IN THE SUPREME COURT OF THE STATE OF NEVADA

LEMANS CORP.,
Appellant/Cross-Respondent

v.

JOSEPH PROVENZA, ET AL.,
Respondent/Cross-Appellant

Supreme Court Docket No. 51026

AMICI CURIAE BRIEF OF LAS VEGAS CHAMBER OF COMMERCE, AMERICAN TORT REFORM ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, NFIB SMALL BUSINESS LEGAL CENTER, AMERICAN INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AND NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES IN SUPPORT OF APPELLANT/CROSS-RESPONDENT

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INTEREST OF *AMICI CURIAE*

Amici curiae are associations whose members include manufacturers and sellers of products and their insurers. Consequently, *amici* have a substantial interest in ensuring that product liability rules are fair, predictable, and promote sound public policy. *Amici* believe these principles were violated by the court below, resulting in one of the largest product liability awards in Nevada history. This Court should vacate the district court's judgment and direct it to dismiss the complaint and enter judgment in Appellant/Cross-Respondent LeMans' favor, or alternatively, vacate the judgment and remand for a new trial.

ISSUE PRESENTED

Amici's brief will focus on whether the district court erred by excluding all objective evidence proffered by LeMans to show that the subject motocross clothing performed "in the manner reasonably to be expected in light of its nature and intended function" and that "an ordinary user" of the clothing "having the ordinary knowledge available in the community" would not have expected the clothing to

prevent all serious burn injuries in a gasoline-fed conflagration resulting from a motocross bike crash, and limiting evidence on consumer expectations to the subjective testimony of Respondent Provenza family members.

STATEMENT OF THE CASE

Amici adopt Appellant/Cross-Respondent's summary of the case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over the past half-century, strict liability law has evolved to place sensible limits on product liability by developing objective and predictable standards. Nevada, like many other states, adopted a test to determine the existence of an unreasonably dangerous product with this objective in mind, and provided that such analysis must be based on the expectations of "the ordinary user having the ordinary knowledge available in the community." *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408, 412, 470 P.2d 135, 138 (1970). For nearly four decades, this consumer expectations test has provided an objective ordinary person inquiry in Nevada design defect cases. The trial court's actions here, however, mark a swift departure from this established rule of law by excluding expert evidence and allowing the determination of design defect to be based on the product user's own subjective product expectations.

Specifically, the trial court excluded expert evidence of the statistical rarity of fires in motocross riding, evidence of the unique circumstances of the fire in this case, evidence of the motocross clothing's compliance with applicable government flammability standards, evidence of industry standards under which fire retardants

are never used in motocross clothing, and evidence from professional motocross riders and ordinary members of the motocross community about their expectations as to whether motocross bike clothing is fire-retardant. Instead, the court limited consumer expectations evidence to Respondent Provenza family members' testimony that they had thought the clothing would be fire-retardant.

The trial court erred by excluding such objective evidence of consumer expectations, permitting the jury to determine design defect based purely on the subjective expectations of Respondent. This approach has never been the law in Nevada or other states which apply or have applied a consumer expectations test to determine product defect.

Furthermore, the need to maintain an objective standard is readily apparent. A subjective consumer expectations test would likely result in unsound and unfair absolute liability, contrary to Nevada law, *see Outboard Marine Corp., v. Schupbach*, 93 Nev. 158, 561 P.2d 450, 453 (1977), leading to insurability problems, and raising potential constitutional due process concerns. Because plaintiffs do not purchase or use a product with the expectation that it will harm them, a plaintiff's subjective expectation, by definition, will be that any product causing harm is defective. Manufacturers and sellers could be held liable even if they neither knew nor could have known about the risk, or when there was no safe feasible alternative design at the time the product was manufactured. A subjective standard for design defect determinations also would be highly unpredictable because product users vary considerably in education, intelligence and experience. Because the plaintiff

has an interest in the determination of product defect, trustworthiness and reliability concerns also exist with a subjective-based test. Further, allowing such expansive liability would create powerful incentives to bring new and unwarranted product liability actions in Nevada.

For these reasons, this Court should vacate the district court's judgment and direct it to dismiss the complaint and enter judgment in Appellant/Cross-Respondent LeMans' favor. Alternatively, this Court should vacate the judgment and remand for a new trial.

