IN THE SUPREME COURT OF FLORIDA

LIGGETT GROUP, INC.,

Petitioner, CASE NO. SC08-541

v.

BEVERLY DAVIS,

Respondent.
_____/

On Appeal from the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida

BRIEF OF AMICUS CURIAE FLORIDA JUSTICE ASSOCIATION AND THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENT

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IDENTITY OF AMICUS AND ITS INTEREST IN THE CASE

This Brief is filed by the Florida Justice Association ("FJA") and the American Association for Justice ("AAJ"). The FJA is a statewide not-for-profit organization of approximately 4,000 members, including trial and appellate lawyers primarily representing the interests of consumers. The FJA frequently appears in cases involving issues important to the rights of individuals and to the administration of justice. The Objectives and Goals set forth in the Charter of the FJA are as follows:

> Section I. The objectives of this corporation are to: (a) Uphold and defend the principles of the Constitutions of the United States and the State of Florida. (b) Advance the science of jurisprudence. (c) Train in all fields and phases of advocacy. (d) Promote the administration of justice for the public good. (e) Uphold the honor and dignity of the profession of law. (f) Encourage mutual support and cooperation among members of the Bar. (g) Diligently work to promote public safety and welfare while protecting individual liberties. (h) Encourage the public awareness and understanding of the adversary system and to uphold and improve the adversary system, assuring that the courts shall be kept open and accessible to every person for redress of any injury and that the right to trial by jury shall be secure to all and remain inviolate.

Article II, FJA Charter, approved October 26, 1973.

Consistent with the foregoing, the FJA has one of the State's most active[1] Amicus Curiae committees, whose members work on a pro bono basis to address important issues of substantive and procedural law of widespread importance to the Association's members and our clients, as well as to all of Florida's citizens.

The American Association for Justice ("AAJ") is a voluntary bar association whose 50,000 members practicing in every state primarily represent injured plaintiffs, including those injured by defective and unreasonably dangerous products. AAJ's mission includes the development of the law in a manner that promotes product safety and redress of wrongful injury due to unsafe products. To this end, AAJ has filed amicus curiae briefs in many state supreme courts and in the Supreme Court of the United States advocating in support of accountability for product manufacturers and access to the courts for those who have been harmed.

[1]A LEXIS search reflects more than 400 opinions in cases in which the FJA participated as an amicus curiae, dating back almost forty years. The FJA was formerly known as the Academy of Florida Trial Lawyers.

SUMMARY OF THE ARGUMENT

This matter comes to this Court on two questions certified by the Fourth District Court of Appeal as being of great public importance. Each question should be answered in the negative.

The first question concerns if a plaintiff is required to establish an alternative safer design in order to prevail on a design defect claim for an inherently dangerous product. Florida law on this point is clear, and no court in Florida has ever required a plaintiff to offer such proof. Rather, Florida law, as reflected in the jury instructions approved by this Court, applies either the consumer expectations test or the risk utility test. Proof of a reasonable alternative design is sometimes a relevant factor when the risk utility test is used, but it is not a requirement to prevail on such a claim. The first question should be answered in the negative.

The second question concerns if Florida should adopt the Restatement (Third) of Torts for design defect cases. The Restatement (Third), particularly section 2(b) which requires proof of a reasonable alternative design, has been widely criticized and rejected by many states. The Restatement (Third) represents a radical departure from the standards applied in design defect cases in Florida for over 30 years, and would place consumers at a remarkable disadvantage in those cases by essentially requiring them to prove a negligence standard that requires

proof of the alternative design. This requirement will unfairly burden Florida plaintiffs and will often eliminate any cause of action for design defect. This Court should not put in place this fundamentally unfair provision, and it should answer the second certified question in the negative.

ARGUMENT

This case comes to this Court on two questions certified by the Fourth District Court of Appeal as being of great public importance. *Liggett Group, Inc. v. Davis*, 973 So. 2d 684 (Fla. 4th DCA 2008). Specifically, the questions are: "[i]s a plaintiff required to establish an alternative safer design in order to prevail on a design defect claim for an inherently dangerous product?" and, secondly, [s]hould Florida adopt the Restatement (Third) of Torts for design defect cases?" *Id.* This Court should answer both questions in the negative.

