IN THE SUPREME COURT OF THE STATE OF NEVADA

FORD MOTOR COMPANY,

Appellant,

vs.

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

Respondent.

Case No.: 67843

BRIEF OF AMICUS CURIAE OF THE NEVADA JUSTICE ASSOCIATION IN SUPPORT OF RESPONDENT

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

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record hereby 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:

The Nevada Justice Association ("NJA") is a non-profit organization of independent lawyers in the State of Nevada who represent consumers and shares the common goal of improving the civil justice system. NJA aims to ensure that Nevadans' access to the courts and to justice is not diminished. NJA also works to advance the science of jurisprudence, to promote the administration of justice for the public good, and to uphold the honor and dignity of the legal profession.

NJA did not appear in the district court and has submitted to this Court a motion for leave to file this brief. It is represented in the pending appeal, as amicus curiae, by Matthew L. Sharp, Esq., of the firm of Matthew L. Sharp, Ltd., and Robert T. Eglet, Esq. and Erica D. Entsminger, Esq., of the firm Eglet Prince.

DATED this 2nd day of February 2016.

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IDENTITY AND INTEREST OF *AMICI CURIAE*

The Nevada Justice Association ("NJA") is a non-profit organization of independent lawyers who represent consumers and share the common goal of improving the civil justice system. NJA aims to ensure that Nevadans' access to the courts and to justice is not diminished. NJA also works to advance the science of jurisprudence, to promote the administration of justice for the public good, and to uphold the honor and dignity of the legal profession. NJA has submitted to this Court a motion for leave to file this brief.

SUMMARY OF THE ARGUMENT

This Amicus Brief addresses the issue of whether Nevada should adopt the Restatement (Third) of Torts for design defect cases. Far from reflecting any national "consensus," the Restatement (Third), particularly section 2(b) which requires proof of a reasonable alternative design, has been widely criticized and rejected by many states. Adoption of the Restatement Third is unwarranted, and would effectuate a regression in Nevada strict liability law by promoting an analysis of the conduct of the manufacturer as opposed to an examination of the product's fitness. More importantly, rejection of the long favored consumer expectation test would significantly impede the ability of individual injured citizens to obtain redress for harm inflicted upon them by defective products.

Contrary to Appellant Ford Motor Company's suggestion, there is no urgent or compelling reason to reject Nevada's long-standing legal precedent with respect to strict product liability. The Restatement Third represents a radical departure from the standards consistently applied in design defect cases in Nevada for over four decades, and this Court should not abandon the application of the consumer expectation test and put in place the fundamentally unfair provision.

ARGUMENT

This case comes to this Court on an appeal from a jury verdict in favor of a plaintiff in a personal injury lawsuit against Appellant Ford Motor Company. As

part of this appeal, Ford challenges for the first time the application of the consumer expectation test to strict liability claims in Nevada.

Ford and its Amici Curiae suggest that this case "presents an unanswered question of law" and "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." *See* Appellants Opening Brief at 28; Brief of Amicus Curiae at 4. There is nothing in Nevada law, however, that is unclear or requires clarification. Nevada Courts have consistently applied the consumer expectation test in all types of strict liability cases for decades. Although Ford suggests it is concerned about meeting the needs of Nevada citizens, what Ford really wants to do is make it more difficult for consumers to obtain justice by requesting that the Court add an additional burden of proof on consumers to demonstrate a reasonable alternative design through a "risk v. benefit" analysis. As will be discussed extensively herein, this Court should not adopt section 2 of the Restatement (Third) of Torts, and should join the growing number of state courts that have specifically rejected the Third Restatement.[1]

I. NEVADA LAW HAS LONG FOLLOWED THE CONSUMER EXPECTATION TEST AND HAS NEVER REQUIRED PLAINTIFFS TO DEMONSTRATE A REASONABLE ALTERNATIVE DESIGN.

For over 40 years, Nevada products liability law has been clear on one important point -- a consumer can establish that a product is defective if the product is more dangerous than expected by the ordinary consumer. Although consumers may offer evidence that a reasonable alternative design was available

[1] Section 2(b) of the Restatement (Third) of Torts states 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." Restatement (Third) of Torts § 2(b).

to the manufacturer, Nevada has never required that the consumer demonstrate that the manufacturer had available to it a reasonable, alternative design.

