

To Be Argued By:
ANDREW H. SCHAPIRO

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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

—◆◆◆—
NORMA ROSE and LEONARD ROSE,

Plaintiffs-Respondents,

—against—

BROWN & WILLIAMSON TOBACCO CORPORATION, as successor in interest to
AMERICAN TOBACCO, PHILIP MORRIS, USA, INC.,

Defendants-Appellants,

—and—

R.J. REYNOLDS TOBACCO COMPANY,

Defendant.

BRIEF FOR DEFENDANTS-APPELLANTS

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QUESTIONS INVOLVED

1. Can a defendant be held liable for negligent product design without proof of a safer alternative design that would have the same function and utility as the defendant's product, and would be acceptable to consumers?

(Trial Court's answer: Yes)

2. Can a plaintiff in a negligent-design case establish proximate causation without proving (a) that the alleged negligence was a substantial contributing factor in her injury, or (b) the extent to which her chances of injury would have been reduced absent the alleged negligence?

(Trial Court's answer: Yes)

3. In a case premised on the claim that the defendants' products were unreasonably dangerous because a safer, feasible alternative design existed, did the trial court err by:

- a. Excluding all evidence that consumers consistently refuse to purchase the allegedly safer alternative;
- b. Instructing the jury to consider the product's risks, but not instructing it to consider the product's utility;
- c. Excluding all evidence that consumers (including the plaintiff personally) are aware of the product's dangers and choose to purchase it anyway; or
- d. Refusing to instruct the jury that consumer awareness of the product's risks is relevant to whether the product is "unreasonably dangerous"?

(Trial Court's answer: No)

4. Is the affirmative defense of express assumption of the risk unavailable in any case where the plaintiff asserts that she was addicted to the defendants' products, even if the defendants explicitly warned her of the risks?

(Trial Court's answer: Yes)

5. Is the affirmative defense of primary assumption of the risk available only in cases involving sports or other physical activities, where the immediate risks of physical harm ended when the activity ended?

(Trial Court's answer: Yes)

6. Is a rule of tort liability barring the sale of nearly all cigarettes in New York State preempted by federal law?

(Trial Court's answer: No)

7. With regard to punitive damages, did the trial court err by:

- a. Failing to grant defendant judgment as a matter of law where plaintiffs' sole claim was for negligent design and where defendant had no notice that the conduct at issue was punishable;
- b. Failing to instruct the jury that the facts supporting a finding of punitive damages must be established by clear and convincing evidence;
- c. Excluding relevant evidence that would have demonstrated that defendant's conduct was reasonable;
- d. Allowing plaintiffs to use evidence of defendant's financial condition to urge the jury to impose punitive liability and to increase the size of the award it might otherwise impose simply on the basis of defendant's wealth; or
- e. Upholding the jury's award of \$17.1 million in punitive damages, where such an award represents a 10:1 ratio of punitive to compensatory damages?

(Trial Court's answer: No)

PRELIMINARY STATEMENT

In this case, the nation’s leading cigarette manufacturers were held liable to an individual smoker and her husband for over \$20 million – for selling regular cigarettes that allegedly were negligently designed because they contained more than the lowest technologically feasible levels of tar and nicotine. There was no claim of fraud, failure to warn, false or misleading advertising, or any other misrepresentation or product defect. The plaintiffs’ sole theory of liability was that cigarettes containing more than trace amounts of tar and nicotine are “defectively designed” because tar and nicotine are hazardous, and that it is *per se* negligent to sell such a product.

1. New York law does not impose tort liability for the mere sale of a lawful, though dangerous, product. Rather, it requires the plaintiff to prove the feasibility and the commercial viability of a proposed safer alternative design. Whether a proposed alternative design is “feasible” depends not only on whether the design is technologically possible, but also on whether it would have the same market acceptability – the same “utility” – to the consumer as the original.

According to plaintiffs, defendants acted negligently by offering consumers a choice of brands containing a range of tar and nicotine yields. To plaintiffs, New York law required defendants to sell only “ultra-light” cigarettes – *i.e.*, cigarettes that contain virtually no tar or so little nicotine that they cannot deliver any

“pharmacological” effects to a smoker. Because plaintiffs showed that such a cigarette is technologically possible to manufacture, the trial court held that they had made out a prima facie case of negligence. In the court’s view, technological feasibility alone is sufficient, and a negligent-design plaintiff need not also show that its proposed alternative design is commercially viable or that it has function and utility equivalent to that of the original design.

This was fundamentally wrong. After all, it is possible to make a car safer by turning it into a tank, but no automobile manufacturer is liable for failing to manufacture only tanks. New York law clearly establishes that the plaintiff must demonstrate that there is no “functional difference” between its proposed alternative design and the defendant’s allegedly defective product. Here, there was no basis in the evidence for the jury to find that plaintiffs’ proposed design alternative had function and utility equivalent to those of the cigarettes manufactured by defendants. Indeed, the record demonstrates that for the vast majority of consumers, the opposite was true. Plaintiff herself refused to purchase the alternative design when it was actually offered on the market. Defendants are therefore entitled to a dismissal of this case.

2. This novel verdict also cannot stand because the trial that produced it was deeply flawed. Based on its belief that mere “technological feasibility” is sufficient to make out a proper negligent design claim, the trial court struck or

excluded all of the evidence proffered by defendants demonstrating that for the great majority of consumers ultra-light cigarettes are *not* acceptable. In connection with another key evidentiary ruling – excluding all evidence of consumer awareness of the risks of cigarettes – the trial judge acknowledged that such information is normally admissible in product liability cases, stating: “I am clear on the law. That doesn’t mean I am going to follow it.” A-442. And, rather than instruct the jury to balance the risks of regular cigarettes against their utility (as New York law requires), the trial court told jurors to consider only whether cigarettes are harmful, without regard to their usefulness.

3. Federal law presents an independent ground for reversal. Affirmance of the theory of liability adopted by the court below – that it is negligent to manufacture and sell ordinary cigarettes with more than minimal amounts of tar and nicotine – would result in a fundamental change in the entire cigarette market in New York: It would constitute a ban on over 90 percent of the cigarettes on the market today. As the U.S. Supreme Court has recognized, Congress has foreclosed such a ban.

4. There is no legitimate basis for subjecting Philip Morris to punitive damages, let alone the unconstitutionally excessive \$17.1 million award here. Marketing tobacco products with a range of tar and nicotine yields from which consumers can choose cannot constitute reckless or wanton conduct. Even if

plaintiffs' theory of negligence were upheld, it would be, to say the least, novel, and due process prohibits the imposition of punitive damages against a defendant that lacked notice that its conduct could be penalized in this fashion. The punitive phases of the trial were also rife with instructional and evidentiary errors that at a minimum necessitate a new trial. Finally, the \$17.1 million punitive award is grossly and unconstitutionally excessive, and due process requires, at a minimum, a substantial reduction.

STATEMENT OF FACTS

1. Background

Plaintiff Norma Rose, now 73 years old, first experimented with cigarettes as a teenager in the late 1940s. A-2610. She became a regular smoker around 1951, at age 19. A-2546, 2615-16. Her regular brand in the 1950s was Camel, manufactured by R.J. Reynolds. A-2546, 2616.

In the 1960s, Mrs. Rose began smoking Pall Malls because they were longer than Camels. A-2548-49, 2617. Pall Malls were then manufactured by The American Tobacco Company, a company that no longer exists by reason of a merger with Brown & Williamson Tobacco Co. ("B&W") in 1995. Mrs. Rose continued smoking Pall Malls until 1973 or 1974, when she began smoking filtered cigarettes. *Id.* She briefly smoked two low tar brands – Merit and Vantage – but quickly abandoned them because she didn't like their taste. A-2553. She

eventually settled on Benson & Hedges, made by defendant Philip Morris USA. A-2556, 2619. Mrs. Rose quit smoking in 1993. A-2622.

In 1995, Mrs. Rose was diagnosed with lung cancer and a related neurological condition. A-2554-56, 2578, 2581. She was successfully treated for lung cancer, but, according to her physicians, still suffers from the neurological condition. A-1791. She filed this lawsuit with her husband, Leonard Rose, against the six leading cigarette manufacturers, their current and former corporate parents, and two tobacco-industry research organizations.

Many of the initial claims, and several defendants, were dismissed early on. The plaintiffs were left with claims against Philip Morris USA, Reynolds, and B&W for (1) failure to warn, (2) fraudulent concealment, (3) breach of implied warranties, (4) strict products liability, and (5) negligent design. Ultimately, however, the trial proceeded on a single theory of liability: negligence in the design of cigarettes. All of the other claims were either dismissed or withdrawn before trial.

2. Phase I: Liability and Compensatory Damages

The trial was trifurcated. During Phase I, the jury determined liability and compensatory damages.

A. Plaintiffs' Initial Theory: Defendants' Failure To Design A Safer Cigarette Was Negligent.

Initially, plaintiffs took the position that defendants were negligent because they “could have designed a safer cigarette” by “[taking] the nicotine out” or by making cigarettes with extremely low tar yields.¹ A-1080, 1096-97. Plaintiffs’ primary support for this theory was the testimony of two expert witnesses: Neil Grunberg and Jeffrey Wigand. Dr. Grunberg, a psycho-pharmacologist, testified for plaintiffs that nicotine is addictive and a stimulant. A1394-96. He testified that for nicotine to produce these effects, it must be present in an “effective dose range” (A-1561), which he testified was somewhere between 0.3 and 0.5 milligrams per cigarette. A-1745. According to Dr. Grunberg, by the 1950s it was technologically possible to “remove or substantially decrease” the amount of nicotine in cigarettes. A-1400-01, 1560. A “safer cigarette” would be one that had no stimulating effects: “if it’s below the effective range, it doesn’t have that particular effect.” A-1740. Dr. Wigand, another of plaintiffs’ experts, testified that throughout the period Mrs. Rose smoked, it was technologically possible to reduce the nicotine yield of cigarettes to below 0.4 milligrams per cigarette. A-1963-66, 2041-42. Wigand also testified that it was possible to design a cigarette

¹ “Tar” is the total material (consisting of smoke particles minus nicotine and water) that is captured on a specific type of filter pad when cigarettes are machine-smoked according to a method prescribed by the Federal Trade Commission. A-1465-66, 1471, 2799.

that yields 1 milligram of tar and 1 milligram of nicotine, and that such a cigarette would “in essence” be a “safer alternative.” A-1463-64.

Defendants responded to plaintiffs’ claims by showing that they had implemented recommendations of scientific and medical authorities in the 1950s and 1960s to lower tar yields in order to reduce the risks of smoking. Indeed, defendants went further than the medical establishment had recommended. They developed various methods of lowering tar and nicotine yields, including the introduction of filters, permeable paper and ventilated filters (which allow air to mix with the smoke), reconstituted tobacco (which yields less tar and nicotine), and expanded tobacco (which allows less tobacco to be used in the cigarette). A-2791, 4016.

American Tobacco, for example, reduced the tar delivery of Pall Malls by 30% between 1958 and 1966, from 34.6 milligrams to 22.2 milligrams. A-3997. And Philip Morris reduced tar and nicotine yields by approximately 60% between the mid-1950s and the late 1980s, from tar yields of “about 35” milligrams to “11 to 12,” and from “2.8 or so” milligrams of nicotine to “about 0.8, 0.9.” A-2802, 2794. Over time, lower tar and nicotine yields were achieved by all of the defendants in both their higher- and lower-yield brands. A-4017.

More fundamentally, the undisputed evidence established that each of the defendants manufactured and sold ultra-light cigarettes during the period when

Mrs. Rose was smoking. A-1745-48, 2042-44. For example, Philip Morris has marketed (and continues to market) cigarette brands (such as Merit Ultima) containing as little as 0.1 milligrams of nicotine per cigarette, as well as equivalently small amounts of tar. A-2829-44. See also A-3061-62, 4147, 4221-22, 4378-79. Similarly, by 1971, the tar and nicotine yield of American Tobacco's Carltons had been lowered to 1 milligram of tar and 0.1 milligrams of nicotine. A-7264.