The first certified question is interesting, particularly because the Fourth District has already provided the clear answer. As worded, the question seems to seek clarification of the state of the law on this issue, as if there is a split of authority that requires resolution by this Court. In reality, the law on this point is settled. As the Fourth District stated, "[w]e find no case which holds that a plaintiff is *required* to show a safer alternative design in order to prevail on a strict liability design defect claim.[2] Rather, it appears to be one factor which can be demonstrated and argued to a jury." *Liggett Group, Inc. v. Davis*, 973 So. 2d 467, 475 (Fla. 4th DCA 2007) (emphasis in original). Therefore, the first question is

[2]Judge Warner reemphasized this reality in her special concurrence, noting that no Florida case "*required*" an alternative safer design as an element of proof. *Liggett Group, Inc. v. Davis*, 973 So. 2d 467, 478 (Fla. 4th DCA 2007) (Warner, J., concurring specially) (emphasis in original).

perhaps more accurately restated as whether this Court should radically change Florida law and require, for the first time since section 402(A) of the Restatement (Second) of Torts was adopted by this Court 32 years ago, that a plaintiff is required to establish an alternative safer design to prevail on a design defect claim for an inherently dangerous product. This Court should not make that dramatic change to Florida law, a change that would be contrary to the plain language of section 402(A) of the Restatement (Second).

The first certified question is tied to the second in that the controversial section 2 of the Restatement (Third) of Torts does, in fact, require proof of a reasonable alternative design.[3] As will be discussed extensively below, this Court should not adopt the radically changed section 2 of the Restatement (Third) of Torts, and should join the growing number of state courts that have specifically rejected it.

I. FLORIDA LAW DOES NOT REQUIRE A PLAINTIFF TO ESTABLISH AN ALTERNATIVE SAFER DESIGN IN DESIGN DEFECT CLAIMS INVOLVING INHERENTLY DANGEROUS PRODUCTS.

[3]Section 2(b) of the Restatement (Third) of Torts states that a product "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 . . . and the omission of the alternative design renders the product not reasonably safe." Restatement (Third) of Torts § 2(b).

Florida products liability law is clear on one important point – Florida courts have never required proof of an alternative safer design as an element of a design defect claim. As noted above, the Fourth District recognized this fact in this case. *Liggett*, 973 So. 2d at 475. Confronted with this reality, Liggett makes the novel argument that this Court's seminal decision *West v. Caterpillar Tractor Company*, 336 So. 2d 80 (1976) and section 402(A) of the Restatement (Second) "lead inexorably to [the] conclusion" that a "feasible alternative safer design is required." Liggett Brief, at 10-11.[4] Liggett cites no authority for this position, and indeed there is none. Rather, for over 30 years, though courts in Florida and throughout the country have interpreted section 402(A) in various ways, they have not read it as requiring proof of an alternative safer design. Indeed, one is left to wonder why the controversial section 2 of the Restatement (Third) was even proposed if section 402(A) could be read to require proof of an alternative design.

The application of section 402(A) in Florida has evolved since this Court adopted that section in *West v. Caterpillar Tractor Company*, 336 So. 2d 80, 87

[4]The Amicus Curiae echo this argument, recognizing that *West* did not "explicitly" require proof of a reasonable alternative design, but that the opinion, as well as the language of section 402(A) "support the conclusion that such a requirement must be met." Brief of Amicus Curiae for Petitioner, at 5. In reality, nothing in the opinion or section 402(A) support that conclusion.

