S.C. No. 19310	:	SUPREME COURT
	:	
VINCENT J. BIFOLCK, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF JEANETTE D. BIFOLCK et al., Plaintiff-Appellant,	:	STATE OF CONNECTICUT
	:	
v.	:	
	:	
PHILIP MORRIS USA INC., Defendant-Appellee.	:	
	:	October 2, 2014

BRIEF OF PROPOSED *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

DANIEL S. RAWNER (#430782)
LATHAM & WATKINS LLP
885 THIRD AVENUE
NEW YORK, NY 10022
TELEPHONE: (212) 906-1200
FACSIMILE: (212) 751-4864
EMAIL: DANIEL.RAWNER@LW.COM

KENNETH J. PARSIGIAN (PRO HAC VICE)
LATHAM & WATKINS LLP
JOHN HANCOCK TOWER
20TH FLOOR
200 CLARENDON STREET
BOSTON, MA 02116
TELEPHONE: (617) 948-6000
FACSIMILE: (617) 948-6001
EMAIL: KENNETH.PARSIGIAN@LW.COM

Counsel for Proposed Amicus Curiae Chamber of Commerce of the United States of America

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

Page(s)

STATUTES, RULES AND LEGISLATIVE HISTORY

OTHER AUTHORITIES

THE CERTIFIED QUESTIONS

This Court accepted two certified questions from the United States District Court for the District of Connecticut:

1. Does section 402A of the Restatement (Second) of Torts (and Comment i to that provision) apply to a product liability claim for negligence under the CPLA?
2. Does Connecticut's common law rule of punitive damages, as articulated in *Waterbury Petroleum Products, Inc. v. Canaan Oil & Fuel Co.*, 193 Conn. 208 (1984), apply to an award of statutory punitive damages pursuant to Conn. Gen. Stat. § 52-240b, the punitive damages provision of the CPLA?

This brief addresses only the first certified question.

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus the Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country, including Connecticut. An important function of the Chamber is to represent the interest of its members in matters before Congress, the Executive Branch and the courts. To that end, the Chamber regularly files amicus briefs in cases that raise issues of vital concern to the nation's business community.

The Chamber's membership includes numerous product manufacturers, who are potentially subject to liability under strict liability and negligence theories, and who seek predictable standards against which their potential liability can be judged.[1]

INTRODUCTION

To assist this Court in deciding the first certified question, the Chamber has undertaken a survey of the relevant precedents in the forty-nine other states. Specifically, the Chamber examined whether jurisdictions that, like Connecticut, follow Restatement (Second) of Torts § 402A by requiring that plaintiffs suing under either a strict liability or negligent design theory to prove that the design was "unreasonably dangerous." Of the twenty-eight states that have addressed the issue directly,[2] all but one of them apply the

---

[1] Pursuant to Connecticut Rule of Appellate Procedure 6-7, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

[2] See Appendix for a list of the twenty-eight states that have directly considered and decided this issue. The remaining twenty-two states do not appear to have directly addressed the issue.

same standard to both strict liability and negligent design claims: a plaintiff must prove that the design was unreasonably dangerous.[3] Only Wisconsin has held to the contrary and its cases do not explain how a design that is not un*reasonably* dangerous can somehow still support a claim that the manufacturer breached its duty of *reasonable* care.

This robust consensus among the states that a plaintiff must prove that a product is "unreasonably dangerous" to recover under either a strict liability or negligence theory is well-founded. Comment (i) to Section 402A provides that for a product to be unreasonably dangerous, it "must be dangerous to an extent beyond which would be contemplated by the ordinary consumer." Restatement (Second) of Torts § 402A cmt. i (1965). As the overwhelming majority of states to have considered the issue have concluded, if a product is no more dangerous than ordinary consumers expect, it should follow, that the manufacturer did not breach a duty of *reasonable* care to consumers. Indeed, the U.S. Court of Appeals for the Seventh Circuit, in attempting to apply the contrary Wisconsin standard, candidly acknowledged that it "may seem puzzling that a defendant could be found negligent for designing a product that in the end is not found unreasonably dangerous . . . [but] [p]uzzling or not, this is the law in Wisconsin and we are bound to uphold that law." *Insolia v. Philip Morris Inc.*, 216 F.3d 596, 606 (7th Cir. 2000).

