ORAL ARGUMENT — 12/9/98
98-0857
HERNANDEZ V. TOKAI CORPORATION

CARRERA: I represent Gloria Marie Hernandez, as next friend of Ruben Richard Emeterio, who was two years old when he was severely burnt in a fire that was started by his 5-year old sister with a non-child resistant lighter that had been designed and distributed by the defendants/appellees in this case, the Tokai Corporation and Scripto Tokai Corporation.

PHILLIPS: As I understand from a footnote, these can no longer be sold in the US?

LAWYER: They can be sold. They cannot be imported or manufactured since 1994 when a consumer product's safety commission rule prohibited the import and manufacturer of these products, the non-child resistant cigarette lighters. Because of that, many of these were imported. Millions of them were imported before the cutoff date and they are still out there in the stream of commerce. Because of the _____ through the questions certified by the 5th circuit it goes far beyond the specific disposable cigarette lighters at issue. To some extent that will be addressed by counsel for the amicus curiae. It also applies to such products as the amon(?) flame, which is used to light bar-b-ques or candles, that type of product that is also designed and distributed...

PHILLIPS: That's not the product at issue here?

LAWYER: That is not the product at issue here, but the question certified by the 5th circuit is not limited to the specific product at issue here.

ENOCH: It seems to me that you could have a product that has a number of different features depending on which form of the product you purchase. If I am an elderly person and I have difficulty with child-proof caps, and I decide to buy a product that doesn't have a child-proof cap and my grandchild gets a hold of it and takes the pill, why should the manufacturer have any sort of exposure or duty to have not produced that bottle? It seems to me just because they do produce a bottle that has a child safe cap that's kind of the problem here isn't it? We've got a person who chooses to buy a product that suits their need that's not unsafe for their uses. But then a grandchild gets a hold of the product and now you are asserting, But no they should not have sold that to the grandmother because they had a reasonably safe design which is what the grandmother didn't want to buy.

LAWYER: First of all, I would disagree that that was a reasonably safe design. The product with the child resistant design mechanism would deliver the exact same product requirement, which is a flame to light a cigarette.

ENOCH: But the grandmother purchased it. The argument is, that the two products were available to be purchased and the grandmother chose this one product. It seems to me your

argument is simply, the grandmother should not have been given a choice. She should have been required to buy this product that was safe for grandchildrens' use.

LAWYER: Well, you're going to a consumer expectation type of argument, which has been rejected in Texas. The question here certified by the 5th circuit presupposes the existence of a reasonably safer alternative design and the foreseeability of the injury from the product that was marketed by this manufacturer.

ENOCH: But doesn't that sort of ignore the elderly use of the non-child safety caps verses - doesn't that kind of ignore the fact that you have to look at the consumer - just because a child could remove a non-child proof cap for medicine it seems to me doesn't end the inquiry. You've got to look at what the person who bought the product was expecting from this product.

LAWYER: That is probably important as a fact issue or a factor for the jury to consider in determining whether their product is unreasonably dangerous. Certainly consumer expectations are a factor under the prior common law of Texas on design defects. But it is not a determinative factor. It is not a determinative factor under the 1993 legislation, and it is not a determinative factor under the Restatement Third of Torts that this court has recently adopted.

BAKER: Your opponent cites §2, comment F, for defensive purposes when we have unknown alternate safe design, but the consumer makes a conscious selection between the two and he picks the one without the safety feature. That should not require that the manufacturer be liable under those circumstances.

LAWYER: I beg to differ with you as to the characterization of these illustrations that were given. One had to do with a crashworthiness of an automobile and whether a crashworthy claim could be made a design defect claim by showing an alternative design that a car could have been bigger. And on balance of those factors, I think the commentator said that this would not be a reasonably safe alternative design or economically feasible design. Because in order to make it safer, you would have to make it larger and there would be additional costs in terms of the price of the automobile, weight would increase the cost of fuel. And it was determined on a risk utility balance analysis that that would not be a economically feasible alternative design. The other illustration had to do with the wrap-around bullet proof vest, as opposed to the non-wrap around vest, for someone who gets shot through the side and it goes right in through the seam and they get killed. In that one, that is a little closer question. There was a choice as far as the amount of safety that could be given by this type of product. And there was a question as to comfort and cost. The wrap-around was more expensive and it was less comfortable and easier to use. Then you look at it on balance: a bullet proof vest is not going to prevent all types of injuries to begin with. You can get shot in the head. A bullet proof vest whether it's wrap-around or not isn't going to have anything to do with that.

