Liggett Group, Inc. V. Scott Davis

SC08-541

>> LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT.
PLEASE BE SEATED.

>> THE NEXT CASE ON THE COURT'S DOCKET IS LIGGETT GROUP V. DAVIS.
MR. DAVIS?
>> YES.
NO RELATION, YOUR HONOR.
[LAUGHTER]
ALVIN DAVIS FOR THE PETITIONER.
I WANT TO JUST BRIEFLY FRAME THE STATUS OF THE CASE AS IT COMES OUT OF THE FOURTH DISTRICT.
MRS. DAVIS SMOKED LIGGETT CIGARETTES FOR A PERIOD OF APPROXIMATELY 23 YEARS.
SHE CLAIMED TO BE INJURED BY THOSE CIGARETTES, AND SHE FILED SUIT AGAINST LIGGETT.
IT'S IMPORTANT --
>> [INAUDIBLE] THE FOURTH DISTRICT AFFIRMED A JUDGMENT AGAINST YOUR CLIENT?
>> THE FOURTH DISTRICT AFFIRMED, YES.
THERE WERE TWO ISSUES, ONE WAS WHETHER THERE COULD BE A CLAIM FOR THE NEGLIGENT MANUFACTURE OF CIGARETTES JUST BY THE FACT THAT CIGARETTES ARE HARMFUL, AND THE FOURTH DISTRICT REVERSED THAT --
>> THEIR ARGUMENT WAS JUST BY KEEPING THEM ON THE MARKET --
>> YES.
>> -- THEY WERE NEGLIGENT?
>> YES.
>> WAS THAT THE ONLY BASIS FOR THE CLAIM AGAINST LIGGETT?
>> NO.
>> SO THERE, AGAIN, AND I KNOW YOU WANT TO GO INTO THE FACTS AND I THINK WE'RE FAMILIAR WITH

THE FACTS, BUT UNDER THE TWO-ISSUE RULE IF THERE ARE OTHER BASES FOR THE -- THE FACT THAT THERE WERE --
>> NO, IT WOULD NOT, AND I DON'T -- I DON'T THINK A DETAILED RECITATION OF THE UNDERLYING FACTS IN THE CASE ARE NECESSARY.
I DID WANT TO BRING THE COURT'S ATTENTION TO THIS, AND IT RELATES TO WHAT YOUR HONOR JUST SAID.
THEY BROUGHT A CLAIM FOR NEGLIGENT DESIGN, AND THE JURY FOUND IN FAVOR OF LIGGETT ON NEGLIGENT DESIGN EVEN THOUGH INSTRUCTION SAID WAS THERE A SAFER ALTERNATIVE DESIGN THAT LIGGETT COULD HAVE USED, AND THE JURY FOUND, NO, IN FAVOR OF LIGGETT.
THERE WAS A CLAIM FOR NEGLIGENT WARNING, THE JURY FOUND IN FAVOR OF LIGGETT.
NEGLIGENT TESTING, THE JURY FOUND IN FAVOR OF LIGGETT.
THERE WAS A CLAIM FOR CONTINUATION TO MANUFACTURE THE --
>> NEGLIGENT CONTINUATION OF WHAT?
>> TO MANUFACTURE.
>> ALL RIGHT.
SO THAT ISSUE -- SO THEY DIDN'T FIND -- SO CAN WE GET TO -- ACTUALLY, I THINK IT WOULD HELP ME TO KNOW SINCE I FEEL LIKE THESE ISSUES HAVE EITHER BEEN BEFORE US OR HAVE BEEN LITIGATED BEFORE, WHAT ARE THE TWO ISSUES THAT YOU WANT TO URGE US TO CONSIDER?

>> ONE ISSUE.
>> ONLY ONE.
>> BECAUSE THE NEGLIGENT CONTINUATION OF MANUFACTURING THE FOURTH DCA DEALT WITH SAID NO.
>> BUT THEY ALSO, YOU'RE SAYING THE JURY FOUND THAT WASN'T EVEN A BASIS --
>> THE JURY FOUND FOR THE

PLAINTIFF ON THAT CLAIM --
>> OKAY, I'M SORRY.
>> THE FOURTH DISTRICT REVERSED ON THAT.
THE REMAINING ISSUE IS THE ISSUE THAT WAS CERTIFIED TO THIS COURT, AND THAT ISSUE IS WHETHER ON A STRICT LIABILITY CLAIM THERE CAN BE A FINDING OF LIABILITY IN THE ABSENCE OF ANY SHOWING OF A DEFECT IN THE PRODUCT OR ANY SHOWING OF A SAFER ALTERNATIVE.
>> WELL, ARE YOU SAYING THAT IN THE ALTERNATIVE BECAUSE A DEFECT IN THE PRODUCT UNDER OUR JURY INSTRUCTIONS INCLUDES INSTRUCTING ON TWO ALTERNATIVES FOR FINDING THE PRODUCT UNREASONABLY DANGEROUS, ONE IS THE CONSUMER EXPECTATIONS TEST, AND THE SECOND IS THE RISK UTILITY TEST.
AND SINCE, YOU KNOW, AUBURN MACHINE WORKS ON ALTERNATIVE SAFE DESIGN IS ONE OF SEVERAL FACTORS TO BE CONSIDERED.
AND I'M SEEING THAT WHAT YOU'RE URGING IS FOR US TO REVERSE ALL OF OUR PRECEDENT AND MAKE ALTERNATIVE SAFE DESIGN THE ONLY BASIS ON WHICH A DEFECT IN NOT JUST CIGARETTES SORT OF RAISE OTHER ISSUES, BUT IN ALL PRODUCTS.
THAT WOULD BE THE ONLY WAY THAT THE PLAINTIFF COULD PROVE STRICT LIABILITY DEFECT TO SHOW THE EXISTENCE OF AN ALTERNATIVE SAFE DESIGN.
IS THAT WHAT YOU'RE URGING THIS COURT TO DO?
>> WELL, I'M URGING THE LATTER, BUT I'M NOT URGING THE FORMER, THAT IS, I'M NOT URGING THE COURT TO REVERSE ALL PRIOR PRECEDENT.
WE BELIEVE THAT SINCE WEST V. CATERPILLAR AND THE ADOPTION OF THE SECOND RESTATEMENT OF TORT THAT THE STANDARD HAS BEEN THAT THERE HAS TO BE AN ACTUAL DEFECT IN THE PRODUCT.
THAT IS --

>> CAN I ASK A QUESTION AS WE GO INTO THIS?
HOW BROAD WILL THE APPLICATION OF THIS BE?
WE KNOW STRICT LIABILITY'S NOT JUST EQUIPMENT, IT'S NOT JUST CIGARETTES WHICH -- AND IT DEALS WITH THINGS SUCH AS FOOD PRODUCTS, CORRECT?
>> YOUR HONOR, I, I MADE A LIST OF 21 DIFFERENT PRODUCTS THAT IT APPLIES TO.
IT APPLIES TO ALCOHOL, IT APPLIES TO --
>> WELL, HOW ABOUT JUST FOOD PRODUCTS?
JUST ANSWER THAT ONE.
IT DOES APPLY TO FOOD PRODUCTS --
>> IT DOES.
>> HOW DOES ONE ADDRESS SOMETHING, FOR EXAMPLE, LIKE A TOXIN IN FISH THAT THERE'S NO WAY TO TEST IT, THERE'S NO WAY TO DETERMINE WHETHER IT'S THERE, AND REALLY THE ONLY WAY YOU CAN TRY TO STAY AWAY FROM THAT, FROM OBTAINING FISH IN CERTAIN HOT SPOTS.
IT SEEMS TO ME THAT YOU HAVE TO -- IF YOU ADD THAT ON, THERE WOULD BE NO LIABILITY OR STRICT LIABILITY UNDER FLORIDA LAW FOR THE DELIVERY OF A TAINTED FOOD PRODUCT UNLESS YOU COULD PROVE, THEN, SOMEHOW THAT YOU COULD MAKE IT SAFER SOME WAY.
IS THAT WHERE THIS WOULD LEAD US?
>> NO.
A TAINTED FOOD PRODUCT WOULD BE DEFECTIVE.
IT'S TAINTED.
>> IT'S DANGEROUS.
IT'S JUST PART OF THE FISH.
YOU CAN'T TAKE IT OUT, YOU CAN'T DETECT IT, IT'S JUST GOING TO BE THERE.
>> WITH ALL DUE RESPECT, THAT'S A SEPARATE ISSUE.
WHETHER IT CAN BE DETECTED --
>> -- MAKE SOMETHING SAFER.
I'M TRYING TO UNDERSTAND HOW BROADLY THE RULE YOU'RE ASKING

