IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC08-541

Lower Tribunal No.: 4D04-3811

LIGGETT GROUP INC.,

Petitioner,

vs.

BEVERLY DAVIS,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE

In this product liability case, the Court of Appeal for the Fourth District affirmed a judgment against the defendant based on a design defect claim even though the court concluded that the plaintiff had failed to present any evidence that there was anything avoidably wrong with the design of the product. This Court is presented with two questions certified to it by the Court of Appeal pursuant to Rule 9.330(a) of the Florida Rules of Appellate Procedure:

1. Is a plaintiff required to establish an alternative safer design in order to prevail on a design defect claim for an inherently dangerous product?

2. Should Florida adopt the Restatement (Third) of Torts for design defect cases?

(App. No. 2).

As demonstrated below, Florida decisional law, and the Restatement (Second) of Torts § 402A (1965) which this Court has expressly adopted, require a product liability plaintiff asserting a design defect claim to prove the feasibility of an alternative safer design. This requirement is consistent with the majority rule in other jurisdictions. Because plaintiff failed to adduce evidence of an alternative safer design at trial, the judgment against Liggett on plaintiff's claim for design defect must be reversed. It is unnecessary to reach the question whether to adopt Section 2(b) of the Restatement Third, Torts: Products Liability (1999) ("Restatement (Third)"), which also requires proof of an alternative safer design in design defect cases. However, if the Court believes that adopting that section of

the Restatement (Third) would aid in clarifying Florida law with respect to the alternative safer design requirement, it should do so.

The facts and procedural background of this case are as follows:

A. Proceedings In The Trial Court

Plaintiff, Beverly Davis filed this lawsuit against Liggett Group Inc. ("Liggett") on April 14, 2004. Davis alleged that she suffered injuries from smoking Chesterfield cigarettes, manufactured by Liggett, from 1951 to 1974. (App. No. 3; App. No. 4).[1]

Davis advanced several theories of liability at trial sounding in negligence and strict liability. With respect to negligence, Davis contended that Chesterfield cigarettes were negligently designed, that Liggett negligently failed to warn about the hazards of smoking, that Liggett negligently failed to test its products, and 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." (App. No. 5). With respect to strict liability, Davis alleged that Liggett was strictly liable for design defect and failure to warn. *Id*.[2]

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[1] In 1974, Davis switched to cigarettes manufactured by a non-defendant company. (App. No. 3). Davis smoked until 2001, when she was diagnosed with lung cancer. *Id.* Davis does not claim to be a former member of the class that was decertified in *Engle v. Liggett Group, Inc*., 945 So. 2d 1246, 1277 (Fla. 2006) ("class consists of all Florida residents fitting the class description as of the trial court's order dated November 21, 1996"), *cert. denied*, 128 S. Ct. 96 (2007).

[2] Davis had advanced a fraud claim, which was dismissed at the close of plaintiff's case. Alan Davis, her husband, also pressed a loss of consortium claim, which was ultimately rejected by the jury.

At trial, however, Davis failed to offer any proof that the Chesterfield cigarettes she smoked were in any way different from, or more dangerous than, other cigarettes on the market. Davis offered the testimony of only two experts, an oncologist, Dr. Rosenfeld, and a pathologist, Dr. Roggli. (App. No. 6; App. No. 7). Neither witness offered any testimony that there was a technologically and commercially feasible alternative safer design for Liggett's cigarettes that would have enabled Davis to avoid her injuries. *Id*. Nor did plaintiff introduce other evidence of an alternative safer design for cigarettes. Rather, plaintiff simply contended in closing argument that instead of making cigarettes, Liggett should have made an entirely different product -- cigars. (App. No. 8). At the close of plaintiff's case, Liggett moved for directed verdict on Davis' strict liability and negligent design defect claims on several grounds, including the failure to adduce evidence of an alternative safer design that would have avoided Davis' injuries. The trial court denied this motion. (App. No. 9).

At the charging conference, Liggett asked the trial court to instruct the jury that, in order to prevail on a defective design claim, plaintiff had to prove that Chesterfield cigarettes were unreasonably dangerous because they failed to perform as safely as an ordinary consumer would expect. (App.10; Rec. Vol. 26, 4603-04.) Liggett also requested that the following alternative safer design instruction be given as part of this test:

> To recover under plaintiffs' theory of liability for design defect, you must further determine (1) whether the alleged injuries plaintiff Beverly Davis sustained as a result of the challenged design for the Liggett

> Chesterfield cigarettes she smoked would have been avoided, or less severe, had Liggett used a feasible and then available alternative design, (2) whether Beverly Davis would have used the product employing the alternative design instead of the Liggett Chesterfield cigarettes that she did smoke, and (3) that if she had used a product with this alternative design, her injuries would have been avoided.

(App. No. 10; Rec. Vol. 26, 4607; App. No. 11).

Davis opposed Liggett's proposed instructions and instead argued that the court should give an instruction that would allow the jury to find Liggett's product unreasonably dangerous based on either the consumer expectation test (under which a product is unreasonably dangerous if it does not perform as safely as expected by a ordinary consumer) or a risk-utility test (under which a product is unreasonably dangerous if its risk of danger outweighs its benefits). (App. No. 10). With respect to the strict liability design defect claim, the trial court gave the jury instruction proposed by Davis, refusing to give Liggett's proposed instruction on alternative safer design. (App. No. 12; Rec. Vol. 27, 4946; App. No. 5; Rec. Vol. 27, 4937). In contrast, with respect to the negligent design claim, the trial judge included a modified instruction to the jury concerning alternative safer design. (App. No. 12).

The jury returned a verdict in favor of Davis on her purported claims for strict liability design defect and negligence in continuing to manufacture cigarettes. (App. No. 12). The jury found in favor of Liggett on the remaining claims, including the negligent design claim. (App. No. 12). The jury awarded medical expense damages of $45,000 and non-economic damages of $500,000 to Davis.

(App. No. 12). The trial court denied Liggett's post-trial motions to set aside the verdict and for a new trial and entered Final Judgment. (Rec. Vol. 28, 5263-64.)

B. The Court Of Appeal Decision

Liggett appealed the verdict to the Court of Appeal for the Fourth District. Liggett argued that the trial court erred in failing to grant Liggett a directed verdict on Davis' design defect claim and in permitting the jury to consider plaintiff's theory that Liggett was negligent in continuing to manufacture cigarettes. Liggett also contended that the conflicting jury instructions on the two design defect claims -- the negligence instruction that included alternative safer design and the strict liability instruction that did not -- constituted error.

