SUPREME COURT
STATE OF CONNECTICUT

S.C. 19232

BARBARA A. IZZARELLI,

Plaintiff-Appellant,

v.

R. J. REYNOLDS TOBACCO CO.,

Defendant-Appellee.

Certified Question of Law from the
United States Court of Appeals for the Second Circuit,
Case Nos. FED2CV110003865S, FED2CV110003890S

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

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STATEMENT OF ISSUES

Does comment i to section 402A of the Restatement (Second) of Torts preclude a suit premised on strict products liability against a cigarette manufacturer based on evidence that the defendant purposefully manufactured cigarettes to increase daily consumption without regard to the resultant increase in exposure to carcinogens, but in the absence of evidence of any adulteration or contamination?

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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 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 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]

ARGUMENT

THE "GOOD TOBACCO" EXAMPLE SET FORTH IN *RESTATEMENT (SECOND) OF TORTS* § 402A, COMMENT I, DOES NOT PRECLUDE A FINDING THAT CIGARETTES MANUFACTURED BY DEFENDANT ARE UNREASONABLY DANGEROUS.

In *Garthwait v. Burgio*, 153 Conn. 284, 289-90, 216 A.2d 189, 192 (1965), this Court became one of the first jurisdictions to adopt *Restatement (Second) of Torts* § 402A (1965), imposing strict liability for harms caused by defective, unreasonably dangerous products. *See Potter v. Chicago Pneumatic Tool Co.*, 241 Conn. 199, 214, 694 A.2d 1319, 1330 (1997). In addition, this Court adopted the "consumer expectation" standard set out in comment i as

[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.

the test for determining whether a product is unreasonably dangerous. *Id*. at 215, 694 A.2d at 1330; *Wagner v. Clark Equip. Co.*, 243 Conn. 168, 189, 700 A.2d 38, 50 (1997).

Comment i provides, in pertinent part:

> The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. *Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous.*

Restatement (Second) of Torts § 402A, cmt. i (emphasis added). The certified question before this Court asks whether comment i, and specifically the "good tobacco" example, "preclude[s] a suit premised on strict products liability against a cigarette manufacturer based on evidence that the defendant purposefully manufactured cigarettes to increase daily consumption without regard to the resultant increase in exposure to carcinogens, but in the absence of evidence of any adulteration or contamination?"

AAJ respectfully submits that the answer must be No.

A. The "Good Tobacco" Example Does Not Reflect the Weight of Authority Among American Courts.

The American Law Institute promulgates the *Restatements of the Law* as "scholarly work to clarify, modernize, and otherwise improve the law." *Restatements of the Law* are intended to "contain clear formulations of common law and . . . reflect the law as it presently stands or might plausibly be stated by a court." ALI, *Annual Report 2012/2013* at 3, *available at* http://www.ali.org/doc/ALI_annual-report-2013.pdf.

In adopting principles set out in the *Restatement* as controlling under Connecticut's law of strict products liability, this Court deemed most persuasive those principles that reflect the considered weight of authority among American courts. The Court in *Garthwait v. Burgio*, 153 Conn. 284, 287, 216 A.2d 189, 191 (1965), for example, adopted section 402A in part because it reflected the decisions by the majority of courts, recognizing strict liability without privity of contract. *See also Rossignol v. Danbury School of Aeronautics, Inc.*, 154 Conn. 549, 560, 227 A.2d 418, 423 (1967) ("In accepting the principles adopted by the American Law Institute as contained in the *Restatement (Second) of Torts*, we find ourselves in accord with the great majority of jurisdictions which have recently considered the problems arising out of products liability litigation."). Conversely, this Court rejected *Draft Restatement (Third) of Torts: Products Liability* § 2(b) (1995), which would have required plaintiffs to establish the availability of an alternative design, pointedly stating that "our 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, 694 A.2d at 1331 (emphasis in original).

