Seller Beware: Tort Reform Is Missing in Action; *Soproni*, *Falk*, and the Entrenchment of Strict Products Liability in Washington

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INTRODUCTION

When a state's highest court holds that strict liability is the applicable standard for a design defect claim in the face of a statute that expressly requires a negligence standard, the holding needs to be brought out into the sunlight for all to see.[1] The Washington Supreme Court did so hold two years ago, in the case of *Soproni v. Polygon Apartment Partners*.[2] The *Soproni* case was not the first occasion on which such a proposition was stated.[3] Twice now the state supreme court has construed the Washington Product Liability Act (WPLA)[4] to apply strict liability to defective design and defective

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1. Strict liability has been defined in the following manner:

> When a court imposes 'strict liability' on a defendant, it is saying that the defendant must pay damages although the defendant neither intentionally injured plaintiff nor failed to live up to the objective standard of reasonable care that traditionally has been at the root of negligence law. Some courts and textwriters call this process "absolute liability". . . . [O]ther textwriters and courts [define it as] "liability without fault."

PROSSER, WADE AND SCHWARTZ'S CASES AND MATERIALS ON TORTS 664 (John W. Wade et al. eds., 9th ed. 1994). As usual, Dean Prosser's observation hits the nail on the head:

> Once the legal concept of "fault" is divorced, as it has been, from the personal standard of moral wrongdoing, there is a sense in which liability with or without "fault" must beg its own conclusion. The term requires such extensive definition, that it seems better not to make use of it at all, and to refer instead to strict liability, apart from either wrongful intent or negligence.

W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS 538 (5th ed. 1984).

2. Soproni v. Polygon Apartment Partners, 137 Wash. 2d 319, 330, 971 P.2d 500, 507 (1999).

3. *See, e.g.*, Falk v. Keene Corp., 113 Wash. 2d 645, 654, 782 P.2d 974, 980 (1989); Anderson v. Weslo, Inc., 79 Wash. App. 829, 836, 906 P.2d 336, 340 (1995).

4. WASH. REV. CODE § 7.72.010-060 (2000).

warning product liability claims made under the statute. The first occasion arose in 1989 in the case of *Falk v. Keene Corp.*[5] To the extent that the statutory construction observed in the *Soproni* case has already been seen in the *Falk* opinion, this Note should be read as a critical appraisal of that case as well. To a large extent, however, the *Soproni* case is the more appropriate of the two cases to discuss; it is more recent, contains virtually undisputed facts, and better illustrates the implications for product manufacturers doing business in Washington.

In Part I, this Note will discuss the peculiar procedural history behind *Soproni*. What began at the trial court as a strong case against the first two defendants underwent a change in strategy involving the joinder of a third defendant, Alpine Windows, and a summary judgment for all defendants. The case then followed an appellate path that resulted in the exoneration of the first two defendants, settlement with Alpine Windows on the eve of trial, and a subsequent bankruptcy for Alpine.[6] Part I will also closely examine the WPLA, beginning with a discussion of the tort reform context in which it was enacted and the underlying economic reasons for its passage in 1981. This section will discuss how the WPLA ostensibly supplanted Washington common law on product liability, as well as what a careful reading of the statute seems to dictate for litigating product liability claims.

The reader will then learn how the *Soproni* majority construed the statute and how the statute was constructed by *Falk* a decade earlier. Although the *Soproni* story finally came to a conclusion in the summer of 2000,[7] the surprising chapter authored by five Justices of the state supreme court occupies the heart of this Note in Part I.D. Finally, this Note will explore the consequences of the *Soproni* decision for window manufacturers doing business in Washington, particularly the "Catch 22" situation produced when manufacturers design to prevent liability to one class of plaintiffs (children) only to create liability to another class (the elderly).

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5. 113 Wash. 2d 645, 782 P.2d 974 (1989).

6. *Associated Materials Acquires Alpine Window Facility*, PR Newswire, Oct. 9, 2000, *available in* LEXIS, PRNEWS file.

7. In June 2000, the defendant window manufacturer, Alpine Windows, settled with the plaintiffs for an undisclosed sum, just days before the jury trial was to commence. Telephone interview with Paul Whelan, Plaintiff's Attorney, in Seattle, Wash. (June 2000). One month later, Alpine and its parent company, Reliant Building Products, Inc., filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. *Associated Materials Acquires Alpine Windows Facility*, *supra* note 6.

I. THE CASE, THE LAW, AND HOW THE WASHINGTON SUPREME COURT APPLIED ONE TO THE OTHER

A. *The Facts of* Soproni v. Polygon

In the late summer of 1993, 20-month-old Daniel Soproni and his mother Shannon were visiting with Jeff Elsworth, Shannon's adult friend, at his apartment in Federal Way, Washington.[8] Shannon, Jeff, and Daniel were all together in the upstairs bedroom.[9] The bed on which Daniel was playing had been placed adjacent to the bedroom's only window, a wide horizontal sliding aluminum-frame design.[10] This window was fitted into a recessed "pop-out configuration,"[11] providing the outside of the apartment building some architectural relief, as well as providing the occupants with a wide internal windowsill thirty-four inches above the floor.[12] Thus, the particular dimensions and architectural design of the bedroom window served to offer the apartment's occupants the possibility of designating this a "window seat."[13]

Nonetheless, Jeff Elsworth had arranged his bedroom furniture so as not to avail himself of this added feature.[14] Rather, the bed was situated with the head alongside the windowsill, such that Daniel could quite easily move from the bed to the ledge of the window.[15] This is exactly what little Daniel discovered that day, and his focus quickly turned to the fateful window, which was open approximately two inches.[16] The resourceful toddler learned how to slide the window open, and played with the window by opening and closing it.[17] This

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8. Soproni v. Polygon Apartment Partners, 88 Wash. App. 416, 417-18, 941 P.2d 707, 708 (1997).

9. *Id.* at 418, 941 P.2d at 708.

10. *See* Soproni v. Polygon Apartment Partners, 137 Wash. 2d 319, 323 971 P.2d 500, 503 (1999). For specific details about the window, see Exhibit 2 to Alpine Windows Motion for Summary Judgment, Soproni v. Polygon Apartment Partners (Wash. Sup. Ct. 1995) (No. 94-2-21507-8).

11. *Soproni*, 137 Wash. 2d at 322, 971 P.2d at 502.

12. *Id.* "The interior window ledge measured 16 1/2 inches in width, sufficient to accommodate an ordinary sitting adult." Declaration of Dr. Gary Sloan in Opposition to Defendants' Motions for Summary Judgment ¶ 11, Soproni v. Polygon Apartment Partners (Wash. Sup. Ct. 1995) (No. 94-2-21507-8).

13. Declaration of Dr. Gary Sloan in Opposition to Defendants' Motions for Summary Judgment ¶ 11, Soproni v. Polygon Apartment Partners (Wash. Sup. Ct. 1995) (No. 94-2-21507-8).

14. *Soproni*, 137 Wash. 2d at 323, 971 P.2d at 503.

15. *Id.*

16. *Id.* at 322, 971 P.2d at 502; Brief of Appellants at 4, Soproni v. Polygon Apartment Partners, 88 Wash. App. 416, 941 P.2d 707 (1997) (No. 38011-7-I).