---

[3] Unlike Connecticut, California and Alaska do not use § 402A's "unreasonably dangerous" standard and were therefore not included in the analysis. *See Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153 (Cal. 1972); *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871 (Alaska 1979). North Carolina was excluded because "North Carolina courts have not adopted the doctrine of strict liability in products liability actions." *US Airways, Inc. v. Elliott Equip. Co.*, No. 06-1481, 2008 U.S. Dist. LEXIS 76105, at *15 (E.D. Pa. Sept. 29, 2008). Washington was excluded because its courts of appeals have taken directly contrary positions on the issue. *Compare Lecy v. Bayliner Marine Corp.*, 973 P.2d 1110, 1116-17 (Wash. Ct. App. 1999), *with Brown v. Yamaha Motor Corp. U.S.A.*, 691 P.2d 577, 579-80 (Wash. Ct. App. 1984). The remaining seventeen states do not appear to have addressed the relevant issue directly.

A unified definition of defect as "unreasonably dangerous" under either a strict liability or negligence rubric also provides predictability to product designers that Plaintiff's proffered test—under which something (ill-defined) less than "unreasonably dangerous" suffices for liability—cannot. Such an amorphous, open-ended standard would subject product manufacturers to the inconsistent whims of understandably confused, poorly instructed juries—precisely the sort of confusion the Connecticut Legislature sought to avoid by creating a single cause of action for product claims.

For the reasons set forth in Defendant's brief and the numerous precedents of other states cited in the Appendix, this Court should join the overwhelming majority position and answer the first certified question in the affirmative.

Table 1: States Employing "Unreasonably Dangerous" Standard For Strict Liability Design Defect Cases And Precluding Negligence Liability Where Product Is Not Unreasonably Dangerous				
Alabama	Arizona	Florida	Georgia	Hawaii
Idaho	Illinois	Iowa	Kentucky	Maine
Maryland	Massachusetts	Michigan	Minnesota	Mississippi
New Hampshire	New Jersey	New York	North Dakota	Ohio
Oregon	Pennsylvania	Rhode Island	South Carolina	Tennessee
Texas	Utah			

STATEMENT OF FACTS

The Chamber incorporates by reference Defendant's Counterstatement of Facts to the extent relevant for this amicus brief.

ARGUMENT

I. Defendant's Position Is Shared By The Vast Majority Of States That Have Considered The Issue

All but one of the twenty-eight states that have decided the question have ruled that § 402A's "unreasonably dangerous" standard applies equally to design defect claims rooted in strict liability or ordinary negligence for design defects. Thus, in all twenty-seven states, there can be no liability for an alleged design defect under either a strict liability or negligence theory where a product is not unreasonably dangerous. As set forth in Table 1 and with case citations in the appendix, those states include Alabama, Arizona, Florida, Georgia, Hawaii, Idaho, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Utah. All twenty-seven of these states would answer the first certified question in the affirmative; this Court should do likewise.

Federal courts surveying this issue have also concluded that negligence liability cannot exist where a product is not unreasonably dangerous. The Fourth Circuit, for example, applied generally prevailing law (since none of the parties had briefed the choice of law issue) and concluded that "[t]he standard of safety of goods imposed on the seller or manufacturer of a product is essentially the same whether the theory of liability is labelled warranty or negligence or strict tort liability: the product must not be unreasonably dangerous at the time that it leaves the defendant's possession." *Chestnut v. Ford Motor Co.*, 445 F.2d 967, 968, 969, 970 n.3 (4th Cir. 1971). Similarly, the Ninth Circuit in deciding a question about subsequent remedial measures found that "most Circuits have . . . held that there is no practical difference between strict liability and negligence in defective

design cases," noting that "'the test for an "unreasonably dangerous" condition is equivalent to a negligence standard of reasonableness.'" *Gauthier v. AMF, Inc.*, 788 F.2d 634, 637 (9th Cir. 1986) (quoting *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 467 (7th Cir. 1984)).