The Court of Appeal held that the trial court had erred in allowing plaintiff's claim for negligence in the continued manufacture and sale of cigarettes. *Liggett Group, Inc. v. Davis*, 973 So. 2d 467, 472-74 (Fla. 4th DCA 2007). The court recognized that "continuing to manufacture" was not a proper basis for negligence as Congress had chosen to regulate cigarettes, but not prohibit their sale. *Id*. at 472-73. The court held that Davis' negligence claim would necessitate all manufacturers to refrain from producing cigarettes because all cigarettes pose significant risks to the health of smokers. *Id.* at 472. To allow such a claim would be contrary to Congress' "intent to protect commerce and not to ban tobacco products." *Id.* at 472-73.

As to the design claim, the Court of Appeal "agree[d] that the record was devoid of "evidence of a safer design for cigarettes." *Id.* at 476. While Davis had argued that Liggett should have made cigars instead of cigarettes at trial, Davis

proffered no evidence that she "would have availed herself of that option or that it would have avoided or lessened her injuries." *Id*. at 474. The court also reasoned that cigars are not an alternative safer design for cigarettes because "[i]t is common knowledge and requires no citation or expert testimony to conclude that cigars are an entirely different product than cigarettes." *Id.* Moreover, the court held that such argument -- that Liggett should have made cigars instead of cigarettes -- was preempted by federal law because "the federal government's pronouncement that the continued manufacture of cigarettes is a sanctioned activity precludes application of this theory to cigarettes." *Id.*

The court nonetheless affirmed the judgment on the design claim because it found that plaintiff was not required to prove an alternative safer design: "[w]e find no case which holds that a plaintiff is *required* to show a safer design in order to prevail on a strict liability design defect claim." *Id*. at 475 (emphasis in original). Rather, the availability of a safer design, according to the court, was merely "one factor which can be demonstrated and argued to the jury." *Id.* The court noted that the standard civil jury instruction for a strict liability design defect claim permits a jury to find a product "'unreasonably dangerous'" either because the product "'fails to perform as safely as an ordinary consumer would expect when used as intended'" or if "the risk of danger in the design outweighs the benefits." *Id.* at 477 (citation omitted). The standard instructions do not "include any mention of an alternative design requirement." *Id*. at 476. The court held that these instructions were "presumptively correct and should be used unless a party shows to the contrary." *Id.* Accordingly, the court held that the trial court did not

err in failing to instruct the jury that plaintiff was required to prove the existence of an alternative design for cigarettes in order to prevail on a design defect claim. *Id.* at 477.[3]

C. The Instant Proceedings

Liggett sought rehearing and/or certification of the two questions now before this Court on the ground that these questions raise issues of public importance with respect to Florida design defect law. The Court of Appeal certified the two questions and this Court accepted review. *Liggett Group, Inc. v. Davis*, 978 So. 2d 160 (Fla. 2008).

SUMMARY OF ARGUMENT

Florida law allows a plaintiff to assert a strict liability claim against a product manufacturer for (1) failure to warn (*i.e.*, the manufacturer failed to provide the warnings that would have been provided by a reasonable manufacturer); (2) manufacturing defects (*i.e.*, the product varied from its intended design as a result of some error in the manufacturing process), and (3) design defects (*i.e.*, error in the design of the product). To prove a design defect claim -- the claim at issue on this appeal -- a plaintiff must prove that there was an avoidable flaw in the design of the product and that an alternative safer design was commercially and technologically feasible and would have prevented the plaintiff's

[3] While the Court of Appeal acknowledged the conflict between the trial court's negligent design instruction (which included alternative safer design) and the strict liability design defect instruction (which did not), it refused to reverse on that basis.

injuries. Thus, a manufacturer of a product that has no feasible alternative safer design may potentially be held liable on a strict liability claim for manufacturing defect or for failure to warn, but not on a claim for design defect. In short, if the design could not have been made better, the product was not defectively designed.

The requirement of proof of a feasible alternative safer design for a design claim is embodied in Restatement (Second) Torts § 402A, which this Court adopted as the law of Florida in *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976). The Court's decision in *West* and the text of Section 402A make clear that, to prove liability, it is not enough to prove that a product is "unreasonably dangerous." Instead, plaintiff must also prove a "defective condition." Florida law mandates that a "defective condition" arises only if the product could have been designed in some alternative way that would have avoided the hazard and prevented plaintiff's injury. A hazard presented by a product must be due to an avoidable "defective condition," as opposed to some intrinsic quality that makes the product dangerous. Following such reasoning, Florida courts do not find a knife manufacturer, for example, strictly liable on a design claim simply because knives are sharp. The plain reading of Section 402A and the alternative safer design requirement is confirmed by the contemporaneous writings of scholars involved in the drafting of the Restatement, as well as the comments to Section 402A. Moreover, the alternative safer design requirement is fully consistent with this Court's prior holdings in design defect cases, Florida model jury instructions, lower court decisions in Florida, and the weight of authority across the country.

Requiring the existence of an alternative safer design for a design defect claim furthers the policies underlying strict liability law. It encourages manufacturers to make their products safer. It constitutes a reasonable balance of the interests of consumers in obtaining compensation for their injuries and the interests of manufacturers in not being insurers of products that could not have been made more safely. Florida courts have made clear that manufacturers should not be insurers for all harm caused by their products. Moreover, the alternative safer design requirement ensures that the decision as to whether certain products are too dangerous to be sold at all will be made by the Legislature, which is best equipped to make such determinations.

Finally, as numerous courts have held, the alternative safer design requirement is independently compelled with respect to cigarettes by the federal law doctrine of conflict preemption. A verdict against a cigarette manufacturer on a design claim in the absence of evidence of an alternative safer design is the equivalent of a finding that cigarettes, which Congress has recognized are legal for sale notwithstanding their inherent dangers, are unreasonably dangerous and should not be sold. Such a finding directly conflicts with the Congressional policy permitting the sale of cigarettes when accompanied by mandatory warnings.

Because an alternative design is an essential element of a strict liability design claim under Florida law, and such a holding is dispositive of this case, the Court need not reach the issue of whether it should adopt Restatement (Third) Torts § 2(b) to govern design defect claims. However, Section 2(b) expressly requires the existence of a feasible alternative safer design. If the Court believes

that adopting the Section is desirable to clarify that proof of an alternative safer design is an element of a strict liability design claim, it should do so.

ARGUMENT

I. PLAINTIFF FAILED TO PROVE A FEASIBLE ALTERNATIVE SAFER DESIGN NECESSARY TO PREVAIL ON HER STRICT LIABILITY DESIGN DEFECT CLAIM

A. Florida Law Demonstrates That An Alternative Safer Design Is A Necessary Element Of The Claim

1. This Court's Decision In *West*, Which Adopts Section 402A Of The Restatement (Second), Makes Clear That An Alternative Safer Design Is Required

This Court adopted Restatement (Second) Torts § 402A to govern the application of strict liability to product manufacturers in *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976). Section 402A provides:

> One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate consumer, or to his property if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

Restatement (Second) Torts § 402A. Although the Court in *West* did not expressly state that a feasible alternative safer design is required for a design defect claim,

the Court's reasoning in *West* and the language of Section 402A lead inexorably to that conclusion.

