

THE PLAINTIFFS KEEP GETTING RICHER, THE MANUFACTURERS JUST STAY POOR: DESIGN DEFECT LITIGATION IN GEORGIA POST-*BANKS*¹

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¹ *Banks v. ICI Americas, Inc.*, 450 S.E.2d 671 (Ga. 1994).

I. INTRODUCTION

In the United States, the various requirements and burdens that litigants in product design defect cases must carry have developed in such a manner that plaintiffs have enjoyed a gradual lessening of the barriers to their recovery against allegedly negligent manufacturers.² Consider the following two scenarios. In the first, the largest manufacturer of portable gas cans in the country, Blitz USA, was forced to file for bankruptcy in 2012 due to an extremely litigious environment and the increasing prices of product liability insurance.³ In that instance, plaintiffs sued Blitz chiefly under a design defect theory, alleging the company negligently manufactured gasoline cans that exploded when used to pour their contents onto a fire.⁴ Although it seems openly and obviously dangerous⁵ to pour gasoline onto an open fire, plaintiffs nevertheless effectively run companies out of business under reasonable alternative design theories of negligence and through the increased costs of litigating such cases.⁶

In the other scenario, electric shock killed a man after the mast of his sailboat came into contact with an overhead power line.⁷ The plaintiff brought a design defect action based in strict liability, claiming the manufacturer failed to equip the boat's mast with

² See *infra* Part II.A for a more detailed discussion.

³ See Joe Wertz, *Why the Largest Maker of Portable Gas Cans is Going Out of Business*, STATEIMPACT (July 9, 2012, 4:27 AM), <http://stateimpact.npr.org/oklahoma/2012/07/09/why-the-largest-maker-of-portable-gas-cans-is-going-out-of-business/> (“Deductibles for product liability insurance are often in the tens of millions of dollars, an expert in product liability tells Marketplace. The rates go up even more if you have to use it, and Blitz is currently fighting 42 lawsuits.”).

⁴ See *id.* (“Consumers have accused the company of making faulty cans that explode when used to pour gasoline onto fires. Blitz says its cans carry warnings that say you should never use gasoline to start or accelerate a fire.”).

⁵ See *infra* Part I for discussions of *Mann v. Coast Catamaran Corp.*, 326 S.E.2d 436 (Ga. 1985).

⁶ See Wertz, *supra* note 3 (“Even winning is expensive. Blitz beat one lawsuit in Texas, Marketplace reports, but the fight still cost the company about \$2.5 million.”); see also Jodi Swick & Rod Eshelman, *How a Product Liability Case May Impact Your Insurance*, LAW360 (Apr. 16, 2013, 12:27 PM), <http://www.law360.com/articles/4323000/how-a-product-liability-case-may-impact-your-insurance> (“When it comes to insurance, large manufacturers typically purchase multiple layers of insurance to defend and indemnify against product liability. However, insurance policies for product liability claims often exclude losses that are ‘expected or intended’ by the policyholder. Evidence admitted during a product liability trial that shows that the manufacturer knew of the risks posed by its products could be utilized by an insurer to support an insurance policy’s ‘expected or intended’ exclusion.”).

⁷ *Mann*, 326 S.E.2d at 436.

safety devices to ground or stop electric current.⁸ The court held that the boat was not defective because it had been reasonably designed for its intended purpose—to sail.⁹ Further, despite plaintiff's attempt to offer evidence of proof of a reasonable alternative design, the court denied this proof, asserting that any open and obvious danger eliminated the possibility of a design defect as a matter of law.¹⁰

The former scenario involves litigation occurring in Texas and the latter refers to an overruled Georgia case that will be discussed below; however, when read together, they present the following problem: how much proof of a reasonable alternative design is necessary to survive a claim for defective design—bearing in mind the desire to deter frivolous claims hurtful to entire industries—and when should proof of a reasonable alternative design be denied as irrelevant to design defect claims pertaining to products that exhibit open and obvious dangers? In Georgia, the open and obvious danger exception no longer applies due to the overruling of the *Mann v. Coast Catamaran Corp.* decision by *Banks v. ICI Americas, Inc.*¹¹ However, might the lack of any strict requirement that a plaintiff prove a reasonable, or even *feasible*, alternative design to establish proof of a design defect lead to claims that are harmful to an entire industry, as alluded to in the first scenario above?

Design defect litigation is particularly important because it involves claims that, if successful, take entire product lines out of the market and cost the effected manufacturers exorbitant losses in profit and expose them to steep compensatory as well as punitive damages. In these cases, however, plaintiffs often suffer life-changing injuries or, in extreme cases, death. As such, the line between compensating those negligently injured by the fault of others and requiring enough proof of fault or liability, or both, so as to bar frivolous, potentially industry-ruining claims is

⁸ *Id.*

⁹ *Id.* at 437.

¹⁰ *Id.* This case, which was overruled by this Note's eponymous case, *Banks*, will be discussed in much greater detail below. The case is used here primarily to serve as a foil to the first scenario mentioned above. The case highlights old-Georgia law wherein plaintiffs were barred from offering evidence of a reasonable alternative design in cases where the product presented an open and obvious danger. This effectively led to plaintiffs petitioning for a reasonable alternative design requirement in Georgia product liability law—which will also be discussed in greater detail below.

¹¹ See *infra* Part II.C.2.

extremely fine. These problems also affect more than just the parties at hand. Further, because the Georgia test itself stems from a provision of the *Restatement (Third) of Torts: Products Liability (Restatement (Third))*, which many argue was too pro-manufacturer, there should be special cause for concern.

In Part II of this Note, I will provide a short history of design defect litigation in the United States. In particular, I will focus on the events and legal developments leading up to the drafting and implementation of the *Restatement (Third)* and, specifically, those pertaining to its critical and controversial Section 2(b). Then, I will address critical reactions to the requirement of the “reasonable alternative design” found in the *Restatement (Third)*. Finally, I will focus on the development of strict liability in Georgia by focusing on two pivotal cases: *Banks* and *Jones v. NordicTrack, Inc.*¹²

In Part III, I will address the myriad of ways in which Georgia courts have interpreted the *Banks*-factor test and what those courts hold as necessary for plaintiffs to prove a reasonable alternative design. Further, I will compare the outcomes of these cases with those cases in other states with similar tests for defective design, particularly the reasonable alternative design test. Also, I will compare and contrast the outcomes and tests used with states that require proof of a reasonable alternative design. Recognizing a trend of uncertainty, likely highlighted by preferential treatment of plaintiffs in Georgia, I will then argue that the *Banks*-factor test, lacking an actual requirement of proof of a reasonable alternative design, has swung too far in favor of plaintiffs in design defect litigation and has produced too much common law uncertainty in the application of proof of a reasonable alternative design.

Finally, in Part IV, I will conclude with the argument that the *Banks*-factor test is nothing more than repackaged negligence and will suggest that the new rule should be interpreted to require a lessened showing of alternative design known as the *feasible alternative design*, which can be compared to a quasi-strict liability test for defective design defect in products liability cases.

¹² 550 S.E.2d 101 (Ga. 2001).

II. BACKGROUND

A. A SHORT HISTORY OF THE *RESTATEMENT (THIRD)* SECTION 2(B)

With the publication of the *Restatement (Third)* in 1998, the American Law Institute (ALI) significantly altered the modern landscape of product liability law in the United States.¹³ The *Restatement (Third)* was a response to an inherent ambiguity in the *Restatement (Second) of Torts' (Restatement (Second))* definition of “defect.”¹⁴ The ALI sought to provide clarity to the myriad of interpretations of this definition across multiple jurisdictions.¹⁵ Though much has been said about the interest groups’ alleged role in the drafting of the *Restatement (Third)*,¹⁶ the ALI’s attempt to provide a consensus view amongst states regarding the requirements for defective design in product liability litigation has resulted in considerable disagreement in terms of how particular states follow suit.¹⁷

Long before negligence became the standard for product liability, let alone the emergence of *Restatement (Third)*, product liability began in the realm of contract law. Under a theory of privity of contract, the initial requirement posited that the manufacturer of a product was only liable to the retailer with whom the manufacturer had contracted to sell the product.¹⁸

¹³ RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (1998).