(1976). In *West*, this Court joined the majority of jurisdictions in the country[5] and specifically adopted the doctrine of strict liability as set forth in Restatement (Second) of Torts § 402(A). *West* recognized the spirit and purpose of that section and concluded that "[t]he obligation of the manufacturer must become what in justice it ought to be – an enterprise liability." *Id.* at 92. The Court went on to state:

> The cost of injuries or damages, either to persons or property, resulting from defective products, should be borne by the makers of the products who put them in the channels of trade, rather than by injured or damaged persons who are ordinarily powerless to protect themselves. We therefore hold that a manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.

Id.

Section 402(A) imposes liability for injury caused by a product that is "in a defective condition unreasonably dangerous to the user or consumer." Comment i to that section applied strict liability by imposing liability to products that were "dangerous to an extent beyond which would be contemplated by the ordinary consumer." This language forms what has commonly become known as the

[5]*See West*, 336 So. 2d at 87, n.1.

"consumer expectations test."[6] *West* did not specify that the consumer expectations test was to be used, though it certainly is implied because that test is specifically set forth in the comments to section 402(A).

In *Ford Motor Company v. Hill*, 404 So. 2d 1049 (Fla. 1981), this Court held that strict liability was applicable to second collision or enhanced injury cases, and, importantly to the issues in this matter, rejected the contention (argued by Ford) that strict liability should not apply to design defect cases, but rather a "negligence standard" should be implemented. *Id.* at 1051. This Court stated:

> The policy reasons for adopting strict tort liability do not change merely because of the type of defect alleged . . . . We feel that the better rule is to apply the strict liability test to all manufactured products without distinction as to whether the defect was caused by the design or the manufacturing. If so choosing, however, a plaintiff may also proceed in negligence.

Id. at 1052. The opinion also directed the committee on standard jury instructions to draft "an appropriate instruction which adequately addresses the issue and which reflects the holding of the instant case." *Id.* at 1052 n.4.

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[6]Numerous tests, including the consumer expectations test, have evolved in jurisdictions throughout the country. *See, e.g.*, 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, 538-48 (1996) (setting forth five main tests used in this context as well as variations on those tests) (hereafter *Vargo*).

In 1983, the Committee on Standard Jury Instructions (Civil) proposed jury instructions to meet this Court's request. This Court noted the Committee was "handicapped by little direction from this Court and little precedence in Florida case law to guide it," yet it proposed "two tests widely used in other jurisdictions." *In re Standard Jury Instructions (Civil Cases)*, 435 So. 2d 782, 782 (Fla. 1983). The tests were the "consumer expectations test" set forth in comment i to section 402(A), and what is known as the "risk utility test." The Committee noted in the Comment that the "risk utility test" appeared in a Florida District Court of Appeal case[7] which, in turn relied on a case from the California Supreme Court.[8] *Fla. Std. Jury Inst. (Civ.)* PL 5 cmt. 2. This Court accepted the Committee's report and authorized the use of the proposed instructions. *In re Standard Jury Instructions (Civil Cases)*, 435 So. 2d 782, 782 (Fla. 1983).

The relevant instruction states that "[a] product is unreasonably dangerous because of its design if [the product fails to perform as safely as an ordinary consumer would expect when used as intended or in a manner reasonably foreseeable by the manufacturer] [or] [the risk of danger in the design outweighs

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[7] *Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1145 (Fla. 1st DCA 1981).

[8] *Barker v. Lull Engineering Co.*, 573 P. 2d 443 (Cal. 1978). *Barker* added the risk utility test to the already accepted consumer expectations test used in California. *Id.* at 455-56. *Barker* recognized that the risk utility test approximated issues found in a negligent design case. *Id.* at 455.

the benefits]." *Fla. Std. Jury Inst. (Civ.)* PL 5. The Committee noted that the alternative instructions could be given independently or together, and that the ultimate burden of persuasion remained with the plaintiff.[9] *Id.*

As the discussion above clarifies, this Court specifically adopted tests for defective design, and they have been used by Florida juries for 25 years. Nothing in the standard jury instruction mentions the concept of an alternative safer design, and, as the Fourth District correctly noted, "[w]e find no case which holds that a plaintiff is *required* to show a safer alternative design in order to prevail on a strict liability design defect claim. Rather, it appears to be one factor which can be demonstrated and argued to a jury." *Liggett Group, Inc. v. Davis*, 973 So. 2d 467, 475 (Fla. 4th DCA 2007) (emphasis in original). To be more specific, the possibility of an alternative design is but one of several factors that are sometimes

