

ORAL ARGUMENT - 10/3/96
95-1159
UNIROYAL V. MARTINEZ

KYLE: This is a product's liability case. My client, Uniroyal Goodrich Tire Co., the petitioner in this case who we will refer to as Goodrich, makes tires designed to fit on wheels that are manufactured by other people, but designed only to fit on the size of the tire matching the size of the wheel. We do not make wheels - only tires.

In this case the respondent attempted to fit a 16" tire manufactured by my client onto a 16-1/2" metal wheel manufactured by one of the settling defendants. This is an obvious misuse of the tire. It was never meant to be used on a 16-1/2" wheel.

SPECTOR: Was there evidence that a 16" tire came off the truck?

KYLE: There was some evidence of that. What the evidence basically was that these two men had been out there and that there were 4-5...it wasn't on a truck it was on an old trailer actually behind the building they had been working on, and they had taken several tires and wheels off. And some of them had been 16" yes. There also were pictures however of 16-1/2" wheels back there. So the testimony was that they thought they had taken a 16" tire off of this particular wheel but it was very vague as to whether they actually knew for sure that they had.

This obvious misuse of the tire had been warned against by Goodrich. Specifically, warned against using a 16" tire on a 16-1/2" wheel, and specifically warning and instructing people who change tires how to go about it in a particular manner. This is a portion of the warning sticker which appeared on the tire and in addition to warning not to put a 16 on a 16-1/2, it very specifically tells the persons changing the tire, gives them specific instructions, which apply not only to making sure you don't have a 16" tire on a 16-1/2" wheel, but also it applies to all types of tire changing procedures that will keep the person who is changing tires from being injured. The result of this fact situation presents to the court the legal issue of a manufacturer with a product that is perfectly safe for its ordinary use, but that the manufacturer has become aware of a few instances of misuse of the tire and they are further faced with the fact that no engineering change in the tire can prevent the misuse from occurring and they are further faced with the ability to put a warning on there. By the way the CA acknowledged that they could not prevent misuse from occurring by any engineering change in the design of the tire.

ABBOTT: An engineering change could not prevent the misuse. If I recall isn't there the possibility that an engineering change could have prevented this accident from happening with a different type of bead that was used?

KYLE: Yes your honor, and I will get into that in just a minute when I get a little bit further in the facts of the case. But the plaintiff's expert's testimony was using a heftier bead you would reduce the number of these accidents because the number of pounds per square inch it would take to break up that other bead would be somewhat higher. It's still going to break at some point, but their contention is therefore it reduces the risk. Our position of course is that that's like a guard on any type of machine you have. Let's say you have a meat slicer in the grocery store and you have to put a guard on it because everybody says it's safer with a guard on there and you are warned: Don't take this guard off of there. But if one manufacturer has 2 bolts in the guard and another one has 4, somebody is always going to argue that well if you put 4 bolts on there it is going to take them longer to take that guard off of there, so it's going to reduce the number of instances where they are going to misuse the meat slicer. It's going to reduce the number of times that somebody is going to get hurt with it. But it's still perfectly safe with 2 on there.

ABBOTT: What would have been the drawback to putting the better bead in there?

KYLE: I would question the court's use of the word "better" but there are a couple of drawbacks to it. Before I explain to the court in just a moment the process that the tire changer goes through, the bottom photograph shows a tire on the wrong size rim. That is this is a 16-1/2" rim with a 16" tire on it. And the bead is this little piece of metal is a hoop inside the rim of the tire. If you have the wrong size that middle bead does not stretch. It never stretches. It can't. It is designed not to. Because if it stretched it would come off the wheel driving down the road. If you make it a little bit heftier there are 2 problems that that causes. One is since it's never going to stretch it's always going to break at some PSI when the tire changer gets enough air it, and in this case the man was not using a gauge so he never knew how much air he had in it. He is going to whatever he goes to till he thinks it fits and it's never going to fit. At some point it's still going to break. So the first problem you have is if you put a little heftier bead in there is when it does break in front of that tire changer it's going to cause a larger explosion than the slightly less hefty bead would. More importantly if he stops thinking he's got some kind of a fit even though he really doesn't (let's say he stops at 100 PSI and he thinks he's got some kind of a fit, he puts that on a vehicle, that tire is going to fall apart within a few hundred miles and it may fall apart in front of a school bus, in front of who knows what), but the evidence was clear that down the road that tire is going to fall apart. Because it's not a fit, it's not made to fit it, it will never fit.

