SUPREME COURT

STATE OF CONNECTICUT

S.C. 19310

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

v.

PHILIP MORRIS, INC.

PLAINTIFF'S REPLY BRIEF AND APPENDIX

DAVID S. GOLUB
JONATHAN M. LEVINE
MARILYN J. RAMOS
SILVER GOLUB & TEITELL LLP
184 ATLANTIC STREET
STAMFORD, CT 06901
Tel: (203) 325-4491
Fac: (203) 325-3769
Juris No. 58005

ATTORNEYS FOR PLAINTIFF-APPELLANT VINCENT J. BIFOLCK, EXECUTOR OF THE ESTATE OF JEANETTE D. BIFOLCK AND INDIVIDUALLY

To be argued by:
David S. Golub

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INTRODUCTION

Plaintiff Vincent J. Bifolck submits this Reply Brief in response to the arguments in the briefs of defendant Philip Morris, Inc. ("PM"), and its *amici*, the Product Liability Advisory Council (the "Council") and the Chamber of Commerce (the "Chamber").

ARGUMENT

I. SECTION 402A OF THE RESTATEMENT DOES NOT APPLY TO PRODUCT LIABILITY CLAIMS SOUNDING IN NEGLIGENCE.

A. PM's Contention that the General Assembly, in Enacting the PLA, Created a Single Standard of Liability for All Product Liability Theories of Recovery Ignores Twenty-Five Years of Case Law to the Contrary.

It is PM's core position in response to the first certified question that the General Assembly, when it provided for a single "product liability claim" in the PLA, intended to eliminate the different standards of product liability existing at the common law and to create one new standard of liability for all preexisting common law theories of recovery (including negligence) that includes § 402A's requirements for establishing a product defect. (Def. Br. at 1-2, 8; *see also* Council Br. 3).

PM's position flies in the face of nearly 25 years of contrary case law from this Court interpreting the PLA. This Court has repeatedly held that the consolidation of negligence, strict liability and other common law theories into a single "product liability claim," Gen Stat. § 52-572m, was done to eliminate pleading complexity – not to create new rights. *See Lynn v. Haybuster Manufacturing, Inc.*, 226 Conn. 282, 292 (1993) ("[T]he legislative history of the [PLA reveals] . . . that the legislature was merely recasting an existing cause of action and was not creating a wholly new right for claimants harmed by a product. The intent of the legislature was to eliminate the complex pleading provided at common law: breach of warranty, strict liability and negligence."); *accord Elliot v. Sears,*

Roebuck & Co., 229 Conn. 500, 505 (1994) (same [citing *Lynn*]); *Vitanza v. Upjohn*, 257 Conn. 365, 380-82 (2001) ("important purpose of the act was to 'eliminate the complex pleading provided at the common law'" [citing *Lynn*]); *Gerrity v. R.J. Reynolds Tobacco Co.*, 263 Conn. 120, 127-28 & n.8 (2003) ("the product liability act was designed in part to codify the common law of product liability" [citing *Lynn*]).

This Court has repeatedly held, that absent clear legislative intent to the contrary, the PLA did not alter the common law as it stood at the time of the PLA's enactment. *Vitanza*, 257 Conn. at 380-82; *Elliot,* 229 Conn. at 515. Here, PM concedes that the PLA does not "define standards of fault" (Def. Br. 7, n.1; 13), nor does PM identify any language in the PLA that would suggest any change to the common law elements of negligence. *See LaMontagne v. E.I. DuPont de Nem. & Co.*, 834 F. Supp. 576, 592 (D. Conn. 1993) (since the PLA "is silent on the subject .... it is clear that the requirements of duty, causation and foreseeability applicable to ordinary negligence actions are also applicable to negligence claims against product manufacturers"), *aff'd*, 41 F.3d 846, 855-56 (2d Cir. 1994).

Although PM is well aware of, and expressly cites to and discusses, *Lynn, Elliot* and *Vitanza* in its argument on the second certified question presented by this appeal, (*see* Def. Br. at 24, 26, 30), it ignores this case law directly contrary to its position on the first question. PM does cite the Second Circuit's decision in *LaMontagne*, Def. Br. at 7, 8, 13, but fails to acknowledge the Second Circuit's recognition of the holding in *Lynn:*

> In *Lynn. . .*, the Connecticut Supreme Court stated that the intent of the legislature in enacting the CPLA, was "to eliminate the complex pleading provided at common law: breach of warranty, strict liability and negligence," rather than to "creat[e] a wholly new right," [226 Conn.] at 292, 627 A.2d at 1293, or to eliminate common-law substantive rights, *id.* at 288-89. . . .

41 F.3d at 856, or the Second Circuit's citation to *Restatement (Second) of Torts* § 388 and application of the traditional elements of a common law negligence claim to a post-PLA product liability negligence claim:

> A plaintiff who brings a personal injury suit [based on negligence] against the seller of a product alleged to have caused her harm must establish that a reasonably prudent person in the defendant's position, "knowing what [the defendant] knew or should have known, would anticipate that harm of the general nature of that suffered was likely to result from his act or failure to act." *Coburn v. Lenox Homes, Inc.*, 186 Conn. at 375, 441 A.2d at 624; *see also Restatement (Second) of Torts* § 388 (1965) ("*Restatement*") (supplier of chattel may be liable for physical harm caused by the use of the chattel if it "knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied"); *id.* comment *g* (supplier's duty "is to exercise reasonable care to give to those who are to use the chattel *the information which the supplier possesses,* and which he should realize to be necessary to make its use safe."

Id. (emphasis in original). This Court cited approvingly to these portions of *LaMontagne* in *Potter v. Chicago Pneumatic Tool Co.*, 241 Conn. 199, 245 n. 34 (1997).

B. The Post–PLA Connecticut Cases Cited by PM Do Not Apply § 402A to Product Liability Claims Sounding in Negligence.

As this Court recognized in *Potter*, "§ 402A of the Restatement (Second) of Torts adopted . . . the doctrine of strict tort liability. . . ." 241 Conn. at 209. And, as plaintiff showed in his Opening Brief (pp. 9-10), § 402A appears in a section of the Restatement entitled "Strict Liability," and it explicitly preserves negligence claims, *see* Comment a to § 402A & § 402A(2), which are addressed in separate sections of the Restatement. *See* §§ 388-98. PM does not respond to these important facts.

Instead, it asserts a two-pronged argument, claiming (1) that a "defect" is required to support a cause of action in both negligence and strict liability (Def. Br. 6-8), and (2) that, as a matter of definition, all "actionable defects" must be "unreasonably dangerous," by which it means more dangerous than "ordinary consumers" would expect, as described in comment i to § 402A (*id.* 8-12). Plaintiff agrees that a "defect" must be proved in both negligence and strict liability. Where plaintiff and PM part company is in PM's effort to transplant the "consumer expectation" test – intended to define a defect in strict liability claims – into the definition of "defect" in the negligence area, where it does not belong.

In support of its second argument, PM cherry-picks language from decisions by this and other Connecticut courts that might, upon casual review, appear to support its argument. Def. Br. 6-12. However, a careful analysis shows that the cases PM cites are inapposite, generally because the courts in question are actually referring to the "unreasonably dangerous" language of § 402A in the context of a strict liability claim. Although courts have, on occasion, loosely used the term "product liability" to refer to "strict liability," PM has cited no case in which § 402A's "consumer expectation" test has been applied to a product liability claim grounded in negligence.

PM relies most heavily on *Potter*, 241 Conn. at 220, and *Wagner v. Clark Equipment Co.*, 243 Conn. 168 (1997). Def. Br. 8-9. However, the Court in *Potter* was specifically addressing a design defect case grounded in strict liability. 241 Conn. at 214-26. In *Wagner*, the plaintiff asserted both negligence and strict liability claims; however, the language relied on by PM refers to the strict liability claim. Thus, PM quotes *Wagner* as stating that "[t]he standard to be used in a product liability action for determining

whether a product is defectively designed . . . is *unreasonably dangerous.*" Def. Br. 8 (emphasis in Def. Br.); *see also id.* 10 However, *Wagner,* in fact, stated:

> In [*Potter*], we recently discussed the standard to be used in a product liability action for determining whether a product is defectively designed. "This court has long held that in order to prevail in a design defect claim, 'the plaintiff must prove that the product is unreasonably dangerous.' [*Giglio v. Connecticut Light & Power Co.*, 180 Conn. 230, 234 (1980)]. We have derived our definition of 'unreasonably dangerous' from comment (i) to [2 Restatement (Second) Torts, § 402A], which provides that 'the article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer . . . . *This 'consumer expectation' standard is now well-established in Connecticut strict product liability decisions."* 243 Conn. 189 (emphasis added).

In context, it is clear that the language defendant relies on refers to strict liability. It quotes *Potter*, a strict liability case, and *Giglio*, a case in which the Court explicitly "restrict[ed] our discussion to . . . strict liability in tort" and "express[ed] no opinion as to [plaintiff's] negligence claim," 180 Conn. at 233; and the Court expressly states the consumer expectation test is "well-established in Connecticut strict liability decisions."

