IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-541

Lower Tribunal No. 4D04-3811

LIGGETT GROUP, INC.,

Petitioner,

v.

SCOTT DAVIS, ETC.,

Respondent.

ANSWER BRIEF ON THE MERITS

ON REVIEW OF A CERTIFIED QUESTION OF GREAT PUBLIC IMPORTANCE FROM THE FOURTH DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

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Beverly Davis, who was diagnosed with cigarette-induced lung cancer in 2001 and died during the pendency of these proceedings in the district court, began smoking Chesterfield cigarettes manufactured by Defendant Liggett in 1951 at the age of 15. (R vol. 33, at T 326)[1] Arthur Godfrey and other respected television personalities of the 1950's were paid by Liggett to endorse the Chesterfield cigarette which was touted as "much milder" than other brands, "safe", "best for you", "just what the doctor ordered", and productive of "no ear, nose or throat" maladies as confirmed by a Liggett-financed "scientific study." (Id., at T 335; 739-42; R vol. 34, at T 491-6; R vol. 36 at T 739-42; R vol. 40 at T 1301)

Davis became a regular smoker of Chesterfields shortly after she started smoking and she smoked up to a pack a day, continuously, from 1951 to 1974. (R vol. 33 at T 326-7, 336-7; R vol. 34 at T 421) From the time she began to smoke Chesterfields and until Congress first required specific warning labels on cigarette packaging several decades later, Davis had no idea that cigarette smoking might cause lung cancer or posed any other serious health risks, that nicotine was addictive, or that the tar content of Liggett's unfiltered Chesterfield product was

[1] In this brief, "R" refers to the record on appeal; "T" refers to the trial transcript which is found at volumes 31 through 45 of the record; and "PB" refers to Petitioner's Brief.

the highest of any cigarette on the market. (Id., at T 337-8, 340-1, 350-1) Davis smoked while she was pregnant with her children, and so did her doctors. (Id., at T 352)

Davis smoked Chesterfields first thing in the morning even before she brushed her teeth, and she smoked more than any other activity including spending time with her husband and children because she felt the "need" to smoke. (Id., at T 352-3) Once Davis started smoking, she could not quit. (Id., at T 380, 403; R vol. 37 at T 934) It was only after her diagnosis of lung cancer and with the aid of a nicotine patch that Davis finally stopped smoking in 2001. (Id., at T 324-5) She died during Liggett's appeal at age 69. (Id., at T 311; order substituting personal representative dated July 3, 2008)

Before the introduction of the manufactured cigarette in 1913, lung cancer was an extremely rare form of cancer in the United States. (R 43 at T 1617, 1645) Today, it claims the lives of 150,000 Americans each year. (Id.) Liggett's own Director of Research conceded that, in contrast to natural, raw tobacco, the modern cigarette is a deliberately "engineered product". (R vol. 43 at T 1636, 1749) A very specialized porous paper wrap encases the cigarette and contains additives which control how fast the cigarette burns (i.e. how many puffs a consumer gets per cigarette) and hence the dosage of tar and nicotine the consumer receives. (Id., at T 1643, 1687, 1723, 1735) Several different types of tobacco are blended into

the product including prepared, flue-cured tobacco and "reconstituted" tobacco that traditionally was considered 'scrap'. (Id., at T 1643, 1687, 1743) "Flavor systems" are also purposefully incorporated in order to reduce the natural harshness of tobacco smoke, to produce a smoother, better tasting smoke, and to bypass the human body's natural choking sensation-defense mechanism which would otherwise prevent tobacco smoke from being inhaled into the lungs and hence the bloodstream. (R vol. 37 at T 888-9; R vol. 43 at T 1744-7) The equation is simple: if cigarette smoke does not enter the lungs, then it will not deliver nicotine to the bloodstream and then the brain. Nor will it produce lung cancer. (R vol. 37 at T 896-8, 904)

When a manufactured cigarette is lit, it forms a fire cone that reaches temperatures between 1400 and 1500 degrees Fahrenheit and causes volatile components in the tobacco to vaporize and cool as they travel down the cigarette rod. (R vol. 43 at T 1645-6) During this phase, numerous poisonous, carcinogenic, and addictive chemical compounds are produced including tar, nicotine, polycyclic aromatic hydrocarbons, arsenic, chromium, and carbon monoxide. (R vol. 32 at T 224-5; R vol. 37 at T 930; R vol. 38 at T 981-2; R vol. 43 at T 1648-9)

Over 90% of lung cancer in the United States is related to cigarette smoking (R vol. 31 at T 126; R vol. 37 at T. 909), and there is a well established dose-response relationship between the amount of tar a smoker ingests over a period of

time and the likelihood that she will ultimately develop lung cancer. (Id., at T 99, 929-31) Simply put, a tobacco product that does not invite or allow smoke to enter the lungs is safer than one that does, and the lower the carcinogenic tar and nicotine content the safer the cigarette. (R vol. 37 at T 896-7, 903-4, 929, 931, 934) The diameter and length of a manufactured cigarette also affects its tar and nicotine yield, as does the incorporation of a filter which captures tar. (R vol. 32 at T 229-31; R vol. 43 at T 1648)

It is now beyond argument that nicotine is a highly addictive, pharmacological substance. (R vol. 34 at T 458, 460-1) It takes as little as 10 seconds for nicotine from a single puff of cigarette smoke to be delivered to the brain. (Id., at 465) Nicotine has a "self-perpetuating attribute": it makes people want to smoke and it makes them want to continue to smoke. (Id., at T 462) Over 90% of all cigarette smokers begin smoking before the age of 18 (R vol. 37 at T 924), and only 5% are ever successful in quitting. (R vol. 34 at T 467-8)

Throughout the 24 years that Davis smoked Liggett's Chesterfield cigarette, this product was at the top of a list of 59 manufactured cigarettes for measured tar yield. (R vol. 43 at T 1698, 1734, 1735, 1739, 1740-2) Chesterfields delivered 42 milligrams of tar per cigarette in the 1950's and 28 milligrams of tar in 1967 even after Liggett modified the product due to the "large risk factor associated with smoking cigarettes" of which Liggett was then fully aware. (R vol. 43 at T 1733-5,

1742) Significantly, the 'reduced' tar Chesterfield still delivered more than 7 times the tar yield of other cigarettes then on the market, some of which contained as little as 3.9 milligrams of tar per cigarette. (Id.) As Liggett's Director of Research necessarily conceded, the principal way to reduce the health risk of a cigarette (i.e. make it safer) is to reduce the dose of tar it delivers. (R vol. 43 at T 1733)

Although Liggett was well aware by the 1960's that a reduction in the tar and nicotine yield of its Chesterfield product would reduce the likely harmful response of cigarette smoking, Liggett incredulously kept its Chesterfield cigarette at the top of the list because if Liggett reduced the tar and nicotine content "too quickly", consumers would not continue to buy Chesterfields but would switch brands. (R vol. 43 at T 1698, 1736) Chesterfield 'Kings' were also among the largest manufactured nicotine cigarettes, and they did not contain a filter even though Liggett itself introduced and marketed filtered cigarettes as early as 1952. (R vol. 43 at T 1686, 1722) In fact, Liggett used filters on all of its brands except Chesterfields through the time Davis stopped smoking them. (R vol. 43 at 1756-7)[2]

What Liggett Knew And Expected

In 1950, some of the most respected medical publications, including the Journal of the American Medical Association (JAMA), reported a dramatic epidemiological link between cigarette smoking and lung cancer (94.1% of male

[2] Davis switched to another manufacturer's "milder" cigarette in 1974 and to a filtered brand in the 1980's. (R vol. 33 at T 327-8, 395)

lung cancer patients observed were smokers). (R vol. 40 at T 1223, 1226) By 1952, one JAMA article stated: "It is frightening to speculate on the possible number of bronchogenic cancers that may develop as a result of the tremendous numbers of cigarettes consumed between 1930 and 1950." Liggett's own President in 1953 conceded knowledge of those credible statistics at the time. (R vol. 34 at T 549) In 1953 and 1954, scientists also confirmed the cancer link empirically by painting the backs of mice with cigarette tar condensate which produced tumors on almost half the mice. (R vol. 40 at T 1233-4)

