ORAL ARGUMENT – 09/10/03
02-0552
FORD MOTOR CO V. RIDGWAY

KUHN: The question in this case is whether to embrace the CA's announcement that a plaintiff based on the fact that an accident or evidence to the fact that an accident occurred can prove a manufacturing defect claim for a product that was more than 2-1/2 years old without...

PHILLIPS: Prove it is a little strong in a summary judgment case isn't it?

KUHN: In this case, I think it's undisputed that the court acknowledges that you don't even have to allege a specific defect. Texas has always historically required that a manufacturing defect claim for the plaintiff to show that the finished product deviated from its intended design in a way that left it unreasonably dangerous.

In this case without ever requiring the plaintiffs to allege or demonstrate how the product actually deviated from its intended design, the CA held it was sufficient to get to a jury simply for the plaintiff to provide testimony about how his vehicle caught on fire as he was driving it. And this is a vehicle that was purchased used 2-1/2 years after its original sale. It had two prior owners and 54,000 miles of prior use on it. It had after-market electrical equipment wired into the electrical system.

O'NEILL: What if it was this old and had never had another owner, had never had any work done on it?

KUHN: I think just the fact that it had that much use, and it's going to have because it had 54,000 miles of presumably intervening repairs made to it, even standard maintenance, it's going to raise inferences about what may have happened during those repairs or maintenance.

PHILLIPS: So you get a summary judgment if any adverse inferences can be raised in this case?

KUHN: No. We get a summary judgment because all of the inferences that could be raised from this evidence provide - there's nothing that can be taken from these inferences other than a guess as to what caused the fire in this accident. Under the Lozano rule what we have here is a guess no matter who wants to posit it.

HECHT: And in Farris that's what the plaintiff's expert says - is a guess.

KUHN: He did say that he was just speculating it was an electrical malfunction. He didn't even specify that it was an electrical malfunction caused by a manufacturing defect that existed at the time it left the manufacturer's hands. That's not provided even in Greenlees's

affidavit. I think it is really beyond dispute in this case there is no alleged defect. Specific defect. It's just presumed.

Now using the concept of circumstantial evidence, the CA reversed our summary judgment saying that the story of how it caught fire was alone sufficient circumstantial evidence. And no one disagrees that circumstantial evidence can be used to prove a manufacturing defect. The question is how? And the use of circumstantial evidence shouldn't fundamentally alter the burden of a party. A manufacturing defect, the plaintiffs should have to prove through either direct or circumstantial evidence that the product deviated from its intended design in a way that left it unreasonably dangerous and that that deviation caused the injury or accident in question.

HECHT: Exactly how do you think that works? If you're driving home a new car from the lot and it suddenly turns into a ball of flame, the plaintiff in that case doesn't have to do a lot of science to show what went wrong. He can just say, well you're not supposed to drive home a new car and it turns into a cinder(?). Is that the way it works?

KUHN: I'm glad you raise the hypothetical, because that's the concern that everyone might have. And that's the hypothetical I'm sure everyone on the court has thought of. What if this is a brand new product that fails and we know that it's in the exact same condition it was when it left the lot. Now in that case, he may have a recovery, but that's not a manufacturing defect claim. This court in preparing for argument looking back over these cases and looking at §3 and what it was intended to do, I came across a series of cases from this court and its infancy in product liability and it's the Coca Cola exploding bottle cases. It's a series of three cases which ended in 1969 with this court's opinion in Pittsburgh Coca Cola Bottling, 443 S.W.2d 546. And what the court looked at there (apparently in the middle part of last century it was not uncommon for bottles to explode) can we allow a recovery in those cases when there's not evidence of exactly why the bottle exploded, but we know it exploded as it was handed it over from the manufacturer. And the court looked at res ipsa loquitur and it took that doctrine (and I think this is important because all of these tests are at least §3 and some of the others are trying to look at res ipsa loquitur and modify it some way, and that's what the court did in the Coca Bottling cases), and said can we modify it in a way that would allow a recovery that would be fair? And in the Coca Cola Bottling cases, I think this court did as good as any court has ever done, it required the first prong of res ipsa loquitur, which is of course that the injury would not have occurred in the absence of negligence, and it said, we'll modify the second prong of the control test, which is if the plaintiff can prove that "the bottle 1) was in no way accessible to extraneous harmful forces; and 2) was carefully handled by the plaintiff or any third person who may have moved or touched it.