17. *Soproni*, 137 Wash. 2d at 322, 971 P.2d at 502.

soon attracted the attention of his mother and Jeff, who repeatedly closed the window and scolded the child not to play with it.[18] Unfortunately, Daniel was not sufficiently dissuaded from the object of his play. While no one was paying close attention, Daniel again opened the window, but this time he decided to lean back against the screen.[19] Just when Daniel's mother noticed this and stood up to retrieve him from the windowsill, the screen gave way and Daniel fell onto the patio below, sustaining severe head injuries and long-term neurological impairment.[20]

B. The Lawsuit: Whom to Sue for Negligence and the Afterthought of Products Liability

One year later, Shannon Soproni[21] brought suit against Polygon Apartment Partners, the developer/owner of the apartment complex, for negligence.[22] In its answer, Polygon asserted an affirmative defense of contribution, stating that if it were found to be at fault, then the architect and the window manufacturer should also be found comparatively at fault.[23] Consequently, Soproni amended her complaint to allege that Polygon, Millbrandt Architects, and Alpine Windows were "negligent and in violation of safety rules and regulations, including the applicable building code and laws of the [State of Washington]."[24] Interestingly, it still had not occurred to the plaintiffs to allege a violation of the WPLA.[25] Indeed, having led all three defendants to believe that "this was a case of simple negligence, and having informed counsel for Alpine that it would not oppose Alpine's motion for summary judgment, [the plaintiff] changed tactics."[26] Essentially presenting Alpine with what can fairly be described as a "moving target,"[27] counsel for Soproni first mentioned the product liability statute when opposing Alpine's motion for summary judgment.[28] As

18. *Id.*

19. *Id.*

20. *Id.*

21. While Shannon Soproni was not the sole plaintiff, for ease of understanding she will be referred to as "the plaintiff" throughout this Note. *See* Complaint, Soproni v. Polygon Apartment Partners (Wash. Sup. Ct. 1995) (No. 94-2-21507-8).

22. Soproni v. Polygon Apartment Partners, 88 Wash. App. 416, 418, 941 P.2d 707, 708 (1997).

23. *Id.*

24. *Id.*

25. *Id.*

26. Brief of Respondent at 8, Soproni v. Polygon Apartment Partners, 88 Wash. App. 416, 941 P.2d 707 (1997) (No. 38011-7-I) (citations omitted).

27. *Id.*

28. *Id.* at 9. *See also* Soproni v. Polygon Apartment Partners, 88 Wash. App. at 418, 941 P.2d at 708. "Plaintiffs bring this action against Alpine under the product liability statute,

noted in the opinion by the Washington Court of Appeals for Division I, counsel for Soproni "indicated that this really was not a switch from negligence to strict liability, but negligence as couched by the provisions of the product liability statute. . . ."[29] The prophetic irony of this argument will be fully appreciated in Part I.D of this Note.

Polygon, Milbrandt, and Alpine each moved for summary judgment on the grounds that the building owner/manager, architect, and window manufacturer had no legal duty to childproof the window and screen to prevent this unfortunate accident.[30] In support of its motion for summary judgment, Alpine submitted affidavits and declarations of two experts: Tom King, who attested to the window's full compliance with the applicable building and fire codes,[31] and Dennis Barbee, Alpine's Supervisor of Research and Development Engineering.[32] Mr. Barbee emphasized that these same codes and standards require that windows located in residential sleeping rooms "provide a 'full clear opening without the use of separate tools,' with a minimum 'operable width dimension of 20 inches.'"[33] This is because the windows of sleeping rooms must provide for emergency escape in the event of a fire, and such escape should not be too difficult for elderly persons or small children.[34]

The window was also equipped with a sliding detent, or bolt, which sank vertically into a recessed hole in the window track.[35] This detent could be used to keep the window at two settings: completely closed and open by about three inches, both of which kept the window from sliding laterally.[36] As for the screen, Mr. Barbee stated that the purpose of a window screen is clearly not to prevent residents from

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RCW 7.72.030, . . ." Memorandum in Opposition to Defendant Alpine's Motion for Summary Judgment of Dismissal at 3, Soproni v. Polygon Apartment Partners (Wash. Sup. Ct. 1995) (No. 94-2-21507-8).

29. *Soproni*, 88 Wash. App. at 418, 941 P.2d at 708.

30. Brief of Respondent at 4, Soproni v. Polygon Apartment Partners, 88 Wash. App. 416, 941 P.2d 707 (1997) (No. 38011-7-I). Alpine did not design or manufacture the screen. *See* Affidavit of Dennis Barbee ¶ 4, Soproni v. Polygon Apartment Partners (Wash. Sup. Ct. 1995) (No. 94-2-21507-8).

31. Brief of Respondent at 4-5, Soproni v. Polygon Apartment Partners, 88 Wash. App. 416, 941 P.2d 707 (1997) (No. 38011-7-I). "The [Alpine] Series 220 window involved in this case met or exceeded all standards promulgated by [the Uniform Building Code, the National Fire Protection Association Codes, American National Standards Institute (ANSI) standards, and industry standards promulgated by the American Architectural Manufacturers Association (AAMA)]." *Id.*

32. *Id.* at 6.

33. *Id.* (quoting CP 194).

34. *See id.*

35. Soproni v. Polygon Apartment Partners, 137 Wash. 2d 319, 322, 971 P.2d 500, 502 (1999).

36. *Id.*

falling through them, but rather to keep insects outside when the window is open.[37]

In opposition to Alpine's motion for summary judgment, Soproni offered the testimony of two of its own experts: Stan Mitchell, a Washington architect,[38] and Dr. Gary Sloan, a psychologist and human factors/ergonomics specialist.[39] In contrast to the expert testimony adduced by Alpine, which related primarily to the applicable building and fire codes in manufacturing the window, Messrs. Mitchell and Sloan provided legally conclusory opinions to the effect that the "window in question was not reasonably safe,"[40] that safer alternatives were available,[41] and that such a window would be employed in this type of situation was foreseeable.[42] Mr. Mitchell proceeded to become an expert on consumer expectations, declaring that "the design [of the window] does not meet the consumer expectation of safety,"[43] echoing almost verbatim the statutory language found in the WPLA.[44] Drawing from his architectural expertise, Mr. Mitchell suggested that Alpine could have offered feasibly safe alternatives such as a "casement window . . . opened by a hand crank, a keyless locking barrier, a thumb screw locking detent and/or a double hung window which only opened from the top down."[45] Such alternatives, Mr. Mitchell opined, "would 'probably have prevented this accident.'"[46] Indeed, the developer would have bought such a window if it had been sold for the

37. Brief of Respondent at 6, Soproni v. Polygon Apartment Partners, 88 Wash. App. 416, 941 P.2d 707 (1997) (No. 38011-7-I).

38. Declaration of Stan Mitchell in Opposition to the Defendant Alpine Windows' Motion for Summary Judgment ¶ 2, Soproni v. Polygon Apartment Partners (Wash. Sup. Ct. 1995) (No. 94-2-21507-8).

39. Exhibit 4 to Declaration of Dr. Gary Sloan in Opposition to the Defendants' Motions for Summary Judgment, Soproni v. Polygon Apartment Partners (Wash. Sup. Ct. 1995) (No. 94-2-21507-8).

40. Declaration of Stan Mitchell in Opposition to the Defendant Alpine Windows' Motion for Summary Judgment ¶ 5, Soproni v. Polygon Apartment Partners (Wash. Sup. Ct. 1995) (No. 94-2-21507-8).

41. *Id.* at ¶ 4.

42. *See* Declaration of Dr. Gary Sloan in Opposition to the Defendants' Motions for Summary Judgment at ¶ 18, Soproni v. Polygon Apartment Partners (Wash. Sup. Ct. 1995) (No. 94-2-21507-8).

43. Declaration of Stan Mitchell in Opposition to the Defendant Alpine Windows' Motion for Summary Judgment ¶ 5, Soproni v. Polygon Apartment Partners (Wash. Sup. Ct. 1995) (No. 94-2-21507-8).

44. Section 7.72.030(3) of the WPLA reads: "In determining whether a product was not reasonably safe under this section, the trier of fact shall consider whether the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer." WASH. REV. CODE § 7.72.030(3) (2000).

45. Soproni v. Polygon Apartment Partners, 137 Wash. 2d 319, 324, 971 P.2d 500, 503 (1999) (quoting CP at 265-66).

46. *Id.* (quoting CP at 264).

same price.[47] It is troubling that the developer knew about safer alternative window designs and nonetheless chose not to buy one, especially in light of the fact that Alpine had no knowledge that its product would be installed in a second-floor bedroom.

