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Court of Appeals

of the

State of New York

NORMA ROSE and LEONARD ROSE,
Plaintiffs-Appellants,

– against –

BROWN & WILLIAMSON TOBACCO CORPORATION,
as successor in interest to
THE AMERICAN TOBACCO COMPANY,
PHILIP MORRIS, USA, INC.,
Defendants-Respondents,

– and –

R.J. REYNOLDS TOBACCO COMPANY,
Defendant.

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing an underlying membership of more than three million companies and professional organizations of every size, in every industry section, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the state and federal courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community. This is such a case. It presents a question central to the law of products liability: namely, the evidence necessary to demonstrate a defect in a product's design. The Chamber's interest in this case – and in the proper resolution of the issue presented – is set forth in greater detail in the motion for leave to file this brief.

STATEMENT OF FACTS

In the interest of judicial economy, the Chamber adopts the statement of facts set forth in the Brief for Defendants-Respondents.

ARGUMENT

The Appellate Division correctly held that plaintiffs' failure to present any evidence comparing the usefulness to consumers of ultra-light and regular cigarettes was fatal to their defective-design claim. Plaintiffs litigated this case on an alternative-

design theory of liability: they asked the jury to conclude that regular cigarettes were defectively designed because ultra-light cigarettes represented a superior way to make the same product. But they could not prove that theory without the missing comparison evidence. Courts, legislatures, and commentators have all traditionally understood "reasonable alternative design" claims to require evidence comparing the utility of the different options that the jury is being asked to evaluate. This requirement is eminently sensible. For one thing, there must be some basis for believing that the plaintiff's proposed alternative is similar enough in function to be considered a true "alternative design" for the defendant's product, as opposed to a different product altogether. For another, a jury cannot possibly conclude that adopting an alternative design would be "reasonable" unless it has evidence regarding both the benefits *and* the burdens (including loss of consumer utility) of making the switch. Without such evidence, the jury simply cannot decide that the comparative benefits of the alternative design outweigh its comparative disadvantages.

Plaintiffs here seek to be excused from this traditional requirement of proof. But there is no good reason to accept – and persuasive reasons to reject – plaintiff's invitation to take New York out of the mainstream of American products-liability law by eliminating this essential requirement. Plaintiffs contend that it would be too burdensome for them to produce evidence comparing the sensory satisfaction

consumers receive from each type of cigarette. Yet subjective desirability is hardly an unusual metric for comparing products in a design-defect case; there are a variety of plausible, readily achievable methods a plaintiff might employ to present such comparative evidence in a particular case. Where, as here, plaintiffs present no such evidence *at all*, their claim necessarily fails as a matter of law. A contrary result, moreover, would vastly expand the scope of product liability law in New York, with predictable, negative consequences: consumer choice would be constricted and companies that do business in this state would face unprecedented and highly damaging liability risks. For these reasons, the decision of the Appellate Division should be affirmed.

I. PLAINTIFFS CANNOT PREVAIL ON A "REASONABLE ALTERNATIVE DESIGN" THEORY WITHOUT EVIDENCE COMPARING THE UTILITY OF REGULAR AND ULTRA-LIGHT CIGARETTES.

This case concerns the proper interpretation of a widely established products-liability doctrine: the "reasonable alternative design" method for proving design defect claims. "[T]he great majority of design defect cases [have] involved proof by the plaintiff of a feasible alternative design – proof of some practicable and cost-effective design alternative that would have prevented the plaintiff's harm." DAVID G. OWEN, PRODUCTS LIABILITY LAW 505 (2005) ("PRODUCTS LIABILITY LAW"). Many states

require such proof in all defective-design cases, and even states that do not affirmatively require it generally accept it as a valid way of establishing that a commercial product is defectively designed. See *id.* at 506-07 & nn.22, 27. This general consensus is reflected in the most recent Restatement of products liability law, which takes the position that a product "is defective in design" if and only if "the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design." RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(b) (1998) ("THIRD RESTATEMENT"); see also *id.* Reporter's Note, Comment *d* (surveying the law in the various states and the District of Columbia).