¹⁴ See Frank J. Vandall & Joshua F. Vandall, *A Call for an Accurate Restatement (Third) of Torts: Design Defect*, 33 U. MEM. L. REV. 909, 919 (2003) (“In 1978 the critical issue remaining was how to define defect. The courts ha[d] adopted three definitions for defect.”).

¹⁵ See *id.* at 919–20 (highlighting the various ways in which the term defect has been interpreted).

¹⁶ See *id.* at 939 (“[T]he American Law Institute has been striving to embrace manufacturers in general and the tobacco industry in particular. The *Restatement (Third)*, section 2 reads like a wish list for manufacturing America.”); see also Patrick Lavelle, Comment, *Crashing Into Proof of a Reasonable Alternative Design: The Fallacy of the Restatement (Third) of Torts: Products Liability*, 38 DUQ. L. REV. 1059, 1067 (2000) (“The *Restatement (Third) of Torts: Products Liability* project should have resulted in an academic and scholarly product . . . to which courts and legislatures could turn with confidence However, this project, infected as it was with reporter bias and improper influence, has produced nothing more than a position paper reflecting the views of special interests groups with whom the selected reporters are aligned.”).

¹⁷ See generally John F. Vargo, *The Emperor’s New Clothes: The American Law Institute Adorns a “New Cloth” for Section 402A Products Liability Design Defects—A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493 (1996) (exploring the differences in how the states reacted to and adopted the *Restatement (Third)*’s new proposal).

¹⁸ The first case to recognize privity in the realm of products liability dates back to 1842 and involved a stagecoach driver who was injured after being thrown from his vehicle and

However, this privity requirement lead to unjust, and oftentimes absurd, results, causing courts to carve out exceptions to the general rule over the course of the next sixty or so years. The most notable exception being those cases involving inherently dangerous products. In *Thomas v. Winchester*,¹⁹ for example, a drug manufacturer mislabeled a bottle of poison and sold it to a druggist, who then sold the bottle to a patient who suffered serious injuries.²⁰ The court ultimately allowed the product liability claims to go forward, despite a lack of privity, due to the imminently dangerous nature of the product.²¹

The privity requirement, however, was essentially nullified in 1905 with *MacPherson v. Buick Motor Co.*²² In that case, a plaintiff who bought a Buick from a dealer, who had purchased the vehicle from the manufacturer, was thrown from his vehicle when a wooden wheel broke.²³ In reaching its decision, the *MacPherson* court held that the “inherently dangerous” exception to the privity requirement was not absolute and expanded the scope of liability to include products reasonably certain to cause injuries when negligently made—thus, ushering in a new era of negligence-based product liability.²⁴ Further, it was not until some eighteen years after his famous concurring opinion in *Escola v. Coca Cola Bottling*

the driver subsequently sued the defendant, alleging a failure to maintain the stagecoach for the delivery of mail. *See Winterbottom v. Wright*, 152 Eng. Rep. 402, 405 (1841) (“There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences . . . would ensue.”).

¹⁹ 6 N.Y. 397 (1852).

²⁰ *Id.* at 405.

²¹ *See id.* at 408–10 (finding that the imminent danger of mislabeling poison is likely to fall on the consumer rather than the vendee, a druggist).

²² *See* 111 N.E. 1050 (N.Y. 1916) (holding manufacturer of a car liable to the consumer despite lack of privity).

²³ *Id.* at 1051 (noting that further examination revealed that the wheel had broken because it was manufactured with defective wood).

²⁴ *See id.* at 1053 (“We hold . . . that the principle of *Thomas v. Winchester* is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully.”).

*Co. of Fresno*²⁵ that Justice Traynor was able to put his idea of strict liability for product defects into practice. In *Greenman v. Yuba Power Products, Inc.*,²⁶ a case in which a plaintiff was injured using a Shopsmith manufactured by the defendant,²⁷ Justice Traynor explicitly shifted the focus of product liability from the realm of contract law to the realm of strict liability law, thereby shifting the tides of product defect litigation.²⁸

Section 402A of the *Restatement (Second)*²⁹ was enacted to call for the imposition of strict liability on manufacturers in design defect claims in an attempt to remove the traditional hurdles confronting plaintiffs attempting to prove negligence in similar product liability cases.³⁰ However, without a clear definition of defect and no distinction between manufacturing, design, and failure to warn defects, Section 402A left states uncertain regarding the application of this new legal standard.³¹ Thus came the *Restatement (Third)* with the controversial requirement of

²⁵ See 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring) (“[T]he manufacturer’s negligence should no longer be singled out as the basis of a plaintiff’s right to recover . . . [i]t should be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.”).

²⁶ *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963).

²⁷ See *id.* at 898 (stating plaintiff sustained serious injuries when a piece of wood flew from the shopsmith and struck him).

²⁸ See *id.* at 901 (“[T]he liability is not one governed by the law of contract warranties but by the law of strict liability in tort. Accordingly, rules defining and governing warranties that were developed to meet the needs of commercial transactions cannot properly be invoked to govern the manufacturer’s liability to those injured by their defective products unless those rules also serve the purposes for which such liability is imposed. . . . To establish the manufacturer’s liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of a defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use.”).

²⁹ See RESTATEMENT (SECOND) OF TORTS § 402A (1965) (“(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused . . . if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.”).

³⁰ James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 870 (1998) (“It is received wisdom that section 402A imposed a general regime of strict liability.”).

³¹ See *id.* at 870–71 (“By painting with a broad brush, section 402A sent courts scrambling to discover how strict liability would apply to design defects. Second, courts early on intuited that, in some cases, they could draw an inference of design defect and avoid the need to articulate or apply a general standard for defectiveness.” (footnotes omitted)).

showing a reasonable alternative design in design defect cases.³² Many critics have attacked this requirement for injecting a negligence element back into the realm of product liability law, and thereby recreating barriers to plaintiffs' recoveries supposedly knocked down by the shift towards strict liability.³³ Further, according to some scholars, the requirement of a reasonable alternative design would also result in fewer design defect cases accepted by plaintiffs' attorneys due to the burden of presenting evidence of a prototype or hiring an expert to testify.³⁴

But what exactly must a plaintiff present as evidence to show that a reasonable alternative design existed at the time of manufacture? Further, if no concrete standard exists, does a list of non-exhaustive and non-exclusive factors suffice to provide notice to plaintiffs and defendants as to the likelihood of success of a design defect claim? And would this list of factors *actually* present the huge hurdle to recovery that scholars hypothesize for plaintiffs seeking to present evidence of a reasonable alternative design?

The *Restatement (Third)* seems to adopt a reasonableness or "risk-utility" balancing test for judging design defects, but the balancing test seems, on its face, to require a showing of a reasonable alternative design.³⁵ That said, the ALI lays out a list

³² See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998) ("A product . . . (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.").

³³ See Vandall & Vandall, *supra* note 14, at 921 ("The history of products liability is that of a gradual removal of the hurdles the injured consumer must clear and a shift from a difficult standard to prove to one that is less burdensome. . . . In rejecting 150 years of history, the *Restatement (Third)* returns to a negligence basis and erects a huge hurdle for victims: the reasonable alternative design requirement."); see also Lavelle, *supra* note 16, at 1061 ("Because a reasonable alternative design requirement, by its nature, injects negligence principles into such cases, this proposed rule would effectively remove design defect cases from the realm of strict liability and place them in the arena of negligence, thereby providing manufacturers with a distinct advantage; in the negligence realm, the social policy of manufacturer-as-guarantor, which underlies strict products liability, is not recognized.").

³⁴ See Vandall & Vandall, *supra* note 14, at 923 ("[I]n almost every case the plaintiff's attorney must hire an expert or create a model of a reasonable alternative design before the plaintiff can go to court. This has increased the price of every products liability case by, perhaps, \$25,000 or more." (footnote omitted)).

