No. 104983

In The
Supreme Court of Illinois

CONNIE MIKOLAJCZYK, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR OF THE ESTATE OF JAMES MIKOLAJCZYK, DECEASED,
Plaintiffs-Appellees,
v.
FORD MOTOR COMPANY, MAZDA MOTOR CORPORATION,
Defendants-Appellants,
and
WILLIAM D. TIMBERLAKE,
Defendant.

Appeal from the Appellate Court of Illinois, First District, No. 1-05-3133.
There Heard on Rule 301 Appeal from the Circuit Court of Cook County, County Department, Law Division, Nos. 00 L 3342, The Honorable James P. Flannery Judge Presiding.

BRIEF OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC. AS *AMICUS CURIAE*

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POINTS AND AUTHORITIES

ARGUMENT

In the First District's decision in this case, the court stated that under Illinois law a plaintiff alleging that a product is defectively designed may prove that the product is unreasonably dangerous *either* through the consumer expectations test (also known as the "consumer contemplation test") or the risk-utility test. *Mikolajczyk v. Ford Motor Co.*, 374 Ill. App. 3d 646, 655, 664 (2007); *see also Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247, 256 (2007); *Lamkin v. Towner*, 138 Ill. 2d 510, 529 (1990).

Under the consumer expectations test, "[a] product is 'unreasonably dangerous' when it is 'dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.'" *Lamkin*, 138 Ill. 2d at 528 (quoting *Palmer v. Avco Distributing Corp.*, 82 Ill. 2d 211, 216 (1980)); *see also* Restatement (Second) of Torts § 402A cmt. i (1965) ("unreasonably dangerous" product is one that is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics").

Under the risk-utility test, "a plaintiff may demonstrate that a product is unreasonably dangerous because of a design defect by presenting evidence of an alternative design that would have prevented the injury and was feasible in terms of cost, practicality and technological possibility." *Hansen v. Baxter Healthcare Corp.*, 198 Ill. 2d 420, 436 (2002); *see also Calles*, 224 Ill. 2d at 259 ("Under the risk-utility test, a plaintiff may prevail in a strict liability design-defect case if he or she demonstrates that the magnitude of the danger outweighs the utility of the product.").

Further, it appears that under the case law of this State, to be found defective a product must pass *both* the consumer expectations and risk-utility tests, whereas if it fails *either* one of these tests, it will be deemed defective. *See Calles*, 264 Ill. 2d at 259 (conclusion that product satisfied consumer expectations "does not end our analysis," because the product "may, nonetheless, be deemed unreasonably dangerous under the risk-utility test").

In this brief, *amicus curiae* urges this Court to reject the consumer expectations test as an independent standard for liability in design defects case. As numerous commentators on products liability have persuasively shown, there is a growing consensus among both States and academics that the consumer expectations test—a remnant from the early days of strict products liability law—has no place in complex design defects cases. That test injects a fundamentally arbitrary and subjective element into the jurisprudence.

Moreover, according to the Reporters for the Restatement (Third) of Torts: Products Liability, there is an underlying "consensus standard for defective design" that "American courts are actually applying," and that standard "is both sound in theory and elegant in application." James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 Cornell L. Rev. 867, 871 (1998) [hereinafter Henderson & Twerski, *Achieving Consensus*]. That standard is supplied by the risk-utility test, which, as articulated in the Restatement (Third) of Torts: Products Liability (1998), requires proof that "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 distributor . . . and the omission of the alternative design renders the product not

reasonably safe." Restatement (Third) of Torts: Products Liability § 2(b). In all but a handful of cases (as described below), the risk-utility test provides a rational basis for evaluating product designs and allocating the risks of harm that necessarily arise from the use of virtually all products in modern society.[1]

I. THIS COURT SHOULD HOLD THAT THE CONSUMER EXPECTATIONS TEST MAY NO LONGER SERVE AS AN INDEPENDENT STANDARD FOR DESIGN DEFECTS

We begin with a number of non-contentious premises. *First*, Illinois, like every other State of which we are aware, *rejects* absolute liability—that is, the concept that a

