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Supreme Court of Texas.
BED, BATH & BEYOND, INC., Petitioner,
v.
Rafael URISTA, Respondent.
No. 04-0332.

September 28, 2005

Appearances:
Michael Phillips, Evelyn Ailts Derrington, Phillips & Akers, P.C., for petitioner.
Jonathan Scott Stoger, O'Quinn, Laminack & Pirtle, Houston, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Don R. Willett, Harriet O'Neill, David M. Medina, Paul W. Green, Nathan L. Hecht, Dale Wainwright, Phil Johnson, Scott A. Brister, Justices.

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SPEAKER: All rise.
CHIEF JUSTICE JEFFERSON: Be seated please. The Court is ready to hear argument in 04-0332 Bed, Bath & Beyond v. Urista.
SPEAKER: May it the please the Court. Mr. Michael Phillips will present argument for the petitioner. The petitioner reserves five minutes for rebuttal.

ORAL ARGUMENT OF MICHAEL PHILLIPS ON BEHALF OF THE PETITIONER

MR. PHILLIPS: May it please the Court. I told you earlier audience can stay up to the judgment. [inaudible] they had better things to do. [inaudible]. We're here today to ask this Court to correct the mistakes made by the Court of Appeals and also to take this opportunity to reemphasize the law of review of harmless error where -- what role does it play in the administration of justice in Texas. We are of the opinion that the Court of Appeals erred in applying the Casteel rule in the said facts and thereby reaching a conclusion that there had to be and should be automatic reversible errors. Instead these facts which I will discuss with your permission momentarily, points out to a harmless error rule on the record in its entirety and once that has been on -- this Court would come to the conclusion in my opinion that nothing that was -- that negates conclusion of the [inaudible] unavoidable accident

in this broad-form single theory of liability sufficient calls for rendition of an improper verdict nor that it presents the litigant from presenting to this Court this claim of error.

JUSTICE: Do you think it was error?

MR. PHILIPS: Your Honor, personally I'm not in a full reason that the plaintiff [inaudible] objection [inaudible] itself as we all will recall [inaudible] talks about unavoidable accident until the closing argument but Counsel for the plaintiff cross-examined witnesses on that as part of his cross-examination on plea. Nevertheless, your Honor, under no circumstances this Court unless I emphasize this, the issue that were going to talk about is [inaudible] jurisprudence of this state is to let's assume that it was error although I personally do not believe that. But even if it were error, what do you do in situations where you have an erroneous, improper instruction in a broad-form single liability issue? Do you apply Casteel or do you apply Reinhart theories of analysis. And of course these are -- it must be Reinhart. It should be review of the records in its entirety of the facts in this case.

The facts in this case, this was an incredibly unbelievable [inaudible]. The case was so unbelievable. The defense did not even present any witnesses on rebuttal. They did not present any witnesses on this pending case. This is the case where the plaintiff was caught -- the plaintiff's Counsel was caught encouraging, in tricking testifying doctor to change his records which he did to make all medical records reflect that the patient's problems were related to the Bed, Bath, and Beyond accident, not as the records had previously indicated of a Worker's Compensation claim of auto accident and other instances of [inaudible]. That in and of itself Harris County is law [inaudible]. That is the covered evidence that the jury says, "where is the on-off switch and let me out of here," which what they did do on discretional issue. This first issue which was a combined negligence and possible causation -- broad- form submission.

But it didn't stop there. Mrs. Urista would make statements which I will not [inaudible] on here because they are on the record which you have read. But she would make statements in long speeches and then here on cross-examination -- trapped, caught -- would simply change her testimony as if nothing -- "oh, yes that's the way it happened." There were other instances that were embarrassing during the trial --

JUSTICE O'NEILL: But without going through the factual analysis --

MR. PHILIPS: Yes.

JUSTICE O'NEILL: I mean giving deference to the record as when you have to. In Casteel and Harris we pretty much said that you're entitled to trial on correct theory of law. And if an incorrect instruction was given why does that not become a possible incorrect theory?