It is therefore highly relevant to the certified question in this case that the "good tobacco" example relied upon by RJR was not distilled from the decisions of courts across the country. It was not derived from any decision at all. Researchers examining previously secret tobacco industry documents have concluded that the "good tobacco" example was inserted into comment i at the behest of tobacco industry lobbyists. *See* Elizabeth Laposata, Richard Barnes & Stanton Glantz, *Tobacco Industry Influence on the American Law*

Institute's Restatements of Torts and Implications for Its Conflict of Interest Policies, 98 Iowa L. Rev. 1, 14-30 (2012).[2]

The first two drafts of section 402A, circulated in 1958 and 1960, appeared to impose strict liability, at least implicitly, on sellers of tobacco. *Id*. at 10-11. At the ALI Annual Meeting in May, 1961, Dean Prosser suggested that the *Restatement* make clear that "something must be wrong with the product itself" and that a seller would not be liable for a consumer's allergic reaction. *Id*. at 16. Nevertheless, a member remarked without rebuttal that tobacco would be among the products that "come within 402A." *Id*. at 17.

Shortly after the 1961 Annual Meeting, correspondence among tobacco lawyers expressed concern regarding "an Amendment to the Restatement of Torts which could possibly have adverse [e]ffects on our cigarette-cancer suits." *Id*. at 17. On September 28, the Tobacco Institute Committee on Legal Affairs, which consisted of lawyers from the major tobacco companies and the major law firms that represented tobacco companies and Chaired by H. Thomas Austern of Covington and Burling, met to discuss the draft of section 402A. *Id*. at 19. The Committee viewed the draft as unacceptable to the industry and established a subcommittee to address the matter. *Id*. at 20-21. During the week of December 7, 1961, Austern and the subcommittee met with Dean Prosser to propose changes. *Id*. at 26-27. Three months later, on March 1, 1962, the ALI released Council Draft No. 11, where the "good tobacco" example appeared for first time. *Id*. at 28.

[2] The researchers utilized the over 75 million pages of previously secret tobacco industry documents contained within the Legacy Tobacco Documents Library, which were obtained through a series of lawsuits and have been made public. For a detailed description of the collection, *see* Legacy Tobacco Documents Library, *About the Library*, http://legacy.library.ucsf.edu/about/about_the_library.jsp (last visited July 9, 2014).

The ALI membership approved the draft of section 402A, including the "good tobacco" example, at its March 1962 Annual Meeting and gave final approval in 1964, with no discussion of the origin or rationale for the "good tobacco" example. *Id*. at 29-30. It is clear, however, that it did not originate in the reasoned decisions of courts.[3]

B. The Good Tobacco Example Does Not Preclude Strict Liability of a Cigarette Manufacturer in the Absence of Adulteration or Contamination.

The certified question asks whether comment i precludes a strict liability lawsuit against a cigarette maker "in the absence of evidence of adulteration or contamination."

Of course, the district court in this case did find that RJR added various substances to the tobacco used in its Salem King for the specific purpose of enhancing the effectiveness of nicotine and increasing the smoker's exposure to carcinogens in the smoke. RJR added menthol, making it easier to inhale and attracting younger smokers by "masking the bitter taste of nicotine." *Izzarelli v. R.J. Reynolds Tobacco Co.*, 806 F. Supp. 2d 516, 520-21 (D. Conn. 2011). In addition, RJR also added sugar and ammonia to Salem Kings, both to mask the bitterness of nicotine and to increase its potency. *Id*. at 522-23. The chemical acetaldehyde was also used to cut the harshness of the nicotine and reinforce its effects. *Id*. at 523.[4]

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[3] Significantly, in considering *Restatement (Third) of Torts: Products Liability* § 2 (1998), which most closely parallels section 402A, the ALI membership by voice vote excluded tobacco from comment d, which discusses categories of widely used and consumed, but nevertheless dangerous, products that may inherently pose substantial risk of harm but are not subject to strict liability for defective design. *Id*. at 44-45. *See also Little v. Brown & Williamson Tobacco Corp.*, 243 F. Supp. 2d 480, 491 n.7 (D.S.C. 2001).

