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CLARIFYING THE TEST FOR DESIGN DEFECTS IN SOUTH CAROLINA

I. INTRODUCTION

Products liability jurisprudence in South Carolina stands in a confused state, devoid of a clear standard of liability for defective product designs that cause injuries to consumers. This lack of clarity as to the applicable liability test stems from two apparently contradictory rulings by the South Carolina Supreme Court. In 1978, the court announced the “consumer expectations” test as the proper liability standard for products liability actions premised on defective designs. However, in 1982 the court stated that liability for defective product designs depends on a risk-utility balancing. The court applied this risk-utility test without disturbing its previous holding that the expectations of the ordinary consumer control liability. Due to these inconsistent and ambiguous judicial declarations, the proper interaction between the two liability standards remains an open question in South Carolina.

This Comment explores how the evolution of design defect liability nationwide and its parallel development in South Carolina has resulted in a confounded liability standard. Part II traces the national development of products liability law and the establishment of various standards of liability. Part III outlines South Carolina’s products liability law, beginning with the statutory backdrop and continuing with an analysis of cases discussing the tests for design defect liability. Part III presents the South Carolina Supreme Court’s two inconsistent statements of design defect liability in conjunction with a number of subsequent state and federal cases that struggle to define the test for design defect liability. Part IV attempts to reconcile the contrary holdings to provide a workable standard of liability that is consistent with the statutory language courts are bound to apply.

II. NATIONAL DEVELOPMENT OF THE LIABILITY STANDARD FOR DESIGN DEFECTS

A. The Consumer Expectations Test

Products liability was born in 1963 when Justice Traynor handed down the landmark decision of Greenman v. Yuba Power Products, Inc., a case in which the California Supreme Court unanimously applied strict liability to a manufacturer despite the lack of an express warranty. This was the first application of strict liability in tort for defective products. A mere two years

4. Id. at 900–02.
later, the American Law Institute (ALI) promulgated section 402A of the Restatement (Second) of Torts (Restatement Second), which sets forth a single test of liability for defective products.\(^6\) Regardless of the nature of the alleged product defect, section 402A premises liability on a finding that the product was sold in a “defective condition unreasonably dangerous to the user or consumer or to his property.”\(^7\) While section 402A gained widespread prominence throughout the country,\(^8\) products liability law was still in its infancy and courts had yet to flesh out the many facets of an appropriate liability standard. Over time courts began to realize that there are three recurring types of product defects: defects in the manufacturing process, defects in the design of a product, and defects in the warnings and instructions attached to a product.\(^9\) Each type of defect raises unique concerns, and it is now an accepted tenet of products liability jurisprudence that each type of defect implicates a different set of legal obligations and liability tests.\(^10\) While a uniform standard of liability for defective products seemed appropriate at the time of the promulgation of section 402A, decades of jurisprudence have revealed that a fluid approach—able to accommodate the varying considerations of each recurring type of product defect—is necessary.\(^11\)

The consumer expectations test finds its origins in section 402A’s statement that liability for all product defects rests on a finding that the product was sold “in a defective condition unreasonably dangerous to the user or consumer or to his property.”\(^12\) Two separate comments to this section explain what it means for a product to be in a “defective condition unreasonably dangerous.” A defective condition is “a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him.”\(^13\) A product is unreasonably dangerous when it is “dangerous to an extent beyond that which would be contemplated by the ordinary consumer.”\(^14\) Some courts have interpreted these comments as establishing a two-pronged standard of liability where satisfaction of either prong would establish liability, with comment g’s definition of defective condition serving as one prong and comment i’s definition of unreasonably

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6. See Restatement (Second) of Torts § 402A.

7. Id.


10. Id. The ALI recognized this tripartite construction of products liability in § 2 of the Restatement (Third) of Torts: Products Liability, the successor to § 402A. See Restatement (Third) of Torts: Prods. Liab. § 2 (1998); infra Part II.D.

11. Compare Restatement (Second) of Torts § 402A (creating liability for the sale of defective products “unreasonably dangerous to the user or consumer or to his property”), with Restatement (Third) of Torts: Prods. Liab. § 2 (enumerating specific liability standards for “manufacturing defect[s],” “defect[s] in design,” and defects “because of inadequate instructions or warnings”).

12. Restatement (Second) of Torts § 402A.

13. Id. § 402A cmt. g.

14. Id. § 402A cmt. i.
dangerous as the other prong.\textsuperscript{15} However, a majority of courts have found that the use of such similar language in these comments indicates a single liability standard premised upon a finding that the dangers which inhere in a product’s design are of the sort that the ordinary consumer would not expect of such a product.\textsuperscript{16}

One of the most common criticisms of the consumer expectations test is that it absolves manufacturers of liability from obvious product dangers.\textsuperscript{17} Under the terms of this test a manufacturer would not be liable for an obvious danger in the product’s design because an obvious danger is necessarily within the contemplation of an ordinary consumer.\textsuperscript{18} This creates a perverse incentive for manufacturers: the manufacturer can escape liability no matter how likely or harmful a product danger might be so long as the danger would be obvious to an ordinary consumer. Because liability might not attach in a situation where the manufacturer could easily and cost-effectively remove the open and obvious danger there is no incentive to take seemingly reasonable steps in perfecting the design of products.\textsuperscript{19} Such an issue arose in \textit{Calles v. Scripto-Tokai Corp.},\textsuperscript{20} where the court denied the plaintiff recovery for the death of her three-year-old daughter in a fire that the decedent’s twin sister started using one of the defendant’s lighters.\textsuperscript{21} The plaintiff did not satisfy the consumer expectations test because the product performed exactly as expected: the lighter produced a flame when a consumer pulled the trigger.\textsuperscript{22} Though the court in \textit{Calles} also engaged in a risk–utility analysis,\textsuperscript{23} in jurisdictions where the consumer expectations test is the sole basis of liability, a court could deny a parent recovery in this situation without any consideration of whether there was a simple precaution that the manufacturer should have taken.\textsuperscript{24}

\textsuperscript{15} OWEN, supra note 5, § 5.3, at 269; see, e.g., Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 235 (6th Cir. 1988) (imposing liability where the product sold was “in a defective condition or unreasonably dangerous” (quoting TENN. CODE ANN. §29-28-105 (2000))).

\textsuperscript{16} OWEN, supra note 5, § 8.3, at 503.

\textsuperscript{17} See, e.g., Mary J. Davis, Design Defect Liability: In Search of a Standard of Responsibility, 39 WAYNE L. REV. 1217, 1236 (1993) (“[I]f the product contains a defect which is apparent or obvious, the consumer’s expectations arguably include the apparent danger, preventing liability and therefore discouraging product improvements which could easily and cost-effectively alleviate the danger.”).

\textsuperscript{18} See OWEN, supra note 5, § 5.6, at 306.

\textsuperscript{19} See id. § 8.3, at 506.

\textsuperscript{20} 864 N.E.2d 249 (III. 2007).

\textsuperscript{21} Id. at 252–53. This case also presented the issue of whether an adult consumer’s expectations should control the inquiry under the consumer expectations test. If the court had based its decision on the expectations of a minor child, then perhaps the plaintiff could have recovered. See infra notes 28–34 and accompanying text.