MR. PHILIPS: Well, because we think that Casteel, you dealt with a broad-form submission with multiple theories of recovery. And if that were reversed and sit back presumably on retrial the appellate -- the trial judge will say, "[inaudible] submit separate issues on these liability theories?" He reversed this case and sent it back. You can't submit an issue on unavoidable accident, can you? This is inferential rebuttal issue that can only be done by instruction. Note, your Honor, we say as stated in the plea of the Court respectfully today, we ask you that in situations involving alleged erroneous instructions and I [inaudible] you whether this was an improper instruction because we'll eventually [inaudible]. Let's assume that it was or an improper instruction in a single issue -- single liability theory, broad-form submission except in very few circumstances the rule of the -- that was

governed by a harmless error analysis. Where do you review the entire record?

JUSTICE: Who did the exceptions?

MR. PHILIPS: Well, I think where you have -- in the Romero case where -- you have such a directly -- instructions that were so direct that I don't think that much [inaudible] --

JUSTICE BRISTER: Isn't this instruction covered by Dillard v. Texas [inaudible]?

MR. PHILIPS: We think well, yes sir, it could be. It could be this instruction --

JUSTICE BRISTER: My point is this, why is this instruction wrong?

MR. PHILIPS: Well --

JUSTICE BRISTER: Only because this Court has said why it's just the children and whether even though in fact the instruction says nothing about children and weather.

MR. PHILIPS: Well, that's true and the courts will disagree strongly with the concept of unavoidable accident in the context of this case is improper your Honor, because they objected it. And furthermore, the instruction is a mere aid to the jury. It modifies slightly the meaning of negligence and it modifies slightly and hopes the jury understands proximate causation. It is a helpful aid and in all 254 counties trial judges believe that. They think it's good to give instructions. That's what they were taught. I being 62 years old remember that the courts telling trial judges or instructions as a matter of going. And so now, we are reaching a situation where if a very good instruction and there's even a lot of them that is marginally incorrect. A -- the appellate court wants to apply Casteel reasoning if you have automatic reversal and then you have a trial. No, no, no. We say common sense and good management dictate that where it is a broad form of submission with a single period recovery as pure negligence and a claim of instruction by definition then and in that event of the --

JUSTICE O'NEILL: But the instruction is a matter of avoidance. And so if it's an improper matter of avoidance, how do you separate that out from Casteel?

MR. PHILIPS: Respectfully, I do not think that unavoidable accident --

JUSTICE O'NEILL: Presuming it were incorrect. Presuming it were an incorrect avoidance theory.

MR. PHILIPS: Yes. Well, I did say a few minutes ago that there might be some circumstances which won't result -- would deviate from the hard and fast rule of an instruction in a single issue of lawful submission must be adjudged by harmless error analysis. The Romero circumstance is the best [inaudible] at that time. If you have that circumstance where there is an avoidance theory submitted, usually it's a theory not an instruction. And a theory is a lot different than an instruction because if the instruction encapsulates or sets up a theory then you've got more two Casteel where you had battling theories within one context. So, you don't look whether six went one way or six went the other. The first is an instruction kind of a definition that I think that I'm correct frankly and then it should be adjudged by the harmless error analysis. If you had a situation and [inaudible] where the instruction sets up a theory then you have a [inaudible] different result but not here.

CHIEF JUSTICE JEFFERSON: Apart from your -- whether you believe that it's a proper instruction or not based on their bringing it into the case, what is the evidence that this action was caused by the negligence of no party in the case?

MR. PHILIPS: Well, this -- first of all this is -- there are all kinds of things going on that will be discussed whether there were vibration, whether there was air conditioning ducts, people [inaudible] shells taking stuff off of them and the plaintiff's description of the accident where the merchandise all came tumbling down like a waterfall. There was no [inaudible] here than just one trash can or two trash cans falling. So, we didn't know. But when it came time for the charge conference, the judge did what good judges have always done. They injected it into the case. It was plead and it was considered good practice to submit the issue because it did aid the jury in understanding of the context of the facts.