Plaintiffs' offer of proof in this case fundamentally misconstrues the theory and application of the "reasonable alternative design" method. Plaintiffs' case, in a nutshell, is as follows: (1) the ingredients in regular cigarettes pose a health risk; (2) ultra-light cigarettes pose less of a health risk because they contain less of those ingredients; therefore, (3) ultra-light cigarettes represent a feasible alternative design for regular cigarettes. But a proper understanding of "reasonable alternative design" methodology demonstrates that the first two propositions do not lead to the third. Just because product *A* is riskier than product *B* does not mean that *A* is defectively designed. Rather, the law requires analysis of both the riskiness *and* the usefulness

of products *A* and *B*. First, *B*'s usefulness must be sufficiently close to *A*'s to permit a meaningful comparison of their pros and cons. Second, even assuming the first requirement is met, *A* can be deemed defective only if *B*'s reduced risks outweigh its reduced usefulness. Plaintiffs here failed to provide the evidence necessary to make either determination.

A. A Utility Comparison Was Necessary To Establish That Ultra-Light Cigarettes Are In Fact A Substitutable "Alternative Design" For Regular Cigarettes.

In the absence of any evidence that ultra-light cigarettes actually could serve as an equivalent replacement for regular cigarettes, there was no basis for deeming the former to be an "alternative design" of the latter. "The central question in comparing commodities is . . . whether the commodity compared with the defendant's commodity . . . is sufficiently similar to the defendant's commodity to allow fair comparison." Richard L. Cupp, Jr., *Defining the Boundaries of "Alternative Design" Under the Restatement (Third) of Torts*, 63 TENN. L. REV. 329, 361 (1996). As explained by the scholars who later became the Reporters of the Third Restatement, "the degree of substitutability of the alternative suggested by the plaintiff and the product as designed by the defendant" determines whether it is truly an "alternative design" or is instead a different product altogether. James A. Henderson & Aaron D.

Twerski, *Closing the American Products Liability Frontier*, 66 N.Y.U. L. REV. 1263, 1299 (1991).

States that have codified the reasonable alternative design test have endorsed this substitutability precondition by requiring that the proposed alternative be as useful, or nearly as useful, as the original product. Mississippi, for example, defines a "feasible design alternative" as one that would likely have prevented the harm to the plaintiff "without impairing the utility, usefulness, practicality or desirability of the product to users or consumers." MISS. CODE ANN. § 11-1-63(f)(ii). The legislatures of other states have enacted similar requirements. See, *e.g.*, N.J. STAT. ANN. § 2A:58C-3(a)(1) (proposed alternative must improve safety "without substantially impairing the reasonably anticipated or intended function of the product"); N.C. GEN. STAT. ANN. § 99B-6(a)(1) (proposed alternative must improve safety "without substantially impairing the usefulness, practicality, or desirability of the product"); OHIO REV. CODE. ANN. § 2307.75(F) (proposed alternative must improve safety "without substantially impairing the usefulness or intended purpose of the product"); TEX. CIV. PRAC. & REM. CODE § 82.005(b)(1) (proposed alternative must improve safety "without substantially impairing the product's utility").

Plaintiffs here have made no showing that ultra-light cigarettes are even in the same ballpark as regular cigarettes in terms of functionality, let alone that they are "a

relatively close substitute." Henderson & Twerski, *supra*, 66 N.Y.U. L. REV., at 1299. To the extent that plaintiffs even have a theory as to why ultra-light cigarettes might fairly substitute for regular cigarettes, it appears to be based solely on the fact that the two products contain the same active ingredients (albeit in drastically different combinations) and both are meant to be lit and inhaled. See, *e.g.*, Brief of Plaintiffs-Appellants, at 34-35. But just because two products have similar component parts and are used in similar ways does not make them substitutes. A tricycle, for example, is not an alternative design for a bicycle; it is a completely different product. See Henderson & Twerski, *supra*, 66 N.Y.U. L. REV. at 1298-1300. Although both have wheels, handlebars, and pedals, and both are used for self-propelled transportation, the addition of a third wheel removes "the very design feature – two-wheeledness" – that makes a bicycle "desirable to a majority of its users and consumers." *Id.* at 1300.