ABBOTT: So their argument that the alternative bead is not a viable option?

KYLE: Our position is that it is not viable for several reasons for those that I just gave. Plus the fact that if you follow these instructions you won't ever get to that stage no matter which bead you use and neither bead is safe if it's mismatched.

PHILLIPS: Is this a decision for a court to make or does a fact finder have to make it? In other words if it can be shown that another design would have prevented this accident maybe on this occasion, but it might cause some accident on some other occasion, does the court make those kind of judgment calls as

a matter of law, or do we just look if there is some evidence that another design could have prevented this accident, then we are bound to uphold the judgment?

KYLE: There might be a fact issue as to whether on a particular set of facts this bead, the bead they are claiming was an alternative, might have “prevented that accident,” depending upon how much air pressure the guy got in on that occasion. Our position is it’s not a fact question before this court because as a matter of law we have a warning in place that says if you follow these warnings and these instructions no matter which bead you use nothing is going to happen to you.

CORNYN: Your position is the warning defeats the design defect claim?

KYLE: If they never contest the warning. Our position is basically that 1) even in a design defect case you have to talk about warning because the place and time to show that either there is no warning there or the one that serves no good, and that this is entitled to show that we have a good warning on this device and we have reasons for not changing to this alternative saying: This warning will prevent you from getting hurt. Just like in the meat slicer case.

CORNYN: I thought warnings were primarily relevant in a marketing defect claim, but here you are saying that no matter how (hypothetically) dangerous a design is, no matter how safe the alternatives are if you’ve got a good warning, then the manufacturer wins?

KYLE: Well I don’t know if I would go quite that far. I think that’s what comment J basically says to the restatement of torts.

CORNYN: Which the second part has never been adopted by this court has it?

KYLE: I don’t know if this court has specifically said that. The Langley case out of the Dallas CA I think adopts it. Several other supreme courts around the country have adopted it. The District of Columbia circuit has adopted it in a most recent case. Maryland has adopted it; Kentucky has adopted it.

PHILLIPS: How did they adopt it? Do you say it?

KYLE: They just put it in the opinion saying this comment states the law and this court is adopting it as the law of this state.

CORNYN: In terms of products liability, strict liability, have manufacturing defects, design defects, and marketing defects and the adequacy of the warning is really a paramount consideration in both marketing and design defects you are saying?

KYLE: I believe it is the law of the State of Texas that even in a design defect case, that you have to consider the warning because you have to decide is this product reasonably safe?

HECHT: The CA said that's just one factor. Is that right?

KYLE: Yes I think it is one factor. However I think if they ignore that factor completely, they ignore the warning completely, they don't even challenge it in the TC, then they can't win by saying: "we're going to ignore that one factor; we're going to completely ignore it and say no matter what kind of a warning you put on there, no matter if you tell us to do all these things, you tell us to stand away from the tire, you tell us to use a gauge to know how much air we're putting in it, now matter all those things you tell us, we think we can suggest some kind of design that will prevent your warning from being any good no matter what."

HECHT: My question though is, if it's one factor how do you weigh the other factors and who does that?

KYLE: Well I think the trier of fact weighs both factors together to determine if it is "reasonably safe." However, if you have two elements of a proof and they ignore one of them and have no evidence under it whatsoever it's my opinion that this court can say they completely failed to offer any evidence on the issue of was the warning effective? would this warning had prevented the accident? My point is that since both of those are elements of a design defect case, that when you look at the product if it has a warning on it. Now if there's no warning on the product it makes it easy for them to enter a design defect case to say there is no warning here. As a matter of law there's no warning, therefore, we don't have to challenge it, we can show that by putting a different type of device on this machine it would have made it safer.