Section 402A does not permit imposition of liability based merely on a showing that a product is "unreasonably dangerous." Rather, the Section requires a showing that the product be in a "*defective condition* unreasonably dangerous." (emphasis added). The only plausible reading of such language is that a product must be "unreasonably dangerous" because of an avoidable "defective condition." Indeed, applying this language, this Court itself held in *West*:

> In order to hold a manufacturer liable on the theory of strict liability in tort, the user must establish the manufacturer's relationship to the product in question, the defect *and* unreasonably dangerous condition of the product, and the existence of the proximate causal relationship between such condition and the user's injuries or damages.

336 So. 2d at 87 (emphasis added).

For strict liability design defect claims, the Court in *West* made clear that plaintiff's injury must arise from a "defect" in the design of the product, not merely risks inherent to a product: "strict liability should be imposed *only* when a product the manufacturer places in 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*. at 86 (emphases added). The Court in *West* further clarified that '"when the injury is in no way attributable to a *defect*, there is no basis for imposing product liability . . . ."' *Id.* (emphasis added) (quoting *Royal v. Black & Decker Mfg. Co.*, 205 So. 2d 307, 309 (Fla. 3d DCA 1967)). This holding reflects the longstanding

rule that "'[i]t is not contemplated that a manufacturer should be made the insurer for [a]ll physical injuries caused by his products.'" *Id.* (quoting *Royal*, 205 So. 2d at 309).

Florida law therefore mandates that a product is in a "defective condition" by reason of its design, only if its design has some *avoidable* flaw. A hazard presented by a product must be due to an *avoidable* "defective condition," as opposed to some intrinsic quality that makes it dangerous. If there is no avoidable flaw in a product's design, it defies common sense to call the design of the product "defective." To demonstrate a defect in a product's design, a plaintiff must demonstrate that the product could have been designed differently -- *i.e.*, in a manner that would have prevented the plaintiff's injury. Following such reasoning, Florida law does not, for example, find knife manufacturers strictly liable for design defect merely because knives are sharp. *See Trespalacios v. Valor Corp.*, 486 So. 2d 649, 650 (Fla. 3d DCA 1986) ("one who is injured while using a perfectly made axe or knife would have no right to a strict liability action against the manufacturer because the product that injured him was not defective." *Id.* (citing *Cassissi v. Maytag Co.*, 396 So. 2d 1140, 1143 (Fla. 1st. DCA 1981)); *see also* cases cited and discussed in Sections I.A.2 and I.A.3, *infra* (applying alternative safer design requirements to numerous Florida design defect cases).[4]

[4] As noted above, the fact that a product does not have an alternative design and therefore cannot be subject to a design defect claim, has no effect on the availability of otherwise appropriate claims, such as failure to warn or manufacturing defect claims. In this case, plaintiff advanced no claim for

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This conclusion also flows naturally from the definition of the term "defect." Black's Law Dictionary defines "defect" generally as "[a]n imperfection or shortcoming" and a "design defect" as:

> [a]n imperfection occurring when the seller or distributor could have reduced or avoided a foreseeable risk of harm *by adopting a reasonable alternative design*, and when, as a result of not using the alternative, the product or property is not reasonably safe.

Black's Law Dictionary at 450 (8th ed. 2004) (emphasis added); *see also, e.g.*, Webster's Third New International Dictionary at 591 (1986) (defining "defect" as "want or absence of something necessary for completeness").

The plain reading of Section 402A, which requires evidence of an alternative safer design, is further confirmed by the contemporaneous writings of drafters of Section 402A. Dean William L. Prosser, the Reporter for the Restatement (Second) of Torts, wrote that the American Law Institute ("ALI") considered whether liability could be imposed on "products that are themselves unavoidably dangerous." William L. Prosser, "Strict Liability to the Consumer in California," 18 Hastings L.J. 9, 23 (1966). Dean Prosser said that the drafters of the Restatement expressly rejected the notion that manufacturers of products that are "unavoidably dangerous" should "become automatically responsible for all the harm that such things do in the world." *Id.* He explained that it was to "forestall

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manufacturing defect and the jury found in favor of Liggett on the failure to warn claim. (App. No. 5).

such a possibility that the Restatement limited its new section [Section 402A] to products 'in a defective condition unreasonably dangerous to the consumer.'" *Id.* (footnote omitted).

Dean John Wade, co-reporter for the Restatement (Second), wrote that, to impose design defect liability under Section 402A, "the product must be harmful or unsafe because of something wrong with it." John W. Wade, "On the Nature of Strict Tort Liability for Products," 44 Miss. L.J. 825, 830 (1973). Professor Wade explained that there can be "something wrong" with a product because of a manufacturing defect so that the product "was not what it was intended to be . . . ." *Id.* There may also be "something wrong" with the product, "even though the product was exactly as it was intended to be, because of a *poor design* or the failure to attach a warning or suitable instructions." *Id*. (emphasis added). Obviously, a design can be "poor" only in comparison to some better alternative design.

Dean Wade noted that one of the preliminary drafts of Section 402A had simply referred to "unreasonably dangerous" products, without using the word "defective." *Id*. at 829-30 The drafters were worried that this language might be misconstrued to allow the imposition of liability on inherently unsafe products like whiskey, "so that 'a man who consumes it and gets delirium tremens' might recover because a jury 'might find that all whiskey is unreasonably dangerous to the consumer.'" *Id.* at 830 "The word 'defective' was added [to prevent this result

and] to ensure that it was understood that something had to be wrong with the product." *Id.*[5]

The fact that Section 402A requires a product to have a "defective condition" is further confirmed by comment i to Section 402A. Comment i acknowledges that "[m]any products cannot possibly be made entirely safe for all consumption . . . ." Restatement (Second) of Torts § 402A, cmt. i. The comment explains that such inherently dangerous products are not defective merely because they may cause harm: "That is not what is meant by 'unreasonably dangerous' in this Section." *Id*. Instead, "[t]he rule stated in this Section applies only where the *defective condition* of the product makes it unreasonably dangerous to the user or consumer." *Id*. (emphasis added). In other words, to prove liability, the plaintiff must show that there is something wrong with the product in that it contains some avoidable design flaw.

