do not desire such features. For example, some

drivers prefer their vehicles to include lane departure warnings, or even thermal cameras for night vision, while other drivers may find these optional features unnecessary, distracting, or not worth their cost. *See* Restatement Third, § 2 cmt. f, illus. 10 (providing example of the availability of a wrap-around bulletproof vest, which, while "somewhat safer" than a model that provides front and back protection only, is less flexible, less comfortable, and more expensive).

C. Criticism of the Reasonable Alternative Design Requirement Is Unfounded

Some commentators and courts have resisted the progress toward requiring a reasonable alternative design on two bases, both of which are unfounded.

The first faulty argument is that requiring a reasonable alternative design represents a return to a general negligence standard, requiring a plaintiff to show that the maker of the product did not act with the ordinary prudence of a reasonable manufacturer in the same or similar circumstances. Design liability, however, has long been recognized as not being truly "strict" liability. *See* David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. Ill. L. Rev. 743, 744 (1996) ("While true strict liability has been adopted for manufacturing defects, a reasonableness standard, which includes the notions of optimality and balance, in fact prevails in the design and warning contexts."). The risk-utility test does not focus on the reasonableness of the manufacturer's conduct in designing a product. It focuses on the reasonableness of product itself. *See*

Victor E. Schwartz & Rochelle M. Tedesco, *The Re-emergence of "Super Strict" Liability: Slaying the Dragon Again*, 71 U. Cin. L. Rev. 917, 930 (2003) (noting that under a risk-utility test "the plaintiff is not required to specifically address a manufacturer's conduct or lack of 'reasonable care'")

A second argument frequently made by opponents is that the reasonable alternative design requirement is too difficult for plaintiffs to meet or too costly. Numerous cases, both pre- and post-adoption of the Restatement Third show that plaintiffs can and often do show a reasonable alternative design in complex design cases. *See generally* Burden of Proving Feasibility of Alternative Safe Design in Products Liability Action Based on Defective Design, 78 A.L.R.4th 154 (originally published in 1990); *see also Godoy ex rel. Gramling v. E.I. du Pont de Nemours & Co.*, 768 N.W.2d 674, 698 (Wis. 2009) (Prosser, J., concurring) (rejecting argument that adoption of a reasonable alternative design test would overburden plaintiffs). While such a showing typically requires expert testimony in cases involving complex products, that is how it should be. The reasonable alternative design requirement is needed precisely because the risk-benefit and risk-risk tradeoffs involved in designing complex products is beyond the experience of an ordinary consumer.

It is essential to have reliable expert testimony showing that a complex mechanical product could have been designed to (1) avoid or reduce the plaintiff's

injury; (2) that the modification would not have increased the risk of harm to others; and (3) that the product, as modified, would not have made it undesirable or unaffordable to consumers. The alternative is to impose liability on responsible manufacturers that carefully design products to safely meet consumer needs. Continuing to rely on the consumer expectations test in complex design liability would reduce incentives to design safe products, needlessly raise prices, and result in a lack of consumer choice.

CONCLUSION

For these reasons, *amici curiae* respectfully urge the Court to hold that Nevada law requires instructing juries on the need to balance the risks and benefits of alternative designs when evaluating complex design defect cases.

DATED this 19th day of November, 2015.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28.2 of the Nevada Rules of Appellate Procedures, I, Dennis L. Kennedy, certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman.

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I hereby certify that I have read this *amicus* brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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I certify that I am an employee of BAILEY❖KENNEDY and that on the 19th day of November, 2015, service of the foregoing **AMICI CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AND ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC. IN SUPPORT OF APPELLANT** was made by electronic service through Nevada Supreme Court's electronic filing system and/or by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, and addressed to the following at their last known addresses:

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