TO ESTABLISH WOULD BE
APPLICABLE.
>> IT WOULD BE APPLICABLE --
>> TO EVERYTHING.
>> -- TO ALL PRODUCTS.
YOU'D HAVE TO BE ABLE TO SHOW --
YOU GET A TAINTED FOOD PRODUCT,
YOU'D HAVE TO SHOW THERE WAS AN
ALTERNATIVE WAY OF DELIVERING IT
THAT WOULD HAVE MADE IT SAFER AS
A PRECONDITION TO ANY
RESPONSIBILITY.
>> YOUR HONOR, I DON'T THINK SO.
I THINK THAT A TAINTED FOOD
PRODUCT FITS THE WEST
DEFINITION.
IT HAS A DEFECT.
>> MAY WE GO BACK --
>> [INAUDIBLE]
>> I'D JUST LIKE TO GET AN
ANSWER TO MY QUESTION --
>> YES, YOUR HONOR.
>> BECAUSE I THINK IT'S
IMPORTANT.
MY QUESTION IS WHAT YOU SAID IS
OUR PRECEDENTS STARTING FROM
WEST UNTIL THE PRESENT AND OUR
JURY INSTRUCTIONS REQUIRES AND
SAYS THAT THE ONLY BASIS TO
ESTABLISH A DEFECT IS FOR THE
PLAINTIFF TO SHOW THE EXISTENCE
OF AN ALTERNATIVE SAFER DESIGN,
IS THAT WHAT YOU -- IS THAT YOUR
ANSWER TO MY QUESTION?
>> NO.
NO.
WHAT WEST SAID AND WHAT THE
CASES THAT HAVE FOLLOWED WEST IN
THE SUPREME COURT AND ALL THE
CASES IN FLORIDA THAT WE COULD
FIND IS THAT THERE ARE TWO
STEPS.
ONE, THERE HAS TO BE A DEFECT,
AND, TWO, IT HAS TO BE
UNREASONABLY DANGEROUS.
THE JURY INSTRUCTION GOES TO
UNREASONABLY DANGEROUS.

>> OKAY.
I'M NOT -- YOU KNOW, A DEFECT IS
DEFINED BY TWO ALTERNATIVE WAYS.
IT'S NOT A TWO-STEP CRISIS.
THE WHOLE IDEA WAS TO ELIMINATE
FAULT AND TO SAY THAT YOU COULD

PROVE DEFECT THROUGH TWO DIFFERENT WAYS, THE CONSUMER EXPECTATIONS OR RISK UTILITY.
AND SO WHAT I ASKED YOU BEFORE IS AREN'T YOU ASKING US TO RECEDE FROM ALL THIS PRECEDENT THAT SAYS THERE'S TWO DIFFERENT WAYS TO ESTABLISH A DEFECT IN A PRODUCT, AND THAT ONE OF THEM UNDER THE RISK UTILITY REQUIRES A BALANCING TEST, AND ONE OF THE BALANCING FACTORS IS THE AVAILABILITY OF OTHER SAFER PRODUCTS?

>> YOUR HONOR, EITHER THE RISK UTILITY OR THE CONSUMER EXPECTATION TEST PUBLISHES WHETHER THE PRODUCT WAS UNREASONABLY DANGEROUS.
WHAT WEST REQUIRED, WHAT THE RESTATEMENT OF TORTS REQUIRES IS THAT THERE BE A SEPARATE DEFECT, THAT THERE BE SOMETHING WRONG WITH THE PRODUCT.
AND THE CONSUMER EXPECTATION TEST AND THE UTILITY RISK TEST DOES NOT ESTABLISH A DEFECT, IT ESTABLISHES WHETHER THE PRODUCT WAS UNREASONABLY DIFFERENT.
>> PLEASE ANSWER -- GO ON AND ANSWER JUSTICE KENNEDY.
>> JUSTICE KENNEDY.
>> THE QUESTION I WANTED TO GET BACK TO HAS TO DO WITH THE FISH EXAMPLE.
IF I UNDERSTAND, IT'S ABOUT FISH THAT ARE JUST KIND OF IN THE NATURAL CONDITION OF THE FISH ARE DANGEROUS.
HOW DOES, IN ANALYZING THAT, HOW DOES THE FAILURE TO WARN [INAUDIBLE] THE AVAILABILITY OF THAT FIGURE INTO THE ANALYSIS?
>> WELL, IT FIGURES INTO THE ANALYSIS IN THE SENSE THAT IF YOU'RE DEALING WITH A PRODUCT OF THAT NATURE WHERE THERE MAY BE SOME TAINT THAT FOR SOME REASON CAN'T BE DETERMINED, THEN THERE IS A WARNING THAT SAYS YOU NEED TO BE AWARE THAT THERE COULD BE SOMETHING WRONG WITH THIS FISH THAT COULD CAUSE HARM TO LIFE OR

COULD CAUSE DEATH.
SO YOU'VE MADE THAT.
BUT IF IT TURNS OUT THAT THE FISH WAS, IN FACT, TAINTED, THAT IS A DEFECT.
WHAT WE'RE TALKING ABOUT IS WHAT THE RESTATEMENT TALKED ABOUT, WHAT THE REPORTERS OF THE RESTATEMENT TALKED ABOUT WAS THAT IT WAS NOT SUFFICIENT THAT IT BE UNREASONABLY DANGEROUS, WHICH IS WHAT THE CONSUMER EXPECTATION TEST FOR THE UTILITY RISK TEST WOULD ESTABLISH.
THAT IS NOT SUFFICIENT FOR STRICT LIABILITY.
AND WE'VE CITED IN OUR BRIEF THE REPORTERS MADE IT CLEAR THAT THEY WERE CONCERNED THAT IF SOMETHING WAS UNREASONABLY DANGEROUS, AND NOTHING MORE -- NOT TO MINIMIZE THAT -- BUT NOTHING MORE THAN THAT, THAT THERE WOULD BE A FINDING OF LIABILITY WHICH WOULD MAKE THE MANUFACTURER OF THE PRODUCT THE INSURER OF THE PRODUCT.
>> IT SEEMS TO ME WE'VE STRUCK SOMEWHAT OF A BALANCE HERE BY ALLOWING PLAINTIFFS TO, TO PROCEED EITHER UNDER THE RISK UTILITY THEORY WHICH TAKES INTO CONSIDERATION YOUR ALTERNATIVE DESIGN AND OF THE OTHER CONSUMER EXPECTATION.
OTHERWISE, IT SEEMS TO ME THAT WE ARE PUTTING THE CONSUMER IN A VERY, VERY DIFFICULT POSITION ON MANY OF THESE CASES.
HOW IN THE WORLD IS THE CONSUMER GOING TO COME UP WITH AN ALTERNATIVE DESIGN?
IS A CONSUMER GOING TO GO OUT AND HIRE ENGINEERS TO COME UP WITH SOME NEW WAY TO DO WHATEVER PRODUCT THIS MANUFACTURER HAS PUT ON THE MARKET?
AND HAS, IN FACT, SAID THIS IS SAFE FOR YOU TO USE.
I'M, I'M HAVING A PROBLEM WITH WHAT IS WRONG WITH THE WAY THE STATE OF THE LAW PRESENTLY IS, WHICH, AND YOU MAY DISAGREE, BUT THE WAY THE STATE OF THE LAW

PRESENTLY IS IS YOU COULD DO IT
EITHER UNDER THE RISK UTILITY
STANDARD OR UNDER THE CONSUMER
EXPECTATION STANDARD.