Interestingly, Dr. Sloan opined that it was the "combination of features of this bedroom window such as sill/seat height and depth, the easy access thereto by furniture or the 9-inch high baseboard heater and the non-childproof, non-latchable sliding window [that] presented a risk of serious harm to small children such as Daniel Soproni."[48] Dr. Sloan's opinion would seem to implicate defendants Milbrandt, the architect, and Polygon, the owner/developer, to the extent the features for which Alpine was responsible would seem least relevant, and presumably make Alpine less subject to liability for Daniel's injuries. Dr. Sloan also testified the window should have been equipped with a childproof barrier or lockout to prevent opening more than 4.5 inches.[49]

With the mere existence of such differences in expert opinion serving as the backdrop behind its newly discovered product liability[50] case against Alpine, the plaintiff repeatedly argued that only the jury could resolve the question of liability in the case.[51] Pointing to the statutory language "reasonably safe,"[52] "likelihood that the product would cause . . . harm,"[53] "seriousness of . . . harm[],"[54] "burden on the manufacturer,"[55] and "contemplated by the ordinary consumer,"[56] the plaintiff maintained that summary judgment was not proper.[57] However, the premise underlying that argument was laid bare by its own advocate: "the very nature of a product liability claim [renders]

47. *Id.*

48. Declaration of Dr. Gary Sloan in Opposition to the Defendants' Motions for Summary Judgment ¶ 18, Soproni v. Polygon Apartment Partners (Wash. Sup. Ct. 1995) (No. 94-2-21507-8).

49. *Soproni*, 137 Wash. 2d at 324, 971 P.2d at 503.

50. Specifically, the plaintiff alleged that the product liability statute "provides for liability when a product is not reasonably safe as designed . . . when a product is not reasonably safe for lack of adequate warnings." Memorandum in Opposition to Defendant Alpine's Motion for Summary Judgment of Dismissal at 3, Soproni v. Polygon Apartment Partners (Wash. Sup. Ct. 1995) (No. 94-2-21507-8).

51. *Id.* at 3-6.

52. WASH. REV. CODE § 7.72.030(1) (2000).

53. WASH. REV. CODE § 7.72.030(1)(a),(b).

54. *Id.*

55. WASH. REV. CODE § 7.72.030(1)(a).

56. WASH. REV. CODE § 7.72.030(3).

57. *See* Memorandum in Opposition to Defendant Alpine's Motion for Summary Judgment of Dismissal at 5, Soproni v. Polygon Apartment Partners (Wash. Sup. Ct. 1995) (No. 94-2-21507-8).

summary judgment . . . *rarely appropriate*,"[58] insofar as the statute giving rise thereto necessitates the determination of "questions of fact."[59] Thus, applying the plaintiff's approach to product liability litigation, the expert opinions of Messrs. Mitchell and Sloan are but a procedural formality standing between a complaint and a jury trial. Rejecting such an approach, the trial court concluded that no *genuine issue* existed as to facts material to plaintiff's claims, dismissing all three defendants.[60]

C. *The Appeal: Exonerating the Responsible Parties*

1. The Appellate Strategy

The plaintiff did not appeal from the trial court's grant of summary judgment to the architect and the developer, despite the fact that those parties made the crucial decision to design and construct the window in a "pop-out" configuration and place it in a second-floor apartment bedroom.[61] Instead, recognizing that *de novo* review of the product liability based summary judgment stood a better chance of reversal,[62] Soproni gambled that the appellate court would find the disputed expert testimony important evidence that could only be resolved by a jury.[63] Soproni argued on appeal that because Alpine sold an alternative design of window with a "furled knob type detent [that] could not be easily opened by a child,"[64] and that because Mr. Mitchell testified that the "safety hazards associated with the win-

58. *Id.* (emphasis added).

59. *Id.* Relying on the annotations to ORLAND & LEWIS TEGLAND, 4 WASHINGTON PRACTICE: RULES § 37 at 634-37, the plaintiff argued that this conclusion is compelled by the fact that "virtually every summary judgment product liability case" was held to present "jury questions." *Id.*

60. Soproni v. Polygon Apartment Partners, 88 Wash. App. at 416, 418, 941 P.2d at 702, 708; *see also* BLACK'S LAW DICTIONARY 686 (6th ed. 1990) ("Genuine issues . . . are issues which can be sustained by substantial evidence"); Gregory A. Gordillo, *Summary Judgment and Problems in Applying the* Celotex *Trilogy Standard*, 42 CLEV. ST. L. REV. 263, 264 (1994) ("Stated simply, a material fact is one which will affect the outcome of the case, and a material fact raises a genuine issue if a reasonable jury could reach different conclusions concerning that fact.").

61. *Soproni*, 88 Wash. App. at 418, 941 P.2d at 708. "This exoneration of the architect and builder is troublesome precisely because . . . [they] chose to place this window behind a 16-1/2 inch recessed ledge." Soproni v. Polygon Apartment Partners, 137 Wash. 2d 319, 332, 971 P.2d 500, 507 (1999) (Talmadge, J., concurring in part and dissenting in part).

62. *See generally* Memorandum in Opposition to Defendant Alpine's Motion for Summary Judgment of Dismissal, Soproni v. Polygon Apartment Partners (Wash. Sup. Ct. 1995) (No. 94-2-21507-8).

63. *See* Brief of Appellants at 1, Soproni v. Polygon Apartment Partners, 88 Wash. App. 416, 941 P.2d 707 (1997) (No. 38011-7-I).

64. *Id.* at 5.

dow . . . could have been designed out with feasible safer alternative designs, . . . the Alpine window in question was not reasonably safe. . . ."[65] In sum, Soproni regurgitated its experts' opinion testimony that "reasonable steps should have been taken by [Alpine] to design out the risk by using a feasible alternative childproof design employing a locking device."[66]

In response to Soproni's contention that due to the nature of a product liability claim "summary judgment is rarely if ever appropriate,"[67] the Washington Court of Appeals for Division I stated: "[w]hile we have doubts that Soproni adequately pleaded this case under the product liability act, we will review it on that basis. We hold that even if viewed as a case under the act, it can be decided as a matter of law."[68]

2. The Washington Product Liability Act: The Negligence Standard

After nearly two years of extensive hearings and public debates in the Washington legislature concerning the implementation of broad tort reform, the WPLA was enacted in 1981.[69] The chief reason for the WPLA's passage was the abrupt increase in product liability insurance premiums, as noted in the statute's preamble:

> The purpose of this amendatory act is to enact further reforms in the tort law to create a fairer and more equitable distribution of liability among parties at fault.
>
> Of particular concern is the area of tort law known as product liability law. Sharply rising premiums for product liability insurance have increased the cost of consumer and industrial goods. These increases in premiums have resulted in disincentives to industrial innovation and the development of new products. High product liability premiums may encourage product sellers and manufacturers to go without liability insurance or pass the high cost of insurance on to the consuming public in general.

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65. *Id.* at 7.

66. *Id.* at 8.

67. *Id.* at 13.

68. Soproni v. Polygon Apartment Partners, 88 Wash. App. 416, 419, 941 P.2d 707, 708 (1997).

69. *See* WASHINGTON STATE SENATE SELECT COMMITTEE ON TORT & PRODUCT LIABILITY REFORM, FINAL REPORT 1-2 (1981). *See also* Act of Apr. 17, 1981, ch. 27, 1981 Wash. Laws 112. For an extensive analysis of the legislative history of the WPLA and the various contemporary economic, social, and political issues that led to its passage, *see* Philip A. Talmadge, *Washington's Product Liability Act*, 5 U. PUGET SOUND L. REV. 1 (1981).

> It is the intent of the legislature to treat the consuming public, the product seller, the product manufacturer, and the product liability insurer in a balanced fashion in order to deal with these problems.
>
> It is the intent of the legislature that the right of the consumer to recover for injuries sustained as a result of an unsafe product not be unduly impaired. It is further the intent of the legislature that retail businesses located primarily in the state of Washington be protected from the substantially increasing product liability insurance costs and unwarranted exposure to product liability litigation.[70]

Before the WPLA, claimants seeking redress for product-related injuries could avail themselves of various legal theories of liability: negligence, warranty, contract, and strict liability, for example.[71] With the enactment of the WPLA, the confusion commonly associated with litigating product liability claims amidst these differing legal theories and standards was significantly reduced by the creation of a single cause of action for product-related harms.[72] The WPLA supplanted previously existing common law remedies, including common law actions for negligence, and expressly defined the standards of liability to be applied in defective design, defective warning, and defective construction claims.[73] The statute now provides that a "product manufacturer is subject to liability to a claimant if the claimant's harm was proximately caused *by the negligence of the manufacturer in that the product was not reasonably safe as designed or not reasonably safe because adequate warnings or instructions were not provided.*"[74] The statute goes on to provide that:

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70. Act of Apr. 17, 1981, ch. 27, 1981 Laws 112, at 112-13.