B. Plaintiffs' Revised Theory: Offering A Choice Of Products Was Negligent.

Faced with this evidence, plaintiffs changed course. Instead of maintaining their argument that cigarette manufacturers could have made a safer cigarette, plaintiffs argued in closing that defendants were negligent because they provided consumers with a choice among cigarette brands with different tar and nicotine yields:

For the tobacco companies to put high tar cigarettes on the market, and then to put low tar cigarettes on the market, that I say is wrong.

A-5112. According to plaintiffs' counsel, defendants had a duty to sell *only* cigarettes with the lowest possible tar and nicotine yields: "[S]ell the safest one you can make," he argued. A-5185.² According to plaintiffs, defendants were

² See also A-5119, 5137-40, 5159, 5161, 5171-72.

negligent because they sold ultra-light cigarettes and regular cigarettes “side by side.” A-5228.

However, plaintiffs offered no proof that ultra-light cigarettes would have been accepted by consumers in the market as a substitute for regular cigarettes. In fact, they conceded as much: “we don’t have [that] evidence because that’s not part of the case.” A-4116. And the undisputed evidence was to the contrary – it showed that the vast majority of smokers reject ultra-light cigarettes because such cigarettes do not provide the taste and sensory experience that they seek.

C. The Trial Court’s Evidentiary Rulings.

To counter this moving-target theory of liability, defendants sought to show that throughout the period Mrs. Rose smoked, they had each acted reasonably. Defendants acknowledged that they had the capacity to produce (and indeed did produce) low-yield and ultra-low-yield products. But they were foreclosed by the trial court from explaining *why* they had continued to sell regular cigarettes side by side with ultra-lights. This limitation – which made it virtually impossible for defendants to respond to plaintiffs’ allegations – was principally the result of two broad evidentiary rulings:

First, the court held that consumer preferences are irrelevant to a negligent design claim. It therefore excluded or struck all evidence tending to show that

most smokers prefer to purchase regular cigarettes – or conversely, that most smokers (including Mrs. Rose) will not purchase ultra-low-yield alternatives.

Second, the trial court held that the manufacturer’s knowledge of a product’s risks – not the user’s knowledge – is all that is relevant to a negligent design claim. The court therefore excluded all evidence regarding the public’s and Mrs. Rose’s awareness of the health risks of smoking.

These rulings excluded crucial evidence and sharply limited defendants’ ability to respond to plaintiffs’ claim.

1. The Importance Of Nicotine In Smoking.

The first category of evidence concerned consumer preferences for cigarettes containing nicotine. Plaintiffs’ experts were permitted to opine at length about nicotine’s effects on smokers. Defendants’ witnesses agreed that nicotine was important, and initially testified that consumers’ choices of cigarette brands depend in large part on nicotine yields. However, because of the court’s ruling that consumer preferences are irrelevant to a negligent design claim, much of defendants’ nicotine evidence was stricken from the record, and defendants were prohibited from suggesting to the jury that nicotine preferences could be taken into account when assessing whether defendants’ conduct was reasonable.

Plaintiffs’ witnesses testified that the stimulating effect of nicotine is pleasurable. Dr. Grunberg, for example, testified that nicotine consumption results

in a “kick,” creates a sense of “euphoria or pleasure,” and has a “calming [e]ffect.” A-1408-09. “It jazzes us up when we’re down but calms us down when we’re jazzed up.” A-1410. See also A-2448 (testimony of plaintiffs’ expert psychopharmacologist to the same effect). Dr. Wigand asserted that “nicotine is the product that sells cigarettes,” and that the market performance of cigarettes with very low levels of nicotine was “dismal”; the reason ultra-light cigarettes are preferable, he testified, is that smokers would not smoke them (or would smoke dramatically fewer of them). A-1466, 2042. See also A-1396, 1711. Defendants’ witnesses agreed. Dr. Sharon Blackie, a psychopharmacologist, testified that nicotine plays several roles in smoking: it is a mild stimulant that improves concentration and aids in learning and memory; it affects taste; and it has sensory effects, akin to the sensation in the throat from drinking a carbonated beverage. A-3918-24. Defendants’ evidence regarding consumer preferences, however, was stricken.

2. Consumers’ Rejection Of Low-Tar Cigarettes.

The court also excluded or struck all evidence that consumers choose their cigarettes based on “taste,” that “tar” is the primary determinant of cigarette taste, and that smokers overwhelmingly prefer regular-strength cigarettes to those without appreciable levels of tar.

This evidence showed that low tar delivery necessarily means loss of flavor. As Dr. Blackie testified, by its very design a low-tar cigarette has less taste than a regular cigarette: “It’s the design of the product to give them less flavor, less tar diluted with air. *** It’s the tar that creates the flavor.” A-4029-30. Dr. Jerry Whidby, a former Philip Morris scientist, also testified that tar is what gives a cigarette taste. A-3024. Thus, when design features lower tar yields, those same features adversely affect cigarettes’ taste, draw, and sensory effects. Dr. Blackie testified:

A lot of the modifications that you would use to try to make a cigarette safer, to reduce specific constituents or to reduce tar, for example, result in significant changes in the flavor and the sensory characteristics of the product. *** That’s always been a problem in introducing these products ***.

A-3992. She explained that for these reasons, consumers disliked low-tar cigarettes and overwhelmingly chose to smoke other brands:

The major problem is [consumers] find [low-tar and low-nicotine cigarettes] lacking in taste *** [consumers] can’t draw, they can’t get any flavor through ***.

A-4028. Consumers described smoking a low-tar cigarette as akin to “sucking on a straw” due to the lack of taste. A-4031. Because of these characteristics, “very low-tar products have a very low acceptability in the marketplace.” A-4028; see also A-4091.

Mrs. Rose herself acknowledged the difference between regular cigarettes and the light and ultra-light varieties. She testified that smoking was relaxing, and that it relieved stress and tension. That was one of the reasons she smoked. A-2460-64, 2621-22, 4885-87. She also liked the taste of cigarettes. A-2619. And she was one of the vast majority of smokers who disliked low-tar cigarettes. One of the brands she tried – Merit – was a low-tar and low-nicotine cigarette (not an ultra-light, which would have had even less taste), but Mrs. Rose “didn’t like the taste” of Merits, so she did not smoke that brand for long. A-2553, 2618. Mrs. Rose briefly tried Vantage, another low-tar cigarette, but disliked that brand, too. A-2618. She instead decided to smoke Benson & Hedges, because she “liked the taste of them.” A-2556, 2619.

As a result of the court’s ruling regarding the relevance of consumer preferences, all of this evidence was stricken, and the jury was instructed that it was irrelevant.

3. The Role Of Consumer Preferences In The Development Of Safer Cigarettes.

Consumer tastes were an essential consideration for cigarette manufacturers in developing cigarettes that were safer. As Dr. Whidby explained, a safer cigarette is beneficial from a public-health standpoint only if consumers are actually willing to use it instead of a regular brand:

If a – we had a low-tar cigarette that didn't taste good, that nobody bought, then all of our work on reducing tar and nicotine in the cigarette would be worthless because it wouldn't be in the marketplace, wouldn't be being used by people. So we wanted to have a good-tasting cigarette that people would actually buy and use.

A-2831. See also A-3050, 3142. Dr. Blackie likewise testified that it would be “pointless” to develop a “safer” cigarette that would not actually be used by smokers. A-3910-11.

Dr. Ernst Wynder, an independent researcher regarded as a “giant” in the field of smoking and health, made the same point:

[A] virtually harmless cigarette smoked by one percent of the population will have a lesser impact on the reduction of tobacco-related diseases than a somewhat more harmful cigarette smoked by 80 percent of the total smoking population. Research on the less harmful cigarette should therefore be directed toward developing a cigarette containing the lowest possible amount of harmful elements for all tobacco-related diseases, *but one that has sufficient acceptability for the largest segment of smokers.*

A-3143 (emphasis added). This evidence was struck by the trial court. If admitted, it would have allowed defendants to argue that they complied with health authorities' recommendations by continuing to sell – in addition to the ultra-light brands that were markedly unpopular – cigarettes that were lower in tar but sufficiently acceptable to large segments of consumers. But that argument was

barred by the trial court's ruling that consumer tastes and preferences were entirely irrelevant.

4. Consumer Awareness Of The Risks Associated With Various Kinds Of Cigarettes.

The final category of excluded evidence was defendants' proof that consumers were informed of the potential risks of smoking regular – versus ultra-light – cigarettes. Defendants proffered the testimony of an expert historian, Dr. Michael Schaller, who was prepared to testify that consumers were advised by health researchers and government officials that greater amounts of tar might increase the health risks of smoking, and that some researchers believed that lower-yield cigarettes were less harmful, provided the smoker did not compensate or did not compensate completely.³ A-11525. Dr. Schaller was also prepared to testify that information regarding the tar and nicotine yields of cigarettes was widely disseminated to smokers through a variety of means, including by the Federal Trade Commission. *Id.* Moreover, Dr. Schaller would have testified that the addictive potential of nicotine was widely communicated to consumers. A-11526, 3952.

³ “Compensation” refers to the tendency of some smokers, when smoking low-yield cigarettes, to inhale deeper or more often or to smoke more cigarettes per day.

D. The Effect Of The Trial Court's Rulings

The trial court's legal and evidentiary rulings tied defendants' hands. They could not explain why they offered consumers a choice of brands – *i.e.*, because the vast majority of consumers actually liked Pall Mall and Benson & Hedges better than ultra-light cigarettes. Defendants could not argue that consumers liked the pharmacological effects of nicotine or the taste of tar. Defendants could not argue that ultra-light cigarettes did not have the same function and utility as Pall Malls and Benson & Hedges. Defendants were unable to argue that as a result of widespread publicity, consumers actually had the information to enable them to choose ultra-light products, if they wanted. In short, in a case premised solely on negligence, defendants were unable to demonstrate that they acted reasonably.

E. The Liability Verdict.

After seven weeks of trial on liability and compensatory damages, the jury returned a verdict for plaintiffs and assessed damages in the amount of \$3,420,000 against Philip Morris USA and B&W. The jury found no liability against Reynolds, which manufactured the Camel cigarettes Mrs. Rose had last smoked in the early 1950s.

3. *Phases II and III: Punitive Liability and Punitive Damages*

The trial then moved into a bifurcated punitive damages phase: punitive liability in Phase II and punitive amount in Phase III.

In Phase II, the inquiry into defendants' conduct was even more limited than during Phase I. The jury's liability determination in Phase I had been based on Mrs. Rose having been injured by the combination of high levels of tar and nicotine in cigarettes. But during the punitive phases, the court excluded all evidence related to tar. A-5467-70, 5476-77. Plaintiffs, therefore, argued that defendants should be punished because it was "wanton and reckless" to sell cigarettes with more than 0.4 milligrams of nicotine, regardless of tar content. A-5827-29, 5836. They claimed that no smoker would ever become addicted to cigarettes that did not contain that "threshold dose" of nicotine, and that defendants should therefore have restricted themselves to selling only low-nicotine products. A-5427-29. As a result of its decision to exclude tar-related evidence, the court also excluded evidence relating to whether plaintiffs' proposed alternative design would have been commercially acceptable, holding that consumer preferences related solely to tar and not nicotine. A-5750-51.

The jury found that Philip Morris, but not American Tobacco, was liable for punitive damages. A-5865-66. After hearing evidence in Phase III of Philip Morris's financial structure and resources, including its supposed \$31.5 billion net worth, the jury awarded the Roses \$17,100,000 in punitive damages against Philip Morris. A-6019-20.

Defendants' post-trial motions seeking judgment, a new trial, or, in the alternative, a substantial reduction were denied.