[1] There are various formulations of the risk-utility test. Some may not require proof of a reasonable alternative design. *See*, *e.g.*, Cami Perkins, *The Increasing Acceptance of the Restatement (Third) Risk Utility Analysis in Design Defect Claims*, 4 Nev. L.J. 609, 609 (2004) (stating that "some courts purport to follow a risk-utility analysis but do not require proof of a reasonable alternative design"). The Restatement (Third) of Torts: Products Liability *generally* does require proof of a reasonable alternative design, although there are exceptional circumstances in which the Restatement would not require such proof. *See* Restatement (Third) of Torts: Products Liability § 2(b) and cmts. d-f. Many courts follow this approach. *See id.* at Reporters' Note to § 2 cmt. d, at § II(A)-(C). Although *amicus curiae* believes that proof of a reasonable alternative design generally should be required in design defects cases—especially when the design issues are complex and require the balancing of numerous risks and benefits—*amicus curiae*'s focus in this brief is on the superiority of the risk-utility generally to the consumer expectations test, and specifically on why the consumer expectations test should no longer constitute an independent standard for assessing whether a design is defective.

manufacturer may be liable without evidence of defect or fault, which would make the manufacturer an insurer of its products. *See Woodill v. Parke Davis & Co.*, 79 Ill. 2d 26, 37 (1980) ("To hold a manufacturer liable for failure to warn of a danger of which it would be impossible to know . . . would make the manufacturer the virtual insurer of the product"); *Hunt v. Blasius*, 74 Ill. 2d 203, 211 (1978) ("Products liability does not make the manufacturer an insurer of all foreseeable accidents which involve its product."); *see also Malave-Felix v. Volvo Car Corp.*, 946 F.2d 967, 972 (1st Cir. 1991) ("A manufacturer is not an insurer of all injuries stemming from the use of its products. . . ."); *Sexton v. Bell Helmets, Inc.*, 926 F.2d 331, 336 (4th Cir. 1991) ("[M]anufacturers are not insurers against all injury involving their products."). *Second*, general rule-of-law values, such as predictability, consistency, fairness, clarity, and rationality, should guide and constrain determinations of liability for product defects. *See*, *e.g.*, John Rawls, *A Theory of Justice* 206-13 (Rev. ed. 1999) (rule of law requires, *inter alia*, that legal rules be just, capable of being complied with, consistently applied in similar cases, known, clearly defined, and prospective).

The consumer expectations test is in tension with these core principles, because it sets forth a subjective standard that exposes manufacturers to liability even if their products are not defective and because the test cannot yield predictable, consistent, fair, clear, rational, and constrained decisions. *See, e.g.*, Cami Perkins, *supra*, 4 Nev. L.J. at 610 ("Despite its seemingly simplistic application, the consumer expectations test has long been criticized as highly subjective, confusing, unpredictable, and unfair to both plaintiffs and defendants depending on its application."). Consequently, there is no way for manufacturers to comply with the consumer expectations test's dictates, because there

is no principled way to determine *ex ante* what, if anything, the reasonable consumer expects with regard to complex design decisions, except, of course, that in designing a product the manufacturer will act in accordance with a reasonable balancing of risks and benefits.

The support for this criticism of the consumer expectations test is overwhelming, and the arguments for retaining the test as an independent basis for assessing liability for alleged design defects are quite weak. For instance, some proponents of the test rely on its alleged incorporation into section 402A of the Restatement (Second) of Torts. *See* Henderson & Twerski, *Achieving Consensus*, 83 Cornell L. Rev. at 879 (discussing argument). But, as Henderson & Twerski show, "any argument that the ALI ever intended the consumer expectations test to constitute an independent, governing standard for design defect liability under section 402A is sheer folly." *Id.*; *see generally* George L. Priest, *Strict Products Liability: The Original Intent*, 10 Cardozo L. Rev. 2301, 2303 (1989) (arguing that drafters of Section 402A did not intend the section to effect a "revolution in tort jurisprudence," that they believed the section would "apply to only a small set of cases," and that they intended 402A's strict liability standard, "with minor exceptions, to apply *only* to what we now call manufacturing defect cases").

More importantly, consumer expectations provide a poor basis for evaluating products for defectiveness because ordinary consumer expectations with regard to complex design issues are both uninformed and often self-contradictory. "In many instances, avoiding one type of design-related risk by incorporating one safety feature can be accomplished only by increasing the probability of encountering another risk of equal or even greater magnitude. Persons injured by either risk will contend that their

expectations were disappointed; and in each separate context, the consumer expectations test provides no means of evaluating one set of expectations against the other. Are both seemingly contradictory claims to be countenanced?" Henderson & Twerski, *Achieving Consensus*, 83 Cornell L. Rev. at 880 (footnotes omitted).