The language of Section 402A, this Court's decision in *West*, and contemporaneous comments by drafters of Section 402A thus show that an alternative safer design is a requirement of a design defect claim. Because this requirement flows from the phrase "defective condition," as used in Section 402A, the requirement applies regardless of whether a court or jury applies a consumer

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[5] Dean W. Page Keeton, an adviser to the ALI, similarly explained that design defect liability is not available for products merely because they are unavoidably dangerous. W. Page Keeton, Product Liability And The Meaning Of Defect, 5 St. Mary's L.J. 30, 34 (1973).

expectations test or risk-utility test to determine whether the product satisfies the requirement of being in a "defective condition unreasonably dangerous."

2. The Alternative Safer Design Requirement Is Consistent With This Court's Prior Decisions And Florida Model Jury Instructions

The requirement that a plaintiff asserting a design defect claim must plead and prove an alternative safer design for the product flows not simply from *West* and Section 402A; it is also consistent with this Court's other decisions and Florida Model Jury Instructions.

This Court discussed the duties of a manufacturer under the law of strict product liability in *Auburn Machine Works Co. v. Jones*, 366 So. 2d 1167 (Fla. 1979). Quoting liberally from a Pennsylvania federal court decision in *Dorsey v. Yoder Co*., 331 F. Supp. 753 (E.D. Pa. 1971) (applying Pennsylvania law), the Court explained that a manufacturer does not need to guard against every danger presented by a product. 366 So. 2d at 1169-70. Instead, the manufacturer must guard only against "unreasonable danger[s]." *Id*. at 1170. The Court then explained that, to determine whether the manufacturer violated that duty, the jury must "'(balance the) likelihood of harm to be expected from a machine *with a given design* and the gravity of harm if it happens against the *burden of precautions* which would be effective to avoid harm.'" *Id.* at 1170 (quoting F. Harper & F. Jones, *The Laws of Torts* § 284 (1956 ed.)) (emphases added). Plainly, conducting such a "balance" presupposes that there is some precaution -- *i.e.*, an alternative design -- that could be undertaken by the manufacturer. The

Dorsey court, cited with approval by this Court, characterized as "persuasive" the article written by Dean Wade, discussed above, which explained that a product is not defective unless there is "something wrong" with it and that inherently dangerous products such as whiskey do not have a design defect as a matter of law. *Id.*

The Court in *Auburn* then explained "why the plaintiff accidentally injured by a knife does not recover from the manufacturer," while a person injured by a cutting machine with no safety guards on the cutters can recover. *Id*. (citing *Dorsey*, 331 F. Supp at 759-60). The knife is not "unreasonably dangerous," *inter alia*, because "by definition a guard over the blade (the part that causes the danger) would eliminate its utility." *Id.* at 1170. By contrast, a plaintiff can recover from the manufacturer of the cutting machine because "a guard would not eliminate the machine's usefulness . . . ." *Id.* In other words, the knife is not defective because it has no alternative safer design that would not impair its purpose and function, but the cutting machine is defective because it does have an alternative technologically and commercially feasible safer design that would have prevented the plaintiffs' injuries.

Similarly, it appears that in every other case in which this Court has substantively addressed the elements of a design claim, there was evidence in the record that an alternative safer design had been available. *See, e.g., Ford Motor Co. v. Hill*, 404 So. 2d 1049, 1051 (Fla. 1981)(Section 402A applies to claims for both manufacturing defect and design defect in case where plaintiff contended that the truck manufacturer should have attached the cab to the body of the truck in a

different manner); *West*, 336 So. 2d at 83 (adopting strict liability in case in which plaintiffs had introduced evidence that there was "improper design and configuration of various parts of the grader obstructing visibility in the rear [and] absence of appropriate mirrors").

In addition, contrary to the view of the Court of Appeal in this case, 973 So. 2d at 476, the standard civil jury instruction for a strict liability design defect claim reflects the alternative safer design requirement. The instruction states that a product is defective "if *by reason of its design* the product is in a condition unreasonably dangerous . . . ." Florida Jury Instructions In Civil Cases PL 5 (emphasis added). As explained in Section I.A.1 above, a product can be unreasonably dangerous "by reason of its design" -- as opposed to the intrinsic characteristics of the product -- only if there is a feasible alternative safer design of the product.[6]

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[6] While the language of the standard instruction ("by reason of its design") reflects the requirement of an alternative safer design, the jury below had no basis to appreciate the meaning of that phrase, and was likely confused by the trial court's full set of instructions. When giving the strict liability design defect instruction, the trial court did not explain the meaning of the phrase "by reason of its design." (App. No. 12). Moreover, the trial court affirmatively told the jury that Liggett could be liable for *negligent* design if it "fail[ed] to develop, design, and incorporate available alternative safer and commercially feasible designs" but excluded any reference to alternative safer design when it instructed on the strict liability design claim. *Id.* Referring to alternative safer design in the negligence instruction and not in the strict liability instruction, while at the same time failing to explain the meaning of the phrase "by reason of its design" in the strict liability instruction, created a substantial likelihood that the jury mistakenly believed that the existence of an alternative safer design is not a requirement of a strict liability design defect claim. This risk of jury confusion is also a ground for reversal. *See*,

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3. The Alternative Safer Design Requirement Is Consistent With Other Florida Decisions

Numerous lower courts in Florida have correctly read *West* and Section 402A as requiring proof of an alternative safer design in design defect claims.

For example, the requirement of an alternative safer design has been applied in several cases involving guns. In *Coulson v. DeAngelo*, 493 So. 2d 98, 99 (Fla. 4th DCA 1986), the Third District affirmed dismissal of a design claim against a gun manufacturer that was premised on the allegation that the gun was defective because it "could not be used for any legitimate purpose." *Id*. The court held that "[t]he essence of the doctrine of strict liability for a defective condition is that the product reaches the consumer with something 'wrong' with it." *Id*. The manufacturer was not liable for design defect as a matter law when there was no allegation that the gun "malfunctioned or had a faulty design." *Id*. Similarly, the Third District affirmed dismissal of a design defect claim brought by survivors of a victim killed with a "riot and combat" shotgun who alleged that the shotgun was unreasonably dangerous because it was capable of being used to kill someone. *Trespalacios v. Valor Corp.*, 486 So. 2d 649, 650 (Fla. 3d DCA 1986). The court cited with approval the First District's observation that "one who is injured while using a perfectly made axe or knife would have no right to a strict liability action against the manufacturer because the product that injured him was not defective."

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e.g., *Jacobs v. Westgate*, 766 So. 2d 1175, 1180 (Fla. 3d DCA 2000) ("Reversal is required when a jury might reasonably have been misled, regardless of whether it has actually been misled").

