SUPREME COURT
OF THE
STATE OF CONNECTICUT

S.C. 19310

VINCENT J. BIFOLCK, EXECUTOR OF THE ESTATE OF JEANETTE D. BIFOLCK, AND INDIVIDUALLY,

PLAINTIFF-APPELLANT,

v.

PHILIP MORRIS USA, INC.,

DEFENDANT-APPELLEE.

***AMICI CURIAE* BRIEF OF THE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFF-APPELLANT**

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STATEMENT OF ISSUES

For product liability actions premised on design defects, should this court abandon the ordinary consumer expectation test/modified consumer expectation test; see *Izzarelli v. R.J. Reynolds Tobacco Co.*, 321 Conn. 172 (2016) (majority opinion); and adopt §§ 1, 2(b), and 4 of the Restatement (Third) of Torts, with or without the associated commentary?

INTEREST OF AMICUS CURIAE

The American Association for Justice ("AAJ") is a voluntary national bar association whose members practice in every State, including Connecticut. Since 1946, AAJ members have represented individuals who have been wrongfully injured, including those harmed by unreasonably dangerous products. AAJ members have also represented persons harmed by tobacco products and their families.

AAJ's mission includes the advancement of the law in favor of just compensation of those who have suffered wrongful injury and effective deterrence of such wrongs in the future. In that effort, AAJ has closely followed the development of the law, including the formulation of the Restatements of the Law. AAJ has also filed amicus curiae briefs in the Supreme Court of the United States and in lower courts in support of those seeking legal redress for harms caused by tobacco products. AAJ believes that its experience and nationwide perspective will assist this Court in addressing the certified question before it in this case.[1]

[1] No counsel for a party wrote any part of this brief, and no party or counsel other than AAJ, its members, and its counsel contributed to the cost of the preparation or submission of this brief.

ARGUMENT

AAJ appreciates this Court's invitation to address the question whether to adopt the standards for design defects set out in Restatement (Third) of Torts: Product Liability §§ 1, 2(b), and 4. For the reasons set forth below, AAJ urges this Court to answer No.

AAJ's primary concern with respect to this question is with § 2(b), which states that 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.

In AAJ's view, this requirement that plaintiff produce evidence of a reasonable alternative design of the injurious product as an element of her prima facie design defect case is not a "restatement" of existing law, but is a controversial, pro-defendant change in the law that is inconsistent with the public policy supporting strict products liability, and, as a practical matter, would erect a serious obstacle to many injured plaintiffs with meritorious claims against makers of unreasonably dangerous products.

I. Restatement (Third) § 2(b) Does Not Restate the Law of Products Liability, But Incorporates a Change in the Law Sought by Tort Reform Special Interests.

Restatements of the Law are intended to "contain clear formulations of common law and . . . reflect the law as it currently stands or might appropriately be stated by a court." ALI, Annual Report 2014/2015 at 3, available at https://www.ali.org/news/articles/2014-2015-annual-report/.

The Restatement (Second) of Torts § 402A was clearly the ALI's most successful accomplishment in this regard. Section 402A captured the emerging principle of strict liability for the protection of consumers and workers – making product suppliers accountable for the

unreasonably dangerous condition of products rather than requiring the plaintiff to prove negligent conduct by the defendant. As the ALI stated:

> [P]ublic policy demands that the burden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.

Restatement of Torts (Second) § 402A, comment c.

Connecticut was among the first jurisdictions to adopt § 402A. *See Garthwait v. Burgio*, 153 Conn. 284, 289-90 (1965). About a decade later, the highest court of Maryland could state: "Almost all of the courts of our sister states have adopted the strict liability principles set forth in § 402A of the Restatement (Second) of Torts." *Phipps v. Gen. Motors Corp.*, 363 A.2d 955, 963 (Md. 1976). *See also Berman v. Watergate W., Inc.*, 391 A.2d 1351, 1356 & n.2 (D.C. 1978) (listing 45 states that had adopted strict liability for unreasonably dangerous products subsequent to § 402A).