³⁵ See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. d (1998) ("[T]he test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the

of factors that are relevant in determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe.³⁶ Moreover, the ALI notes that a plaintiff is not required to present proof on all of these factors, and that there are situations in which the plaintiff need not produce expert testimony or a prototype in order to make a prima facie case.³⁷ Finally, the issue of a reasonable alternative design, according to the ALI, is left to local courts regarding jury instructions, and the standard seems to be deferential to the commonsense of local judges.³⁸

B. CRITICS' REACTIONS TO THE "REASONABLE ALTERNATIVE DESIGN" REQUIREMENT

The question then becomes: how have courts addressed this rather broad standard? Have they required a showing of reasonable alternative design for design defect cases? Further, can any measured consistency be gleaned from these various interpretations in the hopes of putting both parties on notice as to what constitutes sufficient evidentiary proof of a reasonable alternative design?

None too shockingly, courts' interpretations of, and legal scholars and institutions' reactions to, the pronouncement of the *Restatement (Third)* have certainly been mixed.³⁹ In light of the

alternative design by the seller or a predecessor in the distributive chain rendered the product not reasonably safe.”).

³⁶ See *id.* § 2 cmt. f (“The factors include, among others, the magnitude and probability of the foreseeable risks of harm, the instructions and warnings accompanying the product, and the nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing.”).

³⁷ See *id.* (noting that the relevance of the factors, the necessity of expert testimony, and the necessity of producing an alternative prototype will vary from case to case).

³⁸ See *id.* (“For justice to be achieved, Subsection (b) should not be construed to create artificial and unreasonable barriers to recovery. . . . Sufficient evidence must be presented so that reasonable persons could conclude that a reasonable alternative could have been practically adopted. . . . This Restatement takes no position regarding the specifics of how a jury should be instructed. So long as jury instructions are generally consistent with the rule of law set forth in Subsection (b), their specific form and content are matters of local law.”).

³⁹ Compare *id.* § 2 rptrs. note to cmt. d § II (summarizing case law on the test for defective product design on a jurisdictional basis), and Henderson & Twerski, *supra* note 30, at 869 (“[A] pragmatic and theoretically sound standard for defective design can be articulated and, in fact, the overwhelming majority of American courts have adopted such a standard.”), with Vandall & Vandall, *supra* note 14, at 911 (“Section 2(b) is flawed . . . [I]t has not been adopted by a majority of the courts since 1994.”), and Vargo, *supra* note 17, at

ALI's proposed change to product liability law, some states accepted the requirement that a plaintiff must show evidence of a reasonable alternative design when attempting to prove a design defect.⁴⁰ Other states, however, do not consider the production of evidence of a reasonable alternative design as a requirement, but rather merely as a factor in the risk-utility balancing test (balancing test).⁴¹ Other states even sought to continue applying the consumer expectations test from the *Restatement (Second)* while implicitly requiring a showing of a reasonable alternative design.⁴² Finally, some states outright ignored the *Restatement (Third)* and did not require proof of a reasonable alternative design.⁴³ To further add to the confusion surrounding this issue, as previously stated, legal scholarship regarding the statistics and surveys on this matter and the degree of true acceptance or rejection of the *Restatement (Third)* and its reasonable alternative design requirement differs greatly.⁴⁴

C. DEVELOPMENT OF STRICT LIABILITY IN GEORGIA

The manner in which Georgia courts and legal scholars have interpreted the reasonable alternative design requirement's effect on Georgia law is likewise scattered.⁴⁵ For example, under a subheading labeled "Jurisdictions That Explicitly Require Proof of a Reasonable Alternative Design in Cases Not Covered by § 3 or

550-52 ("[E]ven a cursory examination of the common law test for design defects reveals this so called consensus or majority rule is nothing but smoke which masks the true nature of the accepted rule for design defect. . . . Even assuming some form of risk-utility analysis is used in thirty-two jurisdictions, there are only three states which have accepted the co-reporters extremely narrow view as set forth in section 2(b).").

⁴⁰ See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. f (1998) ("[T]he plaintiff must prove the availability of a technologically feasible and practical alternative design . . .").

⁴¹ See *id.* § 2 rptrs. note to cmt. d § II.B (noting that some jurisdictions' "application of a risk-utility approach to a defective design must involve the question of whether a reasonable manufacturer would have adopted a safer alternative design").

⁴² See *id.* § 2 rptrs. note to cmt. d § II.C ("A few courts set forth the test for defective design using consumer expectations rhetoric, but then apply risk-utility balancing to determine whether reasonable expectations are met . . . [A]doption of risk-utility analysis unavoidably commits a court to a reasonable alternative design requirement in cases not involving § 3 or Comment e to § 2.").

⁴³ See *id.* § 2 rptrs. note to cmt. d § II.D ("In a minority of jurisdictions the failure of a product to meet consumer expectations suffices, in and of itself, to establish liability in cases predicated on design defect.").

⁴⁴ See *supra* note 39.

⁴⁵ See *infra* note 50 and discussions.

§ 4 or Comment *e* to § 2,” the ALI posits that a Supreme Court of Georgia case,⁴⁶ which cited a Preliminary Draft of the *Restatement (Third)*, emphasized the importance of the reasonable alternative design requirement in design defect litigation.⁴⁷ However, a commentator maintains that another Supreme Court of Georgia case⁴⁸ positively recognized the *Restatement (Third)* and reasonable alternative design requirement by noting that the proper analysis in design defect cases requires evidence of whether the defendant failed to adopt a reasonable alternative design.⁴⁹ Further, another commentator maintained that *Banks* was one of the earliest cases to reject Section 2(b) of the *Restatement (Third)*, finding neither appropriate nor persuasive.⁵⁰ That same commenter, however, goes on to note that *Jones* mentions the reasonable alternative design requirement favorably without adopting it as a requirement or actually discussing Section 2(b) of the *Restatement (Third)*.⁵¹

It is also interesting to note one scholar observed that the Supreme Court of Georgia has never adopted strict liability as a common law matter, but has left strict liability to statutory

⁴⁶ See *Banks v. ICI Americas, Inc.*, 450 S.E.2d 671, 674 & n.4 (Ga. 1994) (citing a Preliminary Draft of the *Restatement (Third)* requiring proof of a reasonable alternative design).

⁴⁷ See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 rptr. note to cmt. d § IIA (1998) (“[T]he Georgia high court recognizes that, except for the ‘most extreme’ instance, when a court determines that the product is so dangerous that it should not have been sold at all, it is *necessary* to prove a reasonable alternative design.” (emphasis added)).

⁴⁸ *Jones v. NordicTrack, Inc.*, 550 S.E.2d 101 (Ga. 2001).

⁴⁹ See Cami Perkins, *The Increasing Acceptance of the Restatement (Third) Risk Utility Analysis in Design Defect Claims*, 4 NEV. L.J. 609, 618 (2004) (noting that the Supreme Court of Georgia positively recognized the *Restatement (Third)* “to support its conclusion that the appropriate analysis in defective design cases is whether the defendant failed to adopt a reasonable alternative design that would have reduced the foreseeable risks of harm presented by the product”).

⁵⁰ See Vandall & Vandall, *supra* note 14, at 923–24 (“One of the earliest cases to reject the *Restatement (Third)* section 2(b) is *Banks v. ICI Americas, Inc.*, decided in 1994 The court held that the risk-utility test was appropriate for Georgia, and although it considered the *Restatement (Third)* section 2(b), it did not find it to be appropriate or persuasive and delegated it to a minor footnote.”).

