SUPREME COURT, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203	
OPINION BY THE COURT OF APPEALS Judges Terry, Graham, and Webb Case Number 2015COA124 Appeal from Boulder County District Court Honorable Maria E. Berkenkotter, Judge Civil Action No. 11CV912	▲ **COURT USE ONLY** ▲
Petitioner: FORREST WALKER **Respondent:** FORD MOTOR COMPANY	Case No. 2015SC899
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BRIEF OF *AMICI CURIAE* COLORADO CIVIL JUSTICE LEAGUE AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF RESPONDENT FORD MOTOR COMPANY

AMICI'S CERTIFICATE OF COMPLIANCE

Undersigned counsel of record for *Amici* hereby certifies that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that

The brief complies with the applicable word limit set forth in C.A.R. 29(d).

It contains 3,716 words (does not exceed 4,750 words).

The brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

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STATEMENT OF INTEREST

The Colorado Civil Justice League (CCJL) is a nonpartisan organization large and small businesses, trade associations, individual citizens and private attorneys. It is dedicated solely to improving Colorado's civil justice system through a combination of public education and outreach, legal advocacy, and legislative initiative. CCJL has submitted *amicus curiae* briefs to this Court on numerous previous occasions.

The American Tort Reform Association (ATRA) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that, since 1986, have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than two decades, ATRA has filed *amicus curiae* briefs in cases that have addressed important civil justice issues.

Amici support efforts to improve the Colorado civil justice system and facilitate litigation rules that are usable, reasonable, and fair. They have resisted efforts to expand liability in a manner that would result in windfall recoveries or unbalanced approaches to civil litigation. Of particular relevance here, *amici* actively supported legislation enacted in 2003 which addressed Colorado's product liability law.

STATEMENT OF ISSUE

This Court granted certiorari on three issues. This amicus brief is submitted on the first issue only, which is framed as follows:

> Whether the court of appeals erred in concluding that the "risk-benefit" test for strict product liability incorporates the "consumer expectation" test, such that the trial court reversibly erred by separately instructing the jury on the "consumer expectation" test.

INTRODUCTION

Colorado has adopted a single standard for assessing the danger inherent in products. Only the risk-benefit analysis, informed by factors pertinent to the product and circumstances at issue in individual cases, fits within Colorado's current conception of strict products liability. Although certain early cases considered product safety through the lens of a consumer's contemplation of danger, Colorado strict product liability law came to recognize an array of deficiencies inherent in that approach. Because the multi-factor risk-benefit analysis is the only method that maintains a balanced approach and ensures fairness to the interests of both manufacturers and consumers, only that test should be included within jury instructions.

The need for clear and comprehensible standards is amplified in products liability cases where jurors typically must apply complex legal concepts to highly technical evidence. An alternative instruction regarding the manner of assessing product danger is needlessly confusing, particularly in light of the vagueness and lack of guidance inherent in the consumer expectation test. The Court should continue its adherence to the risk-benefit analysis as the sole means for determining if a product is "unreasonably dangerous." The Court of Appeals correctly reversed the District Court because it improperly instructed the jury to consider and apply the consumer expectation test as an alternative product liability standard.

ARGUMENT

I. COLORADO'S STRICT PRODUCT LIABILITY LAW STRIKES A PROPER BALANCE OF INTEREST BY APPLYING A RISK-BENEFIT ANALYSIS AS THE SOLE TEST FOR DETERMINING WHETHER A PRODUCT IS "UNREASONABLY DANGEROUS."

Colorado's strict liability law has consistently sought to achieve a balance between the compensatory interests of a consumer injured during the use of a product and the interests of a seller to offer reasonably safe products without facing the potentially crushing burden of defending against unsubstantiated design defect claims. Colorado has found that balance through utilization of a multi-faceted risk-benefit analysis.

From the earliest adoption of strict product liability, and continuing throughout the evolution of the doctrine in Colorado, this Court has indicated that the scope of strict liability "is limited." *Kysor Indus. Corp. v. Frazier*, 642 P.2d 908, 911 (Colo. 1982). The need for balance in the strict liability doctrine led Colorado to maintain the requirement that a jury find a product "unreasonably dangerous," despite the abandonment of that element by several other states. *See Union Supply Co. v. Pust*, 583 P.2d 276, 282 n.5 (Colo. 1978). This Court did so in recognition that the "unreasonably dangerous" element appropriately imposes "some limits on the liability of a manufacturer or seller." *Id.* Similarly, this Court has refused to shift away from the plaintiff the burden of proving the unreasonable dangerousness of the product at issue. *See Armentrout v. FMC Corp.*, 842 P.2d 175, 182 (Colo. 1992). *See also Fibreboard Corp. v. Fenton*, 845 P.2d 1168, 1175 (Colo. 1993)("a plaintiff is required to establish that a product is defective and unreasonably dangerous.").

