IN THE SUPREME COURT OF PENNSYLVANIA

No. 7 WAP 2008

JUDITH R. BUGOSH, ADMINISTRATIX OF THE ESTATE OF EDWARD J. BUGOSH, DECEASED, AND JUDITH R. BUGOSH, IN HER OWN RIGHT,

v.

I.U. NORTH AMERICA, INC., as successor by merger to THE GARP COMPANY, formerly known as THE GAGE COMPANY, formerly known as PITTSBURGH GAGE AND SUPPLY COMPANY, E.W. BOWMAN, INC., EMHART GLASS INC., formerly known as EMHART MANUFACTURING COMPANY, formerly known as HARTFORD EMPIRE, F.B. WRIGHT COMPANY, SURFACE COMBUSTION, INC., TAYLORED INDUSTRIES, INC.

Appeal of: I.U. North America, Inc.

BRIEF FOR AMICI CURIAE THE SHERWIN-WILLIAMS COMPANY, UNITED STATES STEEL CORPORATION, TEXTRON INC., and BEAZER EAST, INC., formerly known as KOPPERS COMPANY, INC.

Appeal from the July 18, 2007 Order of the Superior Court of Pennsylvania, Docket No. 997 WDA 2006, Affirming the April 28, 2006 Order of the Court of Common Pleas of Allegheny County, Pennsylvania, Docket No. GD 04-018310

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STATEMENT OF INTEREST OF AMICI CURIAE

Amici are current or former product manufacturers and/or sellers who are or may be, from time to time, parties to cases in this Commonwealth alleging strict products liability in tort.

Amici take no position on the liability of any defendant in this case.

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Amici accept the statement of jurisdiction of appellant.

ORDER OR OTHER DETERMINATION IN QUESTION

Amici accept the statement of the Order in question of appellant.

STATEMENT OF THE SCOPE OF REVIEW AND THE STANDARD OF REVIEW

Amici accept the statement of the scope and standard of review of appellant.

STATEMENT OF THE QUESTION INVOLVED

Should the Supreme Court of Pennsylvania adopt § 2 of the Restatement (Third) of Torts in the place of § 402A of the Restatement (Second) of Torts?

Suggested Answer: Yes.

The Superior Court held that it was not error for the trial court to proceed under § 402A of the Restatement (Second) of Torts, stating: "Until and unless our Supreme Court alters its approach to strict liability, we will continue to adhere to established principles." *Bugosh v. Allen Refractories Co.*, 2007 Pa. Super. 215, 932 A.2d 901, 911 (Pa. Super. Ct. 2007).

STATEMENT OF THE CASE

Amici accept the statement of the case of appellant.

SUMMARY OF ARGUMENT

This case presents an historic opportunity for the Court to adopt § 2 of the Restatement (Third) of Torts (1998) and to bring clarity and consistency to products liability law. The Court should adopt § 2 because it will correct some unintended problems resulting from the fact that § 402A of the Restatement (Second) of Torts (1965) was not written with design or warning defect claims in mind.

Pennsylvania adopted § 402A in the case of *Webb v. Zern*, 422 Pa. 424, 427, 220 A.2d 853, 854 (1966), almost immediately after the American Law Institute published that section. *Webb v. Zern* was a manufacturing defect case and, shortly thereafter, Pennsylvania courts were called upon to adapt § 402A for design and warning defect claims. Pennsylvania quickly embraced the risk-utility test as the principal means for determining defectiveness, and the risk-utility approach has become widely acknowledged as a fair and useful measure of liability. Likewise, Pennsylvania made clear that ***strict*** liability is not the same as ***absolute*** liability.

As it stands today, Pennsylvania products liability jurisprudence under § 402A contains several features that create difficulties for courts, litigants and juries: (1) jurors are not permitted to consider risk-utility factors when deciding defect issues; (2) jury instructions ask jurors to decide product safety without giving them a means by which to make that determination; and (3) assessment of products is artificially divorced from assessment of conduct. These features place Pennsylvania outside the mainstream of jurisdictions.

Section 2 of the Restatement (Third) of Torts presents a modest reformulation of products liability law that accommodates design and warning claims as well as manufacturing defect claims. To adopt § 2 would not cause any great upheaval in Pennsylvania products liability jurisprudence. Instead, it would clarify and harmonize Pennsylvania law and give the courts, jurors and litigants useful tools for determining claims in products cases.

ARGUMENT

I. PENNSYLVANIA SHOULD ADOPT § 2 OF THE RESTATEMENT (THIRD) OF TORTS IN THE PLACE OF § 402A OF THE RESTATEMENT (SECOND) OF TORTS.

A. Section 402A of the Restatement (Second) of Torts has proven to be a poor tool for determining "defectiveness" in design and warning cases.

1. Section 402A was formulated for manufacturing defect cases.

Pennsylvania adopted § 402A of the Restatement (Second) of Torts over forty years ago in *Webb v. Zern*, 422 Pa. 424, 427, 220 A.2d 853, 854 (1966), just one year after the American Law Institute ("ALI") published that standard. In this respect, Pennsylvania is one of the earliest jurisdictions to have embraced the ALI's formulation for strict products liability. Section 402A cemented two major progressions in legal theory: (1) it represented the elimination of privity as a requirement for a suit by product users against manufacturers and sellers; and (2) it confirmed the expansion of strict liability from the limited realm of foodstuffs and "products for intimate bodily use" to all products introduced into the stream of commerce. *See* John W. Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. 5, 5-13 (1965).[1]

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[1] Originally, the Restatement (Second) of Torts applied strict liability only to sellers of food for human consumption and other products "for intimate bodily use." *See* Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. at 7 (early cases were limited to foodstuffs and the original draft of the Restatement (Second) of Torts was limited to "food for human consumption," later broadened to include "products for intimate bodily use," and ultimately expanded to all products shortly before its adoption) (citing RESTATEMENT (SECOND) OF TORTS § 402A (Tent. Draft Nos. 6, (1961), 7 (1962), and 10 (1964)). Pennsylvania first relied on a pure food statute, said to be "declaratory of the common law," in products cases. REST. (2D) § 402A, Reporters Notes no. 2 (citing *Catani v. Swift & Co.*, 251 Pa. 52, 95 A.931 (1915), *error dismissed*, 241 U.S. 690, 36 S. Ct. 554, 60 L.Ed. 1238; *Nock v. Coca-Cola Bottling Works*, 102 Pa. Super. 515, 156 A. 537 (1931)). Only shortly before the adoption of the Restatement (Second) did a Pennsylvania court first signal that it might recognize strict liability for something other than food products. Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. at 12 n.44 (citing *Jarnot v. Ford Motor Co.*, 191 Pa. Super. 422, 156 A.2d 568 (1959) as Pennsylvania's first indication it might apply strict products liability outside of food products). But even *Jarnot* was founded on a theory of implied warranty of merchantability when there *was* privity of

Even though § 402A was a modern formulation of tort concepts, it was a creature of the times. In the mid-1960s and before, "products liability" almost exclusively connoted ***manufacturing*** defects, not design or warning defects. *See Phillips v. Cricket Lighters*, 576 Pa. 644, 664-66, 841 A.2d 1000, 1012-13 n. 2 (2003) (Saylor, J., concurring) (quoting John W. Wade, *On the Nature of Strict Tort 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 the product had a loose screw or a defective or missing part or a deleterious element, and was not the safe product it was intended to be."); Richard L. Cupp, Jr. and Danielle Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, 77 N.Y.U. L. REV. 874, 890 (2002) ("Most of the early cases did not entail claims of defectiveness that could, even in retrospect, be classified as design claims."); James A. Henderson, Jr., and Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L.REV. 867, 880 (1998) ("The simple truth is that liability for defective design was in its nascent stages in the early 1960s and section 402A did not address it meaningfully, if at all."); REST. (3D) § 1 cmt. a ("History") (questions of design defects and inadequate instructions or warnings were infrequent until after adoption of the Restatement (Second))). Indeed, *Webb v. Zern* itself adopted § 402A without considering design or warning defect questions. 422 Pa. at 427, 220 A.2d at 854; *see* 422 Pa. at 428-32, 220 A.2d at 855-57 (Bell, C.J., dissenting). Notwithstanding that § 402A fit well with manufacturing defect claims, it was not so easily applied to design and warning claims.

(continued...)

contract between a manufacturer of a tractor-trailer truck and a business that purchased it. 191 Pa. Super. at 429-31, 156 A.2d at 572-73. With *Jarnot*, Pennsylvania was in the forefront of adopting strict liability for non-food products and shortly thereafter half the states had followed that expansion. 19 SW. L.J. at 11-12 (commenting that "[a] movement this rapid is almost completely unprecedented").

2. Section 402A's wording created problems for design and warning claims.

Virtually from its adoption, § 402A posed difficulties for design and warning claims. Although they share a common name in "products" liability, there is a fundamental difference between manufacturing defect claims and claims alleging defective design or warning.

Proof of a manufacturing defect is conceptually straightforward – the jury need only compare the as-built product with the manufacturer's own standards. The unit of measure – a non-defective product – is readily available and comes directly from the manufacturer. Moreover, the requirements for a non-defective product (the specifications) are known before the claim arises.

In stark contrast, the unit of measure in design and warning claims comes from an external source. *See* REST. (3D) § 2 cmt. a ("In contrast to manufacturing defects, design defects and defects based on inadequate instructions or warnings are predicated on a different concept of responsibility. In the first place, such defects cannot be determined by reference to the manufacturer's own design or marketing standards because those standards are the very ones that plaintiffs attack as unreasonable. Some sort of independent assessment of advantages and disadvantages . . . is necessary."); *Jones v. NordicTrack, Inc.*, 274 Ga. 115, 118, 550 S.E. 2d 101, 103-04 (2001) ("The 'heart' of a design defect case is the reasonableness of selecting from among alternative products designs and adopting the safest feasible one."). As a comment to the Restatement (Third) points out with respect to design defects and whether the manufacturer's specifications themselves create unreasonable risks: "Answering that question requires reference to a standard outside the specifications." REST. (3D) § 2 cmt. d.