Id. (citing *Cassissi v. Maytag Co.*, 396 So. 2d 1140, 1143 (Fla. 1st. DCA 1981)). In contrast, the court in *LeMaster v. Glock*, Inc., 610 So. 2d 1336, 1337-38 (Fla. 1st DCA 1992), held that the plaintiff had stated a design defect claim against a gun manufacturer where the plaintiff alleged that an alternative design for a semi-automatic pistol -- an external safety device - - would have prevented the accidental discharge of the weapon. *Id*.[7]

Courts applying Florida law similarly have applied the alternative safer design requirement in cases involving beer and pharmaceuticals. In *Bruner v. Anheuser-Busch, Inc.*, 153 F. Supp. 2d 1358, 1360 (S.D. Fla. 2001), *aff'd*, 31 Fed. Appx. 932 (11th Cir. Jan. 18, 2002), the court granted a motion to dismiss a design defect claim to recover for personal injuries plaintiffs allegedly sustained as a result of drinking beer. Citing comment i to Section 402A for the proposition that

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[7] Federal courts applying Florida law likewise have recognized the alternative safer design requirement in gun cases. In *Shipman v. Jennings Firearms, Inc*., 791 F.2d 1532, 1533-34 (11th Cir. 1986), the Eleventh Circuit held that the manufacturer of a "Saturday Night Special" that "performed exactly as intended" could not be held liable on the theory that the gun was "unreasonably dangerous." In *Marzullo v. Crosman Corp*., 289 F. Supp. 2d 1337, 1342-43 (M.D. Fla. 2003), the court granted summary judgment to the manufacturer of a BB gun on a design claim where plaintiffs simply alleged that the gun's muzzle velocity made the gun more dangerous than a "reasonable person" would have expected. The court noted that "[p]laintiffs do not allege that the [gun] failed to perform the function for which it was designed. Nor do they claim that an *alternative design* would have enabled the [gun] to fire BBs with the same amount of fire power in a *safer manner*." *Id*. (emphasis added). The court analogized plaintiffs' argument to the contention that a knife was defective because it was sharp or that a sports car was defective because it was fast and explained that "[t]hese contentions would defy logic, given the inherent nature of these products." *Id*. at 1342 n.6.

the dangers of alcohol consumption are inherent in the nature of the product, the court held the design defect claim failed because there is no alternative safer design for beer. *Id*. The court in *Cornelius v. Cain*, No. CACE 01-020213(02), 2004 WL 48102 (Fla. Cir. Ct. Jan. 5, 2004), likewise held that a plaintiff injured by the drug OxyContin did not have a design defect claim because the plaintiff failed to establish an alternative safer design. Citing comment i, the court explained that "[m]any products cannot possibly be made entirely safe for all consumption" and held that "plaintiff's death [s]tanding alone" was "not evidence of a design defect." *Id*. at *5. Neither the *Brunder* nor *Cornelius* courts permitted the plaintiffs in those cases to proceed on a theory that the products at issue were "unreasonably dangerous" simply because they were so dangerous that they should not have been sold at all.

The alternative safer design requirement is reflected in numerous other decisions applying Florida law. *See, e.g., Husky Indus., Inc. v. Black*, 434 So. 2d 988, 995 (Fla. 4th DCA 1983) (reversing jury verdict in favor of plaintiff against manufacturer of a can of charcoal igniting fluid because plaintiff failed to prove an alternative safer design for the can that would have prevented his injuries); *Royal v. Black & Decker*, 205 So. 2d at 310 (affirming summary judgment in favor of drill manufacturer on design claim where user was electrocuted because there were "[n]o allegations of any latent characteristics . . . or of any deviation from the norm, either in comparison with similar plugs or in comparison with those customarily used for similar purposes"); *see also Scheman-Gonzalez v. Saber Manufacturing Co.*, 816 So. 2d 1133 (Fla. 4th DCA 2002) (testimony of plaintiff's

expert that wheel rim could have been redesigned to prevent hazard created question for the jury on plaintiff's design defect claim).

Requiring a feasible alternative safer design for a design defect claim is also consistent with Florida appellate decisions in cigarette cases. In *Philip Morris USA, Inc. v. Arnitz*, 933 So. 2d 693, 698-99 (Fla. 2d DCA 2006), the court affirmed a jury verdict in favor of plaintiff on a design claim and, in *Ferlanti v. Liggett Group, Inc.*, 929 So. 2d 1172, 1175-76 (Fla. 4th DCA 2006), the court reversed summary judgment in favor of the defendant on a design claim. Although neither decision addressed whether a feasible alternative safer design is required as a matter of Florida law, in both cases, the courts expressed their belief that plaintiff had presented evidence of such a design. *See Arnitz*, 933 So. 2d at 698 (stating that "Arnitz contended that Philip Morris brand cigarettes had a design defect because Philip Morris placed additives in its cigarettes to make them more inhaleable than natural tobacco; Philip Morris flue cured the tobacco, heightening the *cancer* risk; and some of the additives Philip Morris used changed the nicotine to freebase nicotine") (emphasis in original); *Ferlanti*, 929 So. 2d at 1173 (noting that plaintiff contended that "Liggett failed to use alternative safer designs to reduce or eliminate harmful materials or characteristics" and that "Liggett sold cigarettes containing 'artificially high levels of nicotine'").[8]

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[8] Liggett does not agree that the plaintiffs in *Arnitz* and *Ferlanti* actually proved -- or could prove -- the existence of a commercially and technologically feasible alternative safer design that the plaintiffs in those cases would have used to prevent their injuries. The relevant point for the instant appeal is simply that the lower courts that reviewed the issue in those cases were of the view that plaintiffs had

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4. The Alternative Safer Design Requirement Is Consistent With The Majority View

Requiring an alternative safer design is also consistent with the majority view across the country. *See* Restatement of Torts (Third) § 2 (1998) Reporter's Note II, at 46-77.

Numerous courts have expressly held that a plaintiff asserting a design defect claim must plead and prove that an alternative safer design is possible. *See, e.g., General Motors Corp. v. Jernigan*, 883 So. 2d 646, 662 (Ala. 2003) ("In order to prove that a product is defective . . . a plaintiff must prove that a safer, practical, alternative design was available to the manufacturer at the time it manufactured the product."); *Miller v. Todd*, 551 N.E.2d 1139, 1143 (Ind. 1990) ("Defectiveness" means "claimant should be able to demonstrate that a feasible, safer, more practicable product design would have afforded better protection"); *Parish v. Jumpking, Inc.*, 719 N.W.2d 540, 543 (Iowa 2006) ("a plaintiff must ordinarily show the existence of a reasonable alternative design") (citation omitted); *Toyota Motor Corp. v. Gregory*, 136 S.W.3d 35, 42 (Ky. 2004) ("design defect liability requires proof of a feasible alternative design"); *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 96 (Minn. 1987) ("To establish a prima facie case that it was unreasonably dangerous normally requires production of evidence of the existence of a feasible, alternative safer design); *Uloth v. City Tank Corp.*, 384 N.E.2d 1188,

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satisfied the evidentiary requirement of proving an alternative safer design sufficient to proceed to a jury determination.