Restatement (Third) of Torts § 2(b), by contrast, following its promulgation in 1998, has been widely rejected as one of the most controversial and sharply criticized products of the ALI.

As this Court pointed out, § 2(b) has been a source of "substantial controversy." *Potter v. Chicago Pneumatic Tool Co.*, 241 Conn. 199, 216 (1997). That controversy began in the early 1990s as "tort reform" proponents "turned their attention to the American Law Institute (ALI) . . . [and] chose as their standard-bearers two law professors, James A. Henderson, Jr. and Aaron D. Twerski, who had supported legislative tort reform and written extensively in favor of limiting manufacturers' liability for harm caused by their products." Note, *Just What You'd Expect: Professor Henderson's Redesign of Products Liability*, 111 Harv. L. Rev. 2366,

2367 (1998). *See also* Philip H. 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, 1073-74 (1994); Patrick Lavelle, *Crashing into Proof of a Reasonable Alternative Design: The Fallacy of the Restatement (Third) of Torts: Products Liability*, 38 Duq. L. Rev. 1059, 1065-67 (2000) (noting the influence of special interests on this Restatement).

The proposed reasonable alternative design requirement of § 2(b) was "the most hotly debated proposal" at the ALI 1994 membership meeting – so controversial that the membership voted to refer the entire proposed Restatement to the Member Consultative Group. Larry S. Stewart, *The ALI and Products Liability: 'Restatement' or 'Reform'?*, Trial, Sept. 1994, at 29. *See also* 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, 518-36 (1996) (extensively quoting the discussions of § 2(b) at the 1995 membership meeting).

Further controversy arose as scholars and courts determined that the reasonable alternative design requirement in § 2(b) was not a majority or consensus view, as the Reporters claimed, but was a requirement imposed by only a small number of states. *See* Vargo, *supra* at 536-37 (only three states have judicially adopted the alternative design requirement, though five more imposed it in anti-consumer "tort reform" statutes); Frank Vandall, *The Restatement (Third) of Torts: Products Liability Section 2(b): The Reasonable Alternative Design Requirement*, 61 Tenn. L. Rev. 1407, 1428 (1994) ("This requirement is not supported by the majority of the jurisdictions that have considered the question."); Lavelle, *supra* at 1068 ("[T]he very cases cited and analyzed by the Restatement (Third) reporters do not support its broad conclusion.").

This Court's own "independent review of the prevailing common law reveals that the majority of jurisdictions *do not* impose upon plaintiffs an absolute requirement to prove a feasible alternative design." *Potter*, 241 Conn. at 216 (emphasis in orig.). *See also Delaney v. Deere & Co.*, 999 P.2d 930, 946 (Kan. 2000) ("Our own research also reflects that a majority of jurisdictions in this country do not require a reasonable alternative design in product liability actions.").

Moreover, the reasonable alternative design requirement in § 2(b) has been widely viewed as "a tool of tort reform." Andrew F. Popper, *Tort Reform Policy More Than State Law Dominates Section 2 of the Third Restatement*, 8 Kan. J.L. & Pub. Pol'y 38, 39 (Fall 1998). *See also* Larry S. Stewart, *Strict Liability for Defective Product Design: The Quest for A Well-Ordered Regime*, 74 Brook. L. Rev. 1039, 1045 (2009) ("thinly disguised "tort reform'"); Frank J. Vandall, *Constructing a Roof Before the Foundation is Prepared: The Restatement (3rd) of Torts: Product Liability Section (2)(b) Design Defect*, 30 U. Mich. J.L. Reform 261, 261 (1997) ("a wish list from manufacturing America"); Michael V. Ciresi & Gary L. Wilson, *A Misstatement of Minnesota Products Liability Law: Why Minnesota Should Reject the Requirement That a Plaintiff Prove a Reasonable Alternative Design*, 21 Wm. Mitchell L. Rev. 369, 372, n.11 (1995) ("there is real suspicion among some members of the bar that the Restatement (Third) . . . is substantive tort reform under the guise of 'restating' the law.").[2]