For design and warning cases, courts, juries and litigants have a greater need for guidance on what is required to establish a defect, but paradoxically cannot find help in the words of

§ 402A itself. For example, § 402A does not define "defective." *See* REST. (2D) § 402A. Nor does the section define what it means for a product to be "unreasonably dangerous." *See Lewis v. Coffing Hoist Div., Duff-Norton Co., Inc.*, 515 Pa. 334, 340, 528 A.2d 590, 592-93 (1987) ("It must be noted, however, that § 402A provides no definition of the term 'defect,' and thus, of itself, does not afford an effective working guide to what kinds of factual circumstances will result in the imposition of liability on a manufacturer for injuries which are caused by its product."). The commentary to § 402A similarly does not venture beyond the nearly-tautological statements that a product is "defective" when it is "unreasonably dangerous" and "not defective" when it is "safe for normal handling." *See* REST. (2D) cmts. g, h, i. This left courts to fill the gap.

In response to this task, and in an effort to circumscribe the boundaries surrounding what otherwise would be limitless liability, courts developed various tests for what makes a product defective or unreasonably dangerous for design and warning claims. Some courts adhered to the so-called "consumer expectations" test, but most used some form of risk-utility balancing, often allowing proof of a reasonable alternative design to influence the liability determination. Other courts adopted a hybrid approach.

Pennsylvania (like most states) applies a risk-utility test in design and warning cases. *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 558, 391 A.2d 1020, 1026 (1978); *Burch v. Sears, Roebuck & Co.*, 320 Pa. Super. 444, 450, 467 A.2d 615, 618 (1983); *see also Moyer v. United Dominion Ind.*, 473 F.3d 532, 538 (3d Cir. 2006); John M. Thomas, *Defining "Design Defect" in Pennsylvania: Reconciling Azzarello and the Restatement (Third) of Torts*, 71 TEMP. L. REV. 217, 223 (1998) ("Pennsylvania appellate courts following *Azzarello* have concluded, almost uniformly, that a cost-benefit analysis must be used in determining whether a product is

'defective' or 'unreasonably dangerous.'").[2] *Cf. Barton v. Adams Rental, Inc.*, 21 Colo. J. 755, 938 P.2d 532, 536-37 n. 7 (Colo. 1997) (non-exclusive list of factors including the existence of a "feasible design alternative"); *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 256-57, 662 N.E.2d 730 (1995)).

Under a risk-utility test, courts balance factors related to the risks and benefits of a product. *See Denny*, 87 N.Y.2d at 257. These factors largely reflect the so-called Wade factors, from the Dean of Vanderbilt Law School's influential article published around the time as the Restatement (Second):

> (1) the usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need, (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger (particularly for established products), (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings), and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.

Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. at 17.

These factors, and the risk-utility test they describe, reflect safety standards *actually used* in real-world product safety design. Design standards promulgated by leading standards-setting organizations like the American Society for Testing and Materials ("ASTM") refer to risk-utility factors like the usefulness of a product, the availability of a safer design, and the effect of

[2] The Reporters Notes to the Restatement (Third) identify Pennsylvania as a risk-utility jurisdiction, and characterize Pennsylvania law as "consistent with" the rules set forth in § 2 of the Restatement (Third). *See* REST. (3D) § 2 cmt. d (Reporters Notes) ("[S]imply because the court has reserved to itself risk-utility balancing does not mean elimination of the plaintiff's obligation to prove that the product that caused injury was not reasonably safe. To make a prima-facie case, the plaintiff must satisfy the court that risk-utility parameters have not been met."); *id.* ("Although Pennsylvania case law governing products liability is sometimes difficult to decipher, a careful analysis of Pennsylvania's appellate decisions suggests that its law may be read to be consistent with the rules set forth in § 2.").

instructions or warnings on product safety. *See, e.g.*, ATSM International, Annual Book of ASTM Standards, Vol. 15.11, No. F 400-004 (2007) ("Standard Consumer Safety Specification for Lighters") ("Lighters, being flame-producing devices, can, as do all flame sources, present a potential hazard to the consumer. This specification cannot eliminate all hazards, but is intended to minimize potential hazards to users."); *id.*, No. F 2088-03 ("Standard Consumer Safety Specification for Infant Swings") ("This consumer safety specification establishes safety performance requirements, test methods, and labeling requirements to minimize hazards to infants ... resulting from normal use and reasonably foreseeable misuse or abuse of infant swings."). There is strong support, bordering on national consensus, that the risk-utility method is the best standard by which to judge strict products liability.[3]

B. Pennsylvania's idiosyncratic approach to § 402A created unintended consequences and places Pennsylvania outside the mainstream of products liability doctrine.

Pennsylvania has an idiosyncratic approach to risk-utility determinations that created unintended problems for courts, juries and litigants.

1. Pennsylvania alone segments the defect inquiry between judge and jury.

Pennsylvania is the only jurisdiction that requires trial judges to apply risk-utility balancing to determine whether a case can proceed to the jury as a matter of law, and forbids the jury from expressly evaluating the product's risk-utility balance. *See Moyer*, 473 F.3d at 538-41

[3] *See* Thomas, *Defining "Design Defect" in Pennsylvania*, 71 TEMP. L. REV. at 222 ("There is widespread agreement among courts and scholars today that the cost-benefit balancing test is the appropriate test for design defect."); George W. Conk, 109 YALE L.J. 1087, 1087-88 (2000) ("Courts had long grappled with the problem of defining 'defect,' drawing on concepts such as warranty and the consumer's reasonable expectations. But they drew most successfully on risk-utility analysis. . . .").

("Our own review of products liability law reveals that most other jurisdictions give the jury a central role in making the strict liability determination and regard juries as capable of balancing risk-utility factors . . . . Indeed our research fails to disclose any other jurisdiction that has adopted [Pennsylvania's] two-step approach or denies the jury a chance to apply the risk-utility test."); Thomas, *Defining "Design Defect" in Pennsylvania*, 71 TEMP. L. REV. at 225 ("*Azzarello* endorsed, and has been almost uniformly interpreted as having endorsed, cost-benefit analysis for purposes of limiting strict liability and preventing manufacturers from being held automatically liable for harm resulting from their product's use. Unfortunately, the *Azzarello* court went on to suggest a jury instruction that, by leaving the most important terms undefined, failed to effectuate these purposes.").

In *Azzarello*, the Court rejected absolute liability for sellers and manufacturers, reasoning that the Restatement (Second) standard would impose liability only with respect to products with a "defect" – a term with special meaning. 480 Pa. at 554-55, 391 A.2d at 1024. As the Court described, the critical factor for determining "defectiveness" under the Restatement (Second) is whether the product is "unreasonably dangerous." 480 Pa. at 555, 391 A.2d at 1024.

At this juncture, the Court adopted an allocation of responsibility that would create unanticipated difficulties in the ensuing decades. Following a California decision, the Court stated that the phrase "unreasonably dangerous" should not go to the jury when it considers whether a product is defective. 480 Pa. at 555, 391 A.2d at 1025 (citing *Cronin v. J.B.E. Olson Corp.*, 8 Cal.3d 121, 132-33, 104 Cal.Rptr. 433, 441, 501 P.2d 1153, 1161, 1162 (1972)). Instead, the Court reasoned that the phrase "unreasonably dangerous" in § 402A represents a label to be used when policy considerations require placing the risk of loss on a manufacturer or supplier as opposed to a user. 480 Pa. at 555-56, 391 A.2d at 1025.

The Court explained the division of responsibility between judge and jury thus:

> While a lay finder of fact is obviously competent in resolving a dispute as to the condition of a product, an entirely different question is presented where a decision as to whether that condition justifies placing liability upon the supplier must be made. Furthermore, we must not lose sight of the fact that regardless of the utility of the Restatement [(Second)] formulation in predicting responsibility, it is primarily designed to provide guidance for the bench and bar, and not to illuminate the issues for laymen.

480 Pa. at 556-57, 391 A.2d at 1025-26 (footnotes omitted).

The Court therefore stated that "[t]he mere fact that we have approved § 402A, and even if we agree that the phrase 'unreasonably dangerous' serves a useful purpose in predicting liability in this area, it does not follow that this language should be used in framing the issues for the jury's consideration." 480 Pa. at 558, 391 A.2d at 1026. The court further explained:

> Should an ill-conceived design which exposes the user to the risk of harm entitle one injured by the product to recover? Should adequate warnings of the dangerous propensities of an article insulate one who suffers injuries from those propensities? When does the utility of a product outweigh the unavoidable danger it may pose? These are questions of law and their resolution depends upon social policy.

Id. Because the court reasoned that the phrases "defective condition" and "unreasonably dangerous" as used in the Restatement formulation are terms of art invoked when imposition of liability is appropriate, and because the court determined that these terms require resolution of policy questions better suited to a court than to a jury, the Court held:

> It is a judicial function to decide whether, under plaintiff's averment of the facts, recovery would be justified; and only after this judicial determination is made is the cause submitted to the jury to determine whether the facts of the case support the averments of the complaint. They do not fall within the orbit of a factual dispute which is properly assigned to the jury for resolution. A standard suggesting the existence of a "defect" if the article is unreasonably dangerous or not duly safe is inadequate to guide a lay jury in resolving these questions.

Therefore, under *Azzarello*, a trial court judge first must apply a risk-utility balancing test to determine whether social policy supports a finding that the product is unreasonably dangerous, assuming all facts in plaintiff's favor. 480 Pa. at 558; 391 A.2d at 1026; *see Surace v. Caterpillar, Inc.*, 111 F.3d 1039, 1045 (3d Cir. 1997) (applying the risk-utility analysis as part of the threshold social policy inquiry). If the court finds the product unreasonably dangerous as a matter of law, the court submits the case to the jury to determine whether the evidence supports the complaint. *Azzarello*, at 1026.