HECHT: But why though if they are trying to prove defective design, unreasonably dangerous product, don't they just get to put on how bad the design is and rest, and if the defendant wants to say something about the warning let them do it? And if everybody stands quiet at that point, isn't the jury entitled to find defective design?

KYLE: They may be your honor if two things occur. If 1) there is no warning on there whatsoever, or 2) if as you say the defendant stands quiet. We didn't stand quiet in this case we produced evidence that there was a warning in effect, and they didn't say anything about it being ineffective, bad or anything else.

ENOCH: In this products liability design defect case you concede that the plaintiff can prove of defective design in the product by doing either that the product as designed is defective, or that as designed it should have had a warning, and didn't have a warning. So the plaintiff doesn't have to overcome a warning on this product before it gets to the jury?

KYLE: I think he does if there's a warning on it. If there's a warning on there I think he has to overcome that issue. At least produce evidence that it's bad.

CORNYN: So your position is no matter how defective the design, that a warning can preclude liability?

KYLE: Don't forget your honor we are talking about a misuse situation. I wouldn't say that in a normal use, in a normal use of the product absolutely not. Normal use of the product it's got to be properly designed. And there's no dispute here in this case but what this product is perfectly good for the average normal use of the tire. It's only when they misuse it by putting it on a wheel, and we did not manufacture, and only in a case where we can't even prevent them from issuing it by any design of the tire.

GONZALEZ: I understand that's the way you characterize the case. But I am sure counsel is going to focus on negligent design, and that's what the jury found - negligent design.

KYLE: Let me show you something your honor. It was undisputed from this case by the plaintiff's expert himself that the tire company could do nothing to prevent the misuse by redesign of the tire. The only people who could prevent the mismatching of these two components is the wheel company. That's their plaintiff's expert's testimony. He specifically said: "I don't know of any way that you can change that tire to keep you from matching these two mismatch things together." Now the wheel company can by its design prevent people from button-holing the tire over the wheel, making the center of the wheel a certain dimension, etc., but because you've got a 16" tire and a 16" wheel, and because there is rubber around the edges of that bead of that tire, the tire company cannot do anything to prevent them from putting those two together.

GONZALEZ: What about the plaintiff's expert testimony that seems to indicate that a stronger bead had been available since the early 1970s, and that Goodrich converted to this head in 1991 after other manufacturers had done so?

KYLE: There is testimony to that effect your honor. I don't quite understand the...

GONZALEZ: Doesn't that speak to the negligent design?

KYLE: I don't believe so for a couple of reasons. Number 1, they didn't talk about (and I realize the court didn't grant on this point, but there is a lot of the briefing in the court and in the CA about a negligence case you've got to talk about processes, etc., etc., about if you're going to talk about foreseeability not just hindsight like you do in a defect case) but assuming the court's correct on that point, the testimony was by everybody that this bead that he's talking about, even though he had been around awhile, nobody in any tire company anywhere in the world had ever said it's a better bead for this purpose. It just happened to be suggested in some testing that was done after our tire was manufactured by the way, by the University of Michigan that when you get in a mismatch situation, it happens to be that this other

bead burst had a little bit stronger level than the lower bead. Neither one of them are safe anyway. They are still not safe either one of them. And in the regular situation when you put them on a regular tire if you put a 16" tire on a 16" wheel with either one of these two beads, they both burst under government testing at about 350 lbs. per square inch. They are both equally strong when you put them on a correct tire. So all he's suggesting is that he has found evidence from some testing done in lawsuits later on that suggests that this tire may burst at a higher pressure in a mismatch situation, not in a regular use of the tire.

HECHT: In a hypothetical case, if there's evidence about the adequacy of the warning is undisputed, it was adequate, and the evidence about a safer design is disputed, dispute in the evidence, and it goes to the jury and the jury finds unreasonably dangerous product defectively designed; is that a fact issue and as long as the evidence is as I've described it, the verdict will support a judgment, or is it a legal question that courts review on appeal?