[4] Acetaldehyde itself has been found to cause laryngeal tumors in laboratory animals, and EPA has classified acetaldehyde as a Group B2, probable human carcinogen. EPA, *Technology Transfer Network-Air Toxics Website*, http://www.epa.gov/ttn/atw/hlthef/acetalde.html (last visited July 9, 2014).

RJR's use of such additives renders the "good tobacco" proviso inapplicable. *See Little v. Brown & Williamson Tobacco Corp.*, 243 F. Supp. 2d 480, 490-91 (D.S.C. 2001) (RJR's use of additives and technology to manipulate nicotine levels rendered manufactured cigarettes distinct from "good tobacco."); *Carter v. Philip Morris Corp.*, 106 F. Supp. 2d 768, 772 & n.11 (E.D. Pa. 2000) (similar); *Hill v. R.J. Reynolds Tobacco Co.*, 44 F. Supp. 2d 837, 852-53 (W.D. Ky. 1999) (addition of substances beyond those naturally occurring in tobacco disqualify cigarettes as "good tobacco").

Even if Plaintiff had not introduced evidence that RJR added various substances to its tobacco products, comment i would not require the court to hold Salem Kings not unreasonably dangerous as a matter of law. Although a natural substance may become unreasonably dangerous by the addition of foreign matter, comment i also indicates that a product may become unreasonably dangerous to the consumer as a result of the manipulation of naturally occurring substances as well. The crucial distinction is not natural versus foreign, but natural versus manufactured.

Thus, the other example proffered by the ALI in this portion of comment i states: "[B]ad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous." Fusel oil is an alcohol distinct from ethanol that naturally occurs in whiskey, and to a lesser extent in wine and beer, during fermentation. The production of fusel oil can be stimulated or suppressed by selecting certain varieties of yeast and by regulating aeration during the fermentation process. John L. Ingraham, *Understanding Congeners in Wine: How Does Fusel Oil Form, and How Important Is It?*, Wines & Vines (May 2010), *available at* http://www.winesandvines.com/template.cfm?section=features&content=74439.

Low concentrations of fusel oils impart taste to the whiskey. Andy Connelly, *The Science and Art of Whisky Making*, The Guardian, Aug. 27, 2010, *available at* http://www.theguardian.com/science/blog/2010/aug/23/science-art-whisky-making.

It is the craft of the stillman to manipulate the level of fusel oil to produce the distinctive flavor of a Scotch, bourbon, or other whiskey, and "each distillery will take a slightly different fraction so each spirit is chemically different." *Id*.

At higher concentrations, however, fusel oil is toxic to humans. *Id*. Whiskey containing high levels of fusel oil may be deemed unreasonably dangerous, not because it contains adulterants or contaminants, but because its natural properties have been manipulated to pose an increased risk of harm.

Plaintiff in this case introduced evidence that RJR manipulated the level of nicotine delivered to the smoker of Salem Kings in a manner that increased the smoker's exposure to carcinogens beyond that present in natural tobacco. For that reason, courts have held that cigarettes are manufactured products subject to strict liability and not "good tobacco." *See Bougopoulos v. Altria Group, Inc*., 954 F. Supp. 2d 54 (D.N.H. 2013) ("good tobacco" portion of comment i was not applicable where plaintiff alleged that the cigarette manufacturer manipulated the nicotine content of its product); *Hearn v. R.J. Reynolds Tobacco Co.*, 279 F. Supp. 2d 1096, 1104-06 (D. Ariz. 2003) ("T]he plain language of Comment i refers to 'good tobacco,' not good cigarettes."); *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515, 1522 (D. Kan. 1995) ("The cigarettes sold by defendants are manufactured products and, as such, the court finds that they are subject to design, packaging, and manufacturing variations which may render them defective even if the tobacco used in the manufacture was initially unadulterated."); *Rogers v. R.J. Reynolds Tobacco Co*., 557 N.E.2d 1045, 1057 n.8 (Ind. Ct.