Now as I said, this Coca Cola bottle case was a series of three cases. The first two really only spoke about negligence. The third spoke about negligence and strict liability. And in doing so, we see how the court developed this theory. In the first case, the bottle was handed over to the manufacturer and it was 5-10 minutes from the time it was handed over until it exploded. And the court looked at that and said, well we'll modify the control requirement. We understand it's no longer strictly in the control of the defendant, but 5 to 10 minutes we're going to allow you a

recovery under res ipsa loquitur.

Now the second case, the bottle was delivered and sat on the shelf for 24 hours at a store. That case came along, the court looked at it and said, it was on the store shelf for 24 hours, it was open and accessible to anyone who may or may not have come in. That's just too much to allow us...

JEFFERSON: If the car was parked in the driveway over night under J. Hecht's example, then that wouldn't be enough to establish liability?

KUHN: From product to product it may vary. What the court said in a series of Coca Cola bottling cases is there's two factors you look at. One is the time out of the defendant's hands; and the other is the amount of people who may have had access to it.

JEFFERSON: So if it's parked on the street overnight what happens there under the Coca Cola Bottling case?

KUHN: Obviously, Coca Cola Bottling didn't deal with a product as complicated. I think it' something that would have to be ____ out by the court if it's going to apply that rule on. The only case that even begins to adopt a test sort of like §3 in Texas is the Barnett case, which is out of Waco. And it was 7 days and 500 miles, and it still allowed an inference there after 7 days and 500 miles. But I think that's actually one of the concerns that this court has to have is once you take the step, and this is the reason why we argue that you should have to show a specific defect, to allow a recovery under fairness or any other guidelines you're going to have those issues. You're going to have those concerns. We believe the best rule is to require to show a specific defect. In that way you get the best policy objections of strict liability, which is you require them to show it, you know it's a defect. That way you spread the cost in known cases, not when there is no knowledge of it, and the manufacturer then has notice to go back and try to correct whatever problem may have occurred.

Now in the third case, which is the Pittsburgh case, I cited. In that case, the bottle was delivered to the store where it was kept in a locked storeroom 4 days and exploded when it was taken out. And the court said, 4 days was longer than 24 hours, but since it was in a locked storeroom we're going to allow recovery.

And I think J. Jefferson to answer your question, that's the court balancing these two factors of time and control, and who had access to it to try to work out an equitable solution. And that's the approach that I think this court should take if it decides to abandon the requirement that you have to show a specific defect. But what we have to recognize is that §3 and this attempt to allow for an equitable recovery is not a manufacturing defect claim. It's something else. Section 3 is an inartful attempt to try to codify what courts have done to address this situation where we know the product is probably in the condition it was when it left the manufacturer's hands and we want it for equitable reasons to allow for recovery. When it does that it raises these issues

and concerns. We think the Coca Cola Bottling cases if this court chooses to continue that ruling, which seems to have been the law in the last 30 years of products liability jurisprudence, we think that's a much better test than the restatement. And as the amicus points out, §3 isn't really a strict test. It's more of an analytical framework which leaves for the court the ability to fill in specific procedures.

But the problems with §3 language is two main problems. The first of which it's loosely worded and its amorphous language allows the person using it to interpret it to mean anything that they want. If you look at their two commentaries, the ____ and the ____ piece, there's a third I would like to cite to the court. It's 68 Tennessee Law Review, 647. If you look at those three commentaries together they can't agree on the basis of the test. They can't agree on its application. They can't agree on its limits. They can't agree on its purpose. It becomes obviously clear that §3, the way it's worded can be taken to mean anything. And it's an amorphous test, which would greatly increase the kind of concerns and questions that the court has raised with this timeliness. Beyond that, §3 when it was first drafted, its originally draft only applied to manufacturing defect claim. Now by its own terms it also applies to design claim. Now you can ask how does that even make sense if we don't know what the defect is? But by its own terms it does. And it's undisputed that §3, and all the commentaries agree on this, is a consumer expectation test. Well this court has adopted a risk utility test and by statute Texas requires a reasonable alternative design. Section 3 allows a plaintiff a way to end around that. But it also has a lot of difficult...