ARGUMENT

I. DEFENDANTS ARE ENTITLED TO DISMISSAL BECAUSE PLAINTIFFS FAILED TO PROVE ESSENTIAL ELEMENTS OF THEIR ONLY CLAIM.

A. Plaintiffs Failed To Present Sufficient Evidence Of A Feasible Alternative Design For Cigarettes.

1. A Negligent Design Plaintiff Must Prove The Existence Of A Safer, Feasible Alternative Design.

The only claim that went to the jury was that defendants' cigarettes were "negligently designed." A claim of negligent design, like a strict liability design defect claim, requires a plaintiff to show that the challenged product is not "reasonably safe," *Denny v. Ford Motor Co.*, 87 N.Y.2d 248, 258 (1995), because "there was a substantial likelihood of harm and it was feasible to design the product in a safer manner." *Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102, 108 (1983). See also *Liriano v. Hobart Corp.*, 92 N.Y.2d 232 (1998); *Searle v. Suburban Propane Div. of Quantum Chem. Corp.*, 263 A.D.2d 335, 338 (3d Dep't 2000).

A defendant cannot be held liable merely for designing a product that is inherently dangerous. After all, "some products *** must by their very nature be dangerous in order to be functional." *Robinson v. Reed-Prentice Div. of Package*

Machinery Co., 49 N.Y.2d 471, 479 (1980). A negligent-design plaintiff, like any other plaintiff asserting that a product is defective as designed, must prove that the allegedly defective product is *unreasonably* dangerous and that there was a feasible and less dangerous alternative design.⁴

2. Plaintiffs’ Proposed Alternative Design – An “Ultra-Light” Cigarette – Is Not Acceptable To Consumers.

Plaintiffs’ proposed alternative to a regular cigarette (or an ordinary “light” cigarette) was an “ultra-light” cigarette: one that contains virtually no tar, or alternatively, so little nicotine that it cannot, as a matter of chemistry, produce any pharmacological effect – what plaintiffs’ expert described as a “kick, [a] stimulatory action” – for smokers. Much of their evidence was essentially undisputed. Defendants did not deny that tar and nicotine are dangerous, nor did they deny that it is technologically possible to produce a cigarette that yields very little tar or nicotine. (Indeed, the evidence showed that defendants *did* manufacture such products.) The undisputed evidence also showed, however, that

⁴ New York is in the mainstream in this regard. Most jurisdictions that recognize a cause of action for negligent or defective design require a plaintiff to prove unreasonable dangerousness and the existence of a safer, feasible alternative design. See, *e.g.*, 2 Louis R. Frumer & Melvin I. Friedman, PRODUCTS LIABILITY § 11.04(1)(b) (2005) (proof of a feasible, alternative design is “an indispensable element” of a plaintiff’s design defect or negligent design case in 18 States plus the District of Columbia; such proof is “probably” or “possibly” an element in four other States) (collecting cases); see also RESTATEMENT 3D OF TORTS (Products Liability) § 2(b) (recognizing requirement of safer, feasible alternative design).

people smoke cigarettes because they like the taste that “tar” creates in the smoke and they desire the “pharmacological effect” of nicotine. See pages 12-15, *supra*; A-1393, 1525-28, 1613, 1987. By definition, the allegedly safer cigarettes that plaintiffs propounded as an alternative do not contain enough tar and nicotine to make them taste good and provide the stimulating effects that smokers seek.

3. The Trial Court’s Ruling – That An Alternative Design Need Not Be Acceptable To Consumers – Is Contrary To New York Law.

The trial court held that a negligent design claim does not require any showing that the proposed alternative design would be acceptable to consumers. “[T]o meet the burden of proving the feasibility of the safer, alternative design,” the court wrote, “a plaintiff must demonstrate the technological feasibility of the ‘design,’ *not* its commercial viability.” A-108 (emphasis added). As the court put it at trial, “whether it’s sellable or not is not part of the case.” A-4301.

This ruling cannot be reconciled with long-standing New York precedent. In order to prove that a purportedly safer design is a “feasible alternative,” a plaintiff must show that the substitute performs the same function, and therefore has the same utility to consumers, as the product that is supposedly unreasonably dangerous. If the product’s utility to consumers would decrease substantially as a result of the proposed change in design – as demonstrated by the fact that many consumers would not actually purchase the alternative product – the plaintiff has

not made out a prima facie case. *Felix v. Akzo Nobel Coatings, Inc.*, 262 A.D.2d 447, 448 (2d Dep't 1999) (granting summary judgment to design-defect plaintiff where there was a "functional difference" between the proposed alternative design and the original product).⁵

The Court of Appeals recognized the relevance of consumer choice to negligent design claims in *Scarangella v. Thomas Built Buses, Inc.*, 93 N.Y.2d 655 (1999). The *Scarangella* plaintiff claimed that the defendant, a manufacturer of school buses, was liable for negligent design because an optional safety feature (an alarm to alert pedestrians that the bus was backing up) was not standard on all of its buses. The Court held the plaintiff had failed to make out a prima facie case because, in part, "there exist normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment; and *** the buyer is in a position, given the range of uses of the product, to balance the benefits and the risks of not having the safety device." 93 N.Y.2d at 661 (emphasis added).

Indeed, the *Scarangella* Court held that jurors determining whether a product is unreasonably dangerous given the availability of an alternative design

⁵ See also *Pigliavento v. Tyler Equip. Corp.*, 248 A.D.2d 840, 841-42 (3d Dep't 1998) (affirming summary judgment in favor of design-defect defendant where the "approximately 85%" of consumers had "declined" to purchase the plaintiffs' proposed safer design when it was offered as an alternative); *Voss*, 59 N.Y.2d at 109 (citing "the utility of the product to the public as a whole and to the individual user" as the first of seven factors to be considered when determining whether a product is "unreasonably dangerous").

may consider “the likely effects of [liability for failure to adopt] the alternative design on the range of consumer choice among products.” *Id.* at 659. In explaining why this information is “pertinent” to the jury’s analysis, the Court of Appeals twice cited a particular illustrative comment in the Restatement (Third) of Torts (2004). That illustration describes a hypothetical action in which the plaintiff claims that the defendant’s car is not reasonably safe because it is too small and that the safer, feasible alternative design would be to increase the car’s size. The Illustration explains that because the effect of finding liability would be to remove small cars from the market, the defendant cannot be held liable for simply making a small car, *even though it is more dangerous than a larger one*:

[E]liminating smaller automobiles from the market would unduly restrict the range of consumer choice among automobile designs. *** Given that the risks and benefits associated with relative automobile size are generally known, decisions regarding which sizes to purchase and use should be left to purchasers and users in the market.

Restatement (Third) of Torts: Product Liability § 2, cmt. f, Illustration 9 (cited in *Scarangella*, 93 N.Y.2d at 659, 663.

Ultimately, the trial court’s ruling was based on its belief that the only function of a cigarette is “to be lit, burned and inhaled.” A-109. By that reasoning, a tobacco cigarette, a lettuce cigarette, and a marijuana cigarette all have the same function and utility, and each would be an alternative design for the

others. Similarly, if the court's logic were followed, a glass of grape juice and a glass of wine would have the same function and utility. But tobacco and alcohol are consumed because consumers like them. That is part of their function and utility.

The implications of the trial court's theory are widespread and staggering. Under this ruling, is a soda company negligent for causing obesity, because it is possible to make soda without sugar? Bakers sell donuts and low-fat products side by side – is this negligence? Is a car manufacturer liable for selling sports cars, on the ground that sports cars are more dangerous than other cars? Affirmance of the ruling below would make it impossible for a jury to consider consumer desires, tastes, and demands. And the ultimate effect of the ruling would be to deprive consumers of the ability to choose products they prefer, because manufacturers could not consider their preferences in making design choices. This is the exact opposite of the world described in *Scarangella*, in which manufacturers are encouraged to market products that consumers want to buy and to offer consumers a choice.

Indeed, plaintiffs contended below, and the trial court found, that limiting tobacco companies to selling only ultra-light cigarettes would benefit public safety. Why? Because many smokers would quit smoking altogether rather than smoke ultra-lights. A-1966. This reasoning turns the law of negligent design on its head.

An alternative product is not “safer” because it would be so unacceptable to consumers that most of them would not buy or use it. Rather, a product is “safer” for purposes of negligent design if consumers would in fact purchase the safer alternative design and, as a result, be subject to less risk. See, *e.g.*, *Felix*, 262 A.D.2d at 448; *Pigliavento*, 248 A.D.2d at 842.

The trial court’s acceptance of plaintiffs’ theory removed from them the burden of proving that a functional equivalent alternative design to defendants’ regular cigarettes existed. It was threshold error to permit this case to be sent to the jury at all. See, *e.g.*, *Felix*, 262 A.D.2d at 449 (granting summary judgment to defendant when plaintiff’s proposed alternative design was one that lacked an ingredient “critical to the products’ performance”); *Perez v. Radar Realty*, 7 Misc.3d 1015A (Sup. Ct. Bronx Cty. 2005) (same).

Whether – despite consumer preferences – our society should adopt rules limiting the tar and nicotine content of cigarettes, as some other countries have done, is a decision for legislators and regulators, not for courts. Indeed, New York courts routinely decline to adopt new theories of tort liability – especially those that would result in “significant change in [the] law” and in New York’s “public policy” – believing that such changes are best left to the legislative decision-making process. See, *e.g.*, *Murphy v. American Home Prod. Corp.*, 58 N.Y.2d 293, 301-302 (1983); *Wieder v. Skala*, 80 N.Y.2d 628 (1992); *Sabetay v. Sterling*

Drug, Inc., 69 N.Y.2d 329 (1987); *Stambovsky v. Ackley*, 169 A.D.2d 254 (1st Dep't 1991).

B. Plaintiffs Failed To Prove Proximate Causation.

Plaintiffs' case suffered from an additional, equally fatal defect: they did not prove that defendants' failure to adopt the proffered alternative design – ultra-light cigarettes – *caused* Mrs. Rose's injuries. This defect is an independent ground for dismissal. See *Robinson*, 49 N.Y.2d at 480; *Clarke v. Helene Curtis, Inc.*, 293 A.D.2d 701, 701 (2d Dep't 2002); *Banks v. Makita, U.S.A., Inc.*, 226 A.D.2d 659, 660 (2d Dep't 1996). We do not dispute, for purposes of this appeal, that Mrs. Rose's cancer was caused by smoking cigarettes. But that was not enough. The plaintiffs were required to show that the *design* of the cigarettes caused the cancer, not the cigarettes themselves. There was simply no proof that the difference in tar and nicotine yield between the cigarettes that Mrs. Rose smoked and ultra-light brands was a substantial contributing cause of her cancer.

The plaintiffs' theory was that Mrs. Rose's cancer was caused by smoking regular cigarettes, and that the plaintiffs' proposed alternative (ultra-light cigarettes) would have been "safer." But as her own witnesses admitted, even ultra-light cigarettes are unsafe, and even if Mrs. Rose had switched to ultra-lights, she might still have developed cancer. The plaintiffs presented no evidence quantifying the degree of "extra" cancer risk that was caused by defendants'

alleged negligence. In short, plaintiffs presented no evidence that the failure to use a safer alternative design mattered at all to Mrs. Rose's injuries.

Under New York law, expert testimony is required to establish any fact “when the subject-matter to be inquired about is presumed not to be within common knowledge and experience [of jurors].” *Mieselman v. Crown Heights Hospital*, 285 N.Y. 389, 396 (1941). That is precisely the situation here – plaintiffs’ allegations involved complex scientific and medical issues involving low-tar cigarettes. The jury could not just assume that the difference in tar yield between ordinary and ultra-light cigarettes was a cause of Mrs. Rose’s injuries. The evidence showed that even low-tar cigarettes are not safe (A-1968, 3149); that carcinogens are found in the gas phase of the smoke, not just in “tar” (the particulate phase) (A-3379); and that smokers who smoke low-yield cigarettes may “compensate” for reduced delivery, by increasing the number of cigarettes smoked per day, the frequency of puffing, or the depth and duration of inhalation. A-3150, 4250, 4252. Plaintiffs’ own expert, Dr. Wigand, even suggested that “light cigarettes” “created more risk.” A-2022. And the cigarettes smoked by Mrs. Rose in the 1950s (which the jury found were not negligently designed and for which there was no liability) were also shown by plaintiffs to be capable of causing cancer.