71. WASHINGTON STATE SENATE SELECT COMMITTEE ON TORT & PRODUCT LIABILITY REFORM, FINAL REPORT at 16 (1981). For a thorough study of the development of strict products liability, which arose in the early 1960s, *see generally* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS, 641-82 (4th ed. 1971). Its creation grew largely out of a jurisprudential movement to adjust conventional tort and warranty theories in order to facilitate recovery for consumers injured by defective products, regardless of the degree of care on the part of the manufacturer in making the product. *Id.* at 656-58.

72. WASHINGTON STATE SENATE SELECT COMMITTEE ON TORT & PRODUCT LIABILITY REFORM, FINAL REPORT 16 (1981). *See also* Celia E. Holuk & Donna L. Walker, Comment, *Products Liability—Tort Reform: An Overview of Washington's New Act*, 17 GONZ. L. REV. 357 (1982); Comment, *Product Liability Reform Proposals in Washington—A Public Policy Analysis*, 4 U. PUGET SOUND L. REV. 143 (1980).

73. WASHINGTON STATE SENATE SELECT COMMITTEE ON TORT & PRODUCT LIABILITY REFORM, FINAL REPORT 16-17 (1981); *see also* WASH. REV. CODE § 7.72.030 (2000).

74. WASH. REV. CODE § 7.72.030(1) (2000) (emphasis added).

> A product is not reasonably safe as designed, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, outweighed the burden on the manufacturer to design a product that would have prevented those harms and the adverse effect that an alternative design that was practical and feasible would have on the usefulness of the product. . . .[75]

However, a "product manufacturer is subject to *strict liability* to a claimant if the claimant's harm was proximately caused by the fact that the product was *not reasonably safe in construction or not reasonably safe because it did not conform to the manufacturer's express warranty* or to the implied warranties under Title 62A RCW."[76] Finally, "in determining whether a product was not reasonably safe under this section, the trier of fact shall consider whether the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer."[77]

Clearly then, strict liability was reserved as the appropriate standard for defective construction and warranty claims, while negligence was deemed more appropriate for defective design and defective warning claims.[78] In its final report, the state senate Select Committee on Tort & Product Liability Reform noted that this new law "reflects essentially a negligence standard in design and warning/instruction cases, and agrees with the UPLA[79] that the 'application of *uncertain strict liability* principles in the areas of design and duty to warn places a whole product line at risk; *therefore a firmer liability foundation is needed.*'"[80] The negligence standard was codified to provide that "firmer liability foundation."[81] Thus, reading the above statutory provisions together, a product liability claimant alleging defective design

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75. WASH. REV. CODE § 7.72.030(1)(a).

76. WASH. REV. CODE § 7.72.030(2) (emphasis added).

77. WASH. REV. CODE § 7.72.030(3).

78. *See* WASHINGTON STATE SENATE SELECT COMMITTEE ON TORT & PRODUCT LIABILITY REFORM, FINAL REPORT 16-18 (1981).

79. At the national level, a legal study of product liability reform was commissioned by the Interagency Task Force on Product Liability. *Id.* at 15. This pre-WPLA study resulted in the development of a Model Uniform Product Liability Act (UPLA) by the U.S. Department of Commerce Task Force on Product Liability and Accident Compensation, which criticized the lack of uniformity among jurisdictions in the standards used to analyze product liability claims. *Id.* The Select Committee's "final proposal . . . closely adheres to [the UPLA's] approaches, if not its precise language." *Id.* at 15-16.

80. *Id.* at 18 (emphasis added).

81. *Id.* at 18. Dean Prosser, in discussing the so-called "risk-utility" test, which is essentially what was codified in RCW 7.72.030(1)(a), concluded that "even though it may occasionally be called strict [liability], [it] appears to rest primarily upon a departure from proper standards of care, so that the tort is essentially a matter of negligence." PROSSER, *supra* note 71, at 644.

and/or warning would seem to be required to show (1) that a product-related injury was proximately caused by the negligence of the manufacturer, (2) that the product was not reasonably safe, (3) that a balancing of the risk/burden factors of subparagraph (1)(a) of the WPLA weighs in the claimant's favor, and (4) that the ordinary consumer's expectations have been considered in the determination of step three.[82] A claimant alleging defective *manufacture or breach of warranty*, on the other hand, need not show negligence by the manufacturer, because the "manufacturer is *subject to strict liability*" for such a claim.[83]

3. The Analysis by the Washington Court of Appeals

The court of appeals affirmed the trial court's grant of summary judgment to Alpine Windows and dismissed the appellant's suggestion that product liability actions and summary judgment are generally mutually exclusive.[84] The court stated that "under the facts of a particular case, 'it may be unreasonable for a consumer to expect product design to depart from . . . regulatory standards, even if to do so would result in a safer product.'"[85] Certainly, it is within the province of a trial court judge to determine whether a reasonable jury could reach different conclusions as to what is within the contemplation of an ordinary consumer. Almost any product could cause injury if put to certain uses, but it would be unreasonable for a consumer to expect to avoid injury when putting products to all conceivable uses.[86] The court then stated that the affidavits of Messrs. Mitchell and Sloan did not show that the product was unsafe within the ordinary consumer's expectation.[87] After all, a window is for "light, air, and egress in case of fire [, and] [t]he window here has not been shown to be 'unsafe,' only that another window design might . . . be safer. . . ."[88]

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82. *See* WASH. REV. CODE § 7.72.030(1),(3); Soproni v. Polygon Apartment Partners, 137 Wash. 2d 319, 336, 971 P.2d 500, 510 (1999) (Talmadge, J., concurring in part and dissenting in part); *see also* Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. CIN. L. REV. 1183, 1264, 1268 (1992) ("Prior to 1981, when the Washington state legislature took products liability law into its own, defense oriented, hands, Washington's strict liability law essentially embodied *Phillips v. Kimwood Machine Co.*[, 525 P.2d 1033 (Or. 1974),] . . . [and the WPLA] effectively brought negligence concepts into failure to warn [and] design defect cases.").

83. WASH. REV. CODE § 7.72.030(2) (2000) (emphasis added).

84. Soproni v. Polygon Apartment Partners, 88 Wash. App. 416, 421-23, 941 P.2d 707, 709-10 (1997).

85. *Id.* at 421, 941 P.2d at 709 (quoting Falk v. Keene Corp., 113 Wash. 2d 645, 655, 782 P.2d 974, 980 (1989)).

86. *See id.*

87. *Id.* at 422, 941 P.2d at 710.

88. *Id.* at 421, 941 P.2d at 709-10.

Turning to the appellant's contention that the dispute between its experts and those of the defense unearthed genuine issues of material fact, the court found the former to contain "conclusions and assumptions not fully supported within the context of standards for summary judgments."[89] Those standards require that declarations set forth specific facts, "not mere speculation or conjecture."[90] Accordingly, the court affirmed the decision of the trial court.[91]

D. The Washington Supreme Court's Divided Reversal

The Washington Supreme Court granted discretionary review, bringing before it the same arguments and assignments of error raised in the court of appeals: summary judgment should not have been granted, Soproni argued, due to the existence of disputed expert testimony as to the consumer expectations and the feasibility of safer alternative window designs.[92] The court first disposed of Soproni's contention that summary judgment was not proper on the defective warning claim, finding that the record clearly established that the lack of warnings did not contribute to the accident.[93] Indeed, it was an undisputed fact that Shannon Soproni was fully aware of the danger presented by her son's playing with the window, by virtue of her own warnings to Daniel to stop doing so.[94]

The court then proceeded to parse the statute's design defect provisions, applying the subversive and illogical textual construction that lies at the heart of this Note. By a slim 5-4 decision, the court reversed both lower courts' decisions and remanded the design defect claim for trial.[95] The reasoning employed by the court, and its reliance on two key previous cases, one prior to and one subsequent to the enactment of the WPLA,[96] substitutes strict liability for the statute's

89. *Id.* at 422, 941 P.2d at 710.

