IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 23-192

JUDITH A. SHEARS and GARY F. SHEARS, JR.,
Petitioners,

v.

ETHICON, INC. and JOHNSON & JOHNSON,
Respondents.

BRIEF ON BEHALF OF *AMICUS CURIAE* THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF RESPONDENTS

Thomas J. Hurney, Jr. (WV Bar No. 1833)
Blair E. Wessels (WV Bar No. 13707)
JACKSON KELLY PLLC
Post Office Box 553
Charleston, West Virginia 25322
(304) 340-1000
thurney@jacksonkelly.com
blair.wessels@jacksonkelly.com

Jonathan M. Hoffman (Oregon Bar No. 754180)
MB Law Group
117 SW Taylor Street, Suite 200
Portland, Oregon 97204
(503) 914-2015
JHoffman@MBLGLaw.com
Pro Hac Vice Forthcoming

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I. INTEREST OF THE *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. ("PLAC") is a not-for-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers.[1] PLAC seeks to contribute to the improvement and reform of law in the United States, emphasizing the law affecting the liability of product manufacturers and others in the supply chain. PLAC's national perspective arises from the experiences of its corporate members in diverse manufacturing industries in courts across the United States. Several hundred leading product liability defense attorneys are sustaining (non-voting) members of PLAC and contribute their breadth and depth of experience to PLAC's activities. Since 1983, PLAC has filed over 1,200 briefs as *amicus curiae* in both state and federal courts presenting the broad perspective of product manufacturers seeking fairness and balance in the law affecting product liability and risk management.

West Virginia's design defect jurisprudence is not well developed. The Supreme Court of Appeals of West Virginia first articulated the standard for evaluating product defect in strict liability 44 years ago in *Morningstar v. Black & Decker Manufacturing Co.*, 253 S.E.2d 666 (W. Va. 1979). As described in *Morningstar*, the "key component" of strict liability is to "remove the burden from the plaintiff of establishing in what manner the manufacturer was negligent," while still requiring proof of a product defect and proximate cause. *Id.* at 680. In the decades since, and perhaps because West Virginia product liability actions are so often litigated in federal court, this Court has had few occasions to define the contours of West Virginia design defect liability.

This case presents an issue of significant interest to PLAC members—the evidence

[1] Counsel for the parties authored no part of this appellate brief, nor has any party or its counsel made any monetary contribution specifically intended to fund the preparation of submission of this brief. W. Va. R. App. P. 30(e)(5).

necessary to state a claim for design defect liability under West Virginia law, and whether the State will remain in the mainstream of product liability law by adopting the design defect standard set forth in the Restatement (Third) of Torts: Products Liability (1998) (hereinafter "Restatement (Third)") and followed in the vast majority of the states. Here, PLAC urges the Court to adopt standards requiring plaintiffs to establish that there was a superior, materially safer design available at the time the product was manufactured and sold.

II. STATEMENT OF THE CASE

PLAC adopts the Respondents' Statement of the Case to the extent necessary for the arguments stated herein.

III. ARGUMENT

A. How We Got Here: From Restatement (Second) of Torts, Section 402A to Restatement (Third).

1. Section 402A, Restatement (Second) of Torts.

The American Law Institute approved Section 402A of the Restatement (Second) of Torts (hereinafter "Section 402A") in 1964, transforming the product liability landscape by adopting the rules of liability intended to govern the liability of manufacturers selling products in the stream of commerce. *See, e.g.*, Kyle Graham, *Strict Products Liability at 50; Four Histories*, 98 Marq. L. Rev. 555, 563 (2014). Section 402A opened the door for strict tort liability nationally, freeing plaintiffs from privity and other contract limitations as well as obviating the need to prove negligence. *See id.*; *see also Morningstar*, 253 S.E.2d at 679–80 (noting that Section 402A permitted recovery for personal injuries from a manufacturer of a product, even when no privity of contract existed between the injured party and manufacturer and in the absence of any negligence on the part of the manufacturer).