KYLE: I think it's a question for directed verdict because one of the two elements of an unreasonably safe product that is the warning was never disputed by the plaintiff. If that's undisputed, then I think the TC should grant a directed verdict on the basis that there was no evidence. If you're talking about a misuse which is a rare situation. We're not talking about the normal use of the tire. Only if we are talking about a misuse. Just like the case out of Maryland that I quoted in our brief was a gasoline can that had instructions on it "Do not store in residential areas; keep out of the reach of children." And the plaintiff's expert said: Well they could have made it a little bit safer if they had put a child-proof cap on there in addition to saying "Keep out of the reach of children." And the Maryland court said: Well but that's a misuse of the product and even though you might could always make it somewhat safer, that doesn't necessarily make it unreasonably dangerous the way it was. That's what Henderson v. Ford says a long time ago in this state. You don't have to always keep upgrading the safest of the product if it's reasonably safe to begin with. And if you're talking about a misuse situation, and they've violated the instructions and warnings about how they were using it, then to say that they have to go one step further that that would overcome the warnings, is not the law of the state.

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RESPONDENT

HASTINGS: The defendants in this case from the time we tried the case 3-1/2 years ago till today keep trying to make the plaintiff's try this case as a failure to warn. It was never tried as a failure to warn. The plaintiffs made the election to try this case as a design defect case. This court as recently as Caterpillar v. Shears last year recognized that there are 3 different methods of proving a product defect, that be a manufacturing defect, design defect, or a marketing defect. And the courts held that a failure to warn is a marketing defect.

HECHT: And so it's not relevant in a design defect case?

HASTINGS: A warning is relevant in a design defect case. It is one of the factors that the courts may look to in determining whether or not a design is defective.

HECHT: Was this warning adequate?

HASTINGS: I never contested the warning. It's a nice warning. The warning does not tell people how to determine if this is a 16" wheel that they are dealing with or a 16-1/2" wheel they are dealing with. If you look at the warning, it says: Never mount on a 16-1/2" rim. But if you can't tell if you're dealing with a 16-1/2" rim or a 16" rim, the warning does you no good. The evidence was very clear that the individuals involved in doing this work pulled off 16" tires from the rim involved in this accident. I brought the rim up here and 2 exemplary rims; one is a 16 and one is a 16-1/2. You can look at them. If you stack them up next to each other you would think that the 16" rim is the shorter one, and that the 16-1/2" rim is the taller one. And there's about 1/2" difference. If you think that, you are wrong. Because you don't measure these with a tape measure from here to here. This is all in the record. What you do is if you are an engineer you have what's called a ball tape. To measure you measure around the circumference of where the bead seats.

OWEN: Uniroyal did not manufacture those wheels?

HASTINGS: Uniroyal did not make these wheels. These wheels have been made since the late 1960s. Uniroyal knew the problem with identifying a 16 and a 16-1/2 rim.

OWEN: What evidence is there that the tire is defective for its intended purpose in its normal use?

HASTINGS: For normal use it is fine except that this type of bead is about 50 years old that they put in the tire. It has had problems since the early 50s. If it hangs up during a mounting process it can blow up on even the right size wheel. But the other question is that a manufacturer has the duty to design a tire for foreseeable misuses. Make it safe for foreseeable misuses. The manufacturer in this case Goodrich knew of the problem with the 16- 16.5 _____.

OWEN: What factors do we take into account in determining whether it was defective? You said warning was one, what are the others?

HASTINGS: From the design defect standpoint there are...in fact the restatement third, the draft list in comment K there are 10 factors that a court can take into consideration in the design defect case. One of those is warning; one of those is safer alternative designs that are technically feasible, economically feasible, marketable. What we showed in this case, and that particular comment of the restatement third draft pretty closely follows the 1993 product liability reform act that was enacted in Texas.

OWEN: Does that section address product misuse?

HASTINGS: I believe it does. Section 2b is the one that lists all the factors. Section 2k deals with the inner actionable warning in a design defect and how they can work together. And it has an illustration where a man is working on a garbage truck and the garbage truck has this warning that says: "Don't stick your feet or your hands in the machinery." But in the process of doing his job he runs up, jumps on the back of the truck as he is going down the street, and he loses his balance and he sticks his foot in the machinery. And he hurts himself. The restatement third points out that does not preclude (just because there's a warning) the design defect. That is a factor to consider but perhaps they should have a guard on it. Because the warning can't make this man avoid losing his balance.