>> YOUR HONOR, WITH ALL DUE
RESPECT, THAT'S NOT THE STATE OF
THE LAW AS ARTICULATED BY THIS
COURT.
THIS COURT SAID IN WEST THAT
THERE MUST BE, THE PRODUCT MUST
BE DANGEROUS, AND YOU DETERMINED
THAT BY USING ONE OF THOSE TWO
TESTS, AND THERE MUST BE A
DEFECT.
>> WOULD YOU ADDRESS OUR JURY
INSTRUCTION?
BECAUSE THAT WAS WHAT I WAS
TRYING TO FIND.
>> YES.
>> THE JURY INSTRUCTION SAYS A
DEFECT EXISTS IF IT'S
UNREASONABLY DANGEROUS TO THE
USER AND THEN DEFINES
UNREASONABLY DANGEROUS.
NOT THE KNIFE EXAMPLE BECAUSE
EVERYONE UNDERSTANDS THE KNIFE
IS JUST INHERENTLY DANGEROUS.
THAT'S NOT -- THAT'S NOT WHAT IT
MEANS IF, AND THEY ARTICULATE
THE TWO TESTS.
IF THE PRODUCT FAILS TO PERFORM
AS SAFELY AS AN ORDINARY
CONSUMER WOULD EXPECT WHEN USED
AS INTENDED, OR THE RISK
OUTWEIGHS THE DANGER.
SO YOU'RE POSITIVE THAT THERE
IS -- YOU'VE GOT TO ESTABLISH
UNREASONABLY DANGEROUS, AND ONE
OF THOSE TWO TESTS, PLUS YOU
HAVE TO ESTABLISH A DEFECT IS --
I DON'T HAVE A SENSE OF WHERE
YOU'RE GETTING THAT FROM.
IF YOU'RE SAYING JUST BECAUSE
THE PRODUCT IS INHERENTLY
DANGEROUS, IT MAY NOT BE
DEFECTIVE, I CAN AGREE WITH YOU,
AND WE CAN TAKE THE KNIFE OR THE
GUN.
BUT AM I MISSING SOMETHING ABOUT
WHAT THE STANDARD JURY
INSTRUCTIONS HAVE SAID SINCE,
FOR THE LAST HOW MANY YEARS?
>> NO, YOU'RE NOT.

>> SO ARE YOU SAYING THEY'RE WRONG?
ARE YOU SAYING THOSE INSTRUCTIONS ARE AN INACCURATE STATEMENT OF FLORIDA LAW?
>> NO.
I'M SAYING THE JURY INSTRUCTION SAYS IF BY REASON OF ITS DESIGN THE PRODUCT IS IN A CONDITION UNREASONABLY DANGEROUS, AND THEN IT DEFINES UNREASONABLY DANGEROUS.
IT STILL REMAINS TO BE SHOWN THAT THE PRODUCT IS DEFECTIVE BY SOMETHING IN THE DESIGN ITSELF.
THE TEST, EITHER OF THOSE TESTS MERELY ESTABLISHES THAT THE PRODUCT IS UNREASONABLY DANGEROUS.
THIS COURT HAS SAID AND THE RESTATEMENT HAS SAID THAT THE FACT IT IS UNREASONABLY DANGEROUS IS NOT SUFFICIENT TO ESTABLISH A CLAIM FOR STRICT LIABILITY.
>> AND WE UNDERSTAND YOU WOULD AGREE THAT INCLUDES WARNINGS AND IN HERE THE FACT THAT THERE WAS WAY MORE TAR IN THESE CIGARETTES AND WAY MORE NICOTINE THAN WAS NECESSARY -- I MEAN, THERE WAS, I MEAN, IN THESE CIGARETTE CASES WE'VE GOT A HOST OF EVIDENCE ABOUT WHAT WAS BEING PUBLISHED.
NOT JUST SAYING PEOPLE SMOKE CIGARETTES, AND THEY DIE OF LUNG CANCER, THAT'S NOT THE CASE.
THERE WAS ALL -- SO I UNDERSTAND WHAT YOU'RE SAYING, THERE'S GOT TO BE SOMETHING ESTABLISHED.
>> AND IN THIS RECORD, EXCUSE ME.
BUT IN THIS RECORD I THINK THIS IS WHY THIS IS A GOOD CASE TO REAFFIRM WHAT THE LAW IS IN THIS JURISDICTION.
THIS CASE COMES BEFORE THIS COURT WITH THERE BEING NO FINDING OF AN ACTUAL DEFECT IN THE CIGARETTE.
THERE'S NO ADDITIVE THAT SHOULDN'T HAVE BEEN IN THERE, THERE'S NO ANYTHING ADDITIONAL.
THEY ARE CIGARETTES.

CIGARETTES ARE DANGEROUS,
EVERYONE AGREES CIGARETTES ARE
DANGEROUS.
THESE ARE THE AVERAGE DANGEROUS
CIGARETTES.
THERE WAS NO SHOWING IN THIS
RECORD OF AN ALTERNATIVE DESIGN,
AND THERE WAS NO SHOWING OF AN
ACTUAL DEFECT.
SO WHAT YOU'RE DEALING WITH, AND
WE'LL AGREE, IT'S AN
UNREASONABLY DANGEROUS PRODUCT.
>> IT SEEMS TO ME THAT SOME OF
THIS IS THAT CIGARETTES WERE
UNREASONABLY DANGEROUS.
I MEAN, THAT'S JUST BY THEIR
VERY BEING OR INHERENTLY
UNREASONABLY DANGEROUS.
AND THAT THE, THE QUESTION IS
WHETHER ALL OF THIS PRODUCT
LIABILITY LAW CAN FIT AROUND IT.
AND BECAUSE THERE WASN'T -- IT
WASN'T IN REALITY THE DESIGN OF
THIS CIGARETTE THAT MADE IT ANY
DIFFERENT THAN THE DESIGN OF ANY
OTHER CIGARETTE.
THAT'S BASICALLY YOUR POSITION,
RIGHT?

>> YES.
AND THE POSITION OF THE FOURTH
DISTRICT.
>> AND SO THIS WAS NOT A DEFECT
BECAUSE THIS WAS JUST INHERENT
IN THE PRODUCT.

>> YES.
AND IN THE CASES, THE
RESTATEMENT, THE NOTES OF THE
RESTATEMENT ALL RECITE THAT YOU
MAY NOT HAVE LIABILITY IF IT IS
SIMPLY THE INHERENT NATURE OF
THE PRODUCT THAT MAKES IT
DANGEROUS.
>> THIS COURT DID FIND IN 1954
THAT THERE COULD BE A BREACH OF
IMPLIED WARRANTY.
OF A CIGARETTE.
ON THE BREACH OF IMPLIED
WARRANTY OF MERCHANTABILITY,
CORRECT?

>> I WILL ACCEPT YOUR WORD.
[INAUDIBLE]

>> THAT'S WHAT GREEN V. AMERICAN TOBACCO.
>> YES, BUT WE'RE TALKING ABOUT WHAT THE COURT ADOPTED IN 1976 DEALING SPECIFICALLY WITH PRODUCT LIABILITY WHICH IS THE ISSUE BEFORE THE COURT NOW.
>> AND SO -- OKAY.

>> I HAVE RESERVED TIME.
>> THANK YOU VERY MUCH.
MR. DAVIS.

>> THANK YOU.