90. *Id.*

91. *Id.* The appellants had assigned error to both the defective design claim and the failure to warn claim, but the bulk of the court of appeals' opinion is devoted to the former. *Id.* The failure to warn claim was affirmed with two sentences of reasoning: "Washington law holds that a manufacturer has no duty to warn when the product user is aware of the risk. . . . 'A manufacturer is not an insurer, and need not warn against hazards known to everyone.'" *Id.* at 422-23, 941 P.2d at 710 (quoting Kimble v. Waste Sys. Int'l, 23 Wash. App. 331, 339, 595 P.2d 569, 573, *review denied*, 92 Wash. 2d 1029 (1979)).

92. Appellants' Petition for Review at 1-2, Soproni v. Polygon Apartment Partners, 137 Wash. 2d 319, 917 P.2d 500 (1999) (No. 38011-7-I).

93. Soproni v. Polygon Apartment Partners, 137 Wash. 2d 319, 326, 971 P.2d 500, 504 (1999).

94. *Id.*

95. *Id.* at 331, 971 P.2d at 507.

96. The court relied on *Falk v. Keene Corp.*, 113 Wash. 2d 645, 782 P.2d 974 (1989), and *Seattle-First Nat'l Bank v. Tabert*, 86 Wash. 2d 145, 542 P.2d 774 (1975).

negligence standard, gives short shrift to the principles of tort reform that moved the legislature to enact the WPLA, and puts Washington's product manufacturers in the difficult position of assessing the risk that their products will be deemed "defective" even when the products perform as intended. This author respectfully submits that the *Soproni* majority has removed all doubt concerning its conviction that the WPLA is a "stain on the beauty of the common law,"[97] demonstrating the degree to which the court pays undying homage to the principle of stare decisis and gives short shrift to the principle of judicial restraint.

Citing its opinion in *Falk v. Keene Corp.*, the *Soproni* court held that "*strict liability* is the applicable standard for a *design defect* product liability claim maintained under RCW 7.72.030(2)."[98] As noted above, the WPLA sets forth strict liability as the statutory standard for *manufacture defect or warranty* claims, not for *design* defect claims.[99] This is the majority's most egregious error of statutory construction, for it renders the word "negligence" as used in the statute either superfluous, that is, synonymous with "strict liability," or a drafting mistake. The court then read the "risk-utility" test provision, found in subparagraph (1)(a) of the WPLA,[100] as an *optional* method of showing that a product is not reasonably safe as designed; the other method being the "consumer expectations" test, found in subparagraph (3).[101] As mentioned above, the language of subparagraph (3) of the WPLA, "*[i]n determining* whether a product was not reasonably safe *under this section*, the trier of fact shall consider . . .",[102] clearly presupposes that the risk-utility test of subparagraph (1)(a) will be used.[103] Construing these two tests as optional schemes for defining the phrase "not reasonably safe" renders the entire risk-utility test language superfluous in those cases where claimants present the jury with nothing but consumer expectations evidence. Rather, the consumer expectations test should be seen as an "interpretive tool"[104] for

97. This is an apt expression described by the author's first-year torts professor, Richard H. Seeburger, on a number of occasions. The original source of this saying could not be determined.

98. *Soproni*, 137 Wash. 2d at 326, 971 P.2d at 504 (second emphasis added).

99. WASH. REV. CODE § 7.72.030(2) (2000).

100. WASH. REV. CODE § 7.72.030(1)(a).

101. *Soproni*, 137 Wash. 2d at 326-27, 971 P.2d at 505.

102. WASH. REV. CODE § 7.72.030(3) (emphasis added).

103. *See* SENATE JOURNAL, 47th Legis. Sess. 631 (Wash. 1981) ("Factors examined under [the risk-utility] balancing test are similar to those suggested by the Washington court in analyzing the consumer expectation test, *Seattle-First National Bank v. Tabert*, 86 Wash. 2d 145 (1975), and therefore can be harmonized with the consumer expectation test. Thus, both tests are adopted here as relevant considerations which the trier of fact should consider.").

104. *Soproni*, 137 Wash. 2d at 333, 971 P.2d at 508, (Talmadge, J., concurring in part and

analyzing the elements of the risk-utility test, the ultimate determination of whether a product should be deemed "not reasonably safe."

In response to the dissent's criticism of the majority's interpretation of the WPLA as "erroneous," the court confines its cursory response to a footnote in which it does little more than remind the dissent of the vaunted principle of stare decisis.[105] In fact, the majority opinion inflates the significance, and ostensibly the soundness, of the *Falk* court's holding by tracing its origin to a case decided before the enactment of the WPLA, *Seattle-First Nat'l Bank v. Tabert*.[106]

Falk v. Keene Corp., decided in 1989, involved a personal injury action brought by the survivors of John Falk, who was exposed to asbestos insulation products during service in the United States Navy from 1947 to 1953.[107] The complaint in *Falk* alleged both defective design and failure to warn of the dangers associated with asbestos; a jury verdict in favor of the defendants was reversed on appeal.[108] The Supreme Court of Washington affirmed the court of appeals' reversal on the grounds that the jury instructions regarding a claim that the product was defectively designed, which defined negligence as "the failure to exercise ordinary care,"[109] constituted prejudicial error.[110] The trial court in *Falk* instructed the jury on design defect product liability in accordance with WPIC 110.02 (1984), using language closely following that of subparagraphs 7.72.030(1), (1)(a), and (3) of the WPLA.[111] The trial court also instructed the jury modeled on the common-law definition of negligence, and the plaintiff objected.[112] The plaintiff requested a pre-WPLA strict liability instruction in accordance with the *Tabert* standard, but the trial court denied this request.[113] Following a jury verdict for the manufacturers, the plaintiff appealed.[114] The Washington Supreme Court held "that ordinary negligence is not the standard adopted by the Legislature for determining manufacturer liability for defectively designed prod-

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dissenting in part).

105. *Id.* at 327 n.3, 971 P.2d at 505 n.3.

106. *Id.* "Not only did *Falk* issue in 1989, . . . but we relied there on our holding in *Seattle-First Nat'l Bank v. Tabert*, 86 Wash. 2d 145, 149, 542 P.2d 774 (1975), a case in which we held that a manufacturer is strictly liable for manufacturing an unreasonably dangerous and therefore defective product." *Id.*

107. Falk v. Keene Corp., 113 Wash. 2d 645, 646, 782 P.2d 974, 975-76 (1989).

108. *Id.* at 646, 648, 782 P.2d at 976.

109. *Id.* at 647 n.2, 782 P.2d at 976 n.2.

110. *Id.* at 660, 782 P.2d at 983.

111. *Id.* at 646-47, 782 P.2d at 976.

112. *Id.* at 647, 782 P.2d at 976.

113. *Id.*

114. *Id.* at 647-48, 782 P.2d at 976.

ucts. . . ."[115] The *Falk* court reasoned that because the WPLA codified the consumer expectations and risk-utility analysis, which were originally devised in the pre-WPLA *Tabert* case, the legislature's use of the word "negligence" in the statute was simply acknowledging that the balancing done in *Tabert* was more "'akin' to negligence."[116] The *Falk* court relied on a few fragments of legislative history to support this argument, essentially reducing tort reform to a matter of semantics. Negligence and strict liability were interchangeable in the statutory scheme of products liability in Washington. Thus, with facts much less likely to arouse any great sympathy or interest in the legal community, *Falk* could arguably be overlooked as an anomalous but excusable distortion of the WPLA. However, the *Soproni* court placed great reliance on *Falk* for its precedential value, such that *Falk*'s statutory construction must be critically appraised as well.

The *Soproni* court then purported to fortify the proposition for which the *Tabert* case stands by citing a 1986 opinion, *Baughn v. Honda Motor Co.*,[117] in which the court characterized *Tabert* as "widely recognized [as] a leading case in setting forth standards for imposing strict liability for a defective product."[118] Such heavy reliance on a single product liability case decided *prior* to the passage of the WPLA, coupled with the citation to a case that followed that statute, but did not construe it,[119] speaks volumes about the *Soproni* court's deference to legislative prerogative. Furthermore, that such reasoning was employed in construing a statute that should have so fundamentally changed product liability litigation in Washington makes it difficult not to conclude that five members of the State Supreme Court found the legislature's stance on tort reform, as codified in the WPLA, politically unpalatable.

