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The Resurrection of the Consumer Expectations Test: a Regression in American Products Liability

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THE RESURRECTION OF THE CONSUMER EXPECTATIONS TEST: A REGRESSION IN AMERICAN PRODUCTS LIABILITY

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I. INTRODUCTION

In two recent court decisions, the Supreme Courts of Florida and Nevada departed from the United States majority trend for design defect analyses in product liability.[1] In *Aubin v. Union Carbide Corp.*,[2] and *Ford Motor Company v. Trejo*,[3] the Florida Supreme Court and the Nevada Supreme Court, respectively, rejected the use of risk-utility analyses, including that endorsed by the Restatement (Third).[4] "[Thirty-five] of the 46 states that recognize strict products liability utilize some form of risk-utility analyses in their approach to determine whether a product is defectively designed."[5]

In deciding *Aubin* and *Trejo*, Florida and Nevada determined the proper test for product design defects [within their states].[6] Specifically, the Courts decided whether to follow a consumer expectations test, a risk-utility analysis, and/or the Restatement (Third)'s risk-utility analyses.[7]

Aubin involved a product design defect claim for a Union Carbide Corp asbestos product found in joint compound and texture sprays.[8] The Florida Third District Court of Appeals reversed the trial court's judgement for failing to apply the Restatement (Third)'s risk-utility

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[1] *See Branham v. Ford Motor Co.*, 701 S.E.2d 5 (S.C. 2010).
[2] 177 So.3d 489 (Fla. 2015).
[3] 402 P.3d 649 (Nev. 2017).
[4] *Id*; *Aubin*, 177 So.3d at 493.
[5] *See Branham*, 701 S.E.2d at 5.
[6] *Id*; *Aubin*, 177 So.3d at 493; Larry S. Stewart, *Back to the Future: Renewing Strict Product Liability in Florida*, 90-AUG FLA. B.J. 24, 25 (2016).
[7] *Aubin*, 177 So.3d at 493.
[8] *Id*. at 495.

analysis.[9] The Florida Supreme Court then held that the Restatement (Third)'s risk-utility analysis inconsistent with the rationale behind strict product liability and reversed the Third District Court: "in approaching design defect claims, we adhere to the consumer expectations test, as set forth in the Second Restatement, and reject the categorical adoption of the Third Restatement and its reasonable alternative design."[10]

Trejo concerned an alleged product design defect found in the roof of the plaintiffs' Ford sports-utility vehicle.[11] In this case, the Nevada Eighth Judicial District Court declined to use a risk-utility analysis, noting that Nevada has not adopted the Restatement (Third) for design defect claims.[12] The Nevada Supreme Court held that the district court properly used the consumer expectations test[13] as it "[was] not persuaded that the Third Restatement's risk-utility analysis provides a superior framework for analyzing claims of design defect," and thus concluded that "design defect in Nevada will continue to be governed by the consumer-expectation test."[14]

This Note will begin in Part II with a summary products liability. This part will focus on the history of design defect claims with special attention to the Restatement (Second)'s treatment of the consumer expectations test and risk-utility analyses, and the Restatement (Third)'s treatment of risk-utility analyses. In Part III, this Note will discuss

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[9] *Id*. at 493.
[10] *Id*. at 510.
[11] *Trejo*, 402 P.3d at 653.
[12] *Id*.
[13] *Id*.
[14] *Id*. at 657.

current doctrinal trends of state supreme courts. In Part IV, this Note will discuss the outlier decisions by the Florida Supreme Court in *Aubin* and the Nevada Supreme Court in *Trejo*. Finally, in Part V, this Note will conclude by analyzing Florida and Nevada's recent decision to adopt the consumer expectations test as the sole standard, in contrast to the majority of states.

II. OVERVIEW OF PRODUCTS LIABILITY

"Products liability" refers to liability arising from harm caused by products that are sold or leased in the marketplace.[15] Prior to the 1960s, American products liability doctrines failed to hold manufacturers liable for defective products.[16] Courts primarily relied on two doctrines of liability: (1) implied warranty of merchantability, in which manufacturers were held liable for product defects even if the manufacturer exercised all possible care; and (2) negligence, in which manufacturers were held liable for product defects if the manufacturer failed to exercise due care.[17] At the time, both doctrines were constrained by the doctrine of privity, which required a plaintiff to prove a direct contractual relationship with the manufacturer to recover damages.[18]

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[15] AARON D. TWERSKI & JAMES A. HENDERSON JR., TORTS: CASES AND MATERIALS 711 (3rd. ed. 2011).
[16] *Id*.
[17] David G. Owen, *The Evolution of Products Liability Law*, 26 REV. LITIG. 955, 963 (2007).
[18] TWERSKI & HENDERSON, TORTS, *supra* note 15, at 711.

In the mid 1900s, the privity limitation began to wither away with the introduction of negligence principles.[19] For example, in 1964, the New York Court of Appeals became the first court to adopt modern negligence principles when it decided *MacPherson v. Buick Motor Co.*[20] In this case, the Court rejected the privity limitation, holding that manufacturers are liable under a theory of negligence when the product is a "thing of nature" and the manufacturer has knowledge that the danger may occur to others besides the original consumer.[21]

Shortly after, American courts began to recognize that manufacturers of products containing defects should be liable for harm caused by the product regardless of the plaintiffs ability to sustain a warranty or negligence action.[22] Therefore, in 1963, the Supreme Court of California became the first state to adopt strict liability in tort in the case *Greenman v. Yuba Power Products, Inc.*"[23] The American Law Institute quickly followed suit by adopting section 402A as part of the Restatement (Second) of Torts in 1964.[24]

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[19] *See MacPherson v. Buick Motor Co;* 111 N.E. 1050, 1051 (NY. 1916); see also *Henningsen v. Bloomfield Motors, Inc. (*holding that the privity requirement for warranty is "inimical to the public welfare" and "violative of public policy and void.").

[20] *Id*.

[21] *Id*.

[22] RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 (AM. LAW INST. 1998).

[23] 377 P.2d 897 (Cal. 1963) (holding that "implicit in [a product's] presences on the market . . . [is] a representation that it [will] safely do the jobs for which it was built."); TWERSKI & HENDERSON, TORTS, *supra* note 15, at 774.

[24] *See* Owen, *The Evolution of Products Liability Law, supra* note 16, at 963.