But Section 402A was not built to address liability for design defects; such claims were

virtually unknown at the time. *See* Aaron D. Twerski and James A. Henderson, Jr., *Manufacturers' Liability for Defective Designs: The Triumph of Risk-Utility*, 74 Brooklyn L. Rev. 1064, 1063–64 (2009) ("Because the drafters of section 402A had in mind only manufacturing defects, they saw no reason to distinguish among other types of defects to which their strict liability rule might apply."). Clear rules for such cases did not appear until the publication of the Restatement (Third) in 1998. In the interim, "American courts and legislatures grappled for over a quarter century with the crucial issue of whether defectively designed products, and products with defective warnings, should come under a strict liability 'hindsight' rule as defectively manufactured products did, or whether they should come under a more realistic 'foreseeability' rule." Peter Nash Swisher, *Products Liability Tort Reform: Why Virginia Should Adopt the Henderson-Twerski Proposed Revision of Section 402a, Restatement (Second) of Torts*, 27 U. Rich. L. Rev. 857, 863 (1993); *see also* David G. Owen, *Design Defect Ghosts*, 74 Brooklyn L. Rev. 927, 927 (2009) ("[F]rom the time the American Law Institute (ALI) approved section 402A in 1964 . . . , courts and lawyers struggled to apply its 'strict' liability principles beyond manufacturing defects, a context where such principles comfortably grounded liability determinations, to the then-emerging context of design safety, where section 402A's consumer expectations test proved increasingly inadequate."). During this interim period, the Supreme Court of Appeals decided *Morningstar*, thus beginning the process of developing West Virginia's products liability law.

2. Restatement (Third) of Torts: Products Liability

The Restatement (Third) project evaluated thirty-plus years of nationwide jurisprudence decided under Section 402A and the common law and distilled a set of rules and standards applicable to all defective product claims, as well as other types of products liability

unaddressed in Section 402A. Section 2 of the Restatement (Third) described three separate categories of product defect: manufacturing defects, design defects, and labeling defects (*i.e.*, failure to adequately warn). Restatement (Third), § 2(a)–(c). Separate, disparate liability standards were prescribed for each defect category, reflecting their differences. The rules are elaborated and further clarified by the Reporters' detailed Notes and Comments.

Section 2(b) of the Restatement (Third) sets forth the general rules governing claims for design defect litigation. Based on a comprehensive review of the standards applied to adjudicate design defect claims in all states, Section 2(b) establishes a risk-utility balancing test which asks the jury to weigh the risks and benefits of the manufacturer's design against the risks and benefits of a design alternative. *Id.*; *see also* Twerski et al., 74 Brooklyn L. Rev. at 1068. The Restatement (Third)'s alternative design requirement is central to the concept of a design defect. The ultimate question is whether "the omission of a reasonable alternative design renders the product not reasonably safe." Restatement (Third), § 2, cmt. *f*. The Restatement (Third) lists a variety of factors that might be relevant to determine if the risks of the design outweigh its benefits and render the design "not reasonably safe."[2]

This alternative design requirement is a crucial component of any claim of defective design that calls for risk-utility balancing. *See id.*, § 2, cmt. *n*. Whether the design defect claim is couched in terms of strict liability or negligence makes no difference. *Id.* (clarifying that so long as the requisite proof of an alternative design is supplied by plaintiff, "doctrinal tort

[2] Under the Restatement (Third), risk-utility balancing—and presentation of a superior alternative design—is not *always* required to prove a design defect. For example, in certain limited circumstances, a plaintiff may prove a defect under a product malfunction theory (Section 3), demonstrate that the design violated a governmental safety standard (Section 4), or establish that the product is unreasonably dangerous *per se* (*i.e.*, the product is so dangerous and has such minimal general social value that it should not be marketed at all (Section 2, cmt. *e*). None of these methods require risk-utility balancing and comparison to a putative alternative design. None of them apply here.

categories such as negligence or strict liability may be utilized in bringing the claim"). As explained below, *Morningstar* is consistent with the position of the Restatement (Third).