OWEN: Do we still take into a risk utility?

HASTINGS: Yes.

OWEN: And who balances those factors?

HASTINGS: Only the jury. What we've shown in this case as far as the design defect and as far as the affect of the warning is...I brought two...these were exhibits in the trial. This bead is the exact same bead as was in the tire that blew up and injured my client. It is called a tape(?) bead. It is made by taking 5 strands of wire and wrapping it around 6 or 7 times and finally you get the top of the bead right up here. This is a splice and it's called a splice. And history has shown and is documented in the evidence that all the way back to 1955 there is a patent application that shows this type of bead has a problem and it always breaks right at the bottom area of the splice when you get a hang up. And a hang up can _____ the right size wheel. A hang up is what occurs on a missize. And these break right there. There is evidence in the record to that effect that that is the problem with the design. There is also evidence in the record that this is called a single strand bead. This is the bead that Goodrich went to within about 6 months after this accident. They put it in a 1991 tire. Our accident happened in 1990. This single strand bead is made up of 1 wire wrapped around a whole lot of times so that you don't have the hard spot underneath. You don't have that hangup point and the pressure concentration. This was all explained in the evidence. This is the better bead and this is a bad bead.

What we explained in the evidence was that this 50 year old bead design has injured many, many people and that is evidence in the record. This has been recognized as a problem in the mismatch of a 16 on a 16.5 rim since the early 1970s.

GONZALEZ: How do you respond to the graphic here of the exhibit that purports to say that your own expert stated that there was no way to design or alter a 16" tire so that somebody on mistake doesn't try to put it on a 16.5" wheel? Did your expert say that?

HASTINGS: Yes. But that is tunnel vision on the part of the manufacturer. They say that if we can't prevent this misuse then we don't have to do anything but warn about it. If they can design to reduce the

risk of a misuse the law says they have to do that.

ABBOTT: But what about the argument that if they did design to prevent misuse, they did design a different bead for this tire to be put on a 16.5 rim it would be potentially hazardous under those circumstances?

HASTINGS: That is a jury question in the balancing. The response is that this tape bead that they used has hurt many people in mismatch situations. This single strand bead has never injured anyone in a mismatch situation. It has never injured anyone out on the highway being used. It has been in use by other manufacturers since the late 1970s by Goodyear, Yokohama, General Tire, they all switched to this bead. If this truly poses an increased risk of harm because of a danger in use, why did they switch to it? These are questions that a jury gets to answer in the balancing of the utility of the design. We presented both of these bead options to the jury. We presented all of the arguments this court is considering and wondering in your minds, and the jury said the design is defective.

What the defendant wants to do is convert comment J of the restatement of tort second from a presumption that people will follow an adequate warning and they will heed it and that supplies the causation link for a failure to warn case. They want to change that rebuttable presumption in comment J into a conclusive presumption. This court has never held that comment J is a conclusive presumption. If a plaintiff comes in and says: If they would have put a better warning on it, I would have followed it. This court has noted that in the Saenz case and said it is a rebuttable presumption. If the manufacturer can show well if we would have put a better warning on it, that's nice and fine, but this individual plaintiff can't read. Or in the Saenz case it was there, it was obvious, and nobody ever paid any attention to it, they never read it. So how could it be a cause.

HECHT: Is it true in this case that if the warning had been followed, the accident would not have occurred?

HASTINGS: If the warning had been followed, the accident would not have occurred except that my client and the person he was working with felt that they were following the warning. The problem with the warning is as I've pointed out, you can't tell whether this is a 16 or this is a 16.5.

PHILLIPS: They thought they were following a warning. They didn't have it mounted in the safety stand, they weren't using the clip-on-chuck, and they weren't not leaning over the assembly?

HASTINGS: The employer didn't provide a clip on chuck. The tire machine that was out there was broken - it didn't work. The evidence was people had been changing tires on the ground as long as they had been there.