The adoption of the Restatement (Second) led to the introduction of two new tort doctrines.[25] The first doctrine – the consumer expectations test – evolved from warranty law and sought to protect consumer's expectations generated from manufacturers' representations about its products.[26] The second doctrine – the risk-utility analyses – evolved from negligence law and sought to balance the benefits of avoiding a risk against the cost of avoiding risks.[27]

The Restatement (Second) also reflected three types of product defects: (1) manufacturing defects, (2) design defects, and (3) defective warnings and instructions.[28] Accordingly, manufacturing defects occur when a product is not made as intended; design defects occur when there is a deficiency in a product that is made as intended by the manufacturer; and defective warning and instructions defects occur when a lack of adequate warning renders a product unreasonably dangerous."[29]

Ultimately, in 1988, the American Law Institute created the Restatement (Third), which was a total overhaul of the Restatement (Second) as it concerns liability of sellers and manufacturers of products. Within the Restatement (Third)'s four-major chapters, the Institute responded to questions that were not part of the American products

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[25] 1 David G. Owens & Mary J. Davis, Owen & Davis on Products Liability, § 8: 2 (4th ed., 2014).
[26] *Id*.
[27] *Id*; 1 David G. Owens & Mary J. Davis, Owen & Davis on Products Liability, § 8: 7 (4th ed., 2014).
[28] David G. Owens, *The Puzzle of Comment J*, 55 HASTINGS L.J. 1377, 1381-82 (2004)
[29] AMERICAN LAW OF PRODUCTS LIABILITY § 17:4 (February 2019 update).

liability scene 35 years ago.[30] Specifically, it adopted the now dominant classification of product defects (manufacturing defects, design defects, and defective warning instructions) and created distinct liability rules for each classification.[31] The Restatement (Third) also revolutionized the previously created risk-utility analyses, incorporating new requirements for imposing liability upon manufacturers, including but not limited to, a showing of a reasonable alternative design.[32] Similar to the prior Restatement, the concept of strict liability reigned supreme in the area of manufacturing defects.[33] However, the Restatement (Third) introduced principles of negligence both for products defective in design and those with inadequate warnings.[34]

In any event, both Restatements have received their fair share of optimistic and pessimistic commentaries. While it remains unclear whether the longer Restatement (Third) will completely displace the more concise Restatement (Second), most modern courts have adopted principles found in both. Thus, it is important to discuss both Restatements in detail to analyze the Supreme Court of Florida's and the Supreme Court of Nevada's outlier decisions.

A. THE RESTATEMENT (SECOND)

Section 402A of the Restatement (Second) proposes that product sellers should be strictly liable for injuries

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[30] *Id*.
[31] RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2; TWERSKI & HENDERSON, TORTS, *supra* note 15, at 742.
[32] TWERSKI & HENDERSON, TORTS, *supra* note 15, at 742.
[33] *Id*. at 743; RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. a.
[34] TWERSKI & HENDERSON, TORTS, *supra* note 15, at 742.

resulting from a product in a "defective condition unreasonably dangerous" to the user, if the seller is engaged in selling said product and the product reaches the user without "substantial change in the condition in which it is sold."[35] These rules apply even if the seller "exercised all possible care in the preparation of his product, and the user and consumer has not bought the product from or entered into any contractual relation with the seller."[36] Thus, a manufacturer or seller can be strictly liable simply by introducing a product into the marketplace.[37]

i. The Consumer Expectations Test

Prior to the implementation of the Restatement (Third), courts focused on section 402A's comments to develop the consumer expectations test.[38]Accordingly, courts held that, under the consumer expectations test, a product is defective in design "if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner."[39]As a result, when a product fails to meet the expectations of an ordinary consumer, there is a rebuttable presumption that the product is defective.[40]

Commenters consistently criticize the consumer expectations test. While the consumer expectations test is

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[35] RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST. 1965).
[36] *Id*.
[37] *Id*.
[38] TWERSKI & HENDERSON, TORTS, *supra* note 15, at 740.
[39] *Id*. at 774; Owen, *The Evolution of Products Liability Law, supra* note 16, at 963.
[40] TWERSKI & HENDERSON, TORTS, *supra* note 15, at 774.

supposed to be objective – based on the expectations of the ordinary reasonable user – the Restatement (Second) lacks structure regarding this test, resulting in unpredictable results.[41] Ultimately, the lack of consensus between courts and commentators led many courts to stray from the sole application of the consumer expectations test to determine a product design defect.[42]

ii. RISK-UTILITY ANALYSIS

As it became clear that one theory of recovery was insufficient for product design defect cases, courts began to apply section 402A of the restatement as a "risk-utility" analysis.[43] Under a risk-utility analysis, American courts considered factors outlined by John W. Wade, including public knowledge of danger, consumers ability to avoid danger, and a product's general usefulness.[44] A product is thus considered unreasonably dangerous if, after assessing all of the factors, a jury determines that the risks of the product's design are greater than the product's benefits.[45]

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[41] DAVID M. HOLLIDAY, AMERICAN LAW OF PRODUCTS LIABILITY. 3d §28:44 (2019).

[42] 63A Am. Jur. 2d *Products Liability* § 938 (2d. ed. Feb. 2019 update); Robert S. Stevens, *The Restatement (Third) of Products Liability: Is it a Reasonable Alternative Design to Tennessee's Products Liability Statute?*, 39 U. MEM. L. REV. 463, 473 (2009).

[43] 63A Am. Jur. 2d *Products Liability* § 938.

[44] John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837-38 (1973).

[45] James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 870-71 (1998); Cami

While the Restatement (Second) played a fundamental role in furthering strict liability principles, it was not long before American products liability laws faced complications. As time persisted, courts began to apply different definitions to the terms found in the Restatement (Second).[46] In an effort to end countless judicial differences, talk of a new, clearer Restatement surfaced.[47]

B. THE RESTATEMENT (THIRD)

The Restatement (Third) states that manufacturers of defective products are "subject to liability for harm to persons or property caused by the defect," and that a product is defective when it contains a manufacturing defect, design defect, or is defective due to inadequate warnings or instructions.[48] Specifically, the Restatement (Third) states that a product is defective in design when:

> . . . the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.[49]

Perkins, *The Increasing Acceptance of The Restatement (Third) Risk Utility Analysis in Design Defect Claims*, 4 NEV. L.J. 609, 611 (2004).

[46] RESTATEMENT (SECOND) OF TORTS §402A cmt. i.

[47] *Id*.

[48] RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 (AM. LAW INST. 1998).

[49] RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2B.