Courts around the country have granted judgment to tobacco defendants on identical records. As the California Court of Appeal explained in *Whiteley v. Philip Morris, Inc.*, 11 Cal. Rptr.3d 807, 862-63 (Cal. Ct. App. 2004),

As identified by plaintiff's expert witnesses, the negligent design of defendants' cigarettes resulted in cigarettes less "safe" than they could have been if cigarette smoke's cancer causing substances had been reduced or removed – or less addictive had defendants not manipulated nicotine levels.

[***]

[P]laintiff's evidence on this point was insufficient to support the finding that such negligence was a "cause" of Whiteley's injuries. Plaintiff's expert witnesses did not attempt to quantify the likelihood that the asserted design defects of cigarettes, as distinguished from smoking cigarettes in general, contributed to Whiteley's developing lung cancer. Nor did they opine that the negligent design of cigarettes was "in reasonable medical probability" a substantial factor contributing to her lung cancer (or even to her risk of developing lung cancer.)

The relevant causation evidence admitted in this case was identical to the evidence admitted in *Whiteley*. In both cases, expert witnesses testified about "carcinogens that could be removed from cigarettes, making them 'safer,'" and about the defendants' purposeful "manipulation" of nicotine levels. *Id.*, at 863. But as in *Whiteley*, such evidence is simply insufficient to prove that the defendants' negligent design of cigarettes was "a substantial factor" in the plaintiff's injury. See also *Cipollone v. Liggett Group, Inc.*, 683 F. Supp. 1487,

1493-1496 (D.N.J. 1988) (holding that under New Jersey law, evidence that switching to low-tar cigarettes would have reduced the plaintiff's risk of lung cancer by 8% to 17% was insufficient to establish proximate cause under a design-defect theory).

II. DEFENDANTS ARE ENTITLED TO A NEW TRIAL ON ALL ISSUES BECAUSE THE COURT SYSTEMATICALLY EXCLUDED KEY RELEVANT EVIDENCE AND IMPROPERLY CHARGED THE JURY IN PHASE I.

The trial court also committed multiple, highly prejudicial evidentiary and instructional errors that deprived defendants of a fair trial.

A. Evidentiary and Instructional Errors Relating To The Risk/Utility Analysis Necessitate A New Trial.

New York law requires jurors in a negligent design case to balance a product's risks against its utility. The factors relevant to this risk/utility test are:

- (1) a product's utility to the public as a whole;
- (2) a product's utility to the individual user;
- (3) the likelihood that the product will cause injury;
- (4) the availability of a safer design;
- (5) the possibility of designing and manufacturing the product so that it is safer, but remains functional and reasonably priced;
- (6) the degree of awareness of a product's potential danger that can reasonably be attributed to the individual user; and
- (7) the manufacturer's ability to spread the cost of any safety related design change.

Denny, 87 N.Y.2d at 258; *Voss*, 59 N.Y.2d at 108. Although the risk/utility test was developed in the context of strict liability cases, it “appl[ies] to causes of action sounding in negligent design as well as strict products liability based upon a design defect.” *Giunta v. Delta Int’l Mach.*, 300 A.D.2d 350, 352 (2d Dep’t 2002); see also *Denny*, 87 N.Y.2d at 258.

The court purposefully and erroneously excluded defense evidence directly relevant to many of these factors – particularly evidence that would weigh in defendants’ favor in the context of the balancing test. It then compounded the error by instructing the jury to consider cigarettes’ risks, but not their utility.

1. Evidence of Consumer Preferences and Commercial Acceptability Should Not Have Been Excluded.

In Phase I, the court excluded or struck all evidence concerning the qualities that influence a smoker’s choice of brands, whether the allegedly safer design for cigarettes proposed by plaintiffs would have been acceptable to consumers, and whether the alternative would have been commercially viable.

At first, the court permitted testimony on this topic from Dr. Whidby. A-2847-53. However, it then ruled that only a marketing expert would be competent to testify about consumer acceptability. A-2881-82. During Dr. Blackie’s testimony, the court made the same ruling. A-4018-19. It recognized, however, that evidence of consumer preferences evidence was “crucial to the issues in the

case,” and it initially ruled that defendants could call a marketing expert to testify about the lack of commercial success of low-yield brands. A-4020, 4022.

Plaintiffs objected, arguing that consumer preferences were irrelevant to a negligence claim and that it does not matter if “nobody buys” the alternatively designed product. A-4113-14. The court disagreed at first, stating that the jury had to consider whether an ultra-light cigarette “[g]ives pleasure, relaxation, all those things, and the only way you can determine that is [by] who’s buying it. *** [P]eople smoke cigarettes for taste, for relaxation, for a whole bunch of things. The jury can decide that or not. But that’s in evidence.” A-4167, 4173.

Ultimately, however, the jury was *not* allowed to consider the issue of consumer acceptability. The trial court changed its mind and struck all evidence regarding consumer tastes and preferences, or whether ultra-light cigarettes were acceptable to consumers. It instructed the jury unequivocally that all of that evidence was irrelevant:

This is very important. So get out your notebooks.

*** [T]here are no issues in this case as to peoples’ purchasing cigarettes on the basis of taste, that is consumers liking cigarettes or not, thinking one [is] better than others. That’s not part of the issues in this case. They are out.

So any testimony that’s been given up to now, either on direct or cross as to what consumers preferred or did not prefer, is out of the case and you will no longer consider it. (A-4198.)

The court reiterated this ruling several more times. It stated, for example, that evidence of “what consumers want or not” was inadmissible. A-4281-82, 4257, 4278-80. And, during the defense summation, the court again instructed the jury that there were “no issues in this case having to do with whether or not something is acceptable to the consumer or not.” A-4989.

In addition to striking the evidence that had already been admitted, the court barred defendants from introducing the testimony of their promised marketing expert, Jeanne Bonhomme, who would have testified about the market for cigarettes; consumer preferences for certain aspects of cigarettes, including taste; and Philip Morris’s extensive but unsuccessful efforts to market ultra-low-yield cigarettes and de-nicotinized cigarettes. A-4640-48. Ms. Bonhomme also would have explained that if there is insufficient consumer demand for a product, retailers will not waste valuable shelf space on it. The court even refused to give a curative instruction informing the jury that Ms. Bonhomme’s absence was the result of the court’s ruling – thus destroying defendants’ credibility with the jury, which had already been told to expect testimony from a marketing expert. A-4641.

The trial court’s rulings were erroneous, prejudicial, and completely unprecedented. The excluded evidence was highly relevant to the jury’s task in determining whether plaintiffs’ proposed alternative design – a cigarette containing only “trace” amounts of tar and nicotine – was truly feasible. In order to prove that

ultra-light cigarettes were a “feasible alternative” to regular cigarettes, plaintiffs had to show that their alternative had function and utility to consumers comparable to that of defendants’ regular products, with fewer risks. Plaintiffs adduced insufficient evidence to go to the jury on this issue, as we argue above. But if their evidence had been sufficient, as the trial court believed, a new trial would still be required because the trial court precluded defendants from showing that the plaintiffs were wrong: that ultra-low-yield cigarettes did *not* have the same function and utility as higher-yield ones.

2. The Court Erred By Failing to Charge The Jury On The Utility Of Cigarettes.

The effect of the prejudicial evidentiary rulings discussed above was exacerbated by the trial court’s one-sided jury charge. As discussed, the Court of Appeals has identified at least seven factors relevant to the jury’s risk/utility analysis in a design defect case. Five of these factors concern the potential risks of the product; two factors concern the product’s potential utility. The court charged the jurors that they were to consider the five *risk* factors, but refused to charge on the two *utility* factors. See A-5266, 11416-17.

This eviscerated the risk/utility test and all but pre-ordained a verdict for plaintiffs. The jury’s task in a design defect case is to balance the product’s risk of harm against the product’s utility – to the public as a whole and to the individual user. As the Court of Appeals explained in *Denny*, the risk/utility test “is rooted in

a recognition that there are both risks and benefits associated with many products and that there are instances in which a product's inherent dangers cannot be eliminated without simultaneously compromising or completely nullifying its benefits. In such circumstances, a weighing of the product's benefits against its risks is an appropriate and necessary component of the liability assessment under the policy-based principles associated with tort law." 87 N.Y.2d at 257. See also *Cover v. Cohen*, 61 N.Y.2d 261, 266-67 (1984) (discussing balancing test).

The court's reasoning – that the *Voss* factors are "flexible" standards (A-96), to be applied as the evidence in particular cases demands – does not explain why, in this case, it was irrelevant that smokers, including Mrs. Rose, derived utility from smoking high-tar cigarettes and preferred them to the plaintiffs' alternatives. The test is, after all, not one that considers risk alone, but one that balances risk with *utility* to the consumer. A new trial is the only adequate remedy.

B. The Court Erred By Excluding Evidence Of, and Failing to Charge The Jury Regarding, Consumer Awareness and Expectations.

Before trial, plaintiffs moved to preclude defendants from introducing any evidence that since the 1960s the public has been aware of the dangers of cigarette smoking. This evidence was directly relevant to the key question facing the jury: whether defendants' cigarettes were "in a condition *not reasonably contemplated by the ultimate consumer* and *** unreasonably dangerous for [their] intended

use.” *Voss*, 59 N.Y.2d at 107 (quoting *Robinson v. Reed-Prentice Div. of Package Mach. Co.*, 49 N.Y.2d 471, 479 (1980) (emphasis added)).

The court, misconstruing clear New York law, granted plaintiffs’ motion and (1) prevented defendants from introducing any such evidence during trial; (2) barred defendants from arguing to the jury that such knowledge was relevant to its deliberations (A-94-97); and (3) refused to charge the jury that it should consider the issue (A-5269-78, 5299, 11415-18).

This error was based on a manifest misunderstanding of New York design-defect law. The trial court believed that because the plaintiffs were claiming “negligent design” rather than “strict products liability,” evidence of consumer expectations and awareness was irrelevant to the jury’s task. A-97. That holding was contrary to clear precedent. Indeed, in pre-trial hearings, even the trial court recognized that evidence of consumer awareness is normally admissible under New York product liability law, but declared: “I am clear on the law. That doesn’t mean I am going to follow it.” A-442.

The court’s ruling rested on the following comment made by a federal district court applying New York law:

When a plaintiff asserts a design defect claim on a theory of negligence, the only difference in the inquiry [from strict products liability] is that in the negligence action, the jury must ask whether the manufacturer acted unreasonably in designing the product. That is, the focus shifts from whether the product, as designed, was not

reasonably safe to whether the manufacturer was aware of that condition and chose to market the product anyway. *Voss*, 59 N.Y.2d at 107.

Gonzalez by Gonzalez v. Morflo Indus., 931 F. Supp. 159, 165 (E.D.N.Y. 1996).

This comment (and the portion of *Voss* on which it is based) does not mean what the trial court interpreted it to mean. The comment means only that strict-liability plaintiffs are relieved of the burden of proving that a manufacturer was aware (or should have been aware) of a product defect, in order to prevail. It does not mean that negligence plaintiffs are somehow relieved of proving that the defendant's product was unreasonably dangerous.⁶

Evidence of consumer expectations is clearly relevant to New York's definition of an "unreasonably dangerous" product. One of the risk/utility factors juries consider when determining unreasonable dangerousness (in both negligent design and strict liability cases) is "the degree of awareness of the potential danger

⁶ The federal district court case on which the trial court directly relied also recognized this distinction, in a footnote appended to the very sentence the trial court quoted:

[I]f there is a difference [between negligent design and strict liability] it seems to be that under a strict liability theory, plaintiff does not have to show that the manufacturer was aware of the condition that was unreasonably dangerous, while under the negligence theory, the plaintiff must show actual knowledge of the condition and a choice to market it anyway.