HECHT: What sense does the reasonable alternative design make if you're not complaining about the design. You are just complaining that the product was not built to the design.

KUHN: It doesn't if it was simply a manufacturing claim. But §3 in its language actually says, this section also applies to design claims. Which granted. It doesn't seem to make a lot of sense if you don't know what the actual defect was.

HECHT: But you agree in a manufacturing defect case, that you shouldn't have to prove a safer design?

KUHN: That's right. But the problem with §3 is it says this also includes a design case. And we know that you don't have to prove a reasonable alternative design under §3. So it allows a plaintiff to do an in around in the statutory requirements and also a risk utility test.

HECHT: That was an issue in the CA, but it's not an issue here.

KUHN: That's right.

PHILLIPS: Could you win this case on a straight summary judgment burden of negating all the plaintiff's claims, or do you win it only if we treat it as a ___6(a)(I) claim?

KUHN: I think we would under either. I don't think the court ever need to look past

the no evidence summary judgment. Because I think all the inferences this court needs are contained in the information that was filed in response to the motion attached to their response. But I think we win under either standard. All the inferences are present. They just get flushed out a little bit more because of the proof that was contained in Ford's motion. And Ford's motion was clearly filed both _____ evidence and as a traditional motion.

Basically what the plaintiffs are trying to do here is not prove what was wrong with the product, but allow for a manufacturing defect claim to go forward. It doesn't make sense. This court's jurisprudence, and Texas has probably the most developed products liability jurisprudence in the nation, makes clear that we have different types of strict liability claims. And the entire basis of a manufacturing claim is that the plaintiff prove the product deviated from its intended design. What the CA has allowed to happen here is for us to abandon the one requirement of a manufacturing defect claim. Granted it still has to be unreasonably dangerous. But to show the product actually deviated from its intended design. That's not done here. And that's improper and the court should require it.

O'NEILL: It sounds like we're talking about two different things. Let's say it was a new car and this happened. There was a hot spot in the engine compartment. And an expert concludes that it's most likely the result of an electrical system malfunction because there was no fuel spilled, no circumstantial proof that it had anything to do with the fuel system. Let's say this all happened in a brand new car. It seems like you're still making - I thought you said at first that you could make a claim if it was a new car. But it sounds like what you're saying now, unless they can pinpoint the specific defect, you couldn't have a claim.

KUHN: Right. We believe that Texas law requires a manufacturing claim to prove a specific defect. If the court wants to allow for an equitable exception for situations where we know the product is in the condition it was when it left the manufacturer's hands, there is case law in this court under the Coca Cola Bottling cases under the lower court's under sealed tests which could be used to answer that situation. That's not this case. But if this court ___ out a rule it should do that which sets out straight and strict guidelines. And I only talk about that because §3 has been offered up here as an alternative.

O'NEILL: So you're saying you wouldn't have to necessarily allege a specific defect if you can show that the car was in the condition it was in when it left the manufacturer?

KUHN: Under Coca Cola Bottling cases, the underseal test, arguably under some sort of warranty theory, you could do that. And that's the problem. What you're really doing here is beginning to blend different forms of liability and bringing in from other jurisdictions different theories about - like the malfunction theory, which we've never accepted for a strict liability claim.

All I'm saying is that we recognize in the brand new product question that this court has recognized before an applicable exception under really a modified res ipsa loquitur.

O'NEILL: And the reason for that is, I believe you're saying under the analogous of the exploding coke bottle cases, because there's an inference that it's still in the same condition.

KUHN: That's right.

O'NEILL: And at some point of attenuation that inference does apply?

KUHN: That's correct.

O'NEILL: So it doesn't have anything to do with whether you've allege a specific defect as much as the attenuation piece?

KUHN: That's absolutely right. It's some form of applicable test the court has created simply to address situations where it would be impossible to prove a defect. But we all agree the product was in the exact condition it was when it left the manufacturer.