In its quest for a balanced approach to strict product liability, the Court has moved away from employing the "consumer expectation test" as a freestanding basis for finding a product "unreasonably dangerous." While acknowledging that certain other states, in their conceptions of strict liability, have chosen to embrace the consumer expectation test, this Court has identified a range of flaws that render

it inappropriate as a freestanding test under Colorado's particular conception of strict product liability. For example, the consumer expectation test "fails to address adequately" technical and scientific data bearing on the dangerousness of the product. *Ortho Pharmaceutical Corp. v. Heath*, 722 P.2d 410, 413 (Colo. 1986), *overruled on other grounds by Armentrout*, 842 P.2d 175. *See also Camacho v. Honda Motor Co*., 741 P.2d 1240, 1247 (Colo. 1987) (describing reliance on consumer expectation test as "particularly inappropriate" when the safety of a product's design must be assessed using technical and scientific information). Also, the consumer expectation test does not take into account data made available to manufacturers from "testing, inspection and data analysis" of the product, nor does that test encourage manufacturers to utilize such knowledge in the product design process. *Camacho*, 741 P.2d at 1247. Additionally, the consumer expectation test, as a single-issue inquiry, does not provide "flexibility" to allow consideration of additional "factors which may assist in determining whether or not a design is unreasonably dangerous." *Armentrout*, 842 P.2d at 184. *See also Camacho*, 741 P.2d at 1245 (recognizing that assessing product danger "necessarily depends upon many circumstances," and so an appropriate test "must consider several factors.").

Legal scholars echo Colorado's acknowledgement that the consumer expectation test has severe weaknesses. *See, e.g.*, *Restatement (Third) of Torts: Products Liability* §2, cmt. g (Am. Law Inst. 1997)("Consumer expectations, standing alone, do not take into account whether the proposed alternative design could be implemented at reasonable cost, or whether an alternative design would provide greater overall safety."). At its core, the consumer expectation test is simply too abstract and ungrounded to constitute a viable independent standard:

> Perhaps the most important criticism of the consumer expectations test as it relates to design defects is the impossibility of the task it requires: to define just what an ordinary consumer expects of the technical design characteristics of a product. While it can be assumed that consumers expect a certain level of safety, how is that level defined when it comes to specific design criteria? For example, what do consumers expect of the structural soundness of one type of metal as opposed to another with slightly different characteristics that, if used, would require changes in still other aspects of the design? If the ordinary consumer can be said reasonably to expect a product to be "strong," how strong is strong?

Mary J. Davis, *Design Defect Liability: In Search of a Standard of Responsibility*, 39 Wayne L. Rev. 1217, 1236-37 (1993).[1]

[1] Under the *Restatement (Third)* §2 strict liability standard applicable to design defect claims, "consumer expectations do not constitute an independent standard for judging the defectiveness of product designs." *See* §2, cmt. g.

Only through application of a risk-benefit analysis, informed by factors appropriate for the circumstances at issue in an individual case, can Colorado's strict product liability law maintain the balance of interests between injured consumers and product sellers. As this Court recognized:

> The factors enumerated in *Ortho* are applicable to the determination of what constitutes a product that is in a defective unreasonably dangerous condition. By examining and weighing the various interests represented by these factors, a trial court is much more likely to be fair to the interests of both manufacturers and consumers in determining the status of particular products.

Camacho, 741 P.2d at 1248 (emphasis added). Unlike the single-issue consumer expectation test, the risk-benefit analysis allows the jury to weigh adequately the full range of considerations that bear on a product's safety and achieve Colorado's goal of a balanced liability assessment:

> [S]ince the degree of risk or safety in every product design is counter-balanced by considerations such as cost, utility, and aesthetics, the basis of responsibility for design choices logically should be based on the principle of optimality inherent in the philosophical notion of utility and in the economic concept of efficiency. That is, the goal of both design engineers and the law should be to promote in products an ideal balance of product usefulness, cost and safety. . . . The concept of negligence has been based on the notion of "reasonableness," predicated on the idea that proper decisions involve selecting the proper balance of expected benefits and costs. . . . This type of "cost-benefit" or "risk-utility" analysis . . . nicely describes the

> decisional calculus that lies at the heart of products liability law[.]

David Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*, 1996 U. Ill. L. Rev. 743, 754-55 (emphasis original).

Colorado's strict product liability law has therefore evolved so that only the multi-faceted risk-benefit analysis currently may be applied to assess whether a product presents an "unreasonable danger." *See Camacho*, 741 P.2d at 1248. Subsequent to *Camacho*, the risk-benefit analysis has been described without qualification as the test utilized in design defect cases to assess whether a product is "unreasonably dangerous." *See Barton v. Adams Rental, Inc*., 938 P.2d 532, 537 (Colo. 1997)("To determine whether a product is 'unreasonably dangerous' pursuant to the first element set forth in *Pust*, we have adopted a straightforward risk-benefit analysis.")(emphasis added); *Armentrout*, 842 P.2d at 183 ("Because the determination of whether a product is 'unreasonably dangerous' is made through a risk-benefit analysis, we find that the plaintiffs also bear the burden of proving that the risks outweigh the benefits of the design.")(emphasis added).

The Colorado Supreme Court's resolution of this issue is understood by other courts applying Colorado strict product liability law. The U.S. Court of Appeals for the Tenth Circuit, in determining the proper "unreasonably dangerous" test to apply under Colorado law to design defect allegations pertaining to a boat

steering cable, held that "the court must use only the risk-benefit test; it may not use the consumer expectation test, and it may not use both tests together." *Kokins v. Teleflex*, 621 F.3d 1290, 1297 (10th Cir. 2010). *See also Montag v. Honda Motor Co.*, 75 F.3d 1414, 1419 (10th Cir. 1996)(affirming exclusive instruction on risk-benefit analysis and finding "the consumer expectations test should not be used" in assessing whether a car's seat belt system had a design defect). Similarly, the U.S. District Court for Colorado concluded that "a reading of *Camacho* and subsequent cases reveals that Colorado holds the consumer expectation test in disfavor" and ruled that the risk-benefit test represents the proper means under Colorado law for assessing the danger presented by the design of a butane lighter. *Bartholic v. Scripto-Tokai Corp*., 140 F. Supp. 2d 1098, 1109-10 (D.Colo. 2000).

Allowing jurors to use the consumer expectation test as a standalone alternative means for finding a product "unreasonably dangerous," as Petitioner Walker urges,[2] would ignore the evolution of Colorado product liability law and disrupt the balance of interests achieved through application of the multi-factor risk-benefit analysis. The Court has acknowledged an array of flaws inherent in the consumer expectations test, as well as the superior "fair[ness] to the interests of

[2] *See* Petitioner's Opening Brief at 12-15.

both manufacturers and consumers in determining the status of particular products" achieved by use of the risk-benefit analysis. *Camacho*, 741 P.2d at 1247-48. *See also Armentrout*, 842 P.2d at 184; *Ortho*, 722 P.2d at 413. These assessments of the proper means of fulfilling the purposes of Colorado's strict products liability law, developed incrementally over the course of numerous product liability cases, are circumvented if the jury receives an alternative instruction that creates a back door allowing it to set aside the risk-benefit analysis and, instead, find a product "unreasonably dangerous" based solely on whether the product "creates a risk of harm to persons or property that would not ordinarily be expected[.]" Trial Court Instruction No. 18 (R.Supr., 21.).

This Court surely did not build Colorado's product liability law around the balance of interests achievable through application of the risk-benefit analysis only to have its purposes undermined by an alternative instruction that allows jurors to impose liability on the basis of a demonstrably inadequate test. Accordingly, the Court should reiterate what its previous cases "made clear": that plaintiffs bringing design defect claims must establish that the product at issue is "unreasonably dangerous" by "demonstrating that, on balance, the risk of danger inherent in a challenged design outweighs the benefits of such a design." *Barton*, 938 P.2d at 537 (*citing Armentrout*, 842 P.2d at 183). The Court of Appeals' recognition that

Colorado law allows a product to be assessed as "unreasonably dangerous" only through application of the risk-benefit test should be affirmed.

II. INCLUDING THE VAGUE CONSUMER EXPECTATION TEST AS AN ALTERNATIVE INDEPENDENT TEST IN THE STRICT LIABILITY INSTRUCTION WILL CONFUSE JURIES.