II. The Courts of Other States Have Rejected the Design Defect Standard of § 2(b).

The defendants in *Potter* "propose[d] that it is time for this court to abandon the consumer expectation standard and adopt the requirement that the plaintiff must prove the

[2] This perception was so widespread that the Reporters themselves found it necessary to publish an article denying that the Restatement was a "'tort reform' project." *See* James A. Henderson, Jr. & Aaron D. Twerski, *The Politics of the Products Liability Restatement*, 26 Hofstra L. Rev. 667, 686 (1998).

existence of a reasonable alternative design in order to prevail on a design defect claim." 241 Conn. at 215. This Court "decline[d] to accept the defendants' invitation." *Id.*

AAJ submits that nothing has developed to alter this Court's view. Indeed, the courts of a number of states have followed this Court's lead in *Potter* and have rejected § 2(b). For example, the court in *Delaney v. Deere & Co.*, 999 P.2d at 946, noting that § 2(b) has been "harshly criticized" and does not reflect the majority rule, rejected defendant's suggestion that the court adopt the reasonable alternative design requirement as "contrary to the law in Kansas." *Id.* In *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727 (Wisc. 2001), the Supreme Court of Wisconsin, "troubled by the fact that § 2(b) sets the bar higher for recovery in strict products liability design defect cases than in than in comparable negligence cases," decided that "[t]his court will not impose such a burden on injured persons." *Id.* at 751-52.

The Supreme Court of New Hampshire similarly rejected a proposal to adopt § 2(b) in *Vautour v. Body Masters Sports Industries, Inc.*, 784 A.2d 1178 (N.H. 2001). The court noted, as did this Court in *Potter*, that "a reasonable alternative design requirement would impose an undue burden on plaintiffs because it places a 'potentially insurmountable stumbling block in the way of those injured by badly designed products.'" *Id.* at 1182-83 (quoting Note, *supra*, 111 Harv. L. Rev. at 2373).

In *Halliday v. Sturm, Ruger & Co.*, 792 A.2d 1145 (Md. 2002), Maryland's highest court noted that § 2(b) "has attracted considerable criticism and has been viewed by many as a retrogression, as returning to negligence concepts and placing a very difficult burden on plaintiffs." *Id.* at 1154. The court also noted the broad perception that this provision represents "an unwanted ascendancy of corporate interests under the guise of tort reform." *Id.* at 1154-55. The Illinois Supreme Court also expressly declined to adopt this Restatement provision.

Mikolajczyk v. Ford Motor Co., 901 N.E.2d 329, 345 (Ill. 2008). *See also Guilbeault v. R.J. Reynolds Tobacco Co.*, 84 F. Supp. 2d 263, 277 (D.R.I. 2000) (rejecting defense argument that Rhode Island has adopted § 2(b)); *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 65 (Mo. 1999) ("This Court again declines the invitation to adopt the reasonable alternative design/risk-utility theory.").[3]

There is no reason for this Court to reject is prior well-considered ruling. Restatement (Third) of Torts continues to be controversial. It continues to lack significant support among state courts. And it continues to be viewed as a drastic change in Connecticut law in favor of special interests.

III. The Reasonable Alternative Design Requirement Imposes an Undue Burden on Injured Plaintiffs.

This Court in *Potter* declined to adopt a tentative draft form of the Restatement (Third), in part, because it would require proof of a reasonable alternative design in all cases and without exception. 241 Conn. at 217-19. The Court instead held that, under the modified consumer expectations test, the availability of a reasonable alternative design was but one factor for the jury to consider. *Id.* at 221.

The *Potter* Court specifically highlighted two areas of concern. First, this Court was dissatisfied that expert testimony would be required in every case, including those in which a jury could infer the existence of a defect from circumstantial evidence. 241 Conn. at 217-18. Second, the court observed that some product designs should be considered unreasonably dangerous, even if no reasonable alternative design existed. *Id.* at 219.