This definition is not exclusive, as a plaintiff can also establish that a product is defective in design through circumstantial evidence.[50] For example, it may be inferred that the plaintiff's harm was a result of a product defect if (1) the incident was one that ordinarily occurs due to a product defect and (2) the incident was the sole result of a product defect occurring during the time of sale or distribution.[51] Further, noncompliance with an applicable government statute or regulation will suffice as proof that a product is defective in design with respect to the risks the statute or regulation seeks to protect.[52]

i. The Restatement (Third)'s Risk-Utility Analysis

Similar to the Restatement (Second), the Restatement (Third) adopts risk-utility analyses, but with a controversial addition. As previously stated, a product design defect occurs when the foreseeable risks of harm from the product could have been avoided by implementing an reasonable alternative design.[53] Under this standard, a plaintiff must show not only the mere engineering feasibility or technical possibility of an alternative design, but also evidence establishing the effect the alternative design would have on the product's safety, utility, and cost.[54] Because of the

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[50] *Id*. at § 3.
[51] *Id*.
[52] *Id*. at § 4.
[53] *Id*. at § 2.
[54] 1 David G. Owens & Mary J. Davis, Owen & Davis on Products Liability, § 5: 16 (4th ed., 2014).

requirement for a reasonably alternative design, the Restatement (Third) rejects the consumer expectations test as an independent standard to determine whether a product is defective in design.[55]

The Restatement (Third) has been roughly criticized by many commenters with most of the concern placed on the reasonable alternative design requirement.[56] Commenters state that this requirement imposes an undue burden, as it creates a "potentially insurmountable stumbling block in the way of those injured by badly designed products."[57] Nonetheless, advocates of the Restatement (Third) have a convincing case. Proponents argue that the Restatement (Third)'s risk-utility analysis provides the fairest test for competing interests by ensuring that injured plaintiffs are compensated and manufacturers are protected from frivolous claims.[58] For reasons including, but not limited to, the one above the Restatement (Third) has received varying commentary from products liability critics.

III. COMBINING THE CONSUMER EXPECTATIONS TEST AND RISK-UTILITY ANALYSES

Substantial differences between the Restatement (Second)'s consumer expectations test and the risk-utility analyses, including that endorsed by the Restatement (Third), have established a rivalry between these two tests. Previously, courts determined design defects by exclusively

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[55] RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2.
[56] Owen & Davis, *supra* note 54, at § 5: 16.
[57] *Id*; Perkins, *supra* note 45, at 614.
[58] Owen & Davis, *supra* note 54, at § 5: 16.

using one test and refusing to recognize the validity of the other.[59] However, because of the Restatement (Second)'s consumer expectations test's vagueness and exorbitant language, modern courts have adopted principles from the risk-utility analyses.[60] Specifically, courts have begun to apply both tests together by (1) defining one test in the terms of the other, and/or (2) establishing each test as a liability prong.[61]

A. SWAPPING TERMS

Quite early in the modern development of American products liability law, a large amount of courts began to combine terms from both the consumer expectations test and risk-utility analyses to determine a product defect.[62] The first case to adopt this rationale was *Seattle-First National Bank v. Tabert*.[63] In *Tabert*, the Supreme Court of Washington defined design defect liability in terms of an "ordinary consumer's reasonable safety expectations."[64] Specifically stating that an ordinary consumer "evaluates a product in terms of safety, recognizing that virtually no product is or can be made absolutely safe."[65] As a result, the Court combined the terms of the two tests by holding that the reasonable expectations of

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[59] 1 David G. Owens & Mary J. Davis, Owen & Davis on Products Liability, § 8: 14 (4th ed., 2014).
[60] *See* 1 David G. Owens & Mary J. Davis, Owen & Davis on Products Liability, § 8: 15 (4th ed., 2014).
[61] Owen & Davis, *supra* note 59, at § 8: 14.
[62] *Id*.
[63] *Seattle-First National Bank v. Tabert*, 542 P.2d 774 (Wash. 1975).
[64] *Id*.at 779.
[65] *Id*.

a consumer included the cost and feasibility of avoiding risk.[66] Since *Tabert*, other courts have followed this approach, shifting the standard of liability from a consumer expectations model to a cost/benefit analysis.[67]

B. THE TWO-PRONGS OF LIABILITY

Courts have also recently embraced a two-prong approach to determine whether a product is defective in design.[68] This approach holds a manufacturer liable by recognizing either of the two tests – the consumer expectations test or a risk-utility analysis.[69] For example, in *Barker v. Lull Engineering Co.*,[70] the plaintiff alleged a product design defect for a Lull Engineering Co. high lift loader.[71] The California Supreme Court reversed the trial court's decision in favor of the plaintiff stating that the trial court erred in design defect instructions.[72] Specifically, the Court held:

> [A] trial judge may properly instruct the jury that a product is defective in design (1) if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if the

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[66] *Id*.
[67] *See* Owen & Davis, *supra* note 60, at § 8: 15.
[68] 1 David G. Owens & Mary J. Davis, Owen & Davis on Products Liability, § 8: 16 (4th ed., 2014).
[69] *Barker v. Lull Engineering Co.*, 573 P.2d 443 (Cal. 1978).
[70] *Id*. at 419.
[71] *Id*.
[72] *Id*.

> plaintiff proves that the products design proximately caused his injury and the defendant fails to prove, in light of the relevant factors, . . . that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design.[73]

The Court also listed supplementary factors relevant to the risk-utility prong of this test such as the financial costs of the alternative design, adverse consequences to the product, and feasibility of the alternative design.[74]

With the exception of *Barker*'s shift in burden, many courts have explicitly accepted this two-prong definition of a design defect.[75] For example, the state of Washington opted in a similar statute which separately provides that "a product design may be considered defective on a finding of the cost-effectiveness of a feasible alternative design and for violating

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[73] Owen & Davis, *supra* note 68, at § 8: 16.

[74] *Id*.

