UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

VINCENT J. BIFOLCK, AS EXECUTOR OF THE ESTATE OF JEANETTE D. BIFOLCK AND INDIVIDUALLY,	:	
v.	:	NO. 3:06cv1768 (SRU)
PHILIP MORRIS, INC.,	:	OCTOBER 30, 2013

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO CERTIFY

Introduction

Plaintiff Vincent J. Bifolck submits this Reply Memorandum to respond to defendant Philip Morris' Opposition to Plaintiff's Motion to Certify. In it Opposition, defendant contends that Connecticut law is "clear" on the two issues plaintiffs seeks to certify to the Connecticut Supreme Court, Opp. at 5, and that granting plaintiff's Motion would "impermissibly interfere" with the Second Circuit's plan for disposition of the *Izzarelli* appeal. *Id*. at 1. Plaintiff respectfully submits that both of defendant's contentions are erroneous. Indeed, as plaintiff discusses below, there is a possibility that the Second Circuit will decide the *Izzarelli* appeal without considering or resolving either of the issues presented by plaintiff in his Motion to Certify.

Discussion

A. Philip Morris' Grounds for Opposing Certification of the Negligence Issues Do Not Warrant Denial of Plaintiff's Motion to Certify.

It may be reasonably be asked why, since the Second Circuit panel expressly held in *Izzarelli* that Connecticut law is unclear as to whether all product liability claims against cigarette manufacturers are barred absent proof of adulteration or contamination of the tobacco,[1] the panel limited the question certified to the Connecticut Supreme Court to whether Comment i to § 402A precludes a suit premised on strict products liability.

Although the Second Circuit has given no reason for this limitation, it appears that the panel may have been misled as to Connecticut law by arguments by the defendant in *Izzarelli*, R.J. Reynolds Tobacco Company ("Reynolds"), at oral argument of the appeal and in its opposition to Ms. Izzarelli's motion to the panel to expand the certified question to address whether § 402A and comment i apply to product liability claims grounded in negligence.

At oral argument of the *Izzarelli* appeal in the Second Circuit, the issue of whether Ms. Izzarelli's product liability claims should be certified to the Connecticut Supreme Court was specifically addressed – first, with Ms. Izzarelli's counsel during his argument in response to Reynolds' opening argument, and then with counsel for Reynolds during his rebuttal argument. Counsel for Reynolds asserted in response to a question from the panel about how the independent finding of liability on Ms. Izzarelli's negligence claim affected the propriety of

[1] *See Izzarelli v. R.J. Reynolds Tobacco Co.*, ___ F.3d ____, 2013 U.S. App. LEXIS 18760 at *10 (2d Cir. Sep. 10, 2013) ("it is unclear whether Comment i precludes all products liability claims in Connecticut against tobacco companies absent allegations of contamination or adulteration"); *id*. at *11 ("[w]hether Comment i precludes claims under the CPLA against cigarette manufacturers absent evidence of contamination or adulteration has not been decided in Connecticut").

certifying the product liability issues to the Connecticut Supreme Court, that the CPLA abrogated Connecticut common law and required "the same standard of defect in both [negligence and strict liability] cases:"

> The Court: .... [W]ould it make sense to certify on that question [this Court's view of Comment i] in view of the fact that your client was also found liable on a theory that may not have required a finding of unreasonable dangerousness?
>
> Reynolds' Counsel: Well in fact under Connecticut law first of all defect, product defect is the same for negligence as it is for product liability, for strict liability in tort. And that's because counsel said that under the common law of Connecticut negligence has different standards but the common law was abrogated bv the product liability act...
>
> The Court: But your...
>
> Reynolds' Counsel: ... and that's the same standard of defect in both cases.[2]

Reynolds' assertion was a patent misstatement of Connecticut law. The Connecticut Supreme Court has repeatedly held that absent express language or clear legislative intent, the CPLA does not alter pre-existing common law rights. *Lynn v. Haybuster Mfg., Inc.*, 286 Conn. 282, 290 (1993) ("intent of the legislature was to eliminate the complex pleading provided at common law," not to create new substantive rights; clear legislative intent required to find CPLA modifies pre-existing common law); *Elliot v. Sears, Roebuck &* Co., 229 Conn. 500, 513 (1994) (same, applying rule that courts "will not interpret a statute to have the effect of altering prior statutory or common law unless the language of the statute clearly expresses an intent to have such an effect"); *Vitanza v. Upjohn Company*, 257 Conn. 365, 381 (2001) (same).