PHILLIPS: I didn't even know any of these machines existed. But nevertheless you said they felt they

were following the warning.

HASTINGS: In the manner that they were doing it those are not a complete defense to a product's case. Those are allegations that can be made of contributory negligence. Allegations that they did make in the TC that the jury considered and found no, that Mr. Martinez was not contributorily negligent. Mr. Martinez was not contributorily negligent. They are not total defenses to a product's liability case.

HECHT: Why isn't the defense to say in a warning: whatever you do whether you can tell or you can't tell, no matter what the circumstances are don't interrupt this tire unless it's in a cage?

HASTINGS: The problem with that being a warning is and a total defense is people in the real world don't always have a cage to put it in. Mr. Martinez in this case did not have a cage to put it in. So he's left out there with this product they've designed that has a design defect in it that could prevent his accident. He's forced to go to work anyway, and the manufacturer can sit back and say: Well I sold a defective product but it's too bad. The problem with the warning was pointed out real clearly by defense counsel in the trial. Let me say this one more time: to crack the code on a 16.5" wheel is extremely difficult. Nobody in this case was able to do so. Either management or the employees had any idea as to how you were supposed to find that an incredibly poorly marked vague almost hidden size designation. No one has the slightest idea that is a 16.5" wheel, and we will show the jury this morning how hard it is to find it.

They want the defensible of this warning they put on there but their own counsel admits that you can't comply with the warning because you can't tell if this is a 16 or a 16.5" rim.

ABBOTT: Why is that not a defect on the part of the manufacturer of the wheel as opposed to the tire?

HASTINGS: That is an allegation of defect on the part of the manufacturer of the wheel, and we sued the manufacturer of the wheel- they settled their claim. The jury failed to find that the wheel was defective. Goodrich submitted special issues on whether or not the design of the wheel was defective. They didn't submit it on a warning case theory, they submitted it on a design defect, and the jury failed to find it.

GONZALEZ: Was there anybody to present the issue?

HASTINGS: _____ the tortfeasor and Goodrich took the credit of their money...

GONZALEZ: I understand. But in terms of to inform the jury to defend the validity of the wheel was there anybody to speak for the company that produced it?

HASTINGS: No. Goodrich had a free shot as to...

GONZALEZ: Does it surprise you that the jury found that this was not defective?

HASTINGS: It didn't surprise me or not surprise me. I argued that the wheel wasn't the real problem, that the tire was the real problem. Because this wheel was made in 1979, the tire was made in 1990. The last company with an opportunity to avoid this injury was the people who made the tire in 1990. The wheel problem Goodrich has known about since the wheels came out. In fact there's evidence in the record that the employer spent a full day with this wheel and never could figure out what size it was. That's in the record. And that's why my client could not tell that he was not following the warning because he thought he was. He thought he was dealing with a 16".

ENOCH: Let's assume that that's the problem. The problem is that you've got wheels that you can't tell the size on. Going back to Uniroyal's argument they could have put a stronger bead on here, but they would have still mounted on a 16.5" rim, and depending on how much air they put into it, it would have blown up.

HASTINGS: The response to that is that in this case in particular, the air compressor out at the work site didn't go up to a high enough air pressure to blow up a single strand bead. The evidence in the record from the witnesses was that the air compressor would go up to between 80-120 lbs. The lowest pressure a single strand bead has ever broken at in a mismatch situation is 130 lbs. The experts for the defendant agreed that if that is true that the compressors only go to 120, this accident would have never happened with a single strand bead. The representative of the defendant agreed that if this accident happened at 100 lbs. per square inch, which is what the defendant's expert testified it happened at, that the accident would not have happened with a single strand bead. There was conflicting evidences as to the pressure because my expert said he thought it happened around 50. The witnesses on the scene of the accident said there is no way that there was 100 lbs of pressure in the tire at the time of the explosion, that it was closer to 60. But even taking the defendant's position that it was all the way up to 100, that is not enough to break a single strand bead.

OWEN: In this case. But in other cases it would...