[75] *See* HOLLIDAY, *supra* 42 note §28:98; *see also Long v. TRW Vehicle Safety Systems*, Inc., 796 F. Supp. 2d 1005, 1011 (Ariz. 2011) ("the consumer expectation test applies to claims that seatbelts were defectively designed in that they failed to restrain belted passengers"); *Mikolajczyk v. Ford Motor Co.*, 901 N.E.2d 329, 360 (Ill. 2008)("both the consumer-expectation test and the risk-utility test may be utilized in a strict liability design defect case to prove that the product is 'unreasonably dangerous'"); *Liggett Group, Inc. v. Davis*, 973 So. 2d 467, 476 (Fla. 4th DCA 2007) (Warner, J., concurring) (Typical jury instructions define design defect in terms of the consumer expectations test or, alternatively, a risk-utility analysis).

the safety contemplations of an ordinary consumer."[76] Therefore, by combining the benefits of both tests for a standard of liability, a two-prong system seems to have been the solution to many states' search for the ideal test.[77]

C. COMPLEX VS. SIMPLE DESIGNS

Modern courts' usage of the consumer expectations test and risk-utility analyses vary depending on a product's complexity. For example, some courts limit the consumer expectations prong in areas where consumers have meaningful expectations of product safety.[78] In *Soule v. General Motors Corp.*,[79] the California Supreme Court concluded that in situations where simple products are of concern, the consumer expectations test is appropriate, and in situations where accidents involve complex risk tradeoffs that require an expert explanation, risk-utility analyses should be used exclusively.[80] The Court reasoned that "a complex product, even when it is being used as intended, may often cause injury in a way that does not engage its ordinary consumer's reasonable minimum assumptions about safe performance."[81]

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[76] Owen, *supra* note 68, at § 8: 16. However, Washington's statute deviates from *Barker* as it lacks language stating that the consumer expectations test and risk-utility analysis can be read mutually exclusive from each other.
[77] *Id*.
[78] 1 David G. Owens & Mary J. Davis, Owen & Davis on Products Liability, § 8: 17 (4th ed., 2014).
[79] *Soule v. General Motors Corp.*, 882 P.2d 298 (Cali. 1994).
[80] *Id*.
[81] *Id*. at 308 (citing *Barker*, 573 P.2d at 443).

While many courts adopted *Soule*'s approach to determine the use of the consumer expectations test and risk-utility analyses, some modern courts opted to use risk-utility analyses for both complex and simple product designs.[82] This is because *Soule*'s most prominent flaw is its allocation of the consumer expectations test to simple risk cases, which almost always comprise of obvious design dangers.[83] Obvious dangers are typically expected by the consumer; therefore, in these situations, the risk of injury almost always shifts to the consumer no matter how probable the likely danger or how easy and inexpensive the means of avoiding it.[84] This was ultimately the conclusion in *Mikolajczyk v. Ford Motor Co.*, in which the Illinois Supreme Court adopted an integrated test, making both the consumer expectations test and the risk-utility analyses a product liability standard that can be decided upon by the plaintiff and the defendant.[85] Rejecting the Restatement (Third) but adopting a broadly inclusive risk-utility analysis in which the consumer test is included, the Court emphasized the use of this integrated test for both simple and complex issues.[86]

Some courts ventured further in the unitary use of risk-analyses by using a multi-faceted approach to distinguish liability between complex and simple designs.[87] In *Potter v.*

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[82] Owen & Davis, *supra* note 78, at § 8: 17; *see e.g. Calles v. Scripto-Tokai Corpo*, 864 N.E.2d 249 (Ill. 2007); *Jackson v. General Motors Corp.*, 60 S.W.3d 800 (Tenn. 2001).

[83] Owen & Davis, *supra* note 78, at § 8: 17.

[84] *Id*.

[85] *Mikolajczyk.*, 901 N.E.2d 329 (Ill. 2008).

[86] *Id*.

[87] Owen & Davis, *supra* note 78, at § 8: 17.

Chicago Pneumatic Tool Co,[88] the Connecticut Supreme Court concluded that an "ordinary" consumer expectations test applies when determining design defects for limited simple designs.[89] However, cases involving complex designs would be subject to a "modified" consumer expectations test, in which the product's risk and utility would be established and the "inquiry would then be whether a reasonable person would consider the product design unreasonably dangerous."[90]

Following *Potter*'s approach, courts also noted that when an "ordinary" consumer expectations test fails to provide a rational basis for recovery, a risk-utility analysis is appropriate.[91] For example, in *Izzarelli v. R.J. Reynolds Tobacco Co.*,[92] the Connecticut Supreme Court reaffirmed *Potter*'s dual definition of design by holding that "the ordinary consumer expectations test is reserved for cases in which the product failed to meet the ordinary consumer's *minimum* safety expectations, such as *res ipsa loquitur* type cases."[93] Therefore, some modern courts, like the Connecticut Supreme Court, have implemented the rationale in *Potter* by redefining the terms based on the complexity of the product's design in question.

IV. REJECTING THE RESTATEMENT (THIRD)'S RISK-UTILITY ANALYSIS: FLORIDA AND NEVADA

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[88] *Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319 (Conn. 1997).
[89] *Potter*, 694 A.2d at 1319.
[90] *Id*. at 1333; Owen & Davis, *supra* note 60, at § 8: 15.
[91] *Id*.
[92] *Izzarelli v. R.J. Reynolds Tobacco Co.*, 136 A.3d 1232 (Conn. 2016).
[93] *Id*.

A. FLORIDA

In *Aubin*, the Florida Supreme Court adopted the consumer expectations test as the sole test to determine a product design defect and rejected the use of risk-utility analyses, contrary to modern approaches.[94] In reaching this decision, the Court considered Florida precedent, the Third District Court's use of the Restatement (Third), and supplemental state supreme courts' decisions regarding products liability law.[95]

i. Florida Precedent

The Florida Supreme Court's decision revolved around the landmark case, *West v. Caterpillar Tractor Co.*[96] *West* concerned an alleged product design defect found in a tractor manufactured by the defendant, Caterpillar Tractor Co.[97] The Court unanimously followed the Restatement (Second), concluding that the defendant was liable based on a strict liability theory for these reasons: (1) the public has a right to expect that sellers will stand by their products; (2) the burden of injuries should be imposed on those who place their products on the market; and (3) manufacturers implicitly represent the safety of their products once they are placed on the market.[98]

The Florida Supreme Court went on to state, "since our adoption of the consumer expectations test, we have rejected

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[94] *See Aubin*, 177 So.3d at 493-10.
[95] *Id*.
[96] *Id*; 336 So.2d 80 (Fla. 1976)
[97] *Id*. at 82.
[98] *Aubin*, 177 So.3d at 510.

applying legal principles that are inconsistent with the general philosophy espoused by this Court in *West*."[99] One case the Court used to reinforce this past behavior was *Ford Motor Co. v. Hill*.[100] In *Hill*, the plaintiff claimed that there was a lack of vehicle crashworthiness due to a design defect implicated by the defendant.[101] In response, the defendant requested the use of a risk-utility analysis, stating that the product involved complex engineering issues.[102] The Court denied the defendant's request, concluding that the consumer expectations test is the appropriate standard to apply to all manufactured products.[103]

