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AMERICAN TOBACCO CO V. GRINNELL

KRUSE: May it please the court. I am Sam Kruse from Kruse Scott in Houston. I represent the petitioner, the American Tobacco Co. in this case. This is a product liability case where the decedent, Wiley Grinnell smoked cigarettes for over 30 years. In 1985, Mr. Grinnell developed lung cancer, and he died in 1986. A product liability action was filed in Jefferson County alleging among other things that Mr. Grinnell was unaware of the harmful effects of smoking, and that if he had of been warned about these effects and dangers of smoking, he would have heeded those warnings, and he would not have smoked. And thereby avoided his injuries and death.

The TC granted summary judgment, and it was appealed to the Beaumont CA. The Beaumont CA reversed, and we are asking this court to reverse the decision of the Beaumont CA and render a judgment in favor of American.

Our application for writ of error was granted on all 3 points. And I am going to talk about our first point of error initially which deals with the error of the Beaumont CA in finding that there was a fact issue regarding whether or not the harmful effects of smoking were common knowledge within the community.

Now in its decision, the Beaumont CA held that there was a fact issue on whether or not harmful effects of smoking were common knowledge because they said that Wiley Grinnell, the plaintiff in the case, said that he was unaware of those risks. And as this court knows under the Shear's decision and under Seagrams that is the wrong test. When you are looking to determine common knowledge in the community it's an objective standard. As this court said in Shear you look as to what the community knows about common knowledge and what the individual plaintiff says is not determinative, or as the court in Morris holds it's irrelevant. So the Beaumont Court erred in determining there was a fact issue on the common knowledge doctrine by looking to what Mr. Grinnell said he knew or didn't know about the particular risk.

The Beaumont court also erred in distinguishing this court's opinion in the Seagram's case and in holding that comments I and J to §402A of the Restatement of Torts did not apply to a tobacco case because as the Beaumont court put it: Tobacco has only been around since 1850 and alcohol has been around since ancient times.

ABBOTT: Counsel do you know when comments I & J were added to 402A?

KRUSE: To date, no, I do not sir.

ABBOTT: So you don't know if they were there before he started smoking?

KRUSE: The Restatement was drafted in 1961 and it was adopted in 1963. Comments I & J would have been in there then, but he started smoking in 1952. But when you look at Comments I & J about what they say and what I am going to talk about later they do not say: This only applies to people that started smoking after this date. They do not say they apply only to people who smoked in 1966, 1952, 1953. They just say they apply.

ABBOTT: I understand. But one perception could be that when I & J were written, then it

was common knowledge perhaps at that time that smoking was hazardous to your health. The issue is are possibly could be whether or not it was hazardous at the time that the plaintiff in this case started smoking?

KRUSE: That would be the issue. But I think when you look at comment I, and particular comment I, which holds that the harmful effects of smoking were common knowledge within the community, and that's why tobacco is not unreasonably dangerous, I don't think there is any limitation on it. I think it applies retroactively and it doesn't say otherwise.

ABBOTT: How are we to apply any kind of test or any kind of determination as to when something becomes common knowledge? In other words it seems as though most people today realize that smoking is hazardous to your health. At some point in time in history though that was not common knowledge. And at what time did it become common knowledge?

KRUSE: Well we are talking about 1952, when Mr. Grinnell began smoking. And so you need from the common knowledge standpoint to look at things such as the Restatement, the matters that we've cited in our briefs. You can look to case law. There is the Paul decision, which is out of Ohio. In that case, and it's the same cause of action as this case, the smoker began in 1940, and developed lung cancer and emphysema. And in that case, the Paul court addressed comment I and the common knowledge standard and they held that the dangers posed by tobacco smoking have long been within the ordinary common knowledge to the community. And that comment I to the Restatement of Torts 402A specifically mentions tobacco as a product that is not defective. And then they went on to say: The common knowledge standard does not raise a question of fact for a jury and that an individual's personal knowledge or lack of knowledge about the dangers of smoking is irrelevant. And that was a case where the smoker began in 1940. So I think this is one of the authorities that this court can look to in determining common knowledge as far back as 1952. We've cited other cases as well as comment I and other incidences that this court can use, including the testimony of the plaintiff's own expert witness Dr. Ravenholt who testified that any reasonable intelligent adult from 1950 on would have been aware that smoking causes lung cancer. And that would be entrenched with 1207 at 324 through 326 of his deposition.