>> MAY IT PLEASE THE COURT, I'M JOHN VENABLE FROM TAMPA, AND I'M HERE FOR THE RESPONDENT.
LET ME FIRST ADDRESS SOME OF THE ISSUES THAT WERE POSED BY THE COURT FOR COUNSEL FOR LIGGETT.
>> CAN I --
>> YES, YOUR HONOR.
>> I FEEL LIKE I'M IN ANOTHER UNIVERSE SORT OF.
MAYBE THAT'S BECAUSE IT'S THURSDAY.
WHAT ARE WE HERE TO DECIDE THAT THE FOURTH DISTRICT FOUND SO TROUBLING?
I MEAN, WE'VE HAD ENGLE, WE'VE HAD CARTER.
CIGARETTES ARE DIFFERENT THAN PRODUCT LIABILITY CASES, AUTOMOBILE CASES, THEY ARE DIFFERENT.
BUT SO WHAT IS THE, WHAT'S THE GIST OF WHAT TROUBLED THE FOURTH DISTRICT THAT WE SHOULD BE DECIDING IN THIS CASE?

>> YOUR HONOR, I'M NOT SURE THAT THE FOURTH DISTRICT EXACTLY HAD A PROBLEM.
THEY APPLIED THE LAW JUST AS YOUR HONOR WAS EXPLAINING IT EARLIER, THEY FOUND THE SAFER ALTERNATIVE DESIGN WAS ONE ELEMENT OUT OF MANY THAT COULD BE APPLIED IN A RISK UTILITY ANALYSIS TO DETERMINE WHETHER A PRODUCT WAS UNREASONABLY DANGEROUS WHICH BY DEFINITION MEANS IT'S DEFECTIVE.

>> BUT YOU AGREE THERE'S A DIFFERENCE BETWEEN INHERENTLY DANGEROUS AND UNREASONABLY DANGEROUS.
IN OTHER WORDS, A CIGARETTE, I MEAN, EVERYBODY THAT PICKS UP A CIGARETTE TODAY, STARTS SMOKING, IT'S DANGER.
YOU KNOW, IT HAS A HUGE CHANCE OF CAUSING LUNG CANCER.
IT IS NOT A, IT'S NOT LIKE A, YOU KNOW, DRIVING AN AUTOMOBILE THAT MIGHT FLIP OVER OR EVEN A MOTORCYCLE THAT DOESN'T HAVE GUARD, YOU KNOW, GUARDS ON IT.
SO IN ANY EVENT, YOU'RE SAYING THIS FOURTH DISTRICT HELD THAT THE ALTERNATIVE SAFE DESIGN WAS NOT THE ONLY BASIS FOR ESTABLISHING A DESIGN DEFECT.
>> CORRECT.
AS THEY FOUND IT.
>> SO IS THAT BEFORE US, OR ARE WE JUST BEING ASKED TO REVISIT?
>> ACTUALLY, I THINK THE FOURTH DISTRICT IS SAYING WERE WE RIGHT?
WE FOUND THIS WAS ONE OF MANY FACTORS UNDER THE AUBURN CASE IN RADIATION TECHNOLOGY THAT THIS COURT DECIDED WHERE IT WAS ONE OF MANY FACTORS --
>> WELL, I DON'T READ THAT AT LEAST WITH WHAT JUDGE WARNER WAS SAYING IN HER OPINION BECAUSE SHE WAS MAKING -- AS I READ HER OPINION, SHE WAS MAKING THE POINT THAT YOU CANNOT DESIGN A CIGARETTE THAT IS NOT UNREASONABLY DANGEROUS.
AND SO IF YOU APPLY WHAT THE RESTATEMENT PROVISION, THEN YOU WOULD, IN FACT, BE -- THERE WOULD BE A DOCTRINE THAT WOULD NOT ALLOW YOU TO PROVE STRICT LIABILITY BASIS FOR RECOVERING AGAINST CIGARETTE MANUFACTURER.
ISN'T THAT CORRECT?
>> I THINK THAT THE COURT RECOGNIZED IN SEVERAL RESPECTS THAT AS TO CIGARETTES WHEN YOU APPLY THE LAW OF STRICT LIABILITY, OFTEN THE MANUFACTURER'S GOING TO BE

RESPONSIBLE.
NOW, I WANT TO MAKE IT CLEAR
THAT IN THIS CASE WE PROVED THAT
CHESTERFIELD CIGARETTES WERE
DIFFERENT THAN OTHER CIGARETTES.
THEY WEREN'T ALL JUST THE SAME.
THIS WAS A VERY, VERY HIGH-TAR
CIGARETTE, HIGH-NICOTINE
CIGARETTE WITHOUT A FILTER, WITH
FLAVORANTS, WITH INGREDIENTS TO
HELP IN INHALABILITY WHICH
PROVED ITSELF UNDER THE
TESTIMONY AT TRIAL MUCH MORE
DANGEROUS THAN A LOW-TAR
CIGARETTE WOULD HAVE BEEN.
SO IT'S NOT THAT THEY'RE ALL
EQUAL, BUT GRANTED, THEY'RE ALL
DANGEROUS.
AND IT CAN BE -- A COMPANY CAN
DESIGN A PRODUCT --
>> YOU WOULD AGREE THEY'RE ALL
UNREASONABLY DANGEROUS.
>> I WOULD AGREE THAT THE RISK
OF SMOKING CIGARETTES OUTWEIGHS
ITS UTILITY, AND I DON'T --
>> THAT'S A TEST THAT DOESN'T
SEEM TO ME TO REALLY FIT.
THIS KIND OF PRODUCT, BECAUSE
THIS KIND OF PRODUCT IS THAT THE
RISK IS SO OVERWHELMING HAS BEEN
ESTABLISHED, AND THIS COURT
RECOGNIZED IN 1963 IN THAT GREEN
V. AMERICAN TOBACCO THAT THERE
WAS A REASONABLE PROBABILITY
THAT SMOKING CIGARETTES CAUSED
LUNG CANCER.
>> YES, YOUR HONOR.
>> IN 1963.
>> AND I GUESS THE QUESTION IS
DOES THE CIGARETTE INDUSTRY
DESERVE A SPECIAL SET OF RULES
UNDER THE PRODUCT'S LIABILITY
LAW OF THIS STATE THAT APPLY TO
THEM THAT DON'T APPLY TO ANYBODY
ELSE?
>> WELL, LET'S MAKE SURE HE,
THEN, IF WE'RE GOING TO LOOK AT
THIS QUESTION, IF WE'RE GOING TO
SAY THERE SHOULD BE SOME KIND OF
SPECIAL RULE, WE UNDERSTAND THAT
FOR THE REST OF THE PRODUCTS OUT
THERE, ALTERNATIVE DESIGN IS NOT
GOING TO BE THE ESTABLISHING.
BUT IN ANSWER TO WHAT JUSTICE

ANSTEAD -- WELLS JUST SAID, AND I'D LIKE TO -- MAYBE THIS GOES INTO THE OTHER ISSUE THAT THE FOURTH DISTRICT DID RULE AGAINST YOU ON ABOUT THE ROLE OF FEDERAL PREEMPTION --
>> YES, YOUR HONOR.
>> IF THE JURY FOUND THAT SIMPLY ON THE BASIS OF -- THAT CHESTERFIELD OR LIGGETT WAS NEGLIGENT JUST FOR CONTINUING TO MANUFACTURE CIGARETTES --
>> YOUR HONOR, IF I MIGHT INTERRUPT --
>> THAT'S NOT WHAT HAPPENED?
>> [INAUDIBLE]
>> I THOUGHT THAT'S WHAT MR. DAVIS SAID.
>> THAT IS WHAT HE SAID, BUT THAT'S NOT WHAT WAS FOUND.
>> EXPLAIN THE VERDICT.
>> THEY WERE CONTINUING TO MANUFACTURE THE CIGARETTES AFTER THEY RECOGNIZED THE DANGER OF THOSE CIGARETTES.
NOT UNLIKE ASBESTOS OR ANY OTHER STRICT LIABILITY CASE OR NEGLIGENCE CASE, THE QUESTION WAS GIVEN WHAT THEY KNEW AT THE TIME, DID THEY ACT REASONABLY WHEN THEY CONTINUED TO MANUFACTURE AND SELL THE CIGARETTE?
>> WELL, IF THEY HAD GONE AHEAD AFTER, WHEN THEY KNEW IT AND THEN THEY WERE CONCEALING THINGS AND THEN MANUFACTURED A CIGARETTE THAT HAD THE LOWEST TAR AND LOWEST NICOTINE AVAILABLE, WOULD THAT HAVE BEEN RELEVANT TO WHETHER THEY HAD EXERCISED REASONABLE CARE UNDER THE CIRCUMSTANCES?