This very case illustrates the dilemma posed by Henderson & Twerski. A more rigid seatback may mitigate certain risks, but only at the cost of *increasing* other risks. As the United States Court of Appeals for the Tenth Circuit explained in a case in which a yielding seat design was found to be non-defective, a more rigid front seat could "virtually slingshot the occupant in the event of a rear impact." *Gardner v. Chrysler Corp.*, 89 F.3d 729, 740 (10th Cir. 1996). Thus, even if an alternative to the design at issue here might have mitigated the injuries in the crash at issue in this case, that alternative might have exacerbated the injuries in a different type of crash. In evaluating whether a product is defective, the relative risks of the design alternatives must be assessed—along with their respective effects on costs, product usefulness, comfort, and a variety of other important factors—to determine whether the product as designed was not reasonably safe. *See Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247, 264-266 (2007) (setting forth non-exhaustive compilation of factors pertinent to risk-utility standard). An inquiry that focuses solely on consumer expectations would provide little or no insight into these issues, and might provide entirely contradictory assessments depending on the nature and circumstances of the injury in the case. This would yield unpredictable, inconsistent adjudications, which would violate both the rule of law values underpinning our legal system, and fail to provide guidance to manufacturers of products.

One might argue that divergent consumer expectations can be evaluated against each other, by presenting to the jury the pros and cons—the risks and utilities—of the competing design options. But to do so simply would be to engage in the very risk-utility analysis to which the consumer expectations test is being offered as an independent alternative. Thus, under the weight of our legal system's demand for *rational* decision making, the consumer expectations test tends to collapse into a risk-utility test, because, by itself, the consumer expectations test cannot provide a fair and rational basis for evaluating complex design decisions. *Cf. Navarro v. Fuji Heavy Indus., Ltd.*, 117 F.3d 1027, 1029 (7th Cir. 1997) (stating that there "is little or no practical difference [between negligence and strict liability] in a case of defective design" other than the fact that in the latter the negligence of another is no defense, and noting that in strict liability cases, plaintiffs are offered a choice of "proving that the design was defective and proving that it was not as safe as the consumer would reasonably have expected," "[b]ut this comes to the same thing; the consumer expects the products he buys not to be defectively designed"); *Baughn v. Honda Motor Co.*, 727 P.2d 655, 660 (Wash. 1986) ("While usually called a 'consumer expectations' test, the . . . rule actually combines the consideration of consumer expectations with an analysis of the risk and the utility inherent in a product's use."); *Seattle-First Nat'l Bank v. Tabert*, 542 P.2d 774, 779 (Wash. 1975) ("In determining the reasonable expectations of the ordinary consumer, a number of factors must be considered. The relative cost of the product, the gravity of the potential harm from the claimed defect and the cost and feasibility of eliminating or minimizing the risk may be relevant . . . .").

Indeed, the consumer expectations test can be said to collapse into a risk-utility test for another more fundamental reason. As a leading text on the law of torts notes, "[i]n a sense the ordinary purchaser cannot reasonably expect anything more than that reasonable care in the exercise of the skill and knowledge available to design engineers has been exercised." W. Page Keeton, et al., *Prosser and Keeton on the Law of Torts* § 99, at 699 (5th ed. 1984); *see also* Restatement (Third) of Torts: Products Liability § 2 cmt. g ("Some courts, for example, use the term 'reasonable consumer expectations' as an equivalent of 'proof of a reasonable, safer design alternative,' since reasonable consumers have a right to expect product designs that conform to the reasonable standard in Subsection (b)."). *This* reasonable consumer expectation simply *is* an expectation that the product will be vindicated under a risk-utility test. *See* Cami Perkins, *supra*, 4 Nev. L.J. at 611 ("Furthermore, one can argue that the consumer expectations test is functionally equivalent to a negligence test. By arguing that an ordinary consumer is not likely to expect more than the exercise of reasonable care by the manufacturer, the consumer expectations test is transformed into a risk-utility test."). In this light, the preservation of the consumer expectations test would irrationally elevate tradition over sense.[2]