Moreover, *Wagner*, in ruling on two evidentiary issues (the admissibility of OSHA safety standards and post-accident modifications to the forklift that caused the injury at issue), painstakingly distinguished between the relevance of the evidence in negligence vs. strict liability claims. The Court held that the OSHA evidence could be admitted in support of both claims, because, for strict liability, it could be relevant to whether the forklift had a "defect," and, for negligence, it was relevant to whether the manufacturer "would be prudent in designing a forklift that meets [OSHA] requirement[s]," which goes to "whether the defendants acted with due care." 243 Conn. at 190-91.

As to the admissibility of post-accident modifications, *Wagner* stressed the different policies underlying negligence (which assesses a defendant's conduct) and strict liability (which focuses on product safety), and concluded that such evidence "is generally not admissible in a negligence action" because it penalizes the manufacturer for taking remedial action; however, it is admissible in a strict liability action because conduct is not at issue and OSHA requirements are directly relevant to design safety. *Id.* at 191-98.

Defendant's remaining cases are similarly inapposite. *Sharp v. Wyatt, Inc.*, 31 Conn. App. 824 (1993), *aff'd*, 230 Conn. 12 (1994), and *Battistoni v. Weatherking Prods., Inc.*, 41 Conn. App. 555 (1996), are both "failure to warn" cases brought under Gen. Stat. § 52-572q, which – unlike the general, consolidated "product liability claim" set forth in §§ 52-572m(b) and 52-572n(a) – provides a statutory claim for a "failure to warn." As the *Sharp* court states, this claim provides specific statutory criteria for determining "[w]hether a product is defective" under the statute, 31 Conn. App. at 834, and those criteria are different from the definition of "unreasonably dangerous" contained in comment i.

Finally, *White v. Mazda Motor of Am., Inc.*, 313 Conn. 610 (2014) is likewise inapposite, because – while it appears that the plaintiff there originally asserted claims grounded in both negligence and strict liability, *id.* at 614-15 – the issue presented to this Court was whether plaintiff, whose expert failed to support his claim that his car had the "defect" specified in the complaint, could revise his claim on appeal to assert a "malfunction" theory. *Id.* at 612. In rejecting plaintiff's belated effort to alter his case, the Court did not refer to plaintiff's negligence theories. Although the Court, as background,

recited the elements of a claim for "product liability" (apparently meaning "strict liability"), it did not address the issue here.[1]

PM also refers to Connecticut's pattern jury instructions for "product liability" actions, which define "defect" in terms of "unreasonable dangerousness" and "consumer expectations." *See* Def. Br. 7, 12 (citing Connecticut's Civil Jury Instructions, § 3:10-1). Of course, Connecticut also provides pattern jury instructions for negligence (Civil Jury Instructions § 3.6-1 *et seq.*), and as shown above, the requirements for a product liability claim grounded in negligence are the same as those for any other negligence claim. Thus, defendant's argument simply begs the question of which set of instructions should be used in a products liability claim grounded in negligence. Obviously, pattern jury instructions do not dictate this Court's decisions; rather, the reverse is true.

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[1] PM also cites two trial court decisions: *Bergeron v. Pacific Food, Inc.*, CV 07 5001992S, 2011 WL 1017872 (Conn. Super. Feb. 14, 2011), and *Faux v. Thomas Indus.*, CV 89 0233934S, 1992 WL 293230 (Conn. Super. Oct. 8, 1992). Although these decisions are obviously not controlling, *Faux* stands mainly for the proposition that negligence claims require proof of a defect (which plaintiff agrees with); the issue of whether such a defect must be "unreasonably dangerous," as that term is used in § 402A, is unclear, *inter alia*, because "[p]laintiff's allegations of liability intermingle concepts of negligence and strict tort liability to such an extent that they are in fact indistinguishable." 1992 WL 293230 at *4. *Bergeron*, involving oysters bearing a naturally occurring contaminant which is harmless to healthy people, primarily involved the question of whether defendant was liable for "failure to warn" pursuant to § 52-572q, as to which the PLA provides a definition of "defect" that is independent of § 402A. *See* § 52-572q(b). However, the court stated, in dictum, that "in any products liability action" the plaintiff must allege a "defect" defined in terms of "unreasonable dangerousness." *Id.* at *3. Plaintiff respectfully submits that to the extent the court meant to import the § 402A definition of "unreasonably dangerous," this was an incorrect statement of the law.

C. References in Pre-PLA Negligence Cases to "Unreasonable" Conduct and "Danger" Do Not Signify Application of § 402A's "Consumer Expectation" Test.

PM, supported by its amicus, the Product Liability Advisory Council, argues that before the adoption of the PLA – and long before the ALI's 1969 promulgation of the "consumer expectation" test in comment i to § 402A – Connecticut courts required product liability plaintiffs asserting negligence claims to prove that product defects were "unreasonable" or "dangerous" or involved "imminent risk of harm" – words similar to the phrase "unreasonably dangerous" used in § 402A. (Def. Br. 13-14; Council Br. 2-4). According to PM and the Council, this indicates that the "consumer expectation" test of § 402A has always been a part of the definition of a defect in a product liability negligence case.

This argument is simply a play on words that misleadingly seeks to conflate the words "unreasonable" and "dangerous" as they may have been used, from time to time, in negligence cases with the term "unreasonably dangerous" as it is used as a legal term of art to denote the "ordinary consumer expectation" test set forth in comment i to § 402A.

Negligence cases generally involve "dangerous" products and turn on a defendant's creation of an "unreasonable" risk of harm, so it is not surprising that PM and the Council have been able find early negligence/product liability cases in which the courts used words like "unreasonable" and "dangerous" to describe actionable defects.[2] But there is no suggestion in these pre-PLA cases that the "dangerousness" of a product should be assessed in terms of "consumer expectations." Rather, in each case, the issue

[2] Contrary to the impression they attempt to convey, none of the cases referred to by PM or the Council actually uses the term "unreasonably dangerous."

was whether the manufacturer of a product acted reasonably in light of a foreseeable risk of harm posed by a defect in its product. Connecticut law – pre- and post-PLA – is clear that a product liability plaintiff asserting a negligence claim must prove the same elements as any other negligence plaintiff: (1) the existence of a duty of care, (2) a breach of that duty giving rise to a defect, and (3) actual harm caused by that breach. *See Coburn v. Lenox Homes, Inc.*, 186 Conn. 370, 372 (1982); *LaMontagne*, 834 F. Supp. at 592 ("[I]t is clear that the requirements of duty, causation and foreseeability applicable to ordinary negligence actions are also applicable to negligence claims against product manufacturers"); *Gugliemo v. Klausner Supply Co., Inc.*, 158 Conn. 308, 318 (1969) ("Broadly speaking, negligence is the failure to conform one's conduct to . . . the common law requirement to exercise reasonable care under the circumstances.").[3]

In short, the issue is not whether words similar to "unreasonably dangerous" have been used to describe a defect in a product liability negligence case, but rather whether those words – or even the phrase "unreasonably dangerous" – have the same meaning in the negligence and strict liability contexts. As the United States Supreme Court has stated in rejecting the notion that legal terms have the same meaning in different legal contexts:

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[3] PM repeatedly, and incorrectly, asserts that plaintiff fails to identify the elements of a negligence/product liability claim. (Def. Br. at 1, 12). *See* Pl. Br. at 7-8 (citing the elements identified above in *Coburn*, as well as the similar elements identified in L. Frumer & M. Friedman, *Products Liability* ("*Frumer & Friedman*"), § 2.02 at 2-11 (2012) ("Whether the underlying basis for negligence . . . is products liability or an automobile accident ... the elements of a negligence cause of action are the same ... (1) a duty of care, (2) breach, (3) causal connection between conduct and injury and (4) actual loss from injury").

> The tendency to assume that a word which appears in two or more legal rules and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs through all legal discussions, it has the tenacity of original sin and must constantly be guarded against.

Civil Aeronautics Board v. Delta Airlines, Inc., 367 U.S. 316, 328 (1961).

D. The Contention that Twenty-Seven of Twenty-Eight Jurisdictions Apply § 402a to Product Liability Negligence Cases Is Erroneous.

PM contends that "courts across the country" have adopted its position here. Def. Br. 11, n.3; *id.* 15-16 (referring specifically to six jurisdictions). However, its amicus, the Chamber of Commerce, makes a far more aggressive claim – the Chamber contends that, based on its own survey, 27 of the 28 jurisdictions "that have addressed the issue directly" require "plaintiffs suing under either a strict liability or negligent design theory to prove that the design was 'unreasonably dangerous.'" Chamber Br. 1-2. The results of this survey are set forth in an Appendix to the Chamber's brief.