OWEN: But these analyses were made as questions of law but not as questions of fact?

LAWYER: I disagree with you there. They talk about a balance for the jury to consider. In fact, in comment F, they specifically reject consumer expectation as being a defense per se to any type of design defect case. They talk about it being a factor for a jury to determine once a prima facie case has been made that there is a reasonably safer alternative design.

BAKER: But this comment doesn't necessarily involve consumer expectations. When you have clear choices you're not just looking at one particular product. Do I understand your answer to the question is, that you don't think the legal theory that this comment espouses applies to this case when you distinguish the examples used in that comment? Why wouldn't it apply as a legal theory from this circumstance?

LAWYER: I think it is a consumer expectation test, and that's what consumer choice looks at. And that has been rejected in Texas and has been rejected as a defense by the restatement.

OWEN: Doesn't it go separately to risk utility? For example: You go into a store for either aspirin or mouthwash. Some of them have childproof caps, others are labeled specifically to say they do not for those who have arthritis and are not able to undo them.

LAWYER: The distinction here is that the product, the childproof medicine or whatever, is difficult for someone to get it in order to get access to what's inside. Here, the child resistant device will not pose any impediment to any adult wishing to use it to light a cigarette.

BAKER: Somebody might disagree with that broad statement. I find a lot of pill boxes I can't get open that are childproof. Would that same rationale apply, again back to the question of the choice made by a consumer, when there are known alternate safe designs?

LAWYER: Here you are saying there are no alternate safe designs. Here there is one.

BAKER: That's what I mean. Where they are clearly known, and in this particular case, as I understand it, known by this particular consumer?

LAWYER: I think it becomes a fact issue for determination by the jury. Again it's a factor for the jury to consider in determining whether a product is defectively designed. And that would apply under the common law of Texas or under the statute, the 1993 legislation, which does not incorporate a consumer expectation standard except in firearms and ammunition.

HECHT: Would this apply to firearms? How would the rule that you advocate to firearms?

LAWYER: I'm not quite sure I understand the question.

HECHT: You don't intend for children to get them, but you can foresee that they will.

Should you make them childproof?

LAWYER: I think a firearm would be defective if it didn't have a safety on it.

HECHT: Well that's hardly childproof.

LAWYER: The legislature made a separate category for firearms and ammunition relying on consumer expectations. And the legislative history talked about you can't sue the manufacturer of a Saturday night special just because they make them, they are cheap and they are out there, and someone gets shots with them. And that was the rationale there.

The question certified by the 5th circuit presupposes the availability of a reasonable alternative design, the foreseeability of the injury to the children. And based on the past/present of this court, the 1993 Act, the restatement of torts, the decisions of other jurisdictions applying risk utility tests like this court applies, the question should be certified in the affirmative. Texas law requires a manufacturer to design a safe product taking into account the foreseeable uses, even foreseeable misuses, so does the restatement, and breach of that duty is a fact issue. And this case, of course, comes up in the context of a summary judgment given by the federal DC in San Antonio.

Under Texas law the only way for any manufacturer to conclusively prove and win a design defect case is to show that there was no safer alternative design, or conclusively prove that the alternative design that is suggested would introduce greater dangers or if the element of causation was negated conclusively.

HECHT: Should it be the result of your argument that these lighters should no longer be sold in the US, or they would be sold at the risk of the seller?

LAWYER: I think they should be sold at the risk of the designer and the distributor of being subjected to tort liability if children, particularly children of a tender age - 6 years and younger - are the cause of the fire.

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LAWYER: I am here on behalf of Allstate Ins. Co, the amicus. Allstate presents a unique perspective, because Allstate has paid hundreds of thousands of dollars in property damage claims as a result of small children getting their hands on lighters that are not protected by child safety devices, and playing with these lighters causing fires. These fires don't only cause property damage, but substantial bodily injury and death.

HECHT: It's true then as petitioner's counsel just said, that the dole of the argument is either to prevent the sale of these lighters or to make them sold at the seller's risk?

LAWYER: The goal of our argument is to ask this court to answer the certified question in the affirmative. And, that is, to let a small child that was injured by another child playing with a product that the manufacturer has a means of making that product safer.

HECHT: What's the answer to my question: Will it have that effect or not?