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[3] Only one state supreme court has adopted Restatement (Third) § 2 as the law of the state. *See Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 169 (Iowa 2002). The court did so in the context of precluding cigarette companies from relying on a dictum in § 402A, comment i, that "good tobacco" would not be unreasonably dangerous, unless defendant added a foreign substance, such as marijuana. *Id.* at 170.

Justice Zarella's concurrence in *Izzarelli v. R.J. Reynolds Tobacco Co.*, 321 Conn. 172 (2016), stated that subsequent changes in the Final Draft "resolve[] *Potter's* stated concerns by incorporating appropriate exceptions to the reasonable alternative design requirement and by making clear that expert testimony is not required in all cases to satisfy this obligation." *Id.* at *17 (Zarella, J., concurring) (citing Restatement (Third) of Torts § 3, § 4(a), and § 2 cmt. e).

Section 3 provides that a jury can find liability "without proof of a specific defect, when the incident that harmed the plaintiff: (a) was of a kind that ordinarily occurs as a result of product defect." Section 4 allows a plaintiff to establish a defect by showing that defendant's design violated statutory or regulatory standards. Comment e of § 2 permits a finding of liability for products that are highly dangerous but have low social utility, even if no reasonable alternative design exists.

It is true that these exceptions to the reasonable alternative design requirement would assist some plaintiffs. However, they do not alter this Court's considered view that the reasonable alternative design requirement would place an extraordinary burden on plaintiffs in ordinary product design defect cases:

> "[T]he proposed standard requires the plaintiff to put on a case to the judge supporting a product the defendant did not make. Only then will the plaintiff be permitted to place the merits of his or her case before the jury. Worse yet, due to the added cost and risk of a directed verdict, some plaintiffs with meritorious claims will not reach the jury, and others may not find representation at all."

Potter, 241 Conn. at 217, n.12 (quoting Corboy, *supra*, 61 Tenn. L. Rev. at 1095-96).

Professor Popper agrees with this Court:

> Section 2(b) constitutes an attempt at turning back the clock, employing tort principles that are outdated or reflect the corporate tort "reform" agenda, or both, and forcing plaintiffs to marshal evidence that, in many cases, will require the expenditure of prohibitive sums of money, and, in some others, will be

> unavailable. The result will be that many injury victims will be deterred from pursuing their legal rights.

Andrew F. Popper, *Restatement Third Goes to Court*, Trial, April 1999, at 54, 56.

Other commentators as well have noted that, because of the increased costs to plaintiffs of bringing actions based on defective product design, the alternative design requirement presents the possibility that substantial litigation expenses may effectively eliminate recourse for wrongful injury. *See, e.g.*, Frank J. Vandall & Joshua F. Vandall, *A Call for an Accurate Restatement (Third) of Torts: Design Defect*, 33 U. Mem. L. Rev. 909, 923 (2003) (The alternative design requirement "has increased the price of every products liability case").

Despite the Restatement Reporters' contentions that § 2(b) "does not require the plaintiff to produce expert testimony in every case," and does not "require the plaintiff to produce a prototype in order to make out a prima facie case," Restatement (Third) of Torts § 2 cmt. f, this Court has recognized that, in the real world, "defendants will hold plaintiffs to their burden of showing the alternative design to be reasonable considering the 'overall safety of the entire product.'" *Potter*, at 217, n.12.

As one practitioner has stated:

> [T]he most substantial flaw in the reasonable alternative design requirement is that it will seriously impact the economics of consumer litigation. . . . For suits against manufacturers who produce highly complex products, the reasonable alternative design requirement will often deter the complainant from filing suit because of the enormous costs involved in obtaining expert testimony and building a model of a safer product. . . . [Other plaintiffs] will be deterred from suing the manufacturer because the expenses involved in proving a reasonable alternative design far outweigh his potential award of damages.