The Chamber's survey is deeply flawed and its conclusion about the state of the law in other jurisdictions is simply wrong. The flaws in the survey are more fully set forth in plaintiff's accompanying responsive Appendix; but, to mention some of the more egregious examples: (1) the Chamber relies on cases which have been overruled by later cases or superseded by statute (*e.g.*, Alabama, Illinois, Ohio, Oregon, Pennsylvania); (2) the Chamber ignores contrary authority in many of the states it cites (*e.g.*, Florida, Idaho, Massachusetts, Minnesota, North Dakota, Texas, Utah); (3) the Chamber cites cases which stand for the exact opposite of the proposition it purports to advance (Hawaii, Ohio); (4) the Chamber relies on language, in one case, from a dissenting opinion (Ohio); (5) the Chamber relies on cases in which the definition of "unreasonably dangerous" (*i.e.*,

whether it is used as a strict liability term of art for the "consumer expectation" test or in its negligence sense) either is unclear or clearly refers to a negligence test (*e.g.*, Kentucky, Michigan, North Dakota, South Carolina, Tennessee); and (6) the Chamber fails to clarify whether the states are assessing whether the products at issue are "unreasonably dangerous" under the "ordinary consumer expectation test" or under a risk-utility test.[4]

As to the last point, at least eight jurisdictions cited by the Chamber define "unreasonably dangerous" (either alternatively or exclusively) through the use of risk-utility factors (*e.g.*, Georgia, Iowa, Maryland, Michigan, Mississippi, Ohio, South Carolina, Tennessee). Obviously, these jurisdictions, while they might use the term "unreasonably dangerous" in their analysis, are not referring (or not referring exclusively) to the "consumer expectation" test that PM advocates. Such risk-utility tests are fundamentally at odds with PM's position here, which is that cigarette manufacturers should be able to assert, as a complete defense to both strict liability and negligence claims, the supposed fact that the dangers of cigarettes are "open and obvious." "[A] majority of courts have rejected the notion that the open and obvious danger of a product is an absolute defense to a defective design claim in strict liability." *Calles v. Scripto-Tokai Corp.*, 864 N.E.2d 249, 259 (Ill. 2007), citing *Restatement (Third) Torts*: Products Liability § 2, comment d, pp. 84-85 (identifying 25 jurisdictions that have rejected a *per se* rule). *A fortiori,* it should not provide an absolute defense to a negligence claim, where the central issue is the conduct of the seller.

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[4] Plaintiff's Appendix identifies and corrects the Chamber's many errors. Where plaintiff refers parenthetically in the text above to one or more jurisdictions, the support for plaintiff's statements is set forth in the accompanying Appendix.

Importantly, the Chamber's survey acknowledges that 22 jurisdictions have never held that product liability claims sounding in negligence are subject to § 402A's strict liability requirements, and this is not surprising since as one prominent authority has stated, "[I]n most jurisdictions, negligence remains one of the theories which a plaintiff may utilize to redress any injuries which are alleged to be product-related." *Frumer & Friedman*, § 2.02 at 2-11. Thus, as a general matter, "a jury may find in favor of a defendant on a strict liability claim while finding the defendant negligently designed the product." *Id.*[5]

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[5] *See, e.g., Smith v. Central Mine Equipment Co.*, 559 Fed. Appx. 679, 681 (10th Cir. Mar. 18, 2014) (Oklahoma law: court affirms summary judgment for manufacturer on strict liability because dangers of drill rig were obvious to victim; case submitted to jury on negligent design theory based on lack of deadman switch); *Calles*, 864 N.E.2d at 263-64; *Phillips v. Cricket Lighters*, 576 Pa. 644, 657-58 (2003) (strict liability "focuses solely on the product, and is divorced from the conduct of the manufacturer;" "strict liability was intended to be a cause of action separate and distinct from negligence, designed to fill a perceived gap in our tort law."); *Slisze v. Stanley Bostitch*, 979 P.2d 317, 320 (Utah 1999) (it is "possible to simultaneously bring a negligence and a strict liability claim;" "a manufacturer may act negligently without its product being unreasonably dangerous"); *Davis v. Globe Mach. Mfg. Co.*, 684 P.2d 692, 696 (Wash. 1984) (rejects argument that negligence claim became moot when the jury found the product reasonably safe under the strict liability test: "strict liability and negligence are not mutually exclusive theories of recovery;" "to show negligence, there must be evidence of the existence of a duty, breach of that duty, proximate cause between the breach and injury, and resulting damage"); *Greiten v. LaDow*, 235 N.W.2d 677, 685-86 (Wis. 1975) ("there may be recovery for the negligent design of a product even though it is not unreasonably dangerous in the 402A sense"); *cf. Jimenez v. Sears Roebuck & Co.*, 4 Cal.3d 379, 387 (1971) (rejects argument that lower court should have only instructed on strict liability: "No valid reason appears to require a plaintiff to elect whether to proceed on the theory of strict liability in tort or on the theory of negligence"); *Lavoie v. Pac. Press & Shear Co.*, 975 F.2d 48, 56-57 (2d Cir. 1992) ("Vermont courts permit plaintiffs to bring alternative claims of strict liability and negligence, and have not ruled that strict liability necessarily subsumes negligence."); *Ilosky v. Michelin Tire Corp.*, 172 W. Va. 435, 445 (1983) (court declines to require plaintiff to elect whether to submit strict liability or negligence theories to jury).

E. The Rule Proposed By PM Would Be Contrary to Public Policy.

Adopting PM's construction of Connecticut's product liability law would effectively eliminate product liability claims grounded in negligence. If proof of negligence requires all of the elements of strict liability plus foreseeable fault, no plaintiff will pursue such a claim.[6]

Without a separate negligence claim – with its unique focus on the *conduct* of manufacturers – the consumer expectation test "can result in finding products not to be defective that could easily have been designed safer without great expense or effect on the benefits or functions to be served by the product." Dobbs, Keeton & Owen, *Prosser and Keeton on Torts*, § 99, p. 698 (1984 ed.). To take one common example, a plaintiff injured by an obviously dangerous machine (*e.g.*, a lathe without a hand guard) may be unable to recover on a strict liability theory, even though the injury could be entirely avoided by adding a simple safety guard to the design.[7]

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[6] PM suggests that negligence claims may persist because they offer certain "tactical" advantages. For example, it argues that "[p]roving fault . . . might help plaintiffs establish punitive damages," Def. Br. 17; however, since a defendant's conduct is directly relevant to a punitive damages claim under the PLA, it is unclear why a negligence claim is needed to justify proof regarding conduct. Indeed, proving a negligence claim, would not, in all cases, establish the "reckless disregard for the safety of product users" that is required to establish punitive damages under the PLA. *See* § 52-240b.

[7] *See, e.g.*, *Smith*, 559 Fed. Appx. at 681 (summary judgment for manufacturer on strict liability because dangers of drill rig were obvious); *Orfield v. Int'l Harvester Co.*, 535 F.2d 959 (6th Cir. 1976) (operator injured while driving bulldozer without a protective canopy; verdict on strict liability directed for defendant – despite ease of adding canopy to design – because product was not unreasonably dangerous under consumer expectation test); *Vineyard v. Empire Mach. Co.*, 581 P.2d 1152 (Ariz. Ct. App. 1978) (court granted summary judgment on strict liability because lack of rollover bar on heavy equipment was obvious and the machine was not "unreasonably dangerous" under § 402A).

This concern is particularly acute in cases involving children. While the "ordinary consumer" may recognize a product's dangers, children (and others with diminished capacity) may not. In this case, Jeanette Bifolck, started smoking Marlboro cigarettes as a minor, became addicted, and continued smoking until she developed lung cancer and died at the age of 42. Complaint ¶¶ 5-12. If, as PM argued in its 2012 summary judgment papers,[8] the "ordinary consumer" in this case is found to be an adult smoker, and the jury were to find Marlboros no more dangerous than adult smokers expected, a strict liability claim could be foreclosed under the "ordinary consumer expectation" test described in comment i to § 402A. However, if a negligence cause of action is available, a jury could nonetheless find that PM negligently disregarded an unreasonable risk that underage smokers would be injured by Marlboros which, as alleged in the Complaint (¶¶ 20-26), were designed by PM, in part, to optimize their addictiveness to young smokers.[9]

A case in point is *Talkington v. Atria Reclamelucifers Fabrieken BV*, 152 F.3d 254, 261 (4th Cir. 1998). There, five persons died in a fire caused by a child playing with a cigarette lighter. Plaintiff, asserting negligence and strict liability theories, alleged that the lighter was defectively designed because it lacked a child resistant safety feature. *Id.* 258. Defendant argued that the lighter was not "unreasonably dangerous," because the dangers posed by the flame were consistent with the expectations of adult users of

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[8] *See* PM's Reply In Support of Its Motion for Summary Judgment, filed April 2, 2012 in *Bifolck v. Philip Morris, Inc.*, 3:06-CV-1768-SRU (D. Conn.) at 14-15 (Doc. 140).

[9] It has been judicially determined that PM deliberately marketed to young adolescents. *See United States v. Philip Morris*, 449 F. Supp.2d 1, Findings of Fact ¶¶ 2717-2800, 2893-2917, 3000-3013, 3037-3058, 3089-3099, 3150-3152 (D. D.C. 2006) (detailing PM's youth marketing efforts), *aff'd in part, rev'd in part*, 566 F.3d 1098 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 3501 (2010).

cigarette lighters. The jury found defendant liable for negligent design, but not liable in strict liability. *Id.* 261. Defendant argued this verdict was "fatally inconsistent;" however, the court held that the jury could have concluded that the lighter was "not unreasonably dangerous to the ordinary consumer (an adult) for its intended use (lighting a cigarette)," but nonetheless could have held defendant "negligently failed to exercise due care towards the vulnerable child plaintiffs when it was reasonably foreseeable that serious harm could result from [defendant's] failure to include child-resistant safety features on its lighter." *Id.* 264-65.[10]

If Connecticut were to adopt the rule that a product must be "unreasonably dangerous" (under § 402A) to support a negligence claim, it would reduce manufacturers' incentives to increase safety through simple design improvements, while leaving the most vulnerable members of society unprotected from obviously dangerous products.