The Nevada Supreme Court first adopted the doctrine of strict tort liability in *Shoshone Coca-Cola v. Dolinski*, 82 Nev. 439 (1966). In that case, a consumer sued the manufacturer and distributor of a bottled beverage after he partially consumed the contents of a soda bottle containing a decomposed mouse. The Court affirmed judgment for the plaintiff, holding that "one who places upon the market a bottled beverage in a condition dangerous for use must be held strictly liable to the ultimate user for injuries resulting from such use[.]" *Id.* at 441. Notably the Court found persuasive the policy reasons suggested by William L. Prosser:

> **The public interest in human safety requires the maximum possible protection for the user of the product, and those best able to afford it are the suppliers of the chattel.** By placing their goods upon the market, the suppliers represent to the public that they are suitable and safe for use; and by packaging, advertising, and otherwise, they do everything they can to induce that belief. The middleman is no more than a conduit, a mere mechanical device, through which the thing is to reach the ultimate user. The supplier has invited and solicited the use; and when it leads to disaster, he should not be permitted to avoid the responsibility by saying that he made no contract with the consumer, or that he used all reasonable care.

Id. at 441-442 (citation omitted, emphasis added).

In *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408 (Nev. 1970), the Nevada Supreme Court extended the doctrine of strict tort liability "to the design and manufacture of all types of products" and, for the first time, cited the Restatement (Second) of Torts § 402A(1)(b). *Id.*, 86 Nev. at 413-14.

As is relevant here, the American Law Institute ("ALI") promulgated the Restatement Second in 1965 in response to emerging law in courts across the nation addressing the "need for a coherent statement of manufacturers' liability for defective products." Gray, Oscar S., "Reflections on the Historical Context of Section 402," 10 TOURO L. REV. 75, 85-86 (1993). Section 402A has come to be commonly known as the "consumer expectation" test. Within 10 years of

Section 402A's introduction, thirty-two states – including Nevada – adopted 402A's "consumer expectation" test or a rule substantially similar to it. *See West v. Caterpillar Tractor Co., Inc.*, 336 So. 2d 80, 87 (Fla. 1976); cf. AMERICAN LAW OF PRODUCT LIABILITY, §§ 16.9 & 16.20 (citing decision in 30 jurisdictions through 1976, and seven adopting Section 402A subsequently).

Since *Ginnis*, this Court has consistently and repeatedly relied up Section 402A as the standard in strict-products-liability cases. In fact, as recently as 2009, over ten years after the Restatement Third was promulgated, this Court stated unequivocally that "[t]he Restatement (Second) of Torts section 402A governs strict product liability." *Rivera v. Philip Morris*, 125 Nev. 185, 193 (Nev. 2009).

Not only has the consumer-expectations test derived from Section 402A been consistently ratified in Nevada jurisprudence, it has also formed the basis for a Nevada jury instruction which is routinely applied by Nevada Courts. Specifically, in Product Liability Instruction 7PL.7, the current proposed definition of "unreasonably dangerous" to be given a jury is:

> A product is unreasonably dangerous if it failed to perform in the manner reasonably to be expected in light of its nature and intended function, and was more dangerous than would be contemplated by the ordinary user having the ordinary knowledge available in the community.

Nevada Jury Instructions – Civil, 2011 Edition Inst. 7PL.7.

The authority for this instruction is found in *Ward v. Ford Motor Co.*, 99 Nev. 47 (1983), wherein this Court rejected an earlier request by Ford to change Nevada law, and confirmed that the "correct statement of the law in Nevada" relative to whether a defective product is dangerous is "if it fails to perform in the manner reasonably to be expected in the light of its nature and intended function." 99 Nev. 47, 48 (Nev. 1983) (citation omitted). The *Ward* Court continued: "Beyond that a product being defective gives rise to strict tort liability even though faultlessly made if it was unreasonably dangerous for the manufacturer or supplier to place that product in the hands of a user[.]" *Id.* Thus, in Nevada the

focus of strict product liability is on the product; not on the specific conduct of the manufacturer.