Gonzalez, 931 F. Supp. at 165 n.4.

of the product which reasonably can be attributed to the plaintiff.” *Voss*, 59 N.Y.2d at 109. In other words, a product likely has utility if consumers use it despite being aware of the risks. More basically, the Court of Appeals has consistently *defined* a “defectively designed product” as “one which, at the time it leaves the seller’s hands, is in a condition *not reasonably contemplated by the ultimate consumer.*” *Id.* at 107 (emphasis added). When the *Voss* Court wrote that the “focus” of a strict liability case “shifts” from the conduct of a manufacturer to the safety of the product, it did not hold that consumer expectations are irrelevant in a negligent design case. To the contrary, whether a product “is in a condition *not reasonably contemplated by the ultimate consumer*” is an element under both theories. See *Robinson*, 49 N.Y.2d at 479.⁷

Based on this pervasive error of law, the court also refused to charge the jury that it was permitted to consider Mrs. Rose’s own awareness of the risks of smoking and of the availability of lower-tar cigarettes. A-4930-32, 11422. Because the court believed the “focus” of the inquiry should be on the manufacturer alone, Mrs. Rose’s personal knowledge of the risks of ordinary

⁷ New York’s Pattern Jury Instructions also recognize that, in order for a manufacturer to be found negligent, the product must first be shown to be defective. New York PJI 2:120 states that the jury shall find the defendant negligent if, among other things, the product “*was defective* when put on the market by defendant.” (emphasis added).

cigarettes – and her decision not to switch to ultra-lights – was deemed not to be part of the jury’s inquiry and thus not to merit an instruction.

That ruling violated the rule promulgated in *Scarangella*, 93 N.Y.2d at 661, which held that a plaintiff failed to make out a prima facie case of design defect where, *inter alia*, the plaintiff was a “highly knowledgeable consumer” who had information concerning the availability of alternative designs prior to purchasing the defendant’s product. When “a plaintiff claims that a product without an optional safety feature is defectively designed because the equipment was not standard,” the Court wrote, “[t]he product is not defective where *** (1) the buyer is thoroughly knowledgeable regarding the product and its use and is actually aware that the safety feature is available; (2) there exist normal circumstances of use in which the product is not unreasonably dangerous without the optional equipment; and (3) the buyer is in a position, given the range of uses of the product, to balance the benefits and the risks of not having the safety device ***.” See also *Jackson v. Bomag GmbH*, 225 A.D.2d 879, 883 (3d Dep’t 1996); *Biss v Tenneco, Inc.*, 64 A.D.2d 204, 207 (4th Dep’t 1978).

The defendants were entitled to adduce evidence showing that Mrs. Rose was “thoroughly knowledgeable” about the risks of regular tobacco products and the availability and benefits of “safer,” low-yield products; that there exist normal circumstances where smoking regular cigarettes is not *unreasonably* dangerous,

given the utility smokers derive from cigarette use; and that based on this knowledge and these circumstances, Mrs. Rose was in a position to balance the risks of regular cigarettes against the benefits she derived from them. Of course, the plaintiffs were entitled to rebut these conclusions. But the ultimate decision on this issue belonged to the finder of fact, not the court.

C. The Trial Court Erroneously Barred The Affirmative Defense Of Assumption Of The Risk.

The defendants sought to invoke the affirmative defenses of express and primary assumption of the risk by showing that (1) Mrs. Rose voluntarily purchased cigarettes bearing express warnings of the health risks associated with smoking – warnings that since 1969 have been deemed by the federal government to be “adequate” to warn of “any relationship” between smoking and health (see *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 489 n.9 (1996)); and (2) in any case, the risk of harm from smoking was “perfectly obvious” to Mrs. Rose, who chose to smoke despite “fully comprehend[ing]” the risks.

The court dismissed the defenses even though it acknowledged their general availability in New York. “Express” assumption of the risk is a defense in cases where the plaintiff has been explicitly warned of danger (see *Arbegast v. Board of Educ.*, 65 N.Y.2d 161 (1985)), and “primary” assumption of the risk is applicable in cases where the risk of harm is “obvious” even absent a warning. *Turcotte v.*

Fell, 68 N.Y.2d 432, 439 (1986).⁸ The court’s reasons for dismissing the defenses were that:

- Express assumption of the risk was inapplicable because Mrs. Rose was already addicted to cigarettes by 1969, when warnings became mandatory (A-99); and
- Primary assumption of the risk is a defense limited to cases involving sports or leisure activities or other “physical activities,” where “the elevated risks involved were clear, and the immediate risks of physical harm ended when the activity ended.” *Id.*

This reasoning was flawed. First, as to express assumption of the risk: Whether Mrs. Rose’s addiction was so intense that she could not be said to have freely chosen to smoke defendants’ cigarettes in the face of their express warnings is a classic question of fact for the jury. Certainly, the plaintiffs were free to argue to the jury that Mrs. Rose was addicted, and that therefore, she could not have assumed the risk of smoking, even though she was explicitly warned of the danger. But even plaintiffs’ experts admitted that millions of “addicted” smokers have quit,

⁸ New York law permits a defendant to assert express or primary assumption of the risk even if it has waived comparative fault. See *Morgan v. State*, 90 N.Y.2d 471, 483-84 (1997). As the Court of Appeals has explained, the two doctrines are distinct: Assumption of the risk is a “measure of the defendant’s duty of care.” *Id.* “If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty.” *Turcotte*, 68 N.Y.2d at 439. Comparative fault, on the other hand, is a method of measuring the extent of the defendant’s liability, after the plaintiff has established that the defendant has breached its duty of care. See *Morgan*, 90 N.Y.2d at 483-84 (“[A]ssumption of risk is not an absolute defense but a measure of the defendant’s duty of care and thus survives the enactment of the comparative fault statute.”).

and the trial court cannot simply assume for itself that Mrs. Rose was incapable of doing the same. Both sides presented evidence regarding the strength and consequences of Mrs. Rose's addiction; the jury should have been permitted to resolve this issue of fact.

Second, the trial court's holding that primary assumption of the risk was limited to physical activities with immediate risks of physical harm concurrent with the challenged activity appears nowhere in New York case law. Instead, the law is clear that the defense is available in all circumstances where a plaintiff voluntarily participates in an activity that presents an elevated risk of injury, the danger is inherent in the activity, and the plaintiff knows and understands the risks of engaging in that activity. See, e.g., *Turcotte*, 68 N.Y.2d 432; *Sy v. Kopet*, 18 A.D.3d 463 (2d Dep't 2005); *Belloro v. Chicoma*, 8 A.D.3d 598, 599 (2d Dep't 2004); *Davis v. Kellenberg Mem'l High Sch.*, 284 A.D.2d 293, 294 (2d Dep't 2001); *Powell v. Metropolitan Entm't Co.*, 195 Misc. 2d 847, 851 (Sup. Ct. N.Y. Cty. 2003); *Marshall v. Tanoury*, 157 Misc. 2d 303, 305-06 (Sup. Ct. Oneida Cty. 1993).

Smoking is an inherently dangerous activity, and we submit that the risks associated with it are as obvious as those surrounding the myriad activities (like horse racing [*Turcotte*], exercising on parallel bars [*Marcano*], attending a rock concert [*Powell*], or riding in cars with bad drivers [*Marshall*]) to which New York

courts have routinely applied the doctrine of primary assumption of the risk. The defendants did not ask for a dismissal on this basis; they simply sought the opportunity to argue to the jury that the dangers of smoking regular cigarettes are obvious and that Mrs. Rose assumed those risks. As with express assumption of the risk, the ultimate decision should have been vested in the finder of fact.

III. PLAINTIFFS' NEGLIGENCE CLAIM, AS IT WAS SENT TO THE JURY, IS PREEMPTED BY FEDERAL LAW.

Under the trial court's theory, defendants were negligent merely because cigarettes might have been made "safer" by eliminating tar and nicotine. The consequence of this verdict is that nearly all cigarettes currently on the market may not be sold in New York State without leaving the manufacturer liable for both compensatory and punitive damages.

Plaintiffs' theory conflicts with well established federal law, because it represents an effective ban on nearly all cigarette sales in New York. See, *e.g.*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 882 (2000) (imposing tort liability for failing to install an airbag is tantamount to a state law establishing a duty on manufacturers to install airbags, because "this Court's pre-emption cases *** *assume* compliance with the state law duty in question"). Because such a ban would "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," the verdict is preempted by federal law. *Id.* at 873; *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001).

A. Congress Has Foreclosed A Cigarette Ban.

In *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the Supreme Court recognized that a cigarette ban would contradict the express will of Congress. The federal government, the Court recognized, “has foreclosed the removal of tobacco products from the market,” 529 U.S. at 137, choosing instead to allow the continued sale of these products, subject to extensive regulation of labeling and advertising.

Congress first convened hearings on “the tobacco problem” following the release of the 1964 Surgeon General’s Report. The result of those hearings was the Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. 89-92, § 2, 79 Stat. 282, codified at 15 U.S.C. § 1331, et seq. (“Labeling Act”), which regulates cigarette sales by imposing strict requirements for labeling and advertising.

The choice to regulate sales and advertising, rather than to ban cigarettes or to regulate their design, was purposeful. Congress’s stated objective was to balance the goals of (1) ensuring that “the public may be adequately informed that cigarette smoking may be hazardous to health,” and (2) protecting “commerce and the national economy *** to the maximum extent.” *Id.*, § 2, 79 Stat. 282 (codified at 15 U.S.C. § 1331).

Rather than banning or surtaxing cigarettes,⁹ Congress chose to inform the public of tar and nicotine levels by empowering the Federal Trade Commission (“FTC”) to supervise and police cigarette advertising and labeling. Pursuant to this mandate, the FTC has actively regulated what cigarette manufacturers can and cannot say about tar and nicotine yields and specifically required that all such statements be based upon a standardized testing method prescribed by the FTC. See, e.g., *Price v. Philip Morris, Inc.*, 2005 Ill. LEXIS 2071, *13-*15 (Ill. Dec. 15, 2005); A-5647-55.

The Supreme Court recognized the significance of this history in its *FDA* decision. The Court noted that Congress “has directly addressed the problem of tobacco and health through legislation on six occasions since 1965” and has never banned the sale of cigarettes or other tobacco products, even though the “adverse health consequences of tobacco use were well known as were nicotine’s pharmacological effects.” *FDA*, 529 U.S. at 137-38. The result of this policy is clear:

⁹ Congress has repeatedly refused to ban the sale of high-yield cigarettes or other tobacco products, or to impose tar and nicotine ceilings on cigarettes sold in the United States despite persistent exhortations to do so by many of its members, by regulators, and by the public health community. As the 1989 Surgeon General’s Report explained, for example, between 1967 and 1979, 13 bills were introduced “contain[ing] provisions for taxing cigarettes according to tar and nicotine content or cigarette length. Three other bills would have established maximum levels for tar and nicotine content or cigarette length. None of these bills became law.” A-10020.

Congress's decisions to regulate labeling and advertising and to adopt the express policy of protecting 'commerce and the national economy *** to the maximum extent' reveal its intent that tobacco products remain on the market. *Indeed, the collective premise of these statutes is that cigarettes and smokeless tobacco will continue to be sold in the United States.* A ban of tobacco products by the FDA would therefore plainly contradict congressional policy.

Id. at 139 (emphasis added).

B. Congress Has Affirmatively Blocked Regulation Of Tar And Nicotine Content.

Congress has repeatedly blocked attempts to ban regular cigarettes or regulate tar and nicotine levels. In 1974, for example, the American Public Health Association petitioned the Consumer Product Safety Commission ("CPSC") to regulate cigarettes containing more than 21 milligrams of tar, pursuant to the CPSC's authority under the Hazardous Substances Act ("HSA"). See 120 Cong. Rec. 1604 (1974). The CPSC initially declined, concluding that it lacked the authority to regulate cigarettes, but a federal district court overturned that ruling and ordered the CPSC to reexamine the original petition. See *American Public Health Assoc. v. Consumer Prod. Safety Comm.*, CCH Consumer Prod. Safety Guide 75,081 (D.D.C. 1975), vacated as moot, No. 75-1863 (D.C. Cir. 1976); see also *FDA*, 529 U.S. at 150-51.

In response to this potential regulation of high-yield cigarettes, Congress promptly amended the HSA to divest the CPSC of authority to regulate "tobacco

and tobacco products.” Consumer Product Safety Commission Improvements Act of 1976, Pub. L. 94-284, § 3(c), 90 Stat. 503 (codified at 15 U.S.C. § 1261(f)(2)).