⁵¹ See *id.* at 932–33 (“The heart of a design defect case is the reasonableness of selecting from among alternative product designs and adopting the safest feasible one. . . . Consequently, the appropriate analysis does not depend on the use of the product, as that may be narrowly or broadly defined, but rather includes the consideration of whether the defendant failed to adopt a reasonable alternative design which would have reduced the foreseeable risks of harm presented by the product.” (quoting *Jones*, 550 S.E.2d at 103)).

enactment by the legislature.⁵² However, in regards to the Georgia law that preceded *Banks*, federal and Georgia state courts were very instrumental in the development of strict liability law.⁵³ In fact, consumer expectations tests as developed by the Court of Appeals of Georgia were so highly refined and removed from duty-based concepts that design defect litigation became almost nonexistent.⁵⁴ Further, despite the supreme court's claim that its conception of strict liability was independent of negligence principles, the federal and lower state courts negated this claim through the use of this highly specific interpretation of strict liability.⁵⁵ As a result of this interpretation, in pre-*Banks* Georgia, manufacturers were afforded almost complete immunity from design defect claims, despite proof of a latent defect and an alternative design that would eliminate or reduce harm.⁵⁶

1. *Banks v. ICI Americas, Inc.* In December of 1994, the Supreme Court of Georgia reversed the tides by overruling prior Georgia law in *Banks*.⁵⁷ In *Banks*, the parents of a deceased child brought suit against a chemical manufacturer, alleging the chemical product was defectively designed and inadequately labeled after the child drank the chemical.⁵⁸ In reaching its decision, the *Banks* court concluded that a risk-utility analysis should be applied in design defect cases and that the concept of

⁵² See Vargo, *supra* note 17, at 617 ("The Supreme Court of Georgia has refused to adopt strict liability under its common law; thus, all development of strict liability is based upon statutes and their interpretation.").

⁵³ See *id.* at 623 ("[F]ederal courts and the lower Georgia courts have been extremely active in developing strict liability.").

⁵⁴ See *id.* ("The Court of Appeals of Georgia developed highly refined, no-duty concepts and a consumer expectation test that almost eliminated any viable design defect litigation. A defect had to be hidden or latent before an action would lie for either a design or warning defect." (footnotes omitted)).

⁵⁵ See *id.* at 624 ("The Georgia Court of Appeals closely associated strict liability with negligence . . . Thus, their highly restrictive interpretation of strict liability was used to hinder any development of liability under negligence.").

⁵⁶ See *id.* at 624-25 ("[E]ven when a consumer proved a *latent* defect and proved an alternative design would eliminate or reduce the harm, the consumer did not establish a defective design. The result of such an approach was to render almost complete immunity to product manufacturers for design defects in Georgia.").

⁵⁷ See *Banks v. ICI Americas, Inc.*, 450 S.E.2d 671, 675 (Ga. 1994) ("However, we can no longer accept the position that a manufacturer cannot be liable for injuries proximately caused by a product that functions for its intended use, regardless of the risks associated with the product and its utility to the public for the plaintiff's utility to address evidence that a feasible alteration design . . . was available at the time the manufacturer made its design manufacturing, and marketing decisions.").

⁵⁸ *Id.* at 672.

reasonableness should be factored into this risk-utility analysis.⁵⁹ Thus, by adopting a risk-utility analysis based in negligence principles, the *Banks* court noted that among the various factors⁶⁰ for evaluating design defectiveness, the heart of a design defect inquiry is the availability of an alternative design.⁶¹

After noting the importance of the reasonable alternative design in design defect cases, the *Banks* court then explained the evidence needed to support this test must include both the marketable reality and technological feasibility at the time the product was manufactured.⁶² The *Banks* court placed great importance on the evidence of a reasonable alternative design; however, it noted that this proof is not the sole factor in Georgia's risk-utility analysis.⁶³ The court further held that a manufacturer's compliance with industry custom, state of the art, or federal regulations was not conclusive evidence of a reasonable design to negate liability.⁶⁴ Further, while the *Banks* court's

⁵⁹ See *id.* at 673 (“This risk-utility analysis incorporates the concept of ‘reasonableness,’ i.e., whether the manufacturer acted reasonably in choosing a particular product design, given the probability and seriousness of the risk posed by the design, the usefulness of the product in that condition, and the burden on the manufacturer to take the necessary steps to eliminate the risk.”).

⁶⁰ See *id.* at 674 (“One factor consistently recognized as integral to the assessment of the utility of a design is the availability of alternative designs, in that the existence and feasibility of a safer and equally efficacious design diminishes the justification for using a challenged design ‘The essential inquiry, therefore, is whether the design chosen was a reasonable one from among the feasible choices of which the manufacturer was aware or should have been aware.’” (citations omitted)).

⁶¹ See *id.* (“[T]he reasonableness of choosing from among various alternative product designs and adopting the safest one if it is feasible is considered the ‘heart’ of design defect cases, . . . since it is only at their most extreme that design defect cases reflect the position that a product is simply so dangerous that it should not have been made available at all.” (citations omitted)).

⁶² See *id.* at 674–75 (“[I]n determining whether a product was defectively designed, the trier of fact may consider evidence establishing that at the time the product was manufactured, an alternative design would have made the product safer than the original design and was a marketable reality and technologically feasible.” (citations omitted)).

⁶³ See *id.* at 675 & n.6 (noting that the list of non-exhaustive factors includes “the usefulness of the product; the gravity and severity of the danger posed by the design; the likelihood of that danger; the avoidability of the danger . . . ; the user’s ability to avoid the danger; the state of the art at the time the product is manufactured; the ability to eliminate danger without impairing the usefulness of the product or making it too expensive; and the feasibility of spreading the loss in the setting of the product’s price or by purchasing insurance”).

⁶⁴ See *id.* at 675 n.6 (“[A] manufacturer’s proof of compliance with industry-wide practices, state of the art, or federal regulations does not eliminate conclusively its liability for its design of allegedly defective products.”).

factors for determining the existence of a reasonable alternative design⁶⁵ resemble those found in the *Restatement (Third)*,⁶⁶ the *Banks* factors are broader, due to the inclusion of substitute products.⁶⁷

The question becomes: how have Georgia and other states' courts interpreted these *Banks* factors in determining what evidence plaintiffs are required to produce regarding a reasonable alternative design? Further, considering the history of product liability and design defect law as posited by the ALI and within Georgia specifically, are the *Banks* factors consistent with existing legal precedent, or do they provide too much leeway to plaintiffs seeking to establish prima facie design defect claims? Part III of this Note will analyze in further detail common law cases following the *Banks* decision and how they interpret the requirements of its non-exhaustive list of factors. Part IV of this Note will examine other states with similar reasonable alternative design requirements to ascertain whether Georgia represents a consensus view and whether or not the *Banks*-factor test should be upheld or substituted for another form of risk-utility analysis.

2. *The Banks Dissent.* Before moving on, attention must be drawn to one particular argument made in the *Banks* dissent. Justice Fletcher, in his dissent, agreed that a risk-utility analysis is necessary in a design defect case but disagreed with the majority's formulation of the governing standard.⁶⁸ Justice Fletcher noted that making a reasonable alternative design a mere

⁶⁵ *Id.* ("Alternative safe design factors include: the feasibility of an alternative design; the availability of an effective substitute for the product which meets the same need but is safer; the financial cost of the improved design; and the adverse effects of the alternative.").

⁶⁶ See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. f (1998) (noting that the factors relevant in determining whether the omission of a reasonable alternative design renders a product not reasonably safe include "the magnitude and probability of the foreseeable risks of harm, the instructions and warnings accompanying the product, and the nature and strength of consumer expectations regarding the product, including expectations arising from product portrayal and marketing . . . the likely effects of the alternative design on production costs; the effects of the alternative design on product longevity, maintenance, repair, and esthetics; and the range of consumer choice among products . . .").

⁶⁷ Vargo, *supra* note 17, at 627 ("[T]he factors relevant to a safer alternative design in *Banks* appeared much broader than those recommended by the ALI because they included substitute products.").