As if to rebut such an accusation, the majority cited another principle: "the Legislature is presumed to be aware of judicial interpretations of its enactments and that its failure to amend a statute following a judicial decision interpreting it indicates legislative acquiescence in that decision."[120] Even three years after passage of the WPLA, state legislators might have been forgiven for thinking the supreme court was on board with the "firmer liability foundation"

115. *Id.* at 646, 782 P.2d at 976.

116. *Id.* at 653, 782 P.2d at 979.

117. 107 Wash. 2d 127, 727 P.2d 655 (1986).

118. Soproni v. Polygon Apartment Partners, 137 Wash. 2d 319, 327, 971 P.2d 500, 505 (1999) (quoting *Baughn*, 107 Wash. 2d at 133-34, 727 P.2d at 659-60).

119. *See Baughn*, 107 Wash. 2d 127, 727 P.2d 655. *Baughn* was decided in 1986, five years after the passage of the WPLA, but nonetheless involved a cause of action for injuries sustained prior to the WPLA; the WPLA thus was inapplicable. *See id.*

120. *Soproni*, 137 Wash. 2d at 327 n.3, 971 P.2d at 505 n.3.

established by the statute. Justice Brachtenbach, writing for the majority in *Lenhardt v. Ford Motor Co.*,[121] commented on the new statute—which incidentally was *not applicable* to that case inasmuch as the cause of action accrued prior to the enactment of the WPLA—by stating:

> One of the more significant changes adopted by the Legislature was to change the standard of liability for design and warning/instruction defects. The Legislature felt that the balancing factors announced in *Tabert*,[122] and *Teagle*,[123] had implicitly created a negligence standard for strict liability causes of actions. Therefore, the Legislature adopted negligence standards as the standard of liability for design and warning/instruction defects under the new act.[124]

Justice Brachtenbach also authored the *Falk* opinion five years later, but this time he ascribed to the legislature quite a different intent:

> Our conclusion that ordinary negligence is *not* the standard for design defect claims is supported by the fact that subsection (1)(a) does not include language like that found in subsection (1)(c). . . . Put simply, the Legislature evidently doubted that what we termed "strict liability" in *Tabert* is, or should be called, "strict liability."[125]

Why the legislature's doubt in that regard should not be entitled to deference is a question left unanswered in *Falk*. Where the WPLA does use strict liability terminology, in subsection (2) (manufacture defects and warranty breaches), that standard of liability is not statutorily defined.[126] What is statutorily defined in subsection (2)(a) is the phrase "not reasonably safe in construction."[127] What is statutorily defined in subsection (2)(b) is the phrase "does not conform to the express warranty."[128] What is omitted from the strict liability subsections is the risk-utility test.[129] Similarly, the word "negligence" is not statutorily defined anywhere in the WPLA, although subsection (1) would seem to demonstrate how a manufacturer's negligence

121. 102 Wash. 2d 208, 683 P.2d 1097 (1984).

122. Seattle-First Nat'l Bank v. Tabert, 86 Wash. 2d 145, 542 P.2d 774 (1975).

123. Teagle v. Fischer & Porter Co., 89 Wash. 2d 149, 570 P.2d 438 (1977).

124. *Lenhardt*, 102 Wash. 2d at 214, 683 P.2d at 1101.

125. Falk v. Keene Corp., 113 Wash. 2d 645, 653, 782 P.2d 974, 979 (1989) (emphasis added).

126. *See* WASH. REV. CODE § 7.72.030(2) (2000).

127. WASH. REV. CODE § 7.72.030(2)(a).

128. WASH. REV. CODE § 7.72.030(2)(b).

129. *See* WASH. REV. CODE § 7.72 (2000).

manifests itself "in that the product was not reasonably safe as designed. . . ."[130] The essential point that seems to have escaped both the *Falk* and *Soproni* courts is that the statute provides for *two different standards of liability,* depending on which type of product defect is alleged to have caused injury.

Rather than undertake a serious analysis of whether the court's interpretation of the WPLA is a sound one, an examination that would involve defending its selective construction of the statute's text on the merits, the *Soproni* court rested on the broad principles of stare decisis and legislative acquiescence.

Reviewing the court of appeals' decision and analysis, the majority found fault with its overemphasis on Alpine's compliance with the industry standards and fire codes.[131] While conceding that compliance with such standards is relevant and may be considered by the trier of fact under the WPLA,[132] the court stated that the court of appeals improperly discounted the opinions of the plaintiff's experts.[133] The experts' opinions should have been viewed in a light most favorable to the plaintiff.[134] Had the experts' opinions been so viewed, said the court, they would have established that feasible alternative designs were available that "would have prevented the accident here without violating applicable codes."[135] Affidavits such as those of Messrs. Mitchell and Sloan, the court stated, have been considered sufficient to survive summary judgment in other cases.[136] In one such case, *Lamon v. McDonnell Douglas Corp.*,[137] a flight attendant fell through an escape hatch on a DC-10 airplane.[138] The plaintiff's expert, an engineer, opined that the hatch cover was not reasonably safe and stated that an alternative design manufactured by one of the defendant corporation's competitors lacked the features deemed to be dangerous.[139]

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130. WASH. REV. CODE § 7.72.030(1).

131. *Soproni*, 137 Wash. 2d at 328, 971 P.2d at 506 (1999).

132. Section 7.72.050(1) of the WPLA states:

> Evidence of custom in the product seller's industry, technological feasibility or that the product was or was not, in compliance with nongovernmental standards or with legislative regulatory standards or administrative regulatory standards, whether relating to design, construction or performance of the product or to warnings or instructions as to its use may be considered by the trier of fact.

WASH. REV. CODE § 7.72.050(1) (2000).

133. *Soproni*, 137 Wash. 2d at 328, 971 P.2d at 506.

134. *Id.* at 328-29, 971 P.2d at 506.

135. *Id.* at 329, 971 P.2d at 506.

136. *Id.*

137. Lamon v. McDonnell Douglas Corp., 91 Wash. 2d 345, 348, 588 P.2d 1346, 1348 (1979).

138. *Id.* at 348, 588 P.2d at 1348.

139. *Id.* at 352, 588 P.2d at 1350.

However, the dissent in *Soproni*, authored by Justice Talmadge, found *Lamon* unpersuasive and distinguishable.[140] The expert opinion in *Lamon* was relevant to that case because the manufacturer "had full control over all matters concerning the relative safety of the escape hatch, . . . [insofar] [a]s *only the plane's builder* participated in decisions which could potentially create a dangerous condition. . . ."[141] This testimony, the *Soproni* dissent argued, raised a genuine factual issue sufficient to survive summary judgment.[142] However, the testimony of Messrs. Mitchell and Sloan in *Soproni* merely purported to demonstrate that safer window designs exist, which the dissent maintained was irrelevant because the dangerous condition was created not by Alpine's design decision, but rather by the developer's decision to use such a window *"in [an] upper floor window seat."*[143] Thus, the *Soproni* expert opinion addressed an issue of great relevance to the developer's and architect's liability—not to Alpine's—so summary judgment was not precluded.[144] For that matter, proffering evidence of safer alternative designs only begins to lay the necessary foundation for a risk-utility analysis under subparagraph 7.72.030(1)(a) of the WPLA.[145] Plaintiffs must also show that the alternative design was practical, feasible, and that it brought with it greater usefulness than adverse effect.[146]

The *Soproni* majority also faulted the court of appeals for its emphasis on the fact that Daniel's injuries did not result from an intended or foreseeable use of the window.[147] Returning to its illogical construction of the product liability statute, the majority challenged the simple proposition that there is no duty to make a safe product safer, concluding it was "not appropriate to a product liability claim because strict liability rather than negligence is the standard for design defect claims."[148] With such obvious disregard for the express language and reformist policy behind an important statute for product manufacturers doing business in Washington, the majority's legal reasoning could best be described as superficial.