But lung cancer has a latency period (i.e., it can take up to several decades of smoking before the disease will manifest). (R vol. 37 at T 905) Liggett responded accordingly. First, Liggett increased its annual advertising budget which was already approaching $18 million in 1950 (compared to only $757,305 spent on scientific research) to almost $29 million in 1952 (compared to a reduced $599,867 spent on research) and to over $32 million annually in 1953 and 1954, respectively. (R vol. 35 at T 673-4) Second, Liggett funded and widely disseminated in the form of product advertisements the results of a deliberately confined "medical study" which did not look at lung cancer but rather merely reported the absence of an effect of smoking on the "nose, throat, or accessory organs." (R vol. 34 at T 527, 531-2, 536; R vol. 36 at T 742) In the words of Liggett's then President, this carefully limited study revealed a purportedly "favorable asset" concerning

Liggett's product which Liggett used "as a means which would be effective in the sale of Chesterfield cigarettes." (R vol. 34 at T 532) In the meantime, Liggett privately conducted its own experiments which replicated the results of the published mouse-painting experiments using, inter alia, Chesterfields. (R vol. 32 at T 234-6, 248-50; R vol. 43 at T 1672) Liggett learned from its own mouse-painting experiments of the dose-response relationship between its products including Chesterfields and lung cancer and, more specifically, that if the dose of tar applied to the mice was reduced even by one-half, no tumors were formed. (Id.; R vol. 43 at T 1697)

By 1961, Liggett's research had confirmed the presence of biologically active materials in its cigarette tobacco which were at once "cancer causing"; "cancer promoting"; "poisonous"; and "stimulating, pleasurable, and flavorful". (R vol. 38 at T 981-2) An illuminating memo from Liggett's files explained that "Perhaps one of the reasons that an emphasis on the little poisonous molecules was avoided was that filtering them out seemed a major threat to the other gas phase materials that are added as flavor agents." (Id.) Unfortunately, Liggett did not advise its consumers of these important findings.

Instead, Liggett, together with the other major cigarette manufacturers in the United States, formed the Tobacco Institute, the unabashed purpose of which from its inception has been to "make a greater portion of the public aware that the

widespread indictment of cigarettes as a cause of poor health does not amount to conviction" and to provide "help to members of the industry in cancer case litigations." (R vol. 35 at T 660; R vol. 36 at T 763) This organization launched a concerted campaign to discredit all published studies concerning the dangers of smoking and its relation to lung cancer, and it financed and disseminated medical and scientific publications (e.g., "Tobacco and Health") which admittedly favored the tobacco industry and contested the relationship between cigarette smoking, health, and addiction which Liggett only conceded in 1997. (R vol. 36 at T 755-60, 763, 791) By Liggett's own admission, those publications were purposefully directed to physicians in the United States primarily "to avoid sales being hurt". (Id., at 758)

What The Ordinary Consumer Expected

Liggett's strategy worked. Around the time Davis first began smoking Chesterfields, almost one-half of the adult population of the United States smoked cigarettes. (R vol. 39 at T 1222) Surveys showed that in 1963, a decade after publication of the startling epidemiological and mouse-painting studies, only 25% of Chesterfield smokers believed that they should quit smoking to protect their health. (R vol. 46, Davis's Trial Exhibit 66) Even as of 1970, two years after the first Congressionally mandated labeling warnings were implemented, only 50% of the American public believed that smoking would cause ill health, and most

physicians still did not think that tobacco was addictive. (Id., Davis's Trial Exhibit 60; R vol. 34 at T 469)

At trial, Liggett emphasized the Surgeon General's warnings which were ultimately required to be conveyed on the labels of cigarette packs. Significantly, however, the first federally mandated warning in 1966, which Liggett and the other major cigarette manufacturers first vehemently opposed and then ultimately had a hand in drafting, simply stated: "Caution: cigarette smoking *may* be hazardous to your health." (R vol. 40 at T 1275 [emphasis supplied]) In 1970, a revised required warning still only generally advised: "Warning: the Surgeon General has determined that cigarette smoking is hazardous to your health." (Id.) This, notwithstanding two decades of research confirming a direct link between cigarette smoking and lung cancer. An express Surgeon General's warning that smoking cigarettes may cause lung cancer was not required until 1985. (R vol. 34 at T 422)

As Liggett's own physician expert conceded, it is important for the consumer to understand not only that there is a risk in smoking cigarettes, but the degree of risk involved. (R vol. 34 at T 469) As Liggett's Director of Research further conceded, the general public did not have enough understanding of medical science to have formed an opinion as to whether smoking caused disease. (R vol. 36 at T 792)

The Instructions And The Verdict

The jury returned a favorable verdict on Davis's claims for negligence and strict liability. As to negligence, the jury specifically found that Liggett was negligent "for continuing to manufacture Chesterfield cigarettes when it became known to Defendant Liggett that such cigarettes posed a significant risk to the health of smokers" and that such negligence was a legal cause of loss, damage or injury to Davis. (R vol. 27 at 4946)

As to strict liability, Liggett opposed the giving of that portion of the Florida standard jury instruction on design defect (PL 5) which applies the risk-utility test, but urged the trial court to charge the jury on that portion which applies the consumer expectations test. (R vol. 44 at T 1918) The trial court gave the full instruction: "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 the benefits." (R vol. 45 at T 2133-4)[3]

Liggett nevertheless requested an undifferentiated, single-issue verdict form interrogatory on Davis's strict liability claim which simply asked: "Were the Chesterfield cigarettes manufactured by Liggett Group, Inc. defectively designed;

[3] Liggett also proposed a special jury instruction on safer alternative design the form of which the trial court and the district court rejected as an inaccurate statement of the law and which rulings Liggett does not make a point on appeal in this Court. (R vol. 26 at 4607; merits brief *passim*)

and if so, was such defective design a legal cause of loss, damage or injury to Plaintiffs?". (R vol. 45 at T 2155; R vol. 44 at T 1962 [Liggett's counsel: "Design defect is risk utility and consumer expectation. All you have to do is say defectively designed."]) The jury answered this question "Yes". (R vol. 45 at T 2155) The trial court entered judgment in favor of Davis. (R vol. 29 at 5263-4)

The Fourth District's Decision

The Fourth District affirmed the strict liability verdict under the two-issue rule and the consumer expectations (i.e., "ordinary consumer") test. *Liggett Group, Inc. v. Davis,* 973 So. 2d 467, 474-6 (Fla. 4th DCA 2007). In its brief in the Fourth District, Liggett argued that the consumer expectations test applies in design defect cases in Florida and that it is "the only proper standard" for strict liability involving ordinary consumer products including cigarettes. (Initial brief at p.34, fn. 19; Record as supplemented by the district court)

The Fourth District agreed and determined that ample evidence supported the strict liability verdict under the consumer expectations test. As Judge Warner detailed in her specially concurring opinion:

> While Liggett presented a wealth of information that the dangers of smoking were well-known during the period when Davis smoked Chesterfields, the tobacco industry also made a concerted effort to discredit those studies and to allay people's fears. Such efforts were successful, as surveys showed that as of 1970 only 50% of the public believed that smoking would cause ill health. In 1963 only 25% of Chesterfield smokers believed that they should quit smoking to protect their health. From the evidence presented, a jury could

> conclude that an ordinary consumer of cigarettes would not necessarily expect that smoking would cause cancer or serious health effects during the period before 1974.