The jury then decides whether the product is defective and whether the defect caused the plaintiff's injury. *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 97, 337 A.2d 893, 900 (1975); *see Dambacher ex rel. Dambacher v. Mallis*, 336 Pa. Super. 22, 63-65, 485 A.2d 408, 430 (Pa. Super. Ct. 1984). And, a product is defective if it "left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use." *Azzarello*, 480 Pa. at 559, 391 A.2d at 1027. Although logical when written, this division of responsibility, especially insofar as it has been interpreted to divest the jury from considering reasonableness of conduct, has created many difficulties in application. Moreover, it strips the parties of the right to a jury trial on contested issues of fact, such as the risk-utility factors. *See* Thomas, *Defining "Design Defect" in Pennsylvania*, 71 TEMP. L. REV. at 234-36 (discussing constitutional concerns).

No other jurisdiction adopts Pennsylvania's division of labor between judge and jury, and most states allow the jury to consider risk-utility factors along with explicit instructions. *Moyer*, 473 F.3d at 539-41 & n.4. Pennsylvania's segmentation of risk-utility considerations leads to difficulties in providing meaningful jury instructions because the bare instructions give little guidance (or boundaries) to the jury's determination. Moreover, commentators have reasoned

that juries should be permitted to decide the risk-utility question because it enables them to determine how safe a product should be in order to be "safe." *See* David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 497 (1993) ("One might well argue that the law should jealously guard the community's prerogative consciously to decide the significant moral question of how much product safety is enough.").

2. Pennsylvania's approach creates problems for jury instructions.

Because the jury is not permitted to consider risk-utility factors, the jury receives little guidance on "defectiveness." Instead, the trial court instructs the jury in terms of safeness for an "intended use":

> The (supplier) of a product is the ***guarantor*** of its safety. The product must, therefore, be provided with every element necessary to make it safe for (its intended) use, and without any condition that makes it unsafe for (its intended) use. If you find that the product, at the time it left the defendant's control, ***lacked any element*** necessary to make it safe for (its intended) use or ***contained any condition*** that made it unsafe for (its intended) use, then the product was defective, and the defendant is liable for all harm caused by such defect.

Azzarello, 480 Pa. at 560, 391 A.2d at 1027 (citing Pennsylvania Standard Jury Instruction 8.02 (Civil), Subcommittee Draft (June 6, 1976)) (emphasis added).[4] Despite clear law to the contrary, the terms and tone of this instruction suggest absolute liability – and likely prejudice defendants in design and warning cases. *See* REST. (3D) § 2 Reporters Notes (calling the Pennsylvania instruction "unduly harsh"). It should be revised. The problem with this instruction and ones like it is that the jury receives little guidance from the court for determining

[4] The current version of suggested instruction 8.02 remains largely the same. PA. J.I.-CIV. § 8.02 (2005).

whether a defect exists. "To have to define the term [defective] to the jury, with a meaning completely different from the one they would normally give to it, is to create the chance that they will be misled. To use it without defining it to the jury is almost to ensure that they will be misled." Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. at 831-32.

Another consequence of Pennsylvania's approach is that neither judge nor jury applies the core legal standard to the facts. *See* Thomas, *Defining "Design Defect" in Pennsylvania*, 71 TEMP. L. REV. 217, 229-40; *id.* at 232 ("But if the court is required to view the evidence on the cost-benefit factors in the light most favorable to the plaintiff, and if (as most scholars and some courts have concluded) the *Azzarello* instruction does not permit the jury to consider cost-benefit factors at all, then neither the court nor the jury has the authority to actually decide whether the true benefits of the proposed alternative design outweigh the true costs. In other words, under this view of the decisional power, neither the court nor the jury determines whether the product is in fact unreasonably dangerous or defective.").

Pennsylvania's idiosyncratic divvying of the liability determination creates difficulties not only for jurors, but also for courts. *See e.g. Surace v. Caterpillar, Inc.*, 111 F.3d 1039, 1046 (3d Cir. 1997) ("We regret that the Supreme Court has not yet spoken definitively on the matter of risk-utility analysis or its component factors. Since it is almost twenty years since *Azzarello*, we hope that the Court will speak definitively soon."); *Gaudio v. Ford Motor Co.*, No. 1135-CIVIL-2002, 2007 WL 5077415 (Pa.Com.Pl. June 14, 2007) ("This court shares the views as expressed in a recent order from the Delaware County Court of Common Pleas which stated, 'while the court feels that a risk-benefit analysis is relevant, it is perplexed as to how the evidence should be presented and who should make the decision with respect to this issue. In crashworthiness cases the procedure seems unclear as how to appropriately decide this issue

whether to the jury during trial or by the judge alone.'") (quoting *Busa v. Ford Motor Co.*, Delaware County Court of Common Pleas, No. 04-3469 (2006)). Conversely, there is no indication that other jurisdictions (in which the jury *does* consider risk-utility) have encountered problems due to jury confusion or misapplication. *See, Moyer*, 473 F.3d at 539-41 (no other jurisdiction "denies the jury the chance to apply the risk-utility test"); *Barton v. Adams Rental, Inc.*, 21 Colo. J. 755, 938 P.2d 532, 537 (Colo. 1997) (identifying the factors in its "straightforward" risk-benefit analysis); *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 96 (Minn. 1987) (identifying factors including "state of the art" and industry practices permitting jury to consider availability of, and failure to use, an alternative, safer design).

3. Pennsylvania's approach creates problems by artificially separating assessment of products from assessment of conduct.

In an effort to maintain a separation between judge and jury, Pennsylvania case law permits jurors to assess the safety of products but not the conduct that led to the design or warning choices for those products. This separation grew out of an early concern, in *manufacturing defect* cases, that manufacturers would attempt to defend defectively manufactured products by reference to care taken in the manufacturing process. This concern does not apply in design and warning cases, particularly when alternative designs or warnings can be considered. Moreover, courts and commentators now recognize that "products" and "conduct" are inseparable and this semantic distinction creates more mischief than it resolves. *See Phillips*, 576 Pa. at 669, 841 A.2d at 1015 (Saylor, J., concurring) (calling this distinction between product and conduct "a common aphorism in the developmental stages of strict liability doctrine, [which] the lead Justices are not alone in perpetuating," but observing that "most courts and commentators have come to realize that in design cases the character of the product and the conduct of the manufacturer are largely inseparable."). The *Phillips* concurrence cites a leading

commentary that explains how it is impossible to parse between a product and the conduct of its maker/seller:

> One of the most frequently repeated distinctions is that even though both [negligence and strict liability] risk-utility tests focus on reasonableness, strict liability focuses on the reasonableness of the product, whereas negligence focuses on the reasonableness of the seller. In theory a product manufacturer could act reasonably in designing a product, but its product could nevertheless be unreasonably dangerous. Perhaps, however, the key words in this formulation are "in theory." In practice, manufacturers consciously choose how to design their products. *Asking whether the product is reasonable tends to circle back to asking whether the manufacturer used due care in designing it.* The effort at distinguishing between reasonable products and reasonable manufacturers may be more of a weak excuse for articulating two tests than a true justification.

Id. (quoting Cupp & Polage, *The Rhetoric of Strict Products Liability Versus Negligence*, 77 N.Y.U. L. REV. at 893) (emphasis added).

> *[T]o condemn a design for being unreasonably dangerous is inescapably to condemn the designer for having been negligent.* To insist otherwise would be akin to a professor telling a law student that, while the brief the student wrote is awful, the professor is not passing judgment on the student's skill in writing it. Similarly, . . . insistence that strict liability is somehow being imposed if the court assesses the reasonableness of the design and not the reasonableness of the designer's conduct is purest sophistry.

576 Pa. at 669-70; 841 A.2d at 1015 (Saylor, J., concurring) (quoting Henderson & Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. at 919) (emphasis added).

In practice and at trial, the question whether a product is defective and unreasonably dangerous cannot be evaluated without assessing -- openly or not – the defendant's conduct. Yet, Pennsylvania's current formulation of the legal test ignores this reality and should be reformed.

C. Pennsylvania should allow the jury to consider risk-utility factors when determining liability.

Standing alone, § 402A does not provide the jury with appropriate tools to define the circumstances under which liability should be imposed. Therefore, the risk-utility factors should be used to make sure that ***strict*** liability does not become ***absolute*** liability. *See, e.g., Davis v. Berwind Corp.*, 547 Pa. 260, 690 A.2d 186 (1997) (in a product alterations context, it is not reasonable to hold a manufacturer liable when a product is made unsafe by subsequent changes – "the question becomes whether the manufacturer could have *reasonably expected or foreseen* such an alteration of its product.") (emphasis added); *Mackowick v. Westinghouse Elec. Corp.*, 525 Pa. 52, 56-57, 575 A.2d 100, 102-03 (1990) (in failure to warn context, it is not reasonable to hold a manufacturer liable for "educat[ing] a neophyte in the principles of the product;" a warning is sufficient if it adequately notifies the intended user of the unobvious dangers inherent in the product).

The purpose and history of products liability as a tort supports the use of risk-utility balancing as a tool for determining whether conduct is liability-creating, and for preventing absolute liability. *See* Cupp & Polage, *The Rhetoric of Strict Products Liability Versus Negligence*, 77 N.Y.U. L. REV. at 876 ("In design defect and warning cases, courts allow plaintiffs to utilize two quite different rhetorical constructs – the language of negligence and the language of strict liability – to define what is increasingly *a nearly identical standard of liability*.") (emphasis added).

Products liability as conceived by the ALI in § 402A was never intended to be absolute. Dean Wade of Vanderbilt Law School explained this in his early article on § 402A, later cited in *Azzarello*:

> What do we mean when we speak of strict liability of a manufacturer for harm caused by his products? Is it sufficient for a plaintiff to show that he used the defendant's product and that he was injured? The answer to this is no. . . . If the theory is strict

> liability in tort, the plaintiff must still prove that the article was unsafe in some way. Thus, the liability is not that of an insurer; it is not absolute in the literal sense of the word.

Id. at 13.

Tort liability for product defects as set forth in the Restatement (Second) is more accurately described as a special rule of liability similar to the rule that a dangerously unsafe product is negligence per se. *See id.* at 14 ("In essence, strict liability in this sense is not different from negligence per se. Selling a dangerously unsafe product is the equivalent of negligence regardless of the defendant's conduct in letting it become unsafe. . . ."). At the time, this explanation may have been given to quell the fears that adoption of the liability standard set forth in § 402A was a radical departure from traditional negligence. *Id.* ("Thus, a court which appears to be taking the radical step of changing from negligence to strict liability for products is really doing nothing more than adopting a rule that selling a dangerously unsafe chattel is negligence within itself.").