[9]Left unexplained is the question of why the Committee concluded that the burden of proof remained with the plaintiff when the two cases that the Committee relied on in proposing the test both clearly shifted the burden to the defendant. *See Cassisi v. Maytag Co.*, 396 So. 2d 1140, 1145-46 (Fla. 1st DCA 1981) (noting that the application of the risk benefit prong of the *Barker* test shifts the burden to the defendant to prove the design was not defective); *Barker v. Lull Engineering Co.*, 573 P. 2d 443, 456 (Cal. 1978) (noting that a defendant may be liable if the "defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design").

considered when applying the risk utility test.[10] The law of this state has *never* required a plaintiff to establish an alternative safer design to prevail on a design defect claim for an inherently dangerous product,[11] and nothing in section 402(A), which has been the law in Florida for over 30 years, suggests such a requirement. The first certified question should be answered in the negative.

II. THIS COURT SHOULD NOT ADOPT SECTION 2(B) OF THE RESTATEMENT (THIRD) OF TORTS FOR DESIGN DEFECT CASES.

As noted above, the second certified question, should this Court choose to address it, concerns if Florida should adopt the highly controversial[12] dictates of

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[10]The factors sometimes considered are: "the usefulness and desirability of the products, the availability of other and safer products to meet the same need, the likelihood of injury and its probable seriousness, the obviousness of the danger, common knowledge and normal public expectation of danger, avoidability of injury by care and use of the product, and the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive." *See, e.g.*, *Hobart Corp. v. Siegle*, 600 So. 2d 503, 505 n.3 (Fla. 3d DCA 1992). These factors originate from the writings of Dean John W. Wade, and have been cited by numerous courts, including this one. *See, e.g.*, *Auburn Mach. Works, Co. v. Jones*, 366 So. 2d 1167, 1170 (Fla. 1979). However, these factors are not required, and at best are meant to enhance the risk utility test.

[11]Amicus Curiae for the Petitioner suggest that several Florida cases "have applied the alternative safer design requirement." Brief of Amicus Curiae, at 6. However, a reading of those cases reveals that in no way do they stand for the proposition that proof of an alternative design was a prerequisite for liability.

[12]Controversy raged throughout the ALI's internal debates on section 2(b) of the Restatement (Third). *See, e.g.*, *Vargo* at 518-36 (extensively citing comments regarding the consideration of the issues within the ALI). Further, great

Section 2(b) of the Restatement (Third) of Torts. To date, no Florida court has done so,[13] and this Court should not radically alter products liability law in this state by adopting the Restatement (Third).[14] To do so would create a fundamentally unfair system where, in many if not most cases, the theory of design defect will be eliminated. Adopting section 2(b) would create a playing field that is severely slanted in favor of manufacturers,[15] and it would deny Florida

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controversy has surrounded adoption of section 2(b) by the states. *See, e.g., Vautour v. Body Masters Sports Industries, Inc.*, 784 A.2d 1178, 1182-83 (N.H. 2001) (noting that there "has been considerable controversy surrounding the adoption of Restatement (Third) of Torts §2(b)," and that "[m]ost of the controversy stems from the concern that a reasonable alternative design requirement would impose an undue burden on plaintiffs because it places a 'potentially insurmountable stumbling block in the way of those injured by badly designed products.'"); *Potter v. Chicago Pneumatic Tool Co.*, 694 A.2d 1319, 1331 (Conn. 1997) (noting "substantial controversy" surrounding section 2(b)); *Green v. Smith & Nephew APF, Inc.*, 629 N.W. 2d 727, 751 n. 16 (Wisc. 2001) (noting "considerable controversy").