973 So. 2d at 478.[4]

The court also rejected Liggett's suggestion that its manufactured cigarette constituted "good tobacco" which could not be considered "defective" or "unreasonably dangerous" under comment (i) to the Restatement (Second) of Torts §402A. As Judge Warner observed:

> Here, Davis offered evidence that cigarettes contain many additives which make them more palatable to inhale and thus increase the carcinogenic substances ingested by the body over that which would be ingested by the use of a different product, like a cigar, the smoke of which is not generally inhaled. *See, e.g., Phillip Morris USA, Inc. v. Arnitz*, 933 So. 2d 693, 698 (Fla. 2d DCA 2006)(smoker contended that cigarettes had design defect because manufacturer placed additives in cigarettes to make them more inhalable, that cancer risk was heightened by flue curing of tobacco, and that some additives in cigarettes changed nicotine to freebase nicotine). Apparently, all cigarettes contain such additives. Thus, this would not be a "good tobacco" case. Other courts have also rejected the application of comment (i) as precluding liability. *See, e.g., Witherspoon v. Philip Morris Inc.*, 964 F. Supp. 455, 466 (D.D.C. 1997)("The infamous comment (i) following 402A appears to be on very shaky ground currently.").

Id.

The court further rejected Liggett's suggestion that Florida law requires proof of other safer designs. Rather, every judge on the panel recognized that

[4] The court agreed with Liggett that Davis's negligence claim "for continuing to manufacture cigarettes" was federally preempted, 973 So. 2d at 472, and Associate Judge Scola agreed with Liggett that application of the risk-utility test to Davis's strict liability claim was also preempted. Id.

same is only one factor which may be considered (albeit under the risk-utility test). (Scola, Assoc. J., "We 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 the jury." 973 So. 2d at 475 [e.o.]) (Warner, J., "The court has not adopted the Restatement "Third" test requiring an alternative safer design, nor has any Florida case *required* such proof." Id., at 478 [e.o.]) (Gross, J., "The supreme court has approved a jury instruction defining the term 'unreasonably dangerous' by two alternative tests, the consumer-expectation test and the risk-utility test. . . We know from *Radiation Technology, Inc. v. Ware Construction Co.*, 445 So. 2d 329, 331 (Fla. 1983), that the term 'unreasonably dangerous' requires the balancing of a number of factors. . .[including]. . . the availability of other, safer products to meet the same need. . . ." Id., at 480).

Associate Judge Scola nevertheless commented that the record was "devoid of evidence" of a safer design for "cigarettes", and reported that Davis had only referenced cigars which the court found to be an inapt alternative safer design. Id., at 474.

With all due respect, Davis's counsel, in his closing argument, specifically reviewed just some of the sundry evidence adduced at trial of available safer

designs not only for cigarettes generally but also for Liggett's Chesterfield product in particular. (R vol. 45 at T 2015-16)

SUMMARY OF THE ARGUMENT

Florida law does not require proof of an alternative safer design before a product may be found to be defective or unreasonably dangerous. Rather, the potential availability of other safer designs to meet the same need is merely one factor which may be considered under the risk-utility balancing test. Nor is proof of a safer design required under the alternative 'consumer expectations' test which has been applied uniformly by the appellate courts of this State in design defect strict liability cases and as to which alternative test Petitioner Liggett specifically requested the trial court to charge the jury in this case.

As an academic matter, Davis proved the availability of other, safer product designs for the Chesterfield cigarette at issue, including alternative designs utilized by Liggett itself. Liggett's unfiltered, unsurpassed high tar, smooth, manufactured cigarette did not constitute inherently 'good tobacco' under comment (i) to Restatement (Second) of Torts 402A. Accordingly, this Court should either decline to answer the first certified question asking whether a plaintiff in Florida is required to establish an alternative safer design in order to prevail on a design defect strict liability claim for an "inherently dangerous" product, or rephrase the question and hold that a plaintiff is not required to establish an alternative safer

design in order to prevail on a design defect strict liability claim involving manufactured cigarettes in general, or Liggett's Chesterfield cigarettes in particular. Nor should this Court adopt the Restatement (Third) of Torts as the law of the State of Florida. Finally, this Court should clarify that the risk-utility test for strict liability design defect, as well as Davis's negligence claim for Liggett's continued manufacture of Chesterfield cigarettes, were not federally preempted.

ARGUMENT

I. DAVIS MET THE REQUIRED BURDEN OF PROOF ON HER STRICT LIABILITY DESIGN DEFECT CLAIM

The viability of strict liability and negligence claims in cigarette cases is well established in Florida. *See Carter v. Brown & Williamson Tobacco Corp.,* 778 So.2d 932 (Fla. 2000); *Boerner v. Brown & Williamson Tobacco Corp.*, 394 F.3d 594 (8th Cir. 2005); *Laschke v. Brown & Williamson Tobacco Corporation*, 766 So.2d 1076 (Fla. 2nd DCA 2000); *Tune v. Phillip Morris Inc.*, 766 So.2d 350 (Fla. 2nd DCA 2000); *Phillip Morris USA, Inc. v. Arnitz*, 933 So.2d 693 (Fla. 2nd DCA 2006); *Ferlanti v. Liggett Group, Inc*., 929 So.2d 1172 (Fla. 4th DCA 2006); *Engle v. Liggett Group, Inc.*, 945 So.2d 1246 (Fla. 2006).

In fact, forty-five years ago, this Court in *Green v. American Tobacco Company*, 154 So.2d 169 (Fla. 1963), held that a cigarette manufacturer could be held strictly liable (under implied warranty) for damages caused by smoking cigarettes even if the manufacturer could not have foreseen the injury to the

smoker. As recently as two years ago, this Court in *Engle*, *supra*, let stand findings in favor of the Engle Class that will have res judicata effect in future trials. Those findings include: that the defendants placed cigarettes on the market that were defective and unreasonably dangerous, and that all of the defendants were negligent. In virtually every cigarette case, the facts and the theories of liability are similar. *Carter; Boerner, Ferlanti, Arntiz, Lashke and Tune, supra.* The plaintiff/decedent began smoking cigarettes as a teenager and many decades later developed lung disease or cancer. *Carter; Boerner; Lashke, Ferlanti, and Tune, supra*. In almost every case, the plaintiff seeks to impose liability based upon theories of strict liability and negligence. *Id.* These causes of action are routinely submitted to juries for resolution. *Carter; Boerner; Arnitz.* Despite the long history of cigarette litigation in Florida, no Florida appellate court has ever required a plaintiff to prove the existence of a 'safe cigarette design'. Prior to the district court's decision in this case, no Florida cause of action against a cigarette manufacturer has been found to be preempted by federal law.

A. Florida Law Does Not Require Proof Of An Alternative Safer Design Before A Product May Be Found To Be Defective Or Unreasonably Dangerous

In *West v. Caterpillar Tractor Co., Inc.,* 336 So. 2d 80 (Fla. 1976), this Court formally adopted strict liability in tort as expressed in §402A of the Restatement (Second) of Torts. In *Ford Motor Co. v. Hill,* 404 So. 2d 1049 (Fla.

1981), the Court confirmed that strict liability applies to both product manufacturing and design defects.

To establish liability under §402A, a plaintiff must prove that the product was defective. *West, supra.* A product is defective if it is unreasonably dangerous. *Id.* In a design defect case, a product is unreasonably dangerous and therefore defective if either: (1) it is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge of the community as to its characteristics (the 'consumer expectations' test); or (2) the risk of danger in the product's design outweighs its utility (the 'risk-utility' test). *Cassisi v. Maytag Co.,* 396 So. 2d 1140, 1144-5 (Fla. 1st DCA 1981)(quoting comments (g) and (i) to Restatement (Second) of Torts §402A); *Auburn Machine Works Co., Inc., v. Jones*, 366 So. 2d 1167, 1170 (Fla. 1979).