Increasingly, courts have acknowledged that reasonableness plays some part in the risk-utility determination for design and warning cases. For example, as the New York Court of Appeals described:

> The adoption of this risk-utility balance as a component of the "defectiveness" element has brought the inquiry in design defect cases closer to that used in traditional negligence cases, where the reasonableness of an actor's conduct is considered in light of a number of situational and policy-driven factors. While efforts have been made to steer away from the fault-oriented negligence principles by characterizing the design defect cause of action in terms of a product-based rather than a conduct-based analysis . . . , the reality is that the risk-utility balancing test is a "negligence-inspired" approach, since it invites the parties to adduce proof about the manufacturer's choices and ultimately requires the fact finder to make "a judgment about [the manufacturer's] judgment" . . . . In other words, an assessment of the manufacturer's conduct is virtually inevitable, and, as one commentator observed, "[i]n general, . . . the strict liability

> concept of 'defective design' [is] functionally synonymous with the earlier negligence concept of unreasonable designing". . . .

Denny v. Ford Motor Co., 87 N.Y.2d 248, 257-58, 662 N.E.2d 730 (N.Y. 1995) (citations and quotations omitted). Moreover, this Court has acknowledged a standard for crashworthiness cases that requires proof of an alternative safer, ***practicable design*** as a required element of proof. *See Schroeder v. Commonwealth, Dep't of Transp.*, 551 Pa. 243, 252, 710 A.2d 23, 28 n.8 (Pa. 1998); *Kupetz v. Deere & Co.*, 435 Pa.Super. 16, 26-29, 644 A.2d 1213, 1218-19 (1994) ("In order to prevail on a crashworthiness theory in a products liability action under Section 402A, a plaintiff must demonstrate. . .an alternative, safer design practicable under the circumstances existed").

Pennsylvania should join the modern trend recognizing an explicit role for jury consideration of reasonable alternatives in design and warning cases as part of the risk-utility inquiry. *See* REST. (3D) § 2 commentary; *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 165 (Iowa 2002) ("Whether the doctrine of negligence or strict liability is being used to impose liability *the same process is going on in each instance*, i.e., weighing the utility of the article against the risk of its use.") (emphasis in original); Cupp & Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, 77 N.Y.U. L. REV. at 877-78 ("Strict products liability evolved rapidly in the courts and law. Increasingly, however, scholars and commentators have questioned the distinction between strict liability and negligence in defective design and warning claims. Regardless of the label attached to the cause of action, courts increasingly are using more or less the same standard – a risk-utility analysis essentially based on negligence principles."). The very genesis of the products liability tort from negligence antecedents shows that concepts of reasonableness are not alien to strict liability. For this Court to allow reasonableness to be openly considered -- in the measured way permitted by the

Restatement (Third) of Torts -- does not mean that negligence and strict liability will collapse into a single claim.

D. Most other states use risk-utility factors and proof of reasonable alternative designs or warnings.

Before the Restatement (Third), and because the Restatement (Second) failed to define what makes a product "defective" or "unreasonably dangerous," courts developed various formulations for determining defectiveness in design and warning claims. While a shrinking minority of jurisdictions continues to adhere to a consumer expectations test, in the wake of design and warning cases in the early 1970s and the years that followed, the shortcomings of that standard as an independent test for defect became clear:

> By the early 1970s, some courts sought to impose liability without fault for design defects and defects due to inadequate instructions and warnings under the principles enunciated in section 402A. . . . It became apparent, however, that section 402A, created to address manufacturing defects, did not adequately cover design defects or defects based on inadequate warnings. . . . This court understood the problem and recognized a second, alternative test for proving a strict products liability cause of action involving a defective design. The second test eventually became known as the risk-utility or risk-benefit test. . . .

Glen Blue v. Envtl. Eng'g, Inc., 215 Ill.2d 78, 91, 828 N.E.2d 1128, 1138 (2005) (citations omitted).

Most jurisdictions today apply a risk-utility or risk-benefit test and allow or require proof of a reasonable alternative design or warning. *See Moyer*, 473 F.3d at 539-41 n.4 (collecting authority); *Glen Blue*, 215 Ill.2d at 91, 828 N.E.2d at 1138 (noting that the risk-utility test was created to address the restrictions of the consumer expectations approach) (citations omitted); *see* REST. (3D) § 2 cmt. d Reporters Notes (jurisdictions following consumer expectations test represent a "distinct minority"). Moreover, even so-called consumer expectations states typically allow some version of risk-utility balancing and proof of a reasonable alternative design

to play a role in the jury's determination. *See e.g., Delaney v. Deere & Co.*, 268 Kan. 769, 788, 999 P.2d 930, 944 (2000) ("Kansas law has been clear in allowing evidence of the feasibility of an alternative design in the trial of a design defect."); *McCathern v. Toyota Motor Corp.*, 332 Ore. 59, 23 P.3d 320 (2001); *Potter v. Chicago Pneumatic Tool Co.*, 241 Conn. 199, 211-21, 694 A.2d 1319, 1329-34 (1997). That is, regardless of the formulation of the test they use, jurisdictions throughout the country recognize the importance of weighing the risks of a product against its usefulness in order to determine whether it is not reasonably safe.

At least nineteen states apply a risk-utility balancing test or a reasonable/prudent manufacturer test in design defect or failure to warn cases. Fifteen of those states *allow* reasonable alternative design to be a factor in the proof of liability, while two of those states *require* proof of reasonable alternative design.[5] Another nine states also *require* proof of a

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[5] *Soule v. General Motors Corp.*, 8 Cal.4th 548, 882 P.2d 298 (Cal. 1994) (endorsing risk-utility unless the product is demonstrably defective in which case consumer expectations is the appropriate test); *Armentrout v. FMC Corp.*, 842 P.2d 175 (Colo. 1992) (holding that the plaintiff bears the burden to show that the risks of the product outweighs the benefits, and the jury may consider reasonable alternative design); *Nacci v. Volkswagen of Am., Inc.*, 325 A.2d 617 (Del. Super. Ct. 1974) (endorsing a reasonable manufacturer test that considers whether a reasonable manufacturer would pursue an alternative design); *Hull v. Eaton Corp.*, 825 F.2d 448 (D.C. Cir. 1987) (looking to District of Columbia and Maryland law to endorse a risk-utility test while also requiring proof of a reasonable alternative design); *Radiation Tech., Inc. v. Ware Constr. Co.*, 445 So.2d 329, 331 (Fla. 1983) (including reasonable alternative design as a factor in the risk-utility balancing test); *Nichols v. Union Underwear Co.*, 602 S.W.2d 429 (Ky. 1980) (finding that the standard is the prudent manufacturer – negligence theory, not strict liability – where proof of a reasonable alternative design is a factor); *Guiggey v. Bombardier, et. al.*, 615 A.2d 1169 (Me. 1992) (acknowledging its use of the risk-utility test (citing *St. Germain v. Husqvarna Corp.*, 544 A.2d 1283, 1286 (Me. 1988) (noting reasonable alternative design as a factor))); *Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976) (endorsing risk-utility where reasonable alternative design is a factor, unless the product is demonstrably defective); *Haglund v. Philip Morris, Inc.*, 446 Mass. 741, 847 N.E.2d 315 (2006) (finding that the manufacturer must design to avoid reasonably foreseeable risks of use and requiring proof of a reasonable alternative design); *Prentis v. Yale Mfg. Co.*, 421 Mich. 670, 365 N.W.2d 176 (Mich. 1984) (adopting risk-utility balancing test and allowing proof of reasonable alternative design); *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 96 (Minn. 1987) (determining that the

reasonable alternative design for plaintiffs to prevail in products liability cases – regardless of the specific test they use (i.e., whether they use a consumer expectations test or some other hybrid approach); four of those nine states require proof of a reasonable alternative design by statute.[6]

(continued...)

plaintiff may show a reasonable alternative design (citing *Bilotta v. Kelley Co.*, 346 N.W.2d 616 (Minn. 1984) (affirming Minnesota's adoption of a reasonable care balancing test and jury instructions regarding the manufacturer's duty); *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 395 A.2d 843 (1978) (finding that the court conducts a risk-utility test where it considers reasonable alternative design in addition to the presence and sufficiency of warnings or instructions); *Brooks v. Beech Aircraft Corp.*, 120 N.M. 372, 902 P.2d 54 (N.M. 1995) (applying a risk-utility test where reasonable alternative design is a factor); *Miele v. Am. Tobacco Co.*, 770 N.Y.S.2d 386, 2 A.D.3d 799 (2003) (adopting the risk-utility test and allowing proof of reasonable alternative design); *Perkins v. Wilkinson Sword, Inc.*, 83 Ohio St. 3d 507, 700 N.E.2d 1247 (1998) (applying a risk-utility test where factors include consumer expectations and reasonable alternative design); *Claytor v. General Motors Corp.*, 277 S.C. 259, 286 S.E.2d 129 (S.C. 1982) (adopting a balancing test where courts consider various factors, implicitly including reasonable alternative design); *Peterson v. Safway Steel Scaffolds Co.*, 400 N.W.2d 909 (S.D. 1987) (finding that the jury determines whether the defect was reasonably foreseeable by the *seller*, while knowledge is imputed to the *manufacturer* and warnings are judged based upon their adequacy); *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743 (Tex. 1980) (endorsing a risk-utility balancing test that considers reasonable alternative design); *Morningstar v. Black & Decker Mfg. Co.*, 162 W.Va. 857, 253 S.E.2d 666 (1979) (instructing that the test is risk-utility where the jury considers reasonable alternative design).