A separate statement in the Senate Report accompanying this legislation underscored the law’s purpose to

unmistakably reaffirm the clear mandate of the Congress that the basic regulation of tobacco and tobacco products is governed by the legislation dealing with the subject, *** and that any further regulation in this sensitive and complex area must be reserved for specific Congressional action.

S. Rep.No. 94-251 at 43 (1978), *as reprinted in* 1976 U.S.C.C.A.N. 993, 1012 (additional views of Sens. Hartke, Hollings, Ford, Stevens, and Beall).

That was not the only occasion on which Congress has acted to prevent regulation of cigarette sales by other governmental bodies. As the *FDA* Court noted (529 U.S. at 147-48), Congress has repeatedly rejected proposals to allow the FDA to regulate tar and nicotine levels in cigarettes, and it has placed strict limitations on the power of the FTC to impose labeling or advertising requirements on cigarette manufacturers without first seeking express Congressional authorization (*id.* at 150).

C. The Verdict In This Case Conflicts With Federal Law.

In this case, the jury was permitted to impose liability on defendants merely for selling cigarettes that contained enough nicotine to provide a “kick.” The vast majority of cigarettes do just that, and the jury’s verdict would therefore preclude

defendants from selling virtually all cigarettes currently on the market. See, e.g., A-6716 (1988 Surgeon General's Report) ("*All* tobacco products contain *substantial* amounts of nicotine.") (emphasis added).

An effective ban on cigarette sales – or, more specifically, a ban on the sale of the only products acceptable to consumers – directly conflicts with Congress's well established policy of allowing cigarettes to be sold in this country. The recognition that state courts lack the power to contravene that policy has led to the dismissal of common law negligence claims virtually identical to this one by a long line of state and federal trial and appellate courts.

For example, in *Conley v. R.J. Reynolds Tobacco Co.*, 286 F. Supp.2d 1097, 1107-08 (N.D. Cal. 2002), the court held that a claim for design defect was preempted to the extent it was based upon dangers that "are so inherent in tobacco products that it would not be scientifically or commercially feasible to remove the defect. Holding defendants liable in such circumstances would effectively constitute a ban on the manufacture of tobacco products, a result that would undeniably conflict with Congressional policy." Similarly, in *Johnson v. Brown & Williamson Tobacco Corp.*, 345 F. Supp.2d 16 (D. Mass 2004), the plaintiff claimed – like plaintiffs did here – that cigarettes are defective because they have been "designed and manipulated *** to deliver doses of nicotine sufficient to create and sustain consumer addiction." *Id.* at 20. The court dismissed plaintiff's

defective design claims on the ground that allowing liability “based upon the dangers of smoking” would “impermissibly override the congressional decision to allow their continued sale.” The court noted that “[f]ar from being a defect, the presence of a prescribed level of nicotine is exactly what consumers seek.” *Id.* at 21.

And in *Insolia v. Philip Morris Inc.*, 128 F. Supp.2d 1220, 1222 (W.D. Wisc. 2000), the court addressed a claim that tobacco manufacturers should be held liable “merely for continuing to manufacture and sell a product they knew was dangerous.” Applying *FDA* and *Geier*, the court held that such liability would effectively ban cigarettes and would “interfere with Congress’ policy in favor of keeping cigarettes on the market.” *Id.* at 1224-25. The plaintiffs’ claims were therefore preempted.

Most recently, in *Gault v. Brown & Williamson*, No. 1:02-CV-1849, slip op. (N.D. Ga. March 31, 2005), the court granted summary judgment and dismissed the plaintiff’s claims for negligent design because “[i]t would be in conflict with Congress’s decision to keep tobacco products on the market for this court to now hold Brown & Williamson liable for designing a product that contains and delivers tobacco and nicotine to the body.” *Id.* at 20 (citation omitted). The court held:

A contrary result would force the defendant to remove tobacco from its cigarettes. To put it another way, the plaintiffs’ design defect claim is preempted unless the plaintiffs can prove that it would have been a marketable

reality and would have been technologically feasible to remove the design defect from the cigarette without changing the cigarette's fundamental composition/characteristic as a tobacco product.

Id. Other courts around the country have come to the same conclusion – that if the alleged “defect” in a defendant’s cigarette is simply the inherent dangerousness of tar and nicotine, and that if there is no commercially acceptable alternative, the claim is preempted.¹⁰

IV. THE PUNITIVE DAMAGES AWARD CANNOT STAND.¹¹

The finding that Philip Morris engaged in willful and wanton misconduct is contrary to law, and the award of punitive damages must be dismissed. Philip Morris’s conduct in marketing different cigarette brands with a range of tar and nicotine yields cannot subject it to punishment under New York law. As a matter

¹⁰ See, e.g., *Prado Alvarez v. R.J. Reynolds Tobacco Corp.*, 313 F. Supp.2d 61, 73 (D.P.R. 2004) (“To the extent that Plaintiffs assert that Defendant was negligent because it made and sold cigarettes that were dangerous and addictive, such claims are foreclosed by the doctrine of conflict preemption.”), *aff’d on other grounds*, 405 F.3d 36 (1st Cir. 2005); *Cruz-Vargas v. R.J. Reynolds Tobacco Co.*, 218 F. Supp.2d 109, 118 (D.P.R. 2002) (“Plaintiffs are barred from pursuing a state-law tort claim based exclusively on the theory that Defendant Reynolds manufactured and sold cigarettes.”), *aff’d*, 348 F.3d 271 (1st Cir. 2003); *DuJack v. Brown & Williamson Tobacco Corp.*, No. X07-00728225-S, slip op. (Conn. Super. Ct. Nov. 13, 2001) (“The manufacture, sale, possession and consumption of tobacco cigarettes are a legal activity. Judges and courts cannot ban them, nor impose liabilities, merely for engaging in that activity *** . Those are legislative decisions, for state and federal legislatures, under Constitutional strictures.”).

¹¹ Appellant Brown & Williamson Tobacco Holdings, Inc. was not found liable for punitive damages and therefore does not join in this section of the brief.

of due process, moreover, an award of punitive damages cannot be based upon conduct – such as that at issue here – that the defendant could reasonably have believed to be lawful. Alternatively, numerous trial errors necessitate a new trial on punitive damages. Finally, the award is unconstitutionally excessive and should at the very least be substantially reduced.

A. Philip Morris Is Entitled To Judgment As To Punitive Damages.

1. Philip Morris’s Conduct Was Neither Willful Nor Wanton.

No New York court, other than the court below, has *ever* imposed punitive damages in a negligent design case. And for good reason: As this Court itself has held, mere negligent conduct is insufficient to give rise to punitive damages.

New York law provides for punitive damages only for exceptional misconduct which transgresses mere negligence, as when the wrongdoer has acted maliciously, wantonly, or with a recklessness that betokens an improper motive or vindictiveness *** or has engaged in outrageous or oppressive intentional misconduct or with reckless or wanton disregard of safety or right ***.

Camillo v. Geer, 185 A.D.2d 192, 193-194 (1st Dep’t 1992) (internal quotation marks omitted); see also *In re New York City Asbestos Litigation*, 225 A.D.2d 414, 415 (1st Dep’t 1996). Nor does ordinary recklessness meet the standard.¹²

¹² See, e.g., *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 842-43 (2d Cir. 1967) (Friendly, J.) (examining cases and concluding that under New York law “the recklessness that will give rise to punitive damages *must be close to*

Courts routinely dismiss punitive damages claims in negligent design cases as a matter of law *before trial*.¹³ And where such claims have been allowed to go to the jury, the jury's award has subsequently been vacated as a matter of law.¹⁴

There is no aggravated misconduct in this case that would warrant allowing punitive damages – for the first time – in a negligent design case. Liability was based entirely on Philip Morris's decision to give consumers a range of products to choose from – including the ultra-light cigarettes advocated by plaintiffs – while providing them with the information relevant to that choice. Philip Morris has at all times complied with the federal labeling requirements and has consistently disclosed the tar and nicotine content in all the advertisements for its cigarettes, including those smoked by Mrs. Rose. A-5654-55. Both the range of products sold by Philip Morris and the attendant labeling information have been supervised by the FTC, Congress, and public health authorities. See pages 45-46, *supra*.

criminality”) (emphasis added); *Rosenkrantz v. Steinberg*, 13 A.D.3d 88, 88 (1st Dep't 2004).

¹³ See, e.g., *Lugo v. LJM Toys, Ltd.*, 146 A.D.2d 168, 171 (1st Dep't 1989); *Dubecky v. S2 Yachts, Inc.*, 234 A.D.2d 501, 502-03 (2d Dep't 1996); *Krohn v. Agway Petroleum Corp.*, 168 A.D.2d 858, 860 (3d Dep't 1990); *Croton Falls Fire District v. Pierce Mfg. Co.*, 130 A.D.2d 456, 457 (2d Dep't 1987); *West v. Goodyear Tire & Rubber Co.*, 973 F. Supp. 385, 389 (S.D.N.Y. 1997).

¹⁴ See, e.g., *Camillo*, 185 A.D.2d at 194; *Hafner v. Guerlain, Inc.*, 34 A.D.2d 162, 163 (1st Dep't 1970).

Finally, Philip Morris has dedicated itself to reducing smokers' overall tar and nicotine intake. Defendants' witness Dr. Langenfeld testified that cigarette manufacturers spend "a higher percentage of their advertisements on low-tar cigarettes than they were able to sell at that point in time. *** [They spend] about twice as many dollars of advertising for every dollar of revenue from a low tar cigarette basically." A-5736. Unsurprisingly, this effort has resulted in a significant overall reduction in the sales-weighted-average nicotine levels in cigarettes. A-5661. Philip Morris has also spent more than \$300 million developing a completely denicotinized cigarette; it built specialized commercial plants dedicated entirely to that project. A-5754. That project ultimately failed, however, because nobody would buy the product. A-5752-54.

In this context, Philip Morris's conduct in continuing to sell regular cigarettes cannot be deemed "malicious" or "wanton."

2. Philip Morris Lacked Notice That The Conduct At Issue Could Give Rise To A Penalty.

Plaintiffs' claim for punitive damages is also barred by principles of due process. In *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996), the Supreme Court explained that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice *** of the conduct that will subject him to punishment." See also *Bouie v. City of Columbia*, 378 U.S. 347, 354-55 (1964) (when punishment is imposed based on novel

construction of statute, “the effect is to deprive [defendant] of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime”).

Philip Morris did not have “fair notice” that the conduct at issue in this case might result in severe punishment. Indeed, the verdict in this case is novel in the extreme. As noted above (at 46-47), Congress not only has made a purposeful choice to regulate sales and advertising rather than to bar the sales of regular cigarettes, but has also blocked attempts to regulate tar and nicotine levels. The Surgeon General has never recommended removing regular-yield cigarettes from the market. No state or federal legislator or regulator has ever adopted a rule banning or restricting full-flavored cigarettes. And until this case, no court had ever held any tobacco manufacturer liable simply for continuing to sell regular brands, much less suggested that such conduct was punishable. Punitive damages may not be imposed under such circumstances.¹⁵

¹⁵ See, e.g., *BMW*, 517 U.S. at 585 (a company is “entitle[d] to fair notice of the demands that the several States impose on the conduct of its business”); *Mackintosh v. California Fed. Sav. & Loan Ass’n*, 935 P.2d 1154, 1163 (Nev. 1997) (“[P]unitive damages should not be awarded in the case which initially adopts [a] new cause of action.”); *Harrison v. Allstate Ins. Co.*, 662 So.2d 1092, 1095 (Miss. 1995) (refusing to award punitive damages on novel cause of action); *Murphy v. Dep’t of Labor Servs.*, 630 P.2d 186, 193 (Kan. 1981) (“[I]nasmuch as this is the first recognition of such a cause by a Kansas court of appellate jurisdiction, we believe the allowance of punitive damages in this case would be extremely unjust.”); *Kelsay v. Motorola, Inc.*, 384 N.E.2d 353, 360 (Ill. 1979) (recognizing the “penal nature” of punitive damages and concluding that “punitive damages should not be awarded where, as here, the cause of action forming the basis for their award is a novel one”).