>> PERHAPS IF THEY HAD REDUCED THE TAR LEVELS ENOUGH, PLACED ENOUGH WARNINGS ON THE CIGARETTE ENOUGH THAT IT IS ARGUABLE THAT THEY REACHED A POINT AT WHICH JURIES COULD CONCLUDE THAT WAS REASONABLE CONDUCT.
>> BUT I HEAR YOU TELLING JUSTICE WELLS, AND PROBABLY MOST OF US WOULD AGREE BECAUSE WE

HAVE FRIENDS AND LOVED ONES THAT ARE STILL SMOKING CIGARETTES.
WE JUST GO, PLEASE, WE DON'T WANT TO SEE YOU DIE.
YOU KNOW, THESE ARE, YOU KNOW, A LOT OF PEOPLE WOULD THINK THEY SHOULD BE BANNED, BUT IS THAT -- WHAT YOU'RE REALLY ASKING FOR SEEMS ON THAT ISSUE WHICH IS JUST CIGARETTES ARE SO INHERENTLY DANGEROUS, THEY CAN'T POSSIBLY HAVE ANY UTILITY TO THEM, THAT YOU WOULD BE ASKING FOR A DIRECTED VERDICT ON THAT BASIS BECAUSE WHAT COULD THEY SAY?
I MEAN, YEAH, THEY ARE, YOU KNOW, 90 PERCENT OF PEOPLE THAT SMOKE ARE GOING TO HAVE A RISK OF LUNG CANCER, SO IS THAT WHAT THESE CASES ARE ABILITY?
ALL YOU'VE GOT TO DO IS SAY, HEY, THIS IS ANOTHER CIGARETTE CASE, AND EVERYONE KNOWS THAT CIGARETTES ARE GOING TO CAUSE LUNG CANCER.
GIVE ME A VERDICT ON STRICT LIABILITY.
>> YOUR HONOR, IT IS CERTAINLY NOT THAT EASY BECAUSE THIS LITIGATION HAS, IN FACT, BEEN ONE OF THE LEAST SUCCESSFUL AREAS OF LITIGATIONS FOR PLAINTIFFS --
>> IF THERE WERE NO DIRECTED VERDICTS IN THIS CASE --
>> NO, THERE WERE NOT.
>> THE CASE WENT TO THE JURY.
>> YES, YOUR HONOR.
>> -- UNDER THE INSTRUCTIONS THAT WE'VE BEEN REFERRING TO.
>> YES, YOUR HONOR.
>> AND IT WAS THE JURY THAT DECIDED, IS THAT CORRECT?
>> THAT'S CORRECT.
THAT'S CORRECT.
>> IS THERE ALSO COMPARATIVE -- WAS THERE -- IN THESE CASES DO WE HAVE COMPARATIVE NEGLIGENCE?
>> THAT'S WHAT I WANTED TO GET TO, YOUR HONOR, BECAUSE I THINK THAT'S WHAT YOU'RE REALLY GETTING AT.
IT MAY SEEM LIKE FROM JUST

LOOKING AT THIS CASE, GEE, THERE MUST BE SOMETHING WRONG HERE. THE LAW SHOULDN'T BE THIS WAY THAT THEY'RE RESPONSIBLE FOR THIS PRODUCT.
WELL, THEY HAVE A VERY GOOD DEFENSE TO THESE CASES, AND THAT IS ASSUMPTION OF THE RISK AS NOW APPLIED TO COMPARATIVE FAULT.
BUT THE TACTIC THAT'S TAKEN, THE TRIAL TACTIC THAT'S TAKEN BY MANY CIGARETTE MANUFACTURERS AND WAS DONE IN THIS CASE IS TO PLEAD THAT AFFIRMATIVE DEFENSE, TO TRY IT DURING THE PLAINTIFF'S CASE IN CHIEF, IN EFFECT CAST AS MUCH FAULT AS POSSIBLE ON THE PLAINTIFF.
AT THE CONCLUSION OF THE PLAINTIFF'S CASE TO THEN WITHDRAW THE DEFENSE AND FORCE THE JURY TO CHOOSE ALL OR NOTHING.
AND QUITE OFTEN JURIES CHOOSE NOTHING WHEN NUT THAT POSITION.
>> COULD WE GO BACK TO THAT POINT MR. DAVIS WAS SUGGESTING THE BROAD APPLICATION, AND YOU STAND BEFORE US AND SAY, WELL, THIS IS REALLY A RULE THAT'S DESIGNED ONLY FOR A SINGLE PRODUCT.
I'M TRYING TO UNDERSTAND THE BROAD IMPLICATIONS OF WHAT IS BEING ASKED HERE AND HOW THAT APPLIES.

>> I'M NOT SUGGESTING THAT A SPECIAL RULE SHOULD APPLY FOR A CIGARETTE --
>> WELL, I MEAN, THIS, IN EFFECT, WOULD BE.
>> I THINK I WOULD -- IT WOULD CERTAINLY BE A DEPARTURE FROM THE WAY THE LAW CURRENTLY STANDS, BUT I SUGGEST TO YOUR HONORS THERE'S NO REASON TO HAVE A SPECIAL RULE FOR CIGARETTE MANUFACTURERS.
THEY MANUFACTURE A PRODUCT JUST LIKE EVERY OTHER COMPANY IN THIS COUNTRY AND SHOULD BE JUDGED BY THE SAME RULES.
THEY SHOULDN'T HAVE A SPECIAL

PLACE THAT SAYS WE CAN MAKE A PRODUCT THAT HAS NO UTILITY AND EXTREME RISK AND KILLED TENS OF THOUSANDS OF PEOPLE AND BE IMMUNE FROM LIABILITY SIMPLY BECAUSE OUR PRODUCT WAS SO BAD. I DON'T THINK THE COURT SHOULD CREATE THAT RULE.
>> -- THE FEDERAL PREEMPTION ISSUE BECAUSE THAT SEEMED TO BE WHAT THE FOURTH DISTRICT -- THAT'S THE SECOND PART.
I'M LOOKING AT OUR CASE OF CARTER V. BROWN & WILLIAMSON FROM 2000, AND IT LOOKS LIKE WE DEALT WITH THE ISSUE OF PREEMPTION AND SAID AS FAR AS ADVERTISING IT DIDN'T PREEMPT EVERYTHING THAT GOES INTO A CIGARETTE.
AND THEN IT DOES ALSO LOOK LIKE WE DEALT WITH THE ISSUE OF, YOU KNOW, THE QUESTION OF -- THERE'S THIS ISSUE WHICH IS, YOU KNOW, WHETHER IT WAS PROBATIVE OR NOT AS TO WHETHER THE PLAINTIFF COULD DISCOVER THE RISKS OF SMOKING.
SO I GUESS -- AND I DON'T KNOW IF IT'S A UNANIMOUS OPINION, HAVEN'T WE DECIDED THAT ISSUE, ALSO, THE CONFLICT PREEMPTION ISSUE?
>> I BELIEVE SO.
THE UNITED STATES SUPREME COURT, IN FACT, ADDRESSED IT IN THE CIPOLLONE CASE, AND THEY ADDRESSED SPECIFICALLY WHAT THE PREEMPTIVE IMPACT WAS OF THE EXPRESS LEGISLATIVE PREEMPTION.
>> DO THEY HAVE A PREEMPTION CASE IN BACK IN BEFORE THEM RIGHT NOW DO YOU KNOW?
>> PARDON?
>> DOES THE U.S. SUPREME COURT HAVE A PREEMPTION TOBACCO CASE, OR IS IT JUST THE OTHER PRODUCT?
>> I'M NOT AWARE OF THEM HAVING A PREEMPTION CASE BEFORE THEM, BUT THEY DID DECIDE THE CIPOLLONE PREEMPTION CASE --
>> NO, THEY HAVE ONE THIS TERM.
>> TWO WEEKS AGO [INAUDIBLE]
>> IT'S A LIGHT CIGARETTE CASE.