As the district court correctly observed, no case in Florida holds that a plaintiff is required to prove the existence of an alternative safer design in order to prevail on a strict liability design defect claim. Rather, the potential availability of other, safer designs to meet the same need is merely one of several factors which may be considered under the risk-utility balancing test. *Radiation Technology, Inc. v. Ware,* 445 So. 2d 329, 331 (Fla. 1983); *Auburn, supra* at 1170. In *Ware,* this Court, in rejecting as "largely passé" the classification of certain products as 'inherently dangerous', and which classification the Court explained is "largely of

historical interest which has lost most of its utility with the evolution of products liability law and the adoption of strict liability," plainly stated and held:

> The term "unreasonably dangerous" more accurately depicts liability of a manufacturer or supplier in that it *balances* the likelihood and gravity of potential injury against the utility of the product, the availability of other, safer designs to meet the same need, the obviousness of the danger, public knowledge and expectation of the danger, the adequacy of instructions and warnings on safe use, and the ability to eliminate or minimize the danger without seriously impairing the product or making it unduly expensive.

Id. at 331 [emphasis added]. *Accord Auburn*, at 1170 ("In a persuasive article, Dean Wade has enumerated the specific factors that enter into the final *balance* as follows…[listing the above factors]") [emphasis added].

Nor is proof of other, safer designs required under the alternative consumer expectations test which has been applied uniformly by the appellate courts of Florida in design defect strict liability cases. *See Tran v. Toyota Motor Corp.*, 420 F. 3d 1310, 1313 (11th Cir. 2005)(applying Florida law); *Force v. Ford Motor Co.*, 879 So. 2d 103 (Fla. 5th DCA 2004); *McConnell v. Union Carbide Corp.*, 937 So. 2d 148, 150 fn. 2 (Fla. 4th DCA 2006)(involving "intrinsically dangerous" and "unavoidably unsafe" asbestos product); *Falco v. Copeland*, 919 So. 2d 650 (Fla. 1st DCA 2006); *Sta-Rite Inds., Inc. v. Levey*, 909 So. 2d 901, 904 fn. 7 (Fla. 3d DCA 2004)("Because the evidence is sufficient on this issue [failure of the subject product under the risk-utility test], we do not discuss the availability of the alternative so-called 'consumer expectations' test.").

Liggett does not deign to discuss the consumer expectations test on which alternative test Liggett specifically requested the trial court to charge the jury in this case, and which it successfully urged the district court "is the only proper standard for strict liability defective design where the product is an ordinary consumer product like cigarettes … and one for which consumers have established expectations." *See* (Initial brief at p.34, fn. 19; Record as supplemented by the district court)

B. Liggett's Interpretive And Policy Arguments Are Without Merit

Notwithstanding the foregoing legal authority, Liggett offers a series of interpretive and policy arguments why proof of an alternative safer design should be deemed to be required under Florida law. First, Liggett cites to the Black's Law Dictionary definition of 'design defect' which references alternative safer designs. Davis would merely note that Black's is hardly authority on the law of Florida and does not purport to be. Liggett next argues that a safer alternative design is required because a product cannot be in a defective condition unless the design has some "avoidable flaw". (PB p. 12) According to Liggett, unless the product has an avoidable flaw there is nothing "wrong" with the product. However, Liggett cites no legal authority for this proposition. Instead, Liggett claims that the "avoidable flaw" requirement is a matter of "common sense". The fallacy in Liggett's

argument stems from its refusal to accept that "defective" as used in §402A is a term of art with special significance in strict liability.

As applied in §402A, the requirement of "defect" is used to avoid the manufacturer becoming an insurer of the product. *West, supra.* However, requiring that a product be defective to impose liability does not mean that it has to have an avoidable flaw. All that is required to prove a defect is proof that the product is unreasonably dangerous. Many products found to be unreasonably dangerous do have an avoidable flaw, to be sure. For instance, manufacturing defects occur when there is a mistake in the manufacturing process resulting in a product that is not made according to the product's design. Clearly, in those situations, there is a flaw in the product and there is something wrong with the product that was avoidable.

In design defect cases, there is no flaw in the manufacturing process. The product is exactly what the manufacturer intended to produce. If a product is found to be unreasonably dangerous because a safer design was available, again there is something wrong with the product that was avoidable.

There are, however, products which simply cannot be designed in a manner which makes them 'safe'. Often referred to as "unavoidably" or "inherently" dangerous, these unsafe products can still be found to be defective and liability imposed under §402A. *Auburn supra; Ware supra.* When such a product is found

to be unreasonably dangerous it is because there is something wrong with the product (i.e. the risk associated with the design of the product outweighs its utility or the product is more dangerous than an ordinary consumer would expect given the ordinary state of knowledge of the community as to its characteristics), although the product's inherent "flaw" is unavoidable.

Merely because a dangerous product cannot be designed more safely will not automatically render the manufacturer liable for injuries sustained by the user of the product. *Auburn Machine Works, Co., Inc., supra, Trespalacios v. Valor Corporation of Florida,* 486 So. 2d 649 (Fla. 3d DCA 1986). The test for imposing liability under §402A is the same for all products. *Cassisi v. Maytag Company,* 396 So. 2d 1140 (Fla. 1st DCA 1981). In each case the plaintiff has the burden of proving the product to be unreasonably dangerous. In point of fact, the unavailability or unfeasibility of a safer design may make the plaintiff's proof that the product is unreasonably dangerous more difficult and less compelling.

Liggett next cites cases which have either approved or rejected the sufficiency of the plaintiffs' proof of an alternative safer design. Same, however, does not translate to a requirement that such proof be adduced in all cases. Although §402A does not require a plaintiff to prove as part of her *prima facie* case an alternative safer design, when a plaintiff's only allegation of defect concerning a product is the failure to utilize a safer design, then of course the

burden is on the plaintiff to prove that allegation, that is, the availability of the safer design and that employing the design would have made the injury less likely to occur. *See e.g., Husky Industries, Inc., v. Black* , 434 So. 2d 988 (Fla. 4th DCA 1983); *Boerner v. Brown & Williamson Tobacco Corp.*, 394 F. 3d 594 (8th Cir. 2005)("When a plaintiff's sole proof of a defective design is the designer's choice not to pursue a safer design, the evidentiary burden is on the plaintiff to show that the alternative safer design he advocates actually exists.").

In *Husky*, the plaintiff alleged that charcoal lighter fluid manufactured by Sparky was defective solely because the can did not have a flashback arrester the absence of which allowed the can to explode and the color of the can was black which absorbed heat and contributed to the explosion. The plaintiff further alleged that as a result of these specific defects he was injured when the can exploded after the lighter fluid was sprayed on hot charcoals. Based upon those allegations, the plaintiff's complaint required that he prove that a lighter fluid can with a flashback arrester and/or a lighter colored can would have made the product safer and would have more likely than not avoided the explosion. When the plaintiff was unable to prove the alleged safer alternative design would have prevented the explosion, the Fourth District correctly held that the verdict in favor of the plaintiff had to be reversed. That the Fourth District's opinion in *Husky* does not stand for the proposition that a plaintiff is always required under §402A to prove a safer

alternative design in a design defect case, as claimed by Liggett, is made obvious by the same court's statement to the contrary in this case:

> We 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 case. Rather, it appears to be one factor which can be demonstrated and argued to the jury.

Liggett Group, Inc. v. Davis, 973 So.2d 467 (Fla. 4th DCA 2007)(emphasis the court's).

Liggett next notes that Dean Prosser opined that the drafters of §402A rejected the notion that manufacturers should be "automatically responsible for all the harm" caused by unavoidably dangerous products. (PB p. 13) Davis does not suggest that manufacturers are "automatically responsible" for all the harm caused by unavoidably dangerous products. The law only imposes liability for damages caused by such products if they are found to be defective. As with any product, unavoidably dangerous products are only defectively designed if they are possessed of dangers beyond which an ordinary consumer would expect, or if the risk of danger in their design outweighs their utility. Thus, knives, guns, certain drugs, automobiles, airplanes, etc., though unavoidably dangerous, are not necessarily defective. Nothing said by Dean Prosser supports Liggett's contention that a plaintiff must prove a safer alternative design as a prerequisite to finding a product defectively designed.