[13]This Court "has not as yet adopted the Restatement (Third) test requiring an alternative safer design, nor has any Florida case *required* such proof." *Liggett Group, Inc. v. Davis*, 973 So. 2d 467, 478 (Fla. 4th DCA 2007) (Warner, J., concurring specially) (emphasis in original).

[14]Even the introduction to the Restatement (Third) acknowledges that it represents "an almost total overhaul" of the Restatement (Second). *Restatement (Third) of Torts: Products Liability*, at Introduction. Further, Liggett acknowledges that section 2(b) "contains several provisions that are contrary to existing Florida law." Liggett Brief, at 32 n.10.

[15]One commentator has called section 2(b) a "wish list for manufacturing America" in which "[m]essy and awkward concepts such as precedent, policy and case accuracy have been brushed aside for the purposes of tort reform." Frank J. Vandall, *Constructing a Roof Before the Foundation is Prepared: The Restatement*

consumers rights under product liability law that they have enjoyed in this state for over 30 years. As the Supreme Court of Wisconsin noted, adopting section 2(b) "increases the burden for injured consumers not only by requiring proof of the manufacturer's negligence, but also by adding an additional – and considerable – element of proof to the negligence standard." *Green v. Smith & Nephew APF, Inc.*, 629 N.W. 2d 727, 751-52 (Wisc. 2001). As noted extensively above, that additional element of proof, of a reasonable alternative design, has never been required in Florida, and it should not be now.

Before addressing several well-reasoned opinions where courts have rejected section 2(b), one point of clarification deserves mention. *Liggett* states that section 2(b) "accurately captures the majority rule with respect to design defect claims," and that 2(b) "confirms the general rule that an alternative safer design is an essential element of a design defect claim."[16] Liggett Brief, at 33, 34. Amicus Curiae for Liggett state that the "reasonable alternative design requirement in §

(3rd) of Torts: Product Liability Section (2)(b) Design Defect, 30 U. Mich. J.L. Reform, 261, 265 (1997).

[16]Liggett cites two cases for this proposition, though neither offers any compelling authority. *Clinton v. Brown & Williamson Holdings, Inc.*, 498 F.Supp. 2d 639 (S.D.N.Y. 2007) makes no mention of any "general rule," but merely concludes that New York law requires proof of a feasible alternative design. *Id.* at 646. The other case, *Hernandez v. Tokai Corp.*, 2 S.W. 3d 251 (Tex. 1999), cites a treatise for the flawed proposition in that a majority of jurisdictions require proof of an alternative reasonable design.

2(b) is consistent with the position taken by a majority of courts", and cite the note to the Restatement (Third) as evidence for this contention. Brief of Amicus Curiae for Petitioner, at 9. In reality, the Reporter's conclusions as to the "consensus" of the common law have come under great scrutiny and criticism.[17] "[T]he co-reporters list cases that they interpret as reflecting a more or less majority rule. However, these citations have been attacked as not standing for the proposition stated." *Vargo*, 502. A case in point is the Reporters counting of Florida as a state that required proof of a reasonable alternative design.[18] As demonstrated above, and as the decision below noted, no case in Florida has ever required a plaintiff to

[17]*See generally*, Frank J. Vandall, *The Restatement (Third) of Torts, Products Liability, Section 2(b): Design Defect*, 68 Temp. L. Rev. 167 (1995); Howard C. Klemme, *Comments to the Reporters and Selected Members of the Consultative Group, Restatement of Torts (Third) Products Liability*, 61 Tenn. L. Rev. 1173 (1994). Additionally, John T. Vargo undertook an exhaustive analysis of the state of the law in each state in his 1996 article to determine "whether or not there is, in fact, a "consensus" of existing law requiring proof of an alternative design before liability can attach." *Vargo*, 500, 599-950. He concluded that no such consensus existed.