Common-law courts have applied reasoning similar to that used in the bicycle-tricycle example to reject plaintiffs' attempts to show a design defect by comparing products that lack sufficient substitutability. For example, in *Dreisonstok* v. *Volkswagenwerk, A. G.,* 489 F.2d 1066 (4th Cir. 1974), the court of appeals, applying Virginia law, rejected the notion that a van could be compared for safety purposes to a "normal or standard passenger car." *Id.* at 1074 (internal quotation marks omitted). Vans are different from regular cars, the court observed, in that they are designed to

have much more space – indeed, that feature is precisely responsible for their popularity with consumers. See *id.* at 1073-75. The court therefore concluded that it would be "entirely impermissible to predicate a conclusion of negligent design simply because a vehicle, having a distinctive purpose, such as the microbus, does not conform to the design of another type of vehicle, such as a standard passenger car, having a different nature and utility." *Id.* at 1075. Similarly, in *Monahan* v. *Toro Co.*, 856 F. Supp. 955 (E.D. Pa. 1994), the district court concluded that a walk-behind lawnmower was not comparable to a riding lawnmower because the former "does not address the same need – mowing a large area with less labor expended." *Id.* at 959. See also *Dyson* v. *General Motors Corp.*, 298 F. Supp. 1064, 1073-74 (E.D. Pa. 1969) (concluding that the crash-resistance of a hardtop convertible should not be compared to that of a four-door sedan).

Just as it would have been "impermissible" to condemn the design of a van simply for having a greater amount of consumer-desired space than a passenger car, so too would it be impermissible here to condemn regular cigarettes simply for having a greater amount of consumer-desired ingredients than ultra-light cigarettes. It is undisputed that these additional ingredients are precisely what makes cigarettes popular in the marketplace. And what little evidence there is in this case regarding substitutability indicates that ultra-light cigarettes are *not* an acceptable replacement

for regular ones: plaintiff Norma Rose herself tried two low-tar brands but "did not like their taste" and quickly switched back to regular cigarettes. *Rose* v. *Brown & Williamson Tobacco Corp.*, 855 N.Y.S.2d 119, 128 (App. Div. 2008) (Catterson, J., dissenting). Because plaintiffs failed completely to present any evidence that other smokers would take a different view, there was no factual basis for deeming ultra-lights an "alternative design" for regular cigarettes. This case accordingly never should have gone to the jury on that theory.

B. A Utility Comparison Was Necessary To Show That It Would Be "Reasonable" To Replace Regular Cigarettes With Ultra-Lights.

Even if it were proper to consider ultra-lights an "alternative design" for regular cigarettes, plaintiffs could not prove that they were a "*reasonable*" alternative without evidence comparing the relative effectiveness of the two different products. Plaintiffs here asked the jury to conclude that switching to ultra-light cigarettes is reasonable based simply on (disputed) evidence that ultra-lights present fewer health risks. But that evidence presents only half the picture.

The modern law of defective design recognizes that "'the degree of risk or safety in every product design is counterbalanced by considerations such as cost, utility, and aesthetics.'" THIRD RESTATEMENT § 2, Reporters' Note, comment *a* (quoting David G. Owen, *Defectiveness Restated: Exploding the "Strict" Products Liability Myth*,

1996 U. ILL. L. REV. 743, 754). Thus, the overwhelming trend of courts and commentators in developing design-defect law has been to seek "'an ideal *balance* of product usefulness, cost, *and* safety.'" *Ibid.*; *id.* at comment *d* (cataloging jurisdictions that apply the risk-utility analysis) (second emphasis added); PRODUCTS LIABILITY LAW, at 494 (observing that risk-utility analysis has "indubitably become America's dominant test for design defectiveness"); see also, *e.g.*, *Denny* v. *Ford Motor Co.*, 87 N.Y.2d 248, 257-58 (1995).