1193 (Mass. 1978) (plaintiff must show "an available design modification which would reduce the risk without undue cost or interference with the performance of the machinery") (citation omitted); *Williams v. Bennett*, 921 So. 2d 1269, 1275 (Miss. 2006) ("demonstrating a feasible alternative design as proof of a design defect is elemental to a claimant's prima facie case").[9]

Consistent with this authority, courts have rejected design defect claims with respect to cigarettes where the plaintiff had failed to proffer proof of an alternative safer design. *See, e.g., Toole v. Brown & Williamson Tobacco Corp.*, 980 F. Supp. 419, 425 (N.D. Ala. 1997) (Alabama law); *Rhodes v. R.G. Indus.*, 325 S.E.2d 465, 468 (Ga. App. 1984) (Georgia law); *Filkin v. Brown & Williamson Tobacco Corp.*, No. 99 C 238, 1999 WL 617841, at *1 (N.D. Ill. Aug. 11, 1999) (Illinois law); Estate of White ex rel. *White v. R.J. Reynolds Tobacco Co.*, 109 F. Supp. 2d 424, 431 (D. Md. 2000) (Maryland law); *Kotler v. American Tobacco Co.*, 926 F.2d 1217, 1225 (1st Cir. 1990) (Massachusetts law); *Hardin v. Brown & Williamson Tobacco Co.*, No. G87-503CA1, 1988 WL 288976, at *3 (W.D. Mich. Dec. 27, 1988) (Michigan law); *Herndon v. Brown & Williamson Tobacco Corp.*, No.

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[9] *See also Voss v. Black & Decker Manufacturing Co.*, 463 N.Y.S. 2d 398, 402 (N.Y. 1983) ("plaintiff, of course, is under an obligation to present evidence that . . . it was feasible to design the product in a safer manner"); *Cooper Tire & Rubber Co. v. Mendez*, 204 S.W.3d 797, 807 (Tex. 2006) ("A design defect claim requires proof and a jury finding of a safer alternative design.") (citation omitted); *see also* N.C. Gen. Stat. § 99B-6(a)(1) (2007) (requiring proof that manufacturer "unreasonably failed to adopt a safer, practical, feasible and otherwise reasonable alternative design" that would have prevented or "substantially reduced the risk of harm").

1:92:CV:166, 1993 WL 475530 (W.D. Mich. April 19, 1993) (Michigan law); *Gianitsis v. American Brands, Inc.*, 685 F. Supp. 853, 859 (D.N.H. 1988) (New Hampshire law).[10]

Likewise, courts have held that products such as guns, lead pigment, and other products cannot be the subject to design defect claims where plaintiffs do not allege an alternative safer design. *See, e.g., Delahanty v. Hinckley*, 564 A.2d 758, 760 (D.C. 1989) (guns) (District of Columbia law); *Rhodes v. R.G. Indus., Inc.*, 325 S.E. 2d 465, 468 (Ga. 1984) (guns) (Georgia law); *Aiome ex rel. Aiome v. Walgreen's Co.*, 601 F. Supp. 507, 514 (N.D. Ill 1985) (lawn darts) (Illinois law); *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1202 (7th Cir. 1984) (guns) (Illinois law); *Perkins v. F.I.E. Corp.;* 762 F.2d 1250, 1272 (5th Cir. 1985) (guns) (Louisiana law); *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771, 773-74 (D.N.M. 1987) (guns) (New Mexico law), *aff'd*, 843 F. 2d 406 (10th Cir. 1988); *Sabater v.*

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[10] *See also Buckingham v. R.J. Reynolds Tobacco Co.*, 713 A.2d 381, 385-86 (N.H. 1998) (New Hampshire law); *Semowich v. R.J. Reynolds Tobacco Co.*, No. 86-CV-118, 1988 WL 123930, at * 3-4 (N.D.N.Y. Nov. 15, 1988) (New York law); *Paugh v. R.J. Reynolds Tobacco Co.*, 834 F. Supp. 228, 230-31 (N.D. Ohio 1993) (Ohio law); *Hite v. R.J. Reynolds Tobacco Co.*, 578 A.2d 417, 420 (Pa. Super. Ct. 1990) (Pennsylvania law); *Gunsalus v. Celotex Corp.*, 674 F. Supp. 1149, 1158-59 (E.D. Pa. 1987) (Pennsylvania law); *Miller v. Brown & Williamson Tobacco Corp.*, 679 F. Supp. 485, 488-89 (E.D. Pa. 1988) (Pennsylvania law), *aff'd mem.*, 856 F.2d 184 (3d Cir. 1988); *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 236 (6th Cir. 1988) (Tennessee law); *Sanchez v. Liggett & Myers, Inc.*, 187 F.3d 486, 489-91 (5th Cir. 1999) (Texas law). *But see Bullock v. Philip Morris U.S.A. Inc.*, 71 Cal. Rptr. 3d 775, 789 (Cal. App. 2d Dist. 2008) (California law); *Thompson v. Brown & Williamson Tobacco*, 207 S.W.3d 76, 92-94 (Mo. App. W.D. 2006) (Missouri law).

Lead Indus. Ass'n, 704 N.Y.S. 2d 800, 802 (N.Y. Sup. Ct. 2000) (lead pigment) (New York law); *Caveny v. Raven Arms Co.*, 665 F. Supp. 530, 532-33 (S.D. Ohio 1987) (guns) (Ohio law), *aff'd mem.*, 849 F. 2d 608 (6th Cir. 1988); *City of Philadelphia v. Lead Indus. Assn'n*, No. Civ. A. 90-7064, 1992 WL 98482, at *3 (E.D. Pa. April 23, 1992) (lead pigment) (Pennsylvania law), *aff'd*, 994 F.2d 112 (3d Cir. 1993); *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206, 1209-11 (N.D. Tex. 1985) (guns) (Texas law); *Novak v. Piggly Wiggly Puget Sound Co.*, 591 P.2d 791, 794-95 (Wash. 1979) (guns) (Washington law); *Godoy ex rel. Gramling v. E.I. du Pont de Nemours*, 743 N.W.2d 159, 163 (Wisc. Ct. App. 2007) (lead pigment) (Wisconsin law).

In sum, the requirement that a plaintiff prove the feasibility of an alternative safer design lies at the heart of design defect law not only in Florida, but across the country.

B. Requiring An Alternative Safer Design Is Consistent With The Policies Underlying Product Liability Law

Requiring a product liability plaintiff to prove the existence of a feasible alternative safer design that would have enabled the plaintiff to avoid her injuries is also sound public policy that furthers the goals underlying product liability law.