O'NEILL: So if they could connect the dots that it is in the exact condition it left, then really attenuation wouldn't matter, but that would be a pretty heavy burden?

KUHN: That would be a extremely difficult thing to do. And I don't think it could be done under any of the scenarios that were given here except for maybe the car that drives off the lot brand new and blows up on the way home.

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RESPONDENT

HUGHES: In this appeal, I think Ford just tried to twist the arguments around and to twist the arguments of the plaintiffs around, my clients Mr. and Mrs. Jack Ridgway. They have continuously brought up the res ipsa loquitur issue, and we have never argued res ipsa in this case. We have continually relied on Third Restatement of Torts, §3, General Products Liability.

Also another thing I think that they have kind of twisted around, because what burden was on us at the summary judgment hearing? They keep talking about that we can't prove beyond a preponderance of the evidence. My argument is, all we had to do at this hearing was produce more than a scintilla of evidence.

WAINWRIGHT: Let's talk about that. It's your contention that circumstantial evidence here raises a fact question that includes summary judgment. Correct?

HUGHES: Yes.

WAINWRIGHT: The two pieces of circumstantial evidence are the eyewitness testimony of your client who was in the truck when the fire started and was injured; and then you have an expert

Mr. Greenlees. His testimony in his affidavit is his opinion: a malfunction of the electrical system in the engine compartment is suspected of having caused this incident.

Webster defines suspected as "imagine something to be true or likely." Is Mr. Greenlees's opinion any evidence?

HUGHES: I would argue that it is. Because he also states in there that the vehicle was damaged severely. And he's telling you what he thinks he sees or what he would see. And he also relies on what my client said. And I think what my client says is enough evidence. There are the Miles, Gonzales and the Sipes v. General Motors cases that say witness testimony is enough evidence.

WAINWRIGHT: And I've looked at a couple of those cases. Mr. Greenlees also says there was a hot spot under the engine compartment. And he opines that the fire started in the engine compartment but can't identify or pinpoint the specific defect that caused the fire. Correct?

HUGHES: Right.

WAINWRIGHT: Should we allow cases to go forward if there is no identification of a defect that caused the injury? If there's just a suspicion that there was a defect, but that defect cannot be identified?

HUGHES: Mr. Kuhn mentioned the amicus brief that was filed yesterday. In that brief, the products liability advisory committee they stated that the purpose of the Restatement Third of Torts §3 is, an indeterminate defect first comes into play when a product is so damaged plaintiff is provided no fair opportunity to inspect and identify a specific defect. That's this case.

WAINWRIGHT: The briefing does say that neither party had access to the vehicle. And that's the reason?

HUGHES: There is access to the vehicle, but it is so severely damaged that where the fire started you can't tell what is what.

WAINWRIGHT: Even in Gonzales the expert testimony was sufficient to identify the defect. In Gonzales there was an eyewitness that said, I saw the tire wobble and lean and the evidence that it was sliding sideways rather than rolling. So there was eyewitness testimony, but the eyewitness testimony went to the source of the alleged defect to help identify it. In this case even your client says that he originally saw the fire in the rearview mirror behind it. Your expert opines that the fire started in the engine compartment in front of it. Is that inconsistent?

HUGHES: No. It is not. Because of the flame patterns on the vehicle clearly show that the fire came underneath the vehicle and then curled back up behind the driver's compartment.

WAINWRIGHT: So the fire started in the engine compartment, went under the vehicle, came up behind the passenger compartment?

HUGHES: In the bed of the truck.

WAINWRIGHT: Behind the passenger compartment?

HUGHES: Yes.

WAINWRIGHT: Why would the fire have not come up around the engine compartment?

HUGHES: My client was driving, I think, about 35 or 40 mph, so the wind and the aerodynamics of the vehicle caused it to do that.

PHILLIPS: You're not making any claim that your expert didn't get an adequate opportunity to examine this vehicle all he wanted are you?

HUGHES: I am and I'm not. I'm not saying that he didn't have the opportunity to go out there and inspect it. He had that opportunity.

PHILLIPS: He could do any destructive test or anything else he wanted to do on it right?