The Bed, Bath and Beyond position was there was an employee up there behind it but it's unclear that he was -- that he committed negligent conduct. That was approximate cause of the occurrence in question. And that was the point that the Court of Appeals admits. They just came to the conclusion that gravity decided the case. And gravity admit that -- gravity somehow admit that the case was over and what we point to say is that we don't think that the definition of the instruction was necessary here. But let's just assume that it was. The purpose of this appeal -- because you're all riding a lot on this topic and everybody up here is seeing that you're right [inaudible] Romero so you're running a lot on this charge issue and we're here to do our part to present [inaudible] my position [inaudible] submission with the instruction although a good rule would be that harmless error analysis of one which should be [inaudible] --

JUSTICE JOHNSON: But it has to depend based on what you've just told us. It has to depend on what the instruction is. We're going to always have to define instructions or because some instructions actually tell the jury what to do --

MR. PHILIPS: Absolutely --

JUSTICE JOHNSON: -- and some instructions such as this simply someone could view it as the other side of the proximate cause and not so harmful but it -- how are we going to help the bench and the bar and the judges try cases if we start separating those out or is it going to be of more help if we say it's up to you as a lawyer -- up to you as a lawyer to make sure you're instructions are right so that on appeal it can be looked at and if you can't do it right then you're running the risk of having the case reversed. So, in putting the burden on the lawyer to say if this is questionable I better not put it in there.

MR. PHILIPS: We'd like to think it's a combination of both frankly, your Honor. This is the lawyer who is working with the judge. But even in the Romero case [inaudible] you have less [inaudible] even under the Casteel analysis. This Court has left an open black hole frankly what we call stick patch to cover situations in which we wanted to review certain definitions. In Romero you said nonreversal is merited even under Casteel analysis if the appellate court is quote reasonably certain that the jury is not significantly influenced by issues, you've obviously submitted. Even in Romero you made that clear. You wrote it; we believe it.

So, now in so far as lawyers making mistakes -- yes, lawyers do make mistakes but in this context the only way to determine with Bed, Bad, and Beyond could have solved this problem with [inaudible] to submit the side issue twice once upon unavoidable accident that has instruction and one's without. And you do not want us to do that. In the long run you do not want us to do that. We can't because first of all this says you can't submit the complicated issue as one of them; you should. We'll get back at what it was in the 50. I'll give a speech

and I'll call it back to the future where we have 50 different issues on a simple [inaudible] facts. Note, the system that --

JUSTICE O'NEILL: Would your answer be different if you could fashion this as a separate question? Question number two: Do you find that this was an unavoidable accident? Answer yes or no. If you could do that would your answer be different?

MR. PHILIPS: If [inaudible] if we went back prior to your [inaudible] and we can submit that, yes, my answer would be different if they would -- if inferential rebuttal issues could be submitted as defensive issues, of course my argument would change and I would not let -- but that the reality is that's not the way it is. They have all the constructions and influential rebuttal and matters are those that are included here the whole charts -- the analysis should be of the entire record.

And as I conclude let's look at the entire record. I've touched on it first. I've hesitated a little too much on evidence but it's very important to look at the evidence in this case because it was prima facie evidence case. The Court pointed out that there was -- the Court said erroneously there was a sharp difference of evidence. No, there wasn't. I offered there wasn't. The defense Counsel offered [inaudible] of this case in chief, which was in point of issue. The case was so weak. I say this to you respectfully. Just because lawyers yell to one another doesn't mean that the evidence is sharply contradictory. Lawyers yell to one another when they agree on the facts whether that rises to the level of a prima facie case. That's what happened here. The case was over when they wrestled. I mean when the plaintiff wrestled. And that became -- that's what Justice Jennings was earnestly pointing out in his --

JUSTICE BRISTER: Well, there was some evidence that an employee knocked the trash cans off.

MR. PHILIPS: Yes.

JUSTICE BRISTER: And so that would be some evidence that the jury decided it was ordinarily prudent employees wouldn't do that. And it -- but it wouldn't be overwhelming evidence if the jurors could decide that even ordinarily prudent employees sometimes knocks trash cans.

MR. PHILIPS: Exactly.

JUSTICE BRISTER: So, just the jury question, the jury said no.

MR. PHILIPS: My time has expired. I would reserve my five minutes for my rebuttal.

CHIEF JUSTICE JEFFERSON: Thank you Counsel. The Court is ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. Jonathan S. Stoger will present argument for the respondent.

ORAL ARGUMENT OF JONATHAN SCOTT STOGER ON BEHALF OF THE RESPONDENT

MR. STOGER: May it please the Court. My name is Jonathan Stoger and I represent the plaintiff and the respondent in this case, Rafael Urista. I wanna begin my presentation by touching a couple of facts in response to what the petitioner has said today. And I want to move in the Casteel and then talk about the why part of unavoidable accidents theory.