Quoting Dean Wade, Liggett next suggests that a product can be defective because of a "poor design". That is undoubtedly true. Liggett then incorrectly makes the leap to claim:

> Obviously, a design can be "poor" only in comparison to some better alternative design.

(PB 14) That is not true. A design can be "poor" simply by evaluating the risk of harm the product presents in relation to the benefit obtained, or by evaluating consumers' expectations concerning the safety of the product as designed. Chesterfield cigarettes are a perfect example of such a "poor" design. As designed, Chesterfield cigarettes present a very significant risk to the user without providing corresponding benefits other than satisfying the addiction to nicotine caused by the use of the product. Chesterfields sold before the late 1960's were far more dangerous than the ordinary consumer expected. No one needs to identify a safer design to conclude that Chesterfields were a poor design. Even if no safer design existed, which, as will be shown, it did, the design was still "poor". Liggett has not identified any statement by Dean Wade that supports the proposition that a plaintiff must establish the existence of a safer alternative design in a defective design case. In fact, as this Court pointed out in *Auburn*, Dean Wade has made clear his belief that a safer design is but one of several factors which may be considered and balanced under the risk-utility test in determining whether or not a product is unreasonably dangerous.

Liggett's misunderstanding of "defective" as that concept is applied in §402A is also evidenced by its suggestion throughout its brief that a product must be shown to be both defective **and** unreasonably dangerous. The court in *Cassisi, supra*, explained long ago that the terms "defective" and "unreasonably dangerous" are redundant. Id. at 1144. As the *Cassisi* court explained, all that a plaintiff in a strict liability case is required to prove is that the product was defective. Proof that the product is unreasonably dangerous is the means by which the plaintiff proves the defect. Liggett's failure to appreciate the redundancy of "defective" and "unreasonably dangerous" pervades its entire argument and contributes to its erroneous conclusion that proof of a safer alternative design is required in all design defect cases.

Liggett also claims that this Court's decision in *Auburn, supra*, supports its contention that a plaintiff must prove a safer alternative design. Liggett claims that such support can be found in the Court's statement that one must balance the potential harm from a given design against the burden of precautions necessary to avoid the harm. That is precisely the proper approach to take in a case like *Auburn* where the only defects claimed by the plaintiff were the product's lack of certain safety features and a lack of proper operating instructions. In such a case, the plaintiff's complaint required the balancing of the risk of harm the product presented against the burden of the precautions plaintiff claimed would have been

effective to avoid the harm. This Court did not impose a requirement that plaintiffs in all design defect cases prove the availability of a safer alternative design. In fact, Liggett ignores the quote from Dean Wade which the Court found persuasive in *Auburn* specifically recognizing that the availability of a safer design is but one of many factors to be considered in determining if a product is unreasonably dangerous.

Liggett next points to comment (i) to §402A, which discusses certain products possessed of known inherent danger, as support for its argument that proof of a safer alternative design is required in a design defect case involving cigarettes. Liggett's reliance is misplaced. First, comment (i) does not discuss safer alternative designs, but rather whether certain products possessed of inherent dangers (well known to the ordinary consumer) may be found to be unreasonably dangerous. Second, comment (i) does not discuss manufactured cigarettes but "tobacco". Comment (i) states in pertinent part: "Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful." Davis never contended that raw tobacco is 'unreasonably dangerous'. Davis proved that in sundry respects, the design of the Chesterfield manufactured cigarette — which by Liggett's own admission below, is a highly "engineered product" — was unreasonably dangerous and that its dangers were unknown to and beyond those expected by the ordinary consumer throughout the period that Davis used it.

Although Liggett does not address contrary authority, several courts have expressly rejected Liggett's present suggestion that manufactured cigarettes, as opposed to raw, unadulterated and unprocessed tobacco, especially during the period before the imposition of explicit Congressionally-mandated warnings to consumers of the specific dangers such products posed, constitute "good tobacco" within the meaning of comment (i), or that comment (i) may be used to immunize such products from a finding that they were unreasonably dangerous (not a point on Liggett's appeal). *See e.g. Little v. Brown & Williamson Tobacco Corp.,* 243 F. Supp. 2d 480 (D.S.C. 2001); *Hearn v. R.J. Reynolds Tobacco Co.,* 279 F. Supp. 2d 1096, 1105, 1106 (D. Ariz. 2003)(and observing that even §2 of the Restatement (Third) of Torts (1998), requiring proof of an alternative feasible design, excludes tobacco from its list of commonly and widely distributed products "that may inherently pose substantial risk of harm."); *Guilbeault v. R.J. Reynolds Tobacco Co.,* 84 F. Supp. 2d 263 (D.R.I. 2000); *Witherspoon v. Phillip Morris, Inc.,* 964 F.Supp. 455 (D.D.C. 1997); *Burton v. R.J. Reynolds Tobacco Co.,* 884 F.Supp. 1515 (D. Kan. 1995); *Semowich v. R.J. Reynolds Tobacco Co.,* 1988 WL 86313 (N.D.N.Y. Aug. 18, 1988); *Rogers v. R.J. Reynolds Tobacco Co.,* 557 N.E. 2d 1045 (Ind. Ct. App. 1990), aff'd. in part and vacated in part, 745 N.E. 2d 793 (Ind. 2001). In *Shepard v. Phillip Morris Inc.,* 1998 WL 34064515 (M.D.Fla.1998), the court quoted with approval from *Burton, supra*, as follows:

> Although "good tobacco" without any additives or foreign substances, may not be unreasonably dangerous, that does not automatically mean that all tobacco-containing products are not unreasonably dangerous. The cigarettes sold by defendants are manufactured products and, as such, the court finds that they are subject to design, packaging, and manufacturing variations which may render them defective even if the tobacco used in their manufacture was originally unadulterated.

In the instant case, Davis proved that Liggett added a myriad of ingredients to the already flue-cured and 'scrap' tobacco it blended into its Chesterfield cigarette and that Liggett employed processes so that, as designed, unfiltered Chesterfield cigarettes were among the highest tar and nicotine cigarettes on the market but produced smooth and good tasting smoke which would easily invade the lungs making the product more dangerous and likely to produce lung cancer than the "good tobacco" Liggett started with. Davis further proved that the ordinary consumer of cigarettes in general, and Chesterfields in particular, remained unaware of the dangers presented throughout the period of Davis's use of this product. As Judge Warner aptly observed below, this is not a 'good tobacco' case or one involving a product the inherent dangers of which were obvious or well known to the ordinary consumer during the period it was used.

In view of this evidentiary record, this Court should decline to answer the first certified question as phrased, asking whether proof of a safer alternative design is required in regard to an 'inherently dangerous' product. Alternatively, this Court should rephrase and answer 'no' the question of whether in a strict

liability design defect case involving manufactured cigarettes in general, or Chesterfield cigarettes in particular, a plaintiff is absolutely required to prove the existence a safer alternative design in order to establish a prima facie case.

Liggett also points to statements made by this Court in *Auburn* concerning the fact that knives are not defective as support for the proposition that a plaintiff must prove the availability of a safer design to recover under §402A. However, the knife analogy does not support Liggett's argument. As this Court explained in *Auburn*, a knife, though unavoidably dangerous, is not defective because it does not satisfy either test for being unreasonably dangerous. Specifically, the Court explained that a knife is no more dangerous than an ordinary user would expect, and the utility of its design outweighs its obvious potential to cause harm. As this Court expressly acknowledged in *Auburn*, moreover, "everyone realizes the dangers of knives." 366 So. 2d at 1170.

The knife analogy has no application to products like manufactured cigarettes, and especially Liggett's Chesterfield product, the extreme dangers of which—as demonstrated in this case—were for decades not appreciated by the ordinary consumer, and denied by Liggett, and the risk of developing lung cancer and death from which far outweighed any conceivable benefit offered by the product's design. Products like manufactured cigarettes can be found to be unreasonably dangerous even if no safer design is proven by the plaintiff.