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[10] *Accord Griggs v. BIC Corp.*, 981 F.2d 1429, 1438 (3d Cir. 1992); *Calles,* 864 N.E.2d at 263-64 (rejecting argument that if lighter was not unreasonably dangerous for purposes of strict liability [because of the obviousness of the danger], defendant could not be liable for negligent design); *Phillips v. Cricket Lighters*, 576 Pa. 644, 657-62 (2003) (summary judgment on strict liability claim does not foreclose negligent design claim).

II. CONNECTICUT'S COMMON LAW RULE OF PUNITIVE DAMAGES DOES NOT APPLY TO PLA STATUTORY PUNITIVE DAMAGES

A. The Court's Recent Decision in *Hylton v. Gunter* Is Dispositive of the Punitive Damages Issue Presented Here.

On September 9, 2014, this Court, in *Hylton v. Gunter*, 313 Conn. 472, 486-87 & nn. 13&14 (2014), confirmed virtually all of the points made by plaintiff in his Opening Brief. Specifically, the Court confirmed the compensatory purpose of common law punitive damages (*compare* P.'s Br. 22-24); distinguished common law punitive damages from those provided for in statutes (*id.* 24-28); acknowledged the three categories of statutory punitive damages identified by the dissent in *MedVal USAHealth Programs, Inc. v. MemberWorks, Inc.*, 273 Conn. 634, 672 (2005) (Zarella, J. dissenting), including those which, just like § 52-240b, "limit the amount of the award to no more than two times the actual damages incurred," (*id.* 20); and, in summary, stated:

> *Punitive damages under these statutes, particularly under statutes that provide for awards of fees and costs in addition to punitive damages* like CUTPA, see General Statutes § 42-110g, *are distinct from common-law punitive damages because they 'are not intended merely to compensate the plaintiff* for the harm caused by the defendant *but, rather, serve a broader two-fold purpose. First, they foster private enforcement* of unfair trade practices by providing a reasonable incentive to litigate . . . . *Second, they deter the defendant* and others from engaging in future violations of CUTPA.

Hylton, 313 Conn. at 486, n. 14 (emphasis added) (citing *MedVal USA*, 273 Conn. at 673 and *Ulbrich v. Groth*, 310 Conn. 375, 450-51 (2013)). These conclusions dovetail perfectly with the arguments made by plaintiff in his Opening Brief. *See* P.'s Br. 16-33.

Plaintiff believes *Hylton* is dispositive of the second certified question. Although PM filed its opposing brief on December 3, 2014 – almost three months after the Court

issued its decision in *Hylton* – it does not even mention, much less attempt to distinguish the case.

B. The Second Certified Question Is Ripe for Adjudication.

PM argues that the second certified question is not ripe for adjudication because: (1) plaintiff must first prevail on one or more of its claims, and (2) the jury must also find plaintiff is entitled to punitive damages. Def. Br. 23. This argument is meritless. The statute authorizing review of certified issues from the federal courts, § 51-199b(d), states: "The Supreme Court may answer a question certified to it by a court of the United States . . . if the answer *may be determinative* of an issue in pending litigation in the certifying court . . . ." (emphasis added). There is no requirement that no contingencies can precede the answer being determinative.[11] Here, there is no doubt that the answer to the second certified question "may be determinative" of an issue relating to punitive damages in this action. Indeed, there are likely to be "contingencies" in any pre-trial certification.

C. Defendant's Interpretation of § 52-240b Would Conflict With Connecticut's Constitutional Right to a Jury Trial.

In response to plaintiff's showing that the application of Connecticut's common law punitive damages rule to § 52-240b would conflict with the State's constitutional guarantee of the right to a jury trial (P.'s Br. 28-33), PM argues that the jury trial right applies only to "factual" issues and that the amount of punitive damages is a "legal" issue.

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[11] Defendant's citation to *State v. Ross*, 237 Conn. 332 (1996) is inapposite, *inter alia*, because the Practice Book rule at issue there (P.B. § 4148), pertaining to "reserved questions" from the lower state courts, applied a stricter standard (requiring that "answers to [reserved] questions *will determine* or are *reasonably certain* to enter into the final determination. . . .") than § 51-199b(d) ("may be determinative of an issue"). Notably, the Practice Book has now been amended to track § 51-199b(d). *See* Practice Book § 82-1.

For this proposition, PM relies on language from *Champagne v. Raybestos-Manhattan, Inc.*, 212 Conn. 509, 566-67 (1989), in which the Court stated: the "question as to punitive damages to be awarded" was a "question of law for the trial court." However, PM neglects to mention that, in *Champagne*, the parties had agreed that the trial court would determine the amount of punitive damages. *Id.* at 559. Accordingly, the language PM relies on is simply a statement of fact – not a legal principle.[12]

PM simply ignores the pre-1818 cases cited by plaintiff, *see e.g., Churchill v. Watson*, 5 Day 140, 144 (1811); *Edwards v. Beach*, 3 Day 447, 450 (1809), on the right to jury determination of the amount of punitive damages.[13]

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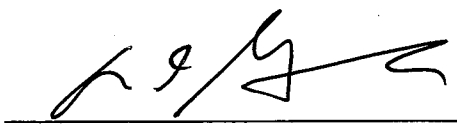
[12] Plaintiff acknowledges that the trial bar and lower courts have on occasion engaged in the informal practice of having the jury determine entitlement to common law punitive damages and having the court then determine the amount of common law punitive damages. But this Court has never ruled that the Connecticut Constitution allows a party to be compelled to have the court decide the amount. *See Berry v. Loiseau,* 223 Conn. 786, 827-29 (1992) (declining to decide whether Constitution requires jury determination of amount of common law punitive damages because issue was not properly preserved).

[13] Post-1818 cases are to the same effect. *Larsen Chelsey Realty Co. v Larsen*, 232 Conn. 480, 517-18 (1995) ("it is the responsibility of the trier of fact to award common law punitive damages for intentional torts"); *Kenny v. Civil Service Comm'n*, 197 Conn. 270, 277 (1985) (same); *Vogel v. Sylvester*, 148 Conn. 666, 673 (1961); *Chykirda v. Yanush*, 131 Conn. 565, 568 (1945); *Craney v. Donovan*, 95 Conn. 482 (1920) (evidence of attorney's fees and non-taxable costs relevant "as furnishing the jury some sure basis" for finding the amount of common law punitive damages).

CONCLUSION

For the foregoing reasons and those set forth in plaintiff's Opening Brief, both of the questions certified by the district court should be answered: "No."

Respectfully submitted,



DAVID S. GOLUB
JONATHAN M. LEVINE
MARILYN J. RAMOS
SILVER GOLUB & TEITELL LLP
184 ATLANTIC STREET
STAMFORD, CONNECTICUT 06901
(203) 325-4491

Attorneys for Plaintiff - Appellant Vincent Bifolck, Executor of the Estate of Jeanette D. Bifolck, and Individually

APPENDIX

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State	Case	Chamber of Commerce Notes	Response
Alabama	*Wakeland v. Brown & Williamson Tobacco Corp.*, 996 F. Supp. 1213 (S.D. Ala. 1998)	"[U]nder Alabama law, a negligence action is merged into a claim under the AEMLD [products liability claim]; therefore no separate action for negligence will lie when a plaintiff claims he is injured by a defective and unreasonably dangerous product. . . . [Liability exists] when the defendant places a product in the stream of commerce which is defective and in an unreasonably dangerous condition." *Id.* at 1217-18.	The Alabama Supreme Court has more recently held that AEMLD does not "subsume[ ] the common law tort action[ ] of negligence." *Tillman v. R.J. Reynolds Tobacco Co.*, 871 So.2d 28, 34-35 (Ala. 2003); *see also Vesta Fire Ins. Co. v. Milan & Co. Constr., Inc.*, 901 So.2d 84, 201 (Ala. 2004); *Wagoner v. Exxon Mobil Corp.*, 813 F. Supp.2d 771, 789 (E.D. La. 2011) ("reliance on *Wakeland* is misplaced. In *Tillman*, the Alabama Supreme Court held that the AEMLD does not subsume other common law actions, such as . . . negligence. . . .").
Arizona	*Mather v. Caterpillar Tractor Corp.*, 533 P.2d 717 (Ariz. Ct. App. 1975)	"Appellant's underlying theories as to both negligence and strict liability were the same . . . defective design . . . . In both instances appellant had to prove that the tractor was in a defective condition and unreasonably dangerous."	The Arizona Supreme Court, in *Dart v. Wiebe Mfgr.*, Inc., 709 P.2d 876 (Ariz. 1985), without mentioning the intermediate appellate court's decision in *Mather*, subsequently held that, for purposes of strict liability in design defect cases, the courts should apply the consumer expectations test, "if possible," and if – on the facts of the case – that fails to provides an adequate test, should apply specified risk-utility factors. *Id.* at 882-83. However, "[e]mployment of