The consumer-expectation test found its way into the earlier versions of the Nevada Pattern Jury Instructions, as well, by virtue of the Nevada Supreme Court's endorsement of Section 402A and discussion of "defect" in *Ginnis* and *Stackiewicz v. Nissan Motor Corp.*, 443, 448, 686 P. 2d 925 (1984). *See* Nev. J. I. 7.06 (1986); see also *Ginnis*, 86 Nev. at 414 (citing Restatement (Second) of Torts § 402A(1)(b) for proposition that "[t]he defect must have been present when the product left the manufacturer or he cannot be held liable."); *Stackiewicz*, 100 Nev. 443, at 448 ("Such a condition is, in the words of the Restatement (Second) of Torts, Section 402A(1) (1965), 'unreasonably dangerous.'").

In this regard, the Comment to the 1986 version of the Pattern Jury Instructions expressly states that the "instruction cannot be viewed as the exclusive test for determining whether a product is unreasonably dangerous and therefore defective." Nev. J. I. 7.06. As the Comment highlighted, "the concept of a defect is a broad one" and, therefore, it "seems logical that a product could be unreasonably dangerous and thus defective, even though it may satisfy ordinary consumer expectations." *Id.* (citations omitted).

Otherwise stated, proving that a product is defective may be easier to demonstrate under some circumstances and a plaintiff may do so by establishing that an alternative design was available. However, neither Nevada jurisprudence nor the Jury Instructions derived from Nevada caselaw contemplate a requirement that the risk-benefit test be applied, whereby it becomes even more difficult to prove that a product is defective. Cf. Comment to Nev. J. I. 7.06.

This Court specifically adopted the consumer expectation test for defective design cases, and Nevada juries have properly applied that standard to all kinds of strict liability cases for decades. Nothing in recent Nevada jurisprudence suggests the standard now requires clarification or that there is any legitimate need to

completely overhaul Nevada law to now require application of the "risk benefit" analysis to the clear detriment of Nevada consumers.

II. THIS COURT SHOULD NOT ADOPT SECTION 2(B) OF THE RESTATEMENT (THIRD) OF TORTS FOR DESIGN DEFECT CASES.

This Court should not abandon years of precedent regarding Nevada products liability law by adopting Section 2(b) of the Restatement (Third) of Torts. The additional element of proof of a reasonable alternative design, or "risk vs. benefit" analysis, has never been required in Nevada, and it should not be now. To do so would create a fundamentally unfair system that would substantially favor manufacturers, and it would deny Nevada consumers rights under product liability law that they have enjoyed in this state for over forty years.[2]

A. The Restatement Third Does Not Represent a "Consensus" Approach to Strict Product Liability Standards.

Notably, neither Ford nor its Amici Curiae direct this Court to *Aubin v. Union Carbide Corp.*, 177 So. 3d 489 (Fla. 2015), wherein the Florida Supreme Court very recently rejected nearly identical arguments and declined to adopt the Third Restatement. Florida, like Nevada, has long applied the consumer expectation test in strict product liability cases. The Florida Supreme Court recognized that manufacturers had been mounting the same challenge to the consumer expectation in other states, and declined to abandon it in favor of the Third Restatement,

> In considering which approach is in line with our prior strict liability jurisprudence, we are in accord with those state supreme courts that have thoughtfully considered this issue and determined that the Third Restatement's new approach is inconsistent with the rationale behind

[2] One commentator has called section 2(b) a "wish list for manufacturing America" in which "[m]essy and awkward concepts such as precedent, policy and case accuracy have been brushed aside for the purposes of tort reform." Vandall, Frank J., "Constructing a Roof Before the Foundation is Prepared: The Restatement (3rd) of Torts: Product Liability Section (2)(b) Design Defect," 30 U. MICH. J.L. REFORM, 261, 265 (1997).