\textsuperscript{22} Calles, 864 N.E. 2d at 257.

\textsuperscript{23} Id. at 257–63.

\textsuperscript{24} After applying the risk–utility test to the facts, the \textit{Calles} court found for the defendant, holding that reasonable minds could differ on whether the lighter was unreasonably dangerous. \textit{Id.} at 263.
Another major criticism leveled against the consumer expectations test involves its relation to complex product designs. Advances in technology have made increasingly elaborate products available to consumers in their everyday lives. As product designs increase in complexity, it becomes less likely that the ordinary consumer will understand the inner workings of such products in a manner that allows the consumer to expect dangers that may result from the use of that product. Thus, application of a liability standard based on consumers' expectations about many complex products which cause harm would result in no design defect liability for the products' manufacturers because the ordinary consumer may have no expectations at all in regard to the safety of such products.

A final problem with the consumer expectations test involves the question of whose expectations control the inquiry. In many cases the person harmed by a product is not the individual who purchased the product, and a question arises as to whether the expectations of the victim or the purchaser should control. For example, in Halliday v. Sturm, Ruger & Co., the court denied the plaintiff mother recovery for the death of her three-year-old son who shot himself while playing with his father's handgun. Maryland's products liability law is governed by section 402A of the Restatement Second. Using section 402A as the basis for its decision, the Maryland Court of Appeals concluded that the plaintiff could not hold the manufacturer liable because the gun functioned exactly as an ordinary consumer of the product, such as the infant's father, would have expected. The court also found that it would be inappropriate to apply a risk-utility analysis to the decision not to include a safety feature in the design because the consumer expectations test was the sole test of liability in design defect cases. This case also demonstrates the concern discussed above regarding obvious dangers. Assuming that the manufacturer could have cost-

25. See Owen, supra note 5, § 5.6, at 309.
26. See, e.g., Barker v. Lull Eng'g Co., 573 P.2d 443, 454 (Cal. 1978) (quoting John W. Wade, On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 829 (1973)) (recognizing that there are many products about which consumers may not have safety expectations).
28. See, e.g., Davis, supra note 17 ("[B]ystanders, who are widely recognized by both tort and contract theories of products liability regardless of privity, cannot be said to have any expectations about a product which causes them injury." (footnote call number omitted)).
29. 792 A.2d 1145 (Md. 2002).
30. Id. at 1147–48.
31. Products liability law in South Carolina is also governed by § 402A. See infra Part III. However, Maryland adopted § 402A judicially, whereas South Carolina adopted this test statutorily. See Halliday, 792 A.2d at 1150; Phipps v. Gen. Motors Corp., 363 A.2d 955, 963 (Md. 1975); infra notes 105–07 and accompanying text.
32. Halliday, 792 A.2d at 1158.
33. Id. at 1158–59.
effectively added a safety feature to this firearm to prevent its operation by toddlers, the consumer expectations test would not command such an addition to the design because it is the purchaser of the firearm whose expectations govern the analysis. 34 To an adult purchaser, the danger that people might shoot themselves while handling a gun is obvious; therefore, the test does not require the manufacturer to adapt the design to protect against use by children, even if it could be done at relatively no cost.

B. The Risk–Utility Test

The problems involved in applying the consumer expectations test to product designs led many courts to reconsider the appropriate basis of liability. From the mid-1970s to the recent adoption of the Restatement (Third) of Torts: Products Liability (Restatement Third), the risk–utility test has gained prominence as the measure of liability.35 As products liability litigation spread across the nation, it became clear that the consumer expectations test was inappropriate outside of the manufacturing defect setting36 and that the flexible environment of competing considerations in which design decisions are made requires a more thorough analysis.37 The risk–utility test is now the standard of liability in a majority of jurisdictions.38 This test deems a product defective if a particular risk of harm outweighs the burden of avoiding the risk.39 A court must consider the likelihood that a particular danger will manifest itself and the probable magnitude of that ensuing harm against the added expense in the product’s manufacturing process and any loss of utility in the product’s design that would result from adopting a design that avoids the particular risk of harm.40 This standard is essentially an application of Judge Learned Hand’s well-known “calculus of risk” principles of negligence liability to the arena of defective

34. See Owen, supra note 5, § 5.6, at 307–08.
37. See Owen, supra note 8, at 755 (“[T]he interrelated concepts of reasonableness, optimality, and balance on which design decisions necessarily rest are captured flawlessly by the flexible negligence concept.”); see generally Owen, supra note 5, chs. 5 & 8 (detailing the evolution of liability tests for design defects).
39. See Owen, supra note 5, § 5.7, at 313.
40. Id.
product designs. The negligence basis for the risk–utility test has led courts in many jurisdictions to declare that liability under strict liability and negligence causes of action for design defects require the same showing by the plaintiff.

In *Prentis v. Yale Manufacturing Co.*, the Michigan Supreme Court presented a number of strong arguments in favor of applying risk–utility balancing when assessing product designs. First, the court reasoned that design defects are the result of “deliberate and documentable decisions on the part of manufacturers” and discovery should provide plaintiffs with ample opportunity to consider the decision making processes of defendant manufacturers. Once plaintiffs acquire such information, according to the court, they may utilize experts to make the case that a manufacturer did not act reasonably in designing its product. Next, the court stated that the risk–utility test is more likely to accomplish the goal of safer product design. This approach rewards manufacturers who are diligent in the design process: if they have adequately weighed the competing design considerations then liability will not attach even if the product’s design does ultimately cause harm. A fault-based risk–utility standard provides an incentive for manufacturers to carefully design their products to avoid liability and punishes those manufacturers who are derelict in this duty. The court also stated that because a finding of a design defect

41. See United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947); see also Prentis v. Yale Mfg. Co., 365 N.W.2d 176, 184 (Mich. 1984) (“The risk-utility balancing test is merely a detailed version of Judge Learned Hand’s negligence calculus.”). For a discussion of how to apply the Hand Formula in design defect terms, see OWEN, supra, note 5, § 5.7, at 314.

42. See, e.g., Ogletree v. Navistar Int’l Transp. Corp., 522 S.E.2d 467, 469 (Ga. 1999) (stating that “the mandate that a product’s risk must be weighed against its utility incorporates the concept of ‘reasonableness,’ so as to apply negligence principles in the determination of whether the manufacturer defectively designed its product” and thus holding that the lower court should not have employed negligence principles separately from the risk–utility analysis); see also Leon Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 TEX. L. REV. 1185, 1205 (1977) (arguing that both courts and the comments to § 402A of the Restatement Second suggest a negligence-based test for design defects); Aaron D. Twerski, *Chasing the Illusory Pot of Gold at the End of the Rainbow: Negligence and Strict Liability in Design Defect Litigation*, 90 MARQ. L. REV. 7, 12 (2006) (“If risk-utility tradeoffs are to be utilized to decide whether a design is defective, then there is no difference between negligence and strict liability.”). But see Blue v. Envtl. Eng’g, Inc., 828 N.E.2d 1128, 1141–42 (Ill. 2005) (holding that it was inappropriate to use strict liability risk–utility analysis in a negligence cause of action for a design defect because under negligence the focus is on the conduct of the manufacturer, while under strict liability the focus is on the product itself).