[2] Transcript of March 18, 2013 oral argument prepared from recording at 54:29 - 55:41 [emphasis added].

And, because Reynolds' assertion was made during its rebuttal argument, Ms. Izzarelli did not have an opportunity to respond to or correct this misstatement.

Thereafter, in opposing plaintiff's Motion to Clarify and Modify the certified question to addresses the applicability of § 402A and comment i to products liability claims grounded in negligence, Reynolds argued that because the statutory language of the CPLA requires all product liability claims (including negligence and strict liability claims) to be brought pursuant to the Act, "a negligence claim must meet the same requirement of a defective product as a claim for strict liability:"

> Plaintiff's argument conflicts not only with Connecticut case law, but also with the Connecticut statute. Under Connecticut's product liability statute (the CPLA), "[a] products liability claim ... shall be in lieu of all other claims against product sellers, *including actions of negligence* [or] strict liability ... for harm caused by a product," and the product liability claim "shall include ... all actions based on [s]trict liability in tort *[or] negligence*." Conn. Gen. Stat. § 52-572m, 572n (emphasis added). Accordingly, because a negligence claim based on harm allegedly caused by a product must be brought under Connecticut's products liability statute, a negligence claim must meet the same requirement of a defective product as a claim for strict liability.

Reynolds' [September 27, 2013] Opposition to Plaintiff's Motion to Clarify and Modify the Court's Order Dated September 10, 2013 [Doc. 112] at 7 (attached as Exhibit C to plaintiff's Motion to Certify).

This argument was also directly contrary to well-established Connecticut law and patently erroneous. As the Connecticut Supreme Court has repeatedly explained:

> In adopting the act, the legislature intended to incorporate in a single cause of action an exclusive remedy for all claims falling within its scope. *Winslow* v. *Lewis-Shepard, Inc.,* 212 Conn. 462, 471, 562 A.2d 517 (1989). In doing so, "the legislature was merely recasting an existing cause of action and was not creating a wholly new right for claimants harmed by a product. The intent of the legislature was to eliminate the complex

> pleading provided at common law. . . . 22 S. Proc., Pt. 14, 1979 Sess., pp. 4637-38; 22 H.R. Proc., Pt. 20, 1979 Sess., pp. 7021-22.

Elliot, 229 Conn. at 505, quoting *Lynn*, 226 Conn. at 292 ("The legislative history of the [product liability act reveals] . . . that the legislature was merely recasting an existing cause of action and was not creating a wholly new right for claimants harmed by a product. The intent of the legislature was to eliminate the complex pleading provided at common law: breach of warranty, strict liability and negligence); *accord Gerrity v. R.J. Reynolds Tobacco Co.*, 263 Conn. 120, 127 n. 8 (2003) (same).

Plaintiff respectfully submits that Reynolds' misstatements of Connecticut product liability law to the Second Circuit panel may reasonably have misled the panel as to whether a product liability action grounded in negligence exists as an independent cause of action under Connecticut post-CPLA product liability law.

The issue of the applicability of § 402A to product liability negligence claims exists as an important issue in this action. Prior to the issuance of the panel's decision in *Izzarelli*, plaintiff's counsel had informed counsel for Philip Morris that plaintiff Bifolck intended to withdraw his strict liability claims and proceed on a product liability claim based on negligence. Because the panel decision in *Izzarelli* leaves in limbo what plaintiff is required to prove to establish a negligence claim (and suggests, *sub silentio*, that a negligence claim is nothing more than a strict liability claim with fault added), plaintiff is unwilling to proceed with his prior plan to withdraw the strict liability claim. However, if the law is clarified and, as plaintiff believes, § 402A is not applicable to a product liability negligence claim, plaintiff will, in fact, withdraw his strict liability claims in this action.

Philip Morris' accusation that plaintiff here is attempting an end-run around the Second Circuit, Opp. at 4, is unfounded. Even though plaintiff Bifolck is represented by the same counsel as Ms. Izzarelli, that does not deprive him of his right to seek certification on the issues that are important to his case. Indeed, it is not surprising that the legal arguments Philip Morris has submitted about the so-called settled nature of Connecticut's application of § 402A to product liability negligence claims closely mirrors (and is, in some respects, identical to) the arguments advanced by Reynolds in its opposition to expanding the certified question in *Izzarelli*.