[2] The fact that the consumer expectations test tends to collapse into a form of risk-utility inquiry, however, does not mean that the jury should be left to its own devices in assessing the evidence in a design defects case. To the contrary, the subjectivity, indeterminacy, and instability of the consumer expectations test underscore the need not just for the submission of *evidence* relevant to a risk-utility analysis of the design questions at issue in the case, but also *instructions* that apprise the jury of the risk-utility

As noted above, the consumer expectations test also is subjective and indeterminate. This results, in part, from the fact that the implicit psychology of the "ordinary consumer" to whom the consumer expectations analysis refers is not defined by the standard itself. The lack of a fleshed-out profile of the ordinary consumer is highly problematic, because the hypothetical consumer's reasonable expectations will be

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standard. Without instructions on the risk-utility standard, the jury will be left to make a standardless and subjective decision. Furthermore, if the risk-utility standard is the sole independent standard that generally should be applied in a design defects case, then instructions on that standard are necessary under the long-established principle that a party is entitled to have the jury instructed on any theory that is supported by law and for which there is evidence in the record. *See, e.g.*, *People v. Davis*, 213 Ill. 2d 459, 478 (2004) ("A defendant is entitled to have the jury be instructed on defense theories about which there is at least 'slight' evidence.") (citation omitted); *People v. Jones*, 175 Ill. 2d 126, 131-32 (1997) (the failure to instruct on a defense theory with some foundation in the evidence is an abuse of discretion); *Snell v. Weldon*, 243 Ill. 496, 531 (1910) ("Appellee was entitled to present his theory of this evidence to the jury by the instruction, and the mere fact that appellant may contend that the facts are not as stated hypothetically in the instruction is no objection to the instruction as long so it is based upon the evidence."); *Brdar v. Cottrell Inc.*, 372 Ill. App. 3d 690, 704 (5th Dist. 2007) ("A party is entitled to jury instructions that clearly and fairly instruct the jury on each theory of the case that is supported by the evidence."); *see also, e.g.*, *Ortiz v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 852 F.2d 383, 386 (9th Cir. 1987) (in federal court proceedings, a litigant "is entitled to [a jury] instruction if it is supported by law").

determined by his or her attitudes toward risk, as well as his or her preferences with regard to aesthetics, economics, and other factors – that is, by basic features of his or her psychology. *See* Henderson & Twerski, *Achieving Consensus*, 83 Cornell L. Rev. at 881. Some reasonable consumers are more willing than others to trade slightly increased risks for savings in costs, improvements in styling, or other properties.

Because such basic features of psychology vary tremendously in the general population and are not defined in a determinate way by the standard itself, the outcome of any particular case will depend upon the subjective attitudes of the particular jury and, therefore, will be indeterminate (and, hence, unpredictable) in advance of the actual trial. As Prosser and Keeton, explain, "[t]he meaning [of the consumer expectations test] is ambiguous and the test is very difficult of application to discrete problems. What does the reasonable purchaser contemplate? In one sense, he does not 'expect' to be adversely affected by a risk or hazard unknown to him. In another sense, he does contemplate the 'possibility' of unknown 'side effects.'" W. Page Keeton, et al., *supra*, § 99, at 699 (footnote omitted). As a result, "[t]he test can be utilized to explain most any result that a court or jury chooses to reach. The application of such a vague concept in many situations does not provide much guidance for a jury." *Id.*

Ultimately, then, the consumer expectations test requires speculative conclusions about what the ordinary consumer expects with regard to technical product design issues. As Professor Owen notes, "[p]articularly in considering the design adequacy of a complex product—such as an automobile, a pharmaceutical drug, or another chemical product—consumers have no idea how safely the product really ought to perform in various situations. How can an ordinary consumer possibly know the extent of protection

fairly to be expected when an automobile crashes into a tree at 10, 20, or even 40 miles per hour? Lurking at the very heart of the consumer expectations test, the vagueness problem undermines the test in the most complex cases where a reliable standard of liability is needed most." David G. Owen, *Products Liability Law* 299-300 (2005) (footnotes omitted).

Another closely related problem with the consumer expectations test is that a consumer rarely, if ever, expects to be injured by a product. Thus, the fact that an injury occurred could itself convince a jury that the product disappoints "reasonable consumer expectations," and, therefore, is defective. Consequently, the test permits a retrospective or hindsight determination that a defect existed in virtually any instance in which someone was injured.