⁶⁸ See *Banks*, 450 S.E.2d at 676 (Fletcher, J., dissenting) ("An essential element of a plaintiff's cause of action is proof that the 'seller . . . failed to adopt a reasonable, safer design that would have reduced the foreseeable risks of harm presented by the product.'" (quoting RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 101 cmt. g (preliminary draft no. 1 1993))).

factor rather than an essential element is inconsistent with the reality of product liability and design defect litigation.⁶⁹ Finally, in pointing out that plaintiffs are required to prove proximate cause in order to hold design defect manufacturers liable, Justice Fletcher emphasized that proof of a feasible alternative design should, in fact, be required in order to establish proximate cause; thus, under his view, evidence of a feasible alternative design is an *essential* element in the risk-utility analysis.⁷⁰

As will be further analyzed in Parts III and IV, in light of the current interpretation of the reasonable alternative design standard in Georgia, Justice Fletcher's dissenting opinion deserves some attention. Considering the analogous development of strict liability law between the ALI's proposed *Restatement (Third)* and Georgia common law, this dissent might serve as a good model for Georgia's reasonable alternative design standard should the *Banks*-factor test prove to be too pro-plaintiff.

3. *Jones v. NordicTrack*. As cited to above,⁷¹ *Jones* was the next Supreme Court of Georgia case⁷² to positively reference the reasonable alternative design as an important factor in the risk-utility analysis as set forth in *Banks*.⁷³

In *Jones*, a husband and wife brought a product liability claim against NordicTrack after Mrs. Jones was penetrated by a chrome bar connected to the exercise machine following stumbling into the machine while walking past it.⁷⁴ Because Mrs. Jones was not technically "using" the product when she was injured, the issue arose whether Georgia law controlled on the question of "use" of a

⁶⁹ See *id.* ("By suggesting that safer feasible alternative is a mere factor to be considered, rather than an essential element, the majority endorses a standard that is inconsistent with the reality that although '[m]any products can not be made safe at all . . . such products may be useful and desirable.'" (citing *Ctr. Chem. Co. v. Parzini*, 218 S.E.2d 580, 582–83 (Ga. 1975))).

⁷⁰ See *id.* ("In order to demonstrate proximate cause, proof that the alternative design provides a 'materially significant increase in safety' that would have prevented or reduced the plaintiff's injury is required, rather than evidence that the alternative design merely 'could have' prevented the injury, as the majority suggests.").

⁷¹ See *Jones v. NordicTrack, Inc.*, 550 S.E.2d 101 (Ga. 2001).

⁷² *Doyle v. Volkswagenwerk Aktiengesellschaft*, 481 S.E.2d 518 (Ga. 1997), cited to *Banks*, but dealt more with the issue of federal regulations pre-emption. As such, it will be dealt with more specifically in Part III.

⁷³ See *Jones*, 550 S.E.2d at 117 ("This Court's adoption of the risk-utility analysis in *Banks* . . . affirms that a product need not be 'in use' for a manufacturer to be held liable in negligence or strict liability for injuries proximately caused by the product.").

⁷⁴ *Id.* at 102.

product as a predication of liability. The Supreme Court of Georgia held that both statutory and case law controlled.⁷⁵ Relying on *Banks*, the *Jones* court then noted that the proper risk-utility analysis for design defects is not predicated on “use” of the product when determining proximate causation.⁷⁶ In reaching this conclusion, the majority also noted the blurring of lines between negligence and strict liability when examining cases using the risk-utility analysis.⁷⁷ The court’s reliance on *Banks* certainly signals a positive reception of the importance of the reasonable alternative design standard in Georgia; however, as the concurring opinion noted, Georgia common law is far from adopting the reasonable alternative design as an essential requirement.⁷⁸

III. ANALYSIS

A. HOW AND WHY PRE-BANKS GOT US TO WHERE WE ARE NOW

Before analyzing the lower courts’ and Supreme Court of Georgia’s applications of the *Banks* test, we must first consider how and why Georgia implemented the *Banks* test in the first place. The reasonable alternative design test is generally considered a huge hurdle to plaintiffs seeking to prevail on a claim of defective design against manufacturers in product liability cases.⁷⁹ It seems strange, then, that plaintiffs’ attorneys were

⁷⁵ See O.C.G.A. § 51-1-11(b)(1) (2009) (“The manufacturer of any person property sold as new property directly or through a dealer . . . shall be liable in tort . . . to any natural person who may *use, consume, or reasonably be affected* by the property and who suffers injury to his person or property because the property when sold by the manufacturer . . . is the proximate cause of the injury sustained.” (emphasis in original)).

⁷⁶ See *Jones*, 550 S.E.2d at 103 (“[T]he appropriate analysis does not depend on the use of the product, as that may be narrowly or broadly defined, but rather includes the consideration of whether the defendant failed to adopt a reasonable alternative design which would have reduced the foreseeable risks of harm presented by the product.”).

⁷⁷ See *id.* at 103 n.5 (“This Court has recognized that there is no significant distinction between negligence and strict liability for purposes of the risk-utility analysis.”).

⁷⁸ See *id.* at 104 (Fletcher, C.J., concurring) (“[A] plaintiff in a defective design case, who has presented a reasonable, safer, alternative design, automatically is [not] entitled to a jury trial . . . Georgia law does not require manufacturers to insure [sic] that the designs of their products are incapable of producing injury. . . Manufacturers should not have to ensure, as part of the risks that they must foresee in choosing a design, that their products are safe from persons who collide by happenstance with their products.”).

⁷⁹ See Vandall & Vandall, *supra* note 14, at 920, 921 (noting that because the reasonable alternative design requirement injects negligence principles back into the realm of design defect claims, the test effectively re-creates hurdles to recovery for injured victims in products

advocating to inject the admissibility of reasonable alternative design into the risk-utility analysis, as we currently know it in Georgia.⁸⁰

Prior to *Banks*, injured parties in product liability cases could not recover under design defect claims where the defect was open and obvious.⁸¹ In design defect cases, the objective, from a plaintiff's perspective, is to get past the defendant's motion for summary judgment or motion for judgment as a matter of law. Once over this hurdle, a victim is at the very least guaranteed his day in court—in front of a jury of his peers who are more likely to be affected by stories of individual injury than the average judge ruling on a motion. Under the “open and obvious” doctrine, however, plaintiffs were precluded from admitting evidence of a reasonable alternative design; accordingly, they were denied the opportunity for the trier of fact—the jury—to weigh the openness and obviousness of the danger with the reasonableness of the product's design.⁸²

That is, where the alleged defect was objectively open and obvious, Georgia courts pre-*Banks* held that the product was not defective, as a matter of law, and precluded plaintiffs from asserting design defect claims in these instances.⁸³ After *Mann*, where a victim was injured and his brother killed after their boat's mast came into contact with a power line crossing over a lake, Georgia courts adhered to the doctrine that a product cannot be defectively designed where the product is safe for normal handling and consumption.⁸⁴ As such, victims of allegedly defective

liability cases where the development of strict liability principles in the *Restatement (Second)* sought to remove such hurdles to assure a victim her “day in court”).

⁸⁰ *Jones*, 550 S.E.2d at 103–04.

⁸¹ See *Weatherby v. Honda Motor Co.*, 393 S.E.2d 64, 66 (Ga. Ct. App. 1990) (“If a product is designed so that it is reasonably safe for the use intended, the product is not defective even though capable of producing injury where the injury results from an obvious or patent peril.” (quoting *Coast Catamaran Corp. v. Mann*, 321 S.E.2d 353, 356 (Ga. Ct. App. 1989))).

⁸² See *id.* at 170–71 (noting that the open and obvious doctrine, rather than being an affirmative defense, actually went to the issue of defectiveness of the product).

⁸³ See *id.* (“[A] product is not defective if the absence of a safety device is open and obvious [T]he decision is made on the basis of an objective view of the product, and the subjective perceptions of the user or injured party are irrelevant.”).