44. *Prentis*, 365 N.W.2d at 185. This is in contrast to the context of manufacturing defects, which are the result of an error in the production process rather than in the design of the product itself. Strict liability is appropriate in the manufacturing defect context because it may be impractical or impossible for the plaintiff to prove the occurrence of a specific production error that led to harm. See OWEN, supra note 5, § 7.2, at 456. However, in the case of design defects, the factors considered in the design process are sufficiently accessible to allow for a fault-based standard or liability without jeopardizing plaintiffs’ rights.

45. *Prentis*, 365 N.W.2d at 185.

46. *Id.*
implicates an entire product line, plaintiffs should be required to demonstrate a higher threshold of fault before a court judgment affects such a large portion of the defendant’s assets and potentially deprives the public of the ability to purchase a particular product.\(^{47}\) Finally, according to the court, the risk–utility standard offers “greater intrinsic fairness” because it will not require a safety-conscious manufacturer to bear the burden of harms caused by the negligence of others.\(^{48}\) As a result, diligent manufacturers will also benefit from being able to offer lower prices than their less-safety-conscious competitors.

The risk–utility test provides an answer to the problems\(^{49}\) inherent in the consumer expectations test. First, a risk–utility balancing would likely not deny recovery for a product-related injury merely because the danger was obvious to the consumer. The obviousness of the danger becomes one factor for the court to consider in assessing the overall utility of the product.\(^{50}\) An obvious danger may weigh against a plaintiff’s recovery if the plaintiff is the most effective risk minimizer,\(^{51}\) but in many situations the risk balance will indicate that the manufacturer could have cost-effectively removed an obvious risk.

Second, the risk–utility test has an advantage over the consumer expectations test in that it offers a workable liability standard to apply to complex products about which consumer expectations are vague or nonexistent. For such products, use of the risk–utility standard allows for the presentation of expert testimony to inform jurors of the nature of products about which they could not otherwise make a safety determination.\(^{52}\) Consideration of expert testimony grants the jury a reasonable basis from which to evaluate the manufacturer’s culpability for an allegedly defective design. This allows the jury to reach the issue at the heart of a design defect case—whether or not the design was sufficiently safe for society to be willing to countenance the manufacturer’s decision to market and sell the product—without the artificial focus on the consumer’s prospective harm, which risks obscuring the true issue of the manufacturer’s culpability.\(^{53}\)

Finally, favoring a risk calculus approach over the consumer expectations test easily resolves the sometimes difficult question of whose expectations should control the inquiry in cases where the injured party is not the purchaser or consumer of the product. Under a risk–utility balancing, the court considers all of the potential dangers inherent in a product, including those to bystanders and

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\(^{47}\) Id.

\(^{48}\) Id.

\(^{49}\) See supra notes 17–34 and accompanying text.

\(^{50}\) See Flock v. Scripto-Tokai Corp., 319 F.3d 231, 241 (5th Cir. 2003).

\(^{51}\) See Henderson & Twerski, supra note 36, at 1517.

\(^{52}\) For a discussion of the role played by technological experts in products liability litigation, see William A. Donaher et al., The Technological Expert in Products Liability Litigation, 52 Tex. L. Rev. 1303 (1974).

\(^{53}\) See, e.g., Heaton v. Ford Motor Co., 435 P.2d 806, 810 (Or. 1967) (affirming the dismissal of plaintiff’s cause of action because there was no evidence of consumer expectations regarding the breaking point of a truck wheel).
third-party users. When the focus is on the reasonableness of the product itself, there is less danger that courts will deny injured parties compensation for harms for which the manufacturer is responsible because of its failure to adequately consider the safety of foreseeable plaintiffs other than the purchaser or an ordinary consumer.

C. Combining the Consumer Expectations and Risk–Utility Tests

Section 402A of the Restatement Second served as the foundation of liability for defective products in most states, either through judicial or statutory adoption, and thus it often bound courts to apply the consumer expectations test embodied in the comments to section 402A even as they began to realize that the risk–utility test might serve as a more suitable basis for liability. As a result, courts created a number of approaches to synthesize the two tests or at least acknowledge the existence of both.

1. Two Independent Bases of Liability

In Barker v. Lull Engineering Co., the California Supreme Court established a theory of design defect liability that allowed for recovery under either the risk–utility or consumer expectations test. The plaintiff in this case was operating a high-lift loader at a construction site. When the load of lumber on the lift began to shift, he jumped from the loader and was hit and seriously injured by a piece of the falling lumber. The trial court rendered a judgment for the defendant, but the California Supreme Court remanded the case due to error in the trial court’s instruction that based strict liability for a defect in the design of a product on a finding that the product was “unreasonably dangerous for its intended use.” This instruction was contrary to the court’s prior holdings criticizing the “unreasonably dangerous” language from section 402A, and the court took the opportunity to set forth a new standard for design defect liability.

The court criticized the consumer expectations test for establishing a “ceiling” on a manufacturer’s liability rather than a “floor.” In other words, the court reasoned that all products must meet an ordinary consumer’s expectations

54. See Schwartz, supra note 27, at 495.
55. See Owen, supra note 8, at 744.
57. 573 P.2d 443 (Cal. 1978).
58. Id. at 446.
59. Id. at 445.
60. Id. at 447.
61. Id. at 449–52.
62. Id. at 451 (citing Cronin v. J.B.E. Olson Corp., 501 P.2d 1153, 1161–62 (1972)).
63. See id. at 449–57.
64. Id. at 451 n.7.
to be deemed nondefective but that such a finding did not end the inquiry; liability could still attach under the risk–utility test.\textsuperscript{65} The court held that:

a product is defective in design either (1) if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if, in light of the relevant factors . . . , the benefits of the challenged design outweigh the risk of danger inherent in such design.\textsuperscript{66}

The court placed the burden of proof on the plaintiff to show that a product failed to conform to the expectations of the ordinary consumer; however, once the plaintiff makes a prima facie showing that the product’s design caused the harm, the court stated that the burden of proof for the risk–utility prong of the test shifts to the defendant to prove that the product was not defective.\textsuperscript{67} In determining that this two-pronged approach was an appropriate measure of liability, the court noted one of the aforementioned problems with the consumer expectations test: in evaluating many product designs, “the consumer would not know what to expect, because he would have no idea how safe the product could be made.”\textsuperscript{68}

2. Different Tests for Complex and Simple Designs

Still struggling with the increasing recognition that in many cases the risk–utility test is a more suitable standard of liability than the consumer expectations test, in 1994 the California Supreme Court expressly held that the consumer expectations test is only applicable to simple designs while the risk–utility test is appropriate for complex designs about which the consumer’s expectations are vague.\textsuperscript{69} Numerous courts throughout the nation follow this approach.\textsuperscript{70} In Soule v. General Motors, the plaintiff suffered two broken ankles when, following a collision with another vehicle, the left front wheel of her vehicle broke free and smashed the floorboard inward.\textsuperscript{71} The plaintiff premised her claim not on the