LAWYER: No. In our scenario, the goal essentially is to get Scripto Tokai to put a .70¢ child protective device on these amon(?) flame lighters, so that when parents go to Walmart and buy these amon(?) flames near the candy section, they get them home and the kids play with these lighters, they are not going to burn the house down.

GONZALES: Doesn't that double the cost?

LAWYER: No, it does not double the cost. Amon flames are about $3 apiece right there at the candy section.

GONZALES: This isn't amon(?) flame. We're talking about a different lighter.

LAWYER: I don't know what it would do to a smaller product. I must emphasize again that that's not the issue that was certified by the 5th circuit. With respect to the question of the pillbox...

BAKER: But we are not limited by the certified question. And they state that plainly when they sent it to us didn't they?

LAWYER: If I may address the issue regarding the pill bottle that was manufactured, that can be sold either with a child safety device or a cap that does not have a child safety device. That product, the intended for foreseeable users are not adults. It's older people with arthritis and most likely they do not have small children in their house. That factual scenario falls outside of the certified question. Because the adults with arthritis who can't use a pill bottle with a child's safety device are not a foreseeable user.

HECHT: Do you know what number of dollars in claims Allstate has paid for damages caused by lighters like the one in this case?

LAWYER: I do not. I know in the two years that I've been handling lighter cases, it's been about $400,000. And that's 14 different cases in the state of Texas.

HECHT: Those were for amon(?) flames or not?

LAWYER: Those were with amon flames and amon flames would fall under the scope of the question certified by the 5th circuit.

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APPELLEE

ANDERSON: To answer your question about the pill bottle, because I think that is exactly on point, that this product is very similar and analytically it is identical to the pill bottle. The child resistant pill bottle cap serves a function in households in which there are young children who could get into them. However, it also prevents certain people from getting to their medication.

I have children, so I am very sensitive to keeping kids out of dangerous products. I also had a grandmother who I had to switch pill bottles into non-child resistant, because she couldn't get to her medication.

HANKINSON: But that's a factor that fits into the definition of safer alternative design under either the restatement or under the statute. If you have the pill bottle, and because of the childproof cap it substantially impairs the product's utility because someone can't get into it, then it's a factor that fits into it. That's weighed into the risk utility analysis. Right?

ANDERSON: Yes.

HANKINSON: So it may very well be that that pill bottle does not then fall within the category that would be covered in terms of there being liability?

ANDERSON: Yes.

HANKINSON: So the very fact that you have to make it that way for someone to be able to use the product?

ANDERSON: Right. And under the product's liability act...

HANKINSON: We're not talking about, Gosh, we can never have anything in this society unless it's childproof given this kind of balancing test that's available under the restatement and under the statute.

ANDERSON: Well I think there are situations and *Shears*, I think, provides a perfect example of the analytical framework to apply here. *Shears* was a multiple use case. You had a product that was used in several different contexts: in-between decks of ships and in warehouses. If you had as the plaintiffs claim there a non-removable cage, roll over protection system, then you could not use that product in the deck. In order for the product to be used by the particular purchaser, it had to have a removable or not have a cage over it. So the purchaser chose that particular product because that was right for them.

OWEN: What's your response to Mr. Carrera's argument that the childproof device on

the cigarette lighter does not foreclose anybody from using the cigarette lighter?

ANDERSON: I think the record before this court in this particular case shows that that's simply not true. The purchaser of this particular lighter, the grandmother Rita, had tried child resistant lighters at her bar. She had had great difficulty. She was very honest in her deposition. She had had difficulty lighting her cigarettes.

OWEN: Is that a fact question though, or should we just decide that as a matter of law?

ANDERSON: I think that in a scenario such as this, I think it is getting to a situation that Judge Keeton recognized in the *Kearney* case; Professor Powers recognizes in his law review article; this court has recognized in a series of cases that somewhere along the continuum a line has got to be drawn. And that line is couched in terms of duty.

OWEN: What do we do with a seller who knows how to make a child resistant and a non-child resistant, and just chooses to only sell cigarette lighters that are not child resistant? Should there be a different standard? Should manufacturers who know how to do both be required to make both available to the public?

ANDERSON: Well there you get yourself out of this consumer choice situation, because there is no choice being made available to the public to purchase what is best for their needs.

OWEN: Should it be enough for the seller to say, Well I don't make them but other manufacturers do?

ANDERSON: Yes. I think it should be. I think if they are available in the marketplace I don't think that you should require a manufacturer to meet every segment of a particular market to meet all the needs.