I THINK THAT THERE IS SOMETHING REGARDING SOME ASPECT OF THAT REGARDING PREEMPTION.
BUT MY POINT BEING IS THAT THE SUPREME COURT HAS MADE VERY, VERY CLEAR THAT WHEN CONGRESS ENACTS EXPRESS PREEMPTION PROVISIONS, THAT YOU DON'T THEN GO LOOK FOR A CONFLICT IN SOME TYPE OF EXPRESSION IN CONGRESS.
WHAT THE COURT DID HERE WAS TO NOT USE THE CIPOLLONE STANDARD THAT THIS COURT USED IN CARTER AND OTHER COURTS OF THIS STATE HAVE USED, BUT RATHER USED THE FDA CASE TO COME TO THE CONCLUSION THAT THE LEGISLATURE HAD INDICATED SOME INDICATION THAT CIGARETTES SHOULD REMAIN ON THE MARKET WHEN, IN FACT, IN FDA WHAT THE SUPREME COURT RECOGNIZED WAS THAT CONGRESS HAD INDICATED ITS UNWILLINGNESS FOR THE FEDERAL GOVERNMENT TO BE INVOLVED IN THIS.
THEY NEVER HAVE SOUGHT TO WITHDRAW FROM THE STATE ITS POLICE POWER TO PROTECT ITS CITIZENS BY REGULATING TOBACCO ANY WAY IT WANTS TO.
>> SO ARE YOU -- IN TERMS OF THE -- DID YOU MAKE AN ARGUMENT -- I MEAN, THIS WAS A FAILURE TO WARN OR A DEFECT IN THE WARNINGS, WAS THAT PART OF YOUR CLAIM?
>> IT WAS PART OF OUR CASE, AND IT WAS FOUND AGAINST US.
>> BUT YOU RAISED THAT --
>> YES, BUT ONLY --
>> IT WAS FOUND AGAINST YOU ON NEGLIGENCE.
>> CORRECT.
>> WE DON'T KNOW -- DO WE KNOW THE BASIS?
AND I'VE GOT TO LOOK IF IT'S AN INTERROGATORY VERDICT.
DO WE KNOW THE BASIS FOR THE FINDING?
>> NO, WE DON'T, AND THE TWO-ISSUE RULE APPLIED IN THIS CASE RECALLING THAT THIS CASE WAS -- THAT THE FOURTH DISTRICT ELIMINATED TWO CAUSES OF ACTION

THAT WERE FOUND BY THE JURY, NOT ACTUALLY TWO CAUSES, BUT ONE WAS NEGLIGENCE, AND THEY SAID THAT WAS PREEMPTED, BUT DIDN'T USE THE STANDARD THIS COURT HAS USED, THAT IS, THOSE DIRECTLY BEGIN TO US BY CIPOLLONE.
BUT USED ANOTHER ANALYSIS.
AND THEN, SECONDLY, THEY SAID THE RISK UTILITY TEST CAN'T APPLY IN CIGARETTE CASES UNDER THAT SAME CONSTITUTIONAL PREEMPTION ANALYSIS WHICH WAS DIFFERENT THAN WHAT THIS COURT HAS USED AND DIFFERENT TO WHAT OTHER COURTS HAVE USED AND WHAT THE SUPREME COURT OF THE UNITED STATES SAID SHOULD BE USED.
>> [INAUDIBLE]
>> YES.
>> SO HOW COME YOU'RE NOT THE PETITIONER?
[LAUGHTER]
>> I'M THE RESPONDENT TO THE CERTIFIED QUESTION.
>> WELL, YOU CERTAINLY DON'T WANT THE FOURTH DISTRICT OPINION TO STAND AS IS, DO YOU?
>> WELL --
>> YOU JUST SAID WE SHOULDN'T ANSWER THE QUESTION.
>> I DON'T WANT IT REVERSED, YOUR HONOR.
[LAUGHTER]
>> YOU WOULD LIKE TO HAVE THE VERDICT UPHELD, RIGHT?
>> [INAUDIBLE]
>> YOU KNOW, WE HAVE -- AGAIN, IN ALL FAIRNESS, YOU'VE GOT A CASE, AND YOU'VE GOT A VERDICT.
BUT WE'VE GOT SOME VERY IMPORTANT PUBLIC POLICY ISSUES --
>> I UNDERSTAND.
>> AND I'M TRYING TO UNDERSTAND WHAT YOU THINK THE FOURTH -- SO WHERE DID THE FOURTH DISTRICT GET IT RIGHT, AND WHERE DID THEY GET IT WRONG?
>> I THINK THEY GOT IT RIGHT WHEN THEY SAID A SAFER ALTERNATIVE DESIGN IS ONE FACTOR TO BE CONSIDERED AMONG MANY IN DETERMINING WHETHER A PRODUCT IS

UNREASONABLY DANGEROUS AND, THEREFORE, DEFECTIVE.
I THINK THEY WERE CORRECT.
WHEN THEY WENT TO THE PREEMPTION ARGUMENTS, I THINK THEY USED THE WRONG ANALYSIS.
I THINK THEY SHOULD HAVE USED THE SAME ANALYSIS THAT THIS COURT USE INSIDE CARTER, AND HAD THEY USED THAT, THEY WOULD HAVE AFFIRMED THE NEGLIGENCE VERDICT, AND THEY WOULD HAVE AFFIRMED -- DOESN'T REALLY MATTER, THEY WOULD HAVE AFFIRMED THE SECOND PRONG OF THE DESIGN DEFECT VERDICT WHICH WE'RE HOLDING ANYWAY.
SO IT DOESN'T MATTER TO THE RESULT, BUT I THINK THEY WERE WRONG WHEN THEY USED THAT PREEMPTION ANALYSIS.
>> BUT THE DISTRICT COURT RELIED ON THE TWO-ISSUE RULE TO --
>> CORRECT.
>> -- STILL AFFIRM THE JUDGMENT IN YOUR FAVOR.
>> CORRECT.
YES.
SO THOSE ARE THE AREAS WHERE I THINK THE COURT GOT IT WRONG, AND IF WE -- AND I THINK WHAT'S VERY IMPORTANT.
AND THE COURT ALSO JUST ASKED THIS QUESTION, DOES FLORIDA WANT TO ADOPT A THIRD RESTATEMENT? THAT'S ONE OF THE CERTIFIED QUESTIONS TO THE COURT.
>> YEAH.
AND IT STRIKES ME THIS IS THE WORST POSSIBLE CASE TO ACTUALLY DISCUSS THAT ISSUE BECAUSE, YOU KNOW, I CAN IN A -- WHEN I SAY A STANDARD PRODUCTS LIABILITY CASE I DON'T KNOW IF THEY'RE BROUGHT ANYMORE, BUT INVOLVING A PRODUCT LIKE A AUTOMOBILE OR A TRACTOR OR A MOTORCYCLE, YOU KNOW, VERY OFTEN A PLAINTIFF DOES, AS PART OF THE RISK UTILITY, SHOW WHAT ELSE WAS OUT THERE.
I MEAN, THAT'S JUST A GOOD PLAINTIFF'S ATTORNEY DOING IT.
>> SURE.
>> BUT AS I'M READING THE WAY