3. In Upholding The Punitive Award, The Trial Court Erroneously Relied On Nonexistent Evidence Of Irrelevant Conduct.

The trial court justified the imposition of punitive damages against Philip Morris based on supposed misconduct that was never alleged, much less proved, and that is irrelevant to the conduct that allegedly harmed plaintiffs. The court held – without explanation – that the continued manufacture and sale of regular cigarettes “demonstrated a reckless disregard for safety and health.” A-66. Apparently recognizing the weakness of that conclusion, the court went on to hold that the jury’s verdict was “supported by evidence presented at trial” that Philip Morris allegedly “added chemicals to cigarettes to speed up the delivery of nicotine,” “hid this from the public,” and “attempted to obfuscate and conceal the dangers [of addiction and lung cancer] from the public.” *Id.* Although acknowledging that “the claims at trial did not involve any claims for failure to warn or misrepresentation,” the court nevertheless concluded that “evidence of the behavior was admissible in the punitive damages phase of the trial for the purposes of determining whether each defendant’s conduct was reprehensible ***.” A-67.

There are two fundamental flaws with the court’s reasoning. First, no evidence of fraud or concealment was admitted at trial. During Phase II, plaintiffs produced evidence that Philip Morris was able – through a variety of techniques, including the addition of chemicals – to control the nicotine content in its cigarettes

to provide “an optimal dose of nicotine” that would not be “rejected by tobacco smokers.” A-5514; see generally A-5513-28.¹⁶ However, there was no evidence that chemicals were added to the cigarettes smoked by Mrs. Rose, and there was absolutely no evidence that Philip Morris hid its ability to control nicotine yields from the public. Nor was there any evidence that Philip Morris attempted to conceal or misrepresent the dangers of addiction or lung cancer from the public. The court’s statements to the contrary are simply – and very unfairly – wrong.

Second, even if plaintiffs had presented some evidence of fraud or concealment, it could not have supported punitive liability in this case. In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003), the United States Supreme Court held that an award of punitive damages must rest on the defendant’s conduct toward the plaintiff before the court.

A defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. *A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.*

Id. at 422-23 (emphasis added). New York law similarly recognizes that a defendant is liable for punitive damages only if the jury finds “that *the act of the Defendant that caused the injury complained of* was wanton and reckless ***.”

¹⁶ The documents produced at trial indicated that “there was little evidence to support the idea” that Philip Morris was using its technology to produce a high nicotine, low tar cigarette. A-5541

New York PJI 2:278 (Punitive Damages). While *State Farm* arguably allows evidence of a defendant’s “similar” acts to demonstrate reprehensibility, 538 U.S. at 422, allegations of fraud can in no way be considered “similar” to allegations regarding the negligent design of a cigarette. Because plaintiffs themselves abandoned any claim for fraud, any evidence of such conduct would have been irrelevant and inadmissible.

B. Philip Morris Is Entitled To A New Trial On Punitive Damages.

Numerous evidentiary and instructional errors necessitate a new trial on punitive damages.

1. The Facts Supporting An Award Of Punitive Damages Must Be Established By Clear And Convincing Evidence.

At trial Philip Morris sought a jury instruction that the facts supporting a finding of punitive damages must be established by clear and convincing evidence. A-11471. The court instead instructed that only “a fair preponderance of the credible evidence” was required. A-5850, 6014. This violated First Department precedent and necessitates a new trial.

The standard of proof for punitive liability is well established in this Department. In *Camillo*, this Court reversed a jury’s finding of punitive liability, holding that “[a]n award for punitive damages must be supported by ‘clear, unequivocal and convincing evidence.’” 185 A.D.2d at 194 (internal quotation marks omitted) (quoting *Roginsky*, 378 F.2d at 851; citing *Cleghorn v. New York C*

& *H RR Co.*, 56 N.Y. 44, 48 (1874)). Other First Department cases confirm the applicability of the clear and convincing standard in negligent design cases. See *Munoz v. Poretz*, 301 A.D.2d 382, 384 (1st Dep’t 2003); *Sladick v. Hudson General Corp.*, 226 A.D.2d 263, 264 (1st Dep’t 1996). The Second Department has likewise reversed a trial court for “failing to charge the jury that the standard of proof regarding the imposition of punitive damages was clear and convincing evidence.” *Orange and Rockland Util., Inc. v. Muggs Pub, Inc.*, 292 A.D.2d 580, 581 (2d Dep’t 2002).¹⁷ See also *Roginsky*, 378 F.2d at 850 (New York requires liability for punitive damages to be “clearly established”).

¹⁷ Two older Court of Appeals cases appear to offer conflicting guidance as to the standard of proof necessary to impose punitive damages. Compare *Cleghorn*, 56 N.Y. at 48 (for punitive damages “[s]omething more than ordinary negligence is requisite; it must be reckless and of a criminal nature, and clearly established”), with *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, 60 (1920) (stating that to recover punitive damages plaintiffs had to “satisfy the jury by a fair preponderance of evidence” that the defendant was either malicious or reckless). *Camillo, Munoz*, and *Sladick*, however, post-date *Corrigan* by decades and resolve the conflict as a matter of law in this Department. See *Belco Petroleum Corp. v. AIG Oil Rig, Inc.*, 164 A.D.2d 583, 591-92 (1st Dep’t 1991) (holding that because “numerous cases in this Department” had decided an issue disputed on appeal, “[w]e are bound by those precedents as a matter of stare decisis” despite contrary decision in the Second Department).

Although the Fourth Department apparently requires that punitive liability be proven only by a preponderance of the evidence, it has recognized that such a standard conflicts with this Court’s holding in *Camillo*. See *In re Seventh Judicial Dist. Asbestos Litig.*, 190 A.D.2d 1068, 1069 (4th Dep’t 1993).

The trial court strained to read *Camillo*, *Munoz*, and *Sladick* as “carving out a special exception” limited to cases involving imposition of punishment on the basis of *respondeat superior*. A-114. That analysis, however, cannot be squared with the broad and general language in the decisions themselves. In *Camillo*, for example, this Court explained:

An award for punitive damages must be supported by “clear, unequivocal and convincing evidence” (supra, at 851; see also, Cleghorn v New York Cent. & Hudson Riv. R. R. Co., 56 NY 44, 48 [1874]). This legal standard has not been satisfied in the case at bar. The evidence fails to establish that FMC was motivated by malice, vindictiveness or criminal intent or that its conduct was intentionally outrageous or oppressive or undertaken with wanton disregard for the public safety.

185 A.D.2d at 194 (some citations, quotation marks, and ellipses omitted) (emphasis added). The *respondeat superior* doctrine is not even discussed until five paragraphs later, and the *Camillo* Court nowhere indicated that the standard of proof bore any relation to that issue. The language in the other decisions is equally broad and general. See *Munoz*, 301 A.D.2d at 384 (“In order to recover punitive damages, a plaintiff must show, by clear, unequivocal and convincing evidence, egregious and willful conduct that is morally culpable, or is actuated by evil and reprehensible motives.”) (internal citations and quotation marks omitted); *Sladick*, 226 A.D.2d at 264 (“Plaintiff failed to demonstrate by clear, unequivocal and convincing evidence that defendants’ conduct was so wanton or reckless as to

justify an award of punitive damages.”). The trial court’s interpretation of those cases is simply untenable.

The heightened standard of proof required for punitive damages under New York law is based on the notion that punishment should not be imposed absent the clearest evidence of wrongdoing. See *Roginsky*, 378 F.2d at 850-51 (“New York demands, as it might have to before punishing a defendant with fines similar to those imposed on a criminal charge, that the quality of conduct necessary to justify punitive damages must be ‘clearly established.’”). As the Supreme Court held in *State Farm*, “[g]reat care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof.” 538 U.S. at 428.

2. The Trial Court Erroneously Excluded Defense Evidence Concerning The Commercial Acceptability Of Plaintiffs’ Proposed Alternative Design.

The court erroneously excluded from Phase II relevant defense evidence regarding the acceptability of plaintiffs’ proposed alternative design to consumers. In addition to arguing that such evidence was relevant in Phase I (see pages 31-34, *supra*), defense counsel argued that the evidence should be admissible in Phase II to show that it had been entirely reasonable, and certainly not wanton, to respond to public health concerns by attempting to produce a lower-yield product that was

commercially acceptable, while continuing to market cigarettes with a range of tar and nicotine yields. The court initially agreed, A-5407-09, and defense counsel told the jury during Phase II opening statements that the evidence would show that consumers wanted a range of products and would not purchase ultra-light cigarettes. A-5438-48. Ultimately, though, the court changed its mind and excluded the evidence altogether. A-5761-62, 5773, 5750-51.

Regardless of whether this evidence was admissible in Phase I, it was plainly admissible to rebut plaintiffs' assertion that Philip Morris should be punished for continuing to sell regular cigarettes. At the very least, it was relevant as mitigating evidence. Under New York law, where "a plaintiff seeks punitive damages, all circumstances surrounding the transaction that tend to show or explain defendant's motivation or actions are admissible to rebut plaintiff's contention that defendant acted with evil or wrongful motives." *Nickerson v. Winkle*, 161 A.D.2d 1123, 1124 (4th Dep't 1990) (citations omitted). More specifically, a defendant is entitled to introduce evidence of the motive underlying its conduct, as well as any mitigating circumstances. See *Le Mistral v. Columbia Broad. Sys.*, 61 A.D.2d 491, 495 (1st Dep't 1978); *Guariglia v. Price Chopper Operating Co.*, 13 A.D.3d 1028, 1030 (3d Dep't 2004). Here, Philip Morris was erroneously and prejudicially prevented by the court's rulings from presenting evidence of a benign motivation for its conduct.

3. The Admission Of Evidence Regarding Philip Morris's Financial Condition Necessitates A New Trial.

The trial court denied defendants' motion *in limine* to preclude plaintiffs from relying on evidence of defendants' financial condition. A-122. Thus, in Phase II, plaintiffs relied heavily on reports analyzing Philip Morris's recent sales data and national market share. A-5542-49. During his closing statements in Phase II plaintiffs' counsel invited the jury to punish Philip Morris simply because "people spend 12 billion dollars to promote [cigarettes] and sell [them]" and because "[t]his is big business. This is selling billions and billions of cigarettes." A-5830. Whether or not this kind of evidence could be considered in setting a punitive *amount* (but see pp. 63-65, *infra*), New York law absolutely prohibits its consideration during the punitive *liability* phase. See *Rupert v. Sellers*, 48 A.D.2d 265, 272 (4th Dep't 1975).

Plaintiffs' arguments during Phase III were even more specifically intended to inflame the jury's passions. Plaintiffs' counsel emphasized that "Philip Morris USA has a stand-alone or net worth of \$31.5 billion."¹⁸ The prejudice was

¹⁸ That figure was not even correct: Dr. Erickson, plaintiffs' expert, calculated the company's net worth as being \$22.5 billion, and its "stand-alone value" as being \$31.5 billion. Both figures were based on market capitalization, which is not a valid measure of a company's ability to pay. See, e.g., *Bullock v. Philip Morris USA, Inc.*, 42 Cal. Rptr.3d 140, 166 (Cal. App. 2006) (recognizing that market capitalization does not represent "the company's net worth or ability to pay"); *Ramco Oil & Gas, Ltd. v. Anglo Dutch (Tenge) L.L.C.*, 171 S.W.3d 905, 914 (Tex.

compounded by plaintiffs' counsel's further arguments emphasizing Philip Morris's yearly, weekly, and daily income. A-6006-09. Counsel summarized, over defendant's objection, "[n]ow we're talking about a million seven or 3 million or even \$5 million [in punitive damages]. And they're grossing in one week \$351 million corporate. Philip Morris won't even hear about it. And if anything, it will be a little bug on their shoulder they'll flick off with their finger. *** They'll think it's a joke." A-6007. The obvious purpose of this argument was to encourage the jury to increase the size of the award it might otherwise impose, simply on the basis of Philip Morris's wealth.

New York courts have historically allowed the jury to consider evidence of a defendant's wealth in determining the amount of punitive damages. However, as the comments to the Pattern Jury Instructions state, "[t]he numerous New York State cases preceding recent holdings of the United States Supreme Court on the issue of punitive damages must now be read in light of these Supreme Court holdings." PJI 2:278 (comment). Recent Supreme Court decisions dictate that using wealth as an aggravating factor in determining punitive amount – as plaintiffs' counsel encouraged the jury to do here – violates the Constitution.