Vandall, *supra*, 61 Tenn. L. Rev. at 1425-26 (internal notes omitted). The commentator concludes that "the purpose of the reasonable alternative design requirement is clear. The

purpose is to reduce the number of products suits by substantially increasing the costs of litigation." *Id.* at 1426.

This Court concluded in *Potter* that "the feasible alternative design requirement imposes an undue burden on plaintiffs that might preclude otherwise valid claims from jury consideration." 241 Conn. at 217. This burden is substantially increased by this Court's recent decision to adopt the standards set forth by the United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), which require a stringent showing of reliability of an expert's testimony before its admission into evidence. *See Fleming v. Dionisio*, 317 Conn. 498, 506 (2015).

In federal courts, if a plaintiff relies on expert proof of reasonable alternative design, plaintiffs "inevitably face *Daubert* motions to exclude all or part of the expert testimony they plan to introduce to support their claims. Losing such a motion is devastating to the plaintiff's case, but even when the plaintiff prevails, an additional, and often expensive layer of motion practice, including a very expensive *Daubert* hearing, is added to the case." Gary Wilson; Vincent Moccio; Daniel O. Fallon, *The Future of Products Liability in America*, 27 Wm. Mitchell L. Rev. 85, 102 (2000). The result, the authors conclude, is to make "design defect cases prohibitively expensive and, in most cases, unmaintainable." *Id.* at 103.

The Restatement does not define alternative "design." However, federal courts following *Daubert* have widely held that an expert testifying as to a reasonable alternative design generally must have produced a prototype that can be tested, not only to demonstrate that the safety improvement is feasible, but also is "compatible with the underlying design" of the product and does not interfere with its operation. *Milanowicz v. The Raymond Corp.*, 148 F. Supp. 2d 525, 535 (D.N.J. 2001). *See also Watkins v. Telsmith, Inc.*, 121 F.3d 984, 992

(5th Cir. 1997) (expert testimony that other manufacturers used safety devices in their conveyors was inadmissible without testing such a design on an actual conveyor); *Clark v. Takata*, 192 F.3d 750, 758-59 (7th Cir.1999) (testimony of highly qualified expert that properly functioning seatbelt would have prevented plaintiff's head from striking the roof of the car during accident was properly excluded under *Daubert* because the expert had conducted no tests to verify that opinion); *Dancy v. Hyster Co.*, 127 F.3d 649, 651 (8th Cir. 1997) (where a forklift overturned and crushed the operator's leg, expert testimony that the lift should have had a guard to keep the operator's leg inside the frame was inadmissible because the expert had not constructed or tested a lift with such a device).

In one extreme case, a federal district court excluded the testimony of a plaintiff's expert witness, who had been employed by defendant Black & Decker as a design engineer, that a Black & Decker saw could have been equipped with a guard, because the expert had not produced a testable prototype model incorporating that reasonable alternative design. *Stanczyk v. Black & Decker, Inc.*, 836 F. Supp. 565, 567 (N.D. Ill. 1993). As to plaintiff's objection that the expense of obtaining such testimony and prototype evidence would put justice out of reach of many injured plaintiffs, the district court answered simply, "This is true, but . . . [p]roof of any kind is often expensive to gather." 836 F. Supp. at 568. *See also* Jerry R. Palmer, *General Discussion of the Restatement (Third)*, 8 Kan. J.L. & Pub. Policy 35, 36 (Fall 1998) (pointing to *Stanczyk* as an example of the abuse of the alternative design requirement "that makes our hair stand on end").

Nor is that case an outlier. In *Uzzell v. Yale Materials Handling Corp.*, No. A-3728-07T1, 2009 WL 1286685 (N.J. App. Div. May 12, 2009), for example, Corey Uzzell worked at a Lowe's Home Improvement store and was operating a forklift truck. On a quick turn, the

forklift tipped over on its side. Uzzel reached outside the forklift's cage to steady his fall, resulting in the amputation of two fingers. Plaintiff's forklift design expert testified that the injury could have been prevented by placing a handgrip inside the forklift cage and/or designing the cage to completely surround the operator. The Appellate Division reversed on the ground that the expert had not constructed a model to test either proposed safety improvement. *Id.* at *1.