Presentation by the plaintiff of an alternative design is simply a framework for inquiring into whether a defendant's product has achieved that balance. See PRODUCTS LIABILITY LAW, at 508; see also THIRD RESTATEMENT § 2, Reporter's Note, comment *a*. In such a case, what is "actually litigated is a *micro*-balance of the pros and cons of the manufacturer's failure to adopt some [particular] design feature that would have prevented the plaintiff's harm." PRODUCTS LIABILITY LAW, at 514. In that way, the inquiry closely resembles the famous "Hand formula" for determining negligence liability. See *United States* v. *Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (L. Hand, J.). Thus, there is a defect if and only if the safety risks of the current design outweigh any negative effects of switching to the alternative. See PRODUCTS LIABILITY LAW, at 497; see also THIRD RESTATEMENT § 2, Reporter's Note, comment *a* (quoting Owen, 1996 U. ILL. L. REV. at 755). (Or, as Judge Hand would put it, there is a defect

(*D*) only when the probability (*P*) of the product causing an injury times the likely magnitude (*L*) of such an injury outweigh the burden (*B*) of designing the product to avoid that injury: $P \times L > B \Rightarrow D$. See PRODUCTS LIABILITY LAW, at 497.)

The jury in this case saw only part of that equation. Plaintiffs told the jury a great deal about the safety risks associated with smoking regular cigarettes rather than ultra-lights. But it gave them nothing to weigh those safety risks against in assessing whether ultra-lights are actually a better product overall. The jury therefore lacked the tools to determine whether the proposed alternative design was, in fact, "reasonable." Because "people buy and use products to help them with their labors and give them satisfaction[,] . . . sacrifices in a product's utility are important costs that must be carefully evaluated in assessing the costs and benefits of a proposed alternative design." PRODUCTS LIABILITY LAW, at 509. A jury that does not weigh those sacrifices in utility has not actually performed a proper risk-utility analysis. See, *e.g.*, LA. REV. STAT. ANN. § 9:2800.56 (defective-design analysis involves weighing "the adverse effect, if any, of [an] alternative design on the utility of the product"); WASH. REV. CODE § 7.72.030(1)(a) (defective-design analysis involves analyzing "the adverse effect that an alternative design that was practical and feasible would have on the usefulness of the product"); *General Motors Corp.* v. *Jernigan,* 883 So.2d 646, 662 (Ala. 2003) (defective-design analysis involves "such factors as the intended use

of the [product], its styling, cost, and [its] desirability") (internal quotation marks omitted); *Armentrout* v. *FMC Corp.*, 842 P.2d 175, 182 (Colo. 1992) (defective-design analysis involves determining whether "the risk outweighs the benefit") (internal quotation marks omitted); *Warner Fruehauf Trailer Co., Inc.* v. *Boston,* 654 A.2d 1272, 1276 (D.C. 1995) (defective-design analysis involves "the risks, costs and benefits of the product in question and alternative designs") (internal quotation marks omitted); *Banks* v. *ICI Americas, Inc.,* 450 S.E.2d 671, 673 (Ga. 1994) (defective-design analysis involves "the usefulness of the product" in its current form); *Back* v. *Wickes Corp.*, 378 N.E.2d 964, 970 (Mass. 1978) (defective-design analysis involves assessing "the adverse consequences to the product and to the consumer that would result from an alternative design") (internal quotation marks omitted); *Thibault* v. *Sears, Roebuck & Co.*, 395 A.2d 843, 846 (N.H. 1978) (defective-design analysis involves assessing whether "the risk of danger could have been reduced without significant impact on product effectiveness"); *Brooks* v. *Beech Aircraft Corp.*, 902 P.2d 54, 61 (N.M. 1995) (defective-design analysis involves "the ability to eliminate the risk without seriously impairing the usefulness of the product or making it unduly expensive"); *Wood* v. *Ford Motor Co.*, 691 P.2d 495, 498 (Or. 1984) (defective-design analysis involves whether " the suggested alternative is . . . practicable in terms of cost

and the over-all design and operation of the product") (internal quotation marks omitted).