THAT THIS IS BEING ARGUED, THAT WOULD BE -- THE PLAINTIFF'S SOLE BURDEN TO SHOW IT AND THE SOLE WAY YOU WOULD SHOW A DEFECT WHICH WOULD SEEM TO ME TO TURN PRODUCTS LIABILITY ON ITS HEAD IN TERMS OF REALLY PUTTING EVERYTHING THAT WEST WANTED TO DO AND JUST THROWING THAT OUT.
>> IT COMPLETELY UNDOES WEST.
IT COMPLETELY WILL UNDO WEST.
THE THIRD STATEMENT ALSO DOES AWAY WITH IMPLIED WARRANTY, SO IT TURNS THE CLOCK BACK A HUNDRED YEARS.
>> -- WHETHER HAVING DECIDED ON THE BASIS OF THE TWO ISSUES TO AFFIRM THIS JUDGMENT, WAS IT REALLY NECESSARY FOR THE DISTRICT COURT TO RESOLVE THIS ISSUE.
>> NO.
NO.
>> WAS THAT REALLY A NECESSARY PART OF THEIR DECISION?
>> NO.
>> ONCE THEY DECIDED THAT THERE WAS A VIABLE, VALID CAUSE OF ACTION IN WHICH THEY COULD AFFIRM, IS THAT CORRECT?
>> THAT'S CORRECT.
IT WAS THEN -- ONCE THEY PICKED UP AND SAID, OKAY, WE'RE GOING TO AFFIRM THE VERDICT UNDER THE, UNDER THE TEST OF DEFECT, AND WE'RE GOING TO THROW OUT ONE, WE'RE GOING TO THROW OUT RISK UTILITY.
I'M GOING TO KEEP IT UNDER CONSUMER EXPECTATION.
SO ONCE THEY'VE KEPT IT UNDER CONSUMER EXPECTATION, I'M NOT SURE THE OTHER IS MORE THAN DICTA.
HOWEVER, THE PROBLEM WITH THE PREEMPTION IS THAT BECAUSE OF ENGLE AND THE NUMEROUS OTHER CIGARETTE CASES THAT ARE PENDING, THIS IDEA THAT PREEMPTION APPLIES SEPARATE AND APART FROM HOW YOUR HONORS HAVE APPLIED IT, I THINK IS GOING TO CREATE A GREAT DEAL OF CONFUSION IN THE LOWER COURTS.

>> I'M CONCERNED -- AND I WAS GOING TO BRING UP ENGLE, BUT I ALMOST DIDN'T WANT TO, BUT I RECALL -- AND I DON'T KNOW IF MR. DAVIS IS ON ENGLE OR NOT, THAT WAS NOT AN ISSUE IN THE CASE.
IN OTHER WORDS, THERE HAD BEEN VERDICTS, AND THE VERDICTS HAD BEEN PASSED, I'M SURE, ON SOME OF THESE CLAIMS THAT YOUR VERDICT WAS BASED ON, AND THAT WOULD HAVE BEEN THE FIRST EASY WAY TO KNOCK ENGLE OUT.
THE VERY CAUSES OF ACTION THAT THEY'RE RELYING ON, YOU KNOW, ARE NOT VIABLE IN FLORIDA.
SO I'M A LITTLE CONCERNED THAT THIS IS COMING UP IN THIS WAY WHEN, IF THAT WAS REALLY A PRESSING ISSUE, IT SEEMS TO ME, AND, AGAIN, THIS IS JUST SORT OF STATING THIS OUT LOUD, WE SHOULD HAVE ADDRESSED IT IN ENGLE.
>> YOUR HONOR --
>> WAS THAT AN -- ARE YOU AWARE -- I DON'T THINK THAT WAS AN ISSUE IN ENGLE.
>> NOT TO MY KNOWLEDGE, AND I'VE NEVER CONFRONTED THIS ISSUE IN ANY OTHER CASE WITH A CIGARETTE, ASBESTOS OR OTHERWISE ABOUT THIS ALTERNATIVE SAFER DESIGN.
THE CASE IN CHIEF.
THE OTHER ISSUE THAT BOTHERS ME THAT THE FOURTH DISTRICT'S OPINION IS THEY APPEARED TO SAY THAT YOU CAN'T -- YOU DON'T PROVE A SAFER ALTERNATIVE DESIGN UNTIL YOU PROVE A SAFE ONE.
IN OTHER WORDS, WE CLEARLY PROVED THAT THERE WERE SAFER CIGARETTES THAN CHESTERFIELDS ON THE MARKET.
IN FACT, LIGGETT WERE MAKING SAFER CIGARETTES, BUT THEY DIDN'T ACCEPT THAT BECAUSE IN THEIR MIND YOU COULDN'T SAY IF YOU USED A LOWER-TAR CIGARETTE THAT YOU WOULDN'T GET LUNG CANCER, AND THAT'S TRUE.
YOU CAN'T SAY THAT.
BUT YOU CERTAINLY CAN SAY IF YOU USE A LOWER-TAR CIGARETTE,

YOU'LL HAVE A LOWER RISK OF
DEVELOPING LUNG CANCER.
THAT'S A SAFER PRODUCT.
IT MAY NOT BE A SAFE PRODUCT,
BUT IT'S SAFER.
AND SO THAT'S WHY THE DISTRICT
WAS ABLE TO SAY WE DIDN'T PROVE
ANYTHING THAT WAS A SAFE PRODUCT
OTHER THAN A CIGAR.
BUT WE PROVED A SAFER CIGARETTE,
WE PROVED YOU USE A CIGAR AND,
THEREFORE -- AND I DON'T MEAN A
CIGAR LIKE YOU CAN BUILD A
CIGARETTE THAT LOOKS JUST LIKE
THE CIGAR, THE PH IS SO HARSH
IT'S HARD TO INHALE.
BUT YOU CAN GO FROM SAFEST,
SAFER, SAFE.
THEY PUSHED US ALL THE WAY TO
SAFE.
>> YOU CAN'T HAVE A SAFE
CIGARETTE.
>> CORRECT.
NOT IF YOU DEFINE CIGARETTES AS
INHALING SMOKE AND CARCINOGENS
INTO THE LUNGS.
IF THAT'S THE DEFINITION OF A
CIGARETTE, WHICH THE FOURTH
DISTRICT SAYS IT IS, AND I
UNDERSTAND THAT, YOU CAN'T HAVE
A SAFE ONE, BUT YOU CAN HAVE A
SAFER ONE.
AND THAT'S WHAT WE PROVED IN
THIS CASE.
A SAFER DESIGN FOR A CIGARETTE
BEING USED BY LIGGETT AT THE
TIME.
NOW, I THINK WE MET WHATEVER
BURDEN THE COURT WOULD CREATE,
HOWEVER, I STRONGLY SUGGEST THAT
REQUIRING AS PART OF THE
PLAINTIFF'S CASE IN CHIEF A
SAFER ALTERNATIVE DESIGN PUTS AN
UNDUE BURDEN ON THE PLAINTIFF.
AND, REMEMBER, THAT'S NOT WHAT
LIGGETT'S ASKING.
THEY WANT A SAFER, ALTERNATIVE
DESIGN THAT WILL PREVENT THE
INJURY.
THAT'S WHAT THEY'RE ASKING FOR.
COMMERCIALLY FEASIBLE, IT'S GOT
TO BE JUST AS PROFITABLE AS THE
OLD DESIGN, AND THEN IT'S GOT TO
PREVENT THE INJURY.

THOSE ARE NOT GOING TO EXIST.
THAT'S TOO HIGH A BURDEN TO PLACE ON THE PLAINTIFF TO PROVE BEFORE HE COULD EVEN GET INTO COURT.
AND CERTAINLY BEFORE HE CAN GO TO A JURY.
THERE'S NOTHING FURTHER, YOUR HONORS?
>> THANK YOU VERY MUCH FOR YOUR ARGUMENT.