[18]The Reporters stated that *Radiation Technology, Inc. v. Ware Construction Company*, 445 So. 2d 329 (Fla. 1983) was "the leading case in Florida," and interpreted it as holding that the risk benefit test was adopted by this state in design defect cases, and that it implicitly required proof of an alternative design. Restatement (Third) of Torts § 2(b) Reporter's Note, at 66-67. That case contains no such holding, and the jury instructions approved by this Court in 1983 allow either the consumer expectations test or the risk utility test while never mentioning alternative designs. *See In re Standard Jury Instructions (Civil Cases)*, 435 So. 2d 782 (Fla. 1983).

demonstrate an alternative design to prevail on a strict liability design defect claim. *Liggett Group, Inc. v. Davis*, 973 So. 2d 467, 475 (Fla. 4th DCA 2007).

Soon after the Restatement (Third) was formally adopted by the ALI, the Supreme Court of Connecticut addressed the provision in *Potter v. Chicago Pneumatic Tool Company*, 694 A.2d 1319 (Conn. 1997).[19] First, it considered the Reporter's contention that a consensus existed that required proof of a reasonable alternative design, and noted that its "independent review of the prevailing common law reveals that a majority of jurisdictions *do not* impose upon plaintiffs an absolute requirement to prove a feasible alternative design." *Id.* at 1331 (emphasis in original). The court also concluded that the "feasible alternative design requirement imposes an undue burden on plaintiffs that might preclude otherwise valid claims from consideration." *Id.* Further, *Potter* noted that, in some cases, a product might be defective and unreasonably dangerous even if no feasible alternative design was available. *Id.* Finally, the court noted that the consumer expectations test might not be appropriate in all circumstances, and adopted the risk utility test. *Id.*

[19]For more information on *Potter* and its consideration of the Restatement (Third), *see* Marshall S. Shapo, *Products Liability: The Next Act*, 26 Hofstra L. Rev. 761 (1998).

Other courts soon joined in rejecting the Restatement (Third). In *Delaney v. Deere and Company*, 999 P.2d 930 (Kan. 2000), the Supreme Court of Kansas considered a certified question about the adoption of Comment i to section 2(b). The court noted that section 2(b) had been "harshly criticized," and that its own research indicated that a majority of states did not require proof of a reasonable alternative design in product liability cases. *Id.* at 946. *Delaney* noted, as does the forward to the Restatement (Third), that section 2(b) "goes beyond the law," and that it found Comment i "wanting." *Id.* It held that proof of a reasonable alternative design may be presented, but is not required, a view that it concluded was in accordance with the majority of jurisdictions. *Id.* Finally, it noted that the court believed that the focus in product liability actions "must remain on the product that which is the subject of the litigation." *Id.*

In *Green v. Smith & Nephew APF, Inc.*, 629 N.W. 2d 727 (Wisc. 2001), the Supreme Court of Wisconsin considered the argument made by the defendant and amicus curiae that the state should adopt section 2(b). *Id.* at 751. The *Green* court noted that it was "troubled by the fact that 2(b) sets the bar higher for recovery in strict products liability design defect cases than in than in comparable negligence cases." *Id. Green* went on to state:

> Section 2(b) does not merely incorporate a negligence standard into products liability law. Instead, it adds to

> this standard the additional requirement that an injured consumer seeking to recover under strict products liability must prove that there was a "reasonable alternative design" available to the product's manufacturer. Thus, rather than serving the policies underlying strict products liability law by allowing consumers to recover for injuries caused by a defective and unreasonably dangerous product without proving negligence on the part of the products manufacturer, 2(b) increases the burden for injured consumers not only by requiring proof of the manufacturer's negligence, but also by adding an additional – and considerable – element of proof to the negligence standard. This court will not impose such a burden on injured persons.

Id. at 751-52.