3. The Restatement and the Vast Majority of States Properly Recognize That the Safety and Quality of a Product's Design Must Be Measured By Evaluating It Against the Available Alternatives.

In arguing they were not required to establish a safer alternative design, Plaintiffs appear to have overlooked how a "defect" is ordinarily measured in the context of a design defect claim. Design claims are radically different from traditional Section 402A manufacturing defect claims (*e.g.*, a car or other machine breaks because a worker on the line failed to tighten an important screw, thereby causing an accident). Many products necessarily and unavoidably carry risks. A car is not defective merely because it is designed to go fast and can cause serious injuries in high-speed accidents. All medications pose potential risks; that a small percentage of individuals experience side effects does not render a medication defective in design. Accordingly, manufacturers ordinarily are not subject to liability unless "the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design and the omission of the alternative design renders the product not reasonably safe." Restatement (Third), § 2(b).

The relevant screening question in design defect cases should simply be whether experts have adequately demonstrated how an alternative design would have significantly reduced or avoided the harm. The alternative design requirement provides the jury with a critical, objective basis to evaluate the reasonableness of the manufacturer's choice of design specifications. *Id.* at § 2, cmt. *d* (design defect "requires reference to a standard outside the [design] specifications"). The design cannot meaningfully be assessed in a vacuum.

In *Morningstar*, after Section 402A had transformed product liability law in the 1960s and

70s, this Court sought to describe the basic rules governing product liability cases as of 1979. The Court reviewed decisions throughout the United States. *See Morningstar*, 253 S.E.2d at 676–77. Recognizing that Section 402A changed the law, the Court issued guidelines for West Virginia courts. *Id.* at 678–84. Since then, product liability rules have continued to evolve. Just as science, engineering, electronics, and other technology have developed and evolved, resulting in increasingly complex products, the law inevitably needs to evolve and adapt to become more sophisticated as well. The Restatement (Third) did so by prescribing modernized rules for proving design defect claims based on decades of nationwide judicial experience and expert analysis.

As we next explain, the Restatement (Third) and majority rule requiring a plaintiff to prove that the product's design was not reasonably safe because there were alternative designs offering superior safety has, with experience, proven to be a sound basis for adjudicating claims of design defect. This Court reached a similar conclusion in *Morningstar*, and reaffirmed that view in *Church v. Wesson*, 385 S.E.2d 393 (W. Va. 1989). The alternative design requirement is also reflected that standard in Section 411 of the *West Virginia Pattern Jury Instructions for Civil Cases*. This Court should now confirm that this is the rule in West Virginia.

B. Sound Policy and Logic Support the Alternative-Design Requirement.

The process of designing a product necessarily involves design choices and trade-offs that impact the performance and utility of the product, its safety, durability, and aesthetics. To return to the car example, the ability to achieve 70+ miles per hour adds considerable risk, but a car incapable of highway speeds, though safer, would be prohibitively inefficient and unpopular.

For these reasons, from early in the development of modern product liability law, influential scholars called for a balancing analysis of the design's risks and benefits in defining the elusive notion of a "defective" product design. *See* Page Keeton, *Product Liability and the*

Meaning of Defect, 5 St. Mary's L.J. 30, 39 (1973) ("[T]here is no way to avoid a risk-benefit analysis in passing upon designs."); John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 834–35 (1973) (developing multi-factor list for balancing risk and utility for purposes of evaluating product design). *Morningstar* endorsed this balance in defining a defective product as one which is "not reasonably safe for its intended use," 253 S.E.2d at 683; *see also Mullins v. Ethicon, Inc.*, 117 F. Supp. 3d 810, 821 (S.D.W. Va. 2015) (*Morningstar* crafted "what is in effect a coherent risk-utility test that applies to all products."). By the time the Restatement (Third) was published, the vast majority of courts had adopted the risk-utility test (over the competing consumer expectations test) in evaluating design defects. *See* David G. Owen, *Toward a Proper Test for Design Defectiveness; "Micro-Balancing" Costs and Benefits*, 75 Tex. L. Rev. 1661, 1661–62 (1997).