This nearly unanimous position makes perfect sense. Both courts and commentators have noted the obvious similarities between the focus on whether a product is "un*reasonably* dangerous" in the strict-liability design-defect context with the traditional negligence inquiry of whether a defendant has breached its duty to act with *reasonable* prudence. As the Supreme Court of Kentucky ruled four decades ago, 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." *Jones v. Hutchinson Mfg., Inc.*, 502 S.W.2d 66, 69-70 (Ky. Ct. App. 1973). As Pennsylvania has similarly held, "The question under either analysis [strict liability or negligence] is whether the manufacturer acted reasonably in choosing a particular product design . . . ." *Foley v. Clark Equip. Co.*, 523 A.2d 379, 388 (Pa. Super. Ct. 1987) (citations omitted). And the leading tort treatise explains that "[t]he proof required of a plaintiff seeking to recover for injuries from an unsafe product is very largely the same, whether his cause of action rests upon negligence, warranty, or strict liability in tort." William L. Prosser, *Handbook of the Law of Torts* § 103, at 671 (4th ed. 1971).[4]

---

[4] *See also 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.'" (citation omitted)); *Tipton v. Michelin Tire Co.*, 101 F.3d 1145, 1150 (6th Cir. 1996) ("In other words, proof of a defective product is essential to the products liability or the negligence claim. . . . [T]he distinction between the two claims is of 'no practical

Footnote continued on next page

Notably, the twenty-seven states that hold that a plaintiff claiming a defective product design under either a strict liability or negligence theory must prove that the product is unreasonably dangerous have adopted somewhat different routes to reach that conclusion. Some states have forthrightly acknowledged that the purportedly "strict liability" standard for products is actually a negligence standard when applied to product *design* (rather than manufacturing defects) and accordingly both theories could be merged into a single claim, with the "unreasonably dangerous" standard providing the sole benchmark for liability. Those states include Alabama, Iowa, Michigan, and Minnesota.[5]

Other states continue to permit concurrent strict liability and negligence claims for design defects. They require proof under either theory that the product was unreasonably dangerous, but require plaintiffs proceeding in negligence to prove the additional element

---

Footnote continued from previous page
significance.'" (citation omitted)) (applying Kentucky law); W. Page Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 Syracuse L. Rev. 559, 563 (1969) ("[Strict liability] does not alter in any substantial way the plaintiff's proof problems, and the satisfaction of plaintiff's proof requirements for strict liability will generally result also in a finding of negligence."); John W. Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 15 (1965) ("[T]he test for imposing strict liability is whether the product was unreasonably dangerous, to use the words of the *Restatement*, . . . [and] this is simply a test of negligence.").

[5] *See Wakeland v. Brown & Williamson Tobacco Corp.*, 996 F. Supp. 1213, 1217-18 (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 . . . ."); *Wright v. Brooke Grp. Ltd.*, 652 N.W.2d 159, 169 (Iowa 2002) ("[A] court should not submit both a negligence claim and a strict liability claim based on the same design defect since both claims rest on an identical risk-utility evaluation. . . . Therefore, we prefer to label a claim based on a defective product design as a design defect claim without reference to strict liability or negligence."); *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 186 (Mich. 1984) ("[Michigan] adopts, forthrightly, a pure negligence, risk-utility test in products liability actions against manufacturers of products, where liability is predicated upon defective design."); *Bilotta v. Kelley Co.*, 346 N.W.2d 616, 623 (Minn. 1984) ("[A] trial court could properly submit a design-defect or failure-to-warn case to a jury on a single theory of products liability."); *see also* Appendix (collecting cases).

the manufacturer knew or should have known of the dangers. Those states include Pennsylvania, Rhode Island and South Carolina.[6]

Regardless of the analysis, however, all states but Wisconsin would answer the first certified question in the affirmative: a plaintiff must prove that a product is unreasonably dangerous to prevail on either a strict liability or negligence claim for defective design. This Court should rule likewise.

II. Only A Single State Has Adopted The Position Advanced By Bifolck

Plaintiff notably did not cite a single case that adopts its position that the test for proving defective design under a negligence theory differs in some unexplained way from § 402A's "unreasonably dangerous" test. Based on the Chamber's research, only Wisconsin has taken the leap that Plaintiff urges, and its rationale is hardly illuminating. The Wisconsin Supreme Court, for example, has held that "there may be recovery for the negligent design of a product even though it is not unreasonably dangerous in the 402A sense. All that is necessary to prove is that the product is designed with a lack of ordinary

---

[6] *Foley*, 523 A.2d at 389 ("There is but one distinction between the evidentiary requirements of negligence and strict liability in design cases. Unlike 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."); *Guilbeault v. R.J. Reynolds Tobacco Co.*, 84 F. Supp. 2d 263, 269 (D.R.I. 2000) ("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 product] was defective in any manner." (alterations in original) (citation omitted)); *Branham v. Ford Motor Co.*, 701 S.E.2d 5, 9 (S.C. 2010) ("A negligence theory imposes the additional burden on a plaintiff 'of demonstrating the defendant . . . failed to exercise due care in some respect, and, unlike strict liability, the focus is on the conduct of the seller or manufacturer, and liability is determined according to fault." (citation omitted)).

