IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC08-541

LOWER TRIBUNAL NO.: 4D04-3811

LIGGETT GROUP INC.,

Petitioner,

vs.

SCOTT DAVIS, ETC.,

Respondent.
______________________________/

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Davis argues that no Florida case requires a plaintiff to prove an alternative safer design as an element of a strict liability design defect claim, that no such requirement is imposed by Restatement (Second) Torts § 402A (1965), and that such a requirement would be contrary to public policy. Ans. Br. at 16-33.[1] Davis contends that a manufacturer can be liable on a design claim even though it was impossible to design the product in a way that would have prevented plaintiff's injuries. All that is required, under this view, is a jury's determination that the product is "unreasonably dangerous" (Ans. Br. at 20) because the cost of the harm done by products "must be borne by someone" (Ans. Br. at 37). In her view, for example, a water ski manufacturer who made its product as safe as possible could be liable for design "defect" if a jury determines that water skiing is "unreasonably dangerous." Davis is wrong.

This Court's decision in *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976), and Section 402A impose an alternative safer design requirement by requiring that a product be both in a "defective condition" *and* "unreasonably dangerous." Numerous Florida decisions have followed this rule and dismissed cases for failure to prove an alternative safer design. Int. Br. at 16-22. Davis and her amici cannot

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[1] References to "Ans. Br." are to Respondent's Answer Brief On The Merits. References to "Int. Br." are to Petitioner's Initial Brief. References to "Amc. Br." are to the amicus brief submitted in support of Davis.

distinguish any of these decisions. They also cannot cite a single Florida case imposing liability in the absence of proof of an alternative safer design.

Davis does not directly respond to Liggett's arguments for why the alternative safer design requirement furthers public policy and argues instead that the requirement would "immunize from liability" the manufacturers of products that cannot be made safer. This contention is without merit because plaintiffs who are hurt by an inherent danger of a product that is not generally known can bring a failure to warn claim. It also overlooks that tobacco cases routinely proceed on numerous grounds without relying on the radical theory proposed here.

Davis further contends that, contrary to the Fourth District's review of the record, she introduced evidence of an alternative safer design in the form of a tobacco product that cannot be inhaled. The Fourth District correctly held that this "alternative" was effectively a cigar -- and thus a different product. Davis also failed to prove that there was an alternative safer low-tar design for Chesterfield cigarettes that would have prevented her harm.

The Court should confirm that an alternative feasible safer design is an essential element of a design claim and that Davis failed to satisfy this requirement.

I. A DESIGN DEFECT CLAIM REQUIRES PROOF THAT A FEASIBLE ALTERNATIVE SAFER DESIGN EXISTED

A. Florida Law Requires A Showing That The Product Was In A "Defective Condition" And "Unreasonably Dangerous"

Davis erroneously argues that no Florida court has held that proof of an alternative safer design is required for a design defect claim and "all that is required to prove a defect is proof that the product is unreasonably dangerous." Ans. Br. at 17-20.

To the contrary, *West* and Section 402A permit the imposition of liability for design defect only upon proof of a "*defective condition* unreasonably dangerous." Restatement (Second) Torts § 402A (emphasis added). Davis contends that the term "defective condition" is "duplicative" of the term "unreasonably dangerous" and thus meaningless. Ans. Br. at 20. This is contrary to the express instruction in *West* that a plaintiff must prove "the defect *and* unreasonable dangerous condition of the product." 336 So. 2d at 80, 87 (emphasis added). The use of the conjunctive term "and" shows that "defective condition" and "unreasonably dangerous" constitute distinct concepts. *See* John W. Wade, "Strict Tort Liability of Manufacturers", 19 S.W. L.J. 5, 14 (1965) ("Section 402A of the Restatement sets forth *two* requirements for liability -- that the product be in a 'defective condition' *and* that it be 'unreasonably dangerous'") (emphases added). The only plausible reading of this language is that a product must be "unreasonably dangerous" because of some

avoidable "defective condition." Int. Br. at 10-13.[2]

West further makes clear that a product must have an identifiable defect apart from its inherent dangers by stressing that it is insufficient to prove that the injury was caused by the product's dangerousness; rather, plaintiff must identify "a *defect* that causes injury . . . ." 336 So. 2d at 86 (emphasis added); *see also id*. (no recovery "when the injury is in no way attributable to a *defect*") (emphasis added); *Barati v. Aero Indus.*, 579 So. 2d 176, 177 (Fla. 5th DCA 1991) (requiring proof that "the *defect* in the product was the proximate cause of the injuries") (emphasis added; citations omitted); *see Fenner v. General Motors*, 657 F.2d 647, 650 (5th Cir. 1981) (Florida law requires "evidence that the *defect* caused the accident") (emphasis added).[3]

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[2] This is further confirmed by Florida's Model Jury Instructions, which provide that a product is defective "if by reason of its design the product is in a condition unreasonably dangerous . . . ." Florida Standard Jury Instructions In Civil Cases PL 5 (emphasis added). See Int. Br. at 18.