State	Case	Chamber of Commerce Notes	Response
		Id. at 719.	this methodology does not transform the case into one of negligence." Id. at 882. Rather, negligence focuses on the defendant's "conduct" (instead of the "product"), and inquires "whether the manufacturer has '[f]ailed to act as an ordinary careful manufacturer would act under the circumstances.'" *Id.* This is "nothing more than the familiar negligence standard." *Id.* at 881.
Florida	*Witt v. Norfe, Inc.*, 725 F.2d 1277 (11th Cir.1984) (per curiam) (applying Florida law)	"Any distinction drawn between strict liability and negligence on the grounds that § 402A requires that the defect be dangerous, while negligence does not, would be specious. Consequently, it must be deemed inconsistent for a jury to find that a product was not defective for purposes of strict liability, and yet that the product was negligently designed, *i.e.,* was defective, for purposes of establishing liability under a theory of negligence." *Id.* at 1279.	The language quoted by the Chamber is based on dictum in *Cassisi v. Maytag Co.*, 396 So.2d 1140, 1143-45 (Fla. App. 1981). Other Florida authority is to the contrary. *Moorman v. American Safety Equip.*, 594 So.2d 795, 799-801 (Fla. App. 1992) ("[S]trict liability has been placed in the user's arsenal of remedies as an addition to the traditional tort remedy of negligence, not in displacement of it;" Florida courts have "disapproved the notion that our products liability law made strict liability and negligence two separate verbalizations of a single legal concept."). *See also Huck v. Louisville Ladder, Inc.*, No. 8:07-cv-199-T-24MSS, 2008 WL 222682 at *3 (M.D. Fla. Jan. 25, 2008) (distinguishing elements of strict liability from negligence: "In negligence, the test for product defect is that a manufacturer has a duty to exercise reasonable care so that its products will be reasonably safe for use in a foreseeable manner and that he has breached that duty.")

State	Case	Chamber of Commerce Notes	Response
Georgia	*Bryant v. Hoffman-La Roche, Inc.*, 585 S.E.2d 723 (Ga. Ct. App. 2003)	"Our Supreme Court has found that this claim cannot be treated as a distinct theory of recovery from the strict liability claims, as the same risk-utility analysis applies." *Id.* at 730 n.5.	The Chamber omits the following additional language which immediately follows the language it relies upon: "But see *Banks [v. ICI Americas, Inc.*, 450 S.E.2d 671, 674 n.3 (1994)] (where Supreme Court of Georgia stated 'We see no reason to conclude definitively that the two theories [(negligence and strict liability)] merge in design defect cases." *Banks* further states: "[W]e cannot agree that the use of negligence principles to determine whether the design of a product was 'defective' necessarily obliterates under every conceivable scenario the distinction Georgia law has long recognized between negligence and strict liability theories of liability . . . ." In strict liability claims for design defect, Georgia has now adopted a risk-utility test and rejected the obviousness of risk as a complete defense. *Ogletree v. Navistar Int'l Transp. Corp.*, 500 S.E.2d570, 571 (1998).
Hawaii	*Tabieros v. Clark Equip. Co.*, 944 P.2d 1279 (Haw. 1997)	"Pursuant to either theory [strict liability and negligence], it is the legal duty of manufacturers to exercise reasonable care in the design and incorporation of safety features to protect against foreseeable dangers." *Id.* at 1297 (internal quotation marks and alterations omitted); *see* also *id.* (for "strict	*Tabieros* distinguishes Hawaii's cause of action for negligent design from its corresponding claim based on strict liability as follows: "The plaintiff's burden in a negligent design claim is to prove that the manufacturer was negligent in not taking reasonable measures in designing its product to protect against foreseeable risk of injury. . . ." In contrast, "with respect to a claim of strict product liability: '[t]he plaintiff's burden . . . is to prove (1) a defect in the product which rendered it unreasonably dangerous for its intended or reasonably foreseeable use and (2) a causal connection between the defect and [the] plaintiff's injuries." *See also Wagatsuma v. Patch*,

State	Case	Chamber of Commerce Notes	Response
		product liability, '[t]he plaintiff's burden ... is to prove *[inter* alia] a defect in the product which rendered it unreasonably dangerous'" (citation omitted)).	879 P.2d 572, 587 (Int. Ct. App. Haw. 1994) ("the considerations for determining breach of duty in products liability cases differ between [negligence and strict liability]: in a negligence claim the plaintiff must prove the defendant's breach of duty of due care; however, under the doctrine of strict liability the plaintiff need only prove that the product was defective because it was unreasonably dangerous.").
Idaho	*Massey v. Conagra Foods, Inc.* 328 P.3d 456 (Idaho 2014)	"Regardless of whether a products liability case 'is based on warranty, negligence or strict products liability, plaintiff has the burden of alleging and proving that . . . the injury was the result of a defective or unsafe product . . . . Because we hold that the district court erred in its product defect analysis, the Masseys' negligence claim survives." *Id.* at 462 (citation omitted).	*Massey* states: "The term defect is not susceptible of a general definition but must be considered on a case by case basis." *Id.* at 460. The court then refers to comment i to § 402A with apparent approval. However, the Idaho Supreme Court has elsewhere stated: "Unreasonable dangerousness, as used in this context, is an element of a strict liability cause of action, not of a negligence cause of action. There is no dispute that negligence and strict liability are separate, non-mutually exclusive theories of recovery and that '[the] failure to prove one theory does not preclude proving another theory.'" *Toner v. Lederle Labs.*, 732 P.2d 297, 303 n.5 (Idaho 1987) (quoting *Chancler v. American Hardware Mutual Ins. Co.*, 712 P.2d 542, 546 (Idaho 1986). The court in *Massey* did not refer to either of these cases, both of which are inconsistent with the Chamber's interpretation of *Massey*.

State	Case	Chamber of Commerce Notes	Response
Illinois	*Todd v. Societe Bic,* S.A., 21 F.3d 1402 (7th Cir. 1994) (en banc)	"Because Bic did not produce an unreasonably dangerous product, it was neither strictly liable nor negligent." *Id.* at 1413 (applying Illinois law).	The Illinois Supreme Court has explicitly rejected *Todd* insofar as *Todd* holds that Illinois' risk-utility test does not apply to "simple" products. See *Calles v. Scripto Tokai*, 864 N.E.2d 249, 258-62 (Ill. 2007) (risk-utility test does apply to "simple" products; rejects "open and obvious" danger as a complete defense). The Supreme Court, in *Calles*, further stated: "A product liability claim asserting a claim based on negligence, such as negligent design, falls within the framework of common law negligence. . . . Thus, a plaintiff must establish the existence of a duty of care owed by the defendant, a breach of that duty, an injury that was proximately caused by that breach, and damages . . . . The key distinction between a negligence claim and a strict liability claim lies in the concept of fault . . . . In a strict liability claim, the focus is on the product. . . . *Scripto* argues that if the Aim N Flame is not unreasonably dangerous for purposes of strict liability because of the open and obvious nature of the dangers associated with it, then the Aim N Flame is not unreasonably dangerous for purposes of negligent product design. Stated differently *Scripto* maintains that, because of the patent nature of the danger, no duty exists on their part as a matter of law . . . . We disagree . . . ." 864 N.W.2d at 263-64 (citations omitted) (emphasis added).

State	Case	Chamber of Commerce Notes	Response
Iowa	*Wright v. Brooke Grp. Ltd.*, 652 N.W.2d 159, 165 (Iowa 2002)	"Whether the doctrine of negligence or strict liability is being used to impose liability *the same process is going on in each instance,* i.e., weighing the utility of the article against the risk of its use.'" *Id.* at 165 (citation omitted)); *see also id.* (explaining that in Iowa "the absence of an 'unreasonably dangerous' product [is] fatal to both the plaintiff's design negligence and strict liability design defect claims" (citation omitted)).	In *Wright*, the court stated that there is no difference, in a design defect case, between negligence and strict liability because, the standard in each case is reasonable care. *Id.* 166-67. The court held that, in design defect cases, it would apply a risk-utility analysis without labeling the underlying claims as either strict liability or negligence. *Id.* More recently, the Iowa Supreme Court, in describing Iowa law prior to its adoption (in *Wright*) of the Third Restatement, stated that Iowa recognized, in applying § 402A, that it "did not preclude liability based on the alternative ground of negligence when negligence could be proved – the special rule of § 402A simply had no application to those claims." *Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 382-83 (Iowa 2014), citing *Hawkeye Sec. Ins. Co. v. Ford Motor Co.*, 174 N.W.2d 672, 684-85 (Iowa 1970).
	Ackerman v. Am. Cyanamid Co., 586 N.W.2d 208 (Iowa 1998)	"We have held that the 'unreasonably dangerous' element of a negligent design case is the same as the 'unreasonably dangerous' element of a strict liability claim." *Id.* at 220.	*See Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 382-83 (Iowa 2014).