A consensus of commentators have concluded that proof of a reasonable design alternative is a necessary component of an informed risk-utility balancing. The risk-utility test cannot be meaningfully applied "without having an alternative design by which to make the comparison and conduct the analysis." Michael D. Green, *The Schizophrenia of Risk-Benefit Analysis in Design Defect Litigation*, 48 Vand. L. Rev. 609, 616 (1995). The question actually litigated in design defect cases "almost always is a micro-balance of the pros and cons of the manufacturer's failure to adopt some alternative design that would have prevented the plaintiffs harm . . . ." Owen, 75 Tex. L. Rev. at 1675. It is the manufacturer's choice (conscious or not) to avoid a particular modification that is the matter "truly at issue in almost every design defect case." *Id*.; *see also* Theodore S. Jankowski, *Focusing on Quality and Risk: The Central Role of Reasonable Alternatives in Evaluating Design and Making Decisions*, 36 S. Tex. L. Rev. 283, 292 (1995) ("This [reasonable alternative design] requirement is both eminently fair and necessary. If manufacturer decisions

based on complex tradeoffs are being challenged as 'wrong,' it is necessary to understand the alternative decision proposed which is being advanced as 'right.'"); Annot., *Burden of Proving Feasibility of Alternative Safe Design in Product Liability Action Based on Defective Design*, 78 A.L.R.4th 154, 157 (1990) ("The reasonableness of choosing among various alternative product designs and adopting the safest one if it is feasible is not only relevant in a design defect action, but is at the very heart of the case.").

The law does not impose strict liability on manufacturers for designing products that pose a degree of risk. *See* David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. Ill. L. Rev. 743, 754 (1996) ("Because 'strict' liability implies that any degree of risk is simply wrong, it is intrinsically deficient as a true standard for design liability."). No manufacturer can design an entirely accident-proof product. The alternative design requirement recognizes that a jury cannot meaningfully assess the reasonableness of a manufacturer's design choices (*i.e.*, whether a product design is defective), without evidence of the design alternatives that were available, including the comparative risk, benefit, and expense associated with adopting an alternative design. As one article points out,

> [a]ny logical treatment must recognize that a manufacturer's decision can only be 'wrong' in the context of 'right' alternatives that were available. The requirement of alternative availability establishes a juridical control against comparing time-of-sale manufacturer decisions with time-of-trial options that were not feasible at the time of sale. Without this requirement, the manufacturer becomes an insurer of the product.

Jankowski, 36 S. Tex. L. Rev. at 324; *see also Morningstar*, 253 S.E.2d at 877 (acknowledging that this kind of absolute liability is not desirable in products liability law, and that "[s]trict liability does not make the manufacturer or seller an insurer nor does it impose absolute liability"); *Sexton v. Bell Helmets, Inc*., 926 F.2d 331, 336 (4th Cir. 1991) ("[M]anufacturers are not insurers against all injury involving their products. . . .While conformity with industry practice is not conclusive

of the product's safety, . . . the cases where a member of industry will be held liable for 'failing to do what no one in his position has ever done before' will be infrequent." (citation and internal quotation marks omitted)); *Holman v. Mark Indus., Inc*., 610 F. Supp. 1195, 1201 (D. Md. 1985) ("A manufacturer does not insure its product and is not required to make its product accident proof or to design the safest possible machine. . . . [T]he duty assumed by a manufacturer is to design the product for its intended use, namely that use which could reasonably be foreseen.").

C. The Reasonable Alternative Design Requirement is the Strong Majority Rule for Design Defect Cases Sounding in Negligence As Well As Strict Liability.