[3] *Cassisi v. Maytag Co*., 396 So. 2d 1140 (Fla. 1st DCA 1981), does not support Davis' effort to read the phrase "defective condition" out of Section 402A. *See* Ans. Br. at 25. *Cassisi* did speculate in dictum in the process of ruling with respect to a manufacturing defect claim that "[i]t appears that the terms defective and unreasonably dangerous are redundant." 396 So. 2d at 1144. However, the court based this statement on the mistaken belief that it was the phrase "unreasonably dangerous" -- and not the phrase "defective condition" -- that was added to Section 402A to "foreclose the possibility" that liability could be imposed on inherently dangerous products. *Id.* Moreover, notwithstanding this error, it is apparent that the court believed that liability could not be imposed on products that do not have an alternative safer design: "one who is injured while using a perfectly made axe or

Contrary to Davis' assertion that "nothing" written by Deans Prosser and Wade "supports the proposition that a plaintiff must establish the existence of a safer design" (Ans. Br. at 23, 24), both explained that the phrase "defective condition" was added to Section 402A to require that there be something "wrong" with the product and to "forestall" the possibility that liability could be imposed because certain products such as whiskey have inherent dangers. Int. Br. at 13-15; *see also* Proceedings of the 38th Annual Meeting of the American Law Institute, at 87-88 (1961) (Dean Prosser: "[T]he fact that the product itself is dangerous, *or even unreasonably dangerous*, to people who consume it is not enough. There has to be something wrong with the product.") (emphasis added). Deans Prosser and Wade cannot be dismissed as merely "opin[ing]" about the meaning of Section 402A (Ans. Br. at 23) because, as the primary draftspersons of Section 402A, they are uniquely qualified to explain its proper interpretation. *See, e.g., Auburn Machine Works Co. v. Jones*, 366 So. 2d 1167, 1170 (Fla. 1979) (noting that Wade's article is "persuasive").[4]

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knife would have no right to a strict liability action against a manufacturer *because the product that injured him was not defective*." *Id.* at 1143 (emphasis added).

[4] To be sure, Dean Wade listed the degree of difficulty in designing the product more safely to be one of the factors to be considered in his proposed risk-utility test. John W. Wade, "On the Nature of Strict Tort Liability for Products, 44 Miss. L.J. 825, 837 (1973). Contrary to Davis' assertion (Ans. Br. at 18), there is nothing inconsistent with holding that the existence of an alternative safer design is a foundational requirement for all design defect claims and that, once that foundation is established, the degree of difficulty of making that design may be considered in determining

Comment i supports this reading of 402A. The point is not that comment i provides a categorical exemption for cigarettes (Ans. Br. at 26-27), but rather that it recognizes that "[m]any products cannot possibly be made entirely safe for all consumption" and that such products are not defective merely because they caused harm. Restatement (Second) Torts §402A, cmt. i. Liability applies "only where the *defective condition* of the product makes it unreasonably dangerous . . . ." *Id.* (emphasis added).

Numerous courts applying Florida law have rejected design defect claims in the absence of an alternative safer design for the product. Int. Br. at 19-26 (collecting cases); *see also St. Cyr. v. Flying J. Inc.*, No. 3:06CV13 J33TEM, 2006 WL 2175662, at *4-5 (M.D. Fla. July 31, 2006) (design claim as to propane failed because "there is nothing indicating that the propane was in a defective condition due to a design"). The Fourth District did not discuss these decisions, instead mistakenly concluding that such decisions did not exist. 973 So. 2d at 475-76. Davis' amici do not attempt to distinguish them (Amc. Br. at 12 n.11) and Davis attempts to explain away only the gun cases by suggesting, without reference to any specific language, that the courts found guns non-defective because they have utility to society and people are aware of the dangers they present. Ans. Br. at 30. In fact, the courts invoked neither

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whether the product is unreasonably dangerous. *See*, *e.g, Voss v. Black & Decker Manufacturing Co.*, 463 N.Y.S.2d 398, 402-03 (N.Y. 1983) (requiring proof of the existence of an alternative safer design as a foundational requirement yet also considering the "availability" of that design as one factor in risk-utility test).

of those two supposed rationales, instead predicating their holdings on the absence of an alternative design. For example, the court in *Coulson v. DeAngelo*, 493 So. 2d 98, 99 (Fla. 4th DCA 1986), explained that "[t]he essence of the doctrine for strict liability for a defective condition is that the product reaches the consumer with something 'wrong' with it." The court in *Trespalacious v. Valor Corp.*, 486 So. 2d 649, 650 (Fla. 3d DCA 1986), agreed, explaining 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.'" (Citation omitted.)