\textsuperscript{65} See id. at 454.
\textsuperscript{66} Id. at 446.
\textsuperscript{67} Id. at 455.
\textsuperscript{68} Id. at 454 (quoting Wade, supra note 26, at 829) (internal quotation marks omitted); see supra notes 25–27 and accompanying text.
\textsuperscript{70} See, e.g., Dart v. Wiebe Mfg., Inc., 709 P.2d 876, 880 (Ariz. 1985) (using the consumer expectations test for products which a consumer may form expectations about and the risk–utility test for products which a consumer may not form expectations about); Camacho v. Honda Motor Co., 741 P.2d 1240, 1246–47 (Colo. 1987) (noting that the consumer expectations test is inappropriate for some complex products because manufacturers “have greater access than do ordinary consumers to the information necessary to reach informed decisions concerning the efficacy of potential safety measures” (citing Thomas V. Harris, Enhanced Injury Theory: An Analytical Framework, 62 N.C. L. REV. 643, 675 (1984))); Ray v. BIC Corp., 925 S.W.2d 527, 533 (Tenn. 1996) (using both the consumer expectations test and the risk–utility test).
\textsuperscript{71} Soule, 882 P.2d at 301.
cause of the accident itself, but rather on the crashworthiness of the vehicle.\footnote{72}{Id. at 303.} According to the plaintiff, the defendant’s design was defective for failing to adequately protect against the foreseeable injuries of motor vehicle accidents.\footnote{73}{Id.} She alleged that the placement of a bracket and the configuration of the frame of the vehicle failed to adequately restrict the rearward travel of the wheel in an accident and thus exacerbated the injuries that she would have otherwise suffered.\footnote{74}{Id. at 302.} The trial court gave the standard California design defect jury instruction, which was based on the two-pronged Barker test discussed above.\footnote{75}{Id. at 303; see discussion supra Part III.C.1.} The issue before the California Supreme Court was the defendant’s contention that it was inappropriate to instruct the jury on the consumer expectations prong of liability and that in this case, the jury should have considered only the risk–utility test.\footnote{76}{Id. at 307.}

The court began its analysis by noting that there are some cases in which the “purposes, behaviors, and dangers of certain products are commonly understood by those who ordinarily use them.”\footnote{77}{Id. at 308 (“As we have seen, the consumer expectations test is reserved for cases in which the everyday experience of the product’s users permits a conclusion that the product’s design violated minimum safety assumptions, and is thus defective regardless of expert opinion about the merits of the design.”).} In such cases, no proof beyond the expectations of ordinary consumers is required to prove liability, and the manufacturer is not entitled to defend the claim by presenting evidence of the design’s risks and benefits.\footnote{78}{Id. at 307.} On the other hand, there are cases in which “a complex product . . . may often cause injury in a way that does not engage its ordinary consumers’ reasonable minimum assumptions about safe performance.”\footnote{79}{Id.} In such complex product cases, “the jury must consider the manufacturer’s evidence of competing design considerations,” and the consumer expectations test is an inappropriate basis for liability.\footnote{80}{Id.} Where ordinary consumers lack expectations about a product’s operation under certain conditions, “the ultimate issue of design defect calls for a careful assessment of feasibility, practicality, risk, and benefit.”\footnote{81}{Id.} The fact that Soule was a complex design case requiring experts in biomechanics, metallurgy, orthopedics, design engineering, and crash-test simulation to frame the issue supports the court’s unwillingness to apply the consumer expectations test.\footnote{82}{See id. at 302.} Indeed, because the determination of design defect in this case was a matter of “technical and mechanical detail” and the jury had to consider the “precise behavior of several
obscure components of [the plaintiff’s] car under the complex circumstances of a particular accident,” the instruction on the consumer expectations test was not appropriate for this case; instead, the court should have limited the jury to a consideration of risk–utility. However, because the court found it highly unlikely that the jury relied on the consumer expectations test to the exclusion of the risk–utility test, the court affirmed the judgment for the plaintiff.

3. Defining Consumer Expectations in Risk–Utility Terms

A number of courts have attempted to blend the consumer expectations and risk–utility tests into a single test of liability. For example, in 1997, the Connecticut Supreme Court declared a test for design defectiveness in Potter v. Chicago Pneumatic Tool Co. that framed the consumer expectations test explicitly in risk–utility terms. Although adhering to its “long-standing rule that a product’s defectiveness is to be determined by the expectations of an ordinary consumer,” the court announced a hybrid test. Specifically, a “modified consumer expectation test provides the jury with the product’s risks and utility and then inquires whether a reasonable consumer would consider the product unreasonably dangerous.” Factors which the trier of fact may consider in the analysis of a product’s risk and utility include

- the usefulness of the product, the likelihood and severity of the danger posed by the design, the feasibility of an alternative design, the financial cost of an improved design, the ability to reduce the product’s danger without impairing its usefulness or making it too expensive, and the feasibility of spreading the loss by increasing the product’s price.

In other words, under this test the trier of fact views consumer expectations in light of the above factors and then asks whether a reasonable consumer would view the product as unreasonably dangerous. Thus, the liability inquiry applied in this case purports to rest on consumer expectations, but it is the risk calculus that is ultimately dispositive.

Although the Potter court was wary of backing away from the section 402A formulation of products liability, it did recognize the propriety of the risk–utility approach. Unfortunately, the result is an awkward attempt to fit the different standards into a single measure of liability that merely pays lip service to the

83. Id. at 310.
84. Id. at 311.
85. 694 A.2d 1319 (Conn. 1997).
86. Id. at 1333.
87. Id.
88. Id.; accord Vautuor v. Body Masters Sports Indus., 784 A.2d 1178, 1182 (N.H. 2001) (stating that whether a product is dangerous beyond a consumer’s expectations is “determined by the injury using a risk–utility balancing test”).
89. Potter, 694 A.2d at 1333–34.
expectations of consumers without offering a meaningful definition that comports with the reality of the consuming public. Consumers do not expect to have to weigh the risks and utilities inherent in a product, yet this is precisely what the Potter test asks them to do. While this may be a convenient way to adapt products liability jurisprudence to the growing acceptance of the superiority of the risk calculus, it is doubtful that any ordinary understanding of "consumer expectations" would suggest that it is the responsibility of the consumer to weigh the risks presented by a product's design. Instead, the manufacturer's design experts should perform this balance.

In melding the risk–utility and consumer expectations tests, the Potter court cited Seattle–First National Bank v. Tabert\(^\text{90}\) and its pronouncement that "[i]n determining the reasonable expectations of the ordinary consumer, a number of factors must be considered."\(^\text{91}\) These factors include "[t]he 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."\(^\text{92}\) The Tabert court similarly failed to adequately explain what role the risk–utility factors play in assessing the expectations of consumers. How exactly consideration of these factors informs the consumer's expectations is unclear.

The Oregon Supreme Court offered a more direct approach to melding the two tests in 1974 in Phillips v. Kimwood Machine Co.\(^\text{93}\) The court stated that the test of liability is "whether the seller would be negligent if he sold the article knowing of the risk involved."\(^\text{94}\) This focus on negligence incorporates the risk–utility test into the evaluation of a product because it is the traditional measure of negligence.\(^\text{95}\) The court then stated that its proposed test is actually no different than the test embodied in the reference to consumer contemplations located in comment i of section 402A of the Restatement Second because it viewed the "seller-oriented standard and [the] user-oriented standard" as "two sides of the same standard."\(^\text{96}\) This is true because "a manufacturer who would be negligent in marketing a given product, considering its risks, would necessarily be marketing a product which fell below the reasonable expectations of consumers who purchase it."\(^\text{97}\) This standard does an admirable job of providing a solid
grounding for the consumer expectations test because the ordinary consumer expects the manufacturer to perform a risk–utility balancing before placing a product on the market for sale. However, the *Phillips* holding ultimately disappoints because it allows for the consideration of unforeseeable product risks, imposing too harsh a standard on product manufacturers.98 Regardless, the court’s astute suggestion that consumers have expectations as to the behavior of manufacturers should not be ignored.

D. *The Restatement Third’s Requirement of a Reasonable Alternative Design*

Realizing that the time had come to expressly address many of the trends revealed by the national development of products liability, in 1998 the ALI promulgated a new restatement dedicated entirely to the subject of products liability.99 The liability standard contained therein offered a drastic revision to the single liability test embodied in section 402A.100 Section 2 of the *Restatement Third* expressly addresses the three types of product defects and provides a unique liability test for each.101 A product is defective in design only if it is shown that “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.”102 Despite this “functional” definition of liability, the comments to this section make clear that liability for design and warning defects is “predicated on negligence,” while liability for manufacturing defects remains strict.103 The comments also expressly state that a “‘risk–utility’ balancing is necessary” for design defects.104 This most recent summary of the law by the ALI recognizes many of the considerations discussed above which have pushed courts away from liability premised on consumer expectations and toward the more robust risk–utility standard. Section 402A serves as a model for products liability throughout the nation; however, the *Restatement Third* recognizes that a more robust standard has blossomed from section 402A’s simple beginning.

98. See id. at 1036.
100. Compare *RESTATEMENT (SECOND) OF TORTS § 402A (1965)* (imposing a single liability test based on a finding that the product was in a defective condition and unreasonably dangerous), with *RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB.* § 2 (delineating three separate tests depending on the nature of the product defect).
101. See *RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB.* § 2.
102. Id. § 2(b).
103. Id. § 2 cmt. a; see also Twerski, supra note 42 (explaining that the functional test for design defects embodied in § 2(b) of the *Restatement Third* is really an expression of traditional negligence principles).
III. DESIGN DEFECT LAW IN SOUTH CAROLINA

A. South Carolina's Products Liability Statute

Since its enactment in 1974, section 15-73-10 of the South Carolina Code has governed products liability law in South Carolina. This provision represents a legislative adoption of section 402A of the Restatement Second. The legislature expressly incorporated the comments to section 402A into the legislative history of the products liability chapter of the South Carolina Code. Thus, liability for a product defect in South Carolina attaches upon a finding that the product was sold "in a defective condition unreasonably dangerous to the user or consumer or to his property." As previously discussed, the ALI defined both "defective condition" and "unreasonably dangerous" in terms that impose liability where a product's dangers exceed consumer safety expectations. Incorporation of these definitions from the Restatement Second into the legislative history of section 15-73-10 indicates that the "consumer expectations test" facially applies in South Carolina. Although the single liability standard of section 402A statutey governs all product defects in South Carolina, the developed jurisprudence nationwide has shown that practical considerations mandate the recognition of the unique aspects of each type of product defect. This Part explores the relevance of these developments with regard to liability for defective product designs in South Carolina.

B. Design Defect Case Law in South Carolina

Design defect case law in South Carolina presents a muddled picture. There is not a clear line of precedent from the supreme court on the liability standard for design defects. Still, even though the case law fails to elucidate a single, cognizable measure of liability, a number of cases supply hints and indications as to what the proper standard of liability for defective product designs should be.

106. Id. § 15-73-30 ("Comments to § 402A of the Restatement of Torts, Second, are incorporated herein by reference thereto as the legislative intent of this chapter.").
107. Id. § 15-73-10; see RESTATEMENT (SECOND) OF TORTS § 402A (1965).
108. See supra notes 12–14 and accompanying text.
109. See supra notes 9–11 and accompanying text.
110. Problems relating to the application of South Carolina's unitary liability standard in the areas of manufacturing and warning defects are beyond the scope of this work. For a discussion of these developments on a national level, see OWEN, supra note 5, §§ 5.5, 7.2, 7.3, 9.2, 9.3.
1. Young v. Tide Craft, Inc.

In *Young v. Tide Craft, Inc.*, the South Carolina Supreme Court announced the consumer expectations test as the appropriate basis of liability for defective product designs. This case involved a wrongful death action arising out of the death of a boater who became entangled in the lines of the trolling motor and drowned while hanging over the side of the boat. The plaintiff contended that the design of the boat in question was defective because it did not include a kill switch that would have automatically cut power to the motor at the point when the operator was no longer in a position to control the boat.

The issue in this case was whether the lack of a kill switch "rendered the boat '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.' This is an explicit statement of the consumer expectations test applied to design defects. The court's application of this test also demonstrates that the consumer expectations test was controlling. Specifically, the court held that it is "common knowledge" that one of the dangers of boating is being thrown overboard and that such knowledge, therefore, must be imputed to the decedent. With this danger imputed to the decedent, the court stated that the added "danger posed by the obvious lack of a kill switch could hardly be beyond his contemplation." Therefore, because the court decided this case by analyzing the expectations of an ordinary consumer of the defendant's product, *Young* provides a clear application of the consumer expectations test in South Carolina.

2. Claytor v. General Motors Corp.

Four years after *Young*, the South Carolina Supreme Court decided *Claytor v. General Motors Corp.* The plaintiffs in this case were injured when the wheel separated from a car, causing it to veer into oncoming traffic and strike the plaintiffs' vehicle. The alleged defect in the car was a failure to design a sufficiently strong lug bolt to avoid the cracking that purportedly caused the wheel to come loose.

112. Id. at 471, 424 S.E.2d at 680.
113. Id. at 458, 424 S.E.2d at 673.
114. Id. at 470–71, 424 S.E.2d at 679.
115. Id. at 471, 424 S.E.2d at 680 (quoting RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965)).
116. Id. at 471–72, 424 S.E.2d at 680.
117. Id. at 472, 424 S.E.2d at 680.
119. Id. at 261, 286 S.E.2d at 130.
120. Id.
The Claytor court stated that the test for liability for a design defect is "whether the product is unreasonably dangerous to the consumer or user given the conditions and circumstances that foreseeably attend use of the product."\(^{121}\) The court’s use of the language “unreasonably dangerous” from the products liability statute commands reference to the legislative incorporation of the Restatement Second’s consumer contemplation definition of this phrase\(^{122}\) and does not provide any further guidance as to the appropriate standard of liability.\(^{123}\) However, the court also stated that “[i]n the final analysis, we have another of the law’s balancing acts and numerous factors must be considered, including the usefulness and desirability of the product, the cost involved for added safety, the likelihood and potential seriousness of injury, and the obviousness of danger.”\(^{124}\) This language suggests that the risk–utility test plays some role in the determination of a design defect. Nevertheless, the Claytor court’s statement does not explain how this test can be reconciled with the consumer expectations test appearing in the legislative history as well as in Young’s holding just four years earlier that the consumer expectations test is determinative of design defect liability.

Unfortunately, the court’s reference to a balancing test is only dictum, as the court resolved the issues in this case without resorting to the test for design defectiveness described therein. Because defectiveness under the South Carolina products liability statute is determined at the time of the sale,\(^{125}\) a defect which arises through the actions of a party subsequent to the sale of the product to the consumer cannot be a basis for the manufacturer’s liability. The court ruled that any defect in the product was caused by third party misuse when a mechanic had over tightened the lug bolts on the wheel.\(^{126}\) Given this basis for the court’s decision, its statement of the test for liability is not significantly explicative of the proper liability standard.

3. Reed v. Tiffin Motor Homes, Inc.

In Reed v. Tiffin Motor Homes, Inc.,\(^{127}\) decided almost a year after Claytor, the Fourth Circuit Court of Appeals stated a test of South Carolina design defect liability that appears to synthesize the risk–utility and consumer expectations

\(^{121}\) Id. at 262, 286 S.E.2d at 131 (citing Kennedy v. Custom Ice Equip. Co., 271 S.C. 171, 176, 246 S.E.2d 176, 178 (1978)).


\(^{123}\) See Claytor, 277 S.C. at 262–66, 286 S.E.2d at 131–32.

\(^{124}\) Id. at 265, 286 S.E.2d at 132.

\(^{125}\) See § 15-73-10 (2005); see also RESTATEMENT (SECOND) OF TORTS § 402A cmt. g (1965) (providing that the defectiveness of a product is determined “at the time that it left the hands of the particular seller”).

\(^{126}\) Claytor, 277 S.C. at 265, 286 S.E.2d at 132.

\(^{127}\) 697 F.2d 1192 (4th Cir. 1982).
tests, albeit in an ambiguous fashion. The plaintiffs sued the manufacturer of a motor home after they were injured when the motor home burst into flames following a rear-end collision. The primary issue was whether the location of the fuel tank on the motor home rendered the vehicle defective in design.

One of the questions before the court in Reed was the admissibility of evidence of the relevant state of the art in the industry. In assessing whether to allow such evidence, the court discussed the standard of design defect liability in South Carolina. The Fourth Circuit explained that the defendant offered the evidence for the purpose of showing that the design “met reasonable consumer expectation[s].” Furthermore, the court acknowledged that the South Carolina Supreme Court had held that a design is unreasonably dangerous only if it fails to include a safety feature that a “consumer might expect.” However, the Fourth Circuit also noted that the Claytor decision appears to stand for the proposition that South Carolina courts employ a balancing test to determine the presence of a design defect.

Despite acknowledging the risk–utility test, the Fourth Circuit, like the South Carolina Supreme Court, failed to explain the interaction between this test and the consumer expectations test. The court asserted that the balancing test found its origins in comment i to section 402A. Yet comment i defines the phrase “unreasonably dangerous” in terms of the contemplations of the ordinary consumer. While asserting that a balancing test applied, the Reed court stated that “the comment does require a determination of what consumers expect when they purchase a particular product” and held that state-of-the-art evidence is admissible to aid in the framing of an ordinary consumer’s expectations. The court then stated that a “balancing act” necessarily is relevant to the determination that the product, as designed, is unreasonably dangerous in its failure to conform to the ordinary consumer’s expectations. This language suggests a hierarchy in which the expectations of the consumer ultimately control, with the risk–utility balance standing as just one factor to consider in ascertaining these expectations. But there is no clear picture of the liability standard.

128. Id. at 1197 (citing Claytor, 277 S.C. at 265, 286 S.E.2d at 132; Young v. Tide Craft, Inc., 270 S.C. 453, 471, 242 S.E.2d 671, 680 (1978)).
129. Id. at 1195.
130. Id.
131. Id. at 1194.
132. Id. at 1196–97.
133. Id. at 1195.
134. Id. at 1197 (citing Young v. Tide Craft, Inc., 270 S.C. 453, 471, 242 S.E.2d 671, 680 (1978)).
136. Id. at 1197.
137. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).
138. Reed, 697 F.2d at 1197.
139. Id. (emphasis added) (citing Young, 270 S.C. at 471, 242 S.E.2d at 680).

In Bragg v. Hi-Ranger, Inc., the South Carolina Court of Appeals announced an ambiguous test of liability that inadequately distinguished between the traditional consumer expectations and risk–utility tests of liability. Bragg involved a products liability suit brought in both negligence and strict liability by the estate of an employee of an electrical contractor against the manufacturer of an aerial bucket. The decedent was engaging in a power line change out procedure when the bucket supporting him above the power lines caught on fire, forcing him to jump from the bucket. He sustained injuries which led to his death a few days later. The alleged basis of liability was that the absence of a safety device in the design of the aerial bucket rendered the product defective.

The court of appeals first determined that it was not inconsistent to grant a directed verdict on a strict liability claim while submitting a negligence claim to the jury. The court then proceeded to review the propriety of the trial court’s directed verdict in favor of the manufacturer on the strict liability claim. The court noted that “[t]wo tests have evolved to determine whether a product is in a defective condition unreasonably dangerous.” The two tests the court described were the consumer expectations test and the risk–utility test. The language the court of appeals used indicates that use of the risk–utility test is mandatory in South Carolina. The court then stated, in terms nearly identical to those the Reed court used, that the “‘balancing act’ is also relevant to the determination that the product, as designed, is unreasonably dangerous in its failure to conform to the ordinary user’s expectations.” This latter statement indicates a role for the risk–utility test that in one sense is ancillary to the consumer expectations test. On the one hand, it could be that a determination that a product fails a risk–utility balancing automatically mandates a finding that the product lacks conformity with the expectations of the ordinary consumer. On
the other hand, it could also be that the weighing of risks and benefits inherent in
a product’s design is just one factor to be considered in ascertaining the
expectations of the consumer.

Adding to the confusion engendered by this decision, the court of appeals
agreed with the trial court’s findings that the plaintiff failed to present any
evidence that the product was defective at the time it was sold and that the
plaintiff “failed to introduce evidence of a feasible design alternative.”151 The
plain language suggests that these are separate findings, but the court did not
explain why it structured the findings in this manner. If the court intended to
present two separate findings, a question then arises as to the significance of a
finding of a failure to present evidence of an alternative design alongside a
separate finding that the product was not defective when sold. It remains unclear
whether the lack of alternative design proof is a mere factor in assessing
defectiveness or whether this finding conclusively establishes nonliability, as it
is in the Restatement Third.152 In some jurisdictions, the consideration of a
feasible alternative design is the central, required element of the risk–utility
test,153 whereas other jurisdictions hold that evidence of a feasible alternative
design is admissible but not mandatory in design defect cases.154 Jurisdictions
adopting the latter approach often treat alternative design evidence as a mere
factor in the risk–utility balancing.155 Thus, the significance of evidence of a
feasible alternative design in South Carolina products liability cases depends in
large part on unraveling the mystery of the relevance of the risk–utility test in
this state’s jurisprudence.

The court’s resolution of the strict liability claim in this case also fails to
explain the appropriate interaction between the different standards of liability.
The case turned on a finding of product misuse, foreclosing any need to apply a
test of design defect liability to the facts.156 As in Claytor, the court’s discussion
of the appropriate test for design defect is properly characterized as dictum. The
court found that a mechanic had installed a conductive hose when the mechanic
should have used a nonconductive hose,157 meaning that the defective condition
arose at a time when the product was out of the defendant’s control; thus, the
product was not defective at the time it was sold.158 A finding that the product

151. Id. at 542, 462 S.E.2d at 327.
152. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (1998).
153. See OWEN, supra note 5, § 8.5, at 522–23 (quoting Gen. Motors Corp. v. Edwards, 482
So. 2d 1176, 1191 (Ala. 1985), overruled on other grounds by Schwartz v. Volvo N. Am. Corp.,
554 So. 2d 927, 928 (Ala. 1989)).
154. See id. at 523–24.
(considering the feasibility of another design as a factor in proving that “a product’s risks outweigh
its utility”).
157. Id.
158. Id. at 545, 462 S.E.2d at 329.
was not defective when it left the defendant’s control, however, does not explain the significance of South Carolina’s statutory liability standard.


In a more recent decision, Little v. Brown & Williamson Tobacco Corp., the United States District Court for the District of South Carolina found that South Carolina applies a test of design defect liability that most resembles section 2(b) of the Restatement Third. The widow of a smoker of over thirty years sued the defendant cigarette manufacturers to recover for her deceased husband’s lung cancer and smoking-related injuries. In this decision, the court addressed the defendants’ motion for summary judgment.

The defendants argued that the court should grant summary judgment on the negligence and strict liability claims for three reasons: first, because “cigarettes are not defective as a matter of law”; second, because “cigarettes are not unreasonably dangerous because the dangers of smoking [had] been commonly known throughout [decedent’s] lifetime”; and third, because the plaintiff failed to meet her “burden to prove a safer alternative design.” Only the latter two of these issues are relevant for this discussion. In addressing the defendants’ second contention, the court applied what appears to be a pure consumer expectations test. Specifically, the court framed the issue in terms of whether the dangers of smoking were “common knowledge” to the ordinary consumer and noted that such a finding would bar the plaintiff’s claim. The court ultimately left it to the jury to determine whether the dangerous nature of cigarettes was common knowledge before 1988.

160. Id. at 496 (applying South Carolina law); see also RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (1998).
161. Little, 243 F. Supp. 2d at 484–85. The claim was initially brought in state court by the husband, Martin Little. Mr. Little passed away a year after the lawsuit was commenced. Id. at 485.
162. Id. at 489.
163. 243 F. Supp. at 489–90. As noted above, the legislature incorporated the comments to § 402A into South Carolina’s products liability statute. See supra notes 106–09 and accompanying text.
164. Little, 243 F. Supp. 2d at 491–92. The court further stated that “[a] product cannot be labeled either defective or unreasonably dangerous ‘if a danger associated with the product is one that the product’s users generally recognize.’” Id. at 491 (quoting Anderson v. Green Bull, Inc., 322 S.C. 268, 271, 471 S.E.2d 708, 710 (Ct. App. 1996)).
165. Id. at 494. The Surgeon General first published a report detailing the addictive nature of cigarettes in 1988, and thus the court held that after this date “all the risks associated with cigarette smoking were known to the ordinary consumer with the ordinary knowledge common to the
As to the defendants’ third argument, that the plaintiff failed to present evidence of a reasonable alternative design, a dispute arose over whether such proof is a required element of a products liability action or if it is “instead merely a factor to be considered in the risk–utility analysis.” The court noted that the Fourth Circuit had found proof of a safer alternative design to be a “part of the plaintiff’s products liability case under South Carolina law.” Then, the court held that despite the indefinite language used by South Carolina courts in discussing alternative design evidence, “it is clear the South Carolina law requires that [p]laintiff[s] provide such evidence in order to survive summary judgment.” Because the plaintiff in this case could present evidence of a safer alternative design, the court denied the defendants’ motion for summary judgment. Thus, the district court found that South Carolina applies a test parallel to the dictate of section 2(b) of the Restatement Third—a design is defective when the “foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design.”

IV. RECONCILING YOUNG AND CLAYTOR: TOWARD A CLEARER STATEMENT OF DESIGN DEFECT LIABILITY

With Young and Claytor, the South Carolina Supreme Court sowed the seeds of considerable confusion surrounding the liability standard for design defects, especially regarding the interplay between the consumer expectations and risk–utility tests. However, these holdings are potentially reconcilable to reveal a single, cognizable theory of liability. Still, any attempt at reconciliation must ultimately be grounded in South Carolina’s products liability statute. As previously discussed, this statute is a verbatim adoption of section 402A of the Restatement Second. Therefore, the liability standard of a “defective condition unreasonably dangerous” and the legislatively adopted comments defining this phrase in terms of an ordinary consumer’s expectations govern this attempt at reconciliation. This Part offers a resolution of the conflicts in South Carolina’s design defect authority that strives to remain true to this legislative backdrop but be mindful simultaneously of current developments in design defect

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168. Id. at 494–95.
169. Id. at 495 (internal quotation marks omitted) (quoting Cohen v. Winnebago Indus., Inc., 210 F.3d 360, 2000 WL 299459, at *4 (4th Cir. 2000) (unpublished table decision) (applying South Carolina law)).
170. Id. at 496.
171. Id. at 496–97.
174. See discussion supra Part III.A.
175. See supra note 107 and accompanying text.
176. See supra notes 12–14, 105–06 and accompanying text.
jurisprudence. The goal is to present a structure of design defect law that courts will be able to apply in a more coherent and consistent manner than has been possible under the developed case law.

In Young, the South Carolina Supreme Court cited comment i to section 402A in holding that the allegedly defective product must be "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."177 This decision is entirely consistent with the legislative adoption of section 402A and its consumer expectations test.178 The confusion arises with Claytor’s pronouncement that in assessing liability under the South Carolina statute, "we have another of the law's balancing acts and numerous factors must be considered, including the usefulness and desirability of the product, the cost involved for added safety, the likelihood and potential seriousness of injury, and the obviousness of danger."179 This is a liability standard stated explicitly in risk–utility terms, and the court failed to explain how such a test might fit within the statutory scheme chosen by South Carolina’s legislators. Indeed, other courts have struggled with deriving the accurate liability test from these precedents.180 Thus, it appears difficult to square the Young and Claytor tests in light of the supreme court’s contradictory language while remaining consistent with the clear language of South Carolina’s products liability statute.

Nevertheless, the South Carolina Supreme Court could set forth a sound liability standard by following the Potter, Tabert, and Phillips courts' approach and defining consumer expectations in risk–utility terms.181 The Phillips court provided a helpful step in the right direction with its pronouncement that a manufacturer is liable for producing a product that fails to meet ordinary consumer expectations when the manufacturer would be negligent in selling that product.182 In other words, the ordinary consumer expects that the manufacturer

178. See S.C. CODE ANN. § 15-73-10; RESTATEMENT (SECOND) OF TORTS § 402A.
181. See supra Part II.C.3.
182. Phillips v. Kimwood Mach. Co., 525 P.2d 1033, 1036 (Or. 1974). The Phillips court is guilty of a troublesome adoption of the Wade–Keeton “prudent manufacturer” test: it held that a manufacturer is liable if it would have been negligent for placing the product on the market, knowing all of its potential risks. Id. This formulation would hold manufacturers liable even for unforeseeable risks. See OWEN, supra note 5, § 8.7, at 548–51. Courts have rightly rejected this harsh formulation and even Deans Wade and Keeton, who proposed this standard, have both since
of a given product will act in a non-negligent manner in offering a product for sale. Accordingly, this principle provides a clear role for the “factors [which] must be considered” in assessing the “reasonable expectations of the ordinary consumer.” 183 As previously discussed, Potter and Tabert attempted to merge the consumer expectations and risk-utility tests, but much like the South Carolina cases, Potter and Tabert failed to explain adequately how the risk-utility test is derived from a statement that liability rests on consumer expectations. 184 The Phillips court’s recognition that consumers have expectations regarding a manufacturer’s conduct in selecting a product design answers the question of what the courts are actually evaluating when they cite risk-utility factors as being relevant to assessing consumer expectations: 185 the ordinary consumer expects that the manufacturer will weigh the “usefulness and desirability of the product, the cost involved for added safety, the likelihood and potential seriousness of injury, and the obviousness of danger” 186 and only offer a product for sale to the general public if the benefits of the particular design outweigh the dangers in that product design. 187 Such a formulation of the liability standard may actually be an accurate statement of how the ordinary consumer views product design. Especially in the context of complex designs about which the consumer may have limited expectations regarding the level of safety required, 188 this test adequately encapsulates how such a consumer would conceive of the manufacturer’s duty to the public. 189 Where, due to the nature of the product, the ordinary consumer cannot form intelligible expectations of safety, the consumer is entitled to expect that the manufacturer sought to ensure that it placed the safest product reasonably practicable on the market.

Furthermore, even in cases that implicate only simple product designs and where the consumer can form expectations about the product’s safe function, the consumer nonetheless reasonably expects that the manufacturer will engage in
the type of risk–utility balancing just described. No matter how familiar the ordinary consumer is with the simplest product design, his awareness of dangers posed by that product will never be as inclusive as the awareness of the manufacturer responsible for its development. Thus, consumers are entitled to expect that manufacturers are under a duty to perform this function in a reasonable manner because consumers expect manufacturers to be aware of their unique position to evaluate a product’s safety. It is realistic to maintain that for every product design, whether simple or complex, the ordinary consumer expects that the manufacturer will weigh the costs and benefits that accompany the design choices available for that product.

This type of expectation may be described as an expectation placed on the manufacturer’s conduct in accepting a certain design specification. Also to be considered is an ordinary consumer’s expectation regarding the functioning of a particular product. It is not inconsistent to assert that consumers expect manufacturers to exercise care in designing their products and that consumers also expect certain products to function in certain ways with a particular level of safety. This is the traditionally conceived consumer expectations test.190 The ALI recognized the viability of this consideration as a factor in the risk–utility balance in comment f to the Restatement Third by listing “the nature and strength of consumer expectations regarding the product” among a list of factors to be considered in evaluating an alternative design.191 Certainly the law should require manufacturers to include an ordinary consumer’s expectations regarding a product’s operation and safety high among the factors—perhaps as the prominent factor—that weigh on design decision making. Any liability standard seeking to remain consistent with South Carolina’s legislative enactment of section 402A must embrace this essential product design consideration.

The proposal described above presents a dual role for consumer expectations in an attempt to stay true to the legislative adoption of the consumer expectations test while recognizing that doctrine and practice have moved beyond a narrow formulation of design defect liability. This solution preserves the consumer expectations test in its traditional formulation, yet avoids an overzealous application of the test to every design determination, by locating a consumer’s expectations regarding the functioning of a product in its proper position as one of the crucial factors in deciding whether a design choice was reasonable. At the same time, recognizing that consumers also possess expectations as to how a manufacturer should discharge its design obligations allows for the insertion of the traditional tort calculus to assess the manufacturer’s conduct in meeting consumer expectations. A liability standard so formulated soothes the discord between the competing dictates in Claytor and Young192 by defining consumer

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190. See supra notes 12–17 and accompanying text.
expectations in risk–utility terms, and it remains within the statutory framework that governs South Carolina design defect jurisprudence.\textsuperscript{193}

V. CONCLUSION

South Carolina products liability law is governed by the legislature’s adoption of section 402A of the Restatement (Second) of Torts.\textsuperscript{194} Unfortunately, as the decades have passed since the publication of this section, the courts and commentators have come to realize that the unitary liability standard offered in section 402A does not adequately address the myriad issues that may arise in a products liability action.\textsuperscript{195} This caused courts throughout the country to move away from the consumer expectations test toward the more robust risk–utility test when evaluating allegedly defective designs.\textsuperscript{196} Mirroring this national trend, the South Carolina Supreme Court recognized the propriety of the risk–utility test and announced that such balancing is relevant to assessing the expectations of product consumers.\textsuperscript{197} Coupled with the supreme court’s failure to address its prior holding that the consumer expectations test is determinative of liability,\textsuperscript{198} the absence of a solid theoretical grounding for this new risk–utility standard has caused other courts to struggle to elucidate a test that reserves a role for both consumer expectations and risk–utility balancing.\textsuperscript{199}

A liability standard which recognizes that consumers have expectations as to a manufacturer’s conduct in designing products can ease the tension between these two tests while remaining true to section 15-73-10 of the South Carolina Code. Consumers are entitled to expect that a prudent manufacturer will assess the relevant risks and utilities inherent in any product design before deciding to market that product to the consuming public. Such a conception does no damage to the traditional consumer expectations test but instead allows courts to consider consumer expectations as a crucial yet competing factor in the nationally preferred risk–utility test. South Carolina courts have already engaged in a risk–utility analysis when assessing product designs;\textsuperscript{200} this proposal justifies that

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\textsuperscript{194} See id.; RESTATEMENT (SECOND) OF TORTS § 402A.
\textsuperscript{195} See supra Part II.A–B.
\textsuperscript{196} See supra Part II.B.
\textsuperscript{197} See Claytor, 277 S.C. at 265, 286 S.E.2d at 132.
\textsuperscript{200} See Reed, 697 F.2d at 1197 (citing Claytor, 277 S.C. at 265, 286 S.E.2d at 132; Young, 270 S.C. at 471, 242 S.E.2d at 680); Claytor, 277 S.C. at 265, 286 S.E.2d at 132; Bragg, 319 S.C. at 544, 462 S.E.2d at 328 (citing Reed, 697 F.2d at 1197; Claytor, 277 S.C. at 265, 286 S.E.2d at 132).
approach and offers transparency by explaining how such a test is derived from a statute which bases liability on consumer expectations.

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