> the adoption of strict products liability. The Third Restatement is, in fact, contrary to this state's prior precedent. Decades ago, this Court recognized that the reason behind adopting - strict products liability was based in part on the policy that "[t]he manufacturer, by placing on the market a potentially dangerous product for use and consumption and by inducement and promotion encouraging the use of these products, thereby undertakes a certain and special responsibility toward the consuming public who may be injured by it." West, 336 So. 2d at 86. **Thus, in approaching design defect claims, we adhere to the consumer expectations test, as set forth in the Second Restatement, and reject the categorical adoption of the Third Restatement and its reasonable alternative design requirement.**

Id. at 509 (emphasis added).

In doing so, the *Aubin* Court cited to *Delaney v. Deere and Company*, 999 P.2d 930 (Kan. 2000), and other cases that contradict the suggestion made by Ford and its Amici Curiae that "most" or a "majority of the courts" apply the Third Restatement. *See, e.g., Potter v. Chicago Pneumatic Tool Co.*, 241 Conn. 199, 694 A.2d 1319, 1332 (Conn. 1997); *Delaney v. Deere & Co.*, 268 Kan. 769, 999 P.2d 930, 946 (Kan. 2000); *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 64-65 (Mo. 1999); *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 335 (Pa. 2014); *Green v. Smith & Nephew AHP, Inc.*, 2001 WI 109, 245 Wis. 2d 772, 629 N.W.2d 727, 751-752 (Wis. 2001).

In *Delaney*, the Supreme Court of Kansas noted that section 2(b) of the Third Restatement had been "harshly criticized," and that its own research indicated that a majority of states did not require proof of a reasonable alternative design in product liability cases. *Id.* at 999 P. 2d at 946. *Delaney* noted, as does the forward to the Restatement (Third), that section 2(b) "goes beyond the law," and held that proof of a reasonable alternative design may be presented, but is not required, a view that it concluded was in accordance with the majority of jurisdictions,

> Our own research also reflects that a majority of jurisdictions in this country do not require a reasonable alternative design in product liability actions. It is clear in Kansas that evidence of a reasonable alternative design may be presented but is not required. We adhere to this principle and believe that it represents the majority rule in this country.

Aubin, 177 So. 3d at 508 quoting *Delaney v. Deere and Company*, 999 P.2d at 945-946.

As is relevant here, Section 402A of the Restatement Second was not the invention of the ALI, but was a careful forecast of emerging law as courts across the nation responded to the growing need for consumer and worker protection. Section 402A was promulgated by the ALI at a time when "the courts were struggling with the issue of adequate consumer protection, and there was a need for a coherent statement of manufacturers' liability for defective products." Gray, Oscar S., "Reflections on the Historical Context of Section 402," 10 TOURO L.REV. 75, 85-86 (1993). The ALI identified a strong, and well-reasoned trend to extend strict liability to defective products generally.

Further, far from being universally embraced, great controversy has surrounded adoption of section 2(b) of the Third Restatement by the states. *See, e.g., Vautour v. Body Masters Sports Industries, Inc.*, 784 A.2d 1178, 1182-83 (N.H. 2001) (noting that there "has been considerable controversy surrounding the adoption of Restatement (Third) of Torts §2(b)," and that "[m]ost of the controversy stems from the concern that a reasonable alternative design requirement would impose an undue burden on plaintiffs because it places a 'potentially insurmountable stumbling block in the way of those injured by badly designed products.'"); *Potter*, 694 A.2d 1319, 1331 (Conn. 1997) (noting "substantial controversy" surrounding section 2(b)); *Green*, 629 N.W. 2d 727, 751 n. 16 (Wisc. 2001) (noting "considerable controversy").

The evidence that the ALI was correct in its endeavor is the broad acceptance Section 402A received in the state courts. Gray, supra, "Historical Context." In about a decade after its promulgation, thirty-two states had adopted 402A or a rule substantially modeled after 402A. *West v. Caterpillar Tractor Co., Inc.*, 336 So. 2d 80, 87 n. (Fla. 1976); cf. AMERICAN LAW OF PRODUCT LIABILITY, §§ 16.9 & 16.20 (citing decision in 30 jurisdictions through 1976,

and seven adopting Section 402A subsequently). As discussed above, Nevada was one of those states.[3]

Since that time, Section 402A has been described as "the most frequently cited, and arguably, the most influential section of the Restatement (Second) of Torts." Tdoke, Michael J. "Categorical Liability for Manifestly Unreasonable Designs: Why the Comment d Caveat Should Be Removed from the Restatement (Third)," 81 CORNELL L. REV. 1181, 1182 & n. 4 (1996).