HANKINSON: But haven't you fallen over into the area of where you have a jury question? Aren't you arguing to us that the purchaser of this cigarette lighter should not have bought this kind of cigarette lighter, and shouldn't have taken it home to a house with small children who they knew might play with a lighter? I mean, isn't that what you're arguing, that we really should put the duty lies there, the duty does not lie with the manufacturer?

ANDERSON: Yes.

HANKINSON: Why can't the duty lie in both places and the jury decides who breaches the duty and who's responsible for the child's injury? If the adult in this circumstance knows that they've got a child who may play with a lighter, and, yet, chooses to say, I don't care, it's inconvenient to me to have to deal with a childproof lighter; why doesn't the defendant then prevail with the jury when the jury decides, You know, you shouldn't have bought that lighter and taken it home? Haven't you

spilled over into the area of letting a jury decide who should be responsible as opposed to as a matter of law taking the manufacturer totally out of the loop and alleviating any responsibility on the part of the manufacturer for the products that fits in the stream of commerce?

ANDERSON: I don't think so. If you accept the liability that they would place on a manufacturer here, then in effect we are becoming insurers of all of our products, insurers of all choices consumers make with regard to all products.

HANKINSON: No, a jury could hold a consumer responsible for making that choice. Why not? Why wouldn't a jury be allowed to hold a consumer responsible for that choice in taking cigarette lighter into a house and leaving it on a coffee table, let's say when a child they know is fascinated by that little red lighter that they know creates a flame?

ANDERSON: I think this court could turn it over to juries to decide. I think that is wrong. I think that's bad policy.

HANKINSON: Do you know of any jurisdiction who has taken this issue so far as to make it a duty question and deciding as a matter of law that despite the application of the risk utility test under these circumstances, the manufacturer should never have a duty?

ANDERSON: Cited in the footnote in my brief, there are cases where they say there is no duty. Some are phrased...

HANKINSON: They are not phrased in terms of no duty though are they?

ANDERSON: Some are. It's difficult to characterize them because it's very sloppy between risk utility, consumer expectation. I think what you end up in the case law addressing this issue, I think you end with a lot of result driven opinions where a court has decided this is what we want to reach, and they don't really work it out.

HANKINSON: You've asked us to make it as a duty question because you say it's a public policy issue?

ANDERSON: I've asked you to make it a duty issue because that's what it has to be for my side to prevail; and that it is sound policy for Texas, and it is completely with this court's decision in *Shears*.

HANKINSON: Hasn't though, the Texas legislature already determined what public policy should be by adopting the risk utility analysis as part of the 1993 statute? Hasn't that decision already been made, and isn't that the place the legislature has decided to act in this area, is put that test in the statute, and has, for example, treated firearms differently? We know there are exceptions for those types of things. So you're asking us to make a public policy decision, but the legislature's

already decided this and said, we are going to use the risk utility analysis. Correct?

ANDERSON: I disagree to some extent. The product's liability act specifically says, We are not preventing the courts from developing the common law. And I don't think that the legislature has said, We are taking all design issues, in effect all duty issues on behalf of manufacturers and we're turning them over to the juries of the state.

HANKINSON: No, that's not my question. My question is, Does the fact that the risk utility test, the fact that it was adopted b the legislature in the statute reflect some intent on the part of the legislature to establish public policy?

ANDERSON: Some public policy, but I don't think it's the public policy that applies here. I don't think that the legislature by adopting risk utility, which we are not arguing for the advocation of risk utility - what we are saying is, there are certain contexts in which it just should not go to the jury. The duty that I would frame here, and I think that this is a workable rule and I think it resolves cases that as a matter of policy just should not go to a jury, and that would be where you have market segments.

HANKINSON: But what about the fact that the statute reads: In a product's liability action in which a claimant alleges a design defect (that's our case), the burden is on the claimant to prove by a preponderance of the evidence that 1) there was a safer alternative design; and 2) the defect was a producing cause and so on and so forth. And you're asking us to say that under these circumstances, a claimant can't prove that. We can't give a claimant the opportunity to prove those things. And as I read the 5th circuit question, and what I think the plaintiff is saying to us, is the plaintiff is saying that because the legislature, and this is in accordance with existing SC authority out of this court as well as the restatement, because this is where it is, the answer to the question has to be yes. We're not looking at the underlying facts and who should prevail on summary judgment or not. That's for the 5th circuit. But in light of that you're saying, No, despite the fact that the legislature says, A claimant, if they can prove by a preponderance of the evidence they can prevail on this. We say, No, this claimant can't. I'm having a hard time reconciling when part of your argument is it's good public policy for this court to say there's no duty as a matter of law.