In its analysis, the Florida Supreme Court also cited Florida precedents[104] to argue that strict liability has been used in design defect claims for decades.[105] Specifically, the Court introduced *McConnell v. Union Carbide Corp.*,[106] which involved the same product and defendant as that found in *Aubin*. In this case, the Court reversed the trial court's decision and upheld the use of the consumer expectations test.[107] The Florida Supreme Court thus introduced precedent

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[99] *Id.* at 503(citing *Auburn Mach. Works Co. v. Jones*, 366 So.2d 1167, 1167 (Fla. 1979)).
[100] *Id*; 381 So.2d 249, 251 (Fla. 4th DCA 1979).
[101] *Id*.
[102] *Id*.
[103] *Hill*, 381 So.2d at 251.
[104] *See, e.g.*, *Samuel Friedland Family Enter v. Amoroso*, 630 So.2d 1067, 1071 (Fla.1994); *Stazenski v. Tennant Co.*, 617 So.2d 344, 346 (Fla. 1st DCA 1993); *Visnoski v. J.C. Penney Co.*, 477 So.2d 29, 29 (Fla. 2d DCA 1985); *Liggett Group, Inc. v. Davis*, 973 So.2d 467, 473-75 (Fla. 4th DCA 2007); *Cintron v. Osmose Wood Preserving, Inc.*, 681 So.2d 859, 861 (Fla. 5th DCA 1996).
[105] *See* Aubin, 177 So.3d at 504.
[106] 937 So.2d 148 (Fla. 4th DCA 2006).
[107] *Id*.

in line with *West* to establish the validity of the consumer expectations test.[108]

ii. Third District Court's Adoption of the Restatement Third

The Florida Supreme Court also claimed that the district court recognized that Florida precedent[109] adopted the consumer expectations test but chose to apply the Restatement (Third)'s risk-utility analysis pursuant to its own precedent — *Kohler Co. v. Marcottee*[110] and *Agrofollajes, S.A. v. E.I. DuPont De Nemours & Co.*[111] In these two cases, the District Courts adopted section two of the Restatement (Third) when it employed a risk-utility analysis as the legal standard for a design defect claim.[112] In contrast, the Florida Supreme Court, in *Aubin*, argued that the Restatement (Third) introduces principles of negligence by (1) requiring proof of a reasonable alternative design and (2) introducing foreseeability of risk to the manufacturer as part of the calculus for a design defect.[113] As a result, the Court concluded that the district courts' decision to depart from *West*, through the adoption of the

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[108] *See* Aubin, 177 So.3d at 504.

[109] *Id*. "The Third District recognized that this Court had adopted the consumer expectations test set forth in section 402A of the Second Restatement in *West* and that the Fourth District *McConnell* applied the consumer expectations test in a case involving the same product."

[110] 907 So.2d 596 (Fla. 3d DCA 2005).

[111] 48 So.3d 976 (Fla. 3d DCA 2010).

[112] *See Aubin*, 177 So.3d at 505.

[113] *Id*.

Restatement (Third)'s risk-utility analysis, was inappropriate.[114]

iii. Comparisons of State Supreme Court's Decisions

In determining whether to adopt the Restatement (Third)'s risk-utility analysis, the Florida Supreme Court considered other state supreme court's decisions; specifically, those that were in line with Florida's jurisprudence.[115] Using *West* as the basis for its argument, the Court argued that strict product liability law is based on the following policy: "[T]he manufacturer, by placing on the market a potentially dangerous product for use and consumption and by inducement and promotion encouraging the use of these products, thereby undertakes a certain and special responsibility toward the consuming public who may be injured by it."[116] Agreeing with the Supreme Court of Wisconsin, the Court argued that the use of section two of the Restatement (Third) would frustrate these policy concerns because the burden of compensating injured consumers of unreasonably dangerous products would not be placed on the manufacturers.[117]

Furthermore, the Court agreed with the Supreme Court of Kansas' conclusion – that the "consumer

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[114] *Id*.
[115] *See e.g. Delaney v. Deere & Co.*, 999 P.2d 930, 946 (Kan. 2000); *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 335 (Pa. 2014); *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727, 751-52 (Wis. 2001); Godoy ex rel. Gramling v. E.I. du Ponte de Nemours & CO., 768 N.W. 2d 674, 686 (Wis. 2009).
[116] *Aubin*, 177 So.3d at 510 (citing *West*, 336 So.2d at 86).
[117] *Id*.

expectations test rightly focuses on the expectations that a manufacturer created."[118] The Florida Supreme Court explained that because a manufacturer plays a pivotal role in a consumer's image of a product, the consumer expectations test is the proper test to determine whether a product is defective in design.[119] The Court argued that the Restatement (Third)'s risk-utility analysis shifts from this focus as the additional burden makes it harder to prove a design defect in negligence cases.[120] Additionally, the Court argued that the consumer expectations test does not favor one party over another.[121] As an example, the Florida Supreme Court held that in cases involving tobacco products, manufactures have sought the application of the consumer expectations test over a risk-utility analysis.[122]

Lastly, the Court argued that the Restatement (Third)'s risk-utility analysis is dispensable in products liability law.[123] Agreeing with the Pennsylvania Supreme Court, the Florida Supreme Court held that outside the context of the Restatement (Third)'s risk-utility analysis, a plaintiff is not precluded from showing that a safer design exists, nor is a defendant precluded from showing that the product could not have been made safer through a reasonable alternative design.[124] The Florida Supreme Court held that the

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[118] *Id*. at 511.
[119] *Id*.
[120] *Id*.
[121] *Id*. (citing Larry S. Stewart, *Strict Liability for Defective Product Design: The Quest for A Well-Ordered Regime*, 74 BROOK. L. REV. 1039, 1059 n. 33 (2009))
[122] *Id*.
[123] *Id*.
[124] *Id*.