CORNYN: If that's true, then you would be entitled to prevail you say on the strict liability claims?

KRUSE: Under _____ case, yes.

CORNYN: But that would not necessarily apply to the fraud claim for example would it?

KRUSE: Well in the Seagrams case it did apply to the fraud claims. They had a fraud cause of action and that is well and to the extent that the dangers of smoking are common knowledge in the community there wouldn't be any reliance or something to support a fraud claim. So it would dismiss a fraud claim.

CORNYN: You're arguing for an objective standard for common knowledge in the 402A context. But Mr. Grinnell could subjectively believe the advertising claims of your client, and your client be subject to a fraud claim could it not?

KRUSE: I don't think so under Seagrams. But you don't really even have to get to that because in our alternative grounds for summary judgment there is absolutely no showing in the summary judgment record that Mr. Grinnell ever relied on any cigarette advertisement or statement from American in beginning to smoke cigarettes or in continuing to smoke cigarettes or switch brands. Evidence is all that he began because his friends gave him cigarettes and he switched brands because of taste.

CORNYN: Insofar as the claim your client takes the position that the Surgeon General's determination that cigarette smoking is dangerous to one's health, your client takes a contrary position does it not?

KRUSE: Our client takes the position that there has long been within the community common knowledge that lung cancer is associated with smoking cigarettes. And we had the testimony of Mr. Heiman which says it goes back 25 years. And he was deposed over 5 years so that would be 30 years.

CORNYN: Well let me ask you to try to be a little more straightforward. Does your client agree or disagree that cigarette smoking is dangerous to one's health?

KRUSE: Our client agrees that there is a risk factor in smoking cigarettes.

CORNYN: Rendering it dangerous to one's health?

KRUSE: There is a risk factor from a statistical standpoint. We do not agree that smoking causes lung cancer because we don't know. The testimony in this case shows that what makes a cell a normal cell go from being non-cancerous to cancerous the scientist don't know. Their own experts testified to that in the record in this case. Further, 90% of the people who smoke do not get lung cancer and people who do not smoke get lung cancer. From a strict scientific causation standpoint we do not agree or say that it causes it for the reasons that I have just stated.

CORNYN: So if Mr. Grinnell believes your client's advertising that claims of dangerousness were scientifically unfounded and continued to smoke in reliance upon that, that could subject your client to a fraud claim if there were appropriate evidence in this record?

KRUSE: But there is no such evidence in this case that there was that type of advertising...

CORNYN: I am asking you as a legal proposition that would be a viable fraud claim. Your only point is that there is no evidence in the summary judgment record to support that claim?

KRUSE: That's my position.

SPECTOR: Is it your position that it's not only harmful, but that there is common knowledge that it is addictive?

KRUSE: Your honor it's our position that common knowledge would include the risk of addiction the same as it includes any harmful effects of smoking as is discussed in comment I.

SPECTOR: And there is no difference between harmful perhaps someone develops a cough and harmful someone develops cancer? There is no difference there?

KRUSE: I don't really follow you there.

SPECTOR: Well the common knowledge perhaps that it's harmful in your view also includes that it may cause cancer as well as lesser objections?

KRUSE: It would be the risk of anything inherent in the use of the product, which would include what you've just said.

SPECTOR: As well as addiction?

KRUSE: It would also include addiction. But addiction was also addressed in the Seagram case. In that case they were claiming addiction and I think this court discussed it or at least mentioned it in its opinion. But in determining common knowledge addiction didn't play a part in that. Further again comments I & J do not say that they apply to someone who says that they were unable or couldn't stop smoking. And then as I said this was addressed also in the Seagram case.

ENOCH: You predicate a lot of your argument on comments I & J of the restatement. And Professor Keeton talked in terms of I & J and how it sort of covered alcohol and some other things. And it sort of compared good penicillin, good cigarettes and good whiskey meaning that here is stuff that's for normal consumption by folks and there is not going to be liability if there is common knowledge that that normal consumption carries some risk to it. But it seems to me under I & J they both are presuming that the risk of the use comes from either over consumption or long term usage, and it's this over consumption and long term usage that's the common knowledge. It seems to not include products that are dangerous just from use as opposed to over consumption or long term usage.

KRUSE: I think comment J talks about over consumption and long term usage. But comment I deals with products which have risks that are inherent in them which are well known dangers within the community. And for that reason they are not unreasonably dangerous. And that is where I think this court can find from a common knowledge standpoint that the harmful effects of smoking and particularly the risk of lung cancer would apply to this case. And I think when you look as we have...