This was a negligent activity case. Rafael Urista was shopping at Bed, Bath, and Beyond Store with his wife and children. They were

standing next to a 12 foot high shelf looking at items they could purchase the house when all of a sudden Mr. Urista describes trash cans, glassware, other items just came raining down from the shelf and knocked Mr. Urista unconscious. I don't think that Bed, Bath, and Beyond [inaudible] disputed what happened here that the items fell off the shelf. They prepared an accident report on the day of the incident and this was prepared by the store management. They said that items came raining down -- came down off the shelf and hit Mr. Urista. So, I think that that point has pretty much admitted in the trial that crystal evidence came from David Traxler who was the store manager. He testified at trial as the corporate representative.

JUSTICE O'NEILL: Mr. Stoger let me ask you, the premise of Casteel and Harris County v. Smith I think was that you could separate out these questions and ask them separately, so that if you wanted to challenge something on appeal you could do that. But you can't parse out inferential rebuttal issues separately. So, why wouldn't we say then that the Casteel analysis [inaudible] -- or do you agree and then why? And then we just move into simply the question of was there or was there not harmless error.

MR. STOGER: I agree. Under Rule 277 of course you cannot submit an inferential rebuttal instruction as a separate question but I think that Justice in other areas of law you have to balance and weigh competing rules and policies. I mean I think all the time we have competing rules of constitutional law or statutory law and they clash. And in this case as was stated in Casteel [inaudible] two theories and the same question one of which was later invalid --

JUSTICE O'NEILL: And you could have easily separated it out?

MR. STOGER: Yes.

JUSTICE O'NEILL: That was the key piece of both of those opinions that you know something that -- if you have questions about the evidence to support something, it's possible to separate it out to avoid error. Here when you can't then that just take you out of the Casteel analysis entirely.

MR. STOGER: I don't think it does because I think again we -- the Court should engage in a balancing of two competing interests. Number one, here you have the plaintiff who has the right to pursue a meaningful appeal. And I think, under the Casteel analysis that rights on appeal was denied when he makes two theories together. On the other hand, of course you have the defense who has the right to submit information --

JUSTICE BRISTER: What's improper about this situation?

MR. STOGER: I think that what's improper is that there was no evidence of an unavoidable accident that occurred in this case and in Reinhart and in previous --

JUSTICE BRISTER: Do you agree well -- it is true. We've said it's only weather and children.

MR. STOGER: Yes.

JUSTICE BRISTER: But that's not what the instruction says.

MR. STOGER: Well --

JUSTICE BRISTER: Under the instruction if an employee did it but the employee was acting as an ordinary prudent person it was just accident. That instruction would fit this perfectly.

MR. STOGER: Well, I don't think that -- I don't see how an employee could knock merchandise off the shelf and not be negligent --

JUSTICE BRISTER: So, every time you knock something over you're acting as an unordinarily prudent person?

MR. STOGER: Well, I think the Court has also said --

JUSTICE BRISTER: 'Cause I mean that that's a yes or no. Every time you knock something over you were not acting as an ordinary prudent person because of course ordinarily prudent people never knock anything over. Is that right?

MR. STOGER: I think that there's more to the instruction than just to answer --

JUSTICE BRISTER: Well, answer that one first.

MR. STOGER: Well --

JUSTICE BRISTER: Don't ordinarily prudent people sometimes knock out water glass over?

MR. STOGER: I think that that could happen but if I could get back to the Court's definition of unavoidable accident and the Court has said that it's normally used to inquire about circumstances where you have a none [inaudible] --

JUSTICE BRISTER: What we said in Dillard -- the question is "was the jury misled?" And the jurors have haven't read Reinhart. They don't know that technically this is a misuse of this instruction. All they know is the instruction. And the instruction says --

CHIEF JUSTICE JEFFERSON: And even if they had read Reinhart we -- at least part of that opinion says that the instructions used to make sure jurors understand that they don't have to find -- necessarily find, either party negligent which is just true, right?

MR. STOGER: The jurors don't pick. Their also and this Court has said -- if I could turn it to Select Insurance case v. Boucher, the Court said, "you know, that case that, you know, what we're dealing with here is an inferential rebuttal instruction and I think that what the Court has emphasized as far as inferential rebuttal instruction that's more than just a negative of the plaintiff's case that is actually a separate legal theory in and of itself. So, that is more in that circumstance under Select Insurance Co. v. Boucher than just a flat general denial of plaintiff's case. This Court has treated it actually as a separate legal theory in and of itself.