HUGHES: I don't think he could have because of the damage.

O'NEILL: How did he determine there was a hot spot in the engine compartment?

HUGHES: The entire driver's side part of the engine compartment was basically gone.

PHILLIPS: Your testimony, expert _____, has to raise a reasonable inference that whatever this defect was that it existed at the time the product left the manufacturer's control. Is that right?

HUGHES: Yes.

PHILLIPS: Your expert never used a term "stronger than suspected". Isn't that right? And he also said it might be the fuel line, which had been through a lot of other control. Is that correct?

HUGHES: Yes. He did say that.

PHILLIPS: Let's sit aside this res ipsa you say you haven't argued. But on this expert witness's affidavit what cases do you have that would make the word suspected with an alternative explanation which would clearly not allow recovery, would make that strong enough to survive

summary judgment? Is there a case you could turn to or a doctrine?

HUGHES: I cannot think of any specific case that deals with the word suspected. But it's well established that in a no evidence summary judgment situation you take any adverse inferences and ignore them and you take all evidence that the plaintiff produces or the nonmovant produces in the best light for them.

PHILLIPS: So we'll ignore the fuel line then and we just take suspected engine block. An engine block that hasn't been opened I suppose is some evidence of what the manufacturer did. But let's get this word suspected. Is that enough to get to a jury?

HUGHES: I think in a no evidence summary judgment situation it is. If this is a traditional summary judgment, which I don't think Ford produced any summary judgment evidence in this, and that's why I'm saying it is a no evidence summary judgment, but in this no evidence summary judgment situation I think that's enough because you have to take that - anything he says in the best light and take everything he says to be true.

O'NEILL: I believe he said he looked at the NHTSA reports. Is that right?

HUGHES: Right.

O'NEILL: What was in that report? Were there instances of similar occurrences in there that caused him to surmise that it was the engine?

HUGHES: I do not believe he found any recalls. I think that's what his search was for.

O'NEILL: So he looked through NHTSA but saw no recalls on the engine compartment for a similar defect?

HUGHES: Correct.

PHILLIPS: It's kind of paradoxical because the more similar problems you find the weaker your manufacturing defect case gets.

HUGHES: Correct. And then you have to go to the design defects.

PHILLIPS: Without the expert's affidavit can you get to the jury just on §3 or any other doctrine on Texas product's law?

HUGHES: I d believe we can get there on §3, because we do have...

PHILLIPS: Without setting aside the expert's affidavit. Just on your eyewitness?

HUGHES: Yes. On my eyewitness and the other witness testimony. We do have access to the previous owners who stated in their affidavit they didn't misuse and abuse it. I think based on those facts we can show that this vehicle was in the condition it was in when put into the stream of commerce. There's no evidence that this vehicle was ever misused or abused. It had 54,000 miles. And I think counsel's argument that once a vehicle's been used within reason was 500-600 miles.

O'NEILL: There was a spotlight on the driver's side of the front door that was installed and that would have involved some work on the electrical system.

HUGHES: Yes, but at a very minimum.

Going back to the Coca Cola Bottling cases. I think that we can't limit it to something that is brand new.

HECHT: But it doesn't seem like you limit it at all. What is the limit?

HUGHES: There has to be some limit.

HECHT: What is it? If you just say, well if a fellow says yes I was standing there and it malfunctioned that's another that gets to the jury?

HUGHES: In certain situations it may be.

HECHT: Well which ones would it not be?

HUGHES: In a case of a vehicle case. You can even have situations where a vehicle only has 20,000 miles, 15,000 miles on it, but some shade tree mechanic is doing all the work or somebody's doing the work for themselves. You know they go in there and they do a tuneup.

PHILLIPS: What if you have an affidavit that he had seen a video on a tuneup and he did it backwards. I mean what you're saying here is affidavits from all the owners that they didn't trash the car and that they took it to reputable mechanics gets it to the jury.

HUGHES: They say they took it to reputable dealers. I think in that situation an uncertified mechanic, you're not taking it to a dealer, somebody who is authorized by the manufacturer to work on the vehicle, I think that would cause serious problems for the plaintiff's case. But in this situation where it was always taken to an authorized service center...