This susceptibility of the consumer expectations test to the cognitive distortion known as "hindsight" bias is thus another ground for concern. Hindsight bias is the almost universal tendency of people looking back on an incident to overestimate the probability of the accident—that is, its risk—and the extent to which it was foreseeable before it occurred: "In hindsight, people consistently exaggerate what could have been anticipated in foresight. They not only tend to view what has happened as having been inevitable but also to view it as having appeared 'relatively inevitable' before it happened. People believe that others should have been able to anticipate events much better than was actually the case." Baruch Fischhoff, *For those condemned to study the past: Heuristics and biases in hindsight, in Judgment under uncertainty: Heuristics and biases* 335, 341 (Daniel Kahneman, Paul Slovic, & Amos Tversky, eds., 1982).

Hindsight bias has been demonstrated in legal decision-making settings. "In behavioral science it is well-known that people tend to think that whatever happened was bound to happen—and hence people show *hindsight bias* in assessing probability of harm. The present tests find a large hindsight bias when jurors are assessing recklessness after an accident has occurred." Reid Hastie, *Overview: What We Did and What We Found, in Punitive Damages: How Juries Decide* 17, 25 (Cass R. Sunstein, *et al.*, eds., 2002). Although a risk-utility standard might also be subject to hindsight bias effects, it would almost certainly be less so than is a consumer expectations test, because, in an appropriately defined risk-utility inquiry, the manufacturer's design decisions are evaluated in a more forward-looking fashion, focusing on the options available to the manufacturer when the product was produced and sold, whereas, in a consumer expectations test there is no attempt whatsoever to correct for hindsight effects.

A standard that suffers from such subjectivity and indeterminacy can hardly be called a rule of *law*, and certainly must fail in one of law's principal functions: to provide determinate guidance for the conduct of members of the society. For instance, manufacturers frequently must choose between various design options that present different risks and benefits. A consumer expectations test provides no determinate guidance in making such choices, because it is not clear that an ordinary consumer would have *any* reasonable and determinate expectations with regard to the specific complex design choices confronting the manufacturer, and it is quite possible that a consumer would have conflicting expectations depending on the circumstances of the injury that he or she is asked to consider in hindsight. *Cf.* Henderson & Twerski, *Achieving Consensus*, 83 Cornell L. Rev. at 882 ("To the extent to which a fairness-based consumer

expectations standard relies on intuition in attempting to respond to classic design cases not involving product malfunction, it is so vague as to be lawless."). For these reasons, the Restatement (Third) of Torts: Products Liability has decisively (and wisely) abandoned the consumer expectations test as an independent test of liability. *See* Restatement (Third) of Torts: Products Liability § 2, cmt. g ("Under Subsection (b) [of Section 2], consumer expectations do not constitute an independent standard for judging the defectiveness of product designs.").[3]

II. A RISK-UTILITY TEST IS THE CONSENSUS STANDARD FOR DESIGN DEFECTS CASES AND SHOULD BE THE SOLE INDEPENDENT TEST IN MOST DESIGN DEFECTS CASES

As noted above, the risk-utility test is the standard of choice for a growing number of courts. *See* Henderson & Twerski, *Achieving Consensus*, 83 Cornell L. Rev. at 871 (characterizing risk-utility test as the "consensus standard for defective design" that "American courts are actually applying" and that "is both sound in theory and elegant in application"). The reasons for this emerging consensus are compelling.

[3] This is not to say, however, that consumer expectations have no role whatsoever to play in rationally assessing liability in the products liability context. To the contrary, the Restatement (Third) of Torts: Products Liability includes consumer expectations as a *factor* that may be used in evaluating whether a product is not reasonably safe. *See* Restatement (Third) of Torts: Products Liability § 2 cmt. f; *see also* Cami Perkins, *supra*, 4 Nev. L.J. at 615. Our argument is that consumer expectations should not constitute an *independent* standard for assessing liability—that is, it should be not be used as an *alternative* to the utility-risk standard applicable in the general run of design defect claims.

A risk-utility approach is less likely than the consumer expectations test to result in subjective, ad hoc decision making, and poses fewer dilemmas in choosing a perspective from which to evaluate the design of a product. "The operative perspective in risk-utility analysis is the objective one of achieving reasonable design safety from an overall, societal standpoint, not the more subjective perspective of personal (albeit somehow collective), psychological expectations. Risk-utility analysis also better identifies the factual data relevant in reaching decisions on product defectiveness. The social costs considered in risk-utility balancing are the costs of adopting better, safer technology, including both capital and operating costs. The relevant benefits are reductions in accident costs achieved by reducing both the likelihood and the severity of product-related accidents." *Id.* at 882-83 (footnotes omitted).