HASTINGS: In other cases there has never been a person injured by any other manufacturer's tire that uses a single strand bead. In any way, shape or form. They have never been injured on the road, they have never been injured in a mismatch. This single strand bead is a very good real cure to the problem that this tape bead poses. That is what the evidence in the record was. That is the question for the jury to determine. Since there's evidence in the record of our position that it's a bad design, that the tape is a bad design, there's plenty of evidence to support that. The defendants position is no, it's a good design, you're going to pose a new risk. That's a jury question. That's not a question of law at all. It's a jury question and the jury answered that question already. The CA affirmed that question.

OWEN: Was there some evidence that the other design that you are advocating can explode if

enough pressure is put in the tire in a mismatch situation?

HASTINGS: It can explode. The lowest it's ever exploded at is 130 lbs. per square inch. It goes all the way from 130 to around 300 lbs. per square inch in a mismatch situation. There's evidence in the record.

PHILLIPS: Did the respondent put on evidence that this mismatch could have caused an accident on some other occasion, some other occurrence after the car was being driven?

HASTINGS: The respondent called a witness named Tom Connor who testified he had done some testing for Standard Testing Laboratories and mismatched on purpose wheels and put them on his machines and drove them, and they suffered catastrophic failures later on.

PHILLIPS: I guess my question is is this may or may not be the case. I don't want to get into that. But there certainly could be cases where an alteration that would have been safer for the parties that are in litigation in one instance might create a danger somewhere else. And is that a balance for a jury to make or a court, or do we just say to manufacturers you choose and pay whoever gets hurt?

HASTINGS: That is precisely a question for the jury. Restatement Comment K of the Third Restatement even talks about that being one of the factors...

PHILLIPS: This Restatement of Thirds is all fine and good, but I doubt the jury was instructed...

HASTINGS: They were not. And the only reason I refer to it is this court referred to it in Caterpillar v. Shear. The jury is instructed under the pattern jury charge with a definition of unreasonably dangerous balancing the utility of the product with the risk in its use. The expert I just referred to that said that this posed a new danger out in the real world when people use these tires and mismatched also agreed that if it was his loved one down there putting air in this wheel with a mismatch situation, he would want a single strand bead.

PHILLIPS: At some point a court may have to make a judgment that a manufacturer who wants to make tires is faced with this problem. It seems to me there has to be some judgments made that people cannot be liable for either choice they make. You have a choice to make you've got to make the choice. And what you're saying is in individual cases it can result in liability when it injures somebody on that occasion when there's no over arching policy choice that could be made. We just look at each individual situation in isolation in the abstract and whichever way you choose you lose down the road.

HASTINGS: The over arching policy consideration that I believe is in place is the jury. And the jury looks at all of the evidence for the design change and against the design change.

PHILLIPS: When we do it on appeal we just look in isolation to that instance. And even if the proof were using the multi strand bead caused one accident every 1000 times and using a single strand caused 1 accident every 10. Even if the choice not taken was much more dangerous it's our job as a reviewing court just to look at this instance and isolation. If there is some evidence to support it we have to uphold the verdict?

HASTINGS: That's correct.

PHILLIPS: Next week if another case comes where the other choice was made and there is some evidence to support that, we uphold that verdict as well?

HASTINGS: That is what the constitution provides this court the power to do, and limits this court to a no evidence review.

PHILLIPS: And that's just for jurors maybe to say well there was a greater social good here. You're making the choice that was made so we will give no compensation to this catastrophically injured situation?

HASTINGS: Yes sir.

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REBUTTAL

SPECTOR: On the other hand, is Uniroyal suggesting that we waive that evidence?

KYLE: Well actually your honor what I am suggesting is that that evidence brings up the fact that you can't always produce the safest product in the world for every situation. In the Shears case that counsel referred to was a case where the expert testimony was that you could make it to where they couldn't take off the protective devices and the court's conclusion was well you can always make something safer. That doesn't mean it's not reasonably safe the way it was.

My position is that that's why the warning is important in a defect case. Because you can always say you could do this, you could do that.

HECHT: Well there's no question it's important, but for you it has to be conclusive doesn't it?