Continuing on this theme, Liggett argues that like guns, Chesterfield cigarettes are not defective because they cannot be made safe. In *Trespalacios, supra*, and *Coulson v. DeAngelo,* 493 So. 2d 98 (Fla. 4th DCA 1986), both cited by Liggett, the courts found that the guns in question were not defective. As the court explained in both cases, however, the guns were no more dangerous than an ordinary consumer would expect and thus were not unreasonably dangerous. It also goes without saying that the benefit derived from guns outweighs the obvious and known risks they present. The importance of guns is evidenced by the fact that citizens are constitutionally guaranteed the right to posses them. Unlike guns, Chesterfield cigarettes, at least before the late 1960's, were far more dangerous than an ordinary consumer would expect and the largely unknown risks they posed to the user were far greater than any benefit provided by their excessively high tar and smooth, lung-invading design. Simply stated, guns, though unavoidably dangerous, are not defective because they are not unreasonably dangerous. Manufactured cigarettes can be found defective because a jury can find, as it did in this case, that the plaintiff has satisfied either test for determining whether they were unreasonably dangerous.

Finally, Liggett contends that absent a safer alternative design requirement, the imposition of strict liability in this case would constitute a ban on the sale of Chesterfields. Liggett argues that the legislature is the appropriate branch of

government to determine if the sale of cigarettes should be banned. There is no doubt that criminalizing the sale of cigarettes is uniquely a legislative function. However, the founding fathers bestowed upon the judiciary the responsibility to ensure that damages be borne in accordance with the common law and legislative enactments. Requiring a manufacturer of an unreasonably dangerous, and therefore defective product, to respond in damages to those injured by the product is a proper exercise of judicial authority which should not be abdicated to the legislature.

Liggett invites this Court to begin the slide down the slippery slope of blurring the distinction between civil liability and criminal punishment. Every imposition of liability has the potential to alter a defendant's conduct. In the case of products liability a manufacturer can always claim that the imposition of liability will "force" it to cease production of the product. If the mere possibility that a manufacturer will cease production of a product in response to a civil verdict is accepted as a "ban" on the sale of the product and, thus, uniquely a legislative function, the judiciary will have ceded significant power to the legislature. The practical consequence of ceding such authority is that if the legislature fails to act, the manufacturer of even the most defective unavoidably dangerous product will be immunized from liability. The judiciary and the common law are important protectors of consumers who often lack the political and economic power to compete against powerful manufacturing interests in the legislative arena. Creating

a requirement of a safer alternative design is not required to prevent banning Chesterfield cigarettes or any other product.

C. Davis Proved The Availability Of Other, Safer Product Designs

Although Davis was not required to prove a safer alternative design for Chesterfield cigarettes, she certainly did so. In fact the evidence presented in this case is almost identical to the evidence presented by the plaintiff in *Boerner v. Brown & Williamson Tobacco Company*, 394 F.3d 594 (8th Cir 2005). In *Boerner* the plaintiff smoked Pall Mall cigarettes from 1945 to 1981. Davis smoked Liggett's Chesterfield cigarettes from 1951 until 1974. Like Boerner, Davis ultimately developed lung cancer. According to the Eighth Circuit in *Boerner* the evidence indicated:

> Pall Mall cigarettes had higher levels of tar than any other brand and that reduction of tar intake by smoking low tar cigarettes could have reduced the health risks associated with smoking. Similarly, the evidence indicated that Pall Mall cigarettes lacked effective filter technology, which would have reduced the level of carcinogenic tar inhaled into the lungs... Pall Mall cigarettes were in a defective condition due to faulty design; the faulty design resulted in excessively high levels of carcinogens being introduced into Mrs. Boerner's lungs.

394 F.3d at 599.

Davis proved in this case that, prior to 1974, Chesterfield cigarettes, like Pall Mall, yielded among the highest amount of tar of any cigarette on the market. In the early 1950's, when Davis began using Chesterfields, they delivered 42 milligrams of

tar per cigarette. In 1967, even after a product modification by Liggett admittedly "in response to the competition" which was acting to reduce the likely lung cancer risk associated with cigarettes, Chesterfield cigarettes still yielded 28 milligrams of tar, 7 times as much tar as other cigarettes then on the market some of which delivered as little as 3.9 milligrams of tar per cigarette. Davis also introduced substantial medical evidence, uncontested by Liggett, showing that lung cancer is a dose-response disease and that a low tar cigarette is safer than a high tar cigarette. From 1951 through 1974, Liggett itself manufactured and sold cigarettes other than Chesterfield that yielded lower tar and nicotine levels than did Chesterfield. Liggett also utilized filters, which capture tar, on all of its brands except Chesterfields. Liggett also purposefully designed Chesterfields with 'flavor systems' to produce a smooth and desirable smoke which made it more likely that a user would inhale cancer-causing, if addictive, smoke into her lungs. It is inexplicable how the district court concluded that Davis did not offer proof of a safer design for "cigarettes" as opposed to that employed in manufacturing Chesterfields. Accordingly, even if this Court determines that Florida law should be changed to require evidence of a safer alternative design, Davis would have satisfied that requirement.

II. THIS COURT SHOULD NOT ADOPT THE RESTATEMENT (THIRD) OF TORTS REQUIREMENT THAT PLAINTIFF PROVE AN ALTERNATIVE SAFER DESIGN IN STRICT LIABILITY DESIGN DEFECT CASES

Although the Fourth District recognized that no Florida court has required a plaintiff to prove the availability of a safer alternative design, the court certified to this Court the question of whether Florida should abandon the Restatement (Second) of Torts §402A and adopt The Restatement (Third) in design defect cases. The relevant section of the Third Restatement is found in Section 2(b) which provides:

> [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 by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the reasonable alternative design renders the product not reasonably safe.

Normally, when a Restatement of the law is published it is precisely that, a **restatement** of an existing legal theory or concept. The purpose is to clarify, not create a new legal principle. That was the situation when this Court in *West* adopted §402A. As this Court explained in *West*, Florida and many other jurisdictions had moved very close to strict products liability prior to adopting §402A. In fact, the formal adoption of §402A was according to the Court in *West* little more than a change in nomenclature. Despite claims by the American Law

Institute (ALI) Reporters to the contrary, that was not the case when Section 2(b) of the Third Restatement was adopted by the ALI. *See Delaney v. Deere and Co.* 999 P.2d 930 (Kan. 2000) ("[W]e agree that as the forward to the Third Restatement makes clear, the new Restatement "goes beyond the law." Hazard, Foreword to Restatement (Third) of Torts, xv, xvi (1997). Rather than simply taking a photograph of the law of the field, the Third Restatement goes beyond this to create a framework for products liability.") *See also*, J. 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, 501 (1996); P. Corboy, "The Not-So-Quiet Revolution: Rebuilding Barriers to Jury Trial in the Proposed Restatement (Third) of Torts: Products Liability," 61 Tenn.L.Rev. 1043, 1093 (1994).

Section 2(b) is a dramatic departure from the existing law of product liability in design defect cases. If adopted by the Court Section 2(b) would change existing law for design defect cases in two primary ways. First, it would abolish the consumer expectations test and leave only risk-benefit analysis (which Liggett successfully convinced the district court is preempted in cigarette cases). Second, in evaluating risk-benefit, Section 2(b) requires that a safer alternative design exist which could reasonably be implemented and, if employed, would have avoided the plaintiff's injuries. Moreover, because Section 2(b) limits plaintiffs to this

single cause of action, the Third Restatement if adopted would abolish claims based upon implied warranty which *West* explained was the basis for strict liability. Because Section 2(b) restricts a plaintiff in design defect cases to a single cause of action based upon the reasonableness of the manufacturer's design choice, if it is adopted strict liability would be abandoned. Therefore, when one asks should the Third Restatement be adopted in design defect cases, the real question is: Should manufacturers only be held liable if they are negligent in their design choices?