State	Case	Chamber of Commerce Notes	Response
Kentucky	*Jones v. Hutchinson Mfg., Inc.,* 502 S.W.2d 66 (Ky. 1973)	"We think it apparent that when the claim asserted is against a manufacturer for deficient design of its product the distinction between the so-called strict liability principle and negligence is of no practical significance . . . . In either event the standard required is reasonable care." *Id.* at 69-70.	*Jones* held that in design defect cases – whether sounding in negligence or strict liability – "the standard required is reasonable care;" not "unreasonably dangerous," as in § 402A. 502 S.W.2d at 69-70.
	Ostendorf v. Clark Equip. Co., 122 S.W.3d 530 (Ky. 2003)	"A plaintiff in Kentucky can bring a defective design claim under either a theory of negligence or strict liability. The foundation of both theories is that the product is 'unreasonably dangerous.'" *Id.* at 535 (citation omitted).	*Ostendorf* states that "[t]he foundation of both theories is that the product is 'unreasonably dangerous,'" but it goes on to say that, "under either theory, it is the legal duty of a manufacturer t5o reasonable care to protect against foreseeable dangers. It is, therefore, unclear what the Kentucky courts mean when they use the term "unreasonably dangerous." *See also Dalton v. Animas Corp.*, 913 F. Supp.2d 370, 377 (W.D. Ky. 2012) ("a plaintiff in Kentucky can bring a design defect claim under either a theory of negligence or strict liability . . . . Both . . . claims are premised on [the] argument that the product is unreasonably dangerous, i.e., that the product created an unreasonable risk of foreseeable injury. However, negligence focuses on the conduct of the manufacturer, and specifically whether the manufacturer used reasonable care to

State	Case	Chamber of Commerce Notes	Response
			protect against foreseeable dangers, while strict products liability focuses on the defect in the product itself.")
Maine	*Stanley v. Schiavi Mobile Homes, Inc.,* 462 A.2d 1144 (Me.1983).	"In actions based upon defects in design, negligence and strict liability theories overlap in that under both theories the plaintiff must prove that the product was defectively designed thereby exposing the user to an unreasonable risk of harm." *Id.* at 1148; *id.* (holding that because the jury "of necessity found that the design created no unusual risk of harm to the user" therefore "any error in the dismissal of the strict liability claim was harmless").	The language cited by the Chamber (i.e., that "the product was defectively designed thereby exposing the user to an *unreasonable risk of harm*") (emphasis added) does not support Philip Morris's position that the defect must, under both theories, be shown to have rendered the defective product "unreasonably dangerous." Moreover, the court in *Stanley* noted "a split of opinion as to whether a distinction exists between negligence and strict liability theories of recovery," but it declined to address that conflict because "under the facts of this case any error in dismissing the strict liability count [while allowing the negligence theory to proceed to trial] was harmless."
Maryland	*Singleton v. Int'l Harvester Co.,* 685 F.2d 112, 117 (4th Cir. 1981)	"The sole difference between liability for negligence and strict tort liability is that the plaintiff in proving negligence must prove not only that there was a failure to warn that the product	The court in *Singleton* stated that "in Maryland design cases . . . strict liability, in the usual sense does not apply" because Maryland has adopted a risk-utility test in which the "obviousness" of the danger is one seven factors. 685 F.2d at 115.

State	Case	Chamber of Commerce Notes	Response
		was unreasonably dangerous but also that the failure to warn was the result of the defendant's failure to exercise due care. . . . [I]f the plaintiffs were unable to convince the jury on strict liability they will necessarily be unable to convince them on the more demanding negligence standard." *Id.* at 117 (applying Maryland law).	
Massachusetts	*Colter v. Barber-Greene Co.*, 525 N.E.2d 1305 (Mass. 1988)	"'[A] finding of negligence [is] a statement by the jury about the product and about the manufacturer as well. It signifie[s] that the product was unreasonably dangerous because of its design or because of its failure to be accompanied by an adequate warning, or both.' . . . '[T]he reverse is not true. A defendant cannot be found to have been negligent without having breached the warranty of merchantability [*i.e.*, standard for products	Since *Colter*, the Massachusetts Supreme Judicial Court has held that a strict liability (breach of warranty) plaintiff need not show the accused product is "unreasonably dangerous" under Massachusetts law. See *Evans v. Lorillard Tob. Co.*, 465 Mass. 411, 427-28, 990 N.E.2d 997 (2013) ("[B]ecause reasonable consumer expectations are simply one of many factors that may be considered and not necessarily the determinative factor, the plaintiff was not obligated to prove that Newport cigarettes were more dangerous than consumers reasonably expected.").

State	Case	Chamber of Commerce Notes	Response
		strict liability in Massachusetts].'" *Id.* at 1313 (citation omitted).	
Michigan	*Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176 (Mich. 1984)	"[The Supreme Court of Michigan] adopts, forthrightly, a pure negligence, risk-utility test in products liability actions against manufacturers of products, where liability is predicated upon defective design." *Id.* at 186. Under that test the relevant question is "whether the design of [product] was 'unreasonably dangerous.'" *Id.* at 187	*Prentis* states that Michigan has adopted a "pure, negligence, risk utility test" in design defect cases, and that – under that test – the relevant question is "whether the design of [the product] was 'unreasonably dangerous;'" however, the court also explained that what it meant by "unreasonably dangerous" was as follows: "The test for determining whether the design was "unreasonably dangerous" was: whether the alleged defect in the design of the product created an unreasonable risk of foreseeable injury. . . . Stated another way, whether the manufacturer was under a duty to use reasonable care to design a product that was reasonably safe for its intended, anticipated or reasonably foreseeable uses." *Id.* at 187 (citations omitted).
Minnesota	*Bilotta v. Kelley Co., Inc.*, 346 N.W.2d 616 (Minn. 1984)	Explaining that a product is defective for purposes of strict liability if it is "unreasonably dangerous," recognizing that "strict liability [is] a broader theory of recovery than traditional negligence" and providing that "a trial court could properly submit a design-defect or failure-to-warn case to a jury on a single	*Bilotta* found, on the facts of that case, that 'strict liability [is] a broader theory of recovery than traditional negligence" and that a trial court could properly submit a single instruction which combined the consumer expectation test with a traditional negligence instruction. *Id.* 621-22. However, the court further stated: "[w]hether strict liability or negligence affords the broader theory of recovery will depend largely on the scope of evidence admitted by the trial court." The court also referred with approval to *Bigham v. J.C. Penney Co.*, 268 N.W.2d 892 (Minn. 1978), where it had upheld a verdict for

State	Case	Chamber of Commerce Notes	Response
		theory of products liability" encompassing both strict liability and negligence. Id. at 622-23.	defendant on strict liability (because the "flammable characteristics" of defendant's clothing did not render it "unreasonably dangerous" to the ordinary consumer); but also upheld a negligence verdict in favor of a plaintiff whose work particularly "subjected him to fire hazards," based on defendant's failure to warn of those characteristics. *Id.* 622-23. *See also Independent School Dist. No. 14 v. Ampro Corp.*, 361 N.W.2d 138, 142 (Minn. Ct. App. 1985) (the elements of a design defect claim grounded in negligence are "duty, breach of that duty, proximate cause and damage.").
Mississippi	*Sprankle v. Bower Ammonia & Chem. Co.*, 824 F.2d 409 (5th Cir. 1987)	"[A] jury finding against strict liability for failure to warn [based upon unreasonable dangerousness] necessarily precludes a finding in favor of the plaintiff on a negligence theory." Id. at 414.	*Sprankle* is a failure to warn case, 824 F.2d at 414, in which the court particularly focused on then contemporary academic debate about whether there were meaningful differences between failure to warn cases grounded in strict liability and negligence. *Id.* at 413 n. 5. Mississippi now applies a risk-utility test, which, as the Mississippi Supreme Court has stated, "is essentially a negligence test." *Nunnally v. R.J. Reynolds Tobacco Co.*, 869 So.2d 373, 381 (2004).
New Hampshire	*Greenland v. Ford Motor Co.*, 347 A.2d 159 (N.H. 1975)	Holding that "a jury could not find for plaintiffs on the negligence counts" after finding the product was not "unreasonably dangerous" for purposes of strict liability. *Id.* at 163.	The court in *Greenland* further stated: "[i]t is clear that a products liability action grounded on strict liability may be joined with an action grounded on negligence," and it further noted that comment a to § 402A "has recognized that strict liability does not preclude liability based upon the alternative ground of negligence of the seller, where such negligence can be proved.'" *Id. Greenland* concluded that "[w]hether both issues [i.e., strict liability and negligence] must