ENOCH: Let me follow-up on that. So if there is just an inherent risk that it's common knowledge, then use this (for lack of a better deal arsenic) arsenic is known to be a poison that kills people. But arsenic is also it seems to me to be commonly known that if you use it in just a small enough dosage it doesn't have an immediate effect, but over time it accumulates until ultimately you die. But arsenic commonly known to be a poison don't take it. If a company manufactured arsenic for human consumption, put it up on the shelf and retailed it, does 402a comment I & J insulate the manufacturer of that product because simply using it is the risk that is commonly known is insulated from its liability for manufacturing that product?

KRUSE: You kind of lost me there. And I apologize. The risk or the common knowledge with respect to tobacco according to the people who drafted the restatement, which would include comments I & J were that when you have a product for personal use or enjoyment, which would distinguish between the arsenic example that you just used, and the dangers are well known within the community, those products are not unreasonably dangerous and those products should not be subjected to strict liability.

ENOCH: Aren't those comments though predicated on a notion of distinguishing between like good cigarettes as opposed to bad cigarettes?

KRUSE: That's exactly right. It talks about good tobacco is not unreasonably dangerous merely because there are harmful effects of smoking. And then it goes further and says what would not be good tobacco. It says: If marijuana is in tobacco, that may be unreasonably dangerous. What they are talking about is an ingredient or something getting into a cigarette that doesn't belong in the cigarette as opposed to something an ingredient or something that is normally in a cigarette, that's the distinction I think that you have to look at in terms of the intent of the people who drafted those comments.

ENOCH: So going back to my hypothetical of arsenic that someone chooses to use because they enjoy it, that as long as it's just like all other compounds that it doesn't have some sort of adulteration that makes it different, then comment I would say: As long as it's commonly known to be harmful, then the mere manufacturing of it can't create any sort of liability of that product.

KRUSE: If I understand your example if someone went and bought arsenic and ate it for whatever reason because they wanted to do it and died from it right then, I don't think they would have a claim against the manufacturer.

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RESPONDENT

GAULTNEY: May it please the court. My name is David Gaultney. I am with the law firm of Mehaffy & Weber in Beaumont. And I represent the family of Wiley Grinnell, Jr., whose death from small cell lung cancer was caused by his lifetime of addiction to defendant's product, which was a Pall Mall cigarette, extra long, non-filtered cigarette, which he smoked from his early teen years. His friend says he started at age 14 or 15. He says at a later time at age 18. But in his teen years the Surgeon General under the Nicotine Addiction Report has stated that that is typically when tobacco addiction begins and that is when his use of tobacco began.

The American Tobacco Co. takes two positions on the central issue here. That is what was common knowledge in 1950 concerning the harm caused by their product? One position they take to this court and to the TC that it was common knowledge in the 1950s that their product caused addiction, lung cancer and death. The other position is the position they take to the smoking public - their consumers, and that is the position that is reflected in the documents that I have presented to the court this morning that are in the record, and they are exhibits to Dr. Ravenholt's deposition that counsel referred to earlier.

ABBOTT: Don't you think that the position that this particular defendant took to the general public was pretty ineffective because the general pubic did discover that smoking was bad for your health. So doesn't it seem as though whatever position that the defendant took in this case is irrelevant to the issue of common knowledge? Common knowledge can exist regardless of what the tobacco maker may have said either directly to this particular individual or to the public at large?

GAULTNEY: Common knowledge was affected in 1950s by the public statements of the American Tobacco Co. and by the tobacco industry in general. They were attempting to influence the knowledge of the public, particularly the knowledge of the smoking public.

ABBOTT: And they were ineffective in influencing the knowledge of the public because the public knew at some point in time that it was bad for your health?

GAULTNEY: The deposition testimony that counsel referred to from our expert he was asked whether or not the studies that came out in the 1950s were common knowledge? His response was very specific: That they would have been common knowledge to segments of the medical community, to the principals of the tobacco company, but that he could not speak with particularity with respect to the rest of the population. Although he did say a reasonably intelligent adult would be aware of the studies. But his point was he was not addressing the issue of whether it was common knowledge that cigarettes cause lung cancer. He was addressing the issue of whether the studies were known. And his answer was: With on going controversy. And that is it. The tobacco companies created the on-going controversy. And they did it for a reason: To maintain their cigarette market. They came out with continuous public statements assuring the public, the smokers, that their product was not injurious to health.