Ironically, Davis relies on cases that reflect the alternative safer design requirement. For example, *Auburn* (Ans. Br. at 20), also cited in Liggett's opening brief (Int. Br. at 16-17), found Dean Wade's article discussing the meaning of Section 402A persuasive. 366 So. 2d at 1170. The decision noted that a knife is not defective because it cannot be designed more safely without depriving it of utility, while a cutting machine without a guard over the blade is defective because the addition of a guard would make the machine safer without reducing its utility. *Id*.[5] The Court in *Radiation Technology, Inc. v. Ware Construction Co*., 445 So. 2d. 329, 331 (Fla. 1983) (Ans. Br. at 20), cited *Auburn* for the proposition that "an unsafe product,

[5] *Auburn* cannot be distinguished, as Davis suggests (Ans. Br. at 29), on the ground that the dangers of a knife are common knowledge. It is surely also common knowledge that a cutting machine with a rapidly rotating blade is at least as dangerous as -- if not more dangerous than -- a knife.

whether it be characterized as inherently dangerous or unavoidably dangerous, would not necessarily be an unreasonably dangerous product."

None of Davis' other cases are contrary to the alternative safer design requirement. In the cigarette cases that imposed liability on a defect claim (Ans. Br. at 15-16), the courts believed that plaintiffs had proffered evidence of an alternative safer design.[6] Several of the tobacco decisions are irrelevant because they did not discuss the elements of a design claim.[7] And none of the cases involving other products (Ans. Br. at 18) imposed liability in the absence of evidence that an alternative safer design was possible.[8]

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[6] *Philip Morris USA, Inc. v. Arnitz,* 933 So. 2d 693, 698-99 (Fla. 2d DCA 2006) (plaintiff contended that cigarettes at issue included additives that increased their danger); *Ferlanti v. Liggett Group, Inc.*, 929 So. 2d 1172, 1173, 1175-76 (Fla. 4th DCA 2006) (allegations 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'"); *see Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 599 (8th Cir. 2005) (Arkansas law) (characterizing evidence as showing that Pall Mall cigarettes "lacked effective filter technology, which would have reduced the level of carcinogenic tar inhaled").

[7] *Carter v. Brown & William Tobacco Corp.*, 778 So. 2d 932, 939-42 (Fla. 2000) (addressing preemption); *Tune v. Philip Morris Inc.,* 766 So. 2d 350, 353-54 (Fla. 2d DCA 2000) (addressing choice of law issues); *Laschke v. Brown & Williamson Tobacco Co.*, 766 So. 2d 1076, 1078-79 (Fla. 2d DCA 2000) (overturning summary judgment because the court could not determine the basis for the trial court's decision).

[8] *McConnell v. Union Carbide Corp.*, 937 So. 2d 148, 151 (Fla. 4th DCA 2006) (reversing summary judgment for defendant because defendant's marketing literature showed that its product "had 'an intended design'" and plaintiff was entitled to proceed on a failure to warn claim in any event); *Falco v. Copeland*, 919 So. 2d 650, 651-52 (Fla. 1st DCA 2006) (reversing summary judgment in favor of manufacturer of plugs for repairing tires where manufacturer failed to provide steel patches with

As numerous commentators have recognized, the final argument by Davis' amici that the alternative safer design requirement is contrary to the majority rule (Amc. Br. at 14-15) is likewise wrong. *See, e.g.,* 1 M. Stuart Madden, *Products Liability*, § 8.3, at 299 (2d ed. 1988 & 1995 Supp.) ("[T]he majority rule posits that plaintiff cannot establish a prima facie case of defective design without evidence of a technologically feasible, and practicable, alternative to defendant's product . . . . "); J. Henderson and A. Twerski, "Achieving Consensus On Defective Product Design", 83 Cornell L.R. 867, 903-04 (May 1998).[9]

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the plugs and failed to warn that patches should be used); *Force v. Ford Motor Co*., 879 So. 2d 103 (Fla. 5th DCA 2004) (shoulder belt restraint was designed in manner to allow excessive slack); *Sta-Rite Indus. v. Levey*, 909 So. 2d 901 (Fla. 3d DCA 2004) (pump did not contain an automatic shut off switch); *see Tran v. Toyota Motor Corp*., 420 F.3d 1310, 1312-14 (11th Cir. 2005) (belt for passive restraint system should have been positioned differently).