The logic and policy supporting the reasonable alternative design requirement applies with equal—and perhaps greater—force in the negligence context. Both negligence and strict liability require the same design evaluation, only negligence is measured by the added requirement of establishing that the choice of the adopted design over the available alternative was a careless one, because the proposed alternative design was superior from a safety standpoint without compromising quality, economy, usefulness, or aesthetics. Courts understand a negligence products liability case is more difficult to prove than a strict liability case. Indeed, that was a central basis for developing a strict liability standard in the first place. *Morningstar*, 253 S.E.2d at 679–80. It would be anomalous then to require a reasonable alternative design in a strict liability case but to forego such a requirement in pursuing a negligent design defect case.

Accordingly, the overwhelming majority of states that have addressed the issue have followed the reasoning of the Restatement (Third) to require plaintiffs to prove a feasible alternative design to prevail on a negligent design claim. Indeed, in the Notes and Comments of the Restatement (Third), the Reporters included nearly 70 pages of cases that are consistent with and adopt the Restatement's requirements for both negligent and/or strict liability claims. *See* Restatement (Third), § 2, at pp. 40–110; *see also Beech v. Outboard Marine Corp*., 584 So.2d 447,

450–51 (Ala. 1991) (**Alabama**: defectiveness for purposes of negligent design is established by proving "that a safer, practical, alternative design was available to the manufacturer at the time it manufactured the [product]" (citation omitted)); *Richards v. Michelin Tire Corp.*, 21 F.3d 1048,1056 (11th Cir. 1994) ("[U]nder Alabama law, a plaintiff must prove . . . a safer, practical, alternative design" to show defectiveness for purposes of a negligent design claim.); *Edwards v. Skylift, Inc.*, 39 F.4th 1025, 1030–31 (8th Cir. 2022) (**Arkansas**: negligent design claim failed without evidence that manufacturer's design fell short of contemporary industry standards); *Trejo v. Johnson & Johnson*, 220 Cal. Rptr.3d 127, 142 (Cal. Ct. App. 2017) (**California**: defining defective product in terms of an alternative design); *Whiteley v. Philip Morris Inc.*, 11 Cal. Rptr. 3d 807, 862–63 (Cal. Ct. App. 2004) (upholding dismissal of negligent design claim where plaintiffs could not prove that failure to adopt a safer alternative design caused their injuries); *Staley v. Bridgestone/Firestone, Inc.*, 106 F.3d 1504, 1511 (10th. Cir. 1997) (**Colorado**: to recover for a claim of negligent design, the plaintiff "must show not only that the alternative is safer but that it was practicable and available" at the time of the product's sale); *Hull v. Eaton Corp.*, 825 F.2d 448, 453 (D.C. Cir. 1987) (**District of Columbia**: whether claim is premised on negligence or strict liability, the plaintiff must establish alternative designs to show a defect); *Maynard v. Snapchat, Inc.*, 870 S.E.2d 739, 745–46 (Ga. 2022) (**Georgia**: "Under either [negligence or strict liability], the factfinder performs a risk-utility analysis, assessing the reasonableness of choosing among various alternative product designs by asking whether the risk of harm outweighs the utility of a particular design to determine whether the product is not as safe as it should be." (internal quotations omitted)); *Puckett v. Oakfabco, Inc.*, 979 P.2d 1174, 1181 (Id. 1999) (**Indiana**: proof of a "reasonable alternative design" which could "reduce[] or avoid[]" the harm to plaintiff is necessary to prove design defect for both strict liability and negligence); *Burt v. Makita USA, Inc*.,