[6] *GMC v. Jernigan*, 883 So.2d 646 (Ala. 2003) (finding that plaintiff must prove reasonable alternative design as a threshold issue); *Jones v. NordicTrack, Inc.*, 274 Ga. 115, 550 S.E.2d 101 (2001) (finding that the heart of design defect cases is whether there was a reasonable alternative design); *Glen Blue v. Envtl. Eng'g, Inc.*, 215 Ill.2d 78, 828 N.E.2d 1128 (2005) (finding that feasible alternative design is one of the three proofs required); *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159 (Iowa 2002) (requiring proof of a reasonable alternative design through adoption of § 2 of the Restatement (Third)); *Williams v. Bennett d/b/a Krosstown Trade & Pawn Shop*, 921 So.2d 1269 (Miss. 2006) (acknowledging that the Mississippi Code Annotated agrees with § 2 of the Restatement (Third) and requires proof of a feasible alternative design); *Cavanaugh v. Skil Corp.*, 164 N.J. 1, 751 A.2d 518 (2000) (finding that New Jersey's statute reflects § 2 of the Restatement (Third), requires proof of a reasonable alternative design, but allows defendant to rebut by proving no practical or feasible alternative design); N.C. Gen. Stat. § 99B – 6 (1995) (requiring proof of a reasonable alternative design); *Allen v. Minnstar, Inc.*, 8 F.3d 1470 (10th Cir. 1993) (finding that Utah's statute requires proof of a reasonable alternative design); *Lemons v. Ryder Truck Rental, Inc.*, 906 F. Supp. 328 (W.D.Va. 1995) (applying Virginia law and finding that it requires proof of a reasonable alternative design).

Three additional states apply hybrid approaches involving some consideration of consumer expectations and risk-utility balancing, and allow reasonable alternative design as a factor in the liability determination.[7] Of seven states that have not considered the Restatement (Third) approach yet, five apply the consumer expectations test with a modification allowing proof of a reasonable alternative design or a risk-utility test.[8] Finally, five remaining states simply require a plaintiff to prove defect and causation. Of these last five states, four allow proof of reasonable alternative design or apply the risk-utility test; Pennsylvania is one of those

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[7] *Readenour v. Marion Power Shovel*, 149 Ariz. 442, 719 P.2d 1058 (Ariz. 1986) (recognizing its two-prong test approach, one considering the consumer's expectations and the other engaging in a risk-utility balancing test that includes reasonable alternative design); *Ray by Holman v. BIC Corp.*, 925 S.W.2d 527 (Tenn. 1996) (providing two tests for determining whether a product is unreasonably dangerous: (1) consumer expectations, and (2) prudent manufacturer which includes a risk-utility balancing test); *Ruiz-Guzman v. Amvac Chem. Corp.*, 141 Wash.2d 493, 7 P.3d 795 (2000) (advocating consumer expectations or risk-utility where reasonable alternative design is a factor).

[8] *GMC v. Jernigan*, 883 So.2d 646 (Ala. 2003) (endorsing a consumer expectations test (citing *Beech v. Outboard Marine Corp.*, 584 So. 2d 447, 450 (Ala. 1991)) but the plaintiff must prove as a threshold issue a reasonable alternative design); *Potter v. Chicago Pneumatic Tool Comp. et al.*, 241 Conn. 199, 694 A.2d 1319 (1997) (adopting a modified formulation of the consumer expectation test that considers also the product's risks and utilities; the jury may consider feasible alternative design, but the plaintiff is not required to prove that there was a reasonable alternative design); *Ontai v. Straub Clinic & Hosp.*, 66 Haw. 237, 659 P.2d 734 (Haw. 1983) (finding that the test is consumer expectations or the defendant may rebut defect and causation by showing that the benefits of the product outweigh the risks); *Freeman v. Hoffman-La Roche, Inc.*, 260 Neb. 552, 618 N.W.2d 827 (2000) (applying a consumer expectations test to design defect and a reasonably foreseeable use test for failure to warn); N.C. Gen. Stat. § 99B – 6 (1995) (endorsing a consumer expectations test where proof of reasonable alternative design is required); *Lee v. Volkswagen of Am., Inc.*, 688 P.2d 1283 (Okla. 1984) (endorsing a consumer expectations test for design defect); *Smith v. United States Gypsum Co.*, 612 P.2d 251 (Okla. 1980) (finding that a product is unreasonably dangerous when it does not warn of foreseeable uses); *McCathern v. Toyota Motor Corp.*, 332 Or. 59, 23 P.3d 320 (2001) (acknowledging that the legislature adopted the consumer expectations test in Oregon's statute, but leaving the door open as to whether the statute also contemplates the risk-utility test).

four.[9] *See also Potter*, 241 Conn. at 211 & n. 11, 694 A.2d at 1329 & n. 11 (collecting authority); *Moyer*, 473 F.3d at 538-41 & n.4 (collecting authority).

Since the ALI published the Restatement (Third) in 1998, some states have adopted § 2 of the Restatement (Third) outright.[10] Other states have acknowledged Restatement (Third) principles by citing the Restatement (Third) as a basis for common law decisions or statutory interpretations.[11] States that have rejected the Restatement (Third) of Torts are in a shrinking

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[9] *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871 (Alaska 1979) (defendant may rebut plaintiff's prima facie case by showing benefits of product outweigh risks); *Brown v. North Am. Mfg. Co.*, 176 Mont. 98, 576 P.2d 711 (1978) (plaintiff must show product was unreasonably dangerous and defect caused injury); *Azzarello v. Black Bros. Co., Inc.* 480 Pa. 547, 557, 391 A.2d 1020, 1026 (1978) (court applies risk-utility balancing test in determining whether product is unreasonably dangerous, before jury determines defect and causation); *Lamb v. B & B Amusements Corp.*, 869 P.2d 926 (Utah 1993) (plaintiff must show defect and causation, as codified in Utah's statute); *Rohde v. Smiths Med.*, 165 P.3d 433 (Wyo. 2007) (plaintiff must prove unreasonably dangerous to user or consumer).

[10] *See Wright v. Brooke Group Ltd.*, 652 N.W.2d 159 (Iowa 2002); *Vassallo v. Baxter Healthcare Corp.*, 428 Mass. 1, 22-23, 696 N.E.2d 909, 923 (1998) (adopting § 2(c) and comment m in failure to warn cases; revising the law in "recognition of the clear judicial trend" in products cases); *cf. Buonanno v. Colmar Belting Co., Inc.*, 733 A.2d 712 (R.I. 1999) (adopting § 5 of the Restatement (Third), applicable to component parts manufacturers, which incorporates the standards for being "defective" from § 2); *Freeman v. Hoffman-La Roche, Inc.*, 260 Neb. 552, 618 N.W.2d 827 (2000) (declining to adopt the standard for design defect for prescription drugs and medical devices in § 6(c) of the Restatement (Third), but adopting the learned intermediary doctrine set forth in § 6(d) of the Restatement (Third) applicable to prescription drugs and medical devices).

[11] *See, e.g., Williams v. Bennett*, 921 So.2d 1269, 1275 (Miss. 2006) (relying on § 2 of the Restatement (Third) for principle that plaintiff must prove reasonable alternative design); *Jones v. NordicTrack, Inc.*, 274 Ga. 115, 118, 550 S.E.2d 101, 103 (2001) (citing § 2 of the Restatement (Third) to support interpretation of statute for principle that liability for design defect includes consideration of whether the defendant failed to adopt a reasonable alternative design which would have reduced the foreseeable risks of harm presented by the product) ("The 'heart' of a design defect case is the reasonableness of selecting from among alternative product designs and adopting the safest feasible one.") (citations omitted); *Ruiz-Guzman v. Amvac Chem. Corp.*, 141 Wash.2d 493, 7 P.3d 795 (2000) (citing § 2 of the Restatement (Third) as persuasive authority to support the Washington Products Liability Act, which includes consideration of a reasonable alternative design). *Cf. Cavanaugh v. Skil Corp.* 164 N.J. 1, 6, 751 A.2d 518, 521 (2000) (the New Jersey statute and the Restatement (Third) require that alternative designs be feasible, but

minority still clinging to consumer expectations approaches, and thus have products liability jurisprudence that is unlike Pennsylvania's.[12]

(continued...)

the statute creates an absolute defense if the defendant, not the plaintiff, shows there was no practical or technically feasible alternative design that both would have prevented the harm and would not have substantially impaired the function of the product).

[12] *See Delaney v. Deere & Co.*, 268 Kan. 769, 999 P.2d 930 (2000) (adhering to § 402A of the Restatement (Second) and consumer expectations test, but recognizing validity of risk-utility balancing in complex cases and that the law is "clear" that evidence of the feasibility of an alternative design is allowed at trial); *Green v. Smith & Nephew AHP, Inc.*, 245 Wis.2d 772, 629 N.W.2d 727, 759 (2001) (establishing consumer-contemplation test as the exclusive standard; explicitly rejecting § 2 of the Restatement (Third)). *Cf. Halliday v. Sturm, Ruger & Company, Inc.*, 368 Md. 186, 792 A.2d 1145 (2002) (declining to apply § 2 of the Restatement (Third) in the context of gun safety; deferring to legislature in that context).

II. TO ADOPT § 2 OF THE RESTATEMENT (THIRD) OF TORTS WILL IMPROVE PENNSYLVANIA JURISPRUDENCE WITHOUT UPHEAVING SETTLED PRINCIPLES.

A. Pennsylvania products liability jurisprudence is fundamentally consistent with the Restatement (Third) of Torts in that "absolute liability" is rejected.

To adopt § 2 of the Restatement (Third) of Torts will bring about a modest change in Pennsylvania products law while reaffirming much of that jurisprudence. Pennsylvania long has rejected ***absolute liability*** in products cases. In *Azzarello*, the Court emphasized that manufacturers and sellers are not "insurers" of their products and are not responsible for all injuries caused. *Azzarello*, 480 Pa. at 553-54, 391 A.2d at 1024 (quoting Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. at 13) ("What do we mean when we speak of strict liability of a manufacturer for harm caused by his product? Is it sufficient for a plaintiff to show that he used the defendant's product and that he was injured? The answer to this is no. . . If the theory is strict liability in tort, the plaintiff must still prove that the article was unsafe in some way. Thus, the liability is not that of an insurer; it is not absolute in the literal sense of that word."); *see Phillips*, 576 Pa. at 667, 841 A.2d at 1013 ("Nevertheless, the intent of the Second Restatement was not to render the manufacturer an insurer of his product, responsible for any and all harm caused from the use of its product, regardless of the product's utility and relative safety.") (citing *Azzarello*, 480 Pa. at 555, 391 A.2d at 1025). Instead, products liability can be imposed only when a product is "defective" or "unreasonably dangerous." *See* REST. (2D) § 402A.