⁸⁴ See O.C.G.A. § 51-1-11(b)(1) (2009) (“The manufacturer of any personal property sold as new property directly or through a dealer . . . shall be liable in tort . . . to any natural person who may use, consume, or reasonably be affected by the property and who suffers injury to his person or property because the property when sold by the manufacturer was

products in Georgia courts were effectively denied their day in court where the danger was open or obvious and the injury resulted from abnormal handling. Further, in these two situations, those victims were barred from introducing evidence regarding the reasonable alternative designs of these products.⁸⁵ Due to these harsh rules, plaintiffs' attorneys who began calling for a new risk-utility analysis in which the reasonable alternative design would serve as an "essential element" of the test.

In an answer to their prayers, *Banks* overruled the *Mann* decision and implemented Georgia's current risk-utility analysis for determining design defect cases.⁸⁶ Under this analysis, where no single factor is controlling, it becomes apparent that plaintiffs may no longer be barred from presenting evidence of a reasonable alternative design despite their use of the product or the "open and obvious" danger of the product itself.⁸⁷ So the question becomes: Now that the open and obvious doctrine no longer precludes plaintiffs in Georgia from presenting evidence of a reasonable alternative design in design defect cases, how have the lower state courts and federal courts applying Georgia law interpreted the *Banks* test, and, more importantly, how much evidence of a reasonable alternative design is needed to survive defendants' motions for summary judgment or judgment as a matter of law?

not merchantable and reasonably suited to the use intended . . ." (emphasis added)); see also *Mann v. Coast Catamaran Corp.*, 326 S.E.2d 936, 937 (Ga. 1985) ("[A] plaintiff must establish that there is a defect in the product, and a product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling . . . the seller is not liable." (quoting *Center Chemical Co. v. Parzini*, 218 S.E.2d 580 (Ga. 1975), overruled by *Banks v. ICI Americas, Inc.*, 450 S.E.2d 671 (Ga. 1994))).

⁸⁵ See *Mann*, 326 S.E.2d at 437 (holding that sailing the boat into a power line is "abnormal handling" and the lack of grounding or insulation did not prevent the boat from operating as intended and therefore cannot be considered a design defect); *Weatherby*, 393 S.E.2d at 68 (holding that a manufacturer is "under no duty to warn of a product-connected danger which is obvious or generally known").

⁸⁶ See *Banks*, 450 S.E.2d at 673 (finding that *Mann* failed to address the appropriate test for determining whether a product was defectively designed and holding the analysis set forth therein would be used in products liability design defect cases).

⁸⁷ See *Bodymasters Sports Indus. v. Wimberley*, 501 S.E.2d 556, 559 (Ga. Ct. App. 1998) ("Although *Banks* did not expressly address the open and obvious doctrine, the clear import of the decision is that no one factor absolutely controls the analysis as to whether a product is defective Accordingly, it is clear that under *Banks*, the open and obvious nature of the danger is but one factor to be considered in determining whether a product is defective."). But see *Raymond v. Amada Co.*, 925 F. Supp. 1572, 1578 (N.D. Ga. 1996) (concluding that *Banks* impliedly overruled the open and obvious doctrine in design defect cases).

B. GEORGIA APPELLATE COURT CASES FOLLOWING *BANKS*

After *Banks*, it almost seems self-evident that the new risk-utility analysis for determining whether a product is defectively designed overlaps to a certain extent with negligence principles.⁸⁸ However, at least one Georgia court has noted that merely injecting negligence principles into the risk-utility analysis does not completely negate the notion that scenarios can exist where negligence and strict liabilities are still considered distinct concepts.⁸⁹ Under this standard, where no single factor is dispositive, how much must a plaintiff prove or present as evidence in order to dispute a defendant's motion for summary judgment, and thereby create a question of material fact for the jury to resolve?

In one case, a victim brought suit after sustaining injuries when a forklift backed over him, claiming strict liability under a theory that the manufacturer of the forklift should have installed a warning alarm when the vehicle was in reverse.⁹⁰ According to the court of appeals, which reversed the lower court's grant of summary judgment to the manufacturer, it is improper for the trial court in design defect cases to resolve the facts or reconcile the issues at hand.⁹¹ Further, the risk-utility analysis, as posited by *Banks*, is not to be determined as a matter of law when any of the factors is in dispute.⁹² This analysis, according to the court, served to increase the burden on defendants in design defect cases to show an absence of evidence of a design defect.⁹³ Further,

⁸⁸ See *Bailey v. Cottrell, Inc.*, 721 S.E.2d 571, 574 (Ga. Ct. App. 2011) (“[T]he Supreme Court of Georgia recognized in *Banks* that the risk-utility analysis for design defect claims overlaps to a certain extent with a negligence analysis . . .”).

⁸⁹ See *id.* at 347 (“[S]ince *Banks*, this Court has reiterated that Georgia’s strict liability law focuses not on whether the manufacturer negligently failed to use due care but on whether the marketed product was defective and has continued to honor the distinction between negligence and strict liability for design defect claims.” (quoting *SK Hand Tool Corp. v. Lowman*, 479 S.E.2d 103, 107 (Ga. Ct. App. 1996)) (internal quotations omitted)).

⁹⁰ See *Dean v. Toyota Indus. Equip. Mfg.*, 540 S.E.2d 233, 234 (Ga. Ct. App. 2000).

⁹¹ See *id.* at 237 (noting that despite plaintiff’s expert presenting evidence that such alarms are standard on a competitor’s products and the evidence supporting the manufacturer’s position that the risks of the product as manufactured did not outweigh the benefits, it is not for the trial court to “resolve the facts or reconcile the issues”).

⁹² See *id.* (“[A] product’s risks and benefits will rarely be determined as a matter of law when any of the *Banks* factors is disputed.”).

⁹³ See *id.* (“Indeed, by adopting the risk-utility analysis, Georgia has actually increased the burden of a defendant, in seeking a judgment as a matter of law, to show plainly and indisputably an absence of *any* evidence that a product as designed is defective.”).

because no single factor is dispositive or required, the victim must seemingly only present some miniscule amount of evidence to create a dispute as to a material fact and thereby defeat a defendant's motion for judgment as a matter of law.⁹⁴

The development of products liability law, both nationally and in Georgia, understandably reflects the desire of the courts to remove hurdles for injured victims so that they may receive their day in court. This standard seemingly makes a plaintiff's presentation of *any* conflicting factual evidence regarding a product's defectiveness sufficient to survive a motion for judgment as a matter of law. It seems, in fact, that when any amount of conflicting evidence is presented, a defendant will be unable to succeed on a motion for summary judgment or judgment as a matter of law. Instead, the manufacturer will rarely be put on notice of potential lawsuits under a risk-utility test—where a consumer may choose a theory of defective design by whim from a list of non-exhaustive, non-determinative factors—and will in most cases be forced into the costly realm of trial by jury.⁹⁵

That said, in certain circumstances, appellate courts have seemingly upheld manufacturers' motions for summary judgment in design defect cases in light of *Banks*. In one case, *Kelley v. Hedwin Corp.*,⁹⁶ a husband and wife brought suit against a manufacturer of plastic storage containers after the husband, a hospital employee, suffered injuries by cleaning up formaldehyde that spilled from a five-gallon plastic container originally manufactured by the defendant.⁹⁷ In reviewing the appellants' challenge to the motion for summary judgment based upon negligent design claims, the court noted the recognized instance where the *Banks* test does not foreclose judgment as a matter of

⁹⁴ See *id.* ("Where there is some evidence that the risk caused by not having an alarm outweighed the utility of the forklift in not having an alarm, the issue of negligent design cannot be decided as a matter of law.")

⁹⁵ See *Bryant v. Hoffmann-La Roche, Inc.*, 585 S.E.2d 723, 729–30 (Ga. Ct. App. 2003) ("[I]n a design defect case the entire product line may be called into question and there is typically no readily ascertainable external measure of defectiveness." (quoting *SK Hand Tool Corp. v. Lowman*, 479 S.E.2d 103, 108 (Ga. Ct. App. 2003))). The court in *Bryant* ultimately reversed the trial court's granting of the manufacturer's motion for summary judgment as to the design defect claim by holding that the manufacturer had not argued that the benefits of the product outweighed the risks or that there was no feasible alternative design for the product. *Id.* at 730.