JUSTICE HECHT: But you were going to say that it was important to balance interest?

MR. STOGER: Yes.

JUSTICE HECHT: And so, I was wondering how those should be balanced when in some instances the claim for the defendant can spell all the issues they want to. They just can't put them together when there's no basis for something. So, it's just a question of form. Now, the question is, are you gonna get an answer from the jury. You're gonna get an answer. You're gonna get a final. And all the question is, are we gonna put it all under one Arabic numeral or we gonna put it under several. And so that's one situation. And the other situation is there's nothing we can do about this. There's no other way to submit it other than just not submitting it at all.

MR. STOGER: Well --

JUSTICE HECHT: Don't those [inaudible] different situations?

MR. STOGER: I think that they did. If I could get back to the balancing theory, I think that the plaintiff certainly has an obligation to [inaudible] states the law and the instructions and the definitions and the questions. If you balance that against the defendant's right try to submit inferential rebuttal instructions in defenses, I think in this case under Casteel plaintiff's rights outweigh the defendant's right. Basically, what the defendant's are saying --

JUSTICE HECHT: Why do you -- what I'm getting is the right -- if there is one in Casteel the focus of the dispute is just the form not

the substance. The substance is going to the jury no matter what. So, we're only talking about how. Here we're talking about when. Whether they're gonna see it or not. And it seems to me it's harder to have a first say universal rule when you have that situation than it is when you're only you're talking about is the form. But I'm interested in your [inaudible].

MR. STOGER: I think you'd -- well, you know, if I could get back to the balancing I think the plaintiff's rights in this situation outweigh the defendant's rights. Basically what the defendant is saying they have a right to get wrong [inaudible] on a reversible error standard on appeal -- on the harmless error standard on appeal. There was another option that I thought of. I thought I would bring to the attention of the Court. And I haven't seen any Texas case law on this but I know Justice Hecht you cited the DuPont in the Morris case v. Barkley in your decision in Romero and as I read that case there's the patent infringement case. The jury returned a general verdict for the defendant on infringements. The Court submitted a separate interrogatory asking the jury whether this clear decision was based solely on the issue of obviousness which they said no. I think that that could be an option for the Court. I haven't seen any cases wherein rules that would prohibit Texas practice from submitting interrogatory questions and asking them to base this for a verdict. So, I think in fact that could be an option in the circumstance.

If I could get back to the questions again I'd moved on at this point to the Reinhart standard, and I'd like to argue as to why the Court of Appeals was also correct in determining that the case should be reversed when there is unavoidable accident instruction as harmless -- I mean, was harmful. What the court said is that under Rule 44.1(a)(1) the unavoidable accident instruction probably caused the rendition of proper judgment. What the court said was that this was a highly contested case. Question arises as to whether the verdict was against great weight of preponderance of the evidence. What if Bed, Bath, and Beyond's main contentions at trial was that accidents happen in close and analogue to unavoidable accident theory and that Bed, Bath, and Beyond emphasized the argument during its summation. The main authorities of course that the court relied on were Reinhart v. Young and Hukill v. H.E.B. Feed Stores. This case was not like Reinhart as the Court of Appeals said because this is a situation that clearly did not introduce ample evidence to support the jury's failure to find them negligent and one of the points that the --

JUSTICE BRISTER: So, was the trial judge required to instruct the verdict in your favor?

MR. STOGER: In this case is --

JUSTICE BRISTER: As a matter of law the defendant was negligent.

MR. STOGER: In this case where we wouldn't say obviously there was a genuine issue of material fact [inaudible] --

JUSTICE BRISTER: Which was --

MR. STOGER: -- Bed, Bath, and Beyond was negligent in knocking the items on the -- on top of Mr. Urista --

JUSTICE BRISTER: And your position is there's no evidence that anybody other than Bed, Bath defendant employee did it. So, the jury question is whether just because you did it means it's negligent.