The alternative safer design requirement serves one of the fundamental policy goals underlying product liability law -- encouraging manufacturers to make safer products. *See Auburn*, 366 So. 2d at 1170-71 (citing the policy of encouraging the safer manufacture of products as reason for not relieving the manufacturer of responsibility for obvious danger; to hold otherwise would mean

that "[s]o long as the hazards are obvious, a product could be manufactured without any consideration of safeguards"). If a plaintiff is required to prove a feasible alternative safer design, manufacturers will have a strong incentive to incorporate the safest design reasonably possible for their products because doing so will provide them with a clear-cut defense to a design defect claim. Conversely, not requiring a plaintiff to prove a safer design would diminish the manufacturer's incentives to design its product more safely because, even if the manufacturer invested heavily in research and product development to adopt the safest design reasonably possible, a jury could still impose liability on the theory that the product was not "reasonably safe" and should not have been sold.

The alternative safer design requirement also reflects a reasonable balance of the interests of consumers and manufacturers. On the one hand, product liability law seeks reasonably to compensate consumers for harm caused by defective products and to encourage manufacturers to make their products safer. *West*, 336 So. 2d at 84. At the same time, as this Court has repeatedly recognized, manufacturers should not be transformed into insurers for harm caused by products that are well designed. *See id*. at 90 ("[s]trict liability does not make the manufacturer or seller into an insurer"); *Houdaille Indus., Inc. v. Edwards*, 374 So. 2d 490, 493 (Fla. 1979) (noting that a manufacturer is "not an insurer for all physical injuries caused by its product" and holding that "[f]or there to be a recovery in an action for implied warranty or strict liability, it still must be shown that plaintiff's injury was proximately caused by some defect in the product"). A manufacturer of such products appropriately protects consumers by warning them

about the hazards presented by the product. The alternative safer design rule balances these interests by precluding consumers from recovering on a design defect theory only where a manufacturer could not have made a safer product. At the same time, the rule does nothing to diminish the manufacturer's duty to warn of unknown hazards presented by inherently dangerous products.

The Legislature is best suited to determine whether products with inherent defects should be prohibited because it can treat products in a consistent manner, whereas leaving the issue to juries would be sure to lead to inconsistent results. *See Warren ex rel. Brassel v. K-Mart Corp*., 765 So. 2d 235, 237 (Fla. 1st DCA 2000) (holding that the sale of carbon dioxide cartridge for a pellet gun should not be held tortious and quoting *Holmes v. J.C. Penny Co*., 133 Cal. App. 3d 216, 219 (1982), for the proposition that imposing liability "would result in a ban on sales by judicial fiat, a ban 'within the purview of the Legislature, not the judiciary'"); *see also Rose v. Brown & Williamson Tobacco Corp*, 855 N.Y.S.2d 119, 125 (N.Y. Sup. Ct. 2008) (whether cigarettes should be sold is a "political decision resting with the legislative branch of the government or with regulators"); *Perkins*, 762 F.2d at 1274 n. 68 ("the jury should not be able to speculate on whether handguns are beneficial to society; that is a policy matter for the legislature to decide"); *Gunsalus v. Celotex Corp.*, 674 F. Supp. 1149, 1158-59 (E.D. Pa. 1987) ("whether products should be banned or whether absolute liability should be imposed for their use are determinations more appropriately made by the legislative branch of government"); *Patterson,* 608 F. Supp. at 1216 ("the question of whether handguns can be sold is a political one, not an issue of products liability law . . . this is a

matter for the legislatures, not the courts"); *see generally* David G. Owen, *Inherent Product Hazards*, 93 Ky. L.J. 377, 382 (2004-05) ("[T]he vast majority of courts have been markedly unreceptive to the call that they displace markets, legislatures, and governmental agencies by decreeing whole categories of products to be outlaws.").

For all these reasons, the alternative safer design requirement constitutes sound public policy.

C. Imposing Liability On Cigarette Manufacturers In The Absence Of An Alternative Safer Design Is Barred By the Federal Doctrine Of Conflict Preemption

In this case, the need to show that an avoidable defect was a cause of the plaintiff's injury is not simply a requirement of Florida law, it is also independently compelled by the federal law of conflict preemption.

The doctrine of conflict preemption precludes state-law claims that stand as an obstacle to "the accomplishment and execution of important . . . federal objectives." *Geier v. American Honda Motor Co.*, 529 U.S. 861, 881-82 (2000). The U.S. Supreme Court has held that Congress directed that no law or action is permitted that would, in effect, remove cigarettes from the market simply because of their known health risks:

> *Congress, however, has foreclosed the removal of tobacco products from the market.* A provision of the United States Code currently in force states that "[t]he marketing of tobacco constitutes one of the greatest basic industries of the United States with ramifying activities which directly affect interstate and foreign commerce at every point, and stable conditions therein are necessary to

> the general welfare." More importantly, Congress has directly addressed the problem of tobacco and health through legislation on six occasions since 1965. When Congress enacted these statutes, the adverse health consequences of tobacco use were well known, as were nicotine's pharmacological effects. *Nonetheless, Congress stopped well short of ordering a ban . . . .* Congress' decision to regulate labeling and advertising and to adopt the express policy of protecting "commerce and the national economy . . . to the maximum extent" reveal its intent that tobacco products remain on the market. Indeed, the collective premise of these statutes is that cigarettes and smokeless tobacco will continue to be sold in the United States. *A ban of tobacco products by the FDA would therefore plainly contradict congressional policy*.

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 137-39 (2000) (emphases added) (citations omitted).

The Court of Appeal in this case correctly recognized the doctrine of conflict preemption when it held that the trial court erred in permitting Davis to proceed on the theory that Liggett was negligent in continuing to sell cigarettes after it became aware of the health effects of smoking. 973 So. 2d at 472-74. The court noted that this theory "would necessitate all manufacturers from refraining *[sic]* from producing cigarettes because they all pose significant danger to the health of smokers." *Id.* at 472. Citing *FDA*, the court held that the theory was barred by conflict preemption because "to allow this claim would be contrary to Congress' intent to protect commerce and not to ban tobacco products." *Id.* at 472-73. The court was correct in this holding, but failed to recognize that the doctrine of conflict preemption likewise bars a design claim that is not founded on an

alleged safer design. Such a design claim, like the negligence claim that the court rejected, amounts to a claim that cigarette companies should refrain from selling cigarettes because "they all pose significant danger to the health of smokers." *Id.* at 472.