⁹⁶ *Kelley v. Hedwin Corp.*, 707 S.E.2d 895 (Ga. Ct. App. 2011).

⁹⁷ *Id.* at 897.

law: where the absence of a design flaw is plainly and indisputably shown by the evidence.⁹⁸ In applying this test to the facts at hand, the court, despite contrary evidence from the appellants' expert,⁹⁹ held that the container, as designed, was not defective¹⁰⁰ and that the alleged risk in the design of the container was an open and obvious risk of which any hospital employee should have been aware.¹⁰¹ Further, the court referenced both the appellants' expert's own knowledge of the obvious and unavoidable nature of the risk of a container spilling its contents¹⁰² as well as the evidence of multiple utilities of the design¹⁰³ to conclude that the lower court properly granted the manufacturer's motion for summary judgment on the negligent design claim.¹⁰⁴

As can be gleaned from these Georgia Court of Appeals' decisions, there is uncertainty regarding the *Banks*-factor test's application to design defect litigation. However, we do know that

⁹⁸ See *id.* at 898 ("Although such questions are normally the province of the jury, the test does not foreclose judgment as a matter of law in cases where the absence of a design flaw is plainly and indisputably shown by the evidence." (citing *Ogletree v. Navistar Int'l Transp. Corp.*, 522 S.E.2d 467, 470 (Ga. 1999))).

⁹⁹ See *id.* at 899 ("[The expert] recommended that: (1) containers designed for use in the manual dispensing of toxic liquid should be designed so that all connections are above the normal maximum liquid level; (2) a means should be provided to prevent the flow of toxic liquid by siphon flow; and (3) manual dispensing should be done with a hand pump installed on an upright container.").

¹⁰⁰ See *id.* ("[T]he expert's opinion fails to address the fact that the containers are specifically designed to be modular and useful for multiple purposes . . . Thus, Hedwin's design was appropriate for pairing with the hand pump recommended for toxic chemicals, and the design of the container itself, as manufactured by Hedwin, was not defective.").

¹⁰¹ See *id.* ("Moreover, the alleged risk associated with this modular, universal design—that an improperly capped container on its side will readily spill its contents—is an open and obvious danger of which any hospital employee should have been aware and could avoid.").

¹⁰² See *id.* ("[T]he Kelleys' own expert opined that the method of dispensing that occurred here 'is common,' and the fact that gravity will empty an open container placed on its side is 'not a new revelation.'").

¹⁰³ See *id.* ("[T]he utility of the design . . . was state of the art when designed, could be packaged in a variety of boxes, minimized the costs of shipping and storing empty containers, avoided 'glugs' that can cause spills when dispensing, promoted total emptying thereby reducing waste, and complied with government packaging and shipping regulations.").

¹⁰⁴ See *id.* at 899–900 & n.13 ("Although the Kelleys do not specifically argue a strict liability theory on appeal, we note that [t]he sine qua non of a products liability claim, regardless of whether the plaintiff proceeds under a theory of strict liability or negligence, is a defect in the product.' . . . Based on our conclusions herein and the record in this case, a strict liability argument does not preclude summary judgment in this case." (alteration in original) (emphasis added) (quoting *Boswell v. OHD Corp.*, 664 S.E.2d 262, 263 (Ga. Ct. App. 2008))).

the Georgia courts apply a balancing test in deciding the presence or absence of a design defect. Further, we recognize that this test has made it harder for defendants to prevail on motions for summary judgment, and that plaintiffs need only present *some* conflicting evidence as to the reasonableness of the design in order to negate a motion for judgment as a matter of law. This seems to remove certain hurdles to recovery for plaintiffs, but it also seems to establish that a defendant can rarely, if ever, succeed on a motion for judgment as a matter of law. This effectively means that manufacturers will almost always have to bear the costly expenses of jury trials and will likely not be on notice as to when pre-trial motions will protect them from such expenses.

Georgia plaintiffs' attorneys lobbied to allow evidence of a reasonable alternative design in cases where the allegedly defective product's risk were open and obvious, which they could not do pre-*Banks*. However, it seems that the new *Banks*-factor test has swung too far in the opposite direction by allowing plaintiffs to get past the summary judgment hurdle by merely having an expert opine on some other reasonable design without much in the manner of actual proof of such. Further, as evidenced by the previously discussed case, it seems that the open and obvious doctrine persists in Georgia as a means of defeating negligent design and strict liability claims within the greater balancing test as set forth in *Banks*.

C. SUPREME COURT OF GEORGIA CASES FOLLOWING *BANKS*

In *Doyle v. Volkswagenwerk Aktiengesellschaft*¹⁰⁵ the Supreme Court of Georgia, in relying upon the *Banks*-factor test, held that in Georgia, an automobile manufacturer's compliance with a federal regulation does not preclude personal injury product liability claims against the manufacturer.¹⁰⁶ Further, the court held that under the risk-utility test as enumerated in *Banks*, a manufacturer's compliance with federal standards or regulations,

¹⁰⁵ 481 S.E.2d 518 (Ga. 1997).

¹⁰⁶ *See id.* at 519 (citing *Banks v. ICI Americas, Inc.*, 450 S.E.2d 671, 675 & n.6 (Ga. 1994)) ("Georgia common law permits a Georgia citizen to sue an automobile manufacturer despite the manufacturer's compliance with the standards established by the National Automobile Safety Act. . . . [C]ompliance with industry-wide practices, state of the art, or *federal regulations* does not eliminate conclusively [a manufacturer's] liability for its design of allegedly defective products.'").

though important, is merely a factor in the analysis and does not provide complete immunity from liability.¹⁰⁷

In another Supreme Court of Georgia case, *Ogletree v. Navistar Int'l Transp. Corp.*,¹⁰⁸ the court reversed the judgment of the lower court by holding that where the risk seemed to outweigh the utility of a particular design,¹⁰⁹ the issue of negligent design cannot be decided as a matter of law.¹¹⁰ Thus, we are again confronted with a case where the court ruled that negligent design could not be decided as a matter of law where only *some* evidence was presented to indicate that the utility of design outweighed the risks. Furthermore, according to this case, adjudication of the dispute is typically left to the jury and determinations as a matter of law are unlikely where *any* of the *Banks* factors are in dispute.¹¹¹ As stressed before, this creates a very onerous burden on defendants who are seeking judgment as a matter of law to show plainly and indisputably that there is not *any* conflicting evidence.¹¹² Therefore, because the *Banks* factors are non-exhaustive and non-dispositive, a plaintiff may reach a deliberation by jury by merely presenting some evidence that a product as designed posed more risk than the benefit to be derived from the product. In contrast, using these same factors, a manufacturer must “plainly and indisputably” show an absence of

¹⁰⁷ See *id.* at 521 (“Under the risk-utility test, compliance with federal standards or regulations is a factor for the jury to consider in deciding the question of reasonableness . . . whether the product design selected was a reasonable one from among the *feasible* choices of which the manufacturer was aware or should have been aware. It does not render a manufacturer’s choice of design immune from liability.”).

¹⁰⁸ 522 S.E.2d 467 (Ga. 1999).

¹⁰⁹ See *id.* at 469 (“Because there was some evidence that the risk outweighed the utility of the cab and chassis without the alarm, the issue of negligent design cannot be decided as a matter of law . . .”).

¹¹⁰ See *id.* (“In a negligent design case, the risk-utility analysis applies to determine whether the manufacturer is liable. Thus, 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 . . . [T]he Court of Appeals should not have employed negligence principles separately, but only insofar as they are part of the risk-utility analysis delineated in *Banks*.”).

¹¹¹ See *id.* at 470 (“[I]t is for the trier of fact to consider the numerous factors which are pertinent in balancing the risk of the product against its utility. . . . [D]etermination of a product’s risks and benefits as a matter of law . . . ‘will rarely be granted in design defect cases when *any* of these elements is disputed.’” (citation omitted) (emphasis added)).