Restatement (Third)'s requirement of a reasonable alternative design is different than allowing evidence of a reasonable alternative design.[125] Therefore, considering state supreme courts' decisions, the Court in *Aubin* decided to reject risk-utility analyses by establishing the consumer expectations test as the sole test to determine a product design defect.[126]

B. NEVADA

In *Trejo*, the Nevada Supreme Court strayed from modern product liability approaches by rejecting risk-utility analyses and adopting the consumer expectations test as the sole standard to determine a design defect.[127] In reaching this decision, the Court considered prior Nevada product liability cases as well as the positives and negatives of the Restatement (Third)'s risk-utility analysis.[128]

i. Nevada Precedent

The Supreme Court of Nevada began its analysis by examining the "long-used" consumer expectations test in its own products liability history.[129] Commencing at Nevada's first strict products liability case in 1966, the Nevada Supreme Court examined *Shoshone Coca-Cola Bottling Co. v. Dolinski*.[130] *Dolinski* involved a product design defect claim for a

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[125] *Id*. at 512 (citing *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 397 (Pa. 2014)).
[126] *Id*. at 510.
[127] *See Trejo*, 402 P.3d at 653.
[128] *Id*.
[129] *Id*.
[130] *Shoshone Coca-Cola Bottling Co. v. Dolinski*, 420 P.2d 855, 857 (Nev. 1966).[130]

Shoshone Coca-Cola Bottling Co. soda product.[131] Affirming the jury's verdict, the *Dolinski* Court held that manufacturers are representing to the public that their products are safe solely by placing them on the market.[132]

The Nevada Supreme Court went on to establish that the policies asserted in *Dolinski* led to the adoption of the consumer expectations test in *Ginnis v. Mapes Hotel Corp*.[133] In this case, the Court held that while the definitions of "defect" contain different meanings, they all express that defective products are those that fail to perform in a manner that is reasonably expected from their intended purpose and nature.[134]

Accordingly, the Nevada Supreme Court stated that in its product liability history, Nevada has always relied on the consumer expectations test to determine design defect liability.[135] In fact, Nevada precedent[136] has concluded that an alternative design is one factor that can be used for the jury to decide whether a product is unreasonably dangerous; however, said alternative design must still be commercially feasible.[137] Here, the Nevada Supreme Court's decision in *Trejo* was clearly fashioned from Nevada's products liability precedent.

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[131] *Id*.
[132] *Trejo*, 402 P.3d at 653 (citing *Dolinski*, 420 P.2d at 857).
[133] *Ginnis v. Mapes Hotel Corp*., 470 P.2d 135 (Nev. 1970).
[134] *Id*. at 138.
[135] *Trejo*, 402 P.3d at 653 (citing *Krause Inc. v. Little*, 34 P.3d 566, 571-72 (Nev. 2001)); *Robinson v. G.G,C., Inc.*, 808 P.2d 522, 524 (Nev. 1991).
[136] *See McCourt v. J.C. Penny Co.*, 734 P.2d 696, 698 (Nev. 1987).
[137] *Id*. (citing *Robinson*, 808 P.2d at 525-27).

ii. Risk-Utility Analysis vs. Consumer Expectations Test

The Nevada Supreme Court considered the advantages of risk-utility analyses to determine whether to adopt the Restatement (Third)'s risk-utility analysis over the consumer expectations test. First, the Court noted that numerous States have exclusively adopted risk-utility analyses either in state statutes or in design defect cases,[138] while other state courts have adopted a hybrid approach, using risk-utility analyses only in cases concerning complicated and technical product designs.[139] Courts adopting the later, argue that ". . . consumer[s] d[o] not have ascertainable 'expectations' about the performance of a complex product" and thus the use of a risk-utility analysis provides objective factors that can be analyzed by a jury.[140]

Nevertheless, the Nevada Supreme Court concluded that the proposed benefits of risk-utility analyses are exaggerated.[141] The Court reasoned that a lay jury is sufficiently able to determine whether a complex product performs in a reasonable manner using the consumer

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[138] *Id*. (citing *Gen. Motors Corp. v. Jernigan*, 883 So.2d 646, 662 (Ala. 2003); *Banks v. JCI Americas Inc.*, 264 450 S.E.2d 671, 674 (Ga. 1994); *Wright v. Brooke Grp. Ltd.*, 652 N.W.2d 159, 169 (Iowa 2002); *Toyota Motor Corp. v. Gregory*, 136 S.W.3d 35, 42 (Ky. 2004); J*enkins v. Int'l Paper Co.*, 945 So.2d 144, 150-51 (La. Ct. App. 2006); *Williams v. Bennett*, 921 So.2d 1269, 1273 (Miss. 2006); *Rix v. Gen Motors Corp.*, 723 P.2d 195, 201 (Mont. 1986); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 335 (Tex. 1998).

[139] *Id*. (citing *Soule v. Gen. Motors Corp.*, 882 P.2d 298, 305 (1994); *Mikolajczyk v. Ford Motor Co.*, 901 N.E.2d 329, 347 (2008)).

[140] *Id*. (citing *Douglas A. Kysar, The Expectations of Consumers*, 103 Colum. L. Rev. 1700, 1716 (2003); *Branham*, 390 701 S.E.2d at 5 (2010)).

[141] *Id*. at 655.

expectations test.[142] Emphasizing the Wisconsin Supreme Court's reasoning, the Nevada Supreme Court articulated:

> A determination of "unreasonable danger," like a determination that a product is in a condition not contemplated by the ordinary consumer, does not inevitably require any degree of scientific understanding about the product itself. Rather, it requires understanding of how safely the ordinary consumer would expect the product to serve its intended purpose. [143]

In furthering this concept, the Court stated that in regards to scientific or technical evidence, juries are always asked to make decisions based on complex facts in different types of litigation.[144] Thus, the problems presented in products liability cases are not more insoluble than similar problems found in other areas of strict liability law.[145]

The Supreme Court of Nevada also stated that the Restatement (Third) presents palpable disadvantages.[146] For example, the Court held that the Restatement (Third)'s reasonable alternative design requirement conflicts with Nevada's public policy because it "blurs the distinction between strict products liability claims and negligence claims."[147] Citing to *Aubin* and *Green*, the Court held that unlike the consumer expectations test, which focuses on the

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[142] *Id*.
[143] *Id*. (citing *Green* 629 N.W.2d at 742).
[144] *Id*.
[145] *Id*.
[146] *Id*.
[147] *Id*.

reasonable expectations of the consumer, a risk-utility test undermines this analysis by concentrating on whether the manufacturer considered the "foreseeable risks of harm" when choosing a product design.[148]

The Court also noted that the Restatement (Third)'s focus on the conduct of the manufacturer "imposes an undue burden on plaintiffs that might preclude otherwise valid claims from jury consideration."[149] Therefore, the Nevada Supreme Court upheld the use of the consumer expectations test over risk-utility analyses, after establishing what the Court believed to be the Restatement (Third)'s encumbrances.

V. *AUBIN* AND *TREJO*: A REGRESSION IN AMERICAN PRODUCTS LIABILITY

Aubin and *Trejo*'s import represents a drastic shift from modern product liability laws.[150] The Supreme Courts of Florida and Nevada's decisions to hold the consumer expectations test as the sole determinative analysis represents a regression in American products liability law.[151] Following the Courts' rejection of risk-utility analyses, including that endorsed by the Restatement (Third), commenters are left questioning the validity of the Florida Supreme Court's and the Nevada Supreme Court's arguments.