PHILLIPS: So that's your answer to J. Hecht?

HUGHES: That's one situation.

PHILLIPS: Proof from a prior owner: proper service and no mistreatment and no missing link in that chain gets you to the jury under §3?

HUGHES: And in a situation like this where a vehicle has been driven on a paved county road and it ignites in flames, I think so.

OWEN: What if it had 100,000 miles? Does the age or the mileage have - is there some cutoff point?

HUGHES: I think at 100,000 miles you're starting to push it...

HECHT: Why?

HUGHES: Well vehicle manufacturers pretty much will tell you that they manufacture their vehicles to last 3 times the amount of the warranty. So if they give you a 36,000 mile warranty, they are pretty much designed to go about 115,000 miles. So when you get to 100,000 you're starting to push the envelope on what it was designed to do. But at 50,000 it's well within that design ramifications.

PHILLIPS: Ford has given us a case from Maryland Court of Special Appeals in its reply brief that's pretty much on all fours with this one. The Harrison case. Do you think that's just wrong or did you find a distinction? If it doesn't come to mind don't waste time now. Just drop us a letter.

HUGHES: I don't recall the case. Another issue that opposing counsel brought up is the underseal test. Basically underseal tests means that they can't be touched. Once somebody opens up that hood and touches anything in there, that vehicle is no longer under seal. So again we go back to the warranty situation. They've got to get in there. If somebody has any problems with the vehicle and they take it into an authorized dealer to have repairs done, once they get in there and do some work then it's no longer under seal. And Ford's argument would be then you can't have a case against us. Then you would have to prove a specific defect or design defect to recover. And I just don't think that that would be very equitable to do that to consumers when they go out and purchase a product that has a warranty and they're told the product would be good for the duration of that warranty. I just do not think that would be fair.

Ford also argues that we have to prove that the product deviated from its intended design. Motor vehicles are designed to be driven on public streets, private streets, and that's what Mr. Ridgway was doing in this situation. He was driving on a paved county road, obeying the speed limit when the vehicle caught on fire. I think we have proven that the vehicle deviated from its intended design.

We can't prove a specific defect. We can't tell you what part specifically malfunctioned. But there are situations where the product is so damaged - there are even cases where

products have been lost and the plaintiffs have been allowed to go on based on eyewitness testimony alone. And that's what we're arguing. In this situation, in a no evidence summary judgment we should be allowed. We have produced more than a scintilla of evidence. We have met our burden in this situation.

WAINWRIGHT: McCombs Ford apparently worked on the fuel system on this truck a couple of times. They were nonsuited from this case. It's Ford's argument that that intervening repair work, the fact that that could have caused the problem does that preclude your being successful in this case, or does that mean that Ford's motion should be successful?

HUGHES: No. It doesn't. One thing. I don't think any work was ever done on the fuel system. It was taken in and complaints were made about the fuel system. And I think some tests were done. But I don't think any repairs were actually performed on the fuel system.

O'NEILL: Didn't you allege they were?

HUGHES: In our original petition. We abandoned that claim.

O'NEILL: But at one point you alleged that there were three repairs to the fuel system.?

HUGHES: Yes. We alleged that there were repairs but according to Red McCombs they never performed any repairs. The vehicle was taken in for that. But beside the point, I think even if repairs were done, this is an authorized Ford dealer, and when you take a Ford vehicle to an authorized Ford dealer they are Ford's agent.

PHILLIPS: Do you have any cases on that?

HUGHES: Not with me but if I could submit a brief I can.

PHILLIPS: Just any kind of notation of what you think of the Harrison case and Ford being responsible for a dealer's repairs in a manufacturing defect.

HUGHES: We are relying on the Third Restatement of Torts and we're asking the court to adopt that theory. Further, this is a no evidence summary judgment case. All we have to do is produce more than a scintilla of evidence. In this situation, I think we have. We don't need to prove beyond a preponderance of the evidence. It is just more than a scintilla. That is not very much. In this case, I think we did produce that, and I think this case should be allowed to go to a jury.