The Supreme Court of New Hampshire considered section 2(b) in *Vautour v. Body Masters Sports Industries, Inc.*, 784 A.2d 1178 (N.H. 2001). The court noted that there "has been considerable controversy surrounding the adoption of Restatement (Third) of Torts §2(b)," and that "[m]ost of the controversy stems from the concern that a reasonable alternative design requirement would impose an undue burden on plaintiffs because it places a 'potentially insurmountable stumbling block in the way of those injured by badly designed products.'" *Id.* at 1182-83. *Vautour* noted that there was a distinct possibility that injured consumers in cases involving complex products might be deterred from bringing suit because of the "enormous costs involved in obtaining expert testimony," particularly in cases where the plaintiff has suffered minimal damages. *Id.* at 1183. The opinion

also speculated that the requirement of proof of an alternative design "may be difficult for courts and juries to apply" since 2(b)'s requirements coupled with the Restatement's "broad exceptions will introduce even more complex issues for judges and juries to unravel." *Id.*

Vautour then focused on the risk utility test, and noted that while proof of alternative designs is relevant in design defect cases, it "should be neither a controlling factor nor an essential element that must be proved in every case." *Id.* It noted that flexibility was required to adequately consider factors under the circumstances of a given case, and that a "rigid prerequisite" of a reasonable alternative design places too much emphasis on that factor. *Id.* Finally, the court concluded that the risk utility test as applied in the state "protects the interests of both consumers and manufacturers in design defect cases," and that the Restatement (Third) was not to be adopted. *Id.*

In *Halliday v. Sturm, Ruger & Company*, 792 A. 2d 1145 (Md. 2002), the court noted that section 2(b) "has attracted considerable criticism and has been viewed by many as a retrogression, as returning to negligence concepts and placing a very difficult burden on plaintiffs." *Id.* at 1154. *Halliday* cited the criticism of the Reporter's contention that 2(b) represented the majority position on the issue, and further noted criticism that the Restatement (Third) represents "an unwanted

ascendancy of corporate interests under the guise of tort reform." *Id.* at 1155. Given the criticism and controversy surrounding the section 2(b), the court refused to "cast aside our existing jurisprudence" and adopt the new standards.

The reasoning in these cases is sound and should be adopted by this Court in rejecting adoption of section 2(b) of the Restatement (Third) of Torts. Florida law has never placed the onerous burden on consumers of requiring proof of a reasonable alternative design, and this Court should not now radically overhaul Florida law in that fashion.

CONCLUSION

WHEREFORE, for the foregoing reasons, Amicus Curiae, FLORIDA JUSTICE ASSOCIATION and the AMERICAN ASSOCIATION FOR JUSTICE respectfully request that this Court answer the questions certified by the Fourth District Court of Appeal in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been sent via □ U.S. regular Mail and/or □ facsimile to: **Alvin B. Davis, Esquire**, Squire, Sanders & Dempsey, LLP, 200 South Biscayne Boulevard, Miami, Florida 33131-2398 (Counsel for Petitioner); **Daniel F. O'Shea, Esquire** and **Angel M. Reyes, Esquire**, Reyes, O'Shea & Coloca, 283 Catalonia Avenue, Suite 100, Coral Gables, Florida 33134 (Counsel for Respondent); **John Venable, Esquire**, Venable & Venable, P.A., 205 South Hoover Boulevard, Suite 206, Tampa, Florida 33609; **Kelly A. Luther, Esquire**, Clark, Silverglate & Campbell, P.A., 799 Brickell Plaza, Suite 900, Miami, Florida 33131 (Counsel for Petitioner); **Aaron H. Marks, Esquire**, **Leonard A. Feiwus, Esquire** and **Julie R. Fischer, Esquire**, Kasowitz, Benson, Torres & Friedman, LLP, 1633 Broadway, New York, New York 10019 (Counsel for Petitioner); **Daniel B. Rogers, Esquire**, Shook, Hardy & Bacon LLP, Miami Center, Suite 2400, 201 South Biscayne Boulevard, Miami, Florida 33131; **Victor E. Schwartz, Esquire** and **Mark A. Behrens, Esquire,** Shook, Hardy & Bacon LLP, 600 14th Street, NW, Suite 800, Washington, DC 20005-2004; **Robin S. Conrad, Esquire**, 1615 H Street, NW. Washington, DC 20062; this ___ day of _____, 2008.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief conforms to the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2) in that it was computer generated utilizing Times New Roman 14 point type.

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