Indeed, courts across the country have recognized that the Congressional policy against "the removal of tobacco products from the market" prohibits imposition of liability on a design claim in the absence of proof of a safer alternative design that would have prevented the plaintiff's injuries. *See Jeter ex rel. Estate of Smith v. Brown & Williamson Tobacco Corp.*, 294 F. Supp. 2d 681, 685 (W.D. Pa. 2003) ("Plaintiff avers that cigarettes are "unreasonably dangerous" because they contain carcinogens and nicotine, both of which are inherent characteristics present in all cigarettes. Therefore, Plaintiff's claims are impliedly preempted because, if allowed to stand, it would essentially render selling or manufacturing a cigarette to be a tort, thereby interfering with "Congress's policy in favor of keeping cigarettes on the market.") (citation omitted), *aff'd on other grounds*, 113 Fed. Appx. 465 (3d Cir. 2004); *Conley v. R.J. Reynolds Tobacco Co.*, 286 F. Supp. 2d 1097, 1108 (N.D. Cal. 2002) ("If, however, in this action liability is imposed based on a design defect in cigarettes *that is scientifically and commercially feasible to remove* from the cigarettes that the decedent smoked, plaintiffs' claim will not be preempted . . .") (emphasis added); *see also Cruz Vargas v. R.J. Reynolds Tobacco Co.*, 218 F. Supp. 2d 109, 117 (D.P.R. 2002), *aff'd on other grounds*, 348 F.3d 271 (1st Cir. 2003); *Insolia v. Philip Morris Inc.*, 128 F. Supp. 2d 1220, 1225 (W.D. Wis. 2000); *Prado Alvarez v. R.J. Reynolds*

Tobacco Co., 313 F. Supp. 2d 61, 67-69 (D.P.R. 2004), *aff'd on other grounds*, 405 F.3d 36 (1st Cir. 2005); *Williams v. Philip Morris Cos.*, No. 7539/02, Order, at 2 (N.Y. Sup. Ct. May 1, 2003); *Mash v. Brown & Williamson Tobacco Corp.*, No. 4:03CV0485, 2004 WL 3316246, at *6 (E.D. Mo. Aug. 26, 2004).

II. THE COURT SHOULD ADOPT THE ALTERNATIVE SAFER DESIGN REQUIREMENT FROM THE RESTATEMENT (THIRD) TORTS § 2(b) IF IT BELIEVES DOING SO IS APPROPRIATE TO CLARIFY FLORIDA'S DESIGN DEFECT LAW

It is not necessary for this Court to reach the certified question of whether Florida should adopt Restatement (Third) of Torts § 2(b) because, as demonstrated above, it is clear that proof of the existence of a feasible alternative safer design that would have prevented plaintiff's harm is an essential element of a strict liability design defect claim under Florida law. A holding that proof of an alternative safer design is necessary in a design defect claim is sufficient to dispose of this case, and to provide guidance to future courts adjudicating other product liability actions.

In any event, Section 2(b) of the Restatement (Third) expressly mandates an alternative feasible design requirement in design defect cases. Liggett does not oppose adoption of Section 2(b)'s articulation of the alternative safer design requirement, which is consistent with current Florida law.[11] Section 2(b) provides as follows:

[11] Liggett's position with respect to Section 2(b) should not be misconstrued as a general endorsement of the Restatement (Third), which contains several provisions that are contrary to existing Florida law.

> A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:
>
> * * *
>
> (b) is defective in design when the foreseeable risks of harm posed by the product *could have been reduced or avoided by the adoption of a reasonable alternative design* by the seller or other distributor, or a predecessor in the commercial chain of distribution, *and the omission of the alternative design renders the product not reasonably safe*;
>
> * * *

Restatement (Third) of Torts § 2(b) (emphases added). This section confirms the general rule that an alternative safer design is an essential element of a design defect claim. *See, e.g.*, *Clinton v. Brown & Williamson Holdings, Inc.*, 498 F. Supp. 2d 639, 646 (S.D.N.Y. 2007) (citing Restatement (Third) for the proposition that an alternative safer design is required); *Hernandez v. Tokai Corp.*, 2 S.W.3d 251, 257-62 (Tex. 1999) (Restatement (Third) "makes a reasonable alternative design a prerequisite to design-defect liability, as does the law in most jurisdictions"). This section, like comment i to Section 402A of the Second Restatement, reflects the fact that that "courts have not imposed liability for categories of products that are generally available and widely used and consumed, even if they pose substantial risks of harm." Restatement (Third) of Torts § 2 cmt. d.

As described by the Reporters to the Restatement, Section 2(b)'s requirement of a feasible alternative safer design reflects the input and deliberation

of many distinguished judges, scholars, and practicing attorneys and accurately captures the majority rule with respect to design defect claims. *See* James A. Henderson Jr. and Aaron D. Twerski, "Achieving Consensus on Defective Product Design," 83 Cornell L. Rev. 101 (1998). Adopting the requirement of a feasible alternative safer design reflected in Section 2(b) would constitute good policy and further the goals underlying product liability law for all of the reasons set forth above.

In this case, as the Court of Appeal concluded, plaintiffs did not introduce any evidence that there was a commercially and technologically feasible alternative safer design of the cigarettes at issue, much less that there was an alternative design that plaintiff would have used and that would have avoided plaintiff's injury. Plaintiff only argued in closing that Liggett should have made cigars instead of cigarettes -- with no supporting evidence that the cigarettes at issue could have been designed more safely. As the Court of Appeal held, a contention that a manufacturer should have made an entirely different product does not constitute a contention that an alternative safer design is possible. *See* 973 So. 2d at 474 ("[i]t is common knowledge and requires no citation or expert testimony to understand that cigars are an entirely different product than cigarettes"); *see also City of Philadelphia v. Lead Indus. Ass'n*, Civ. A. No. 90-7064, 1992 WL 98482, at *3 (E.D. Pa. April 23, 1992) (holding that the allegation that defendants should have made zinc pigments instead of lead pigments did not state a design claim and noting that this contention was "akin to alleging a design defect in champagne by arguing that the manufacturer should have made sparkling cider instead. The

challenge is to the product itself, not to its specific design"), *aff'd*, 994 F.2d 112 (3d Cir. 1993).

Because plaintiff presented no evidence of a commercially and technologically feasible alternative safer design to the cigarettes that Davis smoked that would have avoided her injury, the trial court erred in denying Liggett's motion for directed verdict on the design defect claim. The trial court also erred in instructing the jury that it could find cigarettes to be in a "defective condition unreasonably dangerous" for a strict liability design defect claim in the absence of an alternative safer design.

CONCLUSION

The Court should hold that a plaintiff asserting a strict liability design defect claim must allege and prove that an alternative safer design of the product was feasible and that it would have prevented plaintiff's injury. The Court should also remand this case to the Court of Appeal so that it can enter judgment in favor of Liggett based on the finding that plaintiff failed to provide competent proof of a feasible alternative safer design in this case.

Dated: June 10, 2008

Respectfully submitted.

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have, on this 10th day of June, 2008, served a true and correct copy of the foregoing, upon the following counsel of record by U.S. mail, first class postage prepaid, addressed as follows:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure. This Brief is submitted in Times New Roman 14-point font.

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