State	Case	Chamber of Commerce Notes	Response
			be submitted to the jury . . . is dependent upon the facts and circumstances of the case," and found – based on the facts in the case before it – that the issues did not need to be separately presented to the jury. As characterized by the First Circuit, "*Greenland* stands only for the proposition that in cases where the negligence claim is premised on a design defect, a trial court may, in its discretion, withhold the negligence claim from the jury. It does not . . . establish a rule that a court must keep the claim from the jury in these circumstances." *Connelly v. Hyundai Motor Co.*, 353 F.3d 535, 540 (1st Cir. 2003).
New Jersey	*Masi v. R.A. Jones Co.*, 394 A.2d 888 (N.J. Super. Ct. App. Div. 1978)	"[O]ne could not be held liable under a negligence theory if a jury found no strict liability . . . ." *Id.* at 890 (favorably citing Minnesota precedent that "one could not be negligent if one did not produce a defective product, unreasonably dangerous").	*Masi*, which relies on a now overruled Minnesota precedent (*Halvorson v. Am. Hoist & Derrick Co.*, 240 N.W.2d 303 (Minn. 1976), overruled in *Holm v. Sponco*, 324 N.W.2d 207 (Minn. 1982)), is no longer the law in New Jersey. New Jersey has enacted a product liability statute, which – unlike Connecticut's PLA – "no longer recognizes negligence or breach of warranty . . . as a viable separate claim for 'harm' (as defined by the Act) caused by a defective product." *Tirrell v. Navistar Int'l, Inc.*, 591 A2d 643, 647 (N.J. Super. App. Div. 1991).
	Werner v. Upjohn Co., Inc., 628 F.2d 848 (4th Cir. 1980).	Holding that a jury verdict finding a manufacturer liable for negligence was "obviously inconsistent" with the verdict finding the manufacturer not liable for strict liability. Id. at 860 (applying New Jersey law).	*Werner* is inapposite. The court stated as follows: "The effect of the jury verdict on negligence was to find that Upjohn failed to use due care to give an adequate warning of the propensities of the drug marketed, and, in the same breath, the verdict on strict liability found that the drug marketed with such an inadequate warning was not unreasonably dangerous. The verdicts in the context of this failure

State	Case	Chamber of Commerce Notes	Response
			to warn case involving prescription drugs are obviously inconsistent and cannot stand." 628 F.2d at 860.
New York	*Lewis v. White*, No. 08 Civ. 7480, 2010 U.S. Dist. LEXIS 142567 (S.D.N.Y. July 1, 2010)	"[F]or the purposes of analyzing a design defect claim, the theories of strict liability and negligence are virtually identical." *Id.* at *9-10. Both consider "whether a product is defective or 'unreasonably dangerous.'" *Id.*at *9.	Under New York law, "[t]o prevail on a cause of action for negligent design, a plaintiff must prove that the manufacturer failed to exercise reasonable care in designing the product. To prevail on a cause of action sounding in strict products liability, a plaintiff must prove that the product contained an unreasonably dangerous design defect. . . . New York courts have deemed these concepts 'functionally synonymous' with respect to the manufacturer of the product." *See Giunta v. Delta Int'l Machinery*, 751 N.Y.S.2d 512, 515 (2d Dept. 2002). However, the equivalency between the two claims stems from the fact that the New York Court of Appeals has adopted a "risk-utility" approach to both claims, *see Scarangelia v. Thomas Built Buses*, 717 N.E.2d 679, 682 (N.Y. 1999). These factors are applied to "actions sounding in negligent design as well as strict products liability based upon a design defect. . . ." *Giunta*, 751 N.Y.S.2d at 515.
	Lancaster Silo & Block Co. v. N. Propane Gas Co., 427 N.Y.S.2d 1009 (App. Div. 1980)	Because "liability may be imposed for 'unreasonably dangerous design defects' . . . in a design defect case there is almost no difference between a prima facie case in negligence	*See Scarangelia v. Thomas Built Buses*, 717 N.E.2d 679, 682 (N.Y. 1999) (adopting risk-utility test).

State	Case	Chamber of Commerce Notes	Response
		and one in strict liability." *Id.* at 1013 (citation omitted).	
North Dakota	*Oanes v. Westgo, Inc.*, 476 N.W.2d 248 (N.D. 1991).	Upholding jury instruction that provided that "in order to find liability based on negligent design, the jury had to find that the W80 was defective and unreasonably dangerous" and rejecting plaintiffs' contention that "that the trial court's instruction erroneously combined elements of strict liability and negligence." *Id.* at 252.	North Dakota recognizes the difference between negligence and strict liability claims. See *Olson v. A/W/ Chesterton Co.*, 256 N.W.2d 530, 540 (N.D. 1977) (distinction between negligence and strict liability "is significant and should be preserved. In action based upon strict liability in tort, the focal issue is the condition of the product, not the conduct of the defendant"); *Randall v. Warnaco, Inc.*, 677 F.2d 1226, 1231 (8th Cir. 1982) (N.D. law: jury finding of no strict liability not inconsistent with finding of negligence). *Oanes v. Westgo, Inc.*, 476 N.W.2d 248, 252 (N.D. 1991), cited by the *Chamber*, is consistent with those cases. *See* 476 N.W.2d at 253 ("We have recognized that negligence and strict liability in tort are separate and distinct theories of product liability and that each theory has a different focus. . . . Strict liability in tort focuses on whether or not a product is defective and unreasonably dangerous. . . . Negligence focuses on whether or not the conduct of the manufacturer or seller falls below the standard of reasonable care."). The negligent design instruction in *Oanes* used the words "unreasonably dangerous," id. 252, n.5; however, the instruction makes no reference to "consumer expectations," and it is unclear – especially in light of the court's efforts in *Olson* to distinguish negligence from strict liability theories – that either the trial court or the Supreme Court intended to incorporate the

State	Case	Chamber of Commerce Notes	Response
			consumer expectation test. As summarized by the court, the instruction on negligent design "essentially required the Oaneses to prove that the defendants failed to use reasonable care in designing W80 and that the failure resulted in a defective product." *Id.* at 253.
Ohio	*Birchfield v. Int'l Harvester Co.*, 726 F.2d 1131 (6th Cir. 1984)	"Ohio case law has acknowledged that, in a defective design case, there is no practical difference between strict liability and negligence. The test for an 'unreasonably dangerous' condition is equivalent to a negligence standard of reasonableness . . . ." *Id.* at 1139	The language relied upon by the Chamber is from the dissenting opinion of Judge Weick in *Birchfield*. *See* 726 F.2d at 1139. The majority opinion states that, under Ohio law, "the presence or absence of a design defect is no longer to be measured solely by reference to consumer expectations," and that Ohio has adopted a "risk-benefit" test which is to be used where the "ordinary consumer" is "unable to form clear expectations regarding any danger involved." Id. at 1136. More recently, the court has stated, "Ohio does not require the plaintiff in a design defect case to prove that a product is 'unreasonably dangerous.'" *Perkins v. Wilkinson Sword, Inc.*, 700 N.E.2d 1247, 1251 (Ohio 1998). Rather it offers the two tests noted above, which are "not mutually exclusive." *Id.* at 1248. Thus, "a product may be found defective in design even if it satisfies ordinary consumer expectations if the jury finds that the product's design embodies 'excessive preventable danger.'" *Id.* This standard has now been embodied in the Ohio Products Liability Act. Ohio Products Liability Act, R.C. § 2307.75. *Id.* And the statute has been amended to eliminate the "consumer expectation test." *Id.* at 1248, n.1.

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Oregon	*Philips v. Kimwood Machine Co.*, 525 P.2d 1033 (Or. 1974)	"It is necessary to remember that whether the doctrine of negligence, ultrahazardousness, or strict liability is being used to impose liability, the same process is going on in each instance, i.e., weighing the utility of the article against the risk of its use. Therefore, the same language and concepts of reasonableness are used by courts for the determination of unreasonable danger in products liability cases." *Id.* at 1039.	Phillips has been superseded by a statute. See *McCathern v. Toyota Motor Corp.*, 23 P.3d 320 328-29 (Ore. 2001). That statute, Oregon Laws 1979, ch. 866 § 2 ORS 30.920, codifies § 402A of the Restatement, but specifically provides (like § 402A): "Nothing in this section shall be construed to limit the rights and liabilities of sellers and lessors under principles of common law negligence. . . ."
Pennsylvania	*Foley v. Clark Equip. Co.*, 523 A.2d 379 (Pa. Super. Ct. 1987)	"A determination that the risk of harm outweighs the utility of a particular product design [*i.e.*, the product is unreasonably dangerous] necessarily decides that the manufacturer's own evaluation of these factors prior to marketing the product has been unreasonable." *Id.* at 388.	*Foley*, which has repeatedly been criticized by other Pennsylvania courts, see, e.g., *Dillinger v. Caterpillar, Inc.*, 959 F.2d 430, 442-44 (3d Cir. 1992), is flatly inconsistent with the Pennsylvania Supreme Court's decision in *Phillips v. Cricket Lighters*, 576 Pa. 644, 657-62 (Pa. 2003). In *Phillips*, the Supreme Court stated: "The crux of [appellants'] argument is that if we deem that the trial court properly granted summary judgment on Appellee's strict liability claim, then perforce we must hold that her negligence claim also fails. This reasoning is deeply flawed and we decline to adopt it. . . . [N]egligence and strict liability