Moreover, a risk-utility balancing approach best comports with the underlying assumptions of our tort system, specifically, with the fact—noted above—that we do not expect manufacturers to be insurers of their products and that consumers are willing to bear some risks in exchange for other values. We seek not *absolute* safety (and do not impose absolute liability), but rather optimal levels of safety in light of the factors that must be balanced in designing and marketing products. *See* David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. Ill. L. Rev. 743, 754 (1996) (discussing optimal versus absolute safety). As Professor Owen explained in his University of Illinois Law Review article,

> In determining whether the safety of a product's design should be increased further, in searching for the point of optimality, a reasonable design engineer must balance the

> costs and benefits (the risks and utility) of adding increased safety. Balancing assessments are necessary because manufacturers [must accommodate] the often-conflicting interests of three quite different constituencies: (1) consumers generally, who desire an optimal balance between usefulness, cost, and safety; (2) future injury victims, who retrospectively desire absolute safety; and (3) shareholders, who desire safety levels that will generate the highest profit. A reasonable manufacturer must accord equal respect to all such persons by "legislating" levels of safety (and utility and cost) that optimally balance the competing interests of all concerned.

Id. at 758-759 (footnotes omitted). A risk-utility reflects the societal expectations that (1) manufacturers must reasonably weigh the diverse factors and interests relevant to their products, and (2) that manufacturers are not to be regarded as insurers of their products against all risks.[4]

Under our legal system, products liability determinations ultimately depend on whether the product is defective. A product is defective not because it has risks or has caused harm in an accident. Rather, a product is defective when it is not *reasonably safe.*

[4] As Professor Owen notes, "[i]mplicit in finding" that a product does not contain a defect "is the conclusion that its risks of injury fall fairly on users (potential victims) rather than on the manufacturer." David Owen, 1996 U. Ill. L. Rev. at 760 n.81.

The risk-utility test best captures the factors that should be considered in the typical case in which the question whether a product is reasonably safe arises. Because the risk-utility test best comports with the inquiry at the heart of a design defects case, it should guide the determination of the evidence relevant and necessary for such a case and, for the reasons stated in note 2, *supra*, the jury should be instructed to make its liability determination solely on the basis of the risk-utility test.

It bears noting, however, that rational principles of products liability law do *not* require the use of the risk-utility test in *every* case. To the contrary, although the test *generally* should be used (including in cases in which the consumer-contemplation test now provides an alternative independent basis for assessing liability), there are a narrow class of cases in which the general requirement for a risk-utility assessment is not rationally required.

According to the Third Restatement's Reporters, the risk-utility test need not be applied in cases in which the product does not conform with internal design standards (that is, standards devised by the manufacturer itself) or external standards (such as binding standards imposed by statute or a regulatory agency). *See* Henderson & Twerski, *Achieving Consensus*, 83 Cornell L. Rev. at 872-875; *see also* Restatement (Third) of Torts: Products Liability §§ 3, 4.

An internal design standard may be implicit: it may be inferred from the basic functions for which the product is presumably intended. *See* Henderson & Twerski, *Achieving Consensus*, 83 Cornell L. Rev. at 873. As Henderson and Twerski explain, "a producer that sells a new automobile with the manifest (although implicit) intention that it provide safe and effective transportation under normal conditions is liable to those

harmed when the automobile fails dangerously to perform that basic function. For example, if a fire spontaneously starts under the dash of the automobile while it is being driven in a normal, obviously intended manner, then the case for liability is straightforward . . . In effect, the malfunction of the product 'speaks for itself' on the issue of defectiveness . . . ." *Id.* at 874.[5]

Two points bear noting with regard to these limited classes of cases in which a risk-utility analysis is unnecessary.