A plaintiff thus must prove a product is defective and the defect is a proximate cause of the plaintiff's injuries. *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 93-94, 337 A.2d 893,

898 (1975).[13] To avoid absolute liability, Pennsylvania decisions limit liability in design and warning cases by making the "defect" and "safety" inquiries depend upon the product's "intended use" and "intended user" – concepts embedded with reasonableness and foreseeability. *See* Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. at 847 ("It is appropriate to remark here that a court which seeks to impose liability for any product which is unsafe, without consideration of whether that lack of safety is due or reasonable, will find other means of controlling the extent of the liability. One of the ways of doing this is to speak of proximate cause or *to limit the scope of the risk on the basis of a more restricted type of use to which the liability will extend.* It seems much better to bring the policy elements out into the open by giving consideration to the factors to be weighed in determining whether the product is duly safe.") (emphasis added).

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[13] Pennsylvania's three formulations are as follows:

For a *manufacturing defect*, a product is defective when it leaves the seller's hands but fails to comport with its intended design and is unsafe for normal handling or use. *See Dambacher ex rel. Dambacher v. Mallis*, 336 Pa. Super. 22, 70, 485 A.2d 408, 433 (Pa. Super. 1984) (Wieand, J., dissenting) (reviewing theories of strict products liability).

Under a *design defect* claim, a product is "defective only if it 'left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use.'" *Phillips*, 576 Pa. at 652, 841 A.2d at 1005 (quoting *Azzarello*, 480 Pa. at 559, 391 A.2d at 1027). A product is not defective if it is safe for its intended user. *Id.* (applying "intended user" standard from failure to warn cases to design defect case).

Under a *failure to warn* claim, a product is defective if it lacks sufficient warnings to apprise users of non-obvious dangers in the product. *See Davis v. Berwind Corp.*, 547 Pa. 260, 267, 690 A.2d 186, 190 (1997); *Berkebile*, 462 Pa. at 99, 337 A.2d at 902 ("A 'defective condition' is not limited to defects in design or manufacture. The seller must provide with the product every element necessary to make it safe for use. One such element may be warnings and/or instructions concerning use of the product.") (citing REST. (2D) TORTS § 402A cmt. h). "If the product is defective absent such warnings, and the defect is a proximate cause of the plaintiff's injury, the seller is strictly liable without proof of negligence." 337 A.2d at 902. *Mackowick v. Westinghouse Elec. Corp.*, 525 Pa. 52, 55, 575 A.2d 100, 102 (1990) (warnings must be directed to the understanding of the intended user.).

The jurisprudential changes crafted by the common law process are now "codified" in the Restatement (Third) of Torts. Indeed, the Restatement (Third) of Torts articulates a standard of liability that reflects common law concepts that have emerged under Pennsylvania law. *See Azzarello*, 480 Pa. at 558, 391 A.2d at 1026 (risk-utility balancing); *Burch*, 320 Pa.Super. at 450, 467 A.2d at 618 (risk-utility balancing); *Moyer*, 473 F.3d at 538 (risk-utility balancing); Thomas, *Defining "Design Defect" in Pennsylvania*, 71 TEMP. L. REV. at 223 (risk-utility balancing); *Duchess v. Langston Corp.* 564 Pa. 529, 559, 769 A.2d 1131, 1149 (2001) (reasonable alternative design);[14] *Phatak v. United Chair Co*, 756 A.2d 690, 693 & n.4 (Pa. Super. Ct. 2000), *appeal denied*, 566 Pa. 666, 782 A.2d 548 (2001) (citing *Gottfried v. Am. Can Co.*, 339 Pa. Super. 403, 489 A.2d 222 (1985), and *Connelly v. Roper Corp.*, 404 Pa. Super. 67, 590 A.2d 11 (1991)) (reasonable alternative design).

B. The Restatement (Third) will bring clarity to Pennsylvania law and reflects the economic and moral underpinnings of strict products liability.

1. The Restatement (Third) will resolve inconsistencies created by the Restatement (Second) in design and warning cases.

The Restatement (Third) addresses and remedies the shortcomings of the Restatement (Second) regarding design and warnings cases. REST. (3D) § 2 cmt. a. Under the Restatement (Third), "[o]ne engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for the harm to persons or property caused by the defect." *Id.* at § 1. A product is "defective" in design "when the foreseeable risks of harm

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[14] In *Duchess*, the Court stated: "Significantly, such evidence [of feasibility of design alternatives] is an essential element of the plaintiff's liability case predicated on a theory of design defect based upon the availability of an alternate, safer design." 564 Pa. at 559, 769 A.2d at 1149 (citing 63A AM.JUR.2D PRODUCTS LIABILITY § 1095 (1997) (stating that "[t]he reasonableness of choosing from among various alternative product designs and adopting the safest one if it is feasible is not only relevant in a design defect action, but is at the very heart of the case") and REST. (3D) § 2(b) & cmt. d).

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." *Id.* § 2(b); *see Phillips*, 576 Pa. at 675-78, 841 A.2d at 1019 (Saylor, J., concurring). In addition, a product is "defective" due to inadequate instructions or warnings "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings . . ., and the omission of the instructions or warnings renders the product not reasonably safe." *Id.* § 2(c).

The commentary to § 2 makes clear that the Restatement (Third) retains classical strict liability for manufacturing defect cases. REST. (3D) § 2 cmt. a. However, because design and warning cases are "predicated on a different concept of responsibility" and "cannot be determined by reference to the manufacturer's own design or marketing standards because those standards are the very ones that plaintiffs attack as unreasonable," "[s]ome sort of independent assessment of advantages and disadvantages" is necessary. *Id.*

> Products are not generically defective merely because they are dangerous. Many product-related accident costs can be eliminated only by excessively sacrificing product features that make products useful and desirable. Thus, the various trade-offs need to be considered in determining whether accident costs are more fairly and efficiently borne by accident victims, on the one hand, or, on the other hand, by consumers generally through the mechanism of higher product prices attributable to liability costs imposed by courts on product sellers.

Id.

For example, objects like knives, lawnmowers, and automobiles cannot be made perfectly safe for human use without sacrificing useful characteristics – e.g., sharpness for knives, ability to quickly mow for lawnmowers, and available speed for automobiles.

> A simple instrument like a hammer, for example, will not infrequently smash a finger or thumb if used unskillfully. It could probably be designed to make this possibility less likely, but at the

> cost of impairing its usefulness. Despite the dangers which the hammer creates, it is treated as reasonably safe. Or consider an automobile. It occasionally may be involved in an accident in which there is no fault on the part of anyone. It is designed, for example, to go so fast that if an obstacle suddenly and unexpectedly looms in front of it, the driver will be unable to stop or swerve in time to avoid a collision.

Wade, *Strict Tort Liability of Manufacturers*, 19 SW. L.J. at 16 (even under the Restatement (Second) formulation, "[s]trict products liability clearly does not require a perfectly safe product"). Nor would "super-safe" products promote social welfare and consumer choice. Consumers understand that some unknowable risks may well accompany the products they seek on the marketplace; notwithstanding this, "[M]ost people probably want (or 'demand,' from the economic perspective of product makers) manufacturers to provide them with the benefits of science and technology if and when such benefits reasonably appear to exceed the risks." Owen, *The Moral Foundations of Products Liability Law*, 68 NOTRE DAME L. REV. at 466; *see also id.* at 459-61.

The Restatement (Third) illustrates that § 2(b) and (c), which "impose liability for products that are defectively designed or sold without adequate warnings or instructions and are thus *not reasonably safe*, achieve the same *general objectives* as does liability predicated on negligence." *Id.* (emphasis added). Both liability regimes seek to create incentives for optimal levels of safety:

> The emphasis is on creating incentives for manufacturers to achieve optimal levels of safety in designing and marketing products. Society does not benefit from products that are excessively safe—for example, automobiles designed with maximum speeds of 20 miles per hour—any more than it benefits from products that are too risky. Society benefits most when the right, or optimal, amount of product safety is achieved. From a fairness perspective, requiring individual users and consumers to bear appropriate responsibility for proper product use prevents careless users and consumers from being subsidized by more careful users and consumers, when the former are paid damages

> out of funds to which the latter are forced to contribute through higher product prices.

Id.; *see* M. Stuart Madden, *Selected Federal Tort Reform and Restatement Proposals Through the Lenses of Corrective Justice and Efficiency*, 32 GA. L. REV. 1017, 1057-58 (1998) ("'Optimal levels of safety,' it must be noted, does not mean total, or even maximum, safety.") (footnote omitted). The Restatement (Third) is well-crafted to deal with products that have inherent risks, in that the jury can consider whether there are reasonable alternative designs that present an acceptable level of utility and do not pose an unacceptable level of risk.

Moreover, the Restatement (Third) imposes liability for design and warning only when the risks of harm are *reasonably* foreseeable – this approach squares with the economic and moral underpinnings of tort law.

> Most courts agree that, for the liability system to be fair and efficient, the balancing of risks and benefits in judging product design and marketing must be done in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the time of distribution. To hold a manufacturer liable for a risk that was not foreseeable when the product was marketed might foster increased manufacturer investment in safety. But such investment by definition would be a matter of guesswork. Furthermore, manufacturers may persuasively ask to be judged by a normative behavior standard to which it is reasonably possible for manufacturers to conform. For these reasons, Subsections (b) and (c) speak of products being defective only when risks are reasonably foreseeable.

Id.

While reasonable alternative designs or reasonable alternative warnings are required in most instances, the Restatement (Third) recognizes that they are not the exclusive means by which a plaintiff can prove liability. *Id.* cmt. b (recognizing the development in the common law under which some courts have held that reasonable alternatives are a factor, but not always a required element of proof, in a plaintiff's case). Indeed, in § 3 of the Restatement (Third) (when

circumstantial evidence supports a defect), § 4 of the Restatement (Third) (dealing with violations of statutory or regulatory norms), and § 2, cmt. e (dealing with designs that could be considered manifestly unreasonable), the Restatement recognizes that proof of a reasonable alternative design or warning is the primary but not exclusive means to establish a "defect" for products liability. *Id.* cmt. b, d.