What is clear is the Courts' decisions to center their arguments on precedent; specifically, precedent that employs dated public policy implications – that manufacturers

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[148] *Id*. (citing *Aubin*, 177 So.3d at 506; *Green*, N.W.2d at 751).
[149] *Id*. (quoting *Potter*, 694 A.2d at 1332).
[150] *See Branham*, 701 S.E.2d at 5.
[151] *Id*.

implicitly represent the safety of their products by placing them on the market and are thus in the best position to protect innocent customers against the harm.[152] While true, this public policy consideration no longer benefits society given today's complex products and technological dependencies.[153] In its place, the Supreme Courts of Florida and Nevada should have considered manufacturers' ability to achieve optimal levels of safety when designing products.[154] As expressed by Henderson and Twerski, "[s]ociety does not benefit from products that are excessively safe – for example, automobiles designed with maximum speeds for 20 miles per hour – any more than it benefits from products that are too risky."[155] Thus, society benefits most when the proper amount of product safety is reached.[156]

Taking into consideration this appropriate public policy, the consumer expectations test, alone, is unfit. Notably, this test implicates manufacturers for a product defect without the deliberation of factors that might expound a manufacturer's decision to utilize a particular design.[157] In contrast, risk-utility analyses, including that recognized by the Restatement (Third), impose liability contingent upon a cost/benefit analysis, which not only allows for the deliberation of factors regarding a manufacturer's choice in

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[152] *Aubin*, 177 So.3d at 510 (refencing precedent including, but not limited to, *West* and *Hill*); *Trejo*, 402 P.3d at 653 (referencing precedent including, but not limited to *Dolinski* and *Ginnis*).
[153] TWERSKI & HENDERSON, TORTS, *supra* note 15, at 747.
[154] *Id*.
[155] *Id*.
[156] *Id*.
[157] *Id*.

design, but also promotes technological growth by reducing fear of impending litigation.[158]

The second argument employed by the Florida Supreme Court and the Nevada Supreme Court – that the Restatement (Third)'s risk-utility analysis places an undue burden on plaintiffs, which precludes otherwise valid claims from jury consideration – is also easily rebuttable. From an evidentiary perspective, a plaintiff's introduction of a safer alternative design would present a more compelling case than one without said proof.[159] There are numerous examples where the Restatement (Third)'s risk-utility analysis achieved a verdict for the plaintiff.[160] For example, as ironically mentioned by the Florida Supreme Court, the plaintiffs in *Kohler* retained a favorable verdict with the use of this design defect standard.[161]

Following the argument above, the Restatement (Third)'s risk-utility analysis is not cumbersome because a plaintiff is not required to produce a prototype of an alternatively designed product, but can use expert testimony to show a reasonable alternative design.[162] A plaintiff is also allowed to show other products already available on the market that may serve a similar function at a comparable risk and cost.[163] Moreover, when looking at the Restatement (Third) as a whole, sections three and four lessen the need for

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[158] *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2

[159] *See* Thomas V. Van Flein, *Prospective Application of the Restatement (Third) of Torts: Products Liability in Alaska*, 17 ALASKA L. REV. 1, 29 (2000).

[160] Henderson & Twerski, *Achieving Consensus on Defective Product Design*, *supra* note 47, at 914-17.

[161] *Kohler*, 907 So.2d at 596.

[162] *See* RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. b.

[163] *Id*.

a reasonable alternative design.[164] For example, a plaintiff is excused from having to establish a reasonable alternative design when a defect may be inferred through *res ipsa loquitur* (section three), and when a product fails to comply with a governmental regulation or statute (section four).[165] Lastly, comment *e* leaves open the possibility that the Restatement (Third) allows a plaintiff to bypass the requirement of a reasonable alternative design when a court concludes that a product is unreasonably dangerous because "the danger posed by its use or consumption so substantially outweighs its negligible social utility."[166] Upon reflection of the state supreme courts' argument, it is noticeable that the Courts are focused solely on section two rather than the Restatement (Third) as a whole.[167] In fact, the Florida Supreme Court and the Nevada Supreme Court refer to other supreme courts[168] that decline to accept the Restatement (Third) precisely because of this fragmented interpretation.[169]

Ultimately, the Courts could have reached a middle ground by adopting a hybrid tactic that endorses a risk-utility

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[164] *Id*.

[165] *Id*. at § 4

[166] *Id*. at § 4 rep. note cmt. b.; *see e.g*., *Wilson v. Piper Aircraft Corp*., 577 P.2d 1322, 1326-27 (Or. 1978); *Armentrout v. FMC Corp*., 842 P.2d 175, 184-85 (Colo. 1992); *Banks v. ICI Americas, Inc*., 450 S.E.2d 671, 674-75 (Ga. 1994); *Kallio v. Ford Motor Co*., 407 N.W.2d 92, 96-97 (Minn. 1987).

[167] *Aubin*, 177 So.3d at 511; *Trejo*, 420 P.3d at 652.

[168] *Aubin*, 177 So.3d at 511 (Referencing the Kansas Supreme Court, Pennsylvania Supreme Court, and Wisconsin Supreme Court.); *Trejo*, 420 P.3d at 652 (Referencing the Wisconsin Supreme Court, Georgia Supreme Court, Alaska Supreme Court, Iowa Supreme Court, Kentucky Supreme Court, Missouri Supreme Court, and Montana Supreme Court).

[169] *See Aubin*, 177 So.3d at 511; *Trejo*, 420 P.3d at 652.

analysis with the burden placed on the manufacturer.[170] Case in point, the Supreme Courts of Florida and Nevada could have implemented the *Barker* approach, which allows a plaintiff to demonstrate that a product is defective through (1) the consumer expectations test or (2) by establishing that the product design proximately caused his injury and the defendant, through a risk-utility analysis, failed to prove otherwise.[171] Given this available standard, the state supreme courts' decision to reject risk-utility analyses due to a plaintiff's "heightened burden" is immaterial.