ANDERSON: I would point to a couple of things. One, in the product's liability act the safer alternative design cannot substantially impair the product's utility. Here, the evidence is it impairs the product's utility.

HANKINSON: That's for the 5th circuit isn't it? That's a question isn't it in terms of actually weighing the summary judgment in this case or not?

ANDERSON: Not necessarily. I think on a certified issue your role is to provide guidance as to what Texas law is. And you can look at the underlying facts that are clearly established. They don't quibble with us over the fact that this purchaser went into that store knowing that the child

resistant alternative was available and chose not to purchase it. And then we're going to allow them when the risk comes to bare...

HANKINSON: They just say that under Texas law foreseeable misuse is not a bar to recovery, and that obvious risks are not determinative. They say that's Texas law.

ANDERSON: And I think that is Texas law. Taking it back to the *Shears* case. In *Shears*, you held that there was no duty. It was decided on a duty. It was actually couched in terms of no safer alternative design. And I think it's pointed out in several cases, this can be couched in terms of causation, safer alternative design duty. But essentially what you held was that, there is no duty to design a product that will preclude it from being used in one of its several uses.

There was evidence in that case of other designs. They said, We could require manufacturers, or you should require them to make different size loaders. One that's small enough to go in ships, one that's larger that can do more work for warehouses. So there was some evidence. That could have been a fact issue. What the court decided, and I think it is absolutely right, that would be bad policy to force manufacturers to manufacture a multitude of different size loaders, one for each particular job, require consumers...

ENOCH: But *Shears* isn't exactly this case. If we're talking about duty, you have to look at the foreseeability issue. And it seems to me your argument focusing on just the duty is, should the manufacturer foresee that this product will be acquired and used by people that it's not manufactured for. And if we answer that question, Well if it's foreseeable that it will be in the possession of people that it is not manufactured for, then it seems to me there's a duty, because there is a duty for the manufacturer to design a safer product. So there's that duty. It seems to me the question is very narrow here. The question is simply on the duty's aspect of it for product's liability in Texas are manufacturers obligated to consider that their product will get into the hands of people it does not intend for it to get into and warns against getting it into? We know that lighters will get into the hands of children and they will start fires. The question is, is a manufacturer as a matter of duty required to take that into account on its manufacturing of the product? Is there any authority out there, here or elsewhere, that requires a manufacturer to foresee that kind of activity as a part of the process of manufacturing its product?

ANDERSON: Not that specific, no. I mean there is the general case law that a manufacturer must foresee misuse of product.

ENOCH: This misuse is by the person who has designed the product.

ANDERSON: Right. Here, it's a misuser who used it exactly as it was supposed to be used. So it is conceptionally a little different. I think some analogies that are helpful are situations like a learned intermediary that for various reasons if it has been determined that it is not fair to place on a manufacturer the duty to warn the ultimate consumer, that that duty of warning or choosing the

appropriate product for the person is better placed on someone midway in the stream.

SPECTOR: Would that be Walmart, or who would that be?

ANDERSON: No. Here, I think the duty is properly placed on the intended user, on the adult. To put the issue on the flip side if we are held liable in this case, then what effectively is being done is users who benefit from a non-child resistant lighter, there is a real utility for them ease of use, or users of a non-childproof pill cap lose the utility of that use.

ENOCH: Now you're risk utility. But I'm talking about a different deal. I'm talking about a car manufacturer who knows that children get access to the parent's keys and they go and start the cars and have accidents when they are not licensed to drive. I'm talking about do we require GM to accept that foreseeability in the duty element that it is defective because they have not manufactured a car that is childproof?

ANDERSON: No, and we don't require...

ENOCH: But has there been this kind of focus on that notion of foreseeability in product's liability?

ANDERSON: Not that I am aware of. And that is one thing. I think that the duty that they are arguing for and the net result of this case will place on manufacturers a whole new burden that is an improper burden to place. I think the responsibility for this accident in this situation rightly resides with the intended user.

OWEN: Your argument seems to hinge almost totally on the proposition that we need non-childproof lighters. But what do we do about the consumer product's safety commission's determination to the contrary that this does not affect any cigarette users or add a significant cost to the manufacturer? What do we do with that?