The Appellate Division correctly recognized that dismissal was the proper remedy for plaintiffs' failure to equip the jury adequately for a risk-utility analysis. "The overwhelming majority of courts place the burden of proving that a product design failed to meet risk-utility standards on the plaintiff." THIRD RESTATEMENT § 2, Reporters' Note, comment *f* (citing cases); see also, *e.g.*, MISS. CODE ANN. § 11-1-63(f)(ii); *Jernigan,*, 883 So.2d at 662; *Armentrout*, 842 P.2d at 182; accord PRODUCTS LIABILITY LAW, at 506-07 & n.23. Thus, "if a plaintiff fails to present sufficient evidence on this point, a design defect claim ordinarily will fail." PRODUCTS LIABILITY LAW, at 507; see *id.* at 507 n.24 (citing cases); see also, *e.g.*, *Lavespere* v. *Niagara Mach. & Tool Works, Inc.*, 910 F.3d 167, 183 (5th Cir. 1990) (defective-design claim failed where plaintiff failed to produce, among other things, "proof . . . on the matter of the loss of product utility that use of the alternative design would have occasioned"); *Butler* v. *General Motors Corp.,* 1997 WL 33332750, at *2 (Mich. Ct. App. Nov. 14, 1997) (defective-design claim failed where plaintiff presented "no evidence of the magnitude of the risks involved, the utility or relative safety of the proposed alternative, or evidence otherwise concerning the unreasonableness of the [defendant's] design").

The widespread adoption of this approach makes perfect sense. See PRODUCTS LIABILITY LAW, at 507 n.23 (stating that "the plaintiff logically and fairly has the burden of proof on the feasibility and cost-effectiveness of the alternative design" and citing other authorities taking the same view). The reasonableness of the alternative design is the ultimate issue in the case; if the plaintiff's evidence alone would not be sufficient to establish it, there is no point in letting the case go to the jury. Otherwise, a plaintiff could get to a jury merely by asserting, say, that sharp knives are defective because they present more of an injury risk than dull knives. But such a claim is incomplete without at least *some* evidence regarding the degree to which a dull blade reduces the knife's utility, and an argument by the plaintiff as to why the injury risk outweighs that loss in efficacy.

The same logic applies here. Plaintiffs' argument to the jury should not simply have been that ultra-light cigarettes are safer, but instead that their safety benefits outweigh any decrease in utility. And to make that argument, they had to produce sufficient evidence regarding the difference in consumer utility between the two types of cigarettes. Here, plaintiffs not only failed to meet that burden, but in fact caused the trial court incorrectly to instruct the jury that "'[w]hat consumers preferred or did not prefer'" does not constitute "'part of the issues in this case.'" Brief for Defendants-Respondents 7 (quoting p. 4198 of the Joint Appendix presented to the Appellate

Division). Without that evidence, plaintiffs' case simply invited the jury to reach a policy conclusion regarding the health risks of smoking, not a legal conclusion regarding the defectiveness of regular cigarette's design.

II. PLAINTIFFS OFFER NO REASON WHY THEIR CASE SHOULD BE TREATED DIFFERENTLY FROM ANY OTHER "REASONABLE ALTERNATIVE DESIGN" CASE.

Plaintiffs criticize the Appellate Division's decision as "imposing a new, impossible-to-meet 'consumer acceptability' burden on plaintiffs," which they characterize as "radical and unprecedented." Brief of Plaintiffs-Appellants, at 29 (capitalization altered). Plaintiffs get matters exactly backwards. In point of fact, it is plaintiffs' position – that they do not need to present any utility-comparison evidence whatsoever – that would represent a sharp break with existing law.

Contrary to plaintiffs' contention, the Appellate Division did not in this case invent some "new" consumer-acceptability requirement. Rather, it merely applied the well-established legal principles set forth above to the facts of plaintiffs' case. It correctly observed that under New York law, as in other jurisdictions, plaintiffs "cannot prevail on their negligent design claim, as a matter of law, without demonstrating the feasibility of a safer (or, to put it better here, measurably less dangerous) alternative design for the cigarettes Norma Rose smoked." *Rose*, 855 N.Y.S.2d at 121. And the lower court properly recognized that this would require some analysis of the

comparative utility of the different types of cigarettes. *Id.* at 122. It then applied that settled rule to the facts: because of the "subjective nature of the benefits of smoking" (*i.e.*, the fact that consumers buy cigarettes purely to produce a pleasurable sensation), "the viability of light cigarettes as an alternative to regular cigarettes" could be demonstrated "only through evidence of their acceptability to consumers." *Ibid.*

Tellingly, plaintiffs suggest no *other* metric by which the utility of the two types of cigarettes might be compared. Their argument thus boils down to a request that they be excused altogether from presenting utility-comparison evidence. For reasons discussed above, such an excuse would represent a drastic and unwarranted change in the law of products liability that would place New York dramatically out of step with other jurisdictions. The repercussions of such a change – allowing plaintiffs with defective-design claims to get to a jury without showing that they have identified a true alternative design or without any evidence that such a design is reasonable – would extend far beyond this case. Under plaintiffs' proposed approach, businesses would become liable simply for marketing products that juries find more dangerous than other products, without any regard to the products' comparative utility to consumers.