MR. STOGER: No. There's more evidence and we did not plead res ipsa loquitur in this case. But here Mrs. Urista after the incident happened walked around to the back of the shelf. She saw Reginald Neal who was a store employee staying on top of the ladder on the other side of the shelf using a broom to manipulate the merchandize trying to take

the trash cans down. So, that in our opinion in and of itself was [inaudible] --

CHIEF JUSTICE JEFFERSON: Can we focus just for a moment on what the actual instruction says and what it's telling the jury. It's telling them essentially that you don't have to find -- just because this case was brought in this Court and you've heard this evidence, that doesn't mean you have to say the plaintiff was negligent or Bed, Bath, and Beyond was negligent. You decide based on the evidence yourself. What is wrong with that instruction? I mean the lawyers could have said that without an instruction, right?

MR. STOGER: Well, I would disagree with that your Honor. I think in Reinhart and the preexisting case law -- that one before they said that there has to be some evidence of an -- there has to be affirmative evidence [inaudible] --

CHIEF JUSTICE JEFFERSON: Well, I guess that what I'm asking is why do -- why would we stick with that when the jury is being told something that is absolutely true. They can -- I mean they can look at this evidence. They can find as long as there's some evidence find the plaintiff -- find the defendant negligent. But they don't have to. There's nothing that conclusively requires them to find Bed, Bath, and Beyond negligent in this case, right?

MR. STOGER: Well, we do not argue with the form of the question. We are arguing the substance that it should not have been submitted --

CHIEF JUSTICE JEFFERSON: Oh, I'm talking about the substance of the question. Exactly what it tells the jury. What is wrong with telling the jury the absolute truth?

MR. STOGER: I think in this situation that the instruction itself you know and of its like -- well, this instruction itself is an inferential rebuttal. The court relates in Select Insurance Company v. Boucher, the court phrased the history of inferential rebuttal instructions when it said that this is more than just general negative. This is more than just a general denial of the plaintiff's case. This is actually a separate factual theory. So, I think you should probably have to look at the substance and history of inferential rebuttal instructions itself to answer that question. But to get back to the Romero, you know, we did not judge of the form of the question [inaudible] and damage in this case.

If I could return you back to the matter at hand and return to the Reinhart analysis there was not ample evidence offered to support the jury's vote finding [inaudible] -- I'm sorry --4 defendant did not offer arguments to exonerate itself from negligence and the defense claims that somehow puts the burden of proof on them and we do not believe that that's true. This Court observed in the Reinhart case that some evidence was offered, and I think that that will tend to blunt the effect of an improper unavoidable accident instruction if the evidence is just so completely overwhelming that the defendant is not negligent. I think that will tend to blunt the effect of an improper instruction here --

JUSTICE MEDINA: Does evidence have to be so overwhelming or can there be just some evidence for it to be submitted?

MR. STOGER: I think it could be some evidence. I mean here there wasn't -- here there really was no evidence to exonerate themselves from negligence [inaudible]

JUSTICE WILLET: But you will still applying Casteel to a case that's more factually similar to Reinhart. You said Casteel still applies even in that situation.

MR. STOGER: Yes, your Honor, I do believe that Casteel applies.

Well our argument certainly is that Casteel applies as the Court of Appeals found out also alternatively that Reinhart itself -- under the Reinhart analysis the instruction was harmful also so we're arguing both points --

JUSTICE O'NEILL: Your whole argument depends upon the propriety of instruction in the first instance. And in Dillard didn't we say that this type of instruction is proper by its own terms?

MR. STOGER: I must say, your Honor, I'm not familiar with the Dillard case and I apologize for that. I'll be happy to --

JUSTICE O'NEILL: Well, we say that in Dillard we previously said that it ordinarily applies to fogs, no sleet, nonhuman conditions -- things like that. But we specifically said that the instruction itself is not so limited and therefore could be used to say that it just was nobody's fault. And if that is the case -- if the instruction was not improper then don't get into Casteel.

MR. STOGER: Obviously, if the instruction itself was proper then you wouldn't reach the [inaudible]. We argue this was not proper instruction because there was no significant evidence of a nonhuman event that caused this incident.

JUSTICE O'NEILL: But that language is not included in the instruction.

MR. STOGER: The [inaudible] -- yes - -

JUSTICE O'NEILL: No, what I mean -- the inferential rebuttal instruction unavoidable accident doesn't require that it be a nonhuman event.

MR. STOGER: No, but I think --

JUSTICE O'NEILL: So, the jury wouldn't know that.