Finally, it should be noted that, when drafted, Section 402A constituted a recitation of the then-current state of the law in the area of strict liability; it was not an effort to change the law or to advocate another direction. One prominent commentator observed as follows:

> **[From] the date of the adoption of section 402A of the Restatement (Second), to 1992, the date of the first draft of the Restatement (Third) of Torts: Products Liability section 2(b), there were no cases which said that strict liability for products was broken and required fixing.** There were no cases that said it was unworkable or that it was not the appropriate standard of liability for product manufacturers. Just the opposite occurred. Section 402A was quoted in over 3,000 cases, and those cases applied the concept of strict liability, as set out in the Restatement (Second) 402A, in a studious manner. In short, there was no hue and cry for a new draft of

[3] See, e.g., *Winkler v. Mertens*, 2013 WL 607860 (D. Colo. Jan 24, 2013)(Colorado has expressly adopted doctrine of strict liability based on Section 402A); *Adams v. U.S.*, 622 F. Supp. 2d 996 (D. Idaho 2009)(currently operative provision is Section 402A; nothing indicates Idaho Supreme Court would adopt the new Restatement position); *Robinson v. Brandtjen v. Kluge, Inc.*, 500 F. 3d 691 (8th Cir. 2007)(South Dakota had adopted Section 402A and that section endorses the so-called "consumer expectation test."). Oregon's product liability statute has expressly codified Restatement (second) of Torts Section 402A, Or. Rev. Stat. §30.920(3), which has been construed as mandating a consumer expectation test and not requiring alternative design evidence. *McCathern v. Toyota Motor Corp.*, 23 P. 3d 320, 330-32 (Or. 2001). Arkansas also has a product liability statute codifying a consumer expectation definition of defect, Ark. Code §16-16-102(7)(A), which has been viewed by the courts as based upon the Restatement (Second) Section 402A. *Pilcher v. Suttle Equip. Co.*, 365 Ark. 1, 223 S.W. 3d 789 (2006)(Arkansas law patterned on Section 402A); *Mason v. Mitcham*, 2011 Ark. App. 189, 382 S.W. 3d 717 (Ark. Ct. of App. 2011)(same).

> strict products liability and certainly there was no suggestion by the courts that it was biased and needed replacement. Only the manufacturing community objected to strict products liability, because it faced liability for the defective products it put into the market.

See Vandall, Frank J., and Joshua F. Vandall, "A Call for an Accurate Restatement (Third) of Torts: Design Defect" 33 U. MEM. L. REV. 909, 920-21 (2003)(emphasis added).

The New Restatement, published in 1998, does not purport to recite the current state of the products-liability law. Indeed, the New Restatement's Introduction, itself, provides that it is "an almost total overhaul of Restatement Second as it concerns the liability of commercial sellers of products." Introduction, Restatement (Third) of Torts: Products Liability (ALI 1998).

Accordingly, and contrary to Ford's suggestion otherwise, there is no "consensus" or national movement towards the adoption of the Third Restatement's "risk v. benefit" standard that requires this Court to now reconsider its long-standing strict product liability standards. Nevada law has never placed the onerous burden on consumers of requiring proof of a reasonable alternative design, and this Court should not now radically overhaul Nevada law in that fashion. The Restatement Third does not reflect any trend in Nevada law, and quite the opposite, the Third Restatement itself was heavily influenced by, if not the product of, insurance, business, and manufacturing interests. Indeed, many commentators have documented the influence exerted by defense oriented special interest groups.[4] Many states faced with the same arguments Ford makes here

[4] See, e.g., Lavelle, Patrick, "Crashing into Proof of a Reasonable Alternative Design: The Fallacy of the Restatement (Third) of Torts: Products Liability" 38 DUQ. L. REV. 1059, 1067 (2000)("...this project, infected as it was with reporter bias and improper influence, has produced nothing more than a position paper reflecting the views of special interests groups with whom the selected reporters are aligned."); Note, "Just What You'd Expect: Professor Henderson's Redesign of Products Liability," 111 HARV. L. REV. 2366, 2366-67 (1998)(Tort reform campaign launched by manufacturers and insurers moved in the 1990s to use ALI to promote their agenda through reporters who had written extensively in favor of limiting manufacturers liability); Rieders, Clifford, A. and Lorenzo, Nicholas F.,

have already refused to abandon the consumer expectation test in favor of the "risk utility" test, and Nevada should do the same.