And I think if the court would look at their 1954...first of all the American Tobacco Co. was the first company to take this position.

BAKER: Is it your position that the common knowledge doctrine applies only in one time

frame, that that's 1950 when Mr. Grinnell started smoking that you don't ever apply it later on when common knowledge changes? For instance since 1969. What was common knowledge in 1969?

GAULTNEY: Your honor I agree that scientific knowledge changes.

BAKER: So if in 1969 there is a common knowledge that it causes lung cancer, but Mr. Grinnell continued to smoke, where is your position?

GAULTNEY: I would not agree your honor. Well first of all let me address what happens to Mr. Grinnell if I could address the common knowledge issue. First what happened to Mr. Grinnell and we've got expert testimony on this, is that he became addicted. And at that point we have testimony from one of the 4 editors to the 1988 Surgeon General's Report on Nicotine Addiction...

BAKER: That still doesn't answer the common knowledge issue does it?

GAULTNEY: It answers the issue of whether or not he could quit smoking your honor despite what the public knew. And the point is is that in 1960, 1970 and 1980s, he was heavily addicted to tobacco. He was heavily addicted. One of the 4 contributors that was appointed by the Surgeon General to study nicotine addiction, Dr. Bennowitz testified to that effect, that he could not quit without intensive intervention. Dr. Provosky, with UT Medical Center, Director of the Behavioral Health Science Center in Houston, has testified in this case that he could not quit smoking, that Mr. Grinnell was addicted, that nicotine is an addictive substance similar to cocaine, similar to heroine in its difficulty to quitting. Some people quit. Some people quit cocaine. He was unable to quit. His addiction killed him. This product killed him. And we simply ask that we be given an opportunity to present that issue to a jury in this case. This is a summary judgment case. Is there a fact issue which should be submitted to the jury?

BAKER: Do you agree with their _____ position of the Common Knowledge Doctrine that the subjective viewpoint of the victim is not relevant when you apply it?

GAULTNEY: I don't agree that it's not relevant. I agree that it's not determinative, which is the language that this court used in the Caterpillar v. Shears case. The Caterpillar v. Shears case decided last year talked in terms of an objective standard. I think it's relevant evidence. But I think it is as the court said an objective standard. But we can look at the information that the American Tobacco Co., that is in the record, that shows what they were saying about...

BAKER: Well I understand that but that's a different issue. That goes to your problem of fraudulent concealment. But we are still on the Common Knowledge Doctrine issue. You really didn't answer my question. Are you saying that there is no moving target on it because your client was addicted so that dispenses with common knowledge as far as his particular case is concerned; is that your position?

GAULTNEY: Well I think as Mr. Kruse said the issue is common knowledge at the time he started smoking in the 1950s.

BAKER: So it doesn't move any further than that?

GAULTNEY: Well it may move in a particular case your honor. In this particular case there was no warning at all on cigarettes in the 1950s. And at the time he got addicted...

BAKER: But there was in 1966.

GAULTNEY: But at that point your honor he was addicted. And at that point your honor there

is testimony in the record unequivocal testimony in the record from 3 experts: Dr. Ravenholt, who said he could not make a rational choice to quit smoking; Dr. Korosky and Dr. Bennovitz that he was addicted to the product.

Now if I could your honor after they issued their press release in 1953 saying our products is not injurious to health, and after they went with the rest of the industry, and I say the American Tobacco Company was the first tobacco company to come forward with the press release saying it was not injurious to health. They then got with the industry organized and made a frank statement to smokers saying the exact same thing, that their product is safe, not injurious to health. Their research director in this case today testified in our case that these products are safe. Their position today is the same as it was in 1953. In their 1954 report your honor they said something which sounds very much like common knowledge. It's page 4, they say: "Common sense is beginning to prevail. It's working. What they are doing is working. Supported by the opinions of reputable medical scientist the public generally is coming to realize that no real case has been proved against tobacco."

HECHT: Is that true?

GAULTNEY: That is what the evidence was your honor.

HECHT: Is it true though?

GAULTNEY: There was a controversy. That is correct.

HECHT: I mean is it true that no real case has been shown and the public really doesn't think that there is much of a health problem?

GAULTNEY: There are two statements there. At that time 1 out of every 2 adult males were smoking cigarettes and there was a controversy about whether it caused harm. So it was not common knowledge. It was a disputed fact. It was not a disputed fact among those medical scientist and among the principals in the tobacco company. They knew what they were doing. They were committing to use Justice Cornyn's phrase: Fraud.