Equally important, it should be recognized that there is no assurance that the Second Circuit panel will need to consider the merits of the verdict for Ms. Izzarelli on her product liability negligence claim. If the Connecticut Supreme Court upholds this Court's view of the law of strict liability in *Izzarelli*, that will provide the Second Circuit with an independent and sufficient ground for upholding the liability finding in the case wiithout need for adjudication of the negligence verdict.

Philip Morris' contention that Connecticut law is "settled" as to the applicability of § 402A and comment i to a product liability claim grounded in negligence, Opp. at 5, is, moreover, simply wrong. In support of this contention, Philip Morris cites to Connecticut Supreme Court cases applying § 402A and comment i to claims of "defective design." Opp. at 5-6, *citing Potter v. Chicago Pneumatic Tool Co.*, 241 Conn. 199, 214 (1997) and *Wagner v. Clark Equipment Co.*, 243 Conn. 168 (1977).

But, as the Connecticut Supreme Court could not have made clearer, its use of the phrase "defective design" in *Potter* applied solely to strict liability claims involving a design defect.

Thus, the court's decision in *Potter* first reviewed the development of the doctrine of strict liability, 241 Conn. at 207 ("in order properly to evaluate the parties' arguments, we begin our analysis with a review of the development of strict tort liability, focusing specifically on design defect liability"); at 207-10 (tracing development of strict liability doctrine nationwide); at 211 (noting dispute over "some of the specifics of strict tort liability ... in particular, the appropriate definition of defectiveness in design cases" and citing "perplexing problem" of "design defects ... in the field of strict products liability"); at 214-15 (discussing Connecticut's adoption of strict liability doctrine and stating elements plaintiff must prove "in order to recover under the doctrine of strict liability in tort" and "to prevail in a design defect claim").

The *Potter* court then considered and rejected the defendant's contention that the court should adopt a requirement that in order to prevail on a strict liability claim, a plaintiff be required to prove the existence of a feasible alternative design – holding:

> [I]n some instances, a product may be in a defective condition unreasonably dangerous to the user even though no feasible alternative design is available. In such instances, the manufacturer may be strictly liable for a design defect notwithstanding the fact that there are no safer alternative designs in existence.....Accordingly, we decline to adopt the requirement that a plaintiff must prove a feasible alternative design as a sine qua non to establishing a prima face case of design defect. *Id*. at 219 (emphasis added).

The *Potter* court then proceeded to adopt a modified consumer expectation test for use ins strict liability cases, emphasizing:

> our adoption of a risk-utility balancing component to our consumer expectation test does not signal a retreat from strict tort liability. In weighing a product's risks against its utility the focus of the jury should be on the product itself, and not on the conduct of the manufacturer. *Id*. at 221-22 (emphasis added).

And, having laid out these governing principles applicable to a strict liability claim for design defect, the court then undertook to consider whether the trial court had properly instructed the jury as to "the definition of design defect for the purposes of strict tort liability:"

> With these principles in mind, we now consider whether, in the present case, the trial court properly instructed the jury with respect to the definition of design defect for the purposes of strict tort liability. *Id*. at 223 (emphasis added).

Quite clearly, nothing in the Connecticut Supreme Court's discussion in *Potter* of the definition of design defect "for purposes of strict tort liability" supports defendant's contention that *Potter* establishes that § 402A applies to product liability claims grounded in negligence.

Likewise, Philip Morris' reliance on *Wagner* is equally invalid. Although it is true that the plaintiff in *Wagner* asserted product liability claims based on both strict liability and negligence, the Connecticut Supreme Court expressly held that because the parties in their arguments had not differentiated between the two theories, it would not do so in its decision:

> The jury was not asked, and did not indicate, whether its verdict was based on negligence, strict liability, or both. Except where indicated herein, the parties have likewise not differentiated their arguments between the two theories. We, therefore, adjudicate the appeal as the parties have presented it to us.

243 Conn. at 175. Indeed, to the extent the court discussed § 402A applicability to a design defect claim, it expressly relied on the explication in *Potter* of the standards for strict liability design defect cases discussed above. *See id*. at 188-89.