OWEN: Are you saying that a no evidence summary judgment standard is different from a no evidence standard after a jury trial? Let's say that we had the same evidence presented to a jury. And all you had was your expert saying, I suspect in your other affidavits in testimony and the jury finds in your favor. Would that evidence be enough to support the jury's verdict?

HUGHES: On a no evidence situation after it had been submitted to a jury?

OWEN: Yes.

HUGHES: I think it would be. You would have to rely on the jury's judgment of what the testimony...

OWEN: I thought you said earlier that if this were a motion, if Ford had come forward with its own evidence saying, affirmatively there's no defect, that your affidavit would not raise a fact issue. I wasn't clear about that.

HUGHES: If they had risen some other defense with an affidavit or said no this is what caused it, then we would have to - if they had brought forth an expert and said, no, the fire started here, and this is what caused it. If they had done that, then we would have to bring forth someone to directly contradict what they are saying or we would lose, because we would have to contradict what their evidence was. But they brought forth no evidence in this case.

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REBUTTAL

KUHN: I think this court's questioning clearly demonstrates the danger of adopting this special exception or equitable exception to require them to prove a specific defect. Every case you're going to have to sit around and ask the questions that this court was asking. Well what if it was 100,000 miles; well what if it had been repaired? what if those repairs were one thing or the other? This court over the last 35 years has developed specific requirements for different types of claims. For a manufacturing claim they are supposed to prove, allege and prove, that the product deviated from its design. Now he's admitted up here that they can't do that, and they don't intend do that, and that should be it.

Secondly, as to the standard. We've never said they have to prove by a preponderance of the evidence. What we've said is that if you take this evidence to a jury there is no way that they can come to any conclusion beyond a guess. And that's the standard for a directed verdict and a no evidence motion for summary judgment and we should get that judgment here. And we did get the judgment and the CA reversed it.

As to what his expert said. And this goes to J. Wainwright's questions earlier. They did have possession of this vehicle. They did have a chance to inspect it. They have never alleged that they could not determine what a defect was. What they said was, they haven't. In fact in the expert affidavit it tends to indicate that they are going to keep trying, or they may keep trying. What we have here is a case - and this is what the amicus that was filed yesterday sort of goes to - what is §3? what it was meant to do and how is it supposed to be applied under the framework of Texas. And what it says is, it's supposed to be limited for any products, or relative to any products. It's supposed to be limited where you know it's in the condition it was when it left. It's supposed

to be when the product was destroyed and it couldn't be proven. None of those are met here. This isn't really a proper case to try to even argue for §3.

The first requirement of §3, the kind that ordinarily throws the result to the product defect, there's no evidence in this case. The expert and no one has ever said that a vehicle fire ordinarily occurs only because of a product defect. There's no evident that it even meets the first requirement. The second requirement is that you disprove other possible causes. And this is just in the loose language used in their statement. He doesn't even attempt to do that. In fact, at the hearing which was cited in the brief, what he seems to suggest is that it is Ford's duty to disprove any other possible causes. That's clearly not what §3 was intended in its analytical framework to suggest.

If this court adopts some sort of exception modeled after §3 by bringing back its Coca Cola bottle cases, we may have to ___ out all those issues. But it shouldn't do that, because it's going to bring all these concerns and discrepancies and confusion into the law. Even under §3 there is no way to make a claim based on the evidence.

PHILLIPS: So you're saying you win if we adopt §3, but we shouldn't adopt §3?

KUHN: That's absolutely correct. What I"m saying. We win no matter what test this court adopts unless the court decides to make manufacturers insurers of their products period. Other than that, we have to win because there's no way based on the evidence presented in this case that any jury could conclude that there was a manufacturing defect from the time this product left the manufacturers' hands. It would merely be guess. It would merely be surmise. I'm willing to give them it would be a guess or surmise that anything else caused it. But the court can envision the jury discussion if this case goes to the jury: sit around saying, Well do you think it was caused by a manufacturing defect? I don't know. Do you think it was at the time it left? Well I had a car before that had problems when it left the manufacturer. I've had repairs that were done by my local shop and they didn't fix it right, so maybe it was caused by that. That's what's going to happen in this case. It's improper. The court's jurisprudence requires that it proves a specific defect. That's what it should stick with.