With respect to design defects, § 2(b) adopts reasonableness as the standard for judging defectiveness. "More specifically, the test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design by the seller or a predecessor in the distributive chain rendered the product not reasonably safe." *Id.* cmt. d. A plaintiff can prove that a reasonable alternative was (or reasonably could have been) available at time of sale or distribution, whereas defendants can offer evidence of industry standards to question whether alternatives were feasible. *Id.*

By recognizing the potential relevance of industry standards, the Restatement (Third) approach would correct an outlier decision in Pennsylvania law. In *Lewis v. Coffing Hoist Div., Duff-Norton Co., Inc.*, 515 Pa. 334, 340, 528 A.2d 590, 592-93 (1987), the Court held that industry standards were inadmissible in a design defect case because they improperly injected reasonableness into the case (contrary to *Azzarello*). Yet virtually every other jurisdiction allows this kind of proof.[15] The dissenting justices in *Lewis* eloquently explained that courts are poor

[15] *See* Ga. Council of Superior Court Judges, Suggested Pattern Jury Instructions: Civil Cases 62.670 (2007) ("In determining whether a product was defective, you may consider proof of a manufacturer's compliance with federal or state safety standards or regulations and industrywide customs, practices, or design standards."); 3 Ohio Jury Instructions 351.05 (2006) (including as a risk-utility factor "any applicable public or private standard that was in effect . . ."); Anderson, S.C. Requests to Charge – Civil, § 32-43 (2002) ("Industry standards and

substitutes for design offices and, in providing a fair and impartial forum when designs cause injuries, courts "need all the help [they] can get." 515 Pa. at 347, 528 A.2d at 596 (Hutchinson, J., joined by Flaherty, J., dissenting).

> Industry standards are written by individuals considered by their peers in industry, academia and research to be especially knowledgeable in a particular technical specialty. These standards contain their collective expert wisdom. The committees who prepare the standards are as respected in their fields as the American Law Institute, on whose formulation of the law of strict liability the majority relies, is in ours. Their collective opinion is at least as valuable as any individual expert witness's. Of course, these industry standards would not be conclusive, but their relevance and competence is clear.
>
> The majority says that admission of industry standards is improper because the standards will necessarily introduce negligence concepts into products liability. However, it permits the opinions of individual experts hired by the parties to be admitted at trial. This is inconsistent.

Id. ("I am compelled, in the words of a popular song, to 'speak out against the madness.' The instant madness is a creeping consensus among us judges and lawyers that we are more capable of designing products than engineers.").[16]

(continued...)

state of the art at the time of manufacture are relevant to show both the reasonableness of the product's design and that the product is dangerous beyond the expectations of the ordinary consumer."); 8 Tenn. Prac. Pattern Jury Instr. T.P.I. – Civil 10.01 (2007) ("Consider also the customary designs, methods, standards and techniques of manufacturing, inspecting and testing by other manufacturers [sellers] of similar products.") (brackets and italics in original); 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 110.02 (5th ed. 2005) ("evidence of custom in the product seller's industry or of technological feasibility, whether relating to design, construction, or performance of the product, may be considered by the trier of fact.").

[16] Moreover, the dissenting justices in *Lewis* noted that "there is respectable legal opinion that liability for defective design cannot avoid the question of relative care, at least on the question of legal cause." *Id.* (citing *Foley v. Clark Equip. Co.*, 361 Pa. Super. Ct. 599, 523 A.2d 379 (1987) (Wieand, J.)).

A broad range of factors – including the feasibility of other design alternatives – goes into determining whether a reasonable alternative design renders a product "not reasonably safe" under the Restatement (Third).

> The factors include, among others, the magnitude and probability of the foreseeable risks of harm, the instructions and warnings accompanying the product, and the nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing. *See* Comment g. The relative advantages and disadvantages of the product as designed and as it alternatively could have been designed may also be considered. Thus, the likely effects of the alternative design on production costs; the effects of the alternative design on product longevity, maintenance, repair, and esthetics; and the range of consumer choice among products are factors that may be taken into account. . . .

Id. cmt. f. "A plaintiff is not necessarily required to introduce proof on all of these factors; their relevance, and the relevance of other factors, will vary from case to case." *Id.*

Proof in failure to warn cases largely follows design defect cases (noting, however, that the defectiveness concept can be more difficult to apply in warning cases).

> In evaluating the adequacy of product warnings and instructions, courts must be sensitive to many factors. It is impossible to identify anything approaching a perfect level of detail that should be communicated in product disclosures. . . . Product warnings and instructions can rarely communicate all potentially relevant information, and the ability of a plaintiff to imagine a hypothetical better warning in the aftermath of an accident does not establish that the warning actually accompanying the product was inadequate. No easy guideline exists for courts to adopt in assessing the adequacy of product warnings and instructions. In making their assessments, courts must focus on various factors, such as content and comprehensibility, intensity of expression, and the characteristics of expected user groups.

Id.; *see also id.* cmt i ("Subsection (c) adopts a reasonableness test for judging the adequacy of product instructions and warnings. It thus parallels Subsection (b), which adopts a similar

standard for judging the safety of product designs").[17] For precisely these reasons, reasonableness must be considered in order to determine the sufficiency of a warning.

It is a straightforward task to generate a jury instruction based on the Restatement (Third) standard. *See* Cupp & Polage, *The Rhetoric of Strict Products Liability Versus Negligence*, 77 N.Y.U. L. REV. at 879-80; Thomas, *Defining "Design Defect" in Pennsylvania*, 71 TEMP. L. REV. at 240-41 (proposing alternative Pennsylvania instructions that harmonize with the Restatement (Third) and *Azzarello*). For example, the Georgia pattern instruction for design defect includes thirteen common-sense factors a jury should weigh as part of the risk-utility test:

> To determine whether a product suffers from a design defect, you must balance the inherent risk of harm in a product design against the utility or benefits of that product design. You must decide whether the manufacturer acted reasonably in choosing a particular product design by considering all relevant evidence, including the following factors:
>
> a. the usefulness of the product;
>
> b. the severity of the danger posed by the design;
>
> c. the likelihood of that danger;
>
> d. the avoidability of the danger, considering the user's knowledge of the product, publicity surrounding the danger, the effectiveness of warnings, and common knowledge or the expectation of danger;
>
> e. the user's ability to avoid the danger;
>
> f. the technology available when the product was manufactured;

[17] The Restatement (Third) does not permit warnings to validate otherwise unsafe designs. *See id.* cmt. l ("In general, when a safer design can reasonably be implemented and risks can reasonably be designed out of a product, adoption of the safer design is required over a warning that leaves a significant residuum of such risks . . . . However, when an alternative design to avoid risks cannot reasonably be implemented, adequate instructions and warnings will normally be sufficient to render the product reasonably safe. *Compare* Comment e. Warnings are not, however, a substitute for the provision of a reasonably safe design. . . .").

g. the ability to eliminate the danger without impairing the product's usefulness or making it too expensive;

h. the feasibility of spreading any increased cost through the product's price or by purchasing insurance;

i. the appearance and aesthetic attractiveness of the product;

j. the product's utility for multiple uses;

k. the convenience and durability of the product;

l. alternative designs for the product available to the manufacturer; and

m. the manufacturer's compliance with industry standards or government regulations.

If you decide that the risk of harm in the product's design outweighs the utility of that particular design, then the manufacturer exposed the consumer to greater risk of danger than the manufacturer should have in using that product design, and the product is defective. If after balancing the risks and utility of the product, you find by a preponderance of the evidence that the product suffered from a design defect, then the plaintiff is entitled to recover.

Ga. Council of Superior Court Judges, Suggested Pattern Jury Instructions: Civil Cases 62.640 (2007).[18] Moreover, the Georgia instruction sets forth multiple factors a jury can consider for

[18] *See also, e.g.*, Mass. Super. Ct. Civil Prac. Jury Instr. § 11.3.2 (2001) (including "the gravity of the danger posed by the design, . . . the mechanical feasibility of a safer alternative design, . . . any adverse consequences to the product and to the consumer that would result from an alternative design"); 4A Minn. Prac., Jury Instr. Guides – Civil (JIG) 75.20 (5th ed. 2007) (including "2. The likelihood that harm will result from use of the product . . . 4. The cost and ease of taking effective precautions to avoid that harm 5. Whether the manufacturer considered the scientific knowledge and advances in the field. . . ."); N.J. Model Jury Charges (Civil), § 5.40D-3 (1999) (including "(1) The usefulness and benefit of the [product] . . . (2) The safety aspects of the [product] . . . (3) Was a substitute design for this [product] feasible and practical?") (brackets in original); N.Y. Pattern Jury Instr. – Civil 2:120 (2007) (including "(1) the product's usefulness and its costs, and (2) the risks, usefulness and costs of the alternative design[s] as compared to the product the defendant did market") (brackets in original); 3 Ohio Jury Instructions 351.05 (2006) (including "(1) The nature and magnitude of the risks of harm associated with the product's design or formulation in light of its intended and reasonably foreseeable uses, modifications, or alterations; (2) The product users' likely awareness of the

determining the reasonableness of a manufacturer's choice of one design versus other alternatives:

> In determining whether a product was defective, you may consider evidence of alternative designs that would have made the product safer and could have prevented or minimized the plaintiff's injury. In determining the reasonableness of the manufacturer's choice of product design, you should consider
>
> a. the availability of an alternative design at the time the manufacturer designed the product;
>
> b. the level of safety from an alternative design compared to the actual design;
>
> c. the feasibility of an alternative design, considering the market and technology at the time the product was designed;
>
> d. the economic feasibility of an alternative design;
>
> e. the effect an alternative design would have on the product's appearance and utility for multiple purposes, and
>
> f. any adverse effects on the manufacturer or the product from using an alternative design.