212 F. Supp. 2d 893, 900 (N.D. Ind. 2002) (reasoning that "a design claim under Indiana law is a negligence claim," and summary judgment was warranted on account of plaintiff's failure "to show a feasible alternative design that would have reduce the risk of injury"); *Wurster v. Plastics Group, Inc*., 917 F.3d 608, 613–14 (8th. Cir. 2019) (**Iowa**: Iowa law requires evidence of an alternative design to prove design defect under negligent theory); *Toyota Motor Corp. v. Gregory*, 136 S.W.3d 35, 42 (Ky. 2004) (**Kentucky**: "Kentucky law . . . stands for the proposition that design defect liability requires proof of a feasible alternative design."); La. Rev. Stat. 9:2800.57A(l) (**Louisiana**: statute codifying the requirement to prove the existence of an alternative design in any product liability claim alleging a defect in design); *Stanley v. Schiavi Mobile Homes, Inc.*, 462 A.2d 1144, 1148 (Me. 1983) **(Maine**: "In actions based upon defects in design, negligence and strict liability theories overlap . . . proof [of a defect] will involve an examination of the utility of its design, the risk of the design and the feasibility of safer alternatives."); *Tersigni v. Wyeth*, 817 F.3d 364, 369 (1st Cir. 2016) (**Massachusetts**: "Tersigni's claim [for negligent design] fails because he cannot offer proof of a reasonable alternative design, as Massachusetts law plainly requires."); *Croskey v. BMW of N. Am., Inc*., 532 F.3d 511, 515 (6th Cir. 2008) (**Michigan**: to prove a theory of negligent design defect, plaintiff must show the product was not reasonably safe and that a "feasible alternative production practice" was available that would have prevented the harm without impairing the product's utility); *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 96 (Minn. 1987) (**Minnesota**: establishing that a product was unreasonably dangerous in its design normally requires production of a feasible, alternative safer design); Miss. Code Ann. § 11-1-63 (**Mississippi**: statute recognizes proof of a feasible alternative as necessary to prove defect in design, whether based on a theory of strict liability or negligence); *Adamo v. Brown & Williamson Tobacco Corp.*, 900 N.E.2d 966, 968 (N.Y. 2008) (**New York**: "While this is a negligence, not a

strict liability, case, similar requirements apply - specifically, plaintiffs here had to prove that it was feasible to design the product in a safer manner."); N.C. Gen. Stat. § 99B-6(a)(l) (**North Carolina**: establishing alternative design as a statutory requirement to establish design defect); *Sparks v. Oxy-Health, LLC*, 134 F. Supp. 3d 961, 986 (E.D.N.C. 2015) (plaintiff proves product defect, the first element of a negligent design claim, through evidence of a feasible alternative design); *Tosseth v. Remington Arms Co., LLC*, 483 F. Supp. 3d 659, 672 (D.N.D. 2020) (**North Dakota**: "[A] design defect arises when the risk of harm of the current design is unreasonable and could have been reduced or avoided by the use of an alternative design."); Ohio Rev Code § 2307.75 (**Ohio**: "A product is not defective in design if, at the time the product left the control of its manufacturer, a practical and technically feasible alternative design . . . was not available that would have prevented the harm without substantially impairing the usefulness or intended purposes of the product."); *Spear v. Atrium Med. Corp.*, 621 F. Supp. 3d. 553, 558 (E.D. Pa. Aug. 12, 2022) (**Pennsylvania**: unless proceeding under a theory that the product was "too dangerous to market," plaintiffs will "ultimately bear the burden of proving a feasible alternative design" in their action for design defect); *Branham v. Ford Motor Co.*, 701 S.E.2d 5, 16 (S.C. 2010) (**South Carolina**: "[I]n a product liability design defect action, the plaintiff must present evidence of a reasonable alternative design."); Tex. Civ. Prac. & Rem. Code §82.005(b)(l) (**Texas**: the plaintiff has the burden to prove a safer alternative design in any products liability action for design defect); *Henrie v. Northrop Grumman Corp.*, 502 F.3d 1228, 1233, 1236–37 (10th Cir. 2007) (**Utah**: whether couched in strict liability or negligence, a plaintiff asserting a design defect claim has the burden of proving a safer, alternative design); *Evans v. Nacco Materials Handling Group, Inc.*, 810 S.E.2d 462, 471 (Va. 2018) (**Virginia**: "[A] design is not objectively unreasonable unless the plaintiff can show that an alternative design is safer overall than the design used by the

manufacturer."); Wash. Rev. Stat. §7.72.030(l)(a) (**Washington**: making proof of "an alternative design that was practical and feasible" an element of a product liability design defect claim).