MR. STOGER: The jury itself, you know, I think based on the instruction it should not have been [inaudible] unavoidable accident which I think is what they did in this case. But, you know, and we could still feel that the instruction itself should never have been given in the first place when they are rejected in the trial court there was no evidence of unavoidable accident and argue it should not have given and in fact managed to tilt -- management tilted the jury to reach its decision.

If I could get back to you the Reinhart analysis itself, here there's no accompanying instruction like in Reinhart where there was a sudden emergency instruction. It was given including already most of the substance of the -- of what an accident instruction. Also the Court of Appeals found that the jury may very well [inaudible] instruction in this case neither party really disputed that Reginald Neal was standing on top of the ladder and caused the trash cans to fall.

Fourth, Bed, Bath, and Beyond emphasized the theory during its closing argument. At one point it spoke about the reasons why the jury should find against the plaintiff but then it said and more importantly, you know, this was not an unavoidable -- I mean this was an unavoidable accident so we believe that in this case the emphasis that the defense placed on that instruction when he said that this was the most important reason the jury should find in this complaint, in this case shows that the jury relied on that. The case itself here is more like the Hukill [inaudible] than it is Reinhart and that's what the Court of Appeals found meaningful. This was a case where a grocery store customer slipped and fell on a puddle of children's bubble blowing solution. The case went to trial where the judge submitted an unavoidable accident instruction. The Court of Appeals found that the instruction was improper and also that it was harmful in the sense that this was a close question as to whether the verdict against the

plaintiff was against the great weight of preponderance of the evidence. We feel like the facts in this case [inaudible] are equal and therefore the people [inaudible] should be called the outcome. If there's no more question from the Court I will just conclude by asking the Court to affirm the judgment of the Court of Appeals. If the Court determines that the judgment should be reversed for any reason, we asked that the case in that circumstance be remanded to consider our other points of error which were presented to the Court of Appeals. We presented other issues that were addressed by the court of appeals. We would ask that the judgment be affirmed and that the case be remanded to the trial court for a new trial.

CHIEF JUSTICE JEFFERSON: Thank you Counsel.

REBUTTAL ARGUMENT OF MICHAEL PHILLIPS ON BEHALF OF THE PETITIONER

MR. PHILIPS: May it please the Court. Even if Reinhart could be possibly extended from the facts of this case [inaudible] this principle of Reinhart is what is important. The principle of Reinhart is that where you have a single issue-wrongful submission with an alleged erroneous instruction. That's the situation that cries out for a review of the entire record to determine whether there has been harmful error.

The trial counsel for Bed, Bath, and Beyond -- goofy though he may be, probably would be surprised that he was thought to be emphasizing unavoidable accident when he uttered 70 words about it and 5,000 words [inaudible] and never talked about on the case in chief period. There were 25 lines out of the 27 page upon his summation devoted to five lines 70 words to unavoidable accident and indeed when one reads those rather indirect references it appears to be sort of a plea, an appeal to common sense. Sometimes I see license plates as a walk down the street saying [inaudible]. It's sort of a variation that things happen sometimes. It doesn't mean anyone was negligent. It just happened. And that is essentially what the jury heard from the mouth of Counsel for Bed, Bath, and Beyond on the dictation in question. In this argument I don't think so.

Unconscious Mr. Urista, we are told, was unconscious. This was another singular fact that begged credibility. He said there was [inaudible]. He said that he was left unconscious by this avalanche from material that showered down. He fell down on the floor unconscious. And what happened? The sales associate walked out, saw him lying on the floor and then went back to waiting on a customer. That doesn't happen in America in [inaudible] 21st century. And you try to tell the jury that. It's going to be another [inaudible].

This is a threshold issue case. It was the only opportunity for the jury to let its people know quickly and decisively. Admittedly, it was a case we've worked but we do not know whether to apply that as relevant even under Reinhart whereas here the evidence was so fractured and unbelievable. It is proved that no evidence was offered while evidence was offered in Reinhart. The frightening or rather annoying suggestion by the Court of Appeals is that it seems to imply that defense Counsel in cases in the future must put on some testimony and offer some evidence when the plaintiff's case in chief essentially is the moon's made of green cheese. Where the theory of recovery is the moon is made of green cheese the defense is [inaudible] unless no other

questions I will ask permission to retire.

CHIEF JUSTICE JEFFERSON: Thank you Counsel. The case is submitted and the Court will take a brief recess.

SPEAKER: All rise.

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