B. The Third Restatement Undermines the Principles of Strict Liability Law by Injecting Negligence Standards.

Another valid criticism of the Third Restatement is that it rejects the distinction between negligence, warranty and strict products liability, and instead promotes one unitary "products liability" theory based on the type of defect alleged; manufacturing defect, design defect, and inadequate instructions or warnings.

Under the Restatement Third, proof of a reasonable alternative design is made a part of the plaintiff's prima facie case. Restatement (Third) Of Torts, § 2, comment d ("Under prevailing rules concerning allocation of burden of proof, the plaintiff must prove that such a reasonable alternative was, or reasonably could have been, available at time of sale or distribution.")

Jr., "Restatement (Third) of Torts: A Deliberate Step Backward for Products Liability?" 20 THE BARRISTER 21, 24 (1998)("...it became obvious that much of the American Law Institute was made up of corporate lawyers and law professors who supported tort reform...The new restatement of products liability...evolved from a very small cadre of Thornburg Justice Department officials, [*24] insurance funding groups and professors..."). Shapo, Marshall S., "A New Legislation: Remarks on the Draft Restatement of Products Liability," 30 U. MICH. J. L. REFORM 215, 218 (1997)(describing the "veritable barrage of mail aimed to get out the vote," targeted to "members of the ALI who are also members of law firms whose client interests might have led them to support the current proposals."); Vargo, John F., "The Emperor's New Clothes: The American Law Institute Adorns a 'New Cloth' for Section 402A Products Liability Design Defects---A Survey of the States Reveals a Different Weave," 26 U. MEM. L. REV. 493, 509-515 (1996)(recounting "ALI's Pro-Manufacturer Movement"). See also *Halliday v. Sturn, Ruger & Company, Inc.*, 792 A. 2d 1145, 1154-55 (Md. 2002) (The Restatement Third "has been criticized as representing an unwanted ascendancy of corporate interests under the guise of tort reform.")

Consideration of foreseeable risks, examination of duty based on risk versus utility, and measuring conduct against a reasonableness standard are hallmarks of a negligence analysis. The significance of this shift in approach from strict liability to negligence cannot be overemphasized. If the product is complex, it may be impossible or extremely difficult for a consumer who knows little about the workings of the product to even identify the source of the negligence which was responsible for the defect. *See* Birnbaum, L. Nancy, "Strict Liability and Computer Software," 8 COMPUTER LAW JOURNAL 142 (1988). The injured consumer does not have ready access to information regarding who was responsible for a particular design feature, why it was incorporated into a design, what factors were considered or whether other alternatives were available. The task of proving that a manufacturer/seller knew or should have known of the dangers posed by a specific design and acted unreasonably in light of those circumstances can be a daunting, if not insurmountable, undertaking.

This approach is contrary to Nevada jurisprudence which has long recognized the distinction between negligence and strict product liability, and that "strict products liability is based upon an entirely different concept from negligence." *See Young's Mach. Co. v. Long*, 100 Nev. 692, 694 (Nev. 1984). *See also Outboard Marine Corp. v. Schupbach*, 93 Nev. 158, 162 (Nev. 1977); *Shoshone Coca-Cola v. Dolinski, infra.*

Other Courts have rejected the Restatement Third on this basis as well. As the Supreme Court of Wisconsin noted, adopting section 2(b) "increases the burden for injured consumers not only by requiring proof of the manufacturer's negligence, but also by adding an additional -- and considerable -- element of proof to the negligence standard." *Green*, 629 N.W. 2d 727, 751-52 (Wisc. 2001). The *Green* Court considered the argument made by the defendant and amicus curiae that the state should adopt section 2(b), and noted that it was "troubled by

the fact that 2(b) sets the bar higher for recovery in strict products liability design defect cases than in comparable negligence cases." *Id. Green* went on to state:

> Section 2(b) does not merely incorporate a negligence standard into products liability law. Instead, it adds to this standard the additional requirement that an injured consumer seeking to recover under strict products liability must prove that there was a "reasonable alternative design" available to the product's manufacturer. **Thus, rather than serving the policies underlying strict products liability law by allowing consumers to recover for injuries caused by a defective and unreasonably dangerous product without proving negligence on the part of the products manufacturer, 2(b) increases the burden for injured consumers not only by requiring proof of the manufacturer's negligence, but also by adding an additional -- and considerable -- element of proof to the negligence standard.** This court will not impose such a burden on injured persons.

Id. at 751-52 (emphasis added).

Soon after the Restatement Third was adopted by the ALI, the Supreme Court of Connecticut addressed the provision in *Potter v. Chicago Pneumatic Tool Company*, 694 A.2d 1319 (Conn. 1997).[5] The *Potter* court also concluded that the "feasible alternative design requirement imposes an undue burden on plaintiffs that might preclude otherwise valid claims from consideration." *Id.* Further, *Potter* noted that, in some cases, a product might be defective and unreasonably dangerous even if no feasible alternative design was available. *Id. See also Vautour v. Body Masters Sports Industries, Inc.*, 784 A.2d 1178 (N.H. 2001). The court noted that,

> [m]ost of the controversy stems from the concern that a reasonable alternative design requirement would impose an undue burden on plaintiffs because it places a 'potentially insurmountable stumbling block in the way of those injured by badly designed products.

Id. at 1182-83.

The *Vautour* Court noted that there was a distinct possibility that injured consumers in cases involving complex products might be deterred from bringing

[5] The *Potter* court also noted that its "independent review of the prevailing common law reveals that a majority of jurisdiction *do not* impose upon plaintiffs an absolute requirement to prove a feasible alternative design." *Id.* at 1331.

suit because of the "enormous costs involved in obtaining expert testimony," particularly in cases where the plaintiff has suffered minimal damages. *Id.* at 1183. The opinion also speculated that the requirement of proof of an alternative design "may be difficult for courts and juries to apply" since 2(b)'s requirements coupled with the Restatement's "broad exceptions will introduce even more complex issues for judges and juries to unravel." *Id.*

In *Halliday v. Sturm, Ruger & Company*, 792 A. 2d 1145 (Md. 2002), the court noted that section 2(b) "has attracted considerable criticism and has been viewed by many as a retrogression, as returning to negligence concepts and placing a very difficult burden on plaintiffs." *Id.* at 1154. *Halliday* cited the criticism of the Reporter's contention that 2(b) represented the majority position on the issue, and further noted criticism that the Restatement (Third) represents "an unwanted ascendancy of corporate interests under the guise of tort reform." *Id.* at 1155. Given the criticism and controversy surrounding the section 2(b), the court refused to "cast aside our existing jurisprudence" and adopt the new standards.

Finally, in *Aubin* the Florida Supreme Court only recently held,

> The Third Restatement's risk utility test shifts away from this focus and, in fact, imposes a higher burden on consumers to prove a design defect than exists in negligence cases—the exact opposite of the purposes of adopting strict products liability in the first place.

Id.,177 So. 3d at 511.

At the same time, the *Aubin* court noted, "The consumer expectation test does not inherently favor either party." *Id.* The Court noted that the plaintiff, if he/she desires, can prove his/her case by showing an alternative, safer design exists. On the other hand, a defendant can defend the case by claiming "it could not have made the product any safer through reasonable alternative designs." *Id.* Similarly, Nevada's consumer expectation test is a fair rule for both parties.

The underlying policy concerns of Nevada law with regard to strict liability have not changed in recent years or since the Restatement (Second) § 402A was adopted. If anything, a policy aimed to discourage unsafe practices is even more important now given rapidly changing technology, global trading, deregulation, and underfunding of regulatory agencies than it was when strict liability was first enacted in Nevada. *Tincher v. Omega Flex*, 104 A.3d 328, 398-399 (Pa. 2014) (The Court rejected the Third Restatement and continued following the Second Restatement discussing a product liability claim should be based upon facts rather than rigid rule divorced from the real world).

