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1 No. 205
Frank Adamo, as Executor of the
Estate of Norma Rose, et al.,
 Appellants,
 v.
Brown & Williamson Tobacco
Corporation, &c., et al.,
 Respondents,
et al., Defendant.

 Howard A. Levine, for appellants.
 Andrew H. Schapiro, for respondents.
 Product Liability Advisory Council, Inc.; Professor
James A. Henderson, Jr.; Chamber of Commerce of the United States
of America, amici curiae.

SMITH, J.:

 Plaintiffs claim that two cigarette companies were
negligent in designing their product, in that they should have
used lower levels of tar and nicotine. We agree with the
Appellate Division that plaintiffs failed to prove an essential
element of their case: that regular cigarettes and "light"

cigarettes have the same "utility." The only "utility" of a cigarette is to gratify smokers' desires for a certain experience, and plaintiffs did not prove, or try to prove, that light cigarettes perform this function as well as regular cigarettes.

Norma Rose, who died during the pendency of this appeal, smoked for more than 40 years, consuming more than a pack a day of regular cigarettes. Beginning in the late 1960s, the products she smoked were manufactured by The American Tobacco Company and Philip Morris, USA, Inc. Ms. Rose quit smoking in 1993, and was diagnosed two years later with lung cancer and another condition allegedly caused by smoking. She and her husband brought a number of claims against American Tobacco's successor (Brown & Williamson Tobacco Corporation), Philip Morris and a third company. All their claims except one for negligent product design were dismissed at the trial level and are not now before us.

A jury found that American Tobacco and Philip Morris negligently designed the cigarettes Ms. Rose smoked and, in later phases of the trial, awarded compensatory and punitive damages. The Appellate Division reversed the resulting judgment, with two Justices dissenting, and granted judgment in defendants' favor. Plaintiffs appeal to us pursuant to CPLR 5601 (a), and we now affirm the Appellate Division's order.

In Voss v Black & Decker Mfg. Co. (59 NY2d 102, 108

[1983]), speaking of a claim of strict product liability, we said: "The plaintiff . . . is under an obligation to present evidence that the product, as designed, was not reasonably safe because there was a substantial likelihood of harm and it was feasible to design the product in a safer manner." While this is a negligence, not a strict liability, case, similar requirements apply -- specifically, plaintiffs here had to prove that "it was feasible to design the product in a safer manner." This means, to use again the language of Voss, the plaintiffs must show "the potential for designing . . . the product so that it is safer but remains functional" (id. at 109).

Here, plaintiffs presented evidence from which a jury could find that light cigarettes -- cigarettes containing significantly lower levels of tar and nicotine -- are "safer" than regular cigarettes, but they did not show that cigarettes from which much of the tar and nicotine has been removed remain "functional." The function of a cigarette is to give pleasure to a smoker; plaintiffs have identified no other function. Plaintiffs made no attempt to prove that smokers find light cigarettes as satisfying as regular cigarettes -- indeed, it is virtually uncontested that they do not. Both regular and light cigarettes are available on the market, and the enhanced dangers that come from smoking regular cigarettes are well known, but large numbers of consumers continue to prefer regular cigarettes.

It is not necessary in every product liability case

that the plaintiff show the safer product is as acceptable to consumers as the one the defendant sold; but such a showing is necessary where, as here, satisfying the consumer is the only function the product has. A cigarette is a different kind of product from the circular saw in Voss, whose function was to cut wood, or the molding machine in Robinson v Reed-Prentice Div. of Package Mach. Co. (49 NY2d 471 [1980]), whose function was to melt and form plastic.

We find an apt analogy, as the Appellate Division did, in Felix v Akzo Nobel Coatings (262 AD2d 447 [2d Dept 1999]). The product involved in Felix was a quick drying lacquer sealer made from a highly flammable solvent base. The plaintiff argued that a safer design was "feasible," because a sealer can be made from a water base, but the plaintiff's expert "admitted that the water-based products take hours longer to dry" (id. at 448). The court in Felix found that this "functional difference" defeated the plaintiff's case; the plaintiff failed to produce evidence "that there was an alternative, safer design" serving the same function (id. at 448-449). Similarly, here plaintiffs' case fails because plaintiffs failed to show that light cigarettes are equivalent in function, or utility, to regular ones.

Of course we are conscious, as everyone must be, of the irony in speaking of cigarettes' "utility." A strong argument can be made that, when the pleasure they give smokers is balanced against the harm they do, regular cigarettes are worse than

useless. But it is still lawful for people to buy and smoke regular cigarettes, and for cigarette companies to sell them. To hold, as plaintiffs ask, that every sale of regular cigarettes exposes the manufacturer to tort liability would amount to a judicial ban on the product. If regular cigarettes are to be banned, that should be done by legislative bodies, not by courts.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

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PIGOTT, J.(dissenting) :

I respectfully dissent. Plaintiffs met their burden of establishing that defendants were able to design a safer cigarette that maintained the functionality of a regular cigarette (see Voss v Black & Decker Mfg. Co., 59 NY2d 102, 109 [1983]). The majority concludes, however, that plaintiffs were required "to prove that smokers find light cigarettes as satisfying as regular cigarettes," and were further obligated to prove that cigarettes serve some function other than to provide pleasure (maj op at 3). In my view, this language improperly shifts the burden of proving consumer acceptability to plaintiffs.

At trial, defendants moved "to offer evidence tending to prove that the 'safer alternative design' suggested by plaintiffs was not feasible because it was not acceptable to consumers (i.e., not commercially viable)" (10 Misc3d 680, 696-697). The trial court denied that motion, concluding that evidence of commercial viability of the lighter cigarette was irrelevant to its feasibility or functionality (id. at 699). That was error and, therefore, I would remit the matter to Supreme Court for a new trial to permit defendants the

opportunity to present proof of the alleged commercial unacceptability of the lighter cigarette as compared to the regular cigarette.

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Order affirmed, with costs. Opinion by Judge Smith. Chief Judge Kaye and Judges Ciparick, Graffeo, Read and Jones concur. Judge Pigott dissents in an opinion.

Decided December 16, 2008