ANDERSON: I think what you do is you take it for what it's worth. It was done after the fact, after this lighter was out there, and you take into consideration that the decision in this case is going to go beyond a product such as cigarette lighters. And I think you also have to take into consideration that the CPSC did not ban the sale, the immediate sale of these lighters, did not order the recall. I mean if you go into a convenience store today, pick up a lighter that's sitting there by the cash register, I've been doing it for 1-1/2 years that I've been looking at this case, and 9 times out of 10 you're going to have a non-child resistant lighter in front of you. There are a lot still on the market?

PHILLIPS: What's shelf life? Is it indefinite?

ANDERSON: I don't know. I'm not sure how long this supply will last, but they are out there

still, they are plentiful, and this is 4 years after.

GONZALEZ: The fact that they are out there according to Mr. Guerra is that there was a glut in order to beat a deadline. They flooded the market and brought them all in in order to beat a deadline. And that explains perhaps why we have so many of them.

ANDERSON: The CPSC regulations took into account that there might be a glut. And so they said you couldn't increase the number of imported or manufactured, I think it was 20% over your last 3 years, so they did take that into consideration. But you do have a stockpile of these lighters.

HANKINSON: If we can't import them, we can't manufacture them, and these regulations stay in place at some point in time we no longer are going to have them, we are only going to have problems with lighters, is that right?

ANDERSON: That is correct.

HANKINSON: So we really already have the federal government saying to these manufacturers, Sorry, you're not going to market these once you use up what you've got. So we've really already have a government determination that you can't manufacture - that at some point in time these are gone. As soon as the existing supply is gone, we won't have them in the marketplace anymore?

ANDERSON: That is correct. So these will eventually run their course but we will still be left with childproof caps and medicine bottles. We are going to be left with something called a 'bump gun' - a nail gun for carpenters. All you do is push it against the wood and it shoots the nail. That's very safe for an experienced carpenter. It has great utility for someone who wants to move quickly in building a house. But, me, a sort of weekend lawyer goes into Home Depot, that's too powerful a tool for me and that shouldn't be available to me. I should have one where I have to activate the trigger to make sure I don't just start firing on _____. So I think this issue has much broader application and I think it is an important one.

OWEN: Well what about the fact that there is also a federal statute that allows a civil suit for recovery of damages in cases like this?

ANDERSON: I think allowing civil recovery, they've just said we are not going to preclude them. We are going to allow you to sell them. We are going to allow lawsuits. I think you have to take into consideration...

OWEN: Don't they have a federal statutory cause of action?

ANDERSON: I don't know if it's couched in terms of a federal statute or just leaves the

common law actions alone. I don't know on that one. But I think where we ultimately come down on this case is, and these questions were asked right at the outset and I think they are true, where you have an informed consumer, we manufactured this and we put on it a warning that says Keep It Away From Children, so it goes to a particular segment of the market that it has a real utility for.

OWEN: Again, you're assuming that it has a real utility. And we know that in a matter of years even if it has a utility, you won't be able to get it in the US.

ANDERSON: But that's a legislative decision. They've decided, yes, it has some utility for you, but we're not going to allow you to purchase it or we're not going to allow you to meet that segment of the market.

PHILLIPS: What's wrong with a rule where the state court defers to a federal determination on a product? If nail guns haven't been acted on by a federal law or an agency regulation, we would apply our normal test and do our best job with a restatement or whatever test we use. But when there has been an action, we say that's a determination and we apply it even to the products manufactured or sold before the legislative action. I mean, you talk about the parade of horribles that _____ buy a new product, why wouldn't such a narrowly crafted state deference rule, we must preserve a status quo?

ANDERSON: That's one way to do it. I think you can reach it in a better way with a rule that provides a sounder tort policy for the State of Texas by requiring that the product be reasonably safe for its intended user. There's no question here that it was. In adult's hands that's a safe lighter. And requiring that the manufacturer take reasonable steps to ensure that the products stay within its intended market, there are no allegations here that our marketing or our distribution was somehow negligent or improper, that we were standing on the street corner handing these to kids. We sold them to adults and we put a warning on it saying Keep This Away From Kids. Under those circumstances, I think that is the rule that you ought to have, because I think that allows...

HANKINSON: It's the child who has the claim. It's not the 3 year old child reading the warning and saying, I'm not supposed to play with this. Our child is the plaintiff here.

ANDERSON: And the child's claim is better visited upon the careless user of it.