The complexity of products and the marketing process has increased -- not diminished in the intervening years. Under the new Restatement Third formulation, an injured consumer's ability to bring a product liability case will be hampered by new requirements shifting the focus from demonstrating the dangerous characteristics of a product to an attack on the entire state of the art of the defendants' industry, a more difficult, if not nearly impossible, task.

Injecting principles of negligence into strict products liability is not consistent with Nevada law of products liability and the social policies that it was designed to meet. *Young, infra* and *Ward v. Ford Motor Co., infra*. The policy goals justifying Section 402A remain valid, and would be undermined by the Restatement Third approach. Adoption of the Restatement Third would mark a step backward for the products liability law of Nevada and a significant reduction in the rights of consumers.

C. The Consumer Expectation Test Applies Equally to Manufacturing and Design Defects.

Lastly, Ford argues that *Ginnis v. Mapes Hotel Corp.* is simply wrong, and Section 402A of the Restatement Second was intended to address only manufacturing defects and should not be extended to design defect cases. See Opening Brief at pp. 28-30. As such, Ford suggests that the Restatement Second is the improper vehicle for dealing with defective design and failure to warn cases.

As an initial matter, in the past 40 years this Court has never found that there should be a distinction between the treatment of manufacturing defects and design defects with regard to strict liability claims. Moreover, as detailed by Professor Ellen Wertheimer in "The Third Restatement of Torts: An Unreasonably Dangerous Doctrine," 28 SUFFOLK UNIVERSITY LAW REVIEW 1235 (1994), this thesis is demonstrably incorrect:

> The fact that res ipsa loquitur had already evolved into a strict liability theory applicable to mismanufactured products defuses the argument made by some scholars that § 402A was only intended to apply to mismanufacture cases... Nowhere does § 402A claim or even imply such limited application. Had § 402A been intended only for mismanufactured products, it would have been easy for the drafters to say so, and their failure to do so unfathomable. Furthermore, sections such as comments j and k would have been unnecessary if § 402A were intended only for mismanufacture cases.

Id. at 1241 n. 27.

Professor Michael Green also observed, "if strict liability were limited to manufacturing defects, there would have been no need for consumer expectations to be employed in Section 402A." Manufacturing defects can be readily determined by reference to other identical products. Green, Michael D., "The Unappreciated Congruity of the Second and Third Torts Restatements on Design Defects," 74 BROOKLYN L. REV. 807, 829 (2009). Reviewing literature from the time of its promulgation, as well as the structure of section 402A and its comments, Green concluded: "There is almost nothing....supporting the idea that section 402A was meant to be limited to manufacturing defects." *Id.* at 832.

Other Courts agree. In *Ford Motor Company v. Hill*, 404 So. 2d 1049 (Fla. 1981), the Florida Supreme Court, rejected the contention (argued by Ford) that strict liability should not apply to design defect cases, but rather a "negligence standard" should be implemented,

> The policy reasons for adopting strict tort liability do not change merely because of the type of defect alleged . . . . We feel that the better rule is to apply the strict liability test to all manufactured

> products without distinction as to whether the defect was caused by the design or the manufacturing. If so choosing, however, a plaintiff may also proceed in negligence.

Id. at 1052.

Accordingly, Nevada's application of strict liability to both manufacturing and design defect cases is wholly consistent with the Restatement Second and need not be reversed or "clarified" now.

CONCLUSION

HEREFORE, for the foregoing reasons, Amicus Curiae, respectfully request that this Court decline to adopt the Restatement (Third) of Torts and decline to impose the "risk v. benefit" test on Nevada consumers.

Dated this 1st day of February 2016.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this proposed brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief was prepared in a proportionally-spaced typeface (14-point Times New Roman font) using Microsoft Word.

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points or more and contains 6,690 words.

3. I hereby certify that I have read this amicus curiae brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 31, I hereby certify that I am an employee of Matthew L. Sharp, Ltd. and on this date I electronically filed and served a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE OF THE NEVADA JUSTICE ASSOCIATION IN SUPPORT OF RESPONDENT** as follows:

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