¹¹² See *id.* (“[T]he adoption of the risk-utility analysis in this state has actually increased the burden of a defendant, in seeking judgment as a matter of law, to show plainly and indisputably an absence of *any* evidence that a product as designed is defective.”).

any defect to reach a motion for judgment as a matter of law. These conflicting standards, though reflecting a gradual removal of hurdles for plaintiffs in their steps toward recovery or “his or her day in court,” represent a genuine imbalance in the application of law in design defect litigation.

Finally, as discussed above, in *Jones v. Nordictrack, Inc.*,¹¹³ the Supreme Court of Georgia held that a plaintiff did not have to actually be using the product in question for it to be found defective and for the manufacturer to be liable in negligence or strict liability for injuries proximately caused by the product.¹¹⁴ From the previously discussed Supreme Court of Georgia cases following *Banks*, it became apparent just how onerous a burden has been imposed upon manufacturers to succeed on motions for judgment as a matter of law in design defect cases. Even where a manufacturer complies with federal safety standards, any conflicting evidence of risk over utility by the plaintiff will defeat a defendant’s motion for judgment as a matter of law. Where a manufacturer does not show plainly and indisputably an absence of any evidence that a product as designed was defective, it cannot prevail on a motion for judgment as a matter of law. Finally, where the manufacturer presents evidence that plaintiff suffered injuries bearing no relation to the intended use of the product, the *Banks*-factor test permits plaintiffs to advance negligence or strict liability claims for design defect to a jury. All of these serve to illustrate that the various applications of the *Banks*-factor test have led to the unequal administration of the law of Georgia in product liability litigation due to lingering uncertainties as to this test’s true meaning. Thus, this standard needs to be modified so as to help mitigate the unfair burden that it places on manufacturers of allegedly defective products.

¹¹³ See generally *Jones v. NordicTrack, Inc.*, 550 S.E.2d 101 (Ga. 2001).

¹¹⁴ See *id.* at 103 (“The ‘heart’ of a design defect case is the reasonableness of selecting from among alternative product designs and adopting the safest feasible one. Consequently, the appropriate analysis does not depend on the use of the product, as that may be narrowly or broadly defined, but rather includes the consideration of whether the defendant failed to adopt a reasonable alternative design which would have reduced the foreseeable risks of harm presented by the product.” (citation omitted)).

D. A *FEASIBLE-LY* MODEST PROPOSAL

Based upon the unfair application of the *Banks*-factor test detailed above, Georgia should continue to adopt a risk-utility analysis upon which a jury may make decisions as to factual deliberations. However, under the new theory, which I will argue is a quasi-strict liability theory, the plaintiff alleging a design defect must be required to present proof of a feasible alternative design.

Feasible, as it is used here, would mean that a safer alternative design is possible and that the design is technologically workable and any cost is outweighed by the potential to better avoid danger.¹¹⁵ The jury would still deliberate on the risk-utility analysis as before; however, in order for a plaintiff to reach the jury stage, evidence of a feasible alternative design, as described above, would have to be put forward. Other jurisdictions with similar risk-utility analysis tests for design defect claims also require the plaintiff to demonstrate a feasible alternative design.¹¹⁶ Under this feasible alternative design requirement, however, the plaintiff, or plaintiff's expert more appropriately, would not be required to build a working prototype but would only need to prove that the design is capable of being developed. Rather, as has been suggested by other states¹¹⁷ and legal

¹¹⁵ See *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 746 (Tex. 1980) (“A plaintiff may advance the argument that a safer alternative was feasible with evidence that it was in actual use or was available at the time of manufacture. Feasibility may also be shown with evidence of the scientific and economic capacity to develop the safer alternative.”).

¹¹⁶ See *Wright v. Brooke Grp. Ltd.*, 652 N.W.2d 159, 169 (Iowa 2002) (“[A] plaintiff seeking to recover damages on the basis of a design defect must prove ‘the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.’”); *Lewis v. Am. Cyanamid Co.*, 715 A.2d 967, 975 (N.J. 1998) (“To succeed on his design-defect claim, plaintiff was required to prove that a practical and feasible alternative design existed that would have reduced or prevented his harm.”); *Hernandez v. Tokai Corp.*, 2 S.W.3d 251, 256 & n.8 (Tex. 1999) (“[S]ection 82.005 prescribes two elements—a safer alternative design and producing cause—that must be proved, but are not alone sufficient, to establish liability for a defectively designed product. Section 82.005 reflects the trend in our common-law jurisprudence of elevating the availability of a safer alternative design from a factor to be considered in the risk-utility analysis to a requisite element of a cause of action for defective design.”).

¹¹⁷ See *Lavespere v. Niagra Mach. & Tool Works, Inc.*, 910 F.2d 167, 183 (5th Cir. 1990) (holding that the plaintiff was required to present evidence sufficient to enable a reasonable trier of fact to conclude that plaintiff had established the essential elements of his claim,

scholars,¹¹⁸ the plaintiff would be required to show more than a preliminary concept. That is, the plaintiff would have to show that the alternative design existed and was available at the time of manufacturing; that the design was economically and technologically feasible; and that the product was, in fact, safer.

What, then, is the difference between requiring proof of a reasonable alternative design and requiring evidence of a feasible alternative design? Under the former, a plaintiff is subjected to a higher standard whereby he or she must present evidence of a working prototype or the actual manufacturing cost of an alternative design. Under the feasible alternative design standard, which requires lower proof from the plaintiff and could be considered a form of quasi-strict liability, the plaintiff need not provide a working prototype but must show that the alternative design is already being used in the marketplace or that the alternative design is within the realm of engineering feasibility.

IV. CONCLUSION

The current problem with design defect litigation in Georgia involves the uncertainty of the *Banks*-factor test. We know from common law examples that the test involves certain non-exhaustive and non-dispositive factors by which a jury can determine issues of fact within a risk-utility balancing analysis. However, we also know that in light of the adoption of the *Restatement (Third)*, which required proof of a reasonable alternative design, Georgia courts consider the proof of a reasonable alternative design an "important factor." However, the law is currently in a state of uncertainty whereby it has become much too easy for plaintiffs to survive motions for judgment as a matter of law by merely presenting some contrary evidence as to any of the *Banks*-factors. As such, Georgia should adopt a test

"including that the risk avoided by the alternative design outweighed the burden of adopting that design").

¹¹⁸ See Henderson & Twerski, *supra* note 30, at 920 ("By adopting risk-utility balancing with a reasonable alternative design requirement as the general design standard, subject to the exceptions for demonstrably defective and egregiously dangerous designs . . . the *Restatement (Third)* reflects the consensus view."). *But see* Lavelle, *supra* note 16, at 1061 ("Because a reasonable alternative design requirement, by its nature, injects negligence principles into such cases, this proposed rule would effectively remove design defect cases from the realm of strict liability and place them in the arena of negligence, thereby providing manufacturers with a distinct advantage . . .").

grounded in quasi-strict liability where the trier of fact still conducts a risk-utility analysis for design defect claims, but with a requirement that the plaintiff initially show proof of a feasible alternative design. This new test will retain the majority rule of juries utilizing the risk-utility analysis in their deliberations, but will also provide greater notice to manufacturers of when they will be subject to jury trial or when they will likely succeed on motions for judgment as a matter of law.

This new test will continue to please plaintiffs' lobbying groups that pushed for evidence of the reasonable alternative design in light of the open and obvious doctrine in the first place. Admittedly, they will be less than pleased by a requirement of proving a feasible alternative design, but because this test provides a lower standard than that of proving reasonable alternative design by prototype or proof of actual manufacturing cost, the compromise is a necessary evil. Finally, because of the uncertainty of the outcome of design defect litigation in which a plaintiff proceeds under a theory of reasonable alternative design, this new test will also provide better notice to manufacturers, which could help lower the costs of liability insurance and the expense of prolonged product liability litigation that, overtime, have caused many companies to file for bankruptcy.

Davis S. Popper