In addition to construction and testing of an alternative design, courts have also required proof that "the expert has identified and discussed any relevant federal design or performance standards, such as those promulgated by the Occupational Safety and Health Administration (OSHA) or the National Highway Traffic Safety Administration (NHTSA)," as well as "standards published by independent standards organizations, such as the American National Standards Institute (ANSI), Underwriters' Laboratories (UL), the American Society of Mechanical Engineers (ASME), and the American Society for Testing and Materials (ASTM)." *Milanowicz*, 148 F. Supp. 2d at 533.In addition, "Courts should determine whether an expert has supported his conclusions through discussion of the relevant literature, broadly defined" which "may address general design guidelines or rules of thumb, industry practice, developments in industrial design, testing protocols, and design standards for the particular type of product." *Id.*

It is important to keep in mind that all these evidentiary hurdles – and others that defendants will surely urge upon Connecticut courts – are not related to the product that actually injured the plaintiff. Instead, requiring proof of reasonable alternative design as an element of design defect essentially puts a hypothetical product on trial.

This is not to state that reasonable alternative design is not relevant in many, even most, cases. Rather, as this Court has recognized

> [T]he relevant factors that a jury *may* consider include, but are not limited to, the usefulness of the product, the likelihood and severity of the danger posed by the design, the feasibility of an alternative design, the financial cost of an improved design, the ability to reduce the product's danger without impairing its usefulness or making it too expensive, and the feasibility of spreading the loss by increasing the product's price.

Potter, 241 Conn. at 221. In any specific case, some considerations placed before the jury will be more important than others. For that reason, as the Colorado Supreme Court stated, "flexibility is necessary to decide which factors" may be relevant. *Armentrout v. FMC Corp.*, 842 P.2d 175, 184 (Colo.1992). The New Hampshire Supreme Court rejected § 2(b) because "the rigid prerequisite of a reasonable alternative design places too much emphasis on one of many possible factors that could potentially affect the risk-utility analysis." *Vautour*, 784 A.2d at 1182-84. This Court should do the same.

IV. Requiring Proof of Reasonable Alternative Design as an Element of Plaintiff's Prima Facie Case of Design Defect Offends the Policies Underlying This Court's Adoption of Strict Products Liability.

The policies that underpin strict products liability, as set forth in Restatement of Torts (Second) § 402A, comment c, quoted at the beginning of this brief, declare that those who market products and profit by their sale must be held to the knowledge of experts in the field, must provide the maximum protection against harm to their consumers, and must be required to spread the costs of injuries by obtaining insurance against them. *See Wagner v. Clark Equip. Co.*, 243 Conn. 168, 194 (1997) ("The doctrine [of strict products liability] represents a policy decision that the burden of injuries brought about by a defective product should not be placed upon the individual who uses the product, but, rather, should be borne by the

manufacturer or supplier."). The mandatory reasonable alternative design requirement transgresses these important state policies.

First, the reasonable alternative design requirement places the burden of having the knowledge of a design expert upon the plaintiff, rather than upon the manufacturer or supplier. The notion that an injured consumer or worker must design and test a safer machine or toy or medicine than the defendant before being allowed to show the jury that the defendant's product is unreasonably dangerous ignores the policies underlying this Court's product liability jurisprudence.

Second, requiring plaintiffs to demonstrate a reasonable alternative design in addition to prevailing on the risk-utility analysis requires a plaintiff in a strict liability action to make a much greater showing of fault than would be required of a plaintiff in an ordinary negligence suit. This clearly offends the public policy of *removing* the problematic requirement that an injured plaintiff demonstrate lack of due care on the part of the product manufacturer.