App. 1990) ("[A] design defect which renders the product more addictive than it could be . . . may render the cigarette unreasonably dangerous.").

C. Immunity for Tobacco Products as a Matter of Law Is Inconsistent with Connecticut Policy That the Determination That a Product Is Unreasonably Dangerous Is an Issue of Fact for the Jury.

This Court has adopted section 402A and comment i for purposes of Connecticut strict liability law. *See Wagner*, 243 Conn. at 189-90, 700 A.2d at 50. In so doing, this Court has been guided primarily by its own determination that the *Restatement* principle at issue is consistent with this State's policies underlying products liability. Thus, this Court has observed that strict liability as set out in section 402A and adopted by this Court was "based on the public policy of protecting an innocent buyer from harm rather than on the ensuring of any contractual rights." *Rossignol*, 154 Conn. at 559, 227 A.2d at 423 (internal quote omitted). Similarly, this Court adopted comment k to section 402A, concluding that the policy considerations underlying that comment are consistent with the state's own policy that certain products ought not to be found defective or unreasonably dangerous based on the benefit they provide for society, despite their inherent risks. *Vitanza v. Upjohn Co*., 257 Conn. 365, 376-77, 778 A.2d 829, 837 (2001). On the other hand, in *Potter*, 241 Conn. at 217-19, 694 A.2d at 1332, this Court rejected *Draft Restatement (Third) of Torts: Products Liability* § 2(b) (1995), which required that the plaintiff establish the availability of a reasonable alternative design, as inconsistent with the policies underlying strict liability in Connecticut law. *Id*. at 376-77, 778 A.2d at 837.

It is a strong public policy of Connecticut that "[w]hether a product is unreasonably dangerous is a question of fact to be determined by the jury." *Giglio v. Connecticut Light & Power Co.*, 180 Conn. 230, 235, 429 A.2d 486, 489 (1980). The "consumer expectations" standard is one that is best applied by jurors who best represent the common knowledge and

common sense of the community. *See Slepski v. Williams Ford, Inc.*, 170 Conn. 18, 23, 364 A.2d 175, 178 (1975) ("[T]he jury can draw its own reasonable conclusions as to the expectations of the ordinary consumer and the knowledge common in the community at large.").

Other courts have held that the "good tobacco" language does not by itself insulate cigarette makers from strict liability. As one district court has stated, "this Court is aware of no case that has dismissed a cigarette product liability claim solely on the basis of the language contained in comment i" without an analysis of the specific risks alleged and whether those risks were common knowledge. *Guilbeault v. R.J. Reynolds Tobacco Co.*, 84 F. Supp. 2d 263, 272-73 (D.R.I. 2000); *Tompkins v. R.J. Reynolds Tobacco Co.*, 92 F. Supp. 2d 70, 85 n.9 (N.D.N.Y. 2000) (plaintiff entitled to "an opportunity to prove at trial that cigarettes are defective"); *Burton*, 884 F. Supp. at 1522 (refusing to dismiss plaintiff's claim prior to an opportunity to conduct discovery into specific defects). *See also Witherspoon v. Philip Morris Inc.*, 964 F. Supp. 455, 466 (D.D.C.1997) (refusing to dismiss on the basis of the "good tobacco" example, and stating that the "infamous comment (i) following § 402A appears to be on very shaky ground currently.").

CONCLUSION

For the foregoing reasons, the American Association for Justice respectfully urges this Court to answer the certified question in the negative.

Date: July 14, 2014

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE AND SERVICE

This is to certify that this brief complies with the provisions of Practice Book §§ 67-2, 67-3, and 67-7.

This is to also certify that, pursuant to Practice Book § 67-2, a true copy of the foregoing Amicus Curiae Brief of the American Association of Justice was mailed via United Parcel Service for overnight delivery, on this 14th day of July, 2014, to the following:

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