HANKINSON: Why does it have to be mutually exclusive?

ANDERSON: It doesn't have to be, but I think that is the more proper rule. Another analogy would be alcohol. In *Beard v. Graf*, this court said, We don't put a burden on the social host to prevent the person at their party from drinking too much and getting out on the road. What they are asking you to do here is put that burden on the alcohol manufacturer. This situation is the same as -- I'm Anheizer Busch, we manufacture beer, we sell it to adults. Everyone knows that kids get

alcohol. Adults purchase it. They give it to kids. Now are we going to adopt a rule that says Anheizer Busch, You can't manufacturer beer anymore because there are irresponsible and careless adults out there who provide it to users for whom it is absolutely improper?

ABBOTT: They don't do that, but they hold people liable for giving alcohol to minors.

ANDERSON: But they hold the intended user liable. And that's where the liability properly should lie in this case.

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REBUTTAL

LAWYER: In response to a question by Justice Gonzales, as to the cost for a child resistant mechanism on lighters, it's between 1 and 5 cents, and that is in the record. Even the federal DC in this case determined that there would be no increased cost or decrease utility with child resistant lighters.

ABBOTT: You said that the federal court made a fact conclusion that there would be no decrease in utility?

LAWYER: Yes. No substantial impairment to the product's utility, I believe, was the language that the federal DC used. But they went off on the duty argument that the defendants had been making.

ENOCH: How much does the lighter cost?

LAWYER: I think they are about $1 or so, or even under that.

ENOCH: So a 5% increase in the cost of a product is not a substantial change in the cost of the product?

LAWYER: Just 5 cents.

ENOCH: Five percent.

LAWYER: Well look at the cost of the injuries to our children. And I don't think that's an excessive cost. And again the 5th circuit question presupposes that a reasonable safe alternative is available. So those issues have already been met. With regard to their argument that again consumer choice, well one of the reasons that Texas has rejected the consumer expectation test is to protect innocent bystanders such as the 2-year old in this case.

With regard to the duty question that you had Justice Hankinson. We cited

every single reported case in our brief, and I am unaware of a single jurisdiction where they apply a risk utility test, where they have ruled for the defendant except in situations where they rely on the consumer expectation test that's applicable in that jurisdiction, or the open and obvious danger or patent to danger rule both of which have been rejected in Texas and which are rejected by the restatement.

ENOCH: Let me focus on my questioning to Mr. Anderson. In this rule it looks to me the issue here really is whether or not a manufacturer in its thought processes on manufacturing a product must take into account in the design of the product the foreseeability of use of that product by people who are not intended to use the product.

LAWYER: Absolutely.

ENOCH: So the answering of this question seems to me impacts manufacturers of a number of products where the product is not intended to be used by children. Any number of products that would have to have special features because of the lack of judgment of children in using it as opposed to simply negligent use that an adult might put to it. As an example, an automobile. We know that children get access to automobiles when they are not otherwise trained to run an automobile. The supposition is they lack the judgment to operate it correctly. So it perhaps would not be a significant cost over all the other safety features to simply require before a car could be started some sort of code. It would apply to a beer can because we know children get beer cans. So it has to be not simply a safe bottling of the beer but it actually has to be childproof for a child not to be able to open this beer can. Perhaps that is the purpose of saying, that's what we ought to be doing. But it seems to me this is a problematic issue that maybe not a lot of courts have really focused on.

LAWYER: With regard to your car, I don't believe that's an accurate analogy, because maybe a teenager might be able to drive a car, but I don't think a very young child 6 years or under would get involved in driving off in a car. But they are unaware of the dangers of fire, and they get these colorful lighters. Now with regard to the foreseeability issue. Yes, the manufacturer should take into consideration in designing its product either foreseeable uses or misuses of the product. That's consistent with Texas law. That's consistent with Tokai itself in its patents which are in the record recognize that children could get access to them. And with regards to the nail gun, one of the cases that they cited *Borcher v. DuPont* is instructive. That had to do with a can of industrial enamel. And the Western District of Michigan said, We are not holding as a matter of law a manufacturer of a product intended to be sold only to adults need not make its product childproof. For example, the analysis might be different regarding a product sold only to adults but intended for use in a home. That was the distinction there. If you have an industrial product, then it would not be reasonably foreseeable or it would be outside of the realm of reasonable foreseeability that children would get access to it or be given access to it. That's not the situation we have here with regard to lighters.