The Florida Supreme Court and the Nevada Supreme Court made additional unjustified arguments concerning the benefits of the consumer expectations test.[172] For example, the Florida Supreme Court argued that the consumer expectations test is fair to both parties, as both the plaintiff and the defendant can introduce evidence.[173] While this may be true, the consumer expectations test still lacks impartiality. By focusing on the product itself, the consumer expectations test makes it substantially easier for a plaintiff to recover, regardless of whether a manufacturer exercised utmost care.[174] Thus, a risk-utility analysis is the fairest standard for determining a design defect as competing interests are weighed upon consideration of numerous factors, including but not limited to, a reasonable alternative design.[175]

The Florida Supreme Court also claimed that because a manufacturer plays a pivotal role in a consumer's image of

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[170] See *Barker*, 573 P.2d at 443.
[171] *Id*.
[172] *Aubin*, 177 So.3d at 511; *Trejo*, 420 P.3d at 652.
[173] *Aubin*, 177 So.3d at 511.
[174] Perkins, *supra* note 45, at 614.
[175] *Id*.

a product, the consumer expectations test is the proper test to determine whether a product is defective in design.[176] While the consumer expectations test does encapsulate consumer expectations, so too does a risk-utility analysis.[177] In fact, under risk-utility analyses, including that recognized by the Restatement (Third), consumer expectations are not only relevant but "may still substantially influence or even be ultimately determinative on risk-utility balancing."[178]

The Florida Supreme Court could have also imposed a hybrid approach that would have retained the Court's "proper test" argument while simultaneously implementing a risk-utility analysis.[179] This multifunctional test, referred to as the *Tabert* approach, combines both tests by allowing an ordinary consumer to evaluate a product in terms of its safety given numerous factors.[180] Thus, the *Tabert* approach hinders the Florida Supreme Court's argument that a consumer expectations test is a better fit to determine a product design defect.

The Nevada's Supreme Court's decision to reject a hybrid approach because a jury can sufficiently determine whether a complex product performs in a reasonable manner is irrelevant. The flaw in the Restatement (Second)'s consumer expectations test is not that it relies on the ordinary consumer's point of view, but rather that it treats such expectations regarding a manufacturers responsibility as a "ceiling" rather than a "floor."[181] For example, a jury

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[176] *Aubin*, 177 So.3d at 511.
[177] Perkins, *supra* note 45, at 614.
[178] *Id*.
[179] *See Tabert*, 542 P.2d at 774.
[180] *Id*.
[181] See *Barker*, 573 P.2d at 443.

determining liability for a design defect based solely on the consumer expectations test may reach the extreme conclusion that the plaintiff, having suffered injuries, should recover without showing any further evidence.[182] On the other extreme, a jury may conclude that because the product matches the intended design, the plaintiff should be barred from recovery.[183] Therefore, as the majority stated in *Barker*, "the expectations of the ordinary consumer cannot be viewed as the exclusive yardstick for evaluating a design defect because '[i]n many situations . . . the consumer would not know what to expect, because he would have no idea how safe the product could be made.'"[184]

Nevertheless, even if the Supreme Court of Nevada's aforementioned argument is presumed true, the Court could have approached liability of simple and complex design defects by using the *Potter* approach.[185] Accordingly, the Court could have facilitated an "ordinary" consumer expectations test for limited simple design cases and a "modern" consumer expectations tests, which employs a risk-utility analysis, for complex cases.[186] This approach adopts the consumer expectations test as the predominant standard to determine design defects, while simultaneously implementing a preventative measure for extreme outcomes.[187] Thus, there are various modern approaches that the Courts' could have followed that would have rendered most of their arguments obsolete.

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[182] *Id*. at 457.
[183] *Id*.
[184] *Id*. at 443.
[185] *Potter*, 694 A.2d at 1319.
[186] *Id*.
[187] *Id*.

VI. CONCLUSION

The Florida Supreme Court's decision in *Aubin* and the Nevada Supreme Court's decision in *Trejo* exemplify two state supreme courts' decisions to deviate from current products liability approaches by rejecting the use of risk-utility analyses, including that endorsed by the Restatement (Third), to determine a design defect.[188] Most modern courts have adopted some form of risk-utility analysis either following *Tabert*'s combination of terms methodology, *Barker*'s two-prongs of liability approach, or *Soule*'s, *Mikolajczyk, Potter*, and *Izzarelli*'s simple vs. complex design system.[189]

Nevertheless, in both *Aubin* and *Trejo* the Courts expressed rebuttable reasons for their decisions to deviate from modern trends. Specifically, the Florida Supreme Court relied on precedent,[190] Florida public policy, the Third's District Court's "inappropriate" use of precedent,[191] and comparable state supreme court decisions[192] to reach its conclusion.[193] Similarly, in its opinion in *Trejo*, the Nevada Supreme Court not only relied on precedent[194] to reach its

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[188] *See Aubin*, 177 So.3d at 493-10; *Trejo*, 402 P.3d at 649-53.
[189] Owen & Davis, *supra* note 60,68,78, at § 8: 15 – 17.
[190] *See Aubin*, 177 So.3d at 502-12 (Referencing *West*, 336 So.2d at 86).
[191] *See e.g.* Kohler, 907 So.2d at 596; *Agrofollajes,* 48 So.3d at 976.
[192] *Aubin*, 177 So.3d at 511 (Referencing the Kansas Supreme Court, Pennsylvania Supreme Court, and Wisconsin Supreme Court.)
[193] *See e.g. Delaney* 999 P.2d at 946 (Kan. 2000); Tincher, 104 A.3d at 335 (Pa. 2014); *Green*, 629 N.W.2d at 751-52 (Wis. 2001); *Godoy ex rel. Gramling*, 768 N.W. 2d 674, 686 (Wis. 2009).
[194] *See Dolinski*, 420 P.2d at 857; *Ginnis*, 470 P.2d 135 (Nev. 1970).

conclusion, but also emphasized the perceived disadvantages of adopting the risk-utility analyses to determine a product defect.[195] By weighing these factors, the Courts improperly concluded that the consumer expectations test is the proper standard to determine whether a product is defective in design, in contrast to risk-utility analyses, including that recognized by the Restatement (Third).[196]

At length, the state supreme courts' decisions are centered on erred arguments; specifically, the Florida Supreme Court's and the Nevada Supreme Court's arguments concerning precedent and public policy are aligned with dated views.[197] Likewise, the state supreme courts' arguments – that the Restatement (Third) is unduly burdensome, unfair, and unfit – represent the Courts' inability to see the bigger picture and recognize equally proper modern approaches such as that endorsed by *Tabert*.[198] The Nevada Supreme Court's reference to jury interpretation regarding simple and complex product designs also establishes this Court's resistance to suitable modern approaches; specifically, the *Potter* approach.[199] For these reasons, *Aubin* and *Trejo* represent a regression in American products liability, reinstating an unequitable test to determine a product design defect.

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[195] *See Trejo*, 402 P.3d at 649-53.
[196] *Id*; *Aubin*, 177 So.3d at 493-10.
[197] *Id*.
[198] *Id*.
[199] *Id*.