The court in *Potter v. Chicago Pneumatic Tool Co.*, 694 A. 2d 1319 (Conn. 1997) was the first to consider the merits of adopting Section 2(b). The court conducted an extensive review of the historical development of the law concerning products liability based upon design defect. After documenting that the majority of courts did not require a plaintiff to prove the existence of a feasible alternative design, the court refused to adopt Section 2(b) because that requirement "imposes an undue burden on plaintiffs that might preclude otherwise valid claims from jury consideration." *Id.* at 1331. The *Potter* court also rejected the ALI conclusion that the consumer expectation test should be abandoned in design cases. Thereafter, numerous courts followed *Potter's* rationale and refused to adopt Section 2(b). *See e.g., Rodriguez v. Suzuki Motor Corp.*, 996 S.W. 2d 47 (Mo. 1999); *Delaney v. Deere and Co.* 999 P.2d 930 (Kan. 2000); *McCathern v.*

Toyota Motor Corp., 23 P. 3d 320 (Or. 2001); *Green v. Smith & Nephew APF, Inc.*, 629 N.W. 2d 727 (Wis. 2001); *Vautour v. Body Masters Sports Industries, Inc.*, 784 A. 2d 1178 (N.H. 2001). *Jackson v. Gen. Motors Corp.* 60 S.W.3d 800 (Tenn. 2001); *Hiner v. Deere & Co.*, 340 F.3d 1190 (10th Cir. 2003); Ellen Wertheimer. "The Bitter Bit: Unknowable Dangers, The Third Restatement, and the Reinstatement of Liability Without Fault" Villanova University Legal Working Paper Series (2005). Respondent has only found one court which has adopted Section 2(b). *Wright v. Brooke Group Ltd*, 652 N.W.2d 159 (Iowa 2002).

There are important reasons which explain why Section 2(b) has not received acceptance and Restatement (Second) §402A remains the law in most jurisdictions. As noted above, strict products liability was derived from the implied warranty which the common law imposed upon sellers and manufacturers. The warranty imposed upon manufacturers strict liability even where the manufacturer was not at fault. *Green*. The warranty was derived from the notion that a product which has caused damage to the purchaser must be borne by someone, and as between the innocent purchaser and innocent manufacturer it was fair to impose that liability on the manufacturer who profited from the product and was in a better position to insure against the loss. As this Court explained when it adopted §402A in *West*, strict liability is imposed not because of something the manufacturer did wrong, but rather, because:

> The cost of injuries or damages, either to person or property, resulting from a defective product should be borne by the makers of the products who put them into the channels of trade, rather than by the injured or damaged persons who are ordinarily powerless to protect themselves.

The policy annunciated in *West* is especially appropriate when in the rare case a manufacturer elects to profit from the sale of a product found to be far more dangerous than the ordinary consumer would expect or the benefit of which is grossly outweighed by the risk of injury the product poses. In such unusual cases the manufacturer should not be permitted, as Section 2(b) demands, to shift the loss caused by such products to the innocent user simply because a safer alternative design for the product it sold and profited from was then unavailable. Adoption of Section 2(b) would encourage the production of products offering little benefit to consumers even when they posed substantial risk. Entrepreneurs are generally free in this country to make a profit from almost any product they can sell. However, the imposition of liability for unreasonably dangerous products should remain an important deterrent to the sale of products whose risk exceed their benefit or whose design is more dangerous than the ordinary consumer would expect without regard to whether a safer design is available or not.

The adoption of Section 2(b) would be a significant departure from existing products liability law in design defect cases. Davis respectfully urges this Court to join the majority of courts which have refused to adopt Section 2(b).

III. THE RISK-UTILITY TEST FOR STRICT LIABILITY AND DAVIS'S NEGLIGENCE CLAIM WERE NOT FEDERALLY PREEMPTED.

Liggett contends that the Fourth District failed to properly apply the doctrine of conflict preemption. Respondent agrees that conflict preemption was improperly applied by the lower court, but for reasons different than those suggested by Liggett.

The district court held that a negligence claim based upon the sale of Chesterfield cigarettes after Liggett recognized the substantial health hazards they posed for users was preempted by federal law. It also held that the risk-utility test could not be constitutionally applied to a claim that Chesterfield cigarettes were defectively designed. These holdings are inconsistent with the results and comments by this Court in *Carte*r and statements made by the Fourth District itself in *Ferlanti.*

In *Carter v. Brown & Williamson Tobacco, Corp., supra*, this Court accepted review of a district court decision that held a smoker's cause of action preempted. In reversing the district court, this Court relied upon the standards annunciated in *Cipollone v. Ligget Group, Inc.*, 505 U.S. 504 (1992).

In *Ferlanti* the plaintiff alleged, as did Respondent in this case, that Liggett negligently manufactured and sold Chesterfield cigarettes and that Chesterfields were defectively designed. Like in this case, Liggett argued that the plaintiff's

claims were barred by the doctrine of conflict preemption. Just as in this case, Liggett relied upon the statements made by the Court in *FDA v. Brown & Williamson*, 529 U.S. 120 (2000), to establish the constitutional intent to preempt plaintiff's tort claims. However, unlike the instant case, the Fourth District in *Ferlanti* recognized that the tort claims raised in *Ferlanti* did not constitute a ban on the sale of cigarettes and were not preempted. *See also, Laschke and Arnitz.*

Davis urges the Court to clarify the extent to which Florida courts should find federal preemption in cigarette litigation. Such guidance would be extremely helpful to the trial courts in Florida as they undertake the substantial task of resolving the *Engle* class cases, as well as, the substantial number of non-class cigarette cases which are likely to be litigated in the future. The disparity in rulings and decisions concerning the extent of federal preemption in cigarette cases appears to stem from comments made by the U.S. Supreme Court in *FDA* after it had decided *Cipollone*.

In *Cipollone,* to which Liggett was a party, the Court defined the extent to which federal legislation had preempted state regulation of cigarettes. In 1965, Congress enacted the Federal Cigarette Labeling and Advertising Act which mandated warnings on cigarette packages. By its terms, the 1965 Act was to expire in 1969. In 1969, Congress enacted the Public Health Cigarette Smoking Act (PHCSA) which amended the 1965 Act. The 1969 Act strengthened the

warning label required on packages of cigarettes, banned certain cigarette advertising, and modified the 1965 preemption provision. As to preemption, the 1969 Act provided in §5(b) as follows:

> (b) No requirement or prohibition based on smoking shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

In 1992, the United States Supreme Court in *Cipollone* accepted a petition for certiorari for the express purpose of determining the preemptive effect of the federal statutes concerning cigarettes. The Court began its analysis with the recognition that:

> [T]he historic police powers of the State [are] not to be superseded by…Federal Act unless that [is] the clear manifest purpose of the Congress. *Rice v. Sante Fe Elevator Corp.*, 331 V.S. 218, 67 S. Ct. 1146, 1152 91 L. Ed. 1447 (1947).

While recognizing that Congressional intent to usurp the States police power may be express or implied, the Court explained that where, as with cigarettes, Congress has considered the issue of preemption the intent of Congress may not be implied. *Id.* at 2617-8. Thus, when confronted by a claim of preemption by a cigarette manufacturer, the Court instructed:

> The central inquiry in each case is straight forward: We ask whether the legal duty that is the predicate of the common-law damages action constitutes a "requirement or prohibition based on smoking and health…imposed under state law with respect to…advertising or promotion", giving that clause a fair but narrow reading

Id. at 2621.

In *Rivera v. Phillip Morris, Inc.*, 395 F.3d 1142 (9th Cir. 2005), the court was confronted with the claim by a cigarette company that the plaintiffs' claims were preempted by federal law. As urged by the Respondent in this case, the Ninth Circuit evaluated the *Rivera* causes of action under the test annunciated by the Court in *Cipollone.* Applying that standard, the Ninth Circuit held that none of the plaintiffs' causes of action were preempted.