Third, the inevitable result of requiring proof of reasonable alternative design, thereby increasing the expense of bringing suit, will be to shift more losses to the shoulders of consumers. This is counter to the strict liability principle that such losses should rest on the manufacturer, who can market a safer product and/or obtain insurance to compensate those who suffer injury.

Fourth, because the reasonable alternative design requirement will increase the costs of access to the courts for the victims of dangerous products, many potential plaintiffs will simply forego bringing suit to hold manufacturers accountable for unreasonably dangerous products. As a result, responsibility will not be placed on those who can best reduce the

hazards of dangerous products, resulting in greater product hazards for all consumers and workers.

Finally, the reasonable alternative design requirement offers a loophole through which defendants may seek to escape liability for harm caused by clearly dangerous products. This Court need look no further than this case, where plaintiff alleges that Philip Morris manipulated the levels of nicotine in its cigarettes and added a variety of harmful chemicals to them. Under § 2(b) it is at best uncertain whether plaintiff might be able to prove that the risk of cancer "could have been reduced or avoided by the adoption of a reasonable alternative design." Cigarettes unquestionably cause cancer. However, requiring the plaintiff in this case to prove that if Philip Morris had not manipulated the levels of nicotine in Marlboro and Marlboro Lights plaintiff would not have developed cancer is to demand speculation. Moreover, such proof is hardly relevant to whether the cigarettes which *did* kill Jeanette Bifolck were unreasonably dangerous. Yet, as this Court very recently stated, "it would be contrary to the public policy of this state to . . . immunize a manufacturer from liability for manipulating the inherently dangerous properties of its product to pose a greater risk of danger to the consumer." *Izzarelli*, 321 Conn. 172, at *16.

AAJ submits that this Court in *Potter* and *Izzarelli* properly addressed and adjusted for the concerns presented by the consumer expectations test. There is no reason to abandon that test where the evidence supports its application. There certainly is no basis for abandoning that standard in favor of § 2(b) of the Restatement (Third) of Torts, which demands that plaintiffs in product design cases prove not only negligence, but also reasonable alternative design.

As the Supreme Court of Montana has stated, "Strict liability without regard to fault is the only doctrine that fulfills the public interest goals of protecting consumers, compensating the injured, and making those who profit from the market bear the risks and costs associated with the defective or dangerous products which they place in the stream of commerce." *Sternhagen v. Dow Co.*, 935 P.2d 1139, 1147 (Mont. 1997) (rejecting the Restatement (Third) state of the art defense). AAJ asks this Court to agree.

CONCLUSION

For the foregoing reasons, AAJ urges this Court to answer the question whether to adopt Restatement (Third) of Torts §§ 1, 2(b), and 4 in the negative.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 2016, one copy of the Brief of the American Association for Justice as Amicus Curiae in Support of the Plaintiff-Appellant, has been sent to each counsel of record in compliance with Section 62-7 and to any trial judge who rendered a decision that is the subject matter of the appeal.

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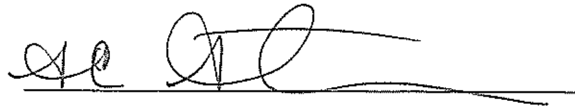

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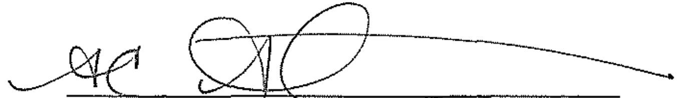
CERTIFICATE OF COMPLIANCE

This is to certify that the original and copies of the Brief of the American Association for Justice as Amicus Curiae in Support of the Plaintiff-Appellant filed with the appellate clerk are true copies of the brief that was submitted electronically pursuant to Rule of Appellate Procedure § 67-2(j). This is to further certify that the Brief of the American Association for Justice as Amicus Curiae in Support of the Plaintiff-Appellant does not contain any names or other identifying information that is prohibited from disclosure by rule, statute, court order, or case law pursuant § 67-2(*i*)(3); and the brief complies with all provisions of this rule pursuant to § 67-2(*i*)(4).



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