App. 2005). The trial court, however, overruled defendants' objections to Erickson's methodology. A-461.

In *BMW*, the Court rejected the notion that a defendant's wealth can justify a high punitive award, holding that "[t]he fact that BMW is a large corporation rather than an impecunious individual" does not change the punitive inquiry. 517 U.S. at 585. In *Cooper Industries v. Leatherman Tool Group, Inc.*, the Court again omitted wealth as a relevant justification for punitive damages, notwithstanding the reliance of the plaintiffs and the court below on that factor. 532 U.S. 424 (2001). Most recently, in *State Farm*, the Court flatly stated that reliance on State Farm's "enormous wealth" constituted "a departure from well-established constraints on punitive damages," and declared that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." 538 U.S. at 426-27. The Supreme Court has thus made clear that such evidence is irrelevant to the punitive inquiry.¹⁹

At the very least, the jury should have been cautioned not to allow its decision to be affected by the fact that Philip Morris is a large company. See, e.g., *State Farm*, 538 U.S. at 417 ("the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases

¹⁹ See also *Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153, 167 (Ky. 2004) (excluding evidence of defendant's wealth following *State Farm* in part because of potential for bias against big business); *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992); *La Plante v. American Honda Motor Co., Inc.*, 27 F.3d 731, 740 (1st Cir. 1994); *Ake v. General Motors Corp.*, 942 F. Supp. 869, 876 (W.D.N.Y. 1996).

against big businesses, particularly those without strong local presences”) (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464 (1993) (plurality opinion). Defendants’ proposed jury instructions to this effect were rejected. A-11495. The trial court’s inexplicable refusal to take even this small precautionary step against the pervasive prejudice inherent in evidence of Philip Morris’s wealth requires a new trial.

C. The \$17.1 Million Punitive Damages Award Is Unconstitutionally Excessive.

Concerned about the “imprecise manner in which punitive damages systems are administered,” *State Farm*, 538 U.S. at 417, the Supreme Court has instructed lower courts to consider three “guideposts” for determining whether a punitive award is unconstitutionally excessive: (1) the degree of reprehensibility of the defendant’s conduct; (2) the ratio of punitive to compensatory damages; and (3) the civil penalties applicable to comparable conduct. *BMW*, 517 U.S. at 574-76.

In reviewing an award for excessiveness, this Court must conduct a *de novo* review of the trial court’s application of these three guideposts. See *Cooper Industries*, 532 U.S. at 436. In so doing, the court views the evidence evenhandedly, rather than taking the facts in the light most favorable to the verdict. As the Supreme Court has stated, “the level of punitive damages is not really a ‘fact’ ‘tried’ by the jury,” but instead “is an expression of [the jury’s] moral condemnation.” *Id.* at 432, 437. Thus, while reviewing courts must accept

“*specific findings of fact*” by the jury (*id.* at 439 n.12 (emphasis added)), in the absence of such findings the reviewing courts must resolve for themselves factual issues bearing on the application of the three guideposts. *Id.*; see also *BMW*, 517 U.S. at 576, 579; *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 72 (Cal. 2005) (“[w]hile [courts must] defer to express jury findings supported by the evidence, in the absence of an express finding on the question [they] must independently decide” whether the fact at issue has been established). This “[e]xacting” judicial review is necessary to “ensure[] that an award of punitive damages is based upon an application of law, rather than a decisionmaker’s caprice.” *State Farm*, 538 U.S. at 418 (internal quotation marks omitted).

If the Court does not strike the punitive damages entirely, Philip Morris respectfully submits that the award should be reduced to an amount no greater than the compensatory damages assessed against it.

1. Philip Morris’s Conduct Was Not Highly Reprehensible.

The \$17.1 million punitive award in this case is “grossly out of proportion to the severity of the offense.” *BMW*, 517 U.S. at 576 (internal quotation marks omitted). A number of factors, each discussed at greater length above, demonstrate the low reprehensibility of Philip Morris’s conduct in this case:

- Philip Morris’s manufacture and sale of regular cigarettes was known to Congress, which considered and rejected legislation making such conduct illegal;

- Philip Morris at all times complied with applicable laws requiring disclosure of the health risks associated with smoking, including informing consumers of the tar and nicotine content of cigarettes through advertising; and
- There is no evidence that Philip Morris employed “intentional malice, trickery, or deceit” in selling the cigarettes for which it has been held liable.

Moreover, it was uncontested that Philip Morris has spent vast resources developing and marketing low-yield cigarettes, including the ultra-light cigarettes that plaintiffs identify as a safer alternative design. See pages 9-10, *supra*. Philip Morris’s only claimed wrongdoing, as embodied in this idiosyncratic verdict, was in offering consumers a choice.

The evidence at trial also firmly established that the custom and practice in the industry is to manufacture and sell a range of products. A-3055-56, 3995, 4465. Not a single cigarette manufacturer limits itself to selling only ultra-low-yield products. As a matter of law, common sense, and public policy, it cannot be considered reprehensible for Philip Morris to have conducted its business in conformity with industry-wide standards, especially where Congress and the public health community never suggested that it do otherwise.

2. The Ratio Guidepost Confirms The Award's Excessiveness.

The 10:1 ratio of punitive to compensatory damages demonstrates the award's excessiveness.²⁰ In *State Farm*, the Supreme Court provided lower courts with detailed guidance regarding the ratio guidepost. The Court stated that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process”; reiterated that a punitive award of four times compensatory damages was “close to the line of constitutional impropriety”; indicated that, though “not binding,” the 700-year-long history of double, treble, and quadruple damages (*i.e.*, ratios of 1:1 to 3:1) is “instructive”; and, most notably for present purposes, explained that, “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.” 538 U.S. at 425 (emphasis added). Applying these guidelines to the facts of the case before it, the Court observed that, even though State Farm's conduct was “reprehensible” and “merit[ed] no praise” (*id.* at 419-420), “a punitive award at or near the amount of compensatory damages” – *i.e.*, a 1:1 ratio – was likely the constitutional maximum. *Id.* at 429. Application of these principles compels the conclusion not

²⁰ As the trial court recognized (A-67), the appropriate denominator in the ratio analysis is the amount of compensatory damages attributed by the jury to Philip Morris' misconduct – \$1.7 million. See, *e.g.*, *Romo v. Ford Motor Company*, 6 Cal. Rptr.3d 793, 812 n.14 (Cal. Ct. App. 2003); *Waddill v. Anchor Hocking, Inc.*, 190 Or. App. 172, 183 n.6 (Or. Ct. App. 2003).

only that the 10:1 ratio of punitive to compensatory damages allowed by the trial court is an unconstitutional punishment, but also that a 1:1 ratio is the constitutional maximum under the specific circumstances of this case.

In this case, there are no factors that justify a higher ratio, such as an “injury that is hard to detect” or a “particularly egregious act [that] has resulted in only a small amount of economic damages.” *BMW*, 517 U.S. at 582. And there can be no doubt that compensatory damages totaling \$1.7 million are “substantial.” In view of the size of the award and the fact that the conduct at issue had never been deemed unlawful, no punitive award higher than the compensatory damages can possibly stand. The Eighth Circuit recently reached that conclusion in *Boerner v. Brown & Williamson Tobacco Co.*, a smoking-and-health case in which — unlike in this case — the plaintiff’s warning claim involved allegations that the defendant “actively misled” consumers. The jury had awarded compensatory damages of \$4.025 million and punitive damages of \$15 million. Although it viewed the defendant’s conduct as highly reprehensible, the court held that a maximum “ratio of approximately 1:1 would comport with the requirements of due process.” *Id.*²¹

²¹ See also, *e.g.*, *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (in racial harassment case, terming compensatory award of \$600,000 “a lot of money,” and holding that 1:1 ratio was the constitutional maximum); *TVT Records v. Island Def Jam Music Group*, 279 F. Supp. 2d 413, 450-51 (S.D.N.Y. 2003) (punitive damages of approximately \$108 million remitted to approximately \$30 million, for a ratio of 1:1); *Czarnik v. Illumina, Inc.*, No. D041034, 2004 WL 2757571, at *11 (Cal. App. Dec. 3, 2004) (unpublished) (“1:1 ratio of punitive to

In this case, where plaintiffs' claim is entirely novel, where no prior statute, regulation, or judicial decision had ever questioned the lawfulness or reasonableness of the conduct at issue, and where the compensatory damages awarded against Philip Morris totaled \$1.7 million, a ratio of 1 to 1 is the constitutional maximum both under the federal Constitution and under New York law.

Here the compensatory award is certainly "a lot of money." In *State Farm*, the Supreme Court recognized that compensatory damages have a deterrent effect in their own right, admonishing that "punitive damages should only be awarded if the defendant's culpability, *after having paid compensatory damages*," is so

compensatory damages [was] the maximum award that is sustainable against a due process challenge" where compensatory damages were \$2,196,935); *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651, 670-72 (S.D. 2003) (compensatory award of \$25,000 was "substantial," and an award "at or near the amount of compensatory damages" was appropriate); *Ceimo v. General Am. Life Ins. Co.*, 2003 U.S. Dist. LEXIS 26699, at *5-6 (D. Ariz. 2003) (reducing \$79 million punitive award to \$7 million; because "the compensatory damages are substantial *** the Constitution constrains us to reduce the punitive damages award in this case to an amount roughly equal to the compensatory damages."), *aff'd*, *Ceimo v. General Am. Life Ins. Co.*, 137 Fed. Appx. 968, 2005 U.S. App. LEXIS 13180 (9th Cir. 2005).

We further note that the recent, well publicized tobacco cases in California and Oregon provide no support for the punitive verdict in this case. The decisions in both cases were based entirely on allegations of fraud and concealment absent here. See *Bullock v. Philip Morris USA, Inc.*, 42 Cal. Rptr. 3d 140, 173-77 (2006); *Williams v. Philip Morris Inc.*, 340 Or. 35, 55-56 (Or. 2006).

reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.” 538 U.S. at 419 (emphasis added).²²

Philip Morris respectfully submits that the Court should reduce or remit the award with a direction to the trial court to fix punitive damages at an amount no greater than the compensatory damages assessed against Philip Morris.²³

3. The Third *BMW* Guidepost Demonstrates Excessiveness.

No state or federal authority would impose any penalty for the conduct at issue here – the sale of a lawful product, the dangers of which have been evaluated by the relevant authorities and found not to justify removal of the product from the market. The absence of any penal provisions covering the conduct is itself a clear indication that any substantial punitive award is excessive.²⁴

²² Prior and subsequent cases have made the same point. See, e.g., *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) (“[d]eterrence *** operates through the mechanism of damages that are compensatory”); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) (“The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.”); *United States v. Bailey*, 288 F. Supp. 2d 1261, 1281 (M.D. Fla. 2003) (setting aside \$3,000,000 punitive award “in its entirety” because, among other things, the compensatory damages exceeded the gain to the defendant, making “the imposition of further sanctions to achieve punishment or deterrence” unnecessary).

²³ The same result is required as a matter of New York law, which holds that an award must be reduced where it “show[s] by its very exorbitancy that it was actuated by passion.” *Nardelli v. Stamberg*, 406 N.Y.S.2d 443, 445 (1978).

²⁴ See, e.g., *FDIC v. Hamilton*, 122 F.3d 854, 862 (10th Cir. 1997); *Groom v. Safeway, Inc.*, 973 F. Supp. 987, 995 (W.D. Wash. 1997).

CONCLUSION

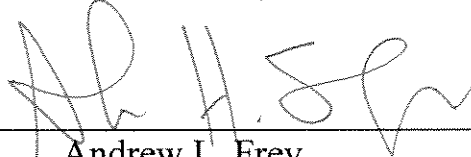
This Court should vacate the judgments against Philip Morris and B&W, and should reverse the trial court's denial of the defendants' motion for an order granting a directed verdict and directing that the complaint be dismissed, or, alternatively, directing a new trial.

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