They intentionally deceived the American public with these statements.

HECHT: But I assume you will agree that whether they did that or not what the public thinks about the health hazards of smoking is independent of whatever position the defendant or anybody else might take in this lawsuit?

GAULTNEY: It's not independent in the sense that they were trying to control that knowledge, and they did.

HECHT: And that's germane to your fraud claim I suppose?

GAULTNEY: It's germane also to the warning claim. That is they created a controversy. It cannot be said that it was an undisputed fact. And that's the distinction between this case and McGuire.

HECHT: Concerning the warning claim, why doesn't that run into Cipollone?

GAULTNEY: In Cipollone the US SC clearly has set forth what the law is on preemption. I mean we don't have to go beyond that decision.

HECHT: Why doesn't that preempt your warning claim?

GAULTNEY: Because the court held that it did not. In other words the court held that the 1965 Act which are the two orders that are involved in this case preempted nothing. It was a 7-2 decision on that issue.

On the 1969 Act, however, they said only that failure to warn claims after 1969 were preempted. At that point our client was addicted and had been addicted for 10 years. He could not quit. Our claim is that there was a failure to warn in the 1950s.

The distinction with McGuire, which is what the trial court did was rely on McGuire. The TC denied their motion for summary judgment raising all these other issues before McGuire came out. When McGuire came out they renewed it - he granted it. And he granted it on the common knowledge issue. And he said that on the record. Now the difference between McGuire here is that there was a fact issue on what was common knowledge. It was a disputed fact. In McGuire the court clearly pointed out that it was dealing only with the duty to warn case. It set that forth in the first sentence of the opinion. And we are looking at a duty to warn case. And it said in this case later on in the opinion the alcohol company admits that alcoholism results from alcohol. Mr. Kruse just told the court that he does not admit that cigarettes cause lung cancer. They won't admit it today. So it is a disputed fact. It is a fact which needs to be submitted to the jury.

This is a summary judgment case that we should be entitled to present to a jury to determine the fact issues.

ABBOTT: Do you agree that there is no evidence of reliance?

GAULTNEY: Your honor first of all he said that he saw statements that there was no proof that it caused lung cancer. Now he said he saw them in the 1970s and '80s.

ABBOTT: But were those statements by American Tobacco Co.?

GAULTNEY: He said he thought that one of them was. When I asked him further was it possible that it was some other company? And he said, "possible." He is deceased now. We can't further that. But his testimony was that he thought it was the American Tobacco Co. and R.J. Reynolds statements that he saw.

ABBOTT: And with regard to the fraud and fraudulent misrepresentation claims, didn't this court reject similar claims in McGuire under facts even more compelling?

GAULTNEY: If I read the McGuire case correctly your honor, the last statement was: In these limited circumstances and this particular case. And the court also started off by saying: We are dealing with a duty to warn case. I read McGuire as addressing common knowledge in terms of a warning case, not in terms of a fraud case.

If I could move onto another issue, which is evidence of a less dangerous design. And there is evidence of that in this case. We produced evidence from Dr. Ravenholt that they could have put a filter on it, that they could have reduced the tar and nicotine, that they could have reduced the carcinogens, that they could have done things which would have substantially lessened, to use his language, the chances that Mr. Grinnell would have been harmed and gotten lung cancer.

BAKER: Don't they do that in other brands that American Tobacco _____?

GAULTNEY: They do so filter brands your honor. In fact they advertise this one as having a filter. I mean it's filtering. And their marketing research said that people believe that.

BAKER: Isn't it a reasonable deduction that Mr. Grinnell could have changed to take advantage of the alternate design, but chose not to for whatever his own reasons were?

GAULTNEY: They manufactured a product which is the only product we are dealing with this in this case your honor. They caused us harm.

BAKER: But your argument now is that they didn't offer a safer alternate design, and that's not what the facts are, is that correct?

GAULTNEY: Well they did not make this design safe. They sold an unreasonable dangerous, and I am not saying that they could have made a "safe". I am saying what Dr. Ravenholt said that they could have made a less dangerous design.

BAKER: But isn't their answer to that: We did, but your client chose not to take advantage of it?

GAULTNEY: But with the particular product that they sold to him.

BAKER: No, no he bought it. It was offered, but he bought it.