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140. *Soproni*, 137 Wash. 2d at 335 n.11, 971 P.2d at 509 n.4. The dissent's response to the majority's reliance on the *Lamon* case is also confined to a lengthy footnote.

141. *Id.* (emphasis added).

142. *Id.* at 336 n.11, 971 P.2d at 510 n.4.

143. *Id.* (emphasis added).

144. *Id.*

145. *Id.* at 336-37, 971 P.2d at 510.

146. *Id.* at 336, 971 P.2d at 510.

147. *Id.* at 330, 971 P.2d at 507.

148. *Id.*

II. ANALOGOUS PRODUCT LIABILITY CASES FROM OTHER JURISDICTIONS

The *Soproni* case is unique. Few cases resemble the factual scenario and legal analysis observed in *Soproni*. Indeed, a window manufacturer was held liable to a plaintiff (where the plaintiff fell through and out of window) in only one case, *Honey v. Barnes Hospital*,[149] a Missouri Court of Appeals decision, which is fundamentally distinguishable from the *Soproni* case, discussed briefly below. Those cases coming closest to *Soproni*'s facts resulted in contrary holdings and are grounded in much more defensible rationales. In any event, the purpose of discussing these cases is not so much to support the author's contention that the *Soproni* court arrived at the wrong *outcome;* rather, these cases demonstrate not only the degree to which the *Soproni* court's *rationale* is flawed, but also that the means by which such an outcome could be produced must be closely scrutinized.

A. Honey v. Barnes Hospital *(Missouri)*

Honey involved a wrongful death action brought by the parents of a young man who was admitted into the Barnes Hospital's psychiatric intensive care ward.[150] The young man committed suicide by jumping from the hospital's fifteenth-floor window, which an architect had specified should be equipped with a secure, tamper-proof, locking device and limit stops.[151] Named as defendants in the case were the hospital, the general contractor, the architect, and the window manufacturer.[152] The plaintiffs in *Honey* alleged that the window manufacturer "negligently supplied windows without adequate tolerance to allow locking" or limit stops.[153] A jury verdict for the plaintiffs against the hospital, general contractor, and window manufacturer was upheld on appeal.[154] On appeal, the window manufacturer asserted that it "was told to go ahead and manufacture the window without limit stops" by the architect.[155] The Missouri Court of Appeals found no evidence to that effect, and reasoned that the plaintiffs' theory of recovery against the window manufacturer was based upon common

149. Honey v. Barnes Hosp., 708 S.W.2d 686 (Mo. Ct. App. 1986).

150. *Id.* at 690.

151. *Id.*

152. *Id.* at 690-91. Also named as a defendant in the case was a "window subcontractor." *Id.* at 691.

153. *Id.* at 691.

154. *Id.* at 690.

155. *Id.* at 702.

law negligence.[156] In sum, the window manufacturer in *Honey* had full knowledge of the specific setting in which its product would be used—a psychiatric suicide-watch hospital ward on the fifteenth floor—and was justly held liable for breaching its duty of care and proximately causing the decedent's death.[157] The circumstances of *Honey*, informed by common sense and logical reasoning, would just as easily support a design defect product liability claim here in Washington under the clear language of the WPLA.[158] The negligence standard of liability, provided in subparagraph 7.72.030(1) of the WPLA, would seem to have been designed for just such a claim. The circumstances of *Soproni*, one could certainly argue, are susceptible to a *claim* under that same provision of the WPLA; but the legal theory relied upon would *not* fairly be characterized as *strict liability*. The legal theory supporting such a claim would, as in the *Honey* case, be *negligence*-based, especially given that product liability claims in Washington can only be litigated pursuant to the WPLA.[159]

B. Todd v. Societe Bic, S.A.[160] *(Seventh Circuit)*

Two-year-old Tiffany Todd died when four-year-old Cori Smith, playing with a Bic disposable lighter, started a fire in Tiffany's bedroom.[161] About a week before the tragic incident, Cori had set a small fire in her parents' bedroom while playing with the same type of lighter, and was warned by her parents never to play with lighters or matches.[162] Tiffany's estate sued Bic Corporation, the manufacturer of the lighter, asserting negligence and strict liability claims, alleging the lighter was defective because it was not made with a child-resistant feature.[163] Before discovery was completed at the trial court level, undisputed evidence showed that at the time of the fire Bic had developed a prototype lighter that did incorporate a child-resistant, although not childproof, feature.[164] Bic moved for summary judgment, arguing that its product was not unreasonably dangerous to consumers.[165] The trial court granted summary judgment for Bic on

156. *Id.* at 702-03.
157. *Id.*
158. WASH. REV. CODE § 7.72 (2000).
159. Washington Water Power Co. v. Graybar Elec. Co., 112 Wash. 2d 847, 853, 774 P.2d 1199, 1203 (1989).
160. Todd v. Societe Bic, S.A., 21 F.3d 1402 (7th Cir. 1994).
161. *Id.* at 1403.
162. *Id.* at 1404.
163. *Id.* Plaintiff alleged both defective design and defective warning claims. *Id.*
164. *Id.*
165. *Id.*

all claims, finding that the lighter was not defective or unreasonably dangerous.[166]

On appeal before the full panel of the Seventh Circuit, the trial court's order was affirmed.[167] The "seminal question" before the court of appeals was: "what does an ordinary consumer expect when he purchases a lighter?"[168] In an attempt to answer that question in such a way as to require reversal, the plaintiff/appellant in *Todd* argued that Illinois law should extend the consumer contemplation test to look to the expectations of all "foreseeable users," not just the ordinary consumer.[169] However, the court found that both Illinois common law and the Restatement Second of Torts, Section 402A, clearly reject such an argument, holding instead that children are not ordinary consumers.[170] Moreover, it would be absurd to inquire into the expectations of a two-year-old child using a consumer product, given that small children cannot be expected to perceive the dangers inherent in almost any product, much less "contemplate" anything.[171]

While *Todd* did not involve windows or screens, it did involve a very common household product—a lighter—that the average consumer likely would not characterize as "unreasonably" dangerous merely because it is not completely childproof. The *Todd* court's distinction between a foreseeable user of a product—i.e., a 20-month-old child—and the ordinary consumer, is overlooked by the *Soproni* court.

C. Brower v. Metal Industries[172] *(Delaware)*

In *Brower*, 11-month-old Shayne Townsend fell out of a second-story bedroom window in the home of his aunt, sustaining injuries.[173] At the time of the fall, Shayne was playing with his twin brother and four cousins, ages one to nine, while his mother was downstairs unpacking groceries.[174] Shayne's parents brought suit against Metal Industries, Inc., the window manufacturer, alleging negligence, breach

166. *Id.* at 1405.

167. *Id.* at 1404.

168. *Id.* at 1407.

169. *Id.* at 1407-08. Bic conceded that it was foreseeable that a child might use a lighter, but this was of very little value to the plaintiff since affixed to the lighter was a warning label reading: KEEP OUT OF REACH OF CHILDREN. However, the court of appeals found that a concession that child use is foreseeable is not a concession that the product so used is unreasonably dangerous. *Id.* at 1408 n.3.

170. *Id.* at 1408.

171. *Id.* at 1408-09.

172. Brower v. Metal Indus., 719 A.2d 941 (Del. 1998).

173. *Id.* at 943.