Jurors struggle to understand even basic jury instructions. One study of Iowa jurors found that, after receiving instructions from the court, as many as 80% of jurors failed to understand fundamental rules of evidence and the burden of proof.[3] If jurors struggle with instructions that convey commonplace concepts, it should be no surprise that instructions regarding complex legal standards leave many jurors with little comprehension of the legal issue or what they need to decide.[4] This situation puts a premium on jury instructions that provide clear and

[3] *See* J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, Indiana University Maurer School of Law Digital Repository, available at http://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1705&context=facpub (1990).

[4] *See, e.g.,* Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. Mich. J.L. 401, 412–25 (1990). The Michigan Juror Comprehension Project evaluated 600 jurors between the ages of 19-71 and across all socioeconomic statuses following their service on criminal jury trials. The study overwhelmingly found that juror comprehension of basic instructions on evidence was significantly higher than comprehension of the instructions on the crime charged. For example, more than 84% of jurors comprehended the

direct statements, if the instructions are to communicate effectively the law to the jurors. *See* Robert Rich, *The Most Grotesque Structure of All: Reforming Jury Instructions, One Misshapen Stone at a Time*, 24 Geo. J. Legal Ethics 819, 820 (2011). Accordingly, Colorado courts have recognized that "instructions that are either irrelevant, misleading, or confusing to the jury must be avoided." *People v. Lucero*, 985 P.2d 87, 92 (Colo. Ct. App. 1999).

Product liability cases in particular necessitate direct, comprehensible and coherent jury instructions to guide jurors' decision-making. During the course of a trial, jurors in product liability cases typically hear from several expert witnesses regarding complex topics such as scientific or technical information, industry standards, regulatory requirements, and the applicable state of the art. After receiving this evidence, jurors need usable guidance to understand how to apply the testimony they have heard to the decisions they must make. Providing the jury with an instruction that sets forth two alternative independent tests for assessing whether the product at issue is "unreasonably dangerous," which is what Petitioner

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instruction for witness credibility, but only 32.3% comprehended the instruction for assault.

Walker asks this Court to sanction,[5] needlessly complicates the jury's task and impedes their ability to reach a resolution consistent with Colorado law.

The vague and abstract nature of the consumer expectation test compounds the confusing effect of an instruction that sets forth alternative standards. Leading tort scholars have recognized that "[t]he application of such a vague concept [as consumer expectation] … does not provide much guidance for a jury." W. Page Keeton et al., *Prosser and Keeton on Torts* 699 (5th ed. 1984). The consumer expectation test, by its nature, simply leaves jurors guessing about how to evaluate a specific product:

> The meaning is ambiguous and the test is very difficult of application to discrete problems. What does the reasonable purchaser contemplate? In one sense he does not "expect to be adversely affected by a risk or hazard unknown to him. In another sense he does not contemplate the "possibility" of unknown "side effects." In a sense the ordinary purchaser cannot reasonably expect anything more than that reasonable care in exercise of the skill and knowledge available to design engineers has been exercised.

Id.

There is no reason to overload Colorado jurors hearing product liability lawsuits with the confusing task of juggling two alternative standards for assessing a product's danger, one of which is vague and deeply flawed. The risk-benefit analysis affords the flexibility necessary for a thorough evaluation of the particular

[5] *See* Petitioner's Opening Brief at 12-15.

product and its injury-causing potential, while fairly balancing the interests of both consumers and product sellers. *See*, *e.g.*, *Camacho*, 741 P.2d at 1246 - 48. Having already moved away from the consumer expectation test, the Court should not burden Colorado's jurors by resurrecting that test as an alternative standard.

CONCLUSION

The risk-benefit analysis represents Colorado's standard for determining whether a product is "unreasonably dangerous" in strict product liability cases. Only that test achieves the balance of interests Colorado law seeks to achieve. The consumer expectation test has properly been rejected as a workable standalone means for evaluating a product's danger. Opening a back door approach for reliance on that test through an alternative jury instruction would be inconsistent with this Court's pronouncements and would undermine Colorado's balanced approach to product liability. The Court should affirm the Court of Appeals' decision to overturn the verdict and remand for a new trial in which the jury would not receive instruction under the consumer expectation test.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September, 2016, a true and correct copy of this **BRIEF OF *AMICI CURIAE* COLORADO CIVIL JUSTICE LEAGUE AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF RESPONDENT FORD MOTOR COMPANY** was filed and served via ICCES to the following:

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