In *Boerner v. Brown & Williamson Tobacco Company,* 394 F.3d 594 (8th Cir. 2005), a cigarette company argued that a smoker's state law cause of action was barred by federal preemption. The Eight Circuit again recognized that Congress intended to preempt only smoking related laws "concerning the advertising and promotion of cigarettes." *Id.* at 599-600. The court quoted as follows from *Cipollone*:

> Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted.

Applying the *Cipollone* holding, the Eight Circuit held that the state law cause of action was not preempted.

As these cases demonstrate, the relevant inquiry in a cigarette case when preemption is claimed is whether the **legal duty** that is the predicate for the plaintiff's negligence claim constitutes:

1. A requirement or prohibition based upon smoking and health, and,

2. Is with respect to advertising or promotion of cigarettes.

Here, the predicate legal duty underlying the Davis's negligence claim was the duty to exercise reasonable care in the manufacture and sale of a product for human consumption. When, as in this case, the predicate legal duty is a general common-law obligation not "based on smoking and health" the cause of action is not preempted. *Cipollone* at 526-530. Moreover, the legal duty breached by Liggett in this case, i.e., the duty to exercise reasonable care in the manufacturing of Chesterfield cigarettes, had nothing to do with the advertising or promotion of Chesterfield cigarettes. Accordingly, Liggett has failed to meet either criteria established by the United States Supreme Court for the preemption of the common-law negligence claims submitted to the jury in this case. That was the analysis employed by this Court in *Carter* and should have been employed by the district court in this case.

Similarly, the design defect claim even if based upon risk-utility had nothing to do with the advertising or promotion of Chesterfield cigarettes nor was the duty imposed under Section 402A based upon smoking and health. Therefore, neither requirement for preemption was satisfied as to the risk-utility test of the design defect claim.

In the case at bar, the district court did not rely upon the clear pronouncement of the extent of federal preemption in cigarette cases announced in *Cipollone*, but instead, relied upon *FDA*, a case having nothing to do with federal preemption. In *FDA*, the issue presented was whether the Food and Drug Administration (FDA) had been given authority by Congress to regulate cigarettes. As the court explained, if the FDA had such authority then the rules and regulations of the FDA would require that it ban the sale of cigarettes. Thus, the question arose as to whether Congress had expressed an intention to empower the FDA with the authority to ban the sale of cigarettes in all fifty states. The court found no Congressional intention to permit a federal ban on the sale of cigarettes. The fact that the Court found that Congress had not given the FDA that authority is very different from finding that Congress had expressed an intention to usurp the constitutional authority of a state to protect the health and welfare of its citizens.

Congress has never passed a law or expressed any intention to usurp the power of the states to protect their citizens by regulating the sale of cigarettes. In fact, states do regulate the sale of cigarettes and have "banned" the sale of cigarettes to minors. The fact that Congress considers the regulation of the sale of cigarettes to be within the police power of the states and not a matter of federal jurisdiction was demonstrated when Congress expressed its desire to prohibit the sale of cigarettes to persons younger than eighteen. Recognizing that the states,

rather than the federal government, had the power to ban the sale of cigarettes to minors, Congress could only seek to entice the states to do so by withholding federal funds if they did not take such action. *See Lorillard Tobacco Co., v. Reilly*, 533 U.S. 525 (2001).

Even if this Court were to conclude that Congress had preempted the states from a requirement banning the sale of cigarettes, the negligence and strict liability claims in this case were not preempted. Those causes of action in no way constituted a state requirement banning the sale of Chesterfields or any other cigarettes.

In the negligence count herein, Davis alleged that the sale of Chesterfield cigarettes given Liggett's knowledge of the dangers they presented was unreasonable. The jury agreed and found that Davis's injuries were proximately caused by Liggett's negligence and awarded damages. The mere fact that a tortfeasor is held civilly liable for damages caused by its negligence in no way constitutes a state imposed ban on the defendant's action. Likewise, the application of the risk-utility test for evaluating if Chesterfield cigarettes were unreasonably dangerous does not constitute a state imposed ban on the sale of Chesterfield cigarettes. What the Fourth District appears to have incorrectly concluded is that the imposition of such liability would make it difficult for Liggett to defend claims thereby resulting in significant potential future liability which

would motivate it to stop selling Chesterfields. The district court apparently believed that the motivation to stop selling Chesterfields amounted to a state requirement banning Chesterfields. This speculation by the Fourth District was similar to that confronted by the United States Supreme Court in *Bates v. Dow 544 U.S. 431 (2005).*

In *Bates,* the Court considered the extent to which the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) preempted state law tort claims. Similar to the cigarette legislation, Congress in FIFRA preempted certain state law claims concerning warnings required by the Act to be placed on pesticides. The Fifth Circuit in *Bates,* like the Fourth District in the instant case, reasoned that if the plaintiff's claims were allowed, manufacturers would be required to alter their conduct. Specifically, in *Bates,* the Circuit Court determined that the imposition of tort liability for negligence and strict liability would cause the manufacturers to change their warning labels. In reversing the Fifth Circuit, the Supreme Court relied in part on its decision in *Cipollone* to explain that courts may not find preemption by speculating about how a defendant might react to a verdict imposing damages for negligence or strict liability. The Court in *Bates* made clear that the imposition of civil liability under state tort laws does not constitute a state law **requirement** for preemption consideration. The Court instructed that the mere fact that the imposition of liability may motivate a defendant to take action to

avoid liability in the future does not rise to the level of a state requirement and therefore cannot serve as the basis to find preemption. That is exactly the mistake made by the Fourth District in the case at bar.

Even if speculation as to the action a defendant may take in response to tort liability constituted a state requirement for preemption purposes, history does not support the speculative conclusion reached by the district court in this case. First, it is impossible to predict the potential liability of Liggett or other cigarette manufacturers for negligently selling high tar and nicotine cigarettes. However, what is certain is that the imposition of enormous liability and potential future liability has never been sufficient to dissuade a cigarette manufacturer from selling its lethal product. This Court explained to the cigarette industry forty-five years ago that it would face "absolute or strict liability" for injuries caused by its cigarettes. *Green.* That did not discourage the manufacturers from selling cigarettes in Florida. The cigarette industry was not deterred from the sale of cigarettes even after being required to pay billions of dollars in claims by Florida and other states for medical costs they had incurred in treating citizens injured by cigarettes. The cigarette industry was assessed billions of dollars in punitive damages by a Florida jury in *Engle*, but nevertheless continued to sell cigarettes in this state. So there is no doubt that despite enormous damage claims this industry will not stop selling cigarettes. Their response has always been the same, keep

selling cigarettes and simply raise the price to pay for the potential liability. Thus, there was no basis for the district court's speculation that the imposition of liability for claims of negligence or strict liability by Florida juries would motivate Liggett or any other cigarette manufacturer to stop selling cigarettes. Therefore, even if the Court finds that Congress has preempted states from banning cigarettes, allowing the tort claims in this case would not result in a ban.

Davis respectfully requests that the Court clarify the extent to which federal law has preempted tort claims in cigarette cases. Davis submits that such clarification will serve the purpose of judicial economy in the many cigarette cases that are yet to be litigated in Florida.

CONCLUSION

For the foregoing reasons, Respondent Davis respectfully requests that the verdict in this case be affirmed; that the Court decline to adopt Section 2(b) of the Restatement (Third) of Torts; that the Court clarify that the risk-utility test for strict liability and Davis' negligence claim were not preempted by federal Law; and finally, answer both certified questions in the negative.

July 31, 2008

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CERTIFICATE OF SERVICE

This is to certify that I have this ___ day of July, 2008, served a true and exact copy of the foregoing ANSWER BRIEF ON THE MERITS upon the following counsel of record by U.S. Mail, first class postage prepaid, addressed as follows:

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CERTIFICATE OF COMPLIANCE

This is to certify that the foregoing ANSWER BRIEF ON THE MERITS complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2). This Brief is submitted in Times New Roman 14-point font.

_____
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