Moreover, plaintiffs' reasons for seeking such an excuse ring hollow. Plaintiffs are mistaken when they suggest that there is something novel about looking to subjective consumer preferences when analyzing a product's functionality. To the

contrary, such considerations are commonplace. See, *e.g.*, MISS. CODE ANN. §11-1-63(f)(ii) (consideration of "utility, usefulness, practicality, *[and] desirability* of the product to users or consumers") (emphasis added); N.C. GEN. STAT. ANN. § 99B-6(a)(1) (consideration of "usefulness, practicality, *[and] desirability*") (emphasis added); *Linegar* v. *Armour of Am., Inc.*, 909 F.2d 1150, 1154 (8th Cir. 1990) (consideration of consumer preferences in rejecting claim that bulletproof vest was defective because it did not cover the back); *Singleton* v. *Int'l Harvester Co.*, 685 F.2d 112, 115 (4th Cir. 1981) (consideration of alternative design's "chances for consumer acceptance"); *Allen* v. *Minnstar, Inc.*, 1989 WL 434765, at *3 (D. Utah Nov. 21, 1989) (consideration of whether "consumers would accept the diminished performance" of the alternative design); *Jernigan*, 883 So. 2d at 662 (consideration of alternative design's "styling" and "desirability") (internal quotation marks omitted); *Banks,* 450 S.E.2d at 674 (consideration of whether alternative design "was a marketable reality"); *Troja* v. *Black & Decker Mfg. Co.*, 488 A.2d 516, 520 (Md. Ct. Spec. App. 1985) (consideration of alternative design's "chances of consumer acceptance"); *Thibault*, 395 A.2d at 846 (consideration of "utility *and desirability*") (emphasis added); *Claytor* v. *General Motors Corp.*, 286 S.E.2d 129, 132 (S.C. 1982) (consideration of "usefulness *and desirability* of the product") (emphasis added); THIRD RESTATEMENT § 2, Comment *f* (consideration of "the effects of the alternative design

on . . . esthetics . . . and the range of consumer choice"); PRODUCTS LIABILITY LAW, at 511 (consideration of "consumer acceptance").

Plaintiffs are similarly mistaken in suggesting that requiring proof of consumer preferences would be overly burdensome. For starters, this issue affects only a certain category of defective-design cases: namely, cases where the challenged product is one that consumers purchase solely for pleasure and whose utility to consumers therefore cannot be measured by some objective criterion. (The utility of a widget-making machine, by contrast, could probably be measured by the number of widgets it makes in an hour.) Furthermore, there is no inherent reason why the required proof need be at all burdensome to produce. There may be certain cases where the relative utility of the products (say, the tastes of different widely-consumed foods) is a matter of common knowledge, and thus no additional proof will be required. There may be other cases where the testimony of the plaintiff, or other lay consumers of the product, will suffice to show how purchasers would view the alternative design. There may also be cases where an expert, in addition to presenting evidence that the alternative design is technically possible, can additionally opine on the matter of consumer acceptability. And finally, even if in certain cases a somewhat more sophisticated market analysis were necessary, such evidence is no stranger to the law: antitrust matters, for example,

frequently involve analysis of the substitutability of different products. See, *e.g.*, Cupp, *supra*, 63 TENN. L. REV., at 354-358.

In any event, issues regarding what *form* consumer-acceptance evidence might have to take in a particular case can and should be left for another day. All this Court need and should conclude here is that plaintiffs bore the burden of producing such evidence; because they did not meet that burden, the Appellate Division was correct to dismiss their case.

CONCLUSION

For the foregoing reasons, and those set forth in the brief of the Defendants-Respondents, the decision of the Appellate Division should be affirmed.

Dated: Washington, D.C.
October 27, 2008

Respectfully submitted,

By:_____

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