care and that lack of care resulted in injury." *Fischer v. Cleveland Punch & Shear Works Co.*, 280 N.W.2d 280, 286 (Wis. 1979).[7]

That standard, however, is practically an invitation to chaos and confusion. As even the Wisconsin Supreme Court has recognized, critics of its approach argue that "negligence requires a jury to find that the product creates an unreasonable risk of harm to the consumer; if the jury finds that the product does not present an unreasonable danger or defect in the strict product liability sense, then the jury cannot find the manufacturer negligent because the jury cannot logically find an unreasonable risk of harm to the consumer created by the manufacturer's conduct." *Sharp v. Case Corp.*, 595 N.W.2d 380, 388 (Wis. 1999). And the Seventh Circuit, attempting to apply Wisconsin's standard, has deemed it "puzzling." Attempting to divine the purported daylight between a product that is not "unreasonably dangerous" but which is somehow still "designed with a lack of ordinary care" would be a game of semantic gymnastics that could consume this Court for years and confuse countless juries and trial courts in the process. That legal uncertainty will unnecessarily burden businesses (particularly those in Connecticut) with costly and socially inefficient litigation expenses—much of which will ultimately be passed on to consumers. And it will deter development and introduction of new products, as risk-averse businesses reasonably shy away from potential litigation exposure from new products that are not unreasonably dangerous but nonetheless subject to unknowable litigation exposure.

---

[7] *See also Toner v. Lederle Labs.*, 732 P.2d 297, 303 n.5 (Idaho 1987) ("[N]egligence and strict liability are separate, nonmutually exclusive theories of recovery, and that '[the] failure to prove one theory does not preclude proving another theory.'" (alteration in original) (citation omitted))

By enacting the CPLA, Connecticut sought to "clear up" the competing standards previously at play in Connecticut product liability law and to establish a "substitute for prior theories for harm caused by a product." 22 S. Proceedings, pt. 14, 1979 Sess., at 4636-37 (Conn. 1979), *reprinted in* Conn. Legislative Histories, Landmark Series, Pub. Act No. 1979-483. This Court should not return Connecticut to the confusion and uncertainty that reigned before the passage of the CPLA by adopting Plaintiff's suggestion of a standardless basis for determining whether a product's design is defective. Instead, consistent with the CPLA and virtually every court to address the question, this Court should rule that, regardless whether a design defect claim sounds in strict liability or negligence, a plaintiff must prove that the product was defective in that it was "unreasonably dangerous," as required under § 402A and comment (i).

CONCLUSION

The Court should answer *yes* to the first certified question and hold that the "unreasonably dangerous" definition of defect from Restatement § 402A applies to all CPLA claims, whether based on strict liability or negligence.

Respectfully submitted,

By: Daniel S. Rawner/pz

DANIEL S. RAWNER (#430782)
LATHAM & WATKINS LLP
885 THIRD AVENUE
NEW YORK, NY 10022
TELEPHONE: (212) 906-1200
FACSIMILE: (212) 751-4864
EMAIL: DANIEL.RAWNER@LW.COM

KENNETH J. PARSIGIAN (PRO HAC VICE)
LATHAM & WATKINS LLP
JOHN HANCOCK TOWER
20TH FLOOR
200 CLARENDON STREET
BOSTON, MA 02116
TELEPHONE: (617) 948-6000
FACSIMILE: (617) 948-6001
EMAIL: KENNETH.PARSIGIAN@LW.COM

APPENDIX

Representative Cases From States Employing "Unreasonably Dangerous" Standard For Strict Liability Design Defect Cases And Precluding Negligence Liability Where Product Is Not Unreasonably Dangerous		
State	**Representative Case**	**Notes**
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.
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." *Id.* at 719.
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.

Georgia	*Bryant v. Hoffmann-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.
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 product liability, '[t]he plaintiff's burden . . . is to prove [*inter alia*] a defect in the product which rendered it unreasonably dangerous'" (citation omitted)).
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 1 . . . 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).
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).

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)).
	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.
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.
	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).

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").
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 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 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.
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 theory of products liability" encompassing both strict liability and negligence. *Id.* at 622-23.
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.
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.
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").

	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).
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.
	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 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.
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

Oregon	*Phillips 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.
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. "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.

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 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.").
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.
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.").

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)). "[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.