174. *Id.*

of warranties, and strict liability.[175] The trial court granted summary judgment for the defendant manufacturer, holding that it did not have a duty to manufacture a screen that would have prevented Shayne from falling out of the window.[176] The court also held that the "vent-stop" feature of the window did not give rise to a duty that would otherwise not have existed[177] and that there was no basis for submitting the issue of proximate cause to a trier of fact.[178] The Supreme Court of Delaware agreed and affirmed the decision of the trial court, finding that the defendant had no legal duty to prevent Shayne's fall through the open window.[179]

Although the defendant in *Brower* manufactured both the window and screen alleged to be defective, the plaintiff's arguments focused on the design and manufacture of the window.[180] Sounding more like a manufacturing defect claim, the plaintiff alleged that had the window been manufactured properly, "as designed," Shayne would not have fallen out of the window.[181] Presumably, the window and screen should have been able to withstand any pressure that the twenty-pound infant could have created.[182] In response, Metal Industries argued that the ordinary purpose of its window screens is to keep insects out while letting in light and air—not to prevent small children from falling out.[183]

The plaintiff also argued that there was an "emerging recognition of a limited duty to avoid foreseeable harm to children from defective windows and screens."[184] The Delaware Supreme Court found this argument wanting in that it overlooked distinctions between the duties owed by manufacturers, landlords, and innkeepers.[185] The court then cited an analogous case brought before the Virginia Supreme Court earlier that year, *Jeld-Wen, Inc. v. Gamble*,[186] which involved another infant's fall from a second-story window.[187] The *Brower* court found the *Jeld-Wen* court's reasoning persuasive, and quoted with approval

175. *Id.* at 942, 942 n.1.
176. *Id.* at 942.
177. *Id.*
178. *Id.* at 942-43.
179. *Id.* at 943.
180. *Id.* at 944.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 944-45.
185. *Id.* at 945.
186. 501 S.E.2d 393 (Va. 1998).
187. *Brower*, 719 A.2d at 945 (quoting *Jeld-Wen, Inc.*, 501 S.E.2d at 397).

the latter court's elaboration on the concept of duty in the products liability field:

> [T]he purpose of making the finding of a legal duty as a prerequisite to a finding of negligence, or a breach of implied warranty, in products liability 'is to avoid the extension of liability for every conceivably foreseeable accident, without regard to common sense or good policy.'[188]

D. Drager v. Aluminum Industries Corp.[189] *(Minnesota)*

At the age of six years, William Drager fell back in his chair, dislodged a screen, and fell out of a second-story apartment window, sustaining severe injuries.[190] Drager brought suit against the landlord for negligence and against Aluminum Industries, the window screen manufacturer, for defective design and failure to warn.[191] The trial court granted summary judgment to the window manufacturer on the grounds that it had no legal duty to design a screen that would have prevented the plaintiff's fall.[192] Interestingly, the landlord's motion for summary judgment was denied due to the existence of a "genuine issue of material fact as to whether [the landlord] maintained the dwelling unit in a safe condition as set out in the Lease Agreement."[193]

The Court of Appeals of Minnesota, in reviewing the plaintiff's product liability claims, was presented with issues of first impression.[194] Finding no cases in which screen manufacturers were held liable for injuries resulting from falls through window screens, the court was inclined to join those jurisdictions holding to the contrary.[195] Nonetheless, the court stated that in determining whether a product is defective, Minnesota courts apply a "reasonable care balancing test."[196] Primarily a common law rule, this balancing test holds a manufacturer to that degree of care that avoids any "unreasonable risk of harm to anyone who is likely to be exposed to the danger *when the product is used in the manner for which the product was intended, as well as an unintended yet reasonably foreseeable use.*"[197] As if in answer to

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188. *Id.* (quoting Pineda v. Ennabe, 72 Cal. Rptr. 2d 206, 209 (1998)).
189. 495 N.W.2d 879 (Minn. Ct. App. 1993).
190. *Id.* at 881.
191. *Id.*
192. *Id.* at 881-82.
193. *Id.* at 882 (alteration in original).
194. *Id.*
195. *Id.* at 883-84.
196. *Id.* at 882 (quoting Westbrock v. Marshalltown Mfg. Co., 473 N.W.2d 352, 356 (Minn. Ct. App. 1991)).
197. *Id.* (quoting Micallef v. Miehle Co., 348 N.E.2d 571, 578 (N.Y. 1976)) (emphasis

the *Soproni* argument that summary judgment and fact-intensive product liability claims rarely coexist, the *Drager* court then stated that, "[g]enerally, the question of whether a product is defective is a question of fact; however, where reasonable minds cannot differ, the question becomes one of law."[198]

Courts in several other jurisdictions have reached substantially the same conclusions as shown above, all of them refusing to extend liability to window manufacturers for the injuries to persons falling through them.[199] Whether grounded on an analysis of the consumer expectations test, a risk-utility test, or both, and whether based upon the construction of a statute or common law rule, the outcome has been the same: an open window is not defective merely because a human being will fall out of one on occasion any more than a roof is defective because human beings have been known to fall from them.

III. CONCLUSION: AN APPEAL TO COMMON SENSE

We Americans are fortunate to live in an age and a world where we are surrounded with modern conveniences and electrical appliances. Our homes are literally filled with gadgets. Yet any wise parent knows that childproofing the home and all of the products found there cannot be simply left to the manufacturers of those products. Doorknobs would be considerably more expensive if their manufacturers were expected to design against young children being able to turn them; knives would made with plastic blade guards that could only be detached by dexterous adults; we might even soon see wall sockets with combination locks affixed to them.

To be sure, there is a demand for safe products, and the modern parent seeks out those that seem to offer the best quality at the lowest price; this often means that safety is a factor given a bit less consideration than it deserves. Nevertheless, that level of safety most often deemed sufficient for most adults is usually the one at which manufacturers start. The modern world is, in most respects, filled with thousands of products designed appropriately for reasonably safe use by adults. Those of us who choose to raise children should have the common sense to know that childproofing the home is fundamentally our own responsibility, not that of product manufacturers. Were this not so, adults without children would be the ones tinkering with each

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added).

198. *Id.*

199. *See, e.g.*, Schlemmer v. Stokes, 117 P.2d 396 (Cal. Dist. Ct. App. 1941); Lamkin v. Towner, 563 N.E.2d 449 (Ill. 1990); Chelefou v. Springfield Inst. for Sav., 8 N.E.2d 769 (Mass. 1937); Egan v. Krueger, 135 A. 811 (N.J. 1927); Potter v. Southwestern Associated Tel. Co., 248 S.W.2d 286 (Tex. Civ. App. 1952).

new product after the purchase to make it more usable and convenient. This would also unnecessarily increase the cost of just about everything. In short, the marketplace for products caters to the lowest common denominator because businesses want to reach the most consumers at the lowest price and consumers want the greatest amount of goods for the lowest price. Those who add children to the mix have the responsibility to upgrade the safety of their homes.

Certainly, we could increase the safety features of both windows and screens by equipping them with heavy duty locks, clips, and other childproof features. But we could be equally certain that tomorrow's plaintiffs will be the estates of elderly persons who lacked the strength and dexterity to extricate themselves from burning apartments because the windows were too difficult to open. Moreover, until the fire codes and industry standards are changed to permit such alternatives, no manufacturer in Washington is going to risk designing childproof windows. What needs to be changed is not codes and standards, but rather the judicial activism that five members of the Washington Supreme Court have been exhibiting for the past decade.

The people of Washington spoke clearly through the Legislature's enactment of tort and product liability reform in the carefully drafted WPLA. Since its enactment, however, the Washington Supreme Court has twice interpreted the statute's negligence standard interchangeably with strict liability. At the same time, the court has read the risk-utility test and the consumer expectations test as alternatives for one another, leaving it up to the court and the trier of fact to make an ad hoc determination as to which test provides the better definition of the words "not reasonably safe." By construing the product liability statute this way, the court has subverted the very end sought to be achieved by the WPLA's passage, an end for which the proper means was deemed a "firmer liability foundation," and an end for which so many interested parties fought so hard to craft the legislative solution. Where is the "firmer foundation of liability" to be found, if negligence means the same thing as strict liability? How will Washington businesses and their product liability insurers assess the risks posed by products sold and used here, given the court's insistence that the product liability statute does not mean what it clearly says?

These are important questions that should be given serious consideration by the state legislature once again, twenty years after the inception of the WPLA. However, a much more fundamental and probing question should occur to Washington attorneys, judges, and legal scholars: do the principles of stare decisis and legislative acqui-

escence justify the court's construction of the WPLA, or has the equally important principle of judicial restraint become so passe for five of its Justices that the *substance* of state legislation must now be subjected to "reasoned judgment"? If the latter is the case, any invitation the author may submit for legislative resolution in the form of amending the statute would likely be of little effect. If the former is the case, perhaps the author harbors an underdeveloped sense of the proper dimensions of the role of the judiciary, and an anachronistic advocacy for the merits of restrained jurisprudence. In either case, the questions need to be asked.