KYLE: In a misuse situation if they produce no evidence that the warning is bad I think it's conclusive your honor. That's my position.

ABBOTT: What about their argument that even with an extremely effective warning that that is not an absolute as a matter of law defense. It is merely evidence of contributory negligence on the plaintiff's part

by not following it, which is something that should be left to the hands of the jury.

KYLE: I think that argument becomes apparent in cases where like the garbage truck that he mentioned, or the meat slicer, or the punch crash, where the worker or the person involved in it can inadvertently just automatically get their hand or their foot in the device, and the testimony is the warning doesn't do any good there. You can't keep it from slipping and putting their foot in there by warning against it. But that's where the language in Saenz and the San Antonio CA of Gillespie v. Century Products that follows Saenz comes up when they say basically that in those kinds of cases, all cases really, there is a presumption that the warning will do some good, that the warning would prevent the accident. But in those cases the plaintiff's expert can very easily say: The warning doesn't, the presumption is not valid in a case like a punch crash or a meat slicer or a garbage truck, the presumption just doesn't apply in those cases because it's a momentary inadvertent slip.

CORNYN: But those are marketing defect cases aren't they? They are not design defect cases.

KYLE: No. A lot of times they are design defect cases. I know that Saenz and Gillespie were marketing cases. I am saying a lot of times cases like the meat slicer with it having a guard on it is a design defect case. But it's very easy to say in those cases the same rule applies, that is there is a presumption that the warning will make a difference whether it's a defect case or a marketing case. And if that presumption doesn't apply because it's a meat slicer, or because it's a garbage truck and those are not marketing cases, those are design defect cases, but the presumption doesn't apply there because it's a momentary slip. Here we are not talking about a momentary slip. And counsel's statement that you can't comply with the warning does not hold any water whatsoever. Maybe it's hard to comply with the warning about not mismatching a 16 or a 16.5. I can't tell the difference in a 9/16" bolt and a 1/2" bolt when I am trying to put on nut on a bolt either. But it quickly becomes apparent if I'm doing it the right way that it doesn't fit because if I keep putting a wrench on there and tightening and tightening and tightening it's not going to fit after awhile. They are told of these instances and they warned in these instances that if you keep putting it on there and you keep adding air to it, 1) it's probably going to break, but 2) you'd better stand back away from it. Not only is it warned, the undisputed testimony in this case is that the plaintiff himself knew that. He testified unequivocally: I know you're not supposed to lean over one of these tires. And not just because of a mismatch it's just because tire changing is a dangerous procedure.

CORNYN: Does this warning address the question or tell the reader how to distinguish a 16" rim from a 16.5" rim?

KYLE: No it does not go into how you measure. It just says don't do it. And then there really is no way to eyeball it. It says don't do number 1, and then if you follow these procedures nothing is going to happen to you even if you do that. That's what it says.

ABBOTT: What cases are you aware of that an effective warning conclusively established that the

defendant was not liable in a negligent design case?

KYLE: The first one was Langly v. Proctor & Gamble, the Dallas CA a long time ago in Texas. The second one would be the recent case out of the DC circuit Ferguson v. Winkler involving a bakery conveyor belt where they were warned not to take the guard off and not to put their hand in the conveyor belt while it was moving. And they took the guard off and put their hand in it while it was moving. And there was testimony that they could have designed around that by some type of electric eye or whatever that they could stop the hand from going in there. And the court said they are warned not to do that, they did it anyway even though you might could have done something about it.

ABBOTT: Would each side provide a post-submission argument on that issue.

KYLE: The Kentucky case involved a grinding wheel that was made out of aggregate. At a certain RPMs those will fly apart. And the court said if they are warned not to exceed 2,000 rpms, they did any way, you could make one that would withstand 2,500 rpms, but they could exceed that also just like in this case they can exceed lots of PSI. The man didn't even have an air gauge so how's he going to know how much air there is in there. They said it couldn't be over 100 PSI. There was no way for them to know that. You can't tell by looking at a tire once you get up to about 30 lbs how much air is in it. So they had no idea how much air was in there.