The general consensus is compelling. After decades of considering the contours of liability for defectively designed products, most states agree that the plaintiff must establish evidence of a defect through failure to adopt a superior, feasible alternative design. West Virginia should follow the majority of states and harmonize its jurisprudence to require proof of a safer alternative in any design defect case, no matter the theory of liability.[3]

D. The Alternative-Design Requirement Provides Consistency for Manufacturers Who Market Their Products Throughout the United States.

Most products sold in interstate commerce are designed for sale throughout the country. Economic efficiency, fairness, and sound policy all support imposing on manufacturers the same or substantially similar standards throughout the nation, to the extent possible. Grounding rules in the Restatement (Third) fosters interstate consistency, and a measure of predictability, so that each product is evaluated under similar rules from state-to-state.

As explained above, the Restatement (Third) was the product of an exhaustive analysis of about three decades of nationwide jurisprudence in the wake of the sea change inaugurated by Section 402A. In addition to the wisdom behind the rules formulated through that distillation of extensive nationwide jurisprudence, adoption of the standards set forth in the Restatement (Third) has the virtue of minimizing balkanization of the standards manufacturers must meet in designing

[3] The Supreme Court of Appeals has previously looked to the Restatement in formulating West Virginia's product liability standards, and should do the same here. *See, e.g.*, *Blankenship v. Ethicon*, 656 S.E.2d 451, 463 (W. Va. 2007) (citing to the Restatement as indication that the medical system had developed an understanding that hospitals and doctors should be held liable for defective medical devices given to patients); *see also Bennett v. Asco Services, Inc.*, 621 S.E.2d 710, 718 (W. Va. 2005) (quoting the Restatement (Third) of Torts: Product Liability, § 3 as support for the claim that a plaintiff need not eliminate all other potential causes to show that it was more probable than not that a product was defective).

their products. A just and efficient tort system adjudicating the quality of products distributed in interstate commerce should seek to protect manufacturers against being exposed to inconsistent and sometimes clashing standards of design quality.

IV. CONCLUSION

For the reasons stated herein, this Court should answer the Certified Questions posed to it in the affirmative and hold that under West Virginia law, a plaintiff alleging a strict liability defective design claim is required to prove the existence of an alternative, feasible product design.

Respectfully submitted,

PRODUCT LIABILITY ADVISORY COUNCIL, INC.

/s/ Thomas J. Hurney, Jr.
Thomas J. Hurney, Jr. (WV Bar No. 1833)
Blair E. Wessels (WV Bar No. 13707)
JACKSON KELLY PLLC
Post Office Box 553
Charleston, West Virginia 25322
(304) 340-1000
thurney@jacksonkelly.com
blair.wessels@jacksonkelly.com

Jonathan M. Hoffman (Oregon Bar No. 754180)
MB Law Group
117 SW Taylor Street, Suite 200
Portland, Oregon 97204
(503) 914-2015
JHoffman@MBLGLaw.com
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CERTIFICATE OF SERVICE

I, Thomas J. Hurney, Jr., counsel for the Product Liability Advisory Council, Inc., certify that on July 26, 2023, I have served the foregoing ***Brief on Behalf of Amicus Curiae the Product Liability Advisory Council, Inc. in Support of Respondents*** on all counsel of record via the Court's E-Filing system.

/s/ Thomas J. Hurney, Jr.
Thomas J. Hurney, Jr. (WV Bar No. 1833)