GAULTNEY: And they offered it with the statement that tobacco is its own best filter.

BAKER: That goes back to Judge Abbott's question that has to do with your fraud allegations doesn't it?

GAULTNEY: But it also has to do with what he thought he was getting. And the fact is is that they know that their advertising penetrated because they did motivation studies afterwards. And they said people say you know we are finding out that people are saying that this product filters, that this has filtration qualities.

BAKER: Wasn't there some evidence in the record that he was even offered and given filtered cigarettes by friends and he tore the filter off?

GAULTNEY: I think at the point that he was addicted. There is evidence of that your honor. There is evidence of a number of different fact issues.

BAKER: So then isn't the bottom line of your argument is the addictive nature of the product is the whole cause of his claim?

GAULTNEY: It is a substantial part of the claim.

CORNYN: Your position is there is no safe cigarette, right?

GAULTNEY: My own personal position is that there is not.

CORNYN: No I am asking about your client's position.

GAULTNEY: I don't think there is a safe cigarette your honor. I think that there are less

dangerous cigarettes which could have reduced the risk. And I don't think they did anything to attempt to do that. In effect the evidence is that they fumigated their product with acrylonitrile which is a carcinogens, that is our manufacturing claim that they added a flavoring which was an animal carcinogens, that they were aware of polonium 210 which is a carcinogens that they could have filtered out, that they did nothing, that they know how since the 1940s and 1950s. There is a memo in the record attached to Dr. Ravenholt that shows that in the 40s and 50s they knew how to reduce the levels of nicotine, that the technology was available. They did nothing on that.

In effect we are dealing with an unreasonable dangerous product. The question here is not whether the jury is not going to be asked are all cigarettes unreasonably dangerous? The jury I think should be asked: Is this product, which defendant sold, marketed and had about 15% of the market at that time, was it unreasonably dangerous, and did it cause the harm in this case, the addiction and the lung cancer, and the death of Mr. Grinnell?

I think the position in this case your honor is whether or not this court is going to accept this type of response to a public health hazard. Because this won't be the last time that a product is on the market in which studies come out or something comes out that says your product is killing people. Your product is killing 300,000-400,000 people a year. And the question is what type of response should a person, a manufacturer, have to that? I mean should they take the position that our product is not injurious to health.

HECHT: But you agree the dangers of alcohol are common knowledge? We can start with that benchmark?

GAULTNEY: I agree that alcohol isn't. Now your honor if for example an alcohol manufacturer or butter manufacturer had carcinogens in their product that could be removed would this court expect them to remove it? I think so. I think that the court would expect them to make a less dangerous product to do what they could to make a less dangerous product. And that's what we are claiming is that the product they sold was an extra long unfiltered cigarette which he became addicted to and which killed him.

CORNYN: Are you making a distinction between alcohol and cigarettes, the dangers associated with...as I heard you say there is no safe cigarette, but there may be safe consumption levels of alcohol?

GAULTNEY: There is a distinction in the record your honor. And that's from I believe Dr. Provosky. And I think he talks in terms of that not all people who drink beer in college, say 10%, become alcoholics. And that's not true with cigarettes. You know if you start smoking at a young age, the percentages are vastly different. So we are talking about a tremendously different product. I mean I don't think it's fair to compare alcohol to cigarettes.

There are other examples of corporate behavior which could have been undertaken. For example in the Tylenol case, when it was learned that Tylenol was contaminated, that company acted promptly. They warned the public. They took the product off the shelf. They did something to correct their problem. Now instead if the American Tobacco Co. instead of starting in 1953 with this press release, which kind of set the standard for the entire industry, if they had in fact done the opposite and warned the public I think we would have a different situation today in terms of lung cancer risks, the addiction, and the damage that has been caused.

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REBUTTAL

KRUSE: On design defect, as this court wrote in Shears you have to show a feasible safer alternative that would have avoided the injury. All of the testimony in this case is there is not a safe cigarette. He would have gotten lung cancer no matter what cigarette he smoke. They haven't made it on design defect. What they are trying to do and asking this court to do is through a risk utility analysis ban an entire class of products. It's the same that was discussed in Shears and it was also discussed by Judge Buckmeier in the Patterson case when they were trying to outlaw saturday night specials. Somebody got killed in a convenience store with one and so they sued the manufacturer and they wanted to ban or outlaw these saturday night specials through a risk utility analysis with the analysis being the risk opposed with using a gun like this far outweighs any kind of utility. But Judge Buckmeier held in that case as this court mentioned in the Shears case that it's a political decision and to do that would be a misuse of the tort process. In banning an entire class of product like they are trying to do with cigarettes here should be left to the legislature.