>> COUNSEL, COULD YOU ADDRESS THE ISSUE OF HAVING DECIDED THIS CASE UNDER THE TWO-ISSUE RULE WHETHER IT WAS REALLY NECESSARY FOR THE DISTRICT COURT TO GO ON AND EXPOUND ON THE LAW THAT WE'RE NOW DISCUSSING HERE.

>> WELL, NO.
IT WASN'T.
BUT RESPECTFULLY, THAT ISSUE ISN'T BEFORE THE COURT.
THE COURT CERTIFIED ONE QUESTION, AND THAT HAD TO DO WITH THIS STRICT LIABILITY ISSUE.
WE DIDN'T BRIEF THE PREEMPTION ISSUE AND AREN'T PREPARED TO ADDRESS THE PREEMPTION ISSUE IN THIS COURT.
TO ANSWER YOUR QUESTION, NO, I DON'T BELIEVE IT WAS NECESSARY.
>> IF IT WASN'T NECESSARY -- YOU KNOW, ONE OF THE THINGS THAT WE'VE TYPICALLY IMPOSED ON CERTIFIED QUESTIONS IS THAT THE COURT ACTUALLY DECIDED THAT THE DISTRICT COURT HAVE ACTUALLY DECIDED THAT ISSUE BEFORE WE WOULD --
>> WELL, THE DISTRICT COURT DID DECIDE THE STRICT LIABILITY ISSUE THAT WE'RE HERE ON.
IT WAS DECIDED QUITE CLEARLY.
>> IT WAS PASSED ON.
IT MIGHT NOT HAVE BEEN NECESSARY FOR THEM TO EXPOUND ON IT, BUT SPECIFICALLY THERE'S CASE LAW NOW.
AND THAT'S SORT OF AN INTERESTING QUESTION.
IS THAT CASE LAW, THEN -- MAYBE

THIS IS SOMETHING FOR US TO DECIDE -- BECAUSE IT WASN'T NECESSARY TO THEIR BASIC HOLDING, IS THAT DICTA FROM THE FOURTH DISTRICT?
>> IT WASN'T NECESSARY FOR THEM TO DECIDE AN ISSUE THAT TOOK THE CASE AWAY FROM THE PLAINTIFF BECAUSE THE PLAINTIFF WAS SUCCESSFUL ON STRICT LIABILITY. SO THEY HAD A FINDING FOR THE PLAINTIFF ON STRICT LIABILITY. I WANT TO GET BACK TO THIS ISSUE THAT --
>> YOU DON'T -- WE'LL HAVE TO DECIDE WHETHER THAT WAS DICTA AND HOW THAT AFFECTS HOW WE APPROACH THAT.
>> WELL, YOU HAVE TO DECIDE WHETHER YOU WANT TO ADDRESS AN ISSUE THAT WASN'T CERTIFIED AND ISN'T BEFORE THE COURT AND WASN'T BRIEFED AS WELL.
>> WHAT ISSUE IS THAT?
>> THIS PREEMPTION ISSUE IS NOT CERTIFIED TO THE COURT.
>> I THOUGHT YOU DECIDE, IN FACT, ADDRESS THE PREEMPTION ISSUE IN YOUR BRIEF.
>> ONLY, ONLY TO INDICATE, TO CONFIRM THE FACT THAT COURTS ARE NOT GOING TO MAKE MANUFACTURERS OF PRODUCTS THE INSURERS OF THE PRODUCT.
AND THAT IF YOU HAVE DONE ABSOLUTELY NOTHING WRONG WITH THE PRODUCT, AND RESPECTFULLY, THE COURT FOUND THAT THERE WAS NO ALTERNATIVE DESIGN EVIDENCE. THE COURT FOUND THAT THESE CIGARETTES WERE THE SAME AS ALL OTHER CIGARETTES.
>> THE COURT.
YOU MEAN -- THE FOURTH DISTRICT DOESN'T FIND THINGS --
>> CONFIRMED THAT THE RECORD ESTABLISHED --
>> WELL, YOU WOULD AGREE WE COULD LOOK AT IT AND SAY --
>> YES.
>> OKAY.
>> I WANT TO GET BACK TO THE VERY BASIC POINT, CERTIFIED QUESTION.

THIS IS THE HOLDING OF THIS
COURT IN WEST.
IN ORDER TO HOLD A MANUFACTURER
LIABLE ON THE THEORY OF STRICT
LIABILITY IN TORT, THE USER MUST
ESTABLISH THE MANUFACTURER'S
RELATIONSHIP TO THE PRODUCT.
WE HAVE THAT HERE.
THE DEFECT AND UNREASONABLY
DANGEROUS CONDITION.
FINDING AN UNREASONABLY
DANGEROUS CONDITION IS NOT
SUFFICIENT FOR STRICT LIABILITY
IN TORT.
WHAT THE DISTRICT COURT DID WAS
TO READ OUT OF EXISTENCE WHAT
WEST SAID WAS ONE OF THE
REQUIREMENTS, THE DEFECT.
AND LET ME THEN GO TO WHAT THE
REPORTERS SAID.
THE REPORTERS SAID THAT -- AND
IF YOU LOOK AT COMMENT I TO THE
RESTATEMENT, IT SAYS IT APPLIES
ONLY WHERE THE DEFECTIVE
CONDITION OF THE PRODUCT MAKES
IT UNREASONABLY DANGEROUS.
SO THERE HAS TO BE BOTH.
IT HAS TO BE, THERE HAS TO BE A
DEFECT, AND IT HAS TO BE
UNREASONABLY DANGEROUS.
WE ARE HERE BEFORE THE COURT
SAYING THAT THE CIGARETTES ARE
UNREASONABLY DANGEROUS.
WE'RE HERE BEFORE THE COURT TO
SAY THERE WAS NO DEFECT IN THIS
RECORD IN THIS CASE THAT CAUSED
IT TO BE UNREASONABLY DANGEROUS,
IT IS THE INHERENT NATURE OF THE
PRODUCT.
THE RESTATEMENT MAKES CLEAR,
WEST MAKES CLEAR, AND ALL THE
CASES THAT FOLLOW IT MADE CLEAR
THAT IT IS THE INHERENT NATURE
OF THE PRODUCT THAT MAKES IT
UNREASONABLY DANGEROUS.
THAT IS NOT THE BASIS FOR --
>> SO YOU WOULD SAY THEN, WHAT
YOU'RE SAYING IS THAT IF WE
FOLLOW AND AGREE WITH YOU, THEN
CLAIMS AGAINST CIGARETTE
MANUFACTURERS BASED ON STRICT
LIABILITY ARE ALL PRECLUDED AS A
MATTER OF LAW?
>> ABSOLUTELY NOT.

>> OKAY.
>> WHAT WE'RE SAYING IS THAT IN THIS RECORD THERE WAS NO SHOWING.
WE CITE IN OUR BRIEF DOZENS OF CASES WHERE STRICT LIABILITY CLAIMS WERE MADE AND WHERE THE CLAIM WAS MADE BY THE PLAINTIFF THAT THERE WERE SAFER ALTERNATIVE DESIGNS.
SO WE'RE NOT SAYING THAT AT ALL.
WHAT WE'RE SAYING IS THIS COURT HAS TO DECIDE AS THE CIGARETTES IN ANY OTHER PRODUCT WHETHER ASSUMING IT'S UNREASONABLY DANGEROUS, AND WE'VE LISTED 20 OF THOSE PRODUCTS IN OUR BRIEF.
ASSUMING UNREASONABLY DANGEROUS, IS THAT ALONE A SUFFICIENT BASIS FOR LIABILITY, AND THIS COURT HAS SAID NO, THE RESTATEMENT SAYS NO.
UNREASONABLY DANGEROUS BY ITSELF IS NOT A SUFFICIENT BASIS.
THERE HAS TO BE A DEFECT IN THE PRODUCT.

>> AND WITH THAT, THANK YOU, MR. DAVIS, FOR YOUR ARGUMENT.
THANK BOTH OF YOU.