[9] Davis' amici place heavy reliance on an article written by John F. Vargo. Amc. Br. at 15. The article asserts that, among states adopting strict liability as a matter of common law, "only Alabama and Maine have clearly adopted an absolute requirement of the alternative design evidence." John F. Vargo, "The Emperor's New Clothes, The American Law Institute Adorns A 'New Cloth' For Section 402A Products Liability Design Defects-A Survey Of the States Reveals a Different Weave," 26 U. Mem. L. Rev. 493, 536 (Winter 1996). This conclusion is incorrect. *See* Int. Br. at 23-26 (citing cases). Another article cited by amici, Frank J. Vandall, "The Restatement of (Third) of Torts: Products Liability Section 2(B): The Reasonable Alternative Design Requirement", 61 Tenn. L. Rev. 1407 (Summer 1994) (*see* Amc. Br. at 15 n. 17), similarly misstates the law. Vandall interpreted sixteen states as expressly rejecting an alternative safer design requirement, although courts in at least seven of those states -- Illinois, Minnesota, Kentucky, New Hampshire, Texas, Washington, and Wisconsin -- have dismissed claims for lack of alternative design or have since expressly held that the existence of an alternative safer design is required. *See* Int. Br. at 23-26.

B. The Alternative Safer Design Requirement Furthers Public Policy

Davis' proposed claim based on inherent risks of a product is contrary to public policy. It would render manufacturers of products that cannot be made safer insurers of their products and would reduce the incentive to make products safer. Int. Br. at 26-29. It also would give juries the power to determine whether a wide range of discretionary but popular products -- *e.g.*, guns, sports cars, motorcycles -- should not be sold due to their inherent risks. This decision is better made by the Legislature. *Id*. at 28-29.

Davis' only response is that the alternative safer design requirement would "immunize from liability" the makers of products with no alternative safer design and leave injured plaintiffs without a remedy. Ans. Br. at 31. This overlooks the fact that, where a product has inherent risks that are unknown to consumers, someone injured by a product may bring a claim for failure to warn. It also ignores that many plaintiffs have brought claims against tobacco companies without relying on the theory proposed here and some have recovered. Int. Br. at 22.

C. Proof Of An Alternative Safer Design Is Independently Required In Cigarette Cases By The Doctrine Of Conflict Preemption

Davis focuses on the express preemption principles articulated by the plurality in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). *See* Ans. Br. at 39-48. Liggett does not contend that *express* preemption bars a no-defect design claim; rather such a claim is barred by the distinct doctrine of *conflict* preemption. Int. Br.

at 29-32. Unlike express preemption, which applies where the federal government has expressly precluded states from acting, conflict preemption precludes state law claims that stand as an obstacle to the accomplishment of important federal goals. *Geier v. American Honda Motors Co.,* 529 U.S. 861, 881-82 (2000).[10]

When Davis does briefly address conflict preemption, she says only that imposing tort liability on the sale of cigarettes "does not constitute a state imposed ban." Ans. Br. at 45. This argument has been repeatedly and expressly rejected by the U.S. Supreme Court. *Geier v. American Honda Motors,* 529 U.S. at 881-82; *San Diego Bld'g Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) ("regulation can be as effectively asserted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy").[11]

Numerous courts have held that imposing tort liability for the sale of cigarettes absent a showing of an alternative design is preempted because it amounts to holding that cigarette companies should refrain from selling cigarettes. *See* Int. Br. at 31 (collecting cases). This Court should hold likewise.

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[10] The Labeling Act's preemption provision and implied conflict preemption are both currently on appeal before the U.S. Supreme Court in *Altria Group, Inc v. Good*. *See* 128 S. Ct. 1119 (2008).

[11] Indeed, in *Bates v. Dow Agrosciences LLC*, 544 U.S. 431 (2005), an express preemption case cited by plaintiffs (Ans. Br at 46-47), the Court held that any common law fraud or failure to warn claim predicated on the theory that defendant had a duty to provide additional or different information inconsistent with a federal pesticide labeling law would constitute a preempted state-law "requirement."