First, in these cases, a consumer expectations test does not provide an independent basis for liability, although courts sometimes refer to designs that "unexpectedly malfunction as designs that disappoint consumer expectations." *Id.* at 876. A product that dangerously fails to function as it was obviously intended to under normal operating conditions—for instance, a ladder step that collapses as soon as any weight is placed on it or a firearm safety that is disengaged by a gentle squeeze of the trigger—is defective *not* because it fails to live up to consumer expectations—although typically it does disappoint such expectations—but because it fails to accord with the implicit design standards adopted by its producer. *See id.* at 890 ("However, because such cases do not involve the application of the general design standard, it would constitute error to count such cases as support for the consumer expectations test as the general standard."). In this respect, the design defect that is apparent in cases in which the product's malfunction "'speaks for itself'" (*id.* at 874) is essentially similar to a manufacturing defect – the

[5] This Court has recently held that there is no per se exemption from the risk-utility rule for cases involving open and obvious dangers. *See Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247, 250 (2007).

product has failed to meet the internal specifications of its producer, and consumer expectations for the product are not relevant. *Cf. id.* (noting that in this narrow range of cases, "the plaintiff is not required to prove what sort of defect—manufacturing defect or design defect—caused the malfunction; in either event the manufacturer is subject to liability") (footnote omitted).

Second, these classes of cases in which a risk-utility analysis is not required should not be expanded by artificially complicating the design issues presented or by enlarging the presumed functions of the product. As Henderson and Twerski explain, using an example that is quite pertinent to the context here: "In contrast, if any circumstance surrounding an accident extends beyond the narrowly defined performance functions that the producer manifestly (although implicitly) intends, the court may not draw an inference of defect from the mere fact of the accident. Instead, the court must apply the general defectiveness standards to determine the producer's responsibility for design-related injury. For example, if a driver operated an automobile in such a manner as to collide violently with another automobile, resulting in harm to the occupants, the measure of defectiveness described in this discussion of implicit internal standards would not be applicable because the producer presumably does not intend violent collisions. To be sure, collisions are reasonably foreseeable, and the general design standard may support a conclusion of defectiveness based on the design's inadequate crashworthiness. However, the automobile's defectiveness would not be demonstrable in the sense being developed here . . . . [A]n inference of defect is supported only when the very nature of the accident supports the conclusion that the product failed to function as the producer itself must have intended it to function." *Id.* at 874-875 (footnote omitted); *cf. Mieher v.*

Brown, 54 Ill. 2d 539, 542-543 (1973) (stating that "the intended use of an automobile does not include its participation in collisions despite the manufacturer's ability to foresee the possibility that such collisions may occur").

Thus, in the far more usual case—including the case at issue here—more will be required than the mere fact of an accident to establish that a product is defective. A "general design standard" (Henderson & Twerski, *Achieving Consensus*, 83 Cornell L. Rev. at 875) will be necessary. As Henderson & Twerski, numerous other commentators, and a growing number of courts persuasively explain, that standard should be determined by a risk-utility analysis, rather than a consumer expectations test—a conclusion reflected in the Restatement (Third) and in the overwhelming preponderance of the case law. *See, e.g.*, Restatement (Third) of Torts: Products Liability § 2, cmt. g ("Under Subsection (b) [of Section 2], consumer expectations do not constitute an independent standard for judging the defectiveness of product designs.").

CONCLUSION

For the foregoing reasons, this Court should hold that the consumer expectations test no longer may be used by the courts of this State as an independent basis to assess whether the design of a product is defective. Rather, subject to only the limited exceptions set forth above, the risk-utility test should be the sole test used to determine the existence of design defects in cases in this State.

Dated: November 7th, 2007

Respectfully Submitted

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b) and Rule 345(b). The length of this brief is 23 pages.

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Jeffrey W. Sarles

CERTIFICATE OF SERVICE

The undersigned, an attorney, duly certifies, that, on this 7th day of November, 2007, the Corrected Brief of the Alliance of Automobile Manufacturers, Inc. As *Amicus Curiae* has been served by U.S. Mail upon the following attorneys hereinafter indicated, by placing three copies of the same into an envelope properly addressed with the requisite postage prepaid and depositing the same at the United States Post Office at Chicago, Illinois.

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CERTIFICATE OF MAILING

The undersigned, an attorney, duly certifies, that, on this 7th day of November, 2007, twenty (20) copies of the Corrected Brief of the Alliance of Automobile Manufacturers, Inc. As *Amicus Curiae* and one copy of the Motion of the Alliance of Automobile Manufacturers, Inc. for Leave to Appear as *Amicus Curiae* have been placed in the U.S. Mail for filing in this Court by depositing the same with appropriate postage prepaid at the United States Post Office at Chicago, Illinois and addressing the package as follows:

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