State	Case	Chamber of Commerce Notes	Response
		"Because strict liability and negligence employ the same balancing process to assess liability, proof sufficient to establish liability under one theory will in most instances be sufficient under the other" but recognizing that negligence has additional element: "[u]nlike strict liability, the plaintiff in a negligence action must show that the manufacturer either knew or should have known of the dangers inherent in the design of its product." *Id.* at 389.	are distinct legal theories. Strict liability examines the product itself . . . . In contrast, a negligence cause of action revolves around an examination of the conduct of the defendant. Were we to dispose of a negligence claim merely by an examination of the product, without inquiring into the reasonableness of the manufacturer's conduct in creating and distributing such a product, we would be divorcing our analysis from the elements of the tort. . . . It is axiomatic that in order to maintain a negligence action, the plaintiff must show that the defendant had a duty 'to conform to a certain standard of conduct;" that the defendant breached that duty; that such breach caused the injury in question; and actual loss or damage." *Id.* 658.
Rhode Island	*Guilbeault v. R.J. Reynolds Tobacco Co.*, 84 F. Supp.2d 263 (D.R.I. 2000)	""Rhode Island employs 'the consumer expectation' test to determine if a product is defective . . . . The elements of a section 402A claim and a negligence claim based on a product defect overlap significantly, with the negligence claim having the additional requirement that the defendant 'knew or had reason to know . . . that [the	*Guilbeault* states that the elements of a § 402A claim and a negligence claim overlap "significantly" and that negligence has "the additional requirement that the defendant 'knew or had reason to know" that the product was defective. This appears to be the law of Rhode Island.

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		product] was defective in any manner.'" *Id.* at 269 (citation omitted).	
South Carolina	*Branham v. Ford Motor Co.*, 701 S.E.2d 5 (S.C. 2010)	"The failure to establish that [the product] was in a defective condition unreasonably dangerous to the user for purposes of the strict liability claim requires the dismissal of the companion negligence claim." Id. at 9; see also id. ("The trial court determined . . . [the product] was not . . . unreasonably dangerous . . . . Consequently, the absence of this common, shared element required the dismissal of the strict liability claim and the companion negligence claim.").	Although *Branham* states that a plaintiff asserting a product liability claim grounded in negligence must prove the product was "unreasonably dangerous," "unreasonable dangerousness" can be shown two ways: (1) through § 402A's "consumer expectation" test, and (2) through a risk-utility test. *Id.* at 13. *Branham* further held that "the exclusive test in a products liability design case is the risk-utility test," in which "numerous factors" must be considered, including "the usefulness and desirability of the product, the cost involved for added safety, the likelihood and potential seriousness of injury, and the obviousness of danger." *Id.* 13-14 (emphasis added).
Tennessee	*Mello v. K-Mart Corp.*, 792 F.2d 1228 (1st Cir. 1986)	Under Tennessee law, the jury's finding that a product "was not . . . unreasonably dangerous" for purposes of strict liability "preclude[d] a finding that the seller or manufacturer is liable in negligence." Id. at 1233.	*Mello*, a First Circuit case interpreting Tennessee law, holds that a product must be "defective" to support a product liability claim grounded in negligence; however, it is unclear whether *Mello* finds that the product must also be "unreasonably dangerous," as that term is used in connection with the "consumer expectation" test. *Mello* makes no reference to the Tennessee Products Liability Act, where "unreasonably dangerous" is defined as follows: "[A]

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			product is 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, *or that the product because of its dangerous condition would not be put on the market by a reasonably prudent manufacturer or seller, assuming that the manufacturer or seller knew of its dangerous condition."* Tenn. Code Ann. § 29-28-102(8) (emphasis added). It is, therefore, not necessary to prove that a product is more dangerous than "contemplated by the ordinary consumer" to prevail on a negligence claim in Tennessee.
Texas	*Garrett v. Hamilton Std. Controls, Inc.*, 850 F.2d 253 (5th Cir. 1988)	"[T]he jury's rejection of strict liability precludes a negligence claim." *Id.* at 257; *see also id.* ("[A] manufacturer logically cannot be held liable for failing to exercise ordinary care [i.e., under a negligence theory] when producing a product that is not . . . unreasonably dangerous.').	*Garrett* found no Texas law covering the issue before it, so the court relied on a prior Fifth Circuit decision applying Mississippi law (*id.* at 256). The court in Garrett also (1) explicitly limits its decision to "whether a defective product theory subsumes a negligent manufacturing theory" and does not address "additional negligence theories;" and (2) found there was no basis for a negligence instruction because "[n]o evidence was offered concerning the manufacturer's conduct in designing or producing the product;" rather the evidence at trial focused exclusively on whether the product was "unreasonably dangerous." *Id.* at 257-58. Under

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			Texas law, negligence and strict liability are treated as distinct causes of action," *Gonzalez v. Caterpillar Tractor Co.*, 571 S.W.2d 867, 871 (Tex. 1978), and they have different elements. *Oldham v. Thompson/Center Arms Co., Inc.*, Civ. Action No. H-12-2432, 2013 WL 1576340 at *5-*6 (S.D. Tex. April 11, 2013) (to prove strict liability, plaintiff must prove, inter alia, a "defect rendered the product unreasonably dangerous;" to prove negligence, plaintiff must prove, "(1) the existence of a duty . . . (2) the breach of that duty; and (3) the injury to the person to whom the duty is owed as a proximate result of the breach."). Trial courts in Texas are required to submit to the jury all theories presented. *Hyundai Motor Co. v. Rodriguez ex rel Rodriguez*, 995 S.W.2d 661, 663 (Tex. 1999).
Utah	*Henrie v. Northrop Grumman Corp., 502 F.3d 1228 (10th Cir. 2007) (applying Utah law)*	"The overlap between an unreasonably safe design and a negligent design has been recognized by other courts [besides Utah] as well." *Id.* at 1236-37 (favorably citing authority that "[i]n both instances [strict liability and negligence] appellant had to prove that the product was in a defective condition and unreasonably dangerous.'" (citation omitted)).	In *Slisze v. Stanley Bostitch*, 979 P.2d 317, 320 (Utah 1999), the Supreme Court of Utah held that it is "possible to simultaneously bring a negligence and a strict liability claim" and that "a manufacturer may act negligently without its product being unreasonably dangerous." *Id.*

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		"[B]ecause the fixture was not defective under the consumer expectation test in § 78-15-6 [*i.e.* strict liability standard], the district court correctly granted summary judgment in favor of NGC."). *Id.* at 1237.	

S.C. NO. 19310	:	STATE OF CONNECTICUT
VINCENT J. BIFOLCK, EXECUTOR OF THE ESTATE OF JEANETTE D. BIFOLCK, ET AL.	:	SUPREME COURT
V.	:	
PHILIP MORRIS, Inc.	:	FEBRUARY 20, 2015

CERTIFICATE OF SERVICE
PURSUANT TO PRACTICE BOOK § 67-2(l)(1)

This is to certify that copies of the Reply Brief and Appendix of Plaintiff - Appellant Vincent J. Bifolck, Executor of the Estate of Jeanette D. Bifolck and Individually, and this Certificate of Service have been served electronically at the last known email address and by first class mail, postage prepaid, this 20th day of February, 2015 on the following counsel of record:

Paul F. Ware, Jr.
John B. Daukas
Kevin P. Martin
Michael K. Murray
Goodwin Procter LLP
Exchange Place
Boston, MA 02109

Anthony J. Franze
John Massaro
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, DC 20004-1206

Francis H. Morrison III
John M. Tanski
Axinn, Veltrop & Harkrider LLP
90 State House Square, 9th Floor
Hartford, CT 06103

and by first class mail, postage prepaid, on the trial judge as follows:

Hon. Stefan R. Underhill
United States District Court
915 Lafayette Boulevard
Bridgeport, CT 06604

JONATHAN M. LEVINE

S.C. NO. 19310	:	STATE OF CONNECTICUT
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V.	:	
PHILIP MORRIS, Inc.	:	FEBRUARY 20, 2015

CERTIFICATION
PURSUANT TO PRACTICE BOOK § 67-2(l)(2) - (4)

This is to certify that the original and copies of the Reply Brief and Appendix of Plaintiff - Appellant Vincent J. Bifolck, Executor of the Estate of Jeanette D. Bifolck and Individually being filed with the appellate clerk are true copies of the Reply Brief and Appendix that was submitted electronically pursuant to Rule of Appellate Procedure § 67-2(j). This is to further certify that the Reply Brief and Appendix of Plaintiff - Appellant Vincent J. Bifolck, Executor of the Estate of Jeanette D. Bifolck and Individually complies with all of the requirements of subsections (l)(3) and (l)(4) of Rule of Appellate Procedure § 67-2.

JONATHAN M. LEVINE

S.C. NO. 19310	:	STATE OF CONNECTICUT
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V .	:	
PHILIP MORRIS, Inc.	:	MARCH 10, 2015

SUPPLEMENTAL CERTIFICATION
PURSUANT TO PRACTICE BOOK § 67-2(l)

This is to certify that the electronically submitted Reply Brief and Appendix of Plaintiff - Appellant Vincent J. Bifolck, Executor of the Estate of Jeanette D. Bifolck and Individually and the filed paper Reply Brief and Appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order, or case law.

JONATHAN M. LEVINE