ABBOTT: Wasn't there testimony by one of their doctors that the product could have been designed in such a way that the possibility of the plaintiff in this case incurring cancer would have been reduced?

KRUSE: That was Dr. Ravenholt, and that's just what I was getting ready to read what he said. He said: I don't know that one could produce a cigarette that really would be without the capacity to cause cancer. And that's at transcript 1022. And under Shears and the Boatland case, that is not a safer feasible alternative that would avoid the injury.

ENOCH: By taking your argument, the decision in Cipollone it seems to me would be a US SC determination that the, at least congress has looked at the issue of whether or not cigarettes ought to be banned or shouldn't be banned. They just decided we will let the public continue buying these cigarettes. We are just going to make sure that there's a warning put on the cigarettes to warn them that it is going to be out there. But because they've done that and they've expressed certain preemption not every state cause of action is preempted. So there is still going to be some cause of action. Haven't they really...I mean you argue in the big picture: Gee, gosh don't let a court decision ban the sale of cigarettes. But doesn't Cipollone specifically say that there are going to be causes of action for injuries, harm that results from smoking cigarettes that are still within the domain of the common law and state law in terms of assessing damages for _____ results?

KRUSE: I don't think just because there is a US SC decision on preemption what is preempted and not preempted under the Labeling Act, I don't think you can go from there and then say well because they're saying everything isn't preempted, which of course is what they did say. They said some are, some are not. But I don't think if I understand you correctly you can then go to each state and each state's law and say just because they say this isn't preempted, that means under I & J that they don't apply if I understand you correctly. I don't think the preemption decision has anything to do with whether or not under the common knowledge doctrine we should win as a matter of law.

HECHT: There is some tension in your position though which is as I understand it there is no safe cigarette, but not everybody knows that, and nobody can prove it. There is some tension there that makes this a difficult case.

KRUSE: I don't think it would be tension. I think that's why tobacco is listed in comment I. I think the reason why you shouldn't be able to sue for cigarettes is because the dangers and the dangers in this case, the risk of lung cancer, were common knowledge. That's what I says and it lists three examples of products that are not unreasonably dangerous: 1) is alcohol, that this court has already rule on in the Seagrams case; and 2) is tobacco. And Dean Prosser who was one of the drafters of the Restatement he was asked about comments I & J and with regard to how they would apply to tobacco.

And this is on page 18 of our application: Comments I & J were intended to protect manufacturers of cigarettes and other products with well known dangers from being held liable to consumers. Similarly, Dean Keeton said from the standpoint of what the court should do: Whiskey and cigarettes should be indistinguishable. That's what we are asking this court to do - treat them just like the examples in the restatement and treat it just like you did in the Seagrams case.

ABBOTT: Since this is an addiction case, why should we not look to pre-1969 with regard to whether or not there were adequate warnings? 1969 is when the labeling requirement came out with regard to warnings, correct?

KRUSE: Well there were labels, warnings in 1966. 1969 is when preemption started your honor.

ABBOTT: And with regard to the preemption issue, with regard to warning in general, since this is an addition case, since he was addicted before 1969, since he was addicted before 1966, since he began smoking a decade before that why should we not look to what the warnings were at the time he began smoking?

KRUSE: Well I think what you have to look to is the common knowledge. That's what we are here asking you to do.

ABBOTT: I am not talking about that issue. I am talking about the warning issue.

KRUSE: Well if it's common knowledge there is not a duty to warn. And that's what we are asking this court to hold. And one of the documents in the handout that Mr. Gaultney gave you talks about recent reports on experiments with mice have given wide publicity to a theory that cigarette smoking was in some way linked to lung cancer. And then it talks on the other page, this is in the '50s: During the past year some statements were widely publicized claiming a relationship between cigarette smoking and lung cancer. These are the kind of things along with comment I, along with the decisions of the other courts, the Permingan(?) in Tennessee that followed _____ which was an alcohol case, then the Rosydon(?) case followed that dismissing a tobacco case on the grounds it is not common knowledge. Those are the things that we are asking you to look to in making your decision on common knowledge. Along with our alternative grounds that are in our brief that deal with design defect that he wouldn't have heeded a warning and no reliance on the breach of warranty also.