It may be that Philip Morris – which litigates strict liability "design defect" cases across the country – truly does not understand that a "design defect" claim is a strict liability claim and differs from a negligence claim based on faulty design. Plaintiffs in this action and in *Izzarelli* leave to this Court's determination whether Philip Morris and Reynolds have deliberately sought

to confuse the federal courts on this issue of product liability law. What is clear, however, is that no Connecticut appellate court case[3] directly addresses or resolves the question of whether § 402A applies to product liability claims grounded in negligence. It is disingenuous to argue that Connecticut law is "clear" on this issue; and it is dismaying that Philip Morris seeks to litigate this case on the basis of an unsettled legal issue, possibly resulting in the same post-trial situation and delay now confronting the parties in *Izzarelli*.

B. Philip Morris' Grounds for Opposing Certification of the Punitive Damages Issue Do Not Warrant Denial of Plaintiff's Motion to Certify.

Although Philip Morris asserts that Connecticut law is also "settled" as to whether Connecticut's common rule of punitive damages applies to an award of statutory damages under the CPLA, Opp. at 7, it is undisputed that Connecticut's appellate courts have not had the opportunity to address this issue and the state trial courts are split on the issue. Judge Arterton's

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[3] The only other purported appellate authority cited by defendant is *White v. Mazda Motor of Am. Inc.*, 138 Conn. App. 39 (2012), *cert granted*, 307 Conn. 949 (2013). Opp. at 6. Although the plaintiff in *White* asserted both strict liability and negligence claims, the Appellate Court's discussion was not focused on the separate elements of the two theories, but rather on whether the plaintiff was entitled to rely on the malfunction theory of defect or was required to present expert evidence of a defect. *Id*. at 46-47 (rejecting argument based on malfunction theory as not raised below); at 49-51 (requiring expert testimony as to the defect). The case contains no mention at all of the elements of a product liability negligence action, and the parties appear not to have raised or addressed that issue.

The trial level decisions cited by Philip Morris, Opp. at 6, also do not support the contention that the law in Connecticut is settled as to the applicability of § 402A to product liability negligence claims. *Bergeron v. Pacific Food, Inc.*, 2011 WL 1017872, at *3 (Conn Super. Feb. 14, 2011), is to the same effect as *White*. In *Bergeron*, the plaintiff alleged that contaminated oysters had caused his injury. The court denied summary judgment without discussion of the various theories asserted by plaintiff, and the case contains no actual statement holding that § 402A applies to claims grounded in negligence. *Martone v. C. Raimondo & Sons Construction,,* 2002 WL 31234758 (Conn. Super. Aug. 28, 2002) does not indicate whether a product liability claim in negligence was even asserted and does not contain any discussion of various product liability theories. And, in *Faux v. Thomas Indus., Inc*., 1992 WL 293230 (Conn. Super. Oct. 8, 1992), the court set aside a jury verdict on plaintiff's negligence claim as inconsistent with the jury's finding in special interrogatories on plaintiff's strict liability claim that there was no defect. *Faux* simply stands for the proposition that negligence claims require proof of a defect – a proposition with which plaintiff concurs.

decision in *Fraser v. Wyeth, Inc.*, 2013 U.S. Dist. LEXIS 109293 (D. Conn. Aug. 5, 2013), while adopting the reasoning of *Izzarelli*, does not remedy the absence of a definitive state court determination of this issue.

Nor is it at all clear that the Second Circuit intends to reach this issue in the pending *Izzarelli* appeal. If the Court reverses as to liability either on the comment i issues or the other numerous liability issues raised by Reynods, the punitive damages issue will become moot. It is – unfortunately for Ms. Izzarelli – a plausible interpretation of the panel's failure to certify the punitive damages issue that the panel intends to reverse on liability.

This Court noted in *Izzarelli* that the CPLA punitive damages issue was an important issue for determination by the Connecticut Supreme Court and that, but for the age of the *Izzarelli* case, certification of the issue would have been appropriate. The Court reiterated that sentiment during the parties' recent status conference in this action. Philip Morris has offered no meaningful arguments to the contrary.

Conclusion

For the foregoing reasons, plaintiff respectfully submits that his Motion to Certify should be granted.

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CERTIFICATION

I hereby certify that on October 30, 2013 a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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