Id. 62.660. Other jurisdictions instruct the jury to conduct a risk-utility or risk-benefit test and mention specific risk-utility factors in the notes or comments following the pattern instructions.[19]

(continued...)

risks of harm, whether based on warnings, general knowledge, or otherwise; . . . (4) The extent to which the product's design or formulation conformed to any applicable public or private standard that was in effect when it left the manufacturer's control"); 6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 110.02 (5th ed. 2005) (including "[*the relative cost of the product, seriousness of potential harm from the claimed defect*] [*the cost and feasibility of eliminating or minimizing the risk*]") (brackets and italics in original).

[19] *See, e.g.*, Revised Arizona Jury Instructions (Civil) PLI 3 (4th ed. 2005) (commenting that the risk-utility factors should be argued by counsel for inclusion in jury instructions); Colo. Jury Instr., Civil 14:3 (4th ed. 2007) (noting that the Supreme Court in *Armentrout v. FMC Corp.*, 842 P.2d 175, 197 (Colo. 1992) identified risk-utility factors, including feasible alternative design); 18 La. Civ. L. Treatise, Civil Jury Instructions §11.02 (2d ed. 2007) (commenting on risk-utility factors and requiring proof of a reasonable alternative design); 8 Tenn. Prac. Pattern

Regardless of the precise formulation, directing the jury to consider specific factors to weigh the risks and benefits of a product guides deliberations to focus on the actual legal standard for liability. *See* James A. Henderson, Jr. and Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 878-79 (1998) ("Compared with the consumer expectations standard, the reasonableness standard based on risk-utility analysis relies less on intuition and more on a balancing of articulated considerations regarding the relative advantages and disadvantages of the product as designed and as it alternatively could have been designed.").

2. The Restatement (Third) is solidly grounded in reality and therefore is beneficial for consumers, manufacturers and sellers.

The Restatement (Third) approach entails significant welfare gains for Pennsylvania consumers, as well as manufacturers and suppliers doing business here. In addition to bringing clarity to Pennsylvania law, it represents a balanced approach to liability that uses real-world factors that go into designing and manufacturing safe products. It also reflects the factors that consumers actually consider when they make decisions in the marketplace. Indeed, risk-utility balancing is not a foreign concept to jurors because they *do it all the time* with respect to the products that they purchase or use every day.

Moreover, the Restatement (Third) has the added benefit of harmonizing Pennsylvania law with the emerging national consensus regarding product safety. This leads to clearer and more predictable obligations for manufacturers and suppliers, and more consistent expectations for consumers, with respect to product safety. In the global economy, having clear standards and

(continued...)

Jury Instr. T.P.I. – Civil 10.01 (2007) (commenting on traditional risk-utility factors that may be considered in the prudent manufacturer test).

uniform treatment of products claims spares local, national, and global companies from trying to decipher confusing and unpredictable standards.

The Restatement (Third) risk-utility test would align Pennsylvania's legal standard for design defect with the standards already used in government and industry. *Compare, e.g.*, REST. (3D) § 2 cmt. a ("Products are not generically defective merely because they are dangerous. Many product-related accident costs can be eliminated only by excessively sacrificing product features that make products useful and desirable.") *with* 16 C.F.R. § 1109.8 (2004) (In setting product safety standards the Consumer Product Safety Commission should consider "the prospective cost of Commission action to consumers and producers, and [] the benefits expected to accrue to society from the resulting reduction of injuries. Consideration of product cost increases [should] be supplemented to the extent feasible and necessary by assessments of effects on utility or convenience of the product."). By explicitly acknowledging the need for product designers and producers to balance the risks of a product with its usefulness to consumers, the Restatement (Third) affirms the design standards appropriately used by product designers and endorsed by sound economic principles: design decisions should optimize the welfare of the consumer by balancing the utility of and access to products with consumer safety.

Manufacturers want to maximize the utility of their products while also maintaining appropriate safety standards. In the face of safety concerns, (1) manufacturers first try to design out the risks of a product without sacrificing its utility; (2) if that is not possible, manufacturers try to guard against the risk; and (3) if that is not possible, manufacturers try to warn against the risk. *See* Mark R. Lehto, *Designing Warning Signs and Warning Labels: Part I - Guidelines for the Practitioner,* ERGONOMICS GUIDELINES AND PROBLEM SOLVING 249, 250 (Anil Mital et. al. eds., 2000) ("In general, the accepted hierarchy of control from most to least effective is: (1)

elimination of hazards, (2) containment of hazards, (3) containment of people, (4) training of people, (5) warning of people.").

For example, consider a piece of heavy equipment like a metal-stamping machine press. To protect the hands of workers operating the press, designers may incorporate hand guards or other physical boundaries or devices to keep hands away from the press during operation. However, there are risks inherent in the use of a press that simply cannot be designed around without sacrificing its purpose. To account for these risks, manufacturers include instructions and warnings that apprise users of the risks associated with the product. These design and warning procedures are used in a variety of products presenting end-user risk. *See, e.g.*, American Society for Testing and Materials (ASTM) International, Annual Book of ASTM Standards, Vol. 15.11, No. F 400-004 (2007) ("Standard Consumer Safety Specification for Lighters") (detailing specific safety standards for cigarette lighter design and suggesting warning statements to affix to product); *id.*, No. F 1004-07 ("Standard Consumer Safety Specification for Expansion Gates and Expandable Enclosures") (detailing design safety standards and minimum required warning information for expandable gates).

The Restatement (Third) – with its incorporation of reasonable alternative designs and warnings, and its principle that a manufacturer cannot use a warning to insulate itself from liability for an unreasonably unsafe design – tracks this process. Moreover, it creates incentives for manufacturers and suppliers to adopt safe designs and warnings whenever feasible. In this sense the Restatement (Third) is "technology forcing" – i.e., it encourages manufacturers to pay attention to safety developments and to adopt safe, feasible standards.

The Restatement (Third) commentary makes clear that the Restatement (Third) attempts to maximize consumer choice. *See* REST. (3D) § 2 cmt. a. This also supports existing policy

goals: Consumers do not always want the safest products possible; they want products that are as safe as possible without unduly sacrificing other features such as affordability, durability, speed, performance, appearance, size, and ease of use. The law should be designed, wherever possible, to maintain consumer choice and honor these other important values.

3. The Restatement (Third) is consistent with fundamental principles of economics and corrective justice.

Tort liability is often justified by courts and commentators based on economic efficiency or "corrective justice" principles. Both of these justifications support adoption of the Restatement (Third).

In the context of product safety, it is economically desirable to adopt a liability rule that encourages manufacturers and suppliers to invest the optimal amount of effort to achieve product safety without sacrificing product utility. *See* Owen, *The Moral Foundations of Products Liability Law* 68 NOTRE DAME L. REV. at 477-82 (explaining that safety is a component of product value and "[t]he theory of utility requires manufacturers to maximize, as best they can, profits and product value – including product usefulness, affordability, and safety to consumers and third parties.").

> [T]he purpose of the law should be to encourage all affected parties to (1) take cost-effective measures to increase the stock of safety information, (2) distribute and act upon it in a cost-effective manner, and (3) facilitate safety transactions optimally among themselves. More specifically, the law should encourage manufacturers to (1) invest in cost-effective types and levels of research to discover product dangers, (2) provide consumers with as much safety information as may cost-effectively be conveyed, and (3) reduce production and design dangers in their products to the lowest cost-effective level.

Id. at 481-82 (footnotes omitted). The Restatement (Third) standard – which makes explicit that liability is based on the incorporation of reasonable alternative designs and warnings – does precisely that.

The moral foundation of products liability law also supports the Restatement (Third) approach by basing liability on reasonably foreseeable risks. *See* Peter M. Gerhart, *The Death of Strict Liability*, 56 BUFF. L. REV. 245, 271-72 (2008) (arguing that the economic approach and the corrective justice approach to tort law both lead to the conclusion that "[i]t is morally unwise to impose liability when a person has made a reasonable choice and impossible practically to alter the standard of care by imposing liability."); Owen, *The Moral Foundations of Products Liability Law*, 68 NOTRE DAME L. REV. at 494 ("If such losses are unforeseeable, or if they result necessarily from the use of products which are on balance good, it simply is morally inappropriate to place legal responsibility on the maker, and the burden of the loss on the maker's owners and customers."); *see Vassallo v. Baxter Healthcare Corp.*, 428 Mass. 1, 20-22, 696 N.E.2d 909, 922-23 (1998).

C. Section 2 of the Restatement (Third) should be adopted simultaneously for all products cases to avoid confusion.

If this Court adopts § 2 of the Restatement (Third), as urged by amici, this Court should not limit its holding to suppliers as opposed to manufacturers, or to warning claims as opposed to design claims. A limited adoption would risk further confusion for trial courts, litigants and jurors. Instead, Pennsylvania's products liability jurisprudence should be updated simultaneously and comprehensively.

Moreover, this case presents an ideal opportunity for this Court to acknowledge the central role of risk-utility balancing, and concepts of reasonableness and foreseeability, in products liability design and warning cases. As Justice Saylor wrote for himself and now-Chief Justice Castille and Justice Eakin in *Phillips*:

> In my view, adoption of the Restatement's closely reasoned and balanced approach, which synthesizes the body of products liability law into a readily accessible formulation based on the accumulated wisdom from thirty years of experience, represents

> the clearest path to reconciling the difficulties persisting in Pennsylvania law, while enhancing fairness and efficacy in the liability scheme.

576 Pa. at 679, 841 A.2d at 1021 (Saylor, J., concurring); *see also id.*, 576 Pa. at 675, 841 A.2d at 1019 (Saylor, J., concurring) ("The Restatement [(Third)]'s considered approach illuminates the most viable route to providing essential clarification and remediation."). Just as this Court was at the forefront in adopting the Restatement (Second) of Torts for this Commonwealth's products liability jurisprudence, this case presents an opportunity to once again move the law forward with the experience that time has brought, by adopting § 2 of the Restatement (Third) of Torts as the law of this Commonwealth.

CONCLUSION

For all the reasons stated above, amici respectfully urge this Court to adopt § 2 of the Restatement (Third) of Torts as the law of this Commonwealth for products liability claims.

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