II. DAVIS FAILED TO PROVE A FEASIBLE SAFER ALTERNATIVE DESIGN THAT WOULD HAVE PREVENTED HER HARM

Davis alternatively contends that she supplied proof of an alternative safer design that would have avoided her injury. Ans. Br. at 32-33. However, the Fourth District correctly concluded that Davis failed to present evidence of such a design. None of the snippets of testimony cited by Davis are to the contrary.

First, Davis relies on the testimony from pathologist Dr. Roggli -- who was held *not* to qualify as a design expert (T896) -- that a tobacco product that is not inhaled (*i.e.*, a cigar) is less dangerous than one that is (*i.e.*, a cigarette) (T895-900, 903-904). However, as the Fourth District correctly noted, "[i]t is common knowledge and requires no citation or expert testimony to conclude that cigars are an entirely different product from cigarettes." 973 So. 2d at 474. This is akin to arguing that an automobile is an alternative safer design for a motorcycle and does not state a claim for design defect. *Kirstein v. W.M. Barr & Co.*, 983 F. Supp. 753, 764 (N.D. Ill. 1997) (mineral spirits are not an alternative design for lacquer thinner because they are "completely different products"); *Philadelphia v. Lead Indus. Ass'n,* Civ. A. No. 90-7064, 1992 WL 98482, at *3 (E.D. Pa. April 23, 1992) (zinc pigments are not an alternative safer design for lead pigments), *aff'd*, 994 F.2d 112 (3d Cir. 1993).[12]

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[12] Moreover, as correctly held by the Fourth District, such a claim would be preempted by federal law in the cigarette context because it is inconsistent with "the federal government's pronouncement that the continued manufacture of cigarettes is a sanctioned activity." 973 So. 2d at 474; *see also* Int. Br. at 29-32.

Second, Davis cites Dr. Roggli's testimony that there is a "dose-response" relationship between tar and lung cancer (T929-931, 934). She also points to testimony from Liggett's expert that Chesterfield cigarettes had higher machine-measured tar yields (on the government's measurement machine) than some other cigarettes (T1698, 1733-42). Critically, however, the undisputed evidence showed that the amount of tar actually delivered to any smoker by a given cigarette "*depends on how they smoke*" (T229) (emphasis added). There was no testimony to support a jury's conclusion that a lower yield cigarette according to the government's machine would have delivered less tar to Davis and thus been safer for her.

Moreover, to prove a design claim, Davis would have had to prove that the design defect proximately caused her injury. *See supra* at 4. This required proof that Davis would have used the alternatively designed product and that the alternative would have prevented her harm. Davis can point to no such proof in light of her concession that the alternative safer design for which she argues -- lowered tar filtered cigarettes -- were in fact available since at least 1952. Ans. Br. at 3; *see* T327-28, 1734. Davis simply chose not to use the alternative. (T327-28, 351, 420-22).

Numerous courts have held that a smoking plaintiff cannot recover on a design claim without proof that the alternatively designed cigarette would have been used and would have prevented the injury. *See, e.g, Labelle ex rel. Labelle v. Philip Morris Inc.*, 243 F. Supp. 2d 508, 522 (D.S.C. 2001); *Insolia v. Philip Morris Inc.*,

128 F. Supp. 2d 1220, 1226 (W.D. Wisc. 2000); *Estate of White ex rel. White v. R.J. Reynolds Tobacco Co.*, 109 F. Supp. 2d 424, 434 (D. Md. 2000); *Cipollone v. Liggett Group, Inc.*, 683 F. Supp. 1487, 1493 (D.N.J. 1988); *Whiteley v. Philip Morris Inc.*, 11 Cal. Rptr. 3d 807, 863-64 (Cal. App. 1st Dist. 2004). This rule is consistent with *West* and should be applied here.

Even if the record were not wholly devoid of evidence from which a jury could have found the existence of an alternative safer design, reversal would be required. The jury was never clearly instructed that proof of an alternative safer design was required, and thus may have based its verdict on the inherent dangers of cigarettes. *See* Int. Br. at 18 n.6. This appears particularly likely since the jury was told that an alternative safer design is a requirement of a negligent design claim and it found for Liggett on that claim. *See id.* [13]

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 the plaintiff's injury. The Court should further hold that Davis failed to offer any such proof here.

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[13] Davis and her amici devote substantial argument to the proposition that the Court should not adopt Restatement (Third) of Torts § 2. Ans. Br. at 34-39; Amc. Br. at 12-20. While § 2(b) reflects the alternative safer design requirement, it is unnecessary for the Court to reach the issue of whether to adopt that section. 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.

Dated: September 5, 2008

Respectfully submitted.

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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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