ARGUMENT

I. THE DEVELOPMENT OF STRICT LIABILITY AND THE CONSUMER EXPECTATIONS TEST

A. The Evolution of Strict Product Liability

At the turn of the twentieth century, product users faced distinct challenges in recovering for injuries resulting from unsafe products. Under established common law, an injured person could not hold a manufacturer liable for its negligence in putting a dangerous product on the market where he or she did not directly purchase the product from the defendant. *See, e.g.*, Dan B. Dobbs, *The Law of Torts* 973 (2000) (discussing *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (Exch. Pl. 1842)). This began to change when Judge Cardozo, in the landmark case *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), eliminated the privity rule in negligence cases. *MacPherson* held, "If [the

manufacturer] is negligent where danger is to be foreseen, a liability will follow." *Id.* at 1053.

Nevertheless, even after abandonment of the privity requirement in negligence cases, plaintiffs faced a difficult task in proving that the manufacturer failed to exercise reasonable care to avoid unintended dangers occurring in the construction process. *See* W. Page Keeton *et al.*, *Prosser & Keeton on Torts* 685 (5th ed. 1984). Thus, many plaintiffs relied on a breach of warranty theory. *See* Dobbs, *supra*, at 973. Yet, in warranty cases, the rule of privity again came into play. *See* David Owen, *Product Liability Law Restated*, 49 S.C. L. Rev. 273, 275 (1998).

For a period of time, courts developed innovations allowing plaintiffs to recover in warranty actions against manufacturers without privity, particularly in cases involving contaminated food, *see* Victor E. Schwartz *et al.*, *Prosser, Wade & Schwartz's Torts* 730 (11th ed. 2005), such as glass in a bottle of Coca-Cola or a "foul, filthy, nauseating, and poisonous substance" in the center of a carton of cooked tongue. *See Coca-Cola Bottling Works v. Lyons*, 111 So. 305 (Miss. 1927); *Mazetti v. Amour & Co.*, 135 P. 633, 633-34 (Wash. 1913). By 1960, courts across the United States had established this strict liability rule in cases involving flawed food products. *See Prosser & Keeton on Torts*, *supra*, at 690; William Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099, 1109 (1960).

A turning point in product liability law was the New Jersey Supreme Court's decision in *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 75 (N.J. 1960), a

leading case nationwide for extending the implied warranty of fitness for use to products beyond food without the need for privity. In *Henningsen*, the court concluded, "under modern marketing conditions, when a manufacturer puts a new [product] in the stream of trade and promotes its purchase to the public, an implied warranty that it is reasonably suitable for use as such accompanies it into the hands of the ultimate purchaser." *Id.* at 83-84.

Concepts of implied warranty, however, continued to be a source of considerable confusion in the courts. While courts had relaxed the privity requirement, other requirements of contract law, such as the applicability of defenses including disclaimers and the buyer's duty to notify the seller promptly of breach required under the Uniform Sales Act and its successor, the Uniform Commercial Code, came into play. *See* Prosser & Keeton, *supra*, at 691. In essence, implied warranties carried "far too much luggage in the way of undesired complications, and is more troublesome than it is worth." *Id* at 692.

For this reason, the California Supreme Court in *Greenman v. Yuba Power Products Inc.*, 377 P.2d 897 (Cal. 1963), adopted the doctrine of strict liability in tort. Soon thereafter, the American Law Institute adopted strict product liability in the Restatement (Second) of Torts § 402A (1965); *see generally* Victor E. Schwartz, *The Restatement (Third) of Torts: Products Liability – The American Law Institute's Process of Democracy and Deliberation*, 26 Hofstra L. Rev. 743, 745-48 (1998) (documenting the development of § 402A).

B. The Consumer Expectations Test

In the wake of this expansion of strict liability and retreat from requiring contractual privity – "the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts," *Prosser & Keeton on Torts*, *supra*, at 690 – courts were tasked with formulating standards to determine the meaning of product defect. The key portion of § 402A stated that a manufacturer could be subject to liability for harms caused by a product if the product was sold "in a defective condition unreasonably dangerous to the user or consumer." Restatement (Second) of Torts § 402A (1965). Comment *i* of that section explained that the 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." *Id* at *cmt. i*; *see also* W. Page Keeton, *Product Liability and the Meaning of Defect*, 3 St. Mary's L.J. 30, 36-39 (1973-1974); John Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 834-835 (1973). Many states eager to form objective design defect standards adopted this "consumer expectations" test. *See Nichols v. Union Underwear Co.*, 602 S.W.2d 429, 432 (Ky. 1980) (stating that seventeen states had expressly adopted the consumer expectations test for design defect by 1980).

II. OBJECTIVE EVIDENCE OF CONSUMER EXPECTATIONS IS REQUIRED

A. The Trial Court's Exclusion of Objective Consumer Expectations Violates Nevada Law

The origins and development of the consumer expectations test demonstrate that at all times the standard for design defect has been an objective one. As first stated in the Restatement (Second), the standard is that of the "*ordinary consumer* who purchases [the product], with the *ordinary knowledge common to the community* as to its characteristics." Restatement (Second) of Torts § 402A, *cmt. i* (1965) (emphasis added). This ordinary person standard has provided guided courts for nearly half a century, including this Court, which adopted the consumer expectations test in *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408, 413, 470 P.2d 135, 138 (1970).

In *Ginnis*, the plaintiff was injured when an automatic door at a casino allegedly malfunctioned and closed on her. 86 Nev. at 410, 470 P.2d at 136. The plaintiff sued the supplier of the door under various liability theories, including strict liability. This Court extended the doctrine of strict product liability from flawed food products, *see Shoshone Coca-Cola Bottling Co. v. Dolinski*, 82 Nev. 439, 420 P.2d 855 (1966), to the design and manufacturer of all products. *See Ginnis*, 86 Nev. at 413, 470 P.2d at 138. The court first articulated what it believed was the "most accurate test for a 'defect' within strict liability." 86 Nev. at 413, 470 P.2d at 138 (citing *Dunham v. Vaughan & Bushnell Mfg. Co.*, 247 N.E.2d 401, 403 (Ill. 1969)). The Court explained that the inquiry was whether the product "failed to

perform in the manner reasonably to be expected in light of its nature and intended function and was more dangerous than would be contemplated by the *ordinary user having the ordinary knowledge available in the community*." 86 Nev. at 413, 470 P.2d at 138 (emphasis added). Hence, the Court was explicit that Nevada's consumer expectations inquiry, like that of the Restatement (Second), is an objective, not subjective test.

In the forty years since this Court adopted its design defect test, Nevada courts appear to have experienced little confusion as to the objective nature of the analysis. Indeed, this Court's decision in *Ginnis* should have removed any doubts in that it permitted expert testimony by both plaintiff and defendant regarding the reasonableness of the automatic door design rather than relying on the plaintiff's subjective expectations. 86 Nev. at 411, 470 P.2d at 137.

Such objective inquiry has also been discussed by this Court in other design defect cases. In *McCourt v. J.C. Penney Co., Inc.*, 103 Nev. 101, 734 P.2d 696 (1987), for instance, this Court discussed the strict liability claims for design defect of a "hand-me-down" football jersey which caught fire, severely injuring a young child. The trial court admitted objective evidence by both plaintiff and defendant, submitted through expert testimony, regarding the safety of the jersey's fabric and availability of safer fabrics providing the same level of comfort. 103 Nev. 102, 734 P.2d 697. Some of the evidence offered to impeach the defendant's fabric expert, however, was excluded, and this Court found it was reversible error to deny such evidence.

Further, in *Robinson v. G.G.C., Inc.*, 107 Nev. 135, 808 P.2d 522 (1991), this Court examined a design defect claim involving a box cutting machine which badly damaged a worker's hand. The Court approved of the admission of objective evidence that the machine complied with the related American National Standards Institute (ANSI) design standards for baling machines. 107 Nev. at 142, 808 P.2d at 526. The Court also stated explicitly that, in Nevada, "[l]egislative or administrative regulatory standards are admissible as evidence of a product's safety" in cases alleging design defect. 107 Nev. at 142, 808 P.2d at 526 (citing *Falk v. Keene Corp.*, 782 P.2d 974 (Wash. 1989)).

As this Court's past design defect decisions make clear, an objective standard has always been intended and applied in Nevada. This Court's admission of objective evidence in such cases stands in stark contrast to the present case where objective evidence of compliance with government regulations or industry standards was not permitted by the trial court. Moreover, such careful attention in determining whether to admit expert evidence would prove entirely unnecessary if Nevada law examined only the plaintiff's subjective expectations of product safety.

B. Other States Uniformly Apply An Objective Consumer Expectations Test

The objective consumer expectations test adopted by this Court in *Ginnis* accords with every other state which applies the test. *See* Restatement Third of Torts: Prods. Liab. § 2, *cmt. d* (1998) (surveying states which apply a consumer expectations test); *see also* Restatement Third, of Torts: Prods. Liab. § 8, *cmt. h*

(1998) (characterizing consumer expectations in Section 8(b) regarding whether a seller's marketing of the product would cause the buyer to expect the used product to present no greater risk of defect than if the product were new as an "objective, not subjective" determination).

The precise issue of whether a subjective inquiry may be determinative of defect under the consumer expectations test has been discussed by a few courts, each of which has rejected the approach. For example, the Illinois Supreme Court recently repudiated such a notion, stating that the consumer expectations test "is an objective standard based on the average, normal, or ordinary expectations of the reasonable person; it is not dependent upon the subjective expectation of a particular consumer or user." *Calles v. Scripto-Tokai Corp.*, 864 N.E.2d 249, 255 (Ill. 2007).

Similarly, in *Toney v. Kawasaki Heavy Indus., Ltd.*, 975 F.2d 162 (5th Cir. 1992), a federal appellate court considered whether it was error for a court to fail to consider the consumer's subjective state of mind in determining whether the danger presented by the design of his motorcycle was patent or latent. The court squarely rejected any determinative subjective inquiry, stating instead that both the consumer expectations analysis and a manufacturer's "open and obvious" risk defense are "objective" standards. *Id.* at 169. As the court explained:

> To be sure, [plaintiffs] personal knowledge and expectations have little relevance to the issues presented in this litigation. The question in product strict liability cases is not whether the product is unreasonably dangerous to a given individual, nor is it whether a particular individual has bargained for a particular danger. Modern products are

> sold by the millions in markets comprising a cross section of the population and therefore are used by people with varying levels of education, experience, and ordinary common sense. The question is whether the manufacturer has released to the general public a product that is 'unreasonably dangerous.' The focus in product liability cases is on the product, not the individual purchaser.

Id. at 168-69 (citations omitted); *see also Brown v. Sears, Roebuck & Co.*, 328 F.3d 1274, 1281 (10th Cir. 2003) (rejecting plaintiff's claim of an "alternative subjective consumer expectations test" under the Utah Product Liability Act).

As in Nevada, parties in other states are generally permitted to introduce objective evidence demonstrating the expectations of the ordinary product user. For example, in *Simien v. S.S. Kresge Co.*, 566 F.2d 551 (5th Cir. 1979), the Fifth Circuit Court of Appeals, applying Texas law, permitted evidence of a jacket's compliance with safety standards in a case similar to the one at bar. There, the plaintiff, a child, suffered severe burns after his jacket caught fire while starting an outdoor fire. A resulting lawsuit alleged that the jacket was defectively designed. The court, considering whether the jacket "would not meet the reasonable expectations of the ordinary consumer as to safety," allowed the defendant to present expert testimony that the jacket complied with, and in fact far exceeded, the federal Flammable Fabrics Act, and other commercial and industry standards. *Id.* at 557. Recognizing that other courts addressing this design defect issue have held that "compliance with the standard is not conclusive as a measure of defectiveness or unreasonable danger," the court nevertheless found that, based on the objective and

"uncontroverted" evidence, the jacket was not unreasonably dangerous and defectively designed. *Id.*[1]

Similarly, in *Union Supply Co. v. Pust*, 583 P.2d 276 (Colo. 1978), the Colorado Supreme Court, sitting *en banc*, stated the importance of admitting objective evidence in a design defect case applying the consumer expectations test. In permitting evidence that a conveyor belt complied with existing government and industry safety standards, the court explained:

> [S]afety standards are relevant, especially in design defect cases. . . . These codes were formulated by groups of experts in the conveyor designing and manufacturing field, and were approved by many organizations. They are likely to be more probative than a single learned treatise or an expert opinion, as they represent the consensus of an entire industry. There is no motive for the formulators to falsify, and there is no danger that the standards will be subsequently altered or incorrectly remembered by a witness. Finally, since we require that the safety standards be introduced through an expert witness, the adverse party will have a fair opportunity to cross-examine the expert on any inconsistencies, misrepresentations or other limitations of the standards.

Id. at 286-87.

As this analysis makes clear, the consumer expectations test is based on far more solid and comprehensive grounding than an individual consumer's subjective

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[1] *See also Two Rivers Co. v. Curtiss Breeding Serv.*, 624 F.2d 1242, 1249 (5th Cir. 1980) (permitting evidence of cattle breeder industry custom to assist in determining whether ordinary purchaser of bull semen would expect product to carry some recessive genes), *reh'g denied*, 629 F.2d 1350, *cert. denied*, 450 U.S. 920 (1981); *Quinn v. Southwest Wood Prods., Inc.*, 597 F.2d 1018, 1021-22 (5th Cir.) (allowing evidence of ladder's compliance with Occupational Safety and Health Administration (OSHA) and other industry standards in design defect action), *reh'g denied*, 603 F.2d 860 (1979).

beliefs about a product. This rationale has also led other courts and legislatures to admit objective evidence of compliance with industry standards and customs when determining ordinary user's expectations. *See, e.g, Sexton v. Bell Helmets, Inc.*, 926 F.2d 331, 337 (4th Cir. 1991); *Sours v. Gen. Motors Corp.*, 717 F.2d 1511, 1517 (6th Cir. 1983); *Schwartz v. Am. Honda Motor Co.*, 710 F.2d 378, 383 (7th Cir. 1983); *Wis. Elec. Power Co. v. Zallea Bros., Inc.*, 606 F.2d 697, 703 (7th Cir. 1979); *Hohlenkamp v. Rheem Mfg. Co.*, 655 P.2d 32, 36-37 (Ariz. Ct. App. 1982); Wash. Rev. Code § 7.72.050. Furthermore, when such objective evidence is excluded, as in the present case, and all the jury has to guide it is the user's testimony, the result is an entirely subjective and unpredictable standard that is not the law of Nevada or anywhere else.

III. ALLOWING THE CONSUMER EXPECTATIONS TEST TO BE BASED UPON SUBJECTIVE EVIDENCE WOULD BE BAD PUBLIC POLICY

A fundamental problem with allowing product defect to be based on a plaintiff's own subjective expectations is that the approach would necessarily impose absolute liability on manufacturers and sellers. Plaintiffs do not purchase or use a product with the expectation that it will cause them injury. Their subjective expectation, by definition, will be that any product causing harm is defective. Manufacturers and sellers could, therefore, be held liable even if they neither knew nor could have known about the risk imposed by the product, or when there was no safe feasible alternative design available at the time the product was manufactured.

Nevada product liability law has not imposed, and should never impose, such absolute liability. *See Bradshaw v. Blystone Equip. Co.* of Nevada, 79 Nev. 441, 386 P.2d 396, 397 (1963); *Schupbach*, 93 Nev. at 561, P.2d at 453; *Robinson,* 107 Nev. at 138, 808 P.2d at 524; *see generally* Victor E. Schwartz, *The Death of "Super Strict Liability": Common Sense Returns to Tort Law*, 27 Gonz. L. Rev. 179 (1992). Absolute liability is unfair and leads to insurability problems.

Furthermore, allowing defect determinations to be based solely upon a plaintiff's subjective expectations would lead to wildly unpredictable results because product users vary considerably in education, intelligence and experience. Due process concerns could arise. As the United States Supreme Court noted in a landmark decision regarding punitive damages, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive *fair notice* . . . of the conduct that will subject him to [liability]. . . ." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) (emphasis added).

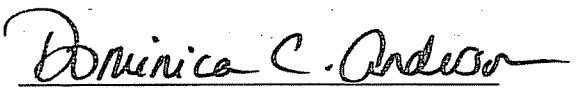
Trustworthiness and reliability issues also would be created by a subjective-based test, as the plaintiff has an interest in the determination of product defect. Finally, allowing such expansive liability would create powerful incentives to bring new and unwarranted product liability actions in Nevada, reducing the attractiveness of the state to employers.

CONCLUSION

For these reasons, this Court should vacate the district court's judgment and direct it to dismiss the complaint and enter judgment in Appellant/Cross-

Respondent LeMans' favor, or alternatively, vacate the judgment and remand for a new trial.

Respectfully submitted,



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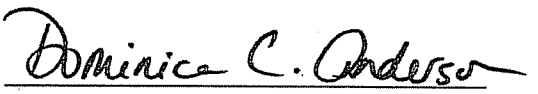

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CERTIFICATE OF RULE 28A COMPLIANCE

Pursuant to Rule 28A of the Nevada Rules of Appellate Procedures, I certify that the I have read the foregoing Brief and that the brief, to the best of my knowledge, is not frivolous or submitted for an improper purpose. I further certify that the brief